NEJVYŠŠÍ SPRÁVNÍ SOUD

ACA-Europe Seminar

Measures to Facilitate and Restrict Access to Administrative Courts

9 September 2019, Brno

General Report

by Zdeněk Kühn and Pavel Molek

Supreme Administrative Court of the Czech Republic
ACA-Europe (German Presidency)

Co-funded by the Justice Programme of the European Union

1. Introduction

Our seminar bears a title "Measures to Facilitate and Restrict Access to Administrative Courts". As visible from the title, both – the seminar and this general report – are defined by the tension between two tendencies. The first is the aim to restrict the access to all administrative courts or to Supreme Administrative Courts and Councils of State (hereinafter "SAC" too) for those cases that do not deserve to be decided by these courts for reasons that will be explained below. The second is the aim of facilitating the access for those participants who would otherwise be precluded from overcoming the general limits or conditions of bringing their cases to administrative courts or would be discouraged to do so, despite the fact that they deserve it. In other words, our Brno seminar is – again, one would say – defined by a tension between Scylla of opening the gates of administrative judiciary for everyone, ending up with our courts being flooded with thousands and thousands of cases every month, and Charybdis of turning our courts into Kafkian gatekeepers keeping the "*Gate to the Law*" closed for "*a man from the country who asks to gain entry into the law*".

This tension between opening and closing the gate to administrative judiciary formed the structure of our questionnaire and we would like to deeply thank all the representatives of 23 member institutions who have responded very thoroughly and have provided us with insight into the measures used in "opening" and "closing" the gates to administrative judiciary that might be inspiring for all of our member institutions. Hereinafter we will use the following ISO codes for these 23 countries: Belgium (BE), Croatia (HR), Cyprus (CY), the Czech Republic (CZ), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Ireland (IE), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), the Netherlands (NL), Norway (NO), Poland (PL), Portugal (PT), Serbia (RS), Slovenia (SI), Spain (ES), Sweden (SE) and the United Kingdom (UK).

The structure of this brief General Report will follow the logic of our questionnaire. Therefore, in the first part we will compare several measures used for "closing the gates" and in the second part several measures for "opening the gates".

Not surprisingly, the measures used are strongly influenced by the size and structure of administrative judiciary in respective countries. The obvious variable is **the number of instances**. The number of countries with two instances (HR, CY, CZ, FI, IT, LT, LU, NL, PL, RS, SI) being almost the same as the number of countries with three instances (DE, EE, EL, ES, FR, IE, LV, NO, PT, SE, UK). A specific system operates in Belgium where the only

instance specialized at administrative justice is the Council of State, being in fact the only purely administrative court of the kingdom. Surprisingly, there is almost no correlation between the population of the country or number of administrative judges on the one hand and the number of instances on the other. It may come as a surprise that 583 Polish administrative judges or 395 Italian administrative judges operate in two instances, while 72 Latvian administrative judges or 42 Estonian administrative judges are divided into three instances.

Regarding the **size of administrative justice** compared to judiciary in general, we can distinguish three models:

1. In a vast majority of countries, the administrative judiciary represents only a small minority in the proportion of the judiciary as a whole (from 2 % in RS, 3 % in BE, 4 % in CZ, ES, IT and SI, 5 % in HR and PL, 8 % in LT and LU, to 10 % in DE, FR and LV).
2. Second model can be called 'Scandinavian', because the proportion of administrative judges in Finland (33 %) and Sweden (41 %) shows the importance attributed to administrative justice comparable to civil or penal justice. Greece (34 %) reaches similar numbers while Cyprus and Estonia (both around 16 %) are on the verge of these two models.
3. Lastly, we mention a model where administrative justice is not institutionally distinguished from the rest of judiciary (IE, NL and supposedly NO).

2. Measures for restricting the access to administrative courts

In our questionnaire, we focused on several measures for restricting the access to administrative courts.

2.1 Court fees

The vast majority of countries applies some court fees. The rare exceptions are Luxembourg and Sweden. France joined those two countries in 2014, when the legislator abolished the court fee of 35 €. The French example puts into question the common sense attitude to the effectiveness of court fees as an effective measure for reducing the courts' case-load. The French legislator realised that the introduction of such fees did not in fact lead to a reduction in number of claims, while rising the administrative costs of court registers, notably arising from the obligation to invite each complainant who had failed to pay it to carry out the necessary payment by a registered letter. In Spain, a similar conclusion was made by the Constitutional

Court in 2016. It issued a judgment[1] declaring the unconstitutionality and nullity of Article 7, paragraph 1 of Law 10/2012, thereby cancelling the court fees in administrative justice.[2]

The amount of court fees generally correlates with the GDP *per capita* in respective countries, starting with € 3 for some cases in Serbia or € 15 in Estonia and ending up with approximately € 1 000 in the United Kingdom and 2 830 € in Norway. Special cases depending on the value of dispute are Finland where for cases of public procurement with value exceeding € 10 000 000 the court fee is € 6 140 and Germany where the court fee at the Federal Administrative Court is € 5 130 for cases of value higher than € 100 000. In the majority of countries, the fee increases at the higher instances, exception being the United Kingdom where the court fee for bringing a case to the Supreme Court (€ 1 117) is slightly lower than the court fee for bringing a case to the Court of Appeal (€ 1 340). Among the other countries, we can distinguish between those where the instance of the court is the only factor determining the court fee (HR, CY, LV, LI, UK) and those where the court fee depends both on the instance and on the content of the case (CZ, EE, EL, FI, IT, PT, RS, SI), the social security cases having usually the lowest court fee. In Ireland, the court fee depends upon the instance of the court and the type of procedure. In the Netherlands, the second factor taken into consideration together with the instance of the court is the type of applicant with higher fees for organisations than for individuals.

The result may be a very complicated system of court fees, good examples of such sophisticated systems being Portugal and Germany. In Germany, the amount of court fee rises degressively with the value of the claim starting at € 105 for cases with value of € 500 at the first instance court and ending with court fee of € 5 130 for cases above € 100 000 at the Federal Administrative Court. If no value of the claim can be estimated (especially in matters with no economic importance), the value of the claim is set at € 5 000. An original factor is taken into account in Norway where the fee rises with the number of days of the hearing and it is reduced if the appeal is denied leave or is rejected. For example, at the first instance court the court fee is € 590, but if the case needs a longer hearing than one day, each day adds an amount of approximately € 350. Another complicated system is applied in Poland where there are two kinds of fees: a proportional one and a fixed one. Fixed fees fall in the range from € 23

[1] Constitutional Court, nº 140/2016, of 07/21/2016, Rec. Appeal of unconstitutionality 973/2013.

[2] Before, there were following fees:

- in the civil jurisdictional order: appeal: € 800; cassation and extraordinary for procedural infringement: € 1 200;
- in the jurisdictional contentious-administrative order: abbreviated: € 200; ordinary: € 350; appeal: € 800; cassation: € 1 200;
- in the social order: supplication: € 500; cassation: € 750.

to € 2 320, depending on the subject matter of the case. Proportional fees are set as a percentage of the value of the subject matter. As a result of this combination, fees fall within the range from € 23 to € 23 200.

Usually the amount of court fee is flat for all applicants while some countries have specific reductions, e. g. reduction for litigants-in-person (CY). In the Netherlands, there are several circumstances influencing the height of the fee: a) whether the Regulation on reduced fee applies; b) whether the appeal is lodged by an individual or by an organisation; c) whether the higher court is competent in first and only instance or in appeal; or d) whether the individual has an income which is lower than the social minimum.

In the majority of countries, the fee has to be paid upon lodging the recourse or appeal or during a set time-limit thereafter (CY, CZ, EE, IE, IT, LV, LT, NL, PL, PT, SI). Exceptions are Finland and Croatia, where the petitioner has to pay within fixed term after the decision of the court is delivered and if the party does not pay the fee, there is a mechanism to enforce its payment. Similarly in Germany, the claimant is informed about the fees to be paid by the court after he or she has initiated proceedings. If the claimant does not pay the fee, this does not directly affect the judicial proceedings, but the fee can be enforced against him or her. In Belgium, the appeal is immediately enlisted to the registry but the procedure is frozen as long as the fee has not been paid: it is called the "procedural freezing". Before the Greek ordinary administrative courts, the fee has to be paid before the first hearing of the case, otherwise the application is rejected as inadmissible. Norway combines both attitudes: the fee has to be paid after the petition, but before the proceeding commences. However, if the petitioner is represented by an attorney, the fee can be paid after the decision of court is delivered. If the fee is not paid, the case is rejected. In the United Kingdom, there are different phases: the fee for a "permission to apply" to an administrative court is payable with the application. Where the court gives permission to proceed with the claim for judicial review, a "permission to proceed" fee is payable within 7 days. Half of that (€ 430) would have been paid already if the claimant requests the court to reconsider the decision on permission at a hearing.

Only a small minority of countries requires deposits for court fees or the costs of the other party (PT and UK), some other countries for covering the costs of presentation of evidence. In Serbia, if a party proposes presentation of evidence, he or she is obliged, upon order of the court, to deposit the amount required to cover the costs. The court abandons presenting the evidence if the amount required to cover the costs is not paid within the time limit determined by the court. Greek exception covers cases with scientific or technical expertise,

where the deposit required is paid by the public authority. In Latvia (similar in Spain), when individual or public authority files an ancillary complaint to appeal procedural errors of lower courts or a cassation complaint before the Supreme Court, he or she has to pay a flat sum deposit. If the petition is successful, the deposit will be paid back to the petitioner.

The compatibility of court fees in public procurement with the principles of effectiveness, speed, non-discrimination, accessibility and with the right to effective judicial protection was already reviewed by the Court of Justice of the EU based on a preliminary question of the Regional Administrative Tribunal of Trentino Alto Adige. In its judgment C - 61/14, *Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino*, of 6 October 2015, the Court of Justice declared the Italian court fees in public procurement cases to be compatible with Directive 89/665 and with Article 47 of the Charter of Fundamental Rights of the EU.

2.2 Costs of proceeding

The costs of proceedings to the successful participant can be compensated in all responding countries. In Sweden, the costs can be compensated only in tax and public procurement cases, if the costs are reasonable. In most countries, where compensation of costs is envisaged, it can be excluded by the discretion of the court based on the reasons of fairness or other important circumstances. Such discretion is not possible in Belgium, Germany, Portugal and Slovenia. These general rules are not applicable in some specific areas and costs are not compensated: in Belgium, in cases of public procurement and disputes concerning certain works, service and supply contracts; in Estonia, in environmental law where references were made as to the Article 9 (4) of Aarhus Convention (similar in Ireland); Finland has specific rules for proceedings of civil servants; in Lithuania, no costs are compensated in proceedings on legality of an administrative act of general character; in the Czech Republic, in election cases no party can be compensated; in Portugal, no compensations are awarded in cases regarding trade unions, occupational diseases and asylum law.

In several countries, the costs cannot be compensated to the public authority, i. e. the public authority has to bear its costs from its budget. This is the case in Germany, Latvia and Sweden. In Belgium, these costs can be compensated only if the public authority was represented by an attorney, and in France, justified attorney's fees can be compensated or specific costs that helped to defend its interests in the case. In Poland the situation differs at different instances: costs can be compensated to the public authority at the cassation proceedings, but not at the first instance; and in disputes between public authorities, no costs are awarded at any

instance. In the Czech Republic and Norway, public authorities are never compensated in social security cases.

In the majority of the countries, the amount of costs to be compensated is based on a generally applicable tariff (BE, HR, CY, CZ, DE, EL, LU, LT, LV, NL, PL, RS and SI), in the rest it is based on a price stipulated between an attorney and his client (IE, NO, PT) with some countries using a disclaimer for unreasonable costs (EE, SE and UK). Italy combines both attitudes with attorney-client-based costs having priority, if they are not set this way, tariff-based costs are applicable. The most complicated system applies in Finland, where generally the amount of money is based on a price stipulated between a client and an attorney (following Finnish Bar Association guidelines), but where the state legal aid is applicable, the costs to be compensated are set at € 110 per hour (under special circumstances may be raised by 20 %) and in international protection cases, flat fee of € 1300/800/400 (administrative courts) and € 1000/400/200 (SAC) is applicable. Similar system works in Norway where tariff applies in case of free legal aid. In France, the amount is determined by the judge, taking into account equity and economic circumstances of the losing party. There is, however, a tentative guideline and the judge may not exceed the amount sought by the winning party. In Spain, the determination of the amount is up to the court.

2.3 Mandatory steps before filing a petition to administrative court

In few countries, before an individual files a petition to an administrative court, he or she has to use some pre-trial procedures. In Estonia, in some cases (e. g. prisoners' right to file complaints and public procurement disputes), the law prescribes a pre-action procedure. An action may be filed with a court only if the pre-action procedure took place and the claim has not been satisfied within due time. In the United Kingdom, a claimant is required to consider alternative dispute resolution and send a letter before filing a claim to the defendant. France is currently experimenting with a mandatory prior use of mediation for certain disputes relating to social matters and public function (due to finish in 2020). In Latvia, in some cases stipulated by law, the complaint shall be first filed with an institution of preliminary extrajudicial examination (e. g. Administrative Disputes Commission).

2.4 Exclusions of some types of cases

In the majority of countries, all the decisions of public authorities (excluding authorities having a personal immunity discussed in chapter 2.5) are reviewable. The minority of countries listed

some measures or types of administrative decisions that are excluded: Belgium (administrative contracts, internal orders, executive acts, collective labour agreements and memos); Cyprus (regulations and by-laws issued by an organ of the Executive and policy decisions of administrative authorities); Finland (e. g. short-term appointments of civil servants); and Sweden (decisions in systems of public economical support granted voluntarily by the state).

The Greek answer emphasized that such exceptions are defined exclusively by the case-law of the Supreme Administrative Court, not by the legislator. These exclusions include governmental acts taken in the field of governmental policy or international relations and decisions of the government appointing the heads of the judiciary, acts of execution of administrative decisions and administrative acts issued by public authorities in the exercise of private-law, and management or internal-organizational competences.

Several countries mentioned explicitly that administrative decisions concerning private law are not reviewable by administrative courts (CY, CZ, EL, IE, HR, LV, PL) and usually, they are reviewed by civil courts. The civil courts in Luxembourg have the competence to review matters of indirect taxation (in particular VAT or inheritance tax), while some social matters are resolved by social courts. Dutch civil courts review orders with general effect and acts of authorities excluded from the definition of administrative authority. Some other countries mentioned the specialized courts or tribunals dealing with public employment (e. g. Labour Courts in Sweden) or with other specific areas (several specialized tribunals in the United Kingdom).

On the other hand, we can find areas of disputes beyond the traditional scope of competence of administrative judiciary which are solved by administrative courts. In various countries, administrative courts are responsible for judicial review of elections or referenda (FI, FR, IT, LV, LT, LU, SI), in some countries together with disputes regarding political parties (BE, CZ). In Portugal, administrative courts have jurisdiction over elections of leaders of public institutions (e. g. universities, hospitals). In Croatia, Estonia and Latvia, administrative courts are competent to resolve disputes arising from administrative contracts. In Greece, one of the SAC benches enjoys the constitutional jurisdiction to elaborate all draft presidential regulatory decrees, after they are proposed by the competent ministers and before they are signed by the President of the Republic (the SAC exercises a control of constitutionality, of general legality, of legality as to the limits set by statutory authorization and of the technical correctness of the draft decrees). A unique situation occurs in Cyprus, where the Supreme Court operates as the highest body for administrative, civil and criminal justice and in fact, operates

as the constitutional court of the country too. In Lithuania, administrative courts have the competence to assess petitions regarding breaches of oath or failure to perform the powers established by the laws by members of the municipal council or the mayor. In the Czech Republic and Poland, the SAC operates as disciplinary court for judges and some other legal professions.

2.5 Immunities of particular public authority

Surprisingly, the list of public authorities, whose acts are excluded from judicial review, is rather short. The head of the state has such immunity in Finland, Cyprus and Poland (with regard to certain acts, particularly his or hers refusal to appoint judges; furthermore, even resolutions of the National Council of Judiciary concerning applications for appointment of judges to the Supreme Court are no longer subject to judicial review). The head of state has such immunity in Ireland and Sweden too, because the Irish President and Swedish monarch do not have any administrative competences. In Estonia, there has been a discussion whether the President's resolutions regarding appeals for clemency are subject to judicial review. Regarding the review of the Estonian President's individual acts, the law stipulates that decisions on appointment to or release from office are subject to review by the Supreme Court.

Other authorities excluded from jurisdiction of Cypriot administrative courts are the government and Supreme Council of Judicature. In Luxembourg and Italy, acts or measures of the central Government in the exercise of political power cannot be challenged. Similarly, in Sweden, those acts of cabinet of ministers that do not affect individuals' civil rights are excluded.

In France, the President of the Republic and the Prime Minister share immunity regarding governmental measures concerning relations among public constitutional powers, relations between the French authorities and those of another State or an international organization, or those which are implemented within the context of military operation carried out by the executive.

A long list of bodies with immunity was provided in the questionnaire from Lithuania: President of the Republic, the Seimas (the sole chamber of the Lithuanian parliament) and its members, the Prime Minister, the Government (as a collegial body), judges of the Constitutional Court, the Supreme Court and the Court of Appeals. Furthermore, procedural acts of courts, prosecutors, investigators, persons conducting an inquiry, the ombudsman of the Seimas, the children rights protection ombudsman and court bailiffs are also not subject to review.

2.6 Frivolous petitions

Amongst the dangers which may result in flooding the courts with cases of no real importance one has to mention frivolous or abusive complaints. In some countries these complaints are either rejected as inadmissible (CY, EE, IE) or penalized by a fine (BE, FR, IT, PT) or by multiplication of costs paid to the other party (EL, IT, NL, PT).

French administrative judge may require fine of up to € 10 000 from an individual grounding his or her application in bad faith upon fraud or the use of fake documents or from an individual persistently challenging confirmatory decisions against which appeals have already been lodged before an administrative judge. The size of the fine is entirely at the discretion of the judge, who is under no obligation to explain his or her decision.

The Greek administrative courts have the power to adjudicate from € 100 to € 500 to the detriment of the party that has requested the postponement of the trial of his case, by way of a separate recorded decision and after a specific request of the opposing party. The SAC has recently been given the power to multiply the costs adjudicated on the defeated party if his writ exceeds a reasonable length, taking into consideration the legal issues posed. Multiplying of the costs is used in Italy too. The court may order unsuccessful party presenting manifestly unfounded reasons to pay the counterparty a sum of money up to double of the costs incurred. Moreover, the court may *ex officio* order the unsuccessful party to pay a financial penalty of not less than twice and no more than five times the court fees due for the application initiating proceedings, when the losing party has brought the legal action or resisted recklessly in court. In disputes concerning public contracts, the amount of the sanction may be increased by up to one per cent of the value of the contract, if greater than the above above-mentioned limit. In the United Kingdom, usually, each party covers its own costs, but a frivolous petitioner can be ordered to pay a share of the costs of the respondent. Furthermore, if someone persistently takes legal actions against others in cases without merit, he or she may be designated a 'vexatious litigant' and forbidden from starting new cases without permission.

In Estonia, the court may return the action to the applicant if he or she has to a significant extent been abusive of his or her right to bring an action and if infringement of the right for which the action seeks protection is a minor one. In such case, the court fee is not returned. The Cypriot Supreme Court may strike out any appeal that appears to be *prima facie* frivolous, after hearing the parties' arguments and may dismiss it if satisfied that it is in fact frivolous. The Irish Rules of the Superior Courts provide for a very specified list of abusive actions, stating that "*the Court may at any stage of the proceedings order to be struck out or amended any*

matter in any endorsement or pleading which may have been unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; and may in such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client." The Rules also provide that "*the Court may also order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just.*"

Latvian courts can "penalize" frivolous actions in the subsequent procedures by rejecting future requests to decrease the amount of the court fee due to his or her poor financial situation. When deciding about these requests, the judge is obliged to assess whether the person has not acted frivolously before, i. e. whether during last three years submissions of this person were not too excessive and whether they were well-founded or rejected by courts as unfounded.

2.7 Other measures for restricting access to court

Beyond the usual or common measures for limiting the access to courts, we can find other measures which are used only in one country, but might be inspiring for the others. Several inspiring ideas were realised in Greece: e. g. raising the ambit of jurisdiction of one-judge formations of administrative courts, setting a monetary limit for the filing of appeals before the courts of second instance (currently: € 5 000 in general cases, € 3 000 for social security and salary claims) or introducing computerised technologies to the courts' organization.

In Lithuania, the use of computerised technologies goes even further and complaints may be filed in an electronic form and submitted by means of electronic communication which allows generating electronic cases. In Latvia, they decided not to make the complaints electronic, but rather to force the applicant to make them shorter: if the cassation complaint is too long, judges may request a party to submit summary of the complaint.

In countries with language minorities, the requirement to write complaints only in the official language might prove to be an obstacle. For example, the Estonian courts use only Estonian as the working language of the court proceedings and if an action is made in another language, the court requires the participant to provide a translation, unless this is impossible or unreasonably complicated for the participant. In some situations, the court may also arrange the translation itself.

3. Measures for facilitating the access to administrative courts

3.1 Exemptions from the duty to pay the fee

In most countries where there is any duty to pay the fee it is the case of state and public authorities which are exempt by law from the duty to pay any fee.

In addition, in some countries certain types of litigations (cases) are exempt (typically IT), in other systems certain types of persons, yet in other legal systems the mixture of both is used (that is some litigation and some persons are exempt from payment).

Typical example of the cases which are exempted covers asylum cases (e. g. HR, CZ, FI, DE, PL), cases of aliens' detention (e. g. CZ, IE, PL), social security cases (e. g. HR, CZ, EE, DE, IT, LT, NO, PL, some types of those cases also in FI), electoral disputes (CZ, IT, LT), competence disputes (CZ, IT).

Less typical cases which are subject to the statutory exception involve civil servants in disputes related to their service (HR, IT, LT, PL, some cases are exempted also in EE), applications for judicial review in proceedings for criminal offences (IE), guarantee of support for pupils with handicaps (IT), access to environmental information (IT), lawsuits against inactivity of the public authority (LT).

In some countries the recent history is visible in statutory exceptions to the rule to pay (see, e. g. Croatia, where invalids of the Croatian War of Independence of the 1990s, spouses, children and parents of Croatian soldiers who were killed, missing and detained in the Croatian War of Independence, etc. are exempted).

Some systems exempt welfare recipients who receive a specific allowance (HR) while in most others it is up to individual decision of the court to exempt a person in need (see 3.6/ below).

The reports state there is no difference between the courts' instances in those statutory exceptions.

3.2 Non-governmental organizations

It seems that explicit statutory exception to the NGOs is very rare. Most systems does not provide in general for any exception for the NGO.

Some examples to the contrary could be mentioned with respect to Croatia (it is only the case of humanitarian organizations), Poland (NGOs and entities listed in the law in their own matters concerning the implementation of the commissioned public task pursuant

to the provisions on public benefit and voluntary service), Slovenia (disabled people's organizations and charities in the cases relating to their purpose).

Specific but very narrow exception exists in Latvia: according to the Article 29 and 128 (3) of the Administrative Procedure Law if the non-governmental organization complies with the notion of "*private law legal persons (entities) who have the right to submit a submission to an institution or an application to a court in order to defend the rights and legal interests of private persons*" and if the person who they represent is poor and thus is exempted from duty to pay the fee, such an NGO is exempt from the duty to pay the fee.

3.3 The decision of the court to exempt a petitioner from the duty to pay the fee

In few countries the law does not give judges the power to exempt the petitioner from fees. This is the case of Italy and Ireland where it is not possible, only legal exceptions (provided by the law) could be applied.

In Cyprus the law provides for the power of the court to exempt the party only in few specific proceedings.

In Croatia since recently it is not the judiciary but the public administration which grants waivers.

In most other countries it is possible. The decision to exempt the petitioner could be made either by the entire chamber deciding the case or by the judge presiding the chamber. Most reports do not distinguish between those two possible scenarios.

A typical example of such a system is the Czech Republic, where the judge presiding the chamber can upon a request exempt the petitioner from the duty to pay the fee. The exemption can be full or partial. The full exemption may be only exceptional. The decision must be justified if full exception is granted or if the judge did not grant what the petitioner asked for. The exemption is awarded if the financial situation of the petitioner justifies it (the court compares the earnings and property conditions of the petitioner with the amount of the court fee). The petitioner is obliged to disclose all the documents which would show her living conditions.

In many systems the court will not grant the exception if the petition has little chance of success (e. g. CZ) or is without sufficient prospects of success (e. g. DE, EE).

Some reports mention specific conditions for corporations (juristic persons of private law). This is the case of Greece (in order to be exempted from paying fees they must provide evidence that the payment of the fee renders impossible or particularly problematic

the fulfillment of their constitutive goals) or Poland (such a person has to prove that it has no means to pay any costs of the proceedings – in order to grant the right of assistance in full; or no sufficient means to pay total costs of the proceedings – in order to grant the right of assistance in part). Many other legal systems do not distinguish as a matter of law between the people (natural persons) and corporations (juristic persons of private law). In Estonia juristic persons may only be exempted if their seat is located in Estonia or in another EU member state.

In Finland where the fee is payable after the decision is delivered the court could waive the fee if "imposing a court fee would be manifestly unreasonable".

It seems that most laws do allow judges sufficient leeway of discretion and do not define financial need of the petitioner in detail. It is different in the Netherlands. There the inability to pay ('*betalingsonmacht*') which is the reason for judicial exemption is governed by very high statutory thresholds:

> "The net income of the applicant and his/her fiscal partner should be lower than 90 % of the maximum social welfare payment the individual is entitled to. As of January 1, 2019 an income of less than 90 % of the net income is € 922,99 or less. Furthermore, the participant nor his/her partner should have any financial capital (shares, cash, claims etc.)."

3.4 Refunding of the paid fee

In Finland where the fee is payable upon the final judgment it is easier. No fee should be paid if the plaintiff wins the case. However, a court fee is charged in Finland even if a claim, appeal or petition is withdrawn.

Other questions arise in most European systems where the fee is payable upon filing a lawsuit, appeal or cassation complaint.

It seems that in case of plaintiff's victory in most systems it is the defendant who reimburses the successful plaintiff. However, in some systems it is not the case and it is the court which returns the paid fee. It is the example of Latvia or Greece. In the latter system if the plaintiff wins her case before the court. Depending on the circumstances of the case, the court has the power by law to exempt the successful applicant from the required fee with his final decision on the case.

In many systems the fee is returned if the petition is dismissed for inadmissibility or because it was delayed (e. g. CZ, EE, PL, EL). However, if the claim has been withdrawn by the claimant then the court shall return the fee decreased by some percentage (e. g. CZ, DE, LV, EE).

A specific rule exists in the systems where the high courts use discretionary powers to select the case for review. It is the example of Norway where the fee is returned if the case has not been selected for the review.

3.5 The duty to be represented by a legal professional

Mandatory legal representation is usually required only when filing cassation complaint or appeal before the high (supreme) court or the council of state (BE, CZ, SI). In France and Germany it is also the case before the court of appeal. A specific situation exists in Poland where cassation complaint shall be drafted by a legal professional but no other requirements for his or her participation exist (so the party does not need a professional during the hearing). In France, for their representation before the Council of State, the parties must use the service of a lawyer pleading in the Council of State and the 'Cour de cassation' (Procedural Appeals Court).

In most jurisdictions the petitioner is not obliged to be represented by a lawyer in any stage of proceedings (CY, EE, FI, IE, LV, LT, NO, SE, UK, NL save the tax law cases before the Supreme Court).

In contrast, albeit rarely, the legal representation is mandatory in all stages of proceedings (EL, IT, LU, ES) although some specific cases could be excluded from this requirement, such as tax law cases in Luxembourg.

3.6 Free legal aid for participants

In most jurisdictions the court can appoint an attorney. Usually it is done upon a request of a participant (e. g. CZ, CY, EE, FR, DE, LV, SI). The law could limit the right to legal aid only to people, i. e. natural persons (this is the case of EE, IT and FR where in addition to natural persons the non-profit organizations and foundations are also included).

In some jurisdiction it is the bar which appoints, thereby it is not responsibility of the court (BE, LU). Likewise, in the Netherlands it is the task of the Council for the Legal Counsel ('*Raad voor Rechtsbijstand*'). In Lithuania the State-guaranteed Legal Aid Service, a state budgetary institution, is tasked with the examination of applications of individuals and decision-making in relation to legal aid. In the United Kingdom the Legal Aid Agency performs the same role.

3.7 The forms and conditions of free legal aid

The conditions to appoint a representative to the party are usually linked to the financial needs of the party. Thereby those conditions are (though sometimes indirectly) linked to the conditions for being exempt from the duty to pay judicial fee (CZ, EE, FI, DE, EL, IT, LV, NL, NO, SI).

Legal aid will not be given, if legal aid would be clearly pointless or if the pursuit of the matter would constitute an abuse of process (e. g. CZ, FI, SI). In Finland it is also the case if the matter is of little importance to the applicant.

In some countries the duty to pay fee is not dependent on the right to free legal aid (CY, FR).

Some jurisdictions do not allow universal right to free legal aid, but they limit it to selected proceedings only (CY).

4. Selection of cases by lower and higher jurisdictions

4.1 Do the administrative courts have power to select cases?

The number of the systems which provide no tools for their supreme (administrative) courts to restrict their case load is quite limited today. Although most European systems would not call it "*selection*" or "*filtering*" and would even emphasize that this procedure is rather formalized, their laws equip judges with rather flexible concepts to say with which case they would deal with in detail and which case is not worthy of any real attention.

In our questionnaires only Cyprus, Italy, Poland and Serbia stated that there are no filtering mechanisms whatsoever. Lithuanian report informs us that although the similar situation exists there as well, draft laws should change it in a foreseeable future.

A very limited selection exists in the Czech Republic, restricted only to asylum law cases (see below). Otherwise, the Czech Supreme Administrative Court deals with all cases, both of factual and legal nature, no matter how insignificant, no matter that the legal issue at stake has been adjudicated many times.

Most other jurisdictions do apply some sort of filtering or selection mechanisms, although most of them only with respect to the court of the final instance (HR, EL, BE, FR, IE, FI, SI, LV, NL). Some states apply filtering mechanisms at the appellate and supreme court levels, although as a rule the supreme courts enjoy more discretion (DE, ES, SE, NO).

It is the United Kingdom which applies filtering mechanism at all court levels. In Estonia, a very specific mechanism is also applied at all levels of administrative courts.

4.2 The conditions for select cases

In virtually all systems where some sort of selection is applied the law provides for some criteria to say which case would go to merits. Unlike views in some reports I believe that they almost always provide for a considerable discretion by judges, although this discretion could vary dependent on the court level and the question whether its decision is subject to further appeal (or constitutional complaint in those systems where it is available).

Those criteria differ. In Belgium the arguments in cassation complaints are admissible only if they invoke an illegality "*insofar as the ground invoked by the appeal is not manifestly unfounded and that this violation is actually of such nature that can lead to the cassation of the contested decision and may have influenced the scope of the decision*".

A neighboring nation of the Netherlands applies somewhat similar rules. The law allows the Supreme Court to declare an appeal not-admissible when the grounds of cassation will evidently not lead to cassation or when a party does not have a sufficient interest in a cassation appeal. Moreover, the law allows the Supreme Court not to deal with a case when the questions of law do not serve the interest of the unity or the development of case law. The rapporteur provides an example from 2017, when in 724 tax cases a cassation complaint was made. In 272 cases, this led to a material assessment of the case, 131 cases where declared inadmissible on the basis of the former rule (the grounds of cassation will evidently not lead to cassation or when a party does not have a sufficient interest in a cassation appeal), and 321 cases where not dealt with by the Supreme Court on the basis of latter rule (the case was not interesting from the view point of the development of the case law).

The second exception in the Netherlands is the 'moderate leave system' of the Jurisdiction Division of the Council of State in asylum cases. The law permits the Council to judge that a ground of appeal will not lead to another decision than the decision that has been reached by the court of first instance, and to offer no further justification. Therefore it allows the Council of State to give an extensive justification only in those cases which have added value to the unity and development of law. In asylum cases this article serves an important purpose, since it prevents aliens to use the possibility of appeal to lengthen the procedure.

Similar logic prevails in the Czech system, which limits filtering only to asylum cases. The Czech Supreme Administrative Court would decide on merits only i) if no previous case law of the Supreme Administrative Court exists, ii) if the previous case law is inconsistent, iii) if the Court decides to change its previous case law or iv) if substantial violation of the law by the court may have an impact on the rights of complainant. In practice, the fourth reason prevails.

Slovenian law, which does not reduce filtering only to the specific field of law, goes in the same direction. It provides, rather bluntly, that the Supreme Court of Slovenia will deal with the case only if the lower court decided the case against the case law of the Supreme Court, case law does not exist or is not uniform.

German law grants some discretion to the appellate and supreme court judges. The appellate court will deal with the case only if there are serious doubts about the correctness of the judgment, special factual or legal difficulties, fundamental significance of the case, deviation from the case law, or procedural shortcomings. The Supreme Court agenda is then limited only to legal issues, which further reduces criteria of filtering to cases of fundamental significance, deviation from the case law and procedural shortcomings.

Scandinavian supreme courts also emphasize their functions as law creators which further interpret law. For instance, in Finland leave of appeal to the Supreme Administrative Court shall be granted if: 1) with regard to the application of the act, in other similar cases, or because of the uniformity of case law, it is important to bring the matter to the Supreme Administrative Court for decision; 2) there is specific reason to bring the matter to the Supreme Administrative Court for a decision due to an obvious error in the matter; or 3) there is another important reason for granting leave.

In Norway, "*Leave can only be granted if the appeal concerns issues that are of significance beyond the scope of the current case or if it is important for other reasons that the case is decided by the Supreme Court.*" Not surprisingly, most of the appeals are not given leave. In 2018, about 15 % of the appeals of judgments in civil cases were granted leave.

A very specific discretion is enjoyed by Estonian judges at all levels. The law functions especially against fraudulent or abusive claimants. The first instance court may return the action if: 1) it is manifest that the applicant has no right of action in the matter; 2) granting the action would not achieve the aim of the action; 2.1) encroachment on the right that the action seeks to protect is a minor one and, in the circumstances, there is little probability of the action being granted; 2.2) the applicant has to a significant extent abused their right of action and encroachment on the right that the action seeks to protect is a minor one [§ 121 (2) CACP]. The Supreme Court of Estonia enjoys even wider discretion.

4.3 The power to select cases restricted to certain fields of law

Selection of cases is not restricted to any certain area of law in most jurisdictions. The only exception is Finland, where currently certain subject matters are subject to the requirement

of leave to appeal while others are not. A new administrative judicial procedure act will likely come into force in the year 2020, and according to the new act, the system of leave to appeal will become the rule, whereas direct appeals to the Supreme Administrative Court will become the exception.

In the Czech Republic selection mechanism is limited only to international protection (asylum) cases.

Last but not least in the Netherlands 'moderate leave systems' apply only in tax and asylum cases in the courts of the highest instance (see 4.2/ above).

4.4 Further procedural rules to select cases

In most cases this is the very panel which could potentially decide the case which would select the case for the full review.

In some systems, the majority of judges suffice to reject the case (HR), in other systems unanimous decision to reject the case is needed (CZ, LV).

A rather sophisticated filtering mechanism exists in France. Since a new law of 1997 appeals have now been divided between the specialized chambers directly implementing the admission procedure. The admission phase entails three procedural alternatives, which will shape the nature of the decision arrived at:

- If the appeal is 'evidently groundless', the presiding judge in the chamber examining it will order that its admission be refused.
- If on the other hand, the appeal must in said judge's eyes be admitted, he or she will directly pronounce a decision to admit.
- If finally the presiding judge in the chamber considers that there are doubts as to whether the appeal should be admitted, the claim is initially examined by the chamber's reporting judge. If he or she pronounces in favour of admission, the chamber's presiding judge shall in most instances comply with this view and issue a decision to admit. If however the reporting judge pronounces against admission, the appeal is then examined by the court rapporteur and then in a hearing by the three-judge section that will pronounce a decision to admit or a decision to refuse admission.

4.5 The decision (not) to select the case

Some systems do divide the decision to take the case for decision in merits from the final decision (HR), some systems do merge this into a single decision (CZ, FI etc.).

The decision by the supreme court not to take the case for the decision in merits is as a rule not subject to appeal.

All systems require the decision which reject the case to be justified (e. g. HR, BE, HR, EE), although in many systems such a justification is particularly succinct and merely sets out the grounds for the appeal before declaring in a standard format – that "none of the grounds will serve to enable admission of the claim" (FR) or is very brief and written on a formal standardized document (FI).

The only two systems which do not require any justification are Norway and the Czech Republic. In the Czech Republic, however, the Supreme Administrative Court in practice justifies its decision not to deal with merits of the case in detail, out of fear that otherwise the Constitutional Court would intervene and would quash the (unjustified) decision for the lack of arguments.

4.6 The review of the lower court decision

In all systems which give the right to the lower court to select its cases the party could make an appeal to the appellate or supreme court to question the decision of the lower court.

4.7 Lower courts power to select cases of a higher court

No system provides such a power to the lower court. The only exception is Germany and the United Kingdom. In Germany the higher court is bound by the decision of the lower court to grant the appeal. Moreover it could also grant the appeal even if the lower court did not offer this right. In contrast, the UK Supreme Court is not bound by the lower court's ruling to grant leave.

At the end of this General Report, the reader has "a legitimate expectation" to find some general conclusions. However, we find it premature to base them just on the responds to the questionnaire, despite their enormous value. We believe that the precise moment for drawing these conclusions will come at the Brno seminar…