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

ASSOCIATION DES CONSEILS D’ÉTAT ET DES JURIDICTIONS ADMINISTRATIVES SUPRÊMES DE L’UNION EUROPÉENNE

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TRANSVERSAL ANALYSIS 2015

ACCESS TO ADMINISTRATIVE SUPREME COURTS AND TO THEIR DECISIONS

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INTRODUCTION

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

- 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 to attain these objectives comprises conducting three cross-sectional studies over this period of three years in order to collect, analyse, share and provide information, best practices and recommendations.

The first cross-sectional study was conducted in 2015, and focused on the access to the administrative law judge and the decisions of the Supreme Administrative Courts. These two elements are essential in an operational area of justice. One of the aims of the study, which led to this report, was identifying the existing obstacles and providing solutions to overcome them.

3. The methodology involved establishing a working group called "Access to supreme administrative courts and their decisions" within the organisation. This group includes Ms. Mylène BERNABEU, Mr. Joris CASNEUF, Mr. Jacek CHLEBNY, Mr. Frank CLARKE, Mr. Geert DEBERSAQUES, Mr. Manuel VICENTE GARZÓN HERRERO, Ms. Denise RENGER and Mr. Ales ROSTOČIL.

This group first defined the methodology and prepared the questionnaire². From the methodological point of view, it was decided to develop an easy-to-complete questionnaire to be answered by the members of the Association (by mostly resorting to closed-ended questions). Even if this methodology does not establish all the existing nuances in the legal systems of the different countries in a precise manner, the group being well aware of this fact, it has nevertheless enabled a quick questioning of the

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.
² See annex 1.
members as well as provided a very good outline of the key aspects. All the member courts of the Association participated in this study, except for Bulgaria, Denmark, Finland, Italy, Malta, Sweden, Switzerland, Turkey and the Court of Justice of the European Union. It can thus be concluded that the results obtained reliably reflect the state of affairs in the member courts of the Association.

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

4. The questionnaire comprised 151 questions. Most of them required a "yes" or "no" answer.

The questions were spread over thirteen groups or domains and each of them dealt with an aspect pertaining to the access to Supreme Administrative Courts and their decisions.

The different groups are:

1° Effective access must be granted to the Supreme Administrative Courts (Q01 to Q12)
2° Legal aid (Q20 to Q25)
3° Pecuniary obstacles (Q30 to Q48)
4° Provisional protection (Q50 to Q58)
5° Full access must be granted to the Supreme Administrative Courts (Q60 to Q75)
6° The right of access to the Supreme Administrative Courts is not absolute (Q80 to Q102)
7° The appointment of judges (Q110 to Q118)
8° Judicial tenure (Q120 to Q126)
9° Judicial conduct (Q130 to Q143)
10° Other roles (Q150 to Q151)
11° Requirement that the Supreme Administrative Court be established by Law (Q161 à Q170)
12° The requirement of a Court capable of rendering a decision (Q180 à Q194)
13° Public access to judgements (Q200 to Q206)

These groups will be examined in the chapters below.

3 See annex 1.
CHAPTER I: GENERAL INFORMATION

§ 1. GENERAL OBSERVATIONS

5. The subject of this study is the access to Supreme Administrative Courts and their decisions. Before addressing the specific results of the questionnaire, two general observations are appropriate:

1. The access to supreme courts is understood in the sense of article 47 of the EU Charter

6. Article 47, of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the EU Charter), is the key provision in the conducted study. This article pertains to the right to an effective remedy and to a fair trial. Access to justice is fundamental to a Union governed by the rule of law, and this principle has evolved through each of the treaties and continues to do so post-Lisbon, particularly in areas in which the Charter applies.

Article 47 of the EU Charter stipulates as follows:

"Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.»

7. Article 47 of the EU Charter is based on articles 6 and 13 of the European Convention on Human Rights (hereinafter referred to as ECHR) to which it gives a broader scope. The first paragraph, like article 13 of the ECHR, lays down the principle of...
the right of every person to an effective remedy. However, the stipulations of the Charter are stricter. On one hand, they provide for the right to an effective remedy to safeguard the rights and liberties guaranteed by the EU law, while article 13 of the ECHR guarantees the right to an effective remedy only for the rights and liberties recognised by this Convention. In addition, article 47, paragraph 1, of the Charter provides for a right to an effective remedy before a court, while article 13 of the ECHR only provides for a right to an effective remedy before a national authority, which could then be a simple administrative authority. The requirement of this right to an effective remedy before a judge is the reflection of a well-established case-law of the Court of Justice. The latter has been able to develop the principle of the right to court as "a general principle of Community law which forms the basis of the constitutional traditions common to the Member states"\(^6\), when the European Court of Human Rights had to consider more restrictive stipulations of article 13 of the ECHR.

The second paragraph of article 47\(^7\) provides an abridged version of article 6, § 1, of the ECHR that guarantees the right of every person to have his/her case heard by an independent and impartial court established by the law. Here, the EU charter extends the scope of law to an impartial judge, which proves to be quite significant and particularly useful, not retaining the reservation stated in article 6, § 1, of the ECHR and which limits the guarantee of an independent and impartial court only to the disputes pertaining to civil rights and obligations and the merits of any criminal charge. In spite of the considerable efforts made by the judges of Strasbourg to push these limitations to the bare minimum, they remain a part of the ECHR and do not allow easily invoking the right to a fair trial in the contexts of pure administrative law. Fortunately, the draftsmen of the Charter decided to remove this limitation: the right to an independent and impartial court is guaranteed in any domain. The explanations appended to the EU Charter, while quoting the "Les Verts c./ Parlement [Green Party vs the Parliament]"\(^8\) ruling, highlight that this is one of the consequences of the fact that the Union is a community based on the rule of law. For the rest, as is stated in the aforementioned explanations, article 47, paragraph 2, has the same meaning and scope as article 6, § 1, of the ECHR, which has created ample case-law of the Court of Strasbourg.

2. **The study is limited to the access to Supreme Administrative Courts**

8. As the Association comprises Supreme Administrative Courts, the scope of the study has been deliberately limited to the access to these courts.


\(^7\) The second paragraph of Article 47 of the Charter states: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

\(^8\) CJEU, 23 April 1986, Case 294/83, European Court Reports 1986 – 01339.
Before addressing the specific results of the questionnaire, in that regard, a number of general observations are appropriate.

1° First, it must be recalled that the structure of the courts in the member states and the precise role conferred on each court within that structure varies significantly from state to state. Thus, the precise role of the Supreme Administrative Court itself may vary significantly from member state to member state;

2° It must also be recalled that, in most member states, administrative proceedings are not commenced directly before the Supreme Administrative Court but rather before first instance courts and tribunals. As explained, the questionnaire was concerned with the right of access to the Supreme Administrative Court itself. Insofar as some of the issues addressed are concerned, it is important to distinguish between questions which may arise in the context of the right of access to a court or independent tribunal of first instance, on the one hand, and, after a party has had a right of access to such court or independent tribunal, the extent that the party concerned enjoys a right to appeal or to secure a further review of the issues from second or final instance courts, on the other hand. Not all of the issues identified in the questionnaire as being applicable to the Supreme Administrative Court will necessarily apply in the same way in relation to the right of access to a first instance court or independent tribunal or, indeed, a second instance or intermediate appeal court.

§ 2. - OTHER ROLES OF THE SUPREME ADMINISTRATIVE COURTS
(Questions 150 – 151)

9. In many member states the supreme administrative jurisdictions exercise a role of consultative body for the government in the matters of legislative proposals. This competence is primarily an important task of the councils of state. The European Court of Human Rights expressed an opinion that the involvement of judges in consultations with regard to certain legislation precludes them from deciding a dispute relating to the assessment of legality or constitutionality of the same legislation in the future9.

Eight member jurisdictions do advise the government on legislation or other matters (jurisdictions in the United Kingdom, Belgium, France, Luxembourg, Greece, Slovakia, the Netherlands and the Czech Republic). Remaining 16 respondents denied such practice. The answers from the United Kingdom, Slovakia and the Czech Republic mention that the judges involved in such consultative activities are not excluded from deciding the litigations relating to the legislation having been consulted with them before. On the other hand, in Belgium, France, Luxembourg, Greece10 and the Netherlands the

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10 As far as the Greek Council of State is concerned, the participation in the dispute deciding process of the judges involved in the consultative procedure is almost always avoided. It only occurs very rarely on an
judges involved in the consultation procedure are not allowed to take part in deciding disputes related to the legislation.

10. These other functions are not dealt with in this study.
CHAPTER II: LEAVE TO APPEAL AND ASSOCIATED ISSUES
(Questions 1 – 48)

§ 1. LEAVE TO APPEAL

a. Analysis

11. The general observations mentioned above\textsuperscript{11} are particularly apposite to the first set of questions which concerned "leave to appeal" or the dismissal of proceedings as being "insubstantial". A significant minority of member states (10) operate a "leave to appeal" system in at least some cases, with 6 member states having such a system in all or almost all cases and 4 in some cases.

However, it is striking that in almost all cases where "leave to appeal" is required, the conduct of proceedings in the Supreme Administrative Court concerned follows on from two previous instances (the exceptions are the Czech Republic (where no prior instances are required) and Belgium (where only 1 prior instance is required)). It may be that it is considered in those jurisdictions which have a leave to appeal procedure that the fact that a party has had appropriate access to a first instance court or independent tribunal together with a second instance appeal provides appropriate redress for an aggrieved party and renders it appropriate that the Supreme Administrative Court should only deal with those cases which raise significant issues in accordance with the law and jurisprudence of the member state concerned. It should also be noted that none of those member states which operate a leave to appeal system provide for some form of internal appeal within the Supreme Administrative Court against the refusal of leave to appeal except the UK.

12. A "leave to appeal" system has the effect of preventing an appeal coming into being without a decision of the Supreme Administrative Court permitting the appeal in question. There are, however, other models whereby proceedings before the Supreme Administrative Court may be dismissed at a very early stage and without a full examination of all of the issues.

In a number of member states, it is possible for the Court to dismiss a case as being insignificant, being for example, that it is without purpose, without subject or the like (specifically in Latvia, Austria, the United Kingdom, Ireland, the Czech Republic, Belgium and France, whether the Conseil d'Etat is sitting as the judge of last resort or as an appellate body). In some cases (specifically Belgium and France) such a decision may be made by a single judge, in most cases (Latvia, Austria, United Kingdom, the Czech Republic and France) it can be made without an oral hearing, and in some cases it may

\textsuperscript{11} Supra, point 8.
be decided without a prior contradictory procedure (the United Kingdom, the Czech Republic, France, and, in exceptional circumstances, Austria).

13. Likewise, in the context of those jurisdictions which operate a "leave to appeal" system, it is possible in a minority of member states to invoke a summary procedure for determining that the case is manifestly ill-founded or inadmissible (4 member states provide this system: Estonia, the United Kingdom, Norway and Belgium). Furthermore, a significant number of member states allow cases to be denied admissibility because of being insignificant (Estonia, the United Kingdom, Norway, Belgium). Member states are broadly evenly divided as to whether such issues can be decided by a single judge (Belgium allow this) but such questions can, in most such states, be decided without an oral hearing (Estonia, Norway, Germany) although member states are divided as to whether a prior contradictory procedure is necessary (2 member states allow this as a general rule (the UK) 2 exceptionally (Estonia and Belgium) while Norway does not allow this).

b. Conclusion

14. It may well be that those member states operating any of the procedures analysed in this part of the questionnaire seek to strike a balance between, on the one hand, affording parties an opportunity to have their case fully considered by the Supreme Administrative Court and, on the other hand, the desirability of ensuring that the resources of the Supreme Administrative Court are directed towards those cases which truly require a ruling from the Supreme Administrative Court. The various procedures adopted such as leave to appeal, early dismissal on the grounds of being insubstantial or early dismissal on the grounds of being manifestly ill-founded or inadmissible are each designed within that broad parameter. A possible area for further and more detailed examination might be firstly to confirm whether, from the perspective of the member states which adopt such procedures, same are seen to reflect a balance such as that identified.

Second, it is suggested that it might be worthwhile to conduct a more in-depth study into the precise criteria which are applied by the Supreme Administrative Courts in decisions which have the effect of either preventing an appeal from commencing at all (by refusing leave) or permitting an appeal to be disposed of in a summary way at a very early stage.

§ 2. Financial Matters

15. Departing from what might be described as formal potential barriers to access to the Supreme Administrative Court, it is next necessary to turn to those questions which
were concerned with practical barriers in the form of financial or pecuniary issues. The first such issue is legal aid.

1. **Legal Aid**

a. **Analysis**

16. All member states who responded indicated that legal aid was at least available in principle. However, the entity which was entitled to grant legal aid varied considerably, with the Supreme Administrative Court being entitled to grant legal aid in 9 member states; (Estonia, Poland, Austria, Germany, Norway, Cyprus, Belgium, Romania and Bulgaria) another court having authority to grant legal aid in 8 member states; (Estonia, Serbia, Poland, Austria, Norway, Slovenia, Romania and Bulgaria) an authority making such grants in 9 member states (Hungary, Latvia, the United Kingdom, Ireland, Norway, Slovakia, Lithuania, Croatia and the Netherlands) and other bodies granting legal aid in 5 member states (in Luxembourg, bâtonnier de l’Ordre des avocats; Greece responded "La juridiction devant laquelle est portée l' affaire"; in Spain, the Legal Aid Commission; in the Czech Republic, the court that is competent to decide the case; and in France, the Office of legal Aid ("le bureau d’aide juridictionnelle") housed by the Conseil d’Etat and composed of specially appointed judges and lawyers).

Member states were relatively evenly divided on whether there were certain categories of individuals who were excluded from legal aid (11 member states answering yes to this question; 13 answering no) and where such exclusion is found, it most commonly relates to the public authority whose decision is challenged, though it also applies in some member states to legal persons (Luxembourg, Latvia, Ireland, Slovenia, Lithuania, Croatia). However, some member states distinguish between non-profit associations and other legal persons (Estonia and Spain).

17. The range of legal aid which exists varies to a very considerable extent. The most common features of the legal aid system across at least a majority of member states provides for the assignment of a lawyer to the applicant (18), the payment of court fees (19) and the provision of interpreters (15).

18. However, some member states provide for the full payment of all costs (11) while others provide for costs sharing (8) and payment by instalments (4). Some member states also provide assistance in relation to documentation.
b. Conclusion

19. While it is clear that some form of legal aid is available in all member states, it is important to recall that the text of Article 47 of the Charter requires that legal aid be available where it is necessary to ensure effective access to justice.

While it would have been beyond the scope of a questionnaire exercise such as that with which the Working Group was involved, a more qualitative, comparative analysis between member states on the question of legal aid might be useful with particular reference to the question of whether it is considered that the legal aid system in place adequately provides for the Charter entitlement. Such further study might also address the question of the extent to which legal aid is, in practise, available in an effective way in some or all Supreme Administrative Court cases.

In addition, some attempt might be made to integrate such analysis with a consideration of the extent to which the possibility of recovering costs from a public authority in the event of the proceedings being successful may provide a form of indirect legal aid.

2. Court Fees

20. It is next necessary to look at the extent to which court fees are required to be paid in order to access justice in the Supreme Administrative Court. The member states are evenly divided on whether there are court fees for every type of procedure (10) or only some (14). Where there are exceptions, the range is quite wide, ranging from social security matters (6 member states) and immigration cases (4 member states) to criminal proceedings (the United Kingdom) and fundamental rights, civil liberties and central government related matters (Spain).

21. Such court fees as there are have to be paid in advance in 13 member states but need not be paid in advance in a somewhat smaller number of member states (8 member states). In a majority of states, a successful claimant will be reimbursed fees. In many cases (10 member states) the losing party may have to reimburse any court fees paid by the winning party. In some member states this is conditional, for example, on whether the winning party requests it (Serbia and Romania), in others (Ireland and Spain) it is at the discretion of the court, and in France, access to justice is entirely free so this does not apply.

22. In a significant majority of cases there is a fixed court fee (20 member states answered yes. Those who answered no were Luxembourg, Poland, Germany and Croatia. Meanwhile Portugal and Montenegro answered N/A) although it must be noted that the answer to this question may not give a complete picture. It is possible that, in some member states, a different fee regime applies in different types of cases so that there
may be a fixed (or no) fee in some circumstances, but also a fee which may be variable by reference to the value of the case or other criteria in other circumstances. Furthermore, in some jurisdictions a fee is charged in respect of each formal document filed so that the total may be variable even though there is a fixed fee (being one which is not dependent on the value of the case or the like) for each formal document which is subject to a charge.

23. In considering the response to the question which sought to identify the minimum sum which has to be paid in respect of a challenge by one person to one measure or act, regard must be had to the comments just made. However, it would appear that, in the vast majority of member states which operate a fixed fee regime, the fee is normally less than €250. In those jurisdictions where a fixed fee does not apply, the majority (3) charge a fee which is dependent on the amount at stake. In such cases, there is a maximum fee which does not exceed (approximately) €12.000 (Poland), €10.000 (Germany) and €5.000 (Croatia).

3. Cost Shifting

24. The third series of questions relating to financial barriers concerned the possibility of the winning party recovering, to a greater or lesser extent, the costs incurred by that party in the proceedings.

The most common position in member states was that the recovery of costs by the winning party was the normal situation, being the response of 14 member states, although in a small number of cases it was suggested that the recovery of costs was always the case (Hungary, Germany and Bulgaria) and in a slightly larger number of cases that it was either at the Court’s discretion (Estonia, Luxembourg, Cyprus and Spain) or did not arise (Latvia, Croatia and the Netherlands).

25. Member states were evenly divided on the question of whether a third party was entitled to a reimbursement of costs, with 12 member states answering that this was the case, 8 member states answering that it was not, and a further 4 member states providing other answers specifying relevant conditions and circumstances.

26. As to the amount of costs which can be recovered, member states were again evenly divided on whether same provide for full costs (12) or partial costs (12). To the extent that partial costs only might be recovered, almost all allowed for costs of an attorney (11), many for the costs of experts (8) and travel costs (6), although a significant number of member states provide that the costs are to be fixed (9).

27. In a majority of member states (18) the Supreme Administrative Court has a discretion to limit the costs which are required to be repaid, with the legal basis in such circumstances being law in almost all circumstances (15) but jurisprudence in a small minority (3).
28. As to the reasons for the Court being given discretion, it may well be that this question was not fully understood. What was intended by the question was to ascertain what lay behind the conferral of discretion on the Court. For example, was it perceived that equity might require that costs should not be awarded against an impecunious applicant? However, some of the answers emphasised that the Court may disallow aspects of the costs which were not considered to be necessary for the proceedings in question.

29. In almost all cases (21) it is possible to argue before the Supreme Administrative Court on the question of costs. Where that is not so, it appears that it may be either because there is no jurisdiction to award costs at all or because the regime in respect of costs is fixed by law and not, therefore, a matter which can be the subject of debate.

30. In many member states, experts may be appointed by the Court. So far as the costs of such experts are concerned, it would appear that the losing party must bear such costs in a majority of member states (Hungary, Estonia, Luxembourg, Greece, Germany, Norway, Slovenia, Slovakia, Lithuania, the Czech Republic, Belgium and France) although some place the burden on the party that sought the expert opinion (Croatia, Spain and Romania) and a small minority placed the burden on the State (Latvia and the Netherlands. Also, Bulgaria specified "the Court" in their response to the question).

31. Likewise, in the context of experts tendered or sought by a party (where this is permissible) member states are reasonably evenly divided between placing that burden on the party that has sought the expert opinion (9), on the one hand, and the losing party, on the other hand (8).

4. Conclusion

32. It is clear that the cost of bringing proceedings can have the potential to operate as a barrier to access to justice. It may be that this topic would warrant further and more detailed analysis to seek to answer the following types of questions:

   (1) To what extent, in practise, does the cost regime mean that a successful party will not ultimately have to face a significant financial bill for bringing successful proceedings;

   (2) To the extent that a public authority successfully defends proceedings and to the extent that such an authority may be awarded its costs against the unsuccessful applicant, what level of financial exposure does an applicant have to undertake in order to bring a challenge;
(3) As noted earlier, can the possibility of recovering costs in favour of a successful applicant against a public authority operate as at least an indirect form of legal aid; and

(4) In the light of the attempt to harmonise the costs regime that applies across the Union in respect of those environmental matters governed by the Aarhus Convention, is it to be anticipated that it may be necessary for member states to become more familiar with the costs regimes that apply in other states.
CHAPTER III : PROVISIONAL PROTECTION

(Questions 50 – 58)

§ 1. INTRODUCTION

33. The adequate functioning of a legal system depends on the judicial remedies available to ensure effective legal protection. Most member states provide special measures which are usually designed, on the one hand, to protect certain rights and interests which may be threatened pending a judicial settlement and, on the other, to ensure the effective and efficient execution of the final judgment. Consequently, application of these provisional measures plays a very important role.

34. There can be provisional protection, on the one hand, in the context of an appeal (in cassation or not in cassation) before the Supreme Administrative Court against a court decision of an ancillary jurisdiction and/or, on the other hand, in the context of a remedy of full jurisdiction (in the sense of article 47 of the EU Charter) against an administrative decision.

In view of the size of the questionnaire, it was decided to remain limited to the cases stated in the second assumption. Hence, the concept of "provisional protection" includes "a procedure (summary procedure) which allows temporarily stopping the implementation of an administrative decision".

§ 2. PROVISIONAL PROTECTION

35. Provisional protection may be automatically applied either connected with an action/appeal or at the request of the parties.

36. The most common position in member states is that provisional protection does not apply automatically (17 member states answered so, i.e. Hungary, Serbia, Luxembourg, Poland, Austria, Ireland, Norway, Slovenia, Slovakia, Lithuania, Croatia, Cyprus, Spain, the Czech Republic, Belgium, France and Romania. Meanwhile Portugal and Montenegro answered N/A\textsuperscript{12}). There seem to be no exceptions to this rule, not even in case of emergencies.

37. In those jurisdictions where it does apply automatically, provisional protection depends on the matter or type of case:

\textsuperscript{12} Portugal and Montenegro did not complete the questionnaire.
Estonia mentions the example of § 42 (3) of the Act on Granting International Protection to Aliens, which states that "[i]f there is good reason to believe that an alien will not voluntarily comply with the precept to leave issued by the decision to refuse the issue of a residence permit, he or she shall be placed, with the permission of an administrative court, in an expulsion centre until he or she is expelled";

In Latvia, provisional protection does not apply automatically in the following cases: "the administrative act of the police, border guard, national guard, firefighting service and other officials authorised by law [...] with the aim of immediate prevention of direct danger to State security, public order or the life, health or property of persons", as well as "when [a] person has been granted administrative act favourable to the addressee, but the person requires to grant even more favourable act";

Provisional protection is provided for in Greece when dealing with, for example, disciplinary decisions affecting civil servants;

In the United Kingdom, provisional protection will be generally awarded where a matter is under appeal, unless there is a situation where the matter is time-sensitive or contingent on other events (for example, certain types of injunctive relief);

And in Germany, regular actions and appeals have suspensive effect. However, according to §80 of the Code of Administrative Court Procedure, this effect fails to apply if taxes and communal fees are called for, with non-postponable orders and measures by policemen and in cases in which immediate execution is ordered by the authority in the overriding public interest.

Provisional protection applies at the request of either party in 14 member states (Hungary, Poland, Greece, Austria, the United Kingdom, Germany, Ireland, Slovakia, Cyprus, Croatia, Spain, the Czech Republic, Belgium and France – in French administrative law one can distinguish two types of proceedings providing provisional protection: the "référé-suspension" and the "référé-liberté" –, two procedures that allow the judge to order, for the former, the suspension of the execution of an administrative decision and, for the latter, all the measures necessary to guarantee the protection of a fundamental freedom).

There are, however, certain exceptions to this rule. For instance:

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13 In Greece the administrative authority has the right to suspend the execution of the administrative decision as soon as a recourse against that decision is formed, without asking the permission of the Council of State. On the other hand, whoever deposited the recourse against that decision, can ask that it be suspended by the Council of State.

14 Croatia specified that the Croatian Act on administrative disputes differs two procedures that allow the judge to order the suspension of the execution of an administrative decision or all the measures necessary to avoid potential damage to the plaintiff.
- In the Polish legal system, appeals do not have a suspending effect when they are accompanied by an order of immediate enforceability or if the decision is statutorily immediately enforceable;

- Exceptions can also be found in the United Kingdom, if the matter is time-sensitive or contingent on other events;

- In Germany, the exceptions are specified in the above mentioned §80 of the Code of Administrative Court Procedure;

- And, finally, in Ireland there are no absolute barriers to the cases where provisional protection may be ordered because it always requires an application to the Court.

39. On the contrary, provisional protection does not apply at the request of the parties in Estonia, Serbia, Luxembourg, Latvia, Slovenia and Romania.

40. In Norway, Lithuania and the Netherlands, it depends on the matter or type of case, being up to the Court to decide whether the conditions for provisional protection are met or not.

41. The Supreme Administrative Court can – upon request – decide to adopt provisional protection if circumstances so require:

- In a number of member states, it is possible for the Court to adopt provisional protection if there are prospects of success (specifically in the United Kingdom, Germany, Lithuania, the Netherlands, Spain and France);

- In some cases (specifically in Austria, the United Kingdom, Norway, Lithuania, the Netherlands, the Czech Republic, Belgium and France) such decision might be taken in special emergency circumstances;

- In others, the Court will simply weigh up the interests between execution and provisional protection (Hungary, Austria, the United Kingdom, Germany, Norway, Slovenia, Lithuania, Croatia, the Netherlands, Spain, the Czech Republic, Belgium and France) or apply a combination of the three criteria above mentioned (specifically in Estonia, Latvia, Greece, the United Kingdom, Ireland, Slovakia, Lithuania, Cyprus, the Netherlands, France and Romania);

- However, the Court might also take into account other criteria to suspend the enforcement of a decision or of some of its effects. These include damage suffered by one of the parties (Slovenia and Croatia), danger caused by delay or periculum in mora (Spain), urgent cases and serious doubts as to the lawfulness of a certain decision (France) and the risk of damage or irreversible effects (Poland).

In Serbia and Luxembourg there is no provisional protection on request.
42. When provisional protection is granted, the petitioner might be required to provide security as a condition for issuing the provisional protection (Poland and Romania) or at the discretion of the Court (the United Kingdom, Germany, Ireland, Norway, Cyprus and Spain). Such security will be used to compensate the other party if the case is eventually lost.

43. Finally, in a significant majority of member states (20) provisional protection will not result in putting the case in a fast track procedure. A small minority answered yes to this question (specifically Greece, Ireland and France).

§ 3. CONCLUSION

44. No real conclusions can be drawn (as yet) from this study as regards the "provisional protection" aspect, understood in the aforementioned sense. Indeed, the questions concerning provisional protection are very brief and they do not give a complete picture, but only a little guidance regarding the conditions demanded to suspend provisionally the execution of a administrative decision.

This topic would need a detailed analysis to reveal the main problems arising when applying provisional measures of protection, as well as to compare national rules on interim relief of various member states and find their main similarities and differences.

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15 Poland specified that financial security as a condition for a provisional protection is an exception: it's required only in certain types of cases, i.e. in construction law if the building permit is challenged at the court.
16 Supra, pt. 34.
CHAPTER IV: FULL ACCESS MUST BE GRANTED TO THE COURTS

(Questions 60 – 75)

§ 1. INTRODUCTION: THE RIGHT OF ACCESS TO THE SUPREME ADMINISTRATIVE COURT IS NOT ABSOLUTE

45. The access to the courts is one of the constituent elements of the rule of law. Therefore, as a rule, there can be no gaps.\(^{17}\)

The Court of Human Rights, regularly referring to its GOLDER landmark ruling of 21 February 1975\(^{18}\), recalls in its abundant and consistent case-law that article 6, § 1, ECHR guarantees each person’s right for a court to hear any dispute relating to his/her rights and obligations. This "right to a fair hearing", whose right to access only constitutes one aspect, is guaranteed to each person who arguably considers that the interference in the exercise of his/her rights is arbitrary and claims that he/she did not have the opportunity to complain about this grievance to a court providing the guarantees stated in article 6, § 1.\(^{19}\)

The Court also notes that the "procedural" guarantees of article 5, §§ 1 and 4, of the ECHR are essentially similar to those of article 6, § 1. Finally, as regards article 13 of the ECHR, it is consistent case-law that this article guarantees the existence of local remedies that allow to examine the content of an "arguable grievance" based on the Convention and the granting of a suitable relief and that the contracting States enjoy a certain margin of discretion with respect to the manner in which they conform to the obligations that result from this provision. The scope of the obligation resulting from article 13 varies according to the nature of the grievance that the applicant draws from the Convention. However, the appeal required by article 13 must be "effective" in law and in practice.\(^{20}\)

46. The Court of Strasbourg states, just as explicitly and consistently, that, as this right of access to courts is not absolute, it may give rise to limitations that are implicitly permitted because "by its very nature it calls for regulation by the State, a regulation that can vary in time and space according to the requirements and resources of the community and individuals."\(^{21}\) By devising such a regulation, the contracting states enjoy

\(^{17}\) ECtHR, 15 June 2006, Zlinsat v. Bulgarie, 577785/00, §§ 80-84.

\(^{18}\) ECtHR, 21 February 1975, Golder v. The United Kingdom, § 36.


\(^{21}\) See, in particular, Ashingdane, aforementioned, § 57; ECtHR [GC], 17 January 2012, Stanev v. Bulgarie, No. 36760, § 230.
a certain margin of discretion. Ultimately, if it is for the European Court of Human Rights to give a ruling on the compliance with the requirements of the ECHR, it cannot replace the assessment of national authorities by another assessment of what could be the best relevant policy. Nevertheless, the applied limitations shall not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. In addition, they are compatible with article 6, § 1, only if they pursue a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the targeted goal. Moreover, the European Court of Human Rights recalls that the purpose of the ECHR is to safeguard rights that are not theoretical or illusory but concrete and effective. The remark especially applies to the guarantees stated in article 6, considering the prominent position given to the right to a fair trial, with all the guarantees stated in this provision, in a democratic society.

47. It is in this context that this chapter has examined a few points pertaining to full access and its limits.

§ 2. PRECLUSION OF THE INDIVIDUAL ADMINISTRATIVE ACTS FROM JUDICIAL REVIEW

48. In almost all member States each individual administrative act falls within the scope of the judicial scrutiny. Only 6 member states declared that in their national legal systems there are some individual acts precluded by law from judicial review. There is an exclusion from the judicial review provided for visa decisions in Estonia, Poland, Czech Republic, and naturalisation in Latvia and the Czech Republic. In the response provided by Slovakia it was stated that some specified categories of administrative decisions may be excluded from judicial review.

§ 3. POSITIVE OR NEGATIVE JURISDICTIONAL CONFLICT

49. In 12 member states positive or negative jurisdictional conflict could arise between Supreme Courts, while another 12 declared that it could not.

In those member states which declared the possibility of jurisdictional conflicts, there are rules on resolving them. For example, there are special panels of justices representing justices from conflicting jurisdictions (Lithuania, Estonia) or this problem is resolved by the Supreme Court (Belgium, Croatia, Greece, the Netherlands, Serbia, Spain, the Czech Republic). The Conflict Tribunal (composed of members of the Court of Cassation and

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22 Ibidem, see also, among many others, Cordova v. Italy (No. 1), No. 40877/98, § 54, ECtHR 2003-I; Also see the recall of the relevant principles in Fayed v. The United Kingdom, 21 September 1994, § 65, series A No. 294-B.
members of the Supreme Administrative Court) is competent to resolve jurisdictional conflicts in France. Bulgarian legislation instigates a General Meeting (General Assembly) consisting of judges of High Court of Cassation and the Supreme Administrative Court, which has a competence to resolve such conflicts. Its interpretative rulings are binding on all courts in Bulgaria.

A jurisdiction of a court can only be challenged at the beginning of a trial at first instance according to the German legislation. There is also a general rule in Poland that a court of the first instance shall refuse dealing with the case if the case does not fall within its jurisdiction and this decision on refusal is binding on the court of other jurisdiction what allows avoiding conflicts.

§ 4. ACCESS TO THE SUPREME ADMINISTRATIVE COURT

1. Preclusion from appeal against the lower court judgement

50. Not all member states allow an individual to appeal against each judgement of the lower court to the Supreme Administrative Court (only 9 member states).

There are different grounds for not allowing an appeal to the Supreme Administrative Court. For example, in some member states an appeal is possible only when a minimum level of the financial value is at stake (Hungary, Austria, Spain). The law may also exclude certain categories of judgements of the lower court from the review by the Supreme Administrative Court (for example, an appeal in election matters in the Czech Republic is inadmissible). It is not possible to appeal against a judgement of the lower court that returns a case to an administrative authority and a judgement that imposes an obligation on the administrative authority an obligation to issue an decision (in case of inaction of the administrative authority) in Croatia. Majority of the member states (16) declared that the first instance court could not decide over the admissibility of an appeal to the Supreme Administrative Court, while in 8 member states there is such a competence entrusted to first instance court.

2. Initiation of the procedure

51. The Supreme Administrative Court may not institute ex officio the review of a decision of a lower court in 19 States. In 4 member states it is not always needed a request from the party in order to review a judgement of the lower court (Luxembourg, Latvia, Slovenia, Bulgaria).
3. **Access to the Supreme Administrative Court denied as a result of failure to meeting the formal requirements**

52. It is required to meet certain procedural conditions in order to exercise an individual right to appeal against a lower court judgement to the Supreme Administrative Court.

One of the procedural conditions is participation in the prior stages of the procedure. A majority of the member states who responded to the questionnaire declared that a party had to exhaust any available administrative remedy before filing an appeal with the Supreme Administrative Court (15 responses). A few States (4) answered that this was needed only in certain cases, and others (5) responded that it was not needed at all. In 11 responses a view is presented that mandatory administrative remedies do not reduce significantly referral to the Supreme Administrative Court while only 6 took an opposite view. It is also interesting to note that in the majority of the States (14 responses) a third party who was not involved in the administrative procedure before the lower court is not allowed to file an appeal with the Supreme Administrative Court. Such a possibility is open in 10 states.

The access to the judicial protection of a third party who was not involved in the administrative procedure before the lower court is remedied by the possibility of reopening the case at the lower court. There is such a possibility in 9 states while 5 states declared lack of it.

4. **Power of the judge in relation to technical conditions for admissibility of an appeal**

53. The Supreme Administrative Court has a discretion to forgive the failure to comply with technical conditions for admissibility (i.e. to extend time for making and appeal for good reason) only in 9 member states. There is no such possibility in 12 member states.

§ 5. **Review of the facts of the case**

54. In 15 member states a fact finding process is reviewed by the Supreme Administrative Court although in 6 of them under certain conditions only. For example, in Estonia the Court is not bound by the facts established by the circuit court only and if the rules of the procedure have been significantly infringed. In Spain a fact finding process is reviewed in the light of its arbitrariness or whether examination of the evidence is illogical or irrational. In the United Kingdom, as a general rule, the Supreme Court does not examine findings of facts made by lower courts, although it is possible in certain
cases. It is not reviewed a fact finding process by the Supreme Administrative Court in Latvia, Austria\textsuperscript{24}, Slovakia, Cyprus, Romania, Hungary, Slovenia. It is allowed submitting new facts (facts that have not been submitted before the lower court and the administrative authority) before the Supreme Administrative Court only in 5 member states (full examination of the facts of the case \textit{ex nunc}). There are Luxembourg, Norway, Lithuania, Croatia, the Netherlands.

Criterion of reviewing facts defined in the questionnaire as the "mere examination of claims and manifest errors" is applied in Belgium, France and Germany \textit{vis-à-vis} facts established by the administrative authority. However, in these member states (Belgium, France and Germany) the Supreme Administrative Court is bound by the facts established by the lower court. In Ireland the Supreme Administrative Court is not bound by the facts established not only by the administrative authority but also by the lower court on the grounds of "mere examination of claims and manifest errors".

\section*{§ 6. Revision of the Jurisprudence}

55. According to the European Court of Human Rights, even if "the requirements of the legal certainty and protection of legitimate expectations of the citizens seeking justice do not set forth the established right in a consistent case-law"\textsuperscript{25}, the Supreme Administrative Courts ensure the consistency of their case-law and "it is in the interest of legal certainty, predictability and equality before the law that they do not deviate from their case-law without a valid reason"\textsuperscript{26}. It is also possible that the Supreme Administrative Courts deem it necessary to return to a part of their case-law, especially when the legal context in which they were pronounced has undergone normative changes that are likely to influence the reason of its previous judgments. Moreover, legal certainty may require that after examining the case-law, the Supreme Administrative Courts change certain criteria that they have retained according to the individual cases that were presented. In fact, "the absence of a dynamic and evolving approach will hinder any change or improvement"\textsuperscript{27}.

It is thus possible to overrule or revise case-law in the context of access to the supreme administrative judge.

56. There are different techniques aiming at revising jurisprudence in order to achieve consistency.

\textsuperscript{24} Austria specified that, generally, the Austrian Supreme Administrative Court itself does not establish the facts of a case. However, parties may claim that the facts have not been established in a lawful procedure. The Supreme Administrative Court may examine this claim and may, if necessary, quash the decision of the (lower) administrative court.

\textsuperscript{25} ECtHR, 18 December 2008, Unedic v. France, § 74.

\textsuperscript{26} See ECtHR [GC], 15 October 2009, Micaleff v. Malta, § 81.

\textsuperscript{27} ECtHR, 26 May 2011, Legrand v. France, § 37.
In Hungary there is a unification procedure conducted by a special judicial organ at the court – a "uniformity panel" which is composed by 5 members. A Polish Supreme Administrative Court revises its jurisprudence mainly by adopting resolutions by enlarged benches (from 7 judges and more) explaining legal provisions whose application has caused differences in jurisprudence of administrative courts and resolution containing solution of legal issues raising considerable doubts in respect of a particular administrative court case. The Austrian Supreme Administrative Court increases from five to nine members in case of taking a decision that runs counter to well-established jurisprudence or when jurisprudence does not provide any unanimous response to the legal question at stake. In any case, a subsequent decision diverging from a previous decision made in a chamber with extended composition must also be made in a chamber with extended composition. In Germany, if one chamber wants to deviate from another chamber's jurisprudence, it has to bring the legal issue before the Grand Chamber ("Großer Senat"), if the other chamber does not want to give up its opinion.

Enlarged bench is also required in Estonia, Lithuania, the Czech Republic, Cyprus, Croatia, Slovakia, Bulgaria, Belgium. In France the most important cases that could result in a change of jurisprudence are judged by special judicial formations of the Council of State (the Section litigation and litigation Assembly).

57. By contrast to the above mentioned States, in Ireland there is no special unification procedure and it is simply used "case by case" mechanism. The Irish Supreme Administrative Court revises its jurisprudence when it is persuaded (while hearing a case) that a previous decision of the Court establishing the jurisprudence concerned is wrong. Similar practice exists in Latvia, where in the case of a change of jurisprudence, firstly, the reasons of change are given, secondly, the new judgement is specifically marked and published on the homepage of the Supreme Court. Case by case techniques are adopted also in Spain and the United Kingdom where there is no requirement for the Supreme Court to be consistent with previous case law in a situation where it chooses to depart from such case law what happens when it is "right to do so".

58. In some responses, it was also found relevant also other techniques, such as "researching similar previous decisions" (Norway) and "coordination meetings of judges" (Slovenia). It is also underlined that the Supreme Administrative Court has a great respect for prior decisions and provides an adequate explanation of the reasons for revoking the previous decisions (Spain).

§ 7. COMMUNICATION OF THE NEW JURISPRUDENCE TO THE GENERAL PUBLIC

59. There are several methods used by the States who responded to the questionnaire in order to communicate a new jurisprudence, such as press releases of judgments (newsletters) of a particular importance (Estonia, The Netherlands, France, Greece, Bulgaria), professional meetings and conferences that give an opportunity to introduce developments in the case law (Serbia), publishing judgements in the collection
of the case law jurisprudence (Croatia, Lithuania, Germany, Poland, France) and also online access to the case law of the Supreme Administrative Court (Spain, Norway, Poland, France, Belgium).

§ 8. DISSENTING OPINION

60. In 17 member states it is possible for a judge to dissent from the majority while delivering judgement (dissenting opinions). Only 7 member states admitted lack such possibility. In 11 Member States dissenting opinions are published, and in 4 they are not (Hungary, Serbia, Lithuania, Croatia).

§ 9. CONCLUSIONS

1. Challenges in analyzing the responses

61. Conducting a survey that addresses legal procedural issues in the member states with different legal traditions and backgrounds can encounter a risk of misunderstandings by both sides - those who draft the survey and analysis the responses and those who answer the questions. The answers to this part of the questionnaire does not always allow the possibility to make thoughtful comments, and it is not only because of the occasional lack of answers to some questions, but also because the questions themselves could have been more precise and accurate. For example, one of the questions that seems to contradict itself is the question no 100 which should be answered only if the answer is "yes" to the previous question (no 99) on the possibility of review "ex officio". This question gives the possibility to answer "in the document used to enter the appeal by the Supreme Administrative Court" and such a document is rather difficult to find out in the procedure initiated ex officio.

However, this and some other deficiencies do not undermine the overall results of this part of the survey, since certain problems could have been grouped and highlighted. In other words, as a result of this survey, some important issues have been identified in the member states although not all of them could have been fully commented. This also leads to the conclusion that some of the issues would require further investigation and more detailed explanation in the future provided that answers to the questions will be comprehensive and thoroughgoing and accompanied with the explanation of the context of the national legal systems.
2. **Limits of the judicial review**

62. The differences among the member states are justified by the so-called procedural autonomy of the member states. This concept has been explained already in the *Rewe* case\(^28\). It goes without saying that the differences in procedures have their limits which also derive from the ECHR and the EU Charter of Fundamental Rights. Therefore, it is not completely left to the discretion of the national parliaments to tailor a procedural framework for the administrative disputes in each Member State. It also leads to a conclusion that while national procedures may be evaluated in the light of the European human rights standards deriving from the ECHR and the EU Charter of Fundamental Rights.

Limits of the judicial review is the most crucial issue of this part of the survey. From this perspective it seems to be problematic an exclusion from the judicial review visa decisions (in 3 member states). A decision on refusal of a visa may engage art. 47 of the EU Charter\(^29\) and art. 13 ECHR, where right to family life is at stake\(^30\). It seems a debatable exclusion of the judicial review on naturalisation decisions since these decisions may directly affect individual rights enshrined by a substantive national law.

3. **Access to the Supreme Administrative Court**

63. Although the possibility to appeal against the first instance judgement is not required by the international standards in administrative cases, such an opportunity - if given to an individual - certainly raises standard of judicial protection. Only 9 member states allow each judgement of the lower court to be challenged before the Supreme Administrative Court.

The possibility of instituting *ex officio* procedure to review a decision of a lower court (in 4 member states) seems to be very interesting and perhaps would require more elaborated answers and examination in order to draw any definite conclusions. The same

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\(^{28}\) CJEU, 16 December 1976, C- 33/76, Rewe-Zentralfinanz Eg and Rewe-Zentral AG v. Landwirtschaftskammer fuer das Saarland, European Court Reports 1976 - 01989. This ruling has been very often reiterated in the subsequent judgements of the Court. According the procedural autonomy as it was explained in the Rewe case: "Applying the principle of cooperation (...) it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of community law. In the absence of Community rules on this subject, it is for the domestic legal system of each Member States to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of a Community Law. It being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature".

\(^{29}\) In 2014 the Commission sent a formal request (a "reasoned opinion") urging Finland, Poland, the Czech Republic, Slovakia, Estonia to take the necessary actions to ensure that appeals against a decision to refuse, annul or revoke a visa include access to a judicial body, see more http://europa.eu/rapid/press-release_MEMO-14-2130_en.htm.

\(^{30}\) Case of Tuquabo-Tekle and others v. the Netherlands, judgement ECHR 01.12.2005 r. application No. 60665/00.
observation is on restriction in procedure on examining questions raised by the party. A few responses indicate categories of cases excluded from possibility to appeal to the Supreme Administrative Court (only given examples were international protection and election cases) which means that denial access to the Supreme Administrative Court just on this ground is considered very exceptional.

It is also important to ensure clear and precise conditions that have to be met before an appeal can be examined by the Supreme Administrative Court. A majority of the member states who responded to the questionnaire (15) declared that a party had to exhaust any available administrative remedy before appeal to the Supreme Administrative Court. A few States (4) answered that this is needed only in certain cases, and other 5 said that it is not needed at all. These numbers show that there is a general tendency to require from a party to exhaust administrative remedies before bringing the case to the court of the last resort. Possibility of filing an appeal to the Supreme Administrative Court by a third party often (14 responses) depends on a prior participation in the administrative procedure before the lower court.

The access to the judicial protection of a third party who was not involved in the administrative procedure before the lower court is remedied by the possibility of reopening the proceeding at the lower court. There is such a possibility in 9 states while 5 states declared a lack of it. It does not exist a common practice on a discretion of the Supreme Administrative Court to forgive the failure to comply with technical conditions for admissibility. Positive or negative jurisdictional conflicts between Supreme Courts seem to be rather technical issues as long as the access to the court is not denied.

4. **Reviewing of the fact finding process by the Supreme Administrative Court**

64. In respect to reviewing a fact finding process a practice varies enormously and it is difficult to find out an overwhelming tendency. The main issue is whether the Supreme Administrative Court may review a fact finding process and whether new facts (that have not been invoked before) may be invoked for the first time before the Supreme Administrative Court. In 15 member states a fact finding process is reviewed by the Supreme Administrative Court although in 6 of them under certain conditions only.

5. **Consistency of the jurisprudence and dissenting opinions**

65. Consistency of the jurisprudence is one of the most compelling challenge for the Supreme Administrative Court in every member state. In the questionnaire there were several methods presented that serve to strengthen consistency of the case law. Generally speaking, the practice of revising jurisprudence in order to achieve consistency is overwhelmingly in favour of special judgements (or special resolutions) adopted by the
enlarged benches of the Court. In relation to presenting dissenting opinions it can only be said that a common practice does not exist.

6. Communication of the new jurisprudence

66. Methods used by the states who responded to the questionnaire on communication of the new jurisprudence to the general public include different techniques indicated in the national questionnaires. It seems that in particular, online access to the whole jurisprudence of the Supreme Administrative Court serves well regarding the transparency of the activity of the court and helps if accompanied by friendly information on the case law in achieving this goal.
CHAPTER V: THE APPOINTMENT, PROMOTION AND JUDICIAL TENURE OF JUDGES

(Questions 110 – 143)

§ 1. GENERAL REMARKS

67. The judiciary is a specific power separate from the executive and legislature. The separation of powers together with the system of checks and balances have been traditionally considered basic components of the modern democratic states which respect the principles of the rule of law and the protection of minorities. The system of appointment of judges, their promotion and conditions of their removal from office play a crucial role in safeguarding the independence of the judiciary. These matters are also indispensably connected with the right to fair trial.

On the other hand, a certain form of involvement of the executive or legislature in the process of appointing judges is necessary to keep democratic legitimacy of the judiciary, provide control and protect the judiciary against isolation. It is also related to the constitutional traditions of particular member states that must be respected.

68. It is necessary to point out that the appointment of judges by the executive bodies (such as the government or the head of State) is not per se contrary to the right to fair trial.

It is also necessary to consider the specific role of Supreme Administrative Jurisdictions which represent the highest court instances deciding the disputes including civil rights, obligations and criminal charges. At the same time the Supreme Administrative Jurisdictions influence the exercise of the public policy by the government and there is always danger of interference by the political actors. The level of protection and safeguards of independence of the Supreme Administrative Jurisdictions must therefore be equivalent to their importance.

§ 2. APPOINTMENT AND CONSULTATION BODY

69. It is necessary to distinguish two kinds of supreme administrative jurisdiction member appointment. The first and most common way is the promotion of existing judges of the lower courts. The second is the appointment of candidates from other legal

31 For instance under art. 6 of the ECHR: ECtHR, 28 June 1984, No. 7819/77 and 7878/77, Campbell and Fell v. United Kingdom.
professions (attorneys at law, professors, public servants etc.) directly to the supreme administrative jurisdictions.

1. Appointment of new judges (first appointment)

70. The appointment of new judges without prior judicial experience to the Supreme Administrative Jurisdictions is less common. The power to appoint such new judges belongs most often to the Head of State (9 member states: Austria, Luxembourg, Poland, Lithuania, Cyprus, Netherlands, Czech Republic, France) or/and at the government (7 member states: Austria, Germany, Ireland, Norway, Belgium, Luxembourg, Czech Republic). In three member states the legislature is involved in the decision making process (Estonia32, Latvia, Slovenia).

Traditionally, the Judicial Councils composed of members of the judiciary have to confirm the candidates for appointment in France, Spain and Greece. In the Eastern European member states, the Judicial Councils, having been established on recommendation of the Council of Europe and the European Union recently, have the decisive (sometimes even exclusive) competence in the matters of the appointment of judges (Bulgaria, Serbia, Romania, Slovakia, Croatia). In Estonia, the Chief Justice has to consult the Judicial Council prior to making the nomination to the Parliament, but the opinion of the Council is not binding for the Chief Justice. In some member states, a specialised selection board issuing binding opinions on candidates has been created (United Kingdom, Germany, France).

Even direct involvement of the Supreme Administrative Jurisdictions is practiced: in Hungary, United Kingdom, the Czech Republic, and France the chief representative of the Supreme Administrative Jurisdiction has to approve the candidate; in Luxembourg the consent with the candidate must be given by the full court; In Estonia the full court of the Supreme Court has to be consulted before the Chief Justice makes the nomination to the Parliament. However, the opinion of the full court is not binding for the Chief Justice; in Greece, Austria and United Kingdom the approval of another body consisting of the members of the Supreme Administrative Jurisdiction is necessary.

Amongst the bodies with the consultative competence in the course of the appointment process there are firstly judicial councils consisting of the representatives of the judiciary (10 member states), bodies composed of members of the Supreme Administrative Jurisdiction (9), plenary of the Supreme Administrative Court (Belgium, the Czech Republic) or the Chief Justice (Latvia, Ireland, France). The appointment is consulted with the government and/or Parliament in the Netherlands and Belgium. A specialised selection board which includes representatives of the other legal professions and lay

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32 In Estonia the power to appoint new judges belongs to the parliament. However, the parliament has no power to nominate their own candidate.
representatives must be consulted in Ireland. There is no consultation procedure in Austria and Greece.

2. Promotion of already appointed judges

71. In the member states where a Judicial Council has been created, this body is often also empowered to decide on the promotion of judges (13 member states). In the other large group of member states (12) the decision on the promotion of judges to the members of the Supreme Administrative Court is made by the representatives of the executive (either the Head of State or the government or its member). The competence of the legislature to decide on the promotion of judges occurs only rarely (e.g. Slovenia). In some member states the Supreme Administrative Courts themselves decide (jointly with other bodies) on the promotion of judges of the lower courts. This can happen by the decision of the Chief Justice (the Czech Republic), the Vice-President of the Council of State (France), the full-court (Estonia) or other judicial body created by the members of the Supreme Administrative Jurisdiction (Austria). An exclusive model has been established in the United Kingdom: a selection committee composed of the representatives of the judiciary, other legal profession, as well as lay representatives, is entitled to render the decision on the promotion of judges of the courts of lower instance.

72. In order to guarantee that only the best candidates are promoted and maintain the system of checks and balances it is important that also other bodies are consulted. In the majority of member states the consultation bodies are part of the judiciary: Chief Justices are consulted in 7 member states, a body composed of the members of the Supreme Administrative Jurisdiction or other judges are consulted in 19 member states. In several member states the Government plays the role of the consultation body (e.g. Ireland), as well as the Parliament (e.g. Belgium). A specialized selection body has to be consulted in 5 member states.

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33 In France, the appointments of members of the administrative courts and administrative courts of appeal to the Council of State are pronounced on the proposal of the Vice President of the State Council, deliberating with Section Presidents, after consulting the Council of Administrative Courts and administrative courts of appeal.

34 The Austrian Supreme Administrative Court specified that it does not have any influence on the promotion of judges within an administrative court of first instance. Concerning the promotion of judges within the Supreme Administrative Court to Presidents of Senates, the plenary assembly of the Court has a right of proposal, i.e. shortlist of three candidates of which one is elected by the government. The appointment is carried out by the Austrian president.
§ 3. APPOINTMENT/PROMOTION PROCEDURE

73. The candidates for appointment to the Supreme Administrative Jurisdiction are required to show their professional competences. The best qualified candidate is chosen in a competition in 5 member states (France, Luxembourg, Greece, Slovakia, Romania). In nine member states the candidate has to go through a competency based interview (Austria, United Kingdom, Germany, Norway, Belgium, Bulgaria, Hungary, Croatia, the Netherlands) whereas in seven other member states the candidate has to prove his/her competence otherwise (Latvia, Ireland, Poland, Slovenia, Lithuania, Spain, Serbia). The selection process is not prescribed by law in the Czech Republic and Estonia. However, the candidates are questioned by the plenary of the Court and their professional competences may be examined. No specific procedure or competence testing is laid down in Cyprus.

74. In the majority of the respondent member states the information on the appointment procedure and the relevant documents are transparently made available to the public (Estonia, Slovenia, Slovakia, Croatia, Spain, Norway, Belgium, France, Bulgaria, Hungary, Serbia, Luxembourg, Poland, Greece, Latvia, Lithuania, Romania, the Czech Republic). Some of the documents are also displayed publicly in Ireland.

On the other hand, in 5 member states the information on appointment procedures and candidates are not available to the public (Austria, United Kingdom, Germany, Cyprus, the Netherlands).

§ 4. APPOINTMENT OF THE PRESIDENT OF THE SUPREME ADMINISTRATIVE JURISDICTION

75. The chief representative of the Supreme Administrative Jurisdiction plays a crucial role in representing the administrative justice and symbolizing its independence. The importance of the function is reflected in the nomination procedure.

In most of the respondent member states the Chief Justice is appointed by the Head of State (9). In 8 member states the president of the Supreme Administrative Court is appointed by the government. Five presidents of the Supreme Administrative Courts are nominated by the Parliament. In five cases the president is elected/approved by the Judicial Council and in two cases the approval of the Supreme Administrative Courts or their representatives is required. In the United Kingdom the selection board must decide on the appointee.

When choosing the new chief justice the appointing body has to be advised by various consultants: the Supreme Administrative Jurisdiction or its representatives in 9 member states, judicial council in 8 member states, the government (8 member states), the
Parliament (3 member states), specialised appointing body (3 member states) or Head of State (2 member states).

§ 5. APPOINTMENT FOR SPECIFIED TIME

76. The conditions of termination of judge´s tenure are very important for safeguarding the judicial independence 35.

This corresponds to the fact that none of the respondent courts reported that the judge´s tenure is set for a fixed term of years and may be renewed. Only the Hungarian legislation enables to appoint judges only for a fixed period of three years for the first time and then to appoint them for an indefinite period of time.

77. Three member states have no limitation of judge´s age and the judges are effectively appointed for life (Slovakia, Romania). In all other member states the judges are appointed for an indefinite period of time but their tenure expires at a certain age set by the law.

In most of the member states the retirement age for judges is 70 (Latvia, United Kingdom, Ireland, Norway, Belgium, Slovenia, Croatia, the Netherlands, Spain and the Czech Republic). The age of 68 is the limit set in 3 member states: Estonia, Luxembourg and Cyprus. In four other member states the judges retire at 67 (Germany, France 36, Serbia and Greece). The lowest age limit (65) is in Austria, Bulgaria and Lithuania. 37

Thus the average retirement age for judges in all of the respondent member states is 68.35 years.

§ 6. DISCIPLINARY PROCEEDINGS

78. Due to the fact that the judges are appointed for an indefinite period of time, they are guaranteed that they will be able to carry out their functions (until they reach the age limit) unless they are removed from their office as a result of disciplinary proceedings. If a party to the dispute before the court (in administrative matters regularly an executive body) is able to influence the judge through a threat of disciplinary proceedings, it is a reason to doubt the impartiality and independence of the judge 38. Thus it is necessary to effectively ensure that the disciplinary proceedings cannot be misused.

35 Cf. ECtHR, 3 February 2009, No. 19206/05, Dauti v. Albania.
36 Or 68, if the member is maintained "in excess" (en français, "maintien en surnombre").
37 Poland specified that there is an obligatory retirement age, but did not say what age.
38 Cf. ECtHR, 7 July 2010, No. 16695/04, Gazeta Ukrajina-Tsentr v. Ukraine.
79. Various sanctions including the removal from office may be imposed in the disciplinary proceeding. In cases that may result in the removal from office the disciplinary proceedings may be initiated first by a judicial body including the Chief Justice (18 member states). In six respondent states the government or its representative, and in one country also the legislator, are entitled to initiate the removal of a judge as well. Bodies including members of legal professions are involved in two member states. In the Czech Republic and Slovakia the ombudspersons are entitled to initiate the disciplinary procedure in certain cases as well. In the United Kingdom the Judicial Conduct Investigation Office which includes also lay representatives shares the responsibility for initiation the procedure. In several member states the Judicial Councils have this power (e.g. Spain, Romania, Bulgaria).

The cases of minor misconduct of a judge are generally decided by the judicial body (17 respondents), although in two member states they are decided by the government and in one of the respondent states by the legislature. In Spain, Croatia, Romania and Bulgaria such cases are resolved by the Judicial Councils. In Ireland there are no formal rules for adjudicating cases of minor misconduct of the members of the Supreme Court.

The removal from office may be imposed by a judicial body (or a specialised disciplinary court) in 16 member states, by the government in three member states, and by the Parliament in five member states. Judicial council holds the competence to remove a judge from office in five member states. In Lithuania and Cyprus, it is the competence of the president. In the United Kingdom, a judge of the Supreme Court may be only removed from office by the Queen upon request made by both Houses of the Parliament. The only case happened in 1830.

80. Not surprisingly, a large majority of member states regulates the disciplinary proceedings against the judges in the law (14). Six member states even report that the regulation of disciplinary proceedings is a constitutional matter. Only three member states (Serbia, Netherlands, Romania) determine the rules of the disciplinary proceedings in the secondary legislation. On Cyprus the procedure in disciplinary cases is contained in the internal regulation of the Supreme Court.

81. Exactly half of the responding jurisdictions (12) stated that the disciplinary proceedings are open to public. In 12 other member states the disciplinary proceedings are not public. On one hand, the public proceedings in disciplinary matters strengthen the confidence of the public in the judiciary through the transparency. On the other hand, the proceedings against a judge may be perceived as sensitive and may discredit the respondent judge before his conviction by the competent body.
CHAPTER VI: JUDICIAL CONDUCT

(Questions 130 – 143)

§ 1. JUDICIAL BIAS

82. It is not surprising that all of the answers to the question: "If any issue arises in respect of judicial conflict of interest or perception thereof, is a judge required to recuse him/herself of their own motion?", are affirmative. All of the respondent member states also report that the party to the proceeding may request a recusal of a judge deemed to be in a conflict of interest. However, the practices differ in terms of bodies competent to decide on the recusal of a judge. In the majority of member states (15) the court as a whole or a panel of judges decides this issue. However, in Serbia, Slovenia and Croatia the Chief Justice or the president of the chamber decides on a recusal request (in certain cases also in Lithuania and the Czech Republic). In Poland a panel of 3 judges decides on the recusal request. In several member states, namely in Cyprus, Spain, Estonia and Ireland, the judges decide on recusal requests objecting to their bias themselves. Although such procedure seems practical and quick, it raises questions about its fairness.

83. If a judge is aware of possible conflict of interest in a pending case he/she is obliged to inform the Court or a senior member thereof in 20 member states. Ten respondents stated that the judge must acquaint the parties to the proceedings of such facts.

84. All respondents mentioned close personal relationship with a party to the case or a witness among the circumstances causing recusal of a judge (24). Another condition resulting in a recusal of the judge mentioned frequently was if the judge dealt with a party previously, at the time before he/she was appointed to be a judge (20 member states).

On the other hand, in Latvia, Ireland, Lithuania and Cyprus this was not considered to be a problem. If the deciding judge has dealt with another case of the same party previously, the judge would be disqualified in the United Kingdom Bulgaria, Greece39 and Croatia. (Such fact was not found to be a violation of right to an impartial judge by the European Court of Human Rights40). In Poland, dealing with a case does not disqualify a judge from deciding a subsequent case of the same party.

In half of the member states, a membership of a judge in an organisation which might be seen as having a strong view on the issue before the Court would also cause the recusal

39 In Greece, the fact that a judge has dealt with a case X of a person A is not a reason of recusal of the same judge in the case Y of the same person A. If the judge has dealt with the same case when he was a member of a lower court, he cannot deal with the same case as member of the Council of State, for instance in the case of an appeal against his decision.

40 Cf. ECtHR, 26 April 2011, No. 31351/06, Steulet v. Switzerland.
of the judge (Latvia, Austria, United Kingdom, Ireland, Belgium, France, Hungary, Serbia, Luxembourg, Poland, Greece and Slovenia).

An expression of an opinion on certain issue (e.g. in academic writing or lectures) may be considered as reason for bias in the United Kingdom, Bulgaria, Hungary, Greece and Romania.

§ 2. TRANSPARENCY REGARDING CONFLICT OF INTEREST AND FINANCIAL SITUATION OF JUDGES

85. In many member states the issue of public or confidential register on facts which might give rise to a conflict of interest on the part of a judge (such as shareholding in a company) has been discussed recently. Similar legislative proposals have been made in the Czech Republic and in France\(^\text{41}\). Therefore it is useful to see the relevant legislation in individual European member states.

In most of the respondent member states (15) there are no obligations for judges. On the contrary, formal registers on circumstances possibly resulting in a conflict of interest exist in 8 Eastern European member states (Latvia, Bulgaria, Hungary, Serbia, Poland, Lithuania, Croatia and Romania) and in the Netherlands. In seven member states such registers are available to the public (Latvia, Bulgaria, Hungary, Poland, Lithuania, Romania and Netherlands). The registers are not public in Serbia and Croatia.

Moreover, in Greece and Slovenia the judges have to inform specific public authorities about their private financial situation and in Slovakia and Hungary such information must be provided to the judicial council. In three member states the information on judge’s private financial situation are disclosed to the public (Lithuania, Romania and Estonia).

§ 3. RIGHT TO PUBLIC HEARING

86. According to Art. 47 (2) of the EU Charter and Art. 6 (1) of the ECHR, everyone is entitled to a fair and public hearing. The right to public hearing is important for the transparency of administering justice.

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\(^{41}\) Law No. 2016-2016-483 of 20 April 2016 relating to the conduct and the rights and obligations of civil servants now provides for the Vice President and the Section Presidents of the Council of State, a property status declaration addressed to the President of the High Authority for transparency in public life. All members of the Council of State (including those already mentioned) must submit an exhaustive, accurate and sincere statement to their interests to various people or bodies, depending on the case (President of the section to which they were assigned, Vice President of the Council of State or ethics panel of the administrative court).
However, the ECtHR decided that generally it is not necessary to conduct a public hearing when the court of appeal or cassation decides on remedies, if the public hearing was held before the court of first instance\textsuperscript{42}. Moreover, the Convention allows some exceptions from the obligation to hold public hearing\textsuperscript{43}. It is in accordance with the Convention if the parties themselves renounce the right to public hearing\textsuperscript{44}.

\textbf{87.} Accordingly, only 11 Supreme Administrative Jurisdictions report that all oral hearings are public. Thirteen member states enable the court to exclude the public under the conditions prescribed by law. Six member states leave the question whether the hearing will be held publicly or not at the discretion of the court.

\section*{§ 4. Access to Documents from the File}

\textbf{88.} The issue of transparency of the proceedings also raises the question whether the documents submitted by the parties are available for public scrutiny. Only three member states confirmed that such documents are always public (Cyprus, Romania and Bulgaria). Four other member states make the documents available in certain circumstances. In Estonia, the disclosure of the documents from the file is a question of judicial discretion. In Slovakia, Ireland and Norway, the conditions for bringing the submissions of parties before the public are set by the law.

Another tricky question is whether the documents submitted by a party and classified as confidential are open to the other party to the proceedings. The European Court of Human Rights insist that the parties to the dispute have the right to contradictory proceedings including the possibility to get acquainted with the submissions and evidence brought by the adverse party and to submit own observations to them. However, according to a recent ruling by the European Court of Human Rights, the court may withhold the party from access to the document submitted by the other party if there is a public interest to keep them confidential. The court must ensure a fair balance between the interests of the parties and the public\textsuperscript{45}).

In 14 member states the legislation allows the courts to deny a party the access to classified documents. On the other hand, ten respondents stated that documents brought by a party are always available to the other party.

\textbf{89.} In its judgement from June 4\textsuperscript{th}, 2013, C-300/11, ZZ vs. Secretary of State for the Home Department, the European court of Justice provided an interpretation of the right to an effective remedy before a tribunal under Art. 47 (1) of the EU Charter, concluding

\textsuperscript{42} Cf. ECtHR, 8 January 2009, No. 29002/06, Schlumpf v. Switzerland.
\textsuperscript{43} The press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
\textsuperscript{44} Cf. ECtHR, 21 September 1993, No. 12235/86, Zumtobel v. Austria.
\textsuperscript{45} Cf. ECtHR, 26 November 2015, No. 35289/11, Regner v. Czech Republic.
there has to be a fair balance between the necessary protection of classified information and the rights of the balance:

"65 In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.

66 Second, the weighing up of the right to effective judicial protection against the necessity to protect the security of the Member State concerned – upon which the conclusion set out in the preceding paragraph of the present judgment is founded – is not applicable in the same way to the evidence underlying the grounds that is adduced before the national court with jurisdiction. In certain cases, disclosure of that evidence is liable to compromise State security in a direct and specific manner, in that it may, in particular, endanger the life, health or freedom of persons or reveal the methods of investigation specifically used by the national security authorities and thus seriously impede, or even prevent, future performance of the tasks of those authorities.

67 In that context, the national court with jurisdiction has the task of assessing whether and to what extent the restrictions on the rights of the defence arising in particular from a failure to disclose the evidence and the precise and full grounds on which the decision taken under Article 27 of Directive 2004/38 is based are such as to affect the evidential value of the confidential evidence.

68 Accordingly, it is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him."

It is interesting that only eleven member states confirmed that their legislation met the standards mentioned in the ruling of the European Court of Justice ZZ v. Secretary of State for the Home Department. In contrast, three member states denied that they were able to provide such procedural standard with regard to classified information relevant for deciding the case (Serbia, Luxembourg and Poland). 9 Other member states failed to
answer this question (Bulgaria, Hungary, Slovakia, Cyprus, Spain, Romania, Germany, Ireland and Norway).
CHAPTER VII: THE REQUIREMENT OF AN APPROPRIATE COURT

(Questions 161 - 206)

§ 1. INTRODUCTION

90. By stipulating that "every person has the right to have his/her case heard, fairly and publicly, and within a reasonable period of time, by an independent and impartial court established by the law, which shall give its ruling", article 6 of the ECHR enumerates four structural conditions that a court needs to have to guarantee a fair trial. It needs to be:

- independent;
- impartial;
- established by the law;
- competent to rule.

The EU Charter has a similar list in its article 47.

91. Only the last two conditions will be analysed in this chapter.

§ 2. THE REQUIREMENT FOR THE SUPREME ADMINISTRATIVE COURT TO BE ESTABLISHED BY MEANS OF LEGISLATION

92. According to the ECtHR, the court must be "established by law" failing which it would lack the "required legitimacy in a democratic society to hear private individuals’ cases". This expression, which according to the European judge "reflects the principle of the state of law inherent to any system within the convention"47, concerns not only the legal basis regarding the very existence of the court and its competence48, but also any internal legal provision regarding the composition of the court in each case - such as those concerning the mandates, the incompatibility and the exclusion of magistrates - non-compliance with which makes the participation of a judge in the examination of the

46 In fact, the "who shall rule" condition is not reproduced literally but this condition is closely related to the condition of independance. A court is not really independent when it cannot give a ruling by itself on a crucial matter and has to accept the interpretation of the executive. (See ECtHR, 24 november 1994, No. 15287/89, Beaumartin v. France, § 38).
47 ECtHR, 28 November 2002, No. 58442/00, Lavents v. Latvia.
case irregular and technically constitutes a violation of article 6 § 1\textsuperscript{49}. The "established by law" condition is therefore not fulfilled if, despite the fact that the court is legally constituted, the procedural rules to be applied in the case in question are not stipulated by law\textsuperscript{50}. The "law" mentioned by article 6 § 1 concerns not only the legislation regarding the establishment and competence of judicial bodies, but also any other measure in national law with which non-compliance leads to the participation of one or several judges examining the case becoming irregular\textsuperscript{51}. A court which inexplicably exceeds its usual competence by deliberately infringing the law is no longer considered a "court established by law" in the proceedings concerned\textsuperscript{52}.

The introduction of the term "established by law" is intended to avoid a situation in which the organisation of the judicial system is left to the discretion of the executive, and to ensure that this matter is governed by laws passed by Parliament\textsuperscript{53}. Furthermore, in member states with codified law, the organisation of the judicial system should not be left to the discretion of the judicial authorities, while still according them a certain degree of power to interpret national legislation in the field in question\textsuperscript{54}. Furthermore, the ECtHR reminds us that the delegation of powers in matters affecting judicial organisation is acceptable in as far as this possibility is enshrined in the national law of the state in question, including in the relevant clauses of the Constitution\textsuperscript{55}.

93. In the various member states of ACA-Europe which replied to this questionnaire, the legal basis for the existence of a Supreme Administrative Court is chiefly found in the Constitution – including the hierarchical order of application of legal rules as detailed in the Constitution (more than two thirds of the member states concerned, i.e. 69\%, for example: Estonia, Hungary, Greece, France, Norway or the Netherlands) or to a lesser extent in the legislation of the states (including Luxembourg, Austria, United Kingdom, Lithuania or Croatia). Only Romania stated that "soft" law - the term employed in English in the questionnaire is "Secondary Legislation" - was the relevant legal basis for the existence of this Supreme Court. It provided the following explanations: in Romania there is no Supreme Administrative Court in the true sense of the word, but instead a single Supreme Court known as the High Court of Cassation and Justice (HCCJ) comprised of four different divisions, with the Administrative and Fiscal Division (AFD) being one of these divisions. The legal basis for the existence of the HCCJ is derived from the Romanian constitution and the code of civil procedure, but above all from the laws on the judicial system\textsuperscript{56}. The legal basis for the composition of the AFD stems both from the laws on the judicial system and the HCCJ’s internal rules.

\textsuperscript{49} ECtHR, the above-mentioned case of Lavents v. Latvia.
\textsuperscript{50} See for example ECtHR, 22 June 2000, No. 32492/96, Coëme and others v. Belgium, concerning the procedure for the indictment and judgement of ministers before the Court of Cassation.
\textsuperscript{51} ECtHR, 5 October 2010, No. 19334/03, DMD Group, A.S. v. Slovakia, § 59.
\textsuperscript{53} ECtHR, 28 April 2009, No. 17214/05, Savino et al. v. Italy, § 94.
\textsuperscript{54} The above-mentioned ruling of Coëme and others v. Belgium, § 98.
\textsuperscript{55} Zand v. Austria, No.7360/76, §§ 69 and 71, report from the Commission of 12 October 1978, Decisions and reports (DR) 15 pp. 70, 97.
\textsuperscript{56} law number 303/2004 concerning the status of judges, law number 304/2004 concerning the organisation of the judicial system but also an older law no. 56/1993 concerning the HCCJ of which very few articles today apply.
94. The competence of the Supreme Administrative Court is chiefly defined by legislation in more than half of the member states concerned. In six member states - Estonia, Greece, Austria, Ireland, Cyprus and Poland - this competence is enshrined in the Constitution itself whereas Serbia, the Netherlands and Romania mentioned "soft law". In France, this competence results from the balance established by provisions included both in the Constitution of October 4, 1958, constitutional principles and legislative measures.57

95. More than two thirds of member states (i.e. 69%) replied that the composition of their Supreme Administrative Court (including in particular the rules governing the number of judges, the number and/or composition of the chambers, etc.) were chiefly determined by legislation. None of them mentioned the Constitution. As was the case with the issue of competence for the Supreme Administrative Court, Serbia, the Netherlands and Romania explained that "soft law" rules govern this composition.

On the other hand, three other member states did not adopt such solutions: in Germany it is the minister of justice who establishes the composition rules; in the case of Slovakia it is the "work schedule of the court" and in the case of Spain, a decision by the court's "governing chamber"58.

96. Regarding the designation of the members of the supreme administrative court to whom cases will be assigned, almost half of the member states (i.e. 46%) which replied (including for example Hungary, Germany, Spain, Slovenia, Croatia or the Czech Republic) said they had opted for an automatic or random procedure determined pursuant to legislation or common practice.

In just under half of member states (i.e. 42%), including Luxembourg, Poland, Greece, the United Kingdom, Belgium or France, the President of the Court or the President of a division or chamber of the Court has the task of distributing and assigning cases to members of the Courts. In the Netherlands, this role is handled by a member of the Court who does not exercise a judicial function 59.

97. In almost two thirds of the member states which replied (i.e. 65%), the supreme administrative court has the power to process certain cases on a priority basis. Some Supreme Administrative Courts do not have this possibility: this is the case in Luxembourg, Slovenia, Slovakia, Spain, the Czech Republic, Romania and Bulgaria.

This power is exercised either by the members of the Court, including in particular the judge assigned to the case (this is the case for example in Austria and Germany) or by the President of the Court (which is the case in Serbia and Ireland60) or the President of the formation of the Court concerned (in Estonia61 and Poland for example). In certain member states, competence may nevertheless lie with a member of the Court assigned

57 Being codified in particular in the Code of Administrative Justice.
58 "Decision of the Governing Chamber of the administrative court".
59 However, in special cases the President of the chamber or the President of the court may decide to assign the case to a judge from the court.
60 The "Chief Justice" is competent.
61 This is the president of the court's administrative chamber.
responsibility for the case and the President of the chamber concerned (in the case of Belgium). This may also be a decision taken by the President of the Court in consultation with the President of the chamber concerned (in the case of the Netherlands. In Greece, the decision lies with the President of the chamber or the President of the Council of State, at the request of the parties). In certain jurisdictions, guidelines have been adopted (as is the case with Norway) or a list defining the cases to be processed as a priority is drawn up and made available to the public (as in the case of Lithuania).

As an example, in France the processing of certain cases on a priority basis is not the subject of any formal decision. The judge assigned to the case is appointed for each case by the head of the chamber. This magistrate is then free to process the cases in the order of his choosing. However, he assesses the priorities according in particular to the importance of the cases, their value with regard to case law, the parties’ situation or the instructions he has received from the head of the chamber. The president of the administrative claims department can also decide that the examination of the case will be assigned to the administrative claims department, to the administrative claims assembly, or to a formation jointly comprised of the united chambers. He then appoints a judge assigned to the case for the case. This procedure allows for faster processing of important cases.

98. In almost two thirds of the member states concerned (i.e. 62%, including for example Serbia, Latvia, Poland, Ireland, Norway, Belgium and the Czech Republic) if the judge initially appointed for a case is no longer in a position to follow it through to the end due to objection, non-availability or on other grounds, the decision to replace him by another judge is taken by the President of the Supreme Administrative Court, of a division or of a chamber of this court. In almost a third of the member states (i.e. 31%) a specific procedure then applies (as is the case among others in Hungary, Estonia, the United Kingdom, Germany and France).

The procedural rules on the basis of which cases or questions are initially allocated to members of the court and then reallocated if necessary chiefly result from “soft law” or internal measures adopted by the court itself. In this latter case, we find an equal split between those member states in which citizens seeking justice are entitled to be informed of the allocation method for the cases drawn up by the court itself (Latvia, Germany, the Czech Republic and Belgium) and those in which this is not the case (Estonia, Poland, Ireland and Norway).

62 The law “Ethics, rights and obligations of officials” was promulgated on 21 April 2016. It changed the name of the sub-sections of the Jurisdiction Division to “chambers”. As a consequence, the Jurisdiction Division now comprises ten chambers. The Council’s formations will therefore consist of either the chamber holding alone, the combined chambers, the Jurisdiction Division or the Jurisdiction Assembly.
§ 3. THE REQUIREMENT THAT THE COURT MUST BE ABLE TO ISSUE A DECISION

99. The requirement for judicial control is a general principle of law in the Union arising from constitutional traditions common to the member states and which has also been enshrined in articles 6 and 13 of the European Convention on Human Rights. The right to an effective remedy was also confirmed by article 47 of the EU charter.63

100. According to the ECtHR, article 6 § 1 requires that the courts exercise effective judicial control. This must be the case for a judicial body in order for it to be considered a "judicial body with full jurisdiction", which means having the competence to examine all relevant factual and legal questions for the cases submitted to it.65 This term "judicial body with full jurisdiction" is included in Union law.66

Consequently, in order to avoid undermining the administration of law before a court, the judge’s supervision should not be too restricted. A power of review limited to an examination of the arguments and to abuse of process is insufficient. More generally, it is important to guarantee a thorough review of the legality aspects and to ensure that the national judge is competent "for points of fact and questions of law".67 It follows from this that the competence to take a decision, and more specifically the power to issue "a binding decision which cannot be modified by any non-judicial authority" is inherent to the very notion of a court.68 The Court must "exercise a full power of review over the legality aspects and must be competent to alter any particular points, in fact and in law".69 However, the existing systems in Europe generally limit the competence of the judge regarding the characterization of the facts, but do not prevent him from setting aside the decision on other grounds. This is in no way affected by the case law of the ECtHR.70

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63 See for example the ruling of 3 March 2011, Areva and others v. Commission, T-117/07 and T-121/07, pt. 224.
64 ECtHR, 28 June 1990, Obermeier v. Austria, series A no.179, § 70.
66 See for example the ruling of 15 May 2012, Nijs v. Court of Audit, T-184/11 P, point 85.
67 ECtHR, 21 September 1993, No. 12235/86, Zumtobel, series A No. 268.
69 ECtHR, 23 October 1995, Schmautzer, series A No. 328, § 36.
70 On this point, see Council of Europe/European Court of Human Rights, Practical guide, article 6 – civil section, 2013, p. 21.
101. In the vast majority of member states having replied, certain aspects of cases involving an administrative claim may be exempted from judicial review due to the legally binding nature of a ruling issued by a civil or criminal court.71

This is the case for example in Poland where the Supreme Administrative Court is bound by civil and criminal judgements. In France, due to the established case law of the Council of State, the authority of the criminal court judge concerns only the findings of fact contained in his rulings, which are a necessary to the decision.72 Decisions in criminal cases are also binding upon the administrative court in Luxembourg. In Bulgaria, a final ruling from the criminal court is binding upon the administrative court, regarding the establishment of the facts, the assessment of illegality, and the determination regarding guilt. This is also the case in Cyprus where the Supreme Administrative Court generally cannot challenge facts established via decisions by the courts.

In Greece, the code of administrative court procedure, which applies to lower courts, lays down the following principles: a) the courts are bound by the decisions of other administrative courts in as far as these have legal authority; b) the courts are bound by the decisions of a civil court in as far as these are valid erga omnes in accordance with the code of civil procedure; c) the administrative courts are bound by rulings from criminal courts sentencing a person, regarding his guilt.

The situation is different in Estonia, where the Code of Administrative Court Procedure stipulates that "facts which have been established in the reasons section of an earlier court decision which has become final are assessed by the court as part of the body of evidence in the matter". The operative parts of judgements are binding – the civil decisions are binding to the participants of the proceedings and their legal successors. Criminals decisions are binding to all persons at the territory of the Republic of Estonia.

In Ireland, a decision taken by a court of a competent jurisdiction in a case concerning the same parties is considered to be legally binding in all other cases which may be brought before the courts, including the supreme administrative court.

As a further example, in Slovenia judgements concerning the perpetration of a criminal offence, the existence of a marriage or of a paternal link (if the law requires this) are considered as being legally binding before the administrative court. In the Netherlands for example it is explained that a ruling from a civil court in which a judge determines the ownership of a plot of land in a case also ongoing before the administrative court judge will be binding upon the administrative court. In the Czech Republic, decisions concerning culpability in criminal matters or those concerning the status of individuals are legally binding before the administrative court.

Finally, in Germany, no aspect of the case is exempt from examination by the court. However, this principle only applies to lower courts (the administrative court, the

71 22 countries replied "yes" to the question: "Are some facts in the case exempt from judicial review due to the binding nature of the ruling from the civil or the criminal court?". Germany and Spain replied "no" to this question.
72 On this point, see EC decision, 27 January 1955, Mrs Pasquelin, in the compendium p. 154.
73 In §61 (4) of the Code of Administrative Court Procedure.
administrative court of appeal). Indeed, the federal administrative court is bound by the findings of the lower courts (in particular the administrative court of appeal).

2. The requirement of a court capable of rendering a decision

a. The power (or not) to issue a binding interpretation of law

102. Additionally, the right to access does not in itself guarantee any right to established case law. Indeed, changes in case law over time are not in themselves an obstacle to the satisfactory administration of justice in as far as the absence of a dynamic and evolving approach may hinder any change or improvement. In the same vein, “the possibility of divergences in case law is naturally inherent to any judicial system based on a number of lower courts having authority over their territorial area. Such divergences may also be within the same jurisdiction. This in itself may not be judged as being contrary to the Convention”, particularly the requirements of article 6 § 1 ECHR. However, persistent divergences in case law within a “hierarchical judicial structure” in the absence of mechanisms making it possible to resolve these are, due to the uncertainty they generate, likely to constitute an obstacle to a fair trial, as is the case with a divergence of case law in the application of the same legal rule based on similar facts between two independent jurisdictions, with no hierarchical relationship between them, if this results from an “arbitrary” or “unreasonable”.

The principal of a “binding interpretation of the law” by another jurisdiction or authority (including the Constitutional Court) exists in more than half of the legal systems (58%). On the other hand, in more than half of the member states (58%) the interpretation of the law by the Supreme Administrative Court in a given case is not legally binding for the court’s judges when they themselves issue rulings in other cases. The interpretation of the law by the Supreme Administrative Court in a given case is binding upon the judges of the lower courts on the one hand, in roughly half of the member states concerned, in the same case (as is the case for example with Luxembourg, Greece, Germany or Norway). On the other hand, for the other half of the member states this interpretation is binding both for the same case and other cases (as is the case for example with France, Spain, Poland, the Czech Republic or the United Kingdom. However, three member states (Slovenia, Lithuania and Belgium) have stated that this interpretation of the law by the Supreme Administrative Court is not legally binding for the lower court judges.

74 ECHR, [GC], 20 October 2011, No. 13279/05, Nedjet Sahin & Perihan Sahin v. Turkey.
76 ECHR, [GC], Nedjet Sahin & Perihan Sahin v. Turkey, as mentioned above.
77 In Greece, the jurisprudence of the Council of State is followed in all similar cases by the lower courts, although it is not legally binding.
In the vast majority of the member states which replied (77%), the Supreme Administrative Court does not have the power to opt for a binding interpretation of the law other than for a given case (for example by means of a resolution). Only four member states (Poland, Slovenia, the Czech Republic and Bulgaria) stated that this was possible. For Slovenia, such an interpretation is not binding upon the lower courts while for the three other member states mentioned, it is. It is however possible to modify this interpretation of the law in the four member states concerned.

In a narrow majority of the member states which replied, (i.e. 13 member states compared to 11) the Supreme Administrative Court has the power to decide on a binding interpretation of the law for an individual case (through reference among other things to “historical decisions”, “decisions of principle” etc.). In this case, the interpretation of the law is binding upon the judges of the lower courts. It also applies in most cases to the members of the Supreme Administrative Court (only three member states: Slovakia, Belgium and Poland, reported that this was not the case). In the vast majority of member states, this interpretation may be modified, with only two member states (Cyprus and the Czech Republic) stating that this was not possible.

b. The power to annul and/or reform a decision or a judgement

Regarding the powers available to the Supreme Administrative Court, first and foremost in most member states we find the power to annul and alter decisions taken by the lower courts (88%), followed by the power to annul a decision taken by an administrative authority (81%). More rarely (in fewer than half of the cases, i.e. 42%), the Supreme Administrative Courts also have the option to replace a decision which has been issued by an administrative authority by a decision which they make themselves (this is the case among others with Hungary, Luxembourg, the United Kingdom, Norway, the Netherlands, France78 or, under certain circumstances, in Belgium).

c. The power of injunction

Half of the member states concerned accord a power of injunction to the administrative court judge vis-a-vis the administrative authorities.

78 This is particularly the case in claims concerning penalties issued against citizens: see EC, 16 February 2009, SOCIETE ATOM, no. 274000, in the compendium p. 25, in the terms of which: “it is the responsibility of the lower court judge, to whom the case is referred concerning a penalty issued against a citizen by the administration, to take a decision replacing that of the administration; (...) subsequently, in view of the powers at his disposal to control a penalty of this nature, the judge rules on the case submitted to him as the administrative claims judge".
This is the case for example in France where the administrative court judge, when such cases are submitted to him, may issue an injunction to the administrative authority ordering it to enforce the court’s decision on a given point\textsuperscript{79} or an order to issue a new ruling within a given deadline\textsuperscript{80}. In the same decision, the court may accompany the injunction with a monetary sanction (an order to pay a sum of money in the event that the court’s decision is not implemented after a certain deadline and after its confirmation by the judge: see below)\textsuperscript{81}.

d. Regarding powers to award damages

\textbf{106.} In certain cases, the Supreme Administrative Court has circumscribed powers concerning the awarding of damages, with an example being a claim for damages against the state (in the case of Spain). In other cases, the limitation lies in the fact that in general it is the lower courts which issue monetary awards and the Supreme Administrative Court only gets involved in the case if it alters the ruling issued in first instance and grants a sum for damages resulting from the enforcement of the contested administrative measure (in the case for example of Slovenia or the United Kingdom).

In Belgium, upon request, the Council of State may award compensation. In France, the Council of State may issue a monetary award against a party during liability proceedings. In the first case, within its competence to issue rulings in first instance, the cases particularly concern: disputes concerning civil servants appointed by decree from the President of the Republic; in addition to cases concerning the excessive length of proceedings. Secondly, when, after having cancelled a ruling from the administrative Court of Appeal, the Council of State settles a case on its merits, an application for appeal is referred to it just as it would be to the court to which the case would have been referred. This means judging the case once again, with such cases covering the various fields of administrative responsibility and liability (such as the liability of hospitals, losses caused by public works, etc.) possibly justifying the granting of damages as reparations for the losses suffered.

e. Concerning the issuing of "penalties"

\textbf{107.} Firstly, fines may be issued by the administrative court judge in respect of appeals considered "manifestly abusive" (in the case of Belgium or France). As an example, in France, in the case of the rejection of an appeal on the grounds that the

\textsuperscript{79} Art. L. 911-1 of the Code of Administrative Justice (CAJ)
\textsuperscript{80} Art. L. 911-2 of the CAJ
application is abusive (including reiterated claims from the same plaintiff directly or indirectly concerning the same subject with the aim of disrupting the operation of the justice system, or a clearly unfounded claim, etc.) the judge may decide at the same time to also issue a fine of up to 3,000 euro\(^\text{82}\). The ECtHR has ruled that the right of access to the court is not incompatible with the existence of a system of fines for unjustified appeals\(^\text{83}\). It is only when the level of the fine is sufficiently high to be considered as constituting an obstacle to access to a court or when this fine has been inflicted in an arbitrary manner that the ECtHR may consider that an infringement of article 6 of the Convention\(^\text{84}\) has occurred.

Other financial "penalties" may be issued in the event that a court-ordered decision has not been implemented (as is the case with the monetary sanction in Belgium and in France\(^\text{85}\)). In Estonia, the code of procedure for the administrative court states that in the event of a failure to implement a court-ordered decision or a settlement agreement approved by the court, the latter may inflict a fine on the party in the dispute responsible for this non-implementation\(^\text{86}\). Other penalties are envisaged, sometimes even against individual persons: thus, in Croatia the court may issue a fine against the competent person within a body governed by public law who fails to obey a ruling. The level of the fine may not exceed the equivalent of the average monthly salary in the country.

108. Finally, "penalties" also exist which may be issued in the case of procedural incidents occurring. As an example, in Latvia, in various cases provided for by law, the court may apply the following penalties: a warning, expulsion from the court, financial penalties or forced attendance at the court. As part of these, financial penalties may be issued: 1) if a party to an administrative hearing, a witness, an expert or interpreter disrupts the hearing repeatedly; 2) if a party to an administrative hearing, who has been unable to attend the hearing, has not provided the court with the grounds for his absence.

\(^{82}\) Based on the provisions of article R. 741-12 of the CAJ.

\(^{83}\) See for example ECtHR, 5 December 2005, No. 35009/02, Maillard v. France, § 34: "Article 6 does not prevent the signatory states from issuing rules governing access for citizens to the court, on condition that these regulations are intended to ensure the satisfactory administration of justice. This is without a doubt the purpose of the regulations concerning referral to a court of appeal, and in particular those intended to prevent frivolous litigation".

\(^{84}\) For its part, article 47 of the EU Charter states that any person is entitled to an effective remedy and access to an impartial court. Accordingly, the fundamental requirement of effective legal protection must on the one hand be to enable any person to fully exercise his right to effective remedy and on the other hand to enable the courts to which the matter is referred to dispense justice effectively and in the interests of all citizens. Thus, in view of the clearly abusive nature of the appeal the European Union Civil Service Tribunal ordered the applicant in the case in question to reimburse the court for a total of €2000 in application of article 94 of the procedural rules: see ruling from the first chamber of February 29 2012, Marcuccio v. Commission (F-3/11) (the above-mentioned point 53)

\(^{85}\) See volume IX of the CAJ.

\(^{86}\) The total of this fine is 3,000 euros according to the provisions of § 248 (1) of the Code of Administrative Court Procedure.
f. Other powers

109. Certain courts also possess other powers: for example, Estonia explains that the supreme administrative court has the option to declare an administrative measure or contract "void". This type of declaration also exists in France where an act tainted by a particularly serious illegality may be declared "null and void", effectively declaring it non-existent from a legal viewpoint. The non-existence of the measure – in the event that it has not been enacted – will lead to the French administrative judge declaring it "void and without effect".
CHAPTER VIII: PUBLIC ACCES TO RULINGS

(Questions 200 - 206)

110. The ECtHR describes the principle of public access as "fundamental"\(^{87}\). It stresses that public access to the court proceedings is one of the essential aspects of the right to a fair hearing: it "protects citizens seeking justice against the implementation of secret justice" and constitutes "one of the means of maintaining trust and confidence" in the justice system\(^{88}\). The extent to which this guarantee is honoured is assessed in light of all of the processes implemented in the national legal system and is dependent upon the individual characteristics of the proceedings\(^{89}\). Public access to the rulings also forms part of the right to a fair hearing guaranteed both by article 6 § 1 of the ECHR and by article 47 of the EU charter.

The ECtHR interprets the requirement for public access to the announcement of the ruling with a great degree of flexibility. Public access to the decision does not necessarily mean this being read out in public and may involve other means, such as the submission of the ruling to the registrar's office "enabling everyone to have full access to the text of the ruling"\(^{90}\) and the publication of the ruling in an official compendium\(^{91}\). On the other hand, the public announcement of the decision by a Court of Appeal is necessary when unrestricted access for each person to the full text of the ruling is not organised\(^{92}\). To determine whether the public access rules provided by national law comply with the requirement for publication of the rulings in terms of article 6 § 1, in each case it is necessary to assess "the form of public access for the judgement provided by national law in light of the particular characteristics of the proceedings in question, and according to the purpose and subject of article 6 § 1"\(^{93}\). The objective concerned in 6 § 1, namely to ensure public review of judicial power to protect the right to a fair hearing, must have been achieved during the procedure, which must be considered as a whole\(^{94}\). In other words, in accordance with the principle under which the fairness of the proceedings is to be assessed on an overall basis, the ECtHR will accept that a decision by a Supreme Court is not issued in public so long as the rulings from the lower courts have been.

Finally, public access to judgements and rulings may still pose a problem, particularly in as far as the decision includes references to personal data concerning the parties, who also enjoy a right to privacy. The solution is to find the right balance between the obligation to guarantee the transparency of the rulings imposed by article 6 of the ECHR


\(^{88}\) ECtHR, 8 December 1983, No. 7984/77, Pretto v. Italy, series A No. 71.

\(^{89}\) For example, for proceedings for professional societies/associations, ECtHR, 30 November 1987, No. 8950/80, H. v. Belgium, series A No. 127.

\(^{90}\) The ruling of Pretto v. Italy, mentioned above in § 27.

\(^{91}\) The ruling of Ernst and others v. Belgium, mentioned above in § 70.

\(^{92}\) ECtHR, 24 November 1997, No. 20602/92, Szücs v. Austria, and No. 21835/93, Werner v. Austria.

\(^{93}\) ECtHR, Pretto and others v. Italy, mentioned above in § 26; ECtHR, 8 December 1983, Axen v. Germany, series A No. 72, § 31.

\(^{94}\) The ruling of Axen v. Germany, mentioned above in § 32; also see, Council of Europe/European Court of Human Rights, Practical guide article 6 – civil section, 2013, p. 50.
and the right to privacy protected in article 8. These issues assume particular importance in relation to case law databases accessible to the public.

111. The study demonstrate that a wide variety of different forms exists of public access to the courts’ decisions used by the various supreme administrative courts.

Publication via the Internet is used almost everywhere. Sometimes, this is the only method of public access available for the country concerned (as in the case with Hungary). It is often combined with a more traditional form of public access (such as in Poland and the Czech Republic which mention both Internet access and the publication of a printed compendium, as the two methods of public access to court decisions). An open reading at a public audience and publication in a "paper" compendium are widely practised (with respectively 12 member states for the former and 15 for the latter). This is followed by consultation at the court registrar's office (9 member states) or the publication of a newsletter (7 member states). Rather more noteworthy is the fact that 10 Supreme Administrative Courts stated that they carry out the notification of decisions to the parties concerned by electronic means (this is the case for example with Belgium, the United Kingdom, Spain, Estonia, Bulgaria, Greece or France).

Among the other public access methods used, Luxembourg and France explained that notification by post is issued to the parties to the case. In France, there is also notification by administrative channels (i.e. notification made directly to the interested party by a civil servant who receives a receipt for this or issues a written confirmation which is forwarded to the registrar's office for the court concerned) and, more recently notification by means of a computer application known as Télérecours to state authorities, legal persons governed by public law and bodies governed by private law given the task of managing one of the public services registered with this application. Finally, in Croatia, certain court decisions are published in the official journal.

112. Regarding the effectiveness of the principle of public access to court decisions, half of the member states concerned declared that exceptions exist to this principle: this is the case with Estonia, Serbia, Latvia, Poland, the United Kingdom, Norway, Slovakia, Lithuania, the Netherlands, Belgium and Romania.

Other member states such as France, Bulgaria, Hungary, Luxembourg, Greece, Austria, Germany, Ireland, Croatia, Cyprus, Spain, Slovenia, the Czech Republic and Bulgaria have introduced no waivers to this right of public access. Two main grounds are used to justify these waivers resulting in the non-publication of a decision in its entirety: on the one hand this concerns public order (7 member states) and on the other hand privacy (7 member states). This is followed by the protection of classified information (6 member states), the protection of national interests (4 member states), the protection of minors (4 member states) or the protection of "commercially sensitive" information (3 member states). Some member states have introduced intermediary solutions: this is the case

95 ECtHR, 25 February 1997, No. 22009/93, Z. v. Finland, §113: in the case in question, the divulgence of the identity of the person and of the serious illness suffered by this person, without the person consenting to divulge this, constituted a measure which was not necessary in a democratic society and thus constituted an infringement of article 8.

96 In Slovenia, the rulings are however systematically anonymised at the time of publication.
with Lithuania for example, where the judicial decisions taken by the supreme administrative court are generally made public via the Internet, although some passages may be obscured and replaced by the wording "This information is not available for divulgence".

More precisely, all of the member states which replied yes to the question "Do exceptions exist to the right of public access to the rulings?" have stated that some court decisions are published after the deletion of any information likely to identify a party or all of the parties. Most of the time, this concerns a "depersonalization" or "anonymization" of the rulings, with the names of the persons concerned being deleted. However, this deletion may also concern other identification-related factors. For example, in Lithuania it also concerns the name of natural persons, addresses, and the registration numbers of vehicles, etc.

In 13 member states, when a court decision is published, the identity of the parties may be made public in certain cases. In 9 other member states, the identity of the parties is never made public (this is the case with Bulgaria, the Netherlands, Germany, Austria, Poland, Latvia, Luxembourg, Serbia and Hungary). The main reason for the anonymization of the published decisions is the protection of privacy (7 member states). Among the grounds mentioned, this is followed by "commercially sensitive" information (6 member states) and to an equal extent: public order, the protection of national interests, the protection of classified information or the protection of minors. According to the case in question, anonymization may occur at the initiative of the Supreme Administrative Court or at the request of the interested parties (for example in Estonia). Sometimes, it takes place exclusively at the request of the parties (this is the case in Belgium) or, on the other hand is systematic (as is the case in Slovenia or Lithuania).

For other states, such as France or Greece, the information is systematically anonymized when it is included in databases accessible by the public. More generally, in France, an applicant whose privacy is affected by the publication of a ruling concerning him may not request the withdrawal of the published ruling but may request its anonymization. In the vast majority of member states (i.e. 77%), it is not possible for an applicant to request the withdrawal of a published ruling (which may be considered as equating to a "right to be forgotten" in judicial matters). On the other hand, this option does exist in Norway, Estonia, Slovakia and Belgium, upon request from an interested party.

113. Finally, the content of the case law databases which are accessible to the public may be consulted with the aid of an organised search system based almost unanimously on a "full text" search (i.e. 88%) and more rarely on a "tree structure" search system.

97 Each of these grounds was mentioned by 5 member states (which may differ according to the grounds in question).
98 see 175 of the Code of Administrative Court Procedure.
99 Only three member states stated that they had introduced such a system: these are Belgium, Estonia and Serbia. For its part, France has a database known as "Ariane Web" which is a case law database providing access to more than 230,000 documents: decisions and opinions from the Council of State and from the administrative court of appeal, analyses of the decisions and opinions noted for their contribution to case law, in addition to a selection of conclusions from the rapporteurs publics. The system uses a "multiple criteria"
search feature, including reference to the administrative case law classification system which allows for a very
detailed theme-based selection of decisions and opinions.