Bundesverwaltungsgericht

Seminar of the Federal Administrative Court and ACA-Europe

Functions of and Access to Supreme Administrative Courts

Berlin, 13 May 2019

General Report

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Introduction

„How our courts decide“ was the abbreviated title of the ACA-Europe seminar in Dublin this March. It took us on a journey through the everyday life of our European colleagues. We learned so much about those things which appear self-evident within our own jurisdiction, but which may be so different in the daily routine of our counterparts. We learnt about oral hearings, their preparation, about deliberations, the role of support staff and many more things. No manual could ever offer such a richness of insights! For those who could not participate, the general report and further documents can be found at www.aca-europe.eu.

Professional curiosity would have given sufficient motivation to conduct this seminar. But it is more; ACA-Europe seminars are an essential means to foster the awareness of an ever closer European legal union. Not only the Court of Justice, but also national courts are continuously interpreting and applying European Union law. To benefit from the jurisprudence of other national courts it is therefore eminent not only to understand the words used in court's decision, but also to be familiar with the circumstances under which these decisions were taken. In this line of thinking the ACA-Europe seminar in Berlin about the functions of and access to Supreme Administrative Courts ties in with the Dublin seminar.

29 members, observers and guests of ACA-Europe have contributed by answering the questionnaire (Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain, Finland, France, Great Britain, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Luxemburg, Latvia, The Netherlands, Norway, Poland, Portugal, Serbia, Sweden, Slovenia, Slovakia). By this we have learned about the case load a judge has to cope with, about the functions which are inflicted on the supreme administrative jurisdictions, about filter systems which may help to select the important cases and reduce the work load, about possible contents of court decisions and about many more things. The results of the questionnaire and the answers thereto are comprised in this general report. As this report is a “general” report it has been necessary to group answers, to simplify and to unify in order to obtain a hopefully readable text. The authors are very well aware that the European jurisdictional landscape is actually much richer and much more diversified as displayed in this summary. In this context we would like to make reference to the original answers of which every single one is worth a read and which will all be published on the ACA-Europe website, too.

I. Functions of the Supreme Administrative Court (SAC)

1. Instances in the Administrative Courts and First Instance Function of the SAC

The legal systems of the member states provide, as general rules, in most cases either two (AT, BG, CY, CZ, FI, HR, IT, LT, LU, NL, PL, SI) or three (DE, DK, EE, ES, FR, GR, HU, IE, LV, NO, PT, SE) instances for judicial review in administrative law cases. In the United Kingdom there are three or four instances. Slovakia and Serbia state that in their legal systems there is one instance of judicial review in administrative law cases complemented with the possibility of an extraordinary remedy to the respective Supreme Courts. The Belgian Council of State makes clear that it does not find itself in a scheme of instances as it is in general the only body of judicial review in administrative law cases in Belgium and only in specific matters it serves as a court of appeal, like in electoral affairs and urban planning.

The SACs serve, in the majority, as first instance courts, too, although generally this applies only in specific cases (BG, CZ, DE, ES, FI, FR, GR, HR, HU, LT, LU, LV, NL, PL, PT, SE, SI, SK). The Belgian Council of State, as already pointed out, is in most cases the only instance of judicial review of administrative law cases and thus (also) a first instance in this sense. A smaller part of the member institutions does not have any first instance cases (AT, CH, CY, DK, EE, GB, IT, NO, RS). The Supreme Court of Cyprus, which until 2015 also served as a first instance court, only retains specific cases of Admiralty law in first (single judge) and last (full bench) instance as well as the exclusive competence to issue prerogative orders. The Administrative Law Chamber of the Estonian Supreme Court does not hear any cases at first instance, the Constitutional Review Chamber, however, does hear complaints against resolutions of Parliament and of the President of the Republic as well as electoral disputes which both might be classified as administrative law cases by abstract criteria. In Italy the Council of State hears as single instance specific actions of compliance for enforcement of judgements as far as most decisions of the Council of State itself are at stake. The Irish Supreme Court mentions two exceptions of not hearing any cases at first instance, which are to be classified rather as constitutional law cases: the President of the Republic can apply directly to the Supreme Court to determine whether a bill is repugnant to the constitution (in order to determine, whether he has to sign it) and the Supreme Court might determine at first instance whether the President has become permanently incapacitated.

As far as the SACs also serve as first instance courts in most of the legal systems this is the case depending on specific subject matters as defined by the law (BG, CZ, DE, FI, FR, GR, HR, HU, LT, LU, LV, NL, PL, SK). Among the most cited subject matters are

disputes arising in connection with national and European elections or referenda (CZ, FR [EP and regional councils], LU, LV, NL, PL [orders of the National Election Commission], SI, SK) or disputes between the national state and self-governing entities or among self-governing entities (CZ, DE [non-constitutional disputes between the Federation and a State or between States], FI [cases from the Åland government and from the Sámi Parliament], HU [non-compliance of a local government with its legal obligations], LU [between municipal authorities and the state], PL). In the Czech Republic action against the dissolution or suspension of a political party or movement is heard by the SAC at first instance, too. In Germany this is true for the prohibition of associations by the Federal Minister of the Interior (i.e. not political parties, which is in the competence of the Constitutional Court). In Finland, France and Bulgaria partly as well as in Lithuania, Portugal, Spain and Sweden some cases are allocated to the SACs at first instance rather depending on the body that issued the challenged decision. In Portugal and Spain acts issued by the national government or (other) constitutional or specific high authorities can – as far as they are of administrative nature – be challenged before the SACs. In Sweden this applies to administrative decisions of the government which affect individuals, too, as well as certain tax decisions by a special body. The same is true in Finland with regard to certain decisions of the Pharmaceuticals Pricing Board, about decisions of the Finnish Government (as the Cabinet in plenary) and data communications cases from the Finnish Communications Regulatory Authority or in Lithuania with regard to requests of the Data Protection Inspectorate where decisions of the European Commission are in doubt. In France disputes against orders of the President of the Republic as well as disputes about recruitment and disciplinary measures of civil servants nominated by decree of the President of the Republic are dealt with by the SAC at first instance. In Bulgaria actions against acts of the Council of Ministers, Prime Minister, deputy prime minister and ministers exercising constitutional powers of government, the Supreme Judicial Council and against bodies of the National Bank are heard by the SAC at first instance. In Greece the Council of State has a general competence in all administrative law cases, but the legislator may generally allocate cases to other courts within the limits of the constitution. Yet, some disputes cannot be allocated to other courts like the civil service appeal which is constitutionally guaranteed to civil servants to defend themselves against disciplinary measures of the state.

Regulatory acts are also named by a number of member institutions to be in their competence at first instance. In France disputes about regulatory decrees and acts of ministers or other main control and regulation authorities are dealt with by the SAC at first instance. Lithuania refers to cases about regulatory enactments passed by central entities of state administration or about general acts by societies or political parties or organisations, Hungary to norm control and Bulgaria to secondary legislation (with the exception of secondary legislation passed by municipal councils).

The SAC in Germany is also competent at first instance for disputes about specific planning or project approvals which are listed in annexes of specific pieces of legislation and which – as a common characteristic – are considered to be very important infrastructure projects of federal or European interest. Additionally the German SAC hears at first instance actions against specific expulsion orders of foreigners considered to be dangerous and disputes arising from activities of the Federal Intelligence Service as well as those related to specific affairs of members of the (federal) parliament or of former (federal) government members.

In Poland the SAC shares competence with the Supreme Court to hear disputes at first instance against resolutions of the National Council of the Judiciary with regard to submissions of applications for appointments as a judge: as far as posts of the Supreme Court are at stake the disputes are heard by the SAC, whereas the Supreme Court is the competent court with regard to posts of the SAC.

2. Case Load of SAC Judges and Types of Cases

Determining the average case load of an individual judge proved to be somewhat difficult. It is evident that in systems with a leave to appeal procedure these proceedings make up the larger part of the overall case load. For example in Finland these cases make up 75% of the cases. In Sweden the applications for leave to appeal make up even 90% of the cases a judge handles per year of which 80% are considered to be rather uncomplicated as they imply questions of evidence which do not raise issues of principle or of the interpretation of the law. In Estonia on average every judge resolved 178 applications for opening the proceedings of which 11.4% were admitted. In Portugal 63-66% of all cases are preliminary analysis opposed to 25% cassation appeals. In Ireland applications for leave to appeal are the largest group. In Slovenia 47% of the cases are requests for a leave to revision (i.e. an appeal on the merits, but limited to points of law), whereas 5.4% are actual revision cases (another 31% are appeal cases). In the United Kingdom the 12 Supreme Court judges heard 199 applications for permission to appeal and 85 final appeals (although it has to be noted that several Supreme Court judges also sit in the Judicial Committee of the Privy Council which makes up 35% of their work). In Germany 55% of the cases are proceedings of admitting an appeal, 25% actual appeals cases (on points of law here, too) and 7% are first instance cases.

As far as reference was made to other classifications the work load of a judge is mostly determined by appeals. In Croatia appeal cases form the largest group (84.3%). In Poland cassation appeals form 73%, in the Czech Republic cassation complaints are the majority (per judge statistically nine per year). In France cassation appeals (pourvois en cassation) constitute 68% of the cases. Also in Bulgaria cassation proceedings are the

largest group. Differently in Italy the largest group are provisional proceedings (2,500 of 11,500 per year). Also the Netherlands name provisional proceedings (22%, usually decided by a single judge).

Weighing the different types of cases proved to be even more difficult and the majority of member courts stated that there are no sufficient criteria to do so. As far as estimation was given many answers pointed out that in average proceedings for leave to appeal can be considered to be easier than full appeals (DE, FI, GB, IE, SE). Interestingly the appraisal of first instance cases is – as far as provided – quite controversial: some member courts consider these cases to be among the most complicated and time consuming (DE, FI), while others cite them as less complicated (CZ with specific reference to election cases, HR).

3. Scope of Activities

In a significant group of jurisdictions the SAC, as a court of appeal (understood as covering all types of legal remedy) reviews the decisions of lower courts both on points of fact and of law (CZ, FI, GR, HR, IT, LT, LU, NL, NO, PL), whereas in a slight majority the SAC reviews the decisions of lower courts only on points of law (AT, BG, CH, CY, DE, EE, ES, FR, GB, LV, SE, PT, SK). The Danish SAC points out that its review of lower courts' decisions extends to all aspects, but the courts in Denmark in general only have authority to review administrative decisions with respect to their legality. In Norway the SAC, although it can review both facts and law, is limited by the extent of the leave on appeal, which might be limited to a part of the case or to specific grounds. Also in Serbia the review of the SAC is limited by the motion. The Irish SAC generally reviews questions of law, although it has discretionary power to admit further evidence on questions of fact. Yet, there are case law limitations, e.g. on hearing witnesses. In Slovenia there are two different types of appeal: one provides for a review of facts (although some limitations apply) and of law. This appeal is only available if explicitly determined by law. The other (revision) solely provides for a review of questions of law. Similarly in Hungary it depends on whether the SAC acts as a court of second or third instance: at second instance the review extends to facts and law, although limitations for new facts apply. At third instance (extraordinary remedy only issues of law are reviewed and new legal grounds, facts or circumstances cannot be submitted. In Poland, Estonia and in Germany the assessment of facts can be challenged as far as this implies an infringement of procedural law which might have had an effect on the result of the lower court's decision. In the Netherlands the SAC reviews lower courts' decisions on points of fact and of law, but each on the grounds of the parties' respective allegations. In Switzerland and in Germany the review by the SAC is focused on federal law. In Sweden there is, although

the review is focused on issues of the interpretation of the law, a "safety valve" as leave on appeal may also be granted with regard to the facts, e.g. obvious and grave mistakes.

4. Purposes of the SAC as Court of Appeal

The purposes of the jurisdictional work of the SACs as courts of appeal are described differently by the member institutions. One group of members affirms that all of the proposed purposes (standardisation/unification of the law; deliverance of single case justice; further development of the law; care for adherence to procedural rules of lower courts) are served by their work (BG, EE, HR, IE, LT, PL). In Finland the further development of the law is not exactly a purpose, although the decisions of the SAC might serve as precedents. In Poland all of these purposes play a role, but the most important ones are the deliverance of single case justice and the care for adherence to procedural rules. The standardisation or unification of law is in the focus of the SACs of Denmark, Norway, Spain, Slovenia and Hungary. In Slovenia single case justice and the care for the adherence to procedural rules are secondary. In Spain the further development of the law is a purpose, too, whereas the particular interest of the claimant stands back behind objective interests in the appeal (cassation) procedure. In the same way procedural defects may only play a role, if they constitute an objective interest in order to develop the law. In Switzerland and in Germany the uniform application of federal law (not of Cantonal/State law) and the further development of the law are the most important purposes, although single case justice also plays a certain role as far as rights of individuals are concerned. In Germany the care for adherence to procedural rules is a purpose too, although in a lesser degree. Similarly in Sweden the main purposes are the standardisation/unification and the further development of the law, although there is some room for reviewing cases in terms of adherence to procedural rules. The standardisation/unification of the law, single case justice and the care for adherence to procedural rules are cited by the Czech Republic and Italy. Austria refers to the standardisation/unification of the law, the further development of the law and the care for adherence to procedural rules. Slovakia and Portugal cite standardisation/unification of the law, single case justice and the care for adherence to procedural rules. Greece refers to standardisation/unification and the further development of the law in the first place and additionally to single case justice once a case has been admitted. The care for adherence to procedural rules of lower courts does not really play a role as the Greek SAC does not refer cases back to the lower court even if it has committed an error. Luxemburg makes reference to the care for the adherence to procedural rules, for a well-founded argumentation and for the development of the law as well as for single case justice. Additionally, Luxemburg invokes the purpose of reconciliation of the parties. Cyprus and Ireland make reference to the doctrine of *stare decisis* to emphasise the purpose of standardisation/unification of the law by their SACs' jurisdictional work as the decisions are bind-

ing for other courts. Also in the United Kingdom the main purposes are to achieve consistency in the interpretation and development of the law and its further development. In general terms it is not the purpose of the Supreme Court to correct errors.

5. Purposes of the SAC as Court of First Instance

As far as the member institutions do have functions as first instance courts, their purpose is to provide for single case justice and to uphold the rule of law or to ensure the legality of acts of administration (BG, FI, GR, PT). According to some answers the purposes are the same as of any other administrative court (DE, ES): to resolve a single case in reasonable time (CZ, ES), to protect subjective rights of individuals, ensure the legality of acts of the administration and to provide single case justice (DE). Lithuania refers to single case justice and to the development of the law. The Netherlands refers to the review of the lawfulness of administrative actions and also cite the uniformity and the further development of the law. Poland states that the purposes depend on the subject matter and cites the efficient solution of the case in protraction proceedings and in electoral cases, single case justice in disputes about judicial posts in the Supreme Court and the care for adherence to competence in disputes between different administrative bodies. Sweden states that the purpose of the function of the SAC as a court of first instance is to provide access to the courts against acts of the government as demanded for by art 6 ECHR and the Aarhus Convention.

The rationale of assigning specific cases to the SAC at first instance is mostly seen in the acceleration of proceedings (DE, FI, FR, IE, LT, LU, NL, PL, SI). Some members invoke – for at least some cases – the dignity or hierarchical position of the body which is responsible for the challenged act, in this context the government of the nation or the minister (ES, FI, PT). France also refers to decrees and regulatory acts issued by ministers invoking the specific importance of these cases. The importance of the cases is in general also referred to by Latvia, Bulgaria, Portugal, Ireland and Slovenia. In Italy the very specific nature of the cases dealt with by the SAC (enforcement of SAC-decisions with reasoning by the SAC) leads to the idea that the judge who has written the motivation shall also be competent to enforce the decision. In the federal system of Germany one of the reasons of assigning cases at first instance to the SACs that the issue does not have a genuine link to any of the federal states. In Greece one of the reasons to maintain first instance competences of the SAC is to serve the democratic nature of the institution and to stay close to the people. Yet, many disputes are allocated to other courts at first instance by law. In Belgium no specific rationales can be given as the SAC is in general the only instance of judicial review.

6. Relations to the Constitutional Court, where Applicable, and Treatment of Constitutional Law

In a larger number of jurisdictions there is a constitutional court separate from the SAC (AT, BE, BG, CZ, DE, ES, FR, HR, HU, IT, LT, LU, LV, PL, PT, RS, SI, SK), whereas in another slightly smaller group there is no such separate constitutional court (CH, CY, DK, EE, FI, GB, GR, IE, NO, NL, SE). In Estonia, there is, nevertheless, a separate Constitutional Review Chamber within in the Supreme Court. This chamber is composed of Supreme Court judges who are determined by means of rotation. In Greece there is a Special Highest Court which is composed of members of the other highest courts of the country and which decides on the constitutionality of statutes enacted by parliament and on the interpretation of statutes in case there are conflicting judgements on this statute.

In jurisdictions without a separate constitutional court a majority of the SACs also serve as constitutional courts (CY, DK, EE, GB, IE, NO, SE). Yet, it is noteworthy that they are not only supreme administrative courts, but single supreme courts that are competent in all areas of law. This implies not only the consideration of constitutional law, especially of fundamental rights, but also the constitutional review of simple law. Norway states that its Supreme Court might have been the first court in Europe to claim the competence to declare statutory law unconstitutional when it did so already in 1866. On the basis of the Human Rights Act of 1999 also the European Convention on Human Rights and several UN treaties on human rights are to prevail in case of conflict with a domestic statutory provision.

In Finland, the Netherlands and Switzerland there is neither a constitutional court nor does the SAC (or a specific part of it or another especially composed institution) serve as a constitutional court. Nevertheless, in Finland and in Switzerland the SAC still does some sort of constitutional review: in Finland the SAC would not apply a law whose application would be in evident conflict with the constitution and would give primacy to the constitution. In Switzerland the SAC does not apply Cantonal law which is contrary to federal or international law. Therefore it does perform a review of constitutionality as far as the case is based on Cantonal law, as the constitution and the fundamental rights are federal law. In the Netherlands on the contrary the constitution prohibits all courts, including the SAC, to review the constitutionality of acts of parliament as a consequence of the sovereignty of parliament. Other normative acts (i.e. not originating from parliament) can be reviewed on their compatibility with higher ranking law including the constitution. And even acts of parliament can be reviewed on their compliance with binding international instruments like the Charter of Fundamental Rights of the European Union or other human rights treaties.

In those legal systems which have a separate constitutional court in most cases the SAC might refer the question of constitutionality of a law to this constitutional court (BE, BG, CZ, DE, ES, FR, HR, HU, IT, LT, LU, LV, PL, SI, SK). In principle the same can be said for Estonia and Greece in regard to the Constitutional Review Chamber of the Supreme Court (EE) and the Special Highest Court (GR). Yet, in Greece such a question has to be presented to the plenum of the SAC first and can only be raised by the plenary of the SAC and only in respect to the content of the law (i.e. not the parliamentary proceedings). In contrast, in Portugal the SAC would not apply of its own accord law which it considers to be unconstitutional. In Austria the situation is completely different: On the one hand the SAC does not consider constitutional law. On the other hand the individual can challenge an administrative act on grounds of an alleged violation of constitutional rights directly before the constitutional court. If the constitutional court denies a violation of constitutional rights the claimant can still demand the case to be forwarded to the SAC for a review in respect of laws not considered constitutional law.

Also, a number of legal systems provide for a special or extraordinary remedy to the constitutional courts against the final decisions of the SAC for a review of constitutionality (CZ, DE, ES, HR, HU – not all decisions, SI, SK), whereas the individual in other legal systems can direct himself to the constitutional court only claiming the unconstitutionality of laws (LV, PL).

II. Access to the SAC

1. Representation of Parties before the SAC

Rules about the representation of a party in legal proceedings before the SAC differ strongly among the ACA members. There are two large groups, one that requires the representation of the party – usually by an attorney (solicitor, barrister, advocate: the denomination differs from member to member) – (AT, BE, BG, CZ [only the complainant, not the defendant], DE, ES, FR, GR, HU [legal professional], IT, LU, NO [in case of a granted appeal], PT, RS, SI, SK) and one that permits the parties to represent themselves (CH, CY, DK, EE, FI, GB, HR, IE, LT, LV, NL, NO [only before the Appeals Selection Committee], PL, SE). In this question there seems to be a division between rather Nordic and Anglo-Saxon traditions on the one hand and southern or central European traditions on the other hand, even though not every jurisdiction “fits” in this broad concept. In the latter group (not requiring an attorney) parties do certainly have the choice to be represented by an attorney, but it is not mandatory. Some members require an attorney if representation is chosen by the party (CY, EE, GB, NL, PL) whereas other members also allow for other persons to conduct the representation (CH [fiduciary, un-

ions, non-profit organizations, legal scholars], DK, IE [legal scholars or NGO representative], LV, SE). In some member states this is specifically possible for family members (DK, HR, PL). Others require a legal education or qualification without demanding this person to be an attorney (HU, SI). In some of the jurisdictions which require a representation by an attorney the representation by representatives of NGOs, unions or legal scholars (DE, PL, SK) is also possible.

Of course, there are further differences in detail, which ought to be highlighted: In some jurisdictions there are exceptions to the mandatory representation by an attorney with reference to the nature of the case. I.e. in electoral cases no representation is necessary in France, Italy and Luxemburg. Some member states also allow legal professionals or attorneys to represent themselves (HU, IT, SI). In other member state employees may represent their employer (CZ, HR, LT, SK), if they are legal professionals (LT).

Most jurisdictions do not require a special authorization for an attorney to represent a party before the SAC. Yet, in some member states a minimum period of experience is required (CY, DK, GR) and in some other member states a special authorization is necessary (FR, GB [barristers or solicitors with rights of audience in higher courts], IT, LU). Norway demands a test to be passed in order to obtain this authorization.

In quite a few jurisdictions public authorities do not underlie the same rules, but may be represented by their civil servants (AT, BE, CH, LT, LU, NL, PL). Some member states require these to have a full legal education (DE, BG, EE, HU, IT, PT, SK), others allow representation by civil servants which pertain to a specific authority (CY [Attorney's General Office], ES [Corps of State lawyer or Corps of the Autonomous Regions], GR [Legal Council of State], HR [State Attorney's Office]).

2. Formal Requirements to Lodge an Appeal

In most jurisdictions formal requirements to lodge an appeal include the denomination of the contested decision, the personal data of the appellant, the observance of the appeal's deadline and the signature of the claimant or its representative, proof of the court fee paid or a certain number of hard copies; partly, electronic submission is possible or even required (IE). In many member states it is also necessary to include a statement of facts (BE, FR, LU), to denominate the supposedly infringed norm or to denominate the parts of the contested decision which supposedly are in violation of the law (BE, BG, DE, EE, ES, HU, IT, LU, LV), to define the extent of the appeal (AT, BE, FR, LU, BG, CH, CY, LV), to give reasons (BE, CH, DE, CY, CZ, DE, EE, ES, FI, FR, IT), make reference to precedent law and decisions (CY), to declare the motion (BG, DE, EE, FR, IT, LT) or to declare the wish for a public hearing (EE, LT). The latter requirements are of increased importance in member states where the scope of the appeals procedure is limited to the

objections defined by the appellant (see below). In some member states, especially (but not only) those who have a procedure of granting leave to appeal it may be necessary to argue the general importance of the case etc. (DE, ES, GB, HU, LV).

As to the question of a limited scope of the appeals procedure there are two large groups of member states. In one group the SAC will assess the case ex officio, not limited to the objections and the arguments of the appellant (DE, DK, EE, ES, FI, GB, GR, PT, SE). In another group the SAC is limited in just this way (AT, BE, CH, CY, CZ, FR, HR, HU, IT, LT, LU, NL, NO, PL, SI, SK). In France recent jurisprudence has softened this limitation by allowing to put legal arguments and motions into a hierarchical order. In Croatia the SAC may ex officio assess questions of nullity of an administrative decision or invalidity of an administrative contract. Furthermore, in most of these member states the SAC will consider some aspects ex officio which may be consolidated under the headline of public order (BE, BG, CY, CZ, FR, HU, IT, LT, LU, NL, PL). These circumstances comprise aspects as nullity, decision from an incompetent court or the infringement of rules considered of superior importance. In Ireland the SAC will only treat those questions which "can fairly be said to come within the ambit of the grounds on which leave to appeal is given" (likewise SI). Yet, these rules are not to be applied overly technically to avoid harsh results. The Netherlands have pointed out, that EU law does not automatically belong in this field of public order (unless prescribed otherwise by EU law). So, a relevant question of EU law may not be subject of a preliminary ruling procedure to the Court of Justice, if this question does not fall within the objections of the appellant (likewise PL).

3. Subjects and Objects of Appeal Procedures

One can almost establish a general rule among the member states that every party of the court proceedings of the lower court which may be considered negatively affected by the decision of the lower court has – in persona – the right to appeal to the SAC (under the relevant formal and material conditions stipulated by the national law of court procedure). Corresponding remarks were made by almost all members (AT, BG, CH, CY, CZ, DE, EE, ES, FI, FR, GB, GR, HR, HU, IE, IT, LU, NL, PL, PT, SE, SI). The United Kingdom has pointed out that even the successful party may seize the Supreme Court to seek to uphold the decision on different grounds. In Finland the administrative authorities, party to the proceedings at the lower court, may only seize the SAC, if they are especially authorized by law. Austria and Greece also provide for the possibility of the competent minister to seize the SAC.

In member states which know more than two instances appeal to the SAC is usually only possible against decisions of the administrative court of appeal/the higher administra-

tive court. Yet, some jurisdictions provide for a "fast track" appeal, a so-called "leap-frog", directly from the administrative court of first instance to the SAC under certain circumstances (see below, 4. e). Latvia and Serbia have a diversified system in which – according to material law – the SAC or alternatively the administrative court of appeal may be seized.

Most member states exclude certain types of decisions or decisions in certain fields of law from an appeal to the SAC. No such exceptions are made in France, Ireland and Italy. Quite a few jurisdictions provide for exceptions which concern preliminary decisions of the lower courts (AT, DE, EE, GR, HU, LU, NL, partly also in CY, FI, NO, PL). In Switzerland preliminary decisions cannot be subject to an appeal to the SAC unless a breach of constitutional law is alleged. Further exceptions are made with reference to court orders which do not constitute a final decision, but which (mostly) concern procedural aspects (AT, CH, DE, EE, SE, partly PL). In Croatia, Hungary and Slovenia these prejudicial questions may be part of a separate appeal to the SAC where the law provides for this. Austria and Estonia mention the faculty of parties to waive the right of an appeal, which – if valid – renders an appeal inadmissible.

Some jurisdictions exclude or delimit the access to the SAC concerning certain fields of law, such as immigration/asylum law (DE, LU, NL), the emergency placement of a child (FI) or the deferral of an enforcement measure (RS). In the Czech Republic an appeal to the SAC is excluded against a further judgment of the lower administrative court, if the earlier judgment of this court had already been quashed by the SAC and the appellant does not allege that the further judgment does not comply with this decision of the SAC. Likewise, in Croatia the appeal is excluded against a decision of the administrative court, which quashes the administrative decision and sends the matter back to the administrative authority in order for it to issue a new decision. In the Netherlands an appeal to the SAC is excluded if the lower court decides that the outcome of the case is "manifestly clear". In this case there is only recourse to another chamber of the same administrative court. Bulgaria has explained that due to recent legislation (valid from 1 January 2019) wide fields of law are excluded from an appeal to the SAC. A case against this legislation is pending at the constitutional court.

4. Filter Systems

Filter systems aim at reducing the case load of the SAC and at finding a way of identifying certain "worthy" cases for the appeal's procedure before the SAC. Apart from this, an appeal in all member states has to meet certain formal requirements of admissibility (recevabilitée), which are not the object of the questions about filter systems.

a) Filter System, Yes or No

A majority of member states has introduced a filter system in form of a preliminary proceeding, in which a decision is met about granting or rejecting leave to appeal (AT, BE, DK, DE, EE, ES, FI [partly: the general rule of no filter is contradicted by special legislation which assigns about 75 % of cases to a filter system], FR, GB, GR, HR, IE, LV, NO, PT, SE, SI [in appeals concerning matters of law only]). In contrast, a strong minority of jurisdiction has no such filter system (BG, CH, CY [as a constitutional right to an appeal], CZ [with an exception concerning cases of international protection], HU, IT, LT, LU, NL, PL, RS [there is no appeal procedure], SK).

Yet, in some member states which do not apply a filter system similar prerequisites as in the filter systems of other member states (see below) will be scrutinized and be relevant for the success of the appeal: I. e. in Hungary the alleged violation affecting the merits of the appeal's case is justified, if a decision by the Curia (SAC) ensures the uniform jurisprudence, if the matter has a special weight of social significance, if the matter has to be referred to the Court of Justice of the European Union or if there is a case of deviation from the jurisprudence of the Curia. These matters are not subject to a preliminary proceeding, but part of the appeals procedure.

b) Material Criteria for Leave to Appeal

Material criteria or grounds for a leave to appeal vary in wording, but may be comprised in several groups. In quite a few jurisdictions the uniform application and interpretation of the law are functions of the SAC which also give reasons for a leave to appeal. Within this category may be considered: legal questions of "fundamental importance", "general public importance", "important legal questions", a "bearing beyond the present case" or "matters of principle" (AT, DE, DK, GB, IE, NO, PT, SE, SI), deviation from the jurisprudence of the SAC (AT, DE, GR), a lack of relevant case law concerning the question at stake (AT, GR), the "objective interest in resolving a cassation appeal on the issue in order to develop case law" (ES) and expressly the uniformity of the law (FI). Another group of reasons concerns the correctness of the lower court's decision and has thus an orientation towards the single case, whereas the former categories concerned questions of general importance. Therefore, reasons to grant leave to appeal are the incorrect application of substantive law (EE, FI, LV) or a grave factual or legal mistake (SE). In Ireland a leave to appeal may also be granted "in the interests of justice". Finally, the incorrect conduct of forensic procedure may lead to a leave for appeal (DE, EE, LV).

c) Competence to Grant or Reject Leave to Appeal

In a majority of jurisdictions the decision of granting or rejecting leave to appeal is met by the SAC itself (DE, EE, FR, GB, GR, HR, IE, LV, PT, SI). In some of these jurisdictions this decision may be met by either the SAC or by the administrative court the decision of which is challenged (DE, GB). The United Kingdom has pointed out that such a decision by a lower court is possible, but unusual. Furthermore the decision of granting or rejecting leave to appeal can be met by the lower courts in Austria and Croatia. It appears that only in Germany a decision by a lower court, granting leave to appeal is binding on the SAC. In contrast, Austria, Croatia, Spain and Portugal have pointed out that such a decision can be overruled by the SAC. In Germany only a negative decision by the lower court can be overruled by the SAC in a complaint procedure. In Denmark and Norway there are special organs within the SAC which decide on the question of granting or rejecting leave to appeal, the Appeals Permission Board (DK) and the Appeals Selection Committee (NO).

Some members pointed out that in their jurisdiction the decision about granting leave to appeal is met in a written procedure (AT, DE, EE, IE). In Finland this decision is taken together with the decision on the merits of the case.

It is worthwhile noting – although this was not explicitly asked for – that some members made mention of who was competent to decide on an application for leave to appeal. Whereas in Germany this decision is met by the same panel (Senat) which, once leave is granted, will sit over the case on the merits, in some jurisdictions there is a different allocation of competences. Special organs in Denmark and Norway have already been mentioned. Additionally, in Spain the decision on applications to leave to appeal is always met by the first section of the third chamber (competent of administrative law), whereas in the case of granting leave, the matter will be transferred to the section in charge of prosecuting the case. In Finland and in Germany the panel to decide about an application for leave to appeal consists of three judges, whereas the regular composition is five judges. In Estonia, in Portugal and in the United Kingdom the panel deciding about granting or rejecting leave to appeal is composed of three judges, which belong to the group of the most experienced judges of the administrative section of the Supreme Court (PT). In Ireland applications for leave to appeal are considered by the Court consisting of at least three judges. In France the president of the competent chamber of the Council of State is competent of rejecting an application for leave to appeal (which can only be granted in cassation procedures). The granting of leave to appeal, in contrast, is done by the chamber competent to consider the case on the merits. In Greece the decision is met in a written procedure by a panel consisting of one or three judges, as determined by the president. This decision can be challenged before the court. Yet, if the party loses again, it will be charged with triple court fees. In Latvia a panel of three judges

designated to this purpose by internal court rules is competent of deciding about the application of leave to appeal.

d) Exceptions to the Rule

One group of jurisdictions is not familiar with exceptions to the above described filter systems (expressly so: AT, DK, EE, ES, FR, HR, SI). In other jurisdictions there are stricter or more generous rules in some areas. Stricter rules apply e.g. to immigration and or asylum law in Belgium, in the Czech Republic and in the Netherlands (which generally does not have a filter system). In Portugal the filter system is not applied and the access to the Supreme Court is thus more generous, in cases concerning public employment, public education or social protection.

e) Leap-frog Procedure

Some jurisdictions are also familiar with so-called leap-frog proceedings (DE, ES, FI, FR, HU, IE, LV, PT). These are proceedings which apply in jurisdictions which have at least three instances and which allow a leap from the first instance directly to the SAC. Some jurisdictions provide for a leap-frog procedure in certain fields of law: Such a procedure is known in Finland in the field of tax law, in Hungary in labour law and in Latvia in public procurement cases. France provides a leap-frog procedure in several fields of law, although the total number of cases has been relatively low (21 in 2017, 19 in 2016, 74 in 2015 and 288 in 2014 – the year of municipal and regional elections). Among the relevant fields of law are parts of social and labour law, communal taxes, driving licenses etc.).

Other jurisdictions are open to leap-frog procedures according to abstract criteria: In Ireland e.g. this procedure may apply to cases of general public importance or in the interestof justice. Germany allows for such a procedure, if the court of first instance admits it and both parties agree and only questions of law are being raised before the SAC. In Portugal the leap-frog procedure is open to cases which have a value of at least 500,000 € and which only concern questions of law.

f) Quotas of Success

The quotas of success of applications to grant leave to appeal, as far as given, vary from 1 to 62 %. They are displayed in the following table:

Jurisdiction	Leave to Appeal Granted (in %)
Sweden	1-2
Estonia	10
Norway	10-14
Finland	10-20
Germany	15
Denmark	17
Czech Republic	20
Spain	20-30
France (cassations)	25
Great Britain	33
Ireland	37
Latvia	40
Portugal	40
Bulgaria	62

5. Factual Filters in Jurisprudence

To most jurisdictions the question whether factual filters have been established by jurisprudence in the absence of a filter system was not applicable (AT, BE, DE, DK, EE, ES, FI, FR, GB, GR, HR, IE, LV, NO, PT, SE, SI). Even among those members whose jurisdiction does not have a filter system as scrutinized in question 4 the majority gave a negative answer (BG, CZ, LT, PL, SK). Hungary and Italy pointed out, that factual filters in form of requirements of admissibility were not established by jurisprudence, but by the law. Next to general prerequisites of admissibility Switzerland pointed out that a simplified procedure would be applied, if the appeal was manifestly inadmissible, insufficiently motivated or abusive. In this case the president of the court can decide by him- or herself. Abusiveness is also a category in Cyprus and the Netherlands. Statistically in a single digit number of cases Luxemburg knows the nullity of an appeal, if the other parties are not correctly notified of the appeal.

6. Relation of Filters to the Functions of the SAC

As far as the relation of the functions of the SAC and relevant filter systems have been treated in the members' contributions there seems to be a more or less unanimous emphasis of the superior function of the unification of the law. This thought is expressed in many ways when members stress the unification of the law (DE, EE, LV, SI), the necessity of giving guidance to the lower courts (PT, SE), the further development of the law (DE, EE, LV, NO), the fundamental importance of a legal question (GB, NO) or the grand lines of jurisprudence (FR). While these aspects describe the exigencies of functions of a higher order, taking into view the whole legal system rather than the single case, there is no denial that every court's mode of operation is based on single cases. So, Latvia found the adequate description by stating that the filter system enables the SAC to balance the function of unifying the law with the function of granting single case justice. Another point was made by only one member, yet it may apply to more: Finland pointed out that the filter system is an effective direction of the resources of the SAC.

7. Constitutional Appeals Provisions

The right to an appeals procedure is guaranteed in the constitutions of Bulgaria, Cyprus, Estonia, Finland, Greece, Croatia, Hungary, Ireland, Italy, Latvia, Poland and Slovenia. Whereas this right to an appeal amounts to an individual right of the complainant, the constitutions of other jurisdictions only provide for an institutional guarantee of an appeals court (AT, BG, CZ, DE, LT, LU, NO, PT, SE). Belgium and the Czech Republic only know the right to an appeal in civil (BE) or penal (CZ) courts. Among those jurisdictions Austria, Belgium, Italy, Portugal and Sweden have expressly stated that their constitutions contain no further regulations about the appeal procedure. In Ireland next to the appellate court structure the threshold of the granting leave to appeal also forms part of the constitution. According to Greek constitutional law the constitutionally guaranteed right to an appeal may be modified, but not abolished by law (likewise Croatia and Poland). The constitutions of Switzerland, Germany, Denmark, Spain, France, Great Britain, Lithuania, the Netherlands, Serbia and Slovakia make no mention of the right to appeal or the appellate procedure.

8. Public or Academic Debate

There is a public or academic debate about the appeal's procedure in many jurisdictions. Apparently, the mainstream direction of discussion is towards a stricter access to an appeal's procedure. In this sense the appeal's procedure is presently being discussed in Switzerland and the Czech Republic. On the contrary, in Germany the discussion is

about loosening the very strict grip on the appeal's procedure applied to appeals to the higher administrative courts in cases of asylum and international protection with the object of producing more guiding and unifying jurisprudence in this field of law which currently has produced a rather scattered first instance jurisprudence. Estonia has just recently, in 2018, extended its filter system on "minor impingements". Spain is discussing the introduction of a general double hearing, thus consequently establishing a second instance before the cassation procedure. In Finland the extension of the request to leave to appeal as a general rule is under discussion. In France a discussion among academics and within the Cassation Court has led to a proposal to the Garde des Sceaux (Minister of Justice) introducing a filter system in civil cases. In Hungary a new and independent administrative court branch has just been established by law. It will be in force as of 1 January 2020. Details will be subject to legislation in 2019. In Lithuania new legislation concerning filters for the appeal's procedure is waiting for its adoption by parliament. In Latvia discussions have calmed down after introducing new filters in 2017. In the Netherlands there is a controversy in the academic world: One side proposes to establish a filter system in the Council of State in order to enable it to better fulfil the function of ensuring the uniform application of the law. The other side argues that restrictions to the appeal's procedure before the lower courts should be lifted, in order to improve single case justice. Finally, in Serbia the judicial system is currently in a reform process including the introduction of a two-tier administrative judiciary.

III. Implementation/Procedural Aspects

1. SAC as Court of First Instance: Possible Contents of Decisions

The question about possible contents of decisions as far as the SAC (also) serves as a court of first instance was not applicable to several members (AT, CH, CY, DK, EE, GB, IE, IT, NO). The Czech Republic only has a first instance competence in electoral matters and matters of political parties. Others pointed out that in this case the regular rules applied which were also applicable for administrative courts of first instance (DE, ES, LU [although in only very rare cases], PL).

The extent and diversity of possible decisions differ strongly between the scrutinized jurisdictions. It seems that the minimum standard of decision is the cassation of the administrative decision found in violation of the law. This form of decision is applicable in Belgium, Bulgaria, Germany, Spain, Finland, France, Greece, Croatia, Luxemburg, the Netherlands, Portugal, Sweden, Slovenia and Slovakia. Apart from administrative acts Lithuania elucidated its competence to declare the (un)lawfulness of regulatory acts and Ireland emphasized its competence to decide on the constitutionality of bills.

Further possibilities to decide as a first instance court are to oblige the administrative authority to issue a (new) administrative act (DE, ES, FI, GR, HR, LV, NL, PT, SE). While Germany explained that apart from discretionary decisions the court can precisely determine the content of the decision to be rendered by the administrative authority, Spain pointed out that courts cannot determine these specifications. In Germany, Spain, Finland, Greece, Croatia, the Netherlands and Portugal the court may also oblige the administrative authority to issue a new discretionary decision – without determining its content. Some SACs also have the competence to oblige the administrative authority to act in a certain way other than an administrative act (BE, BG, DE, ES, FI, FR, GR, HR, LV, NL), e.g. in form of omission, payments, indemnity (BE, FR, HR).

In only a minority of jurisdictions the SAC is also competent of issuing the administrative act itself (FR [a modified or a new administrative act], HR, LU [if provided for by law], NL, SE [in tax issues only], SI [including the decision about damages], SK). Only in the Netherlands this may also include the adoption of a discretionary decision by the court itself.

Greece explained that the SAC may determine the point in time from which an annulment becomes valid. This seems especially important in procedures which factually affect a large number of people (e.g. payment of government employees). The Hungarian Curia is mostly competent in first instance to decide on local government issues. In this context it my annul a local government's decree or authorize the competent control organ of a local government to adopt a local government decree, if the latter refused to do so itself.

The Dutch Council of State also disposes of great flexibility in deciding about a time limit for the administrative authority to adopt a certain decision, declaring that legal consequences of an illegal act remain in effect, providing for remedies or fixing the damages caused by illegal acts of the administrative authority.

2. SAC as Court of Appeal: Possible Contents of Decisions

As far as the SAC serves as a court of appeal it seems to be its characteristic capacity to annul the decision of the lower court and remit the case back to this lower court (CH, CY, CZ, DE, EE, ES, FI, FR, GB, GR, HU, IE, IT, LT, LV, NL, NO, PL, PT, SE, SI, SK). Several members have pointed out that in such a case of cassation (Ireland has explained that the term "cassation" is not being used in the Anglo-Saxon legal tradition) the SAC may also decide the case itself within the margin the lower court had had (DE, FR, GB, IT, LT, LU, PL). It may be estimated that this applies to more jurisdictions, since this aspect was not explicitly asked for in the questionnaire and accordingly there was no direct need to present this information. In this context Spain has further ex-

plained that the SAC can also order the undoing of false proceedings of lower instances. Germany and Estonia mentioned the possibility to annul the judgment of the higher administrative court and at the same time uphold the judgment of the first instance administrative court.

Similar to question III.1. many members have explained that the SAC is also competent to annul the administrative decision (BG, CH, CY, CZ, DE, DK, EE, ES, FI, BG, HR, HU, IE, IT, NL, NO, PT, SE, SK), and to oblige the administrative authority to issue an administrative act (AT, BG, CH, DE, DK, EE, ES, FI, BG, HR, HU, IE, IT, NL), to issue a discretionary decision (CH, DE, DK, EE, ES, FI, GB, HR, HU, IE, IT, NL) or to act in a certain way other than an administrative act (CH, CY, DE, DK, EE, ES, FI, BG, HR, HU, IE, IT, NL). Much smaller is the number of SACs which are competent to issue the administrative act itself (AT, CH, CY [only in asylum and tax cases], DK, HR, HU [only in appeal not in review procedure], NL) or even to issue a discretionary decision itself (NL).

Several members have referred to the possibility of remitting the case to the constitutional court (DE, HR, HU, IT, LU, LV). Only in very few jurisdictions there is the possibility of giving (abstract) legal opinions or authoritative interpretations of the law (HU, PL). Great Britain is familiar with the concept of *obiter dicta*; yet, opinions and interpretations can only be given in a certain case. Next to this only Hungary provides for legal opinions – only in review procedures.

In a majority of jurisdictions the factual findings of the lower court are binding for the SAC (BG, CH, DE, EE, ES, FR, GB [unless “plainly wrong”], HR, IE, LT, LV, PL, PT, RS, SK). France has explained that (in rare cases) it can declare factual findings of the lower instance false. In Poland also the first instance court does not investigate the facts itself. It relies on the facts the administrative authority has collected in the files. Yet, it scrutinizes, if these facts have been lawfully determined. The binding effect may be void if the proceedings of the lower instance have been found unlawful by the SAC (BG, DE, EE, LV). Cyprus has pointed out that it is not bound by the findings, but still the SAC only treats questions of law; the court is not the decision maker. Greece, Hungary and Slovenia have elucidated that the binding effect exists in revision procedures only, not in appeals procedures.

No binding effect exists in the Czech Republic, in Finland, in Italy, in Luxemburg [depending on the kind of proceedings], the Netherlands and Sweden.

3. Procedural Rules for First Instance Cases at the SAC

As far as the SACs also act as courts of first instance the procedural rules to be applied are in most cases the same as for the usual courts of first instance (BG, CZ, DE, ES, FI, FR, GR, HR, IT, LT, LV, NL, PT, SE, SI, SK), although in a number of these legal systems some specific regulations apply. In the Czech Republic the formal requirements may be higher, the time limits may be different and in electoral cases no legal representation is needed. Also in Slovenia there are special provisions for many cases of fist-instance decision-making of the SAC, like for electoral cases. In Greece there are certain differences like shorter deadlines in cases of provisional protection in asylum law and in certain cases of public procurement. In Lithuania in cases of review of the legality of certain regulatory administrative enactments written instead of oral proceedings are the general rule. The main differences consist of timeframes, too. In the Netherlands the time limits can also be shorter. Additionally, in certain cases about zoning plans parties may be obliged to state all grounds within the time limit of the appeal without being allowed to supplement them later. In Germany natural persons need legal representation before the SAC.

In Luxembourg the SAC has its own procedural rules that are applied in appeals cases and in first-instance cases. Nevertheless these are relatively parallel to the procedural rules of the first instance administrative court, although time limits might differ. In Ireland there are specific procedural rules set out in the constitution for the very rare cases of first-instance competences. Also in Hungry the procedural rules for the very specific competences of the SAC as a court of first instance are specific.

In Poland the procedural rules to be applied by the SAC depend on the subject matter. In cases about disputes over competence the provisions on the procedure before first instance courts are to be applied accordingly. For other cases there are specific procedural rules in specific legislation like the Election Code which provides for shorter time limits. In the case of appeals against resolutions of the National Council of the Judiciary concerning appointments as a judge to the Supreme Court the SAC has to apply the Civil Procedure Code, which might be of tremendous importance. It has to be remembered that the Supreme Court decides on the analogous disputes concerning the SAC.

4. Procedural Rules for Leave to Appeal

As far as the legal systems of the members provide for a specific procedure of leave to appeal to the respective SAC, in many cases there are no different rules of procedure for this procedure of leave to appeal, or the leave is regarded as part of the same procedure (DK, ES, FI, GB, HU, LV, SE, SI).

In some legal orders there are simplified rules of procedure in some respects. In Cyprus the SAC may strike out any appeal that appears to be *prima facie* frivolous without pub-

lic hearing, whereas in general a public hearing is obligatory. Yet, in practice the *prima facie*-rule is not applied. In Switzerland (only in cases which do not contain a legal question of general interest) and in Germany the decision on leave to appeal is decided by three judges, whereas these SACs in general decide in panels of five judges. In Germany also the decision to grant leave to appeal, contrary to the decision on the admitted appeal, does not require an oral hearing. Additionally, the scope of review in the leave to appeal procedure is limited to the alleged reasons which have been brought forward. In France the leave to appeal procedure is not even considered contradictory. The appeal is not communicated to the other party and the SAC does not have to inform the appellant if it bases its decision (of non-admittance) on grounds of public order. Finally, this decision is only reasoned very shortly. Some separate rules exist in Austria and Bulgaria in regard to prompting the appellant to remove deficiencies in his appeal and, in case he fails to do so, to reject the appeal. In Bulgaria there are short time limits both for the court and the appellant provided for in the rules of procedure.

In the Czech Republic decisions of unacceptability of an appeal in a case concerning international protection must be voted unanimously by the chamber.

Separate rules for the procedure of admittance exist in Estonia in Ireland.

Lithuania remarks that since 2019 the admittance of appeal claims takes place in the courts of first instance.

5. Oral Hearings

In a significant number of jurisdictions oral hearings are not required in appeals proceedings (CH, FI, HR, LT, PT, RS, SE). Denmark points out that the meetings of the Appeals Permission Board are not public. Similarly, in Norway the Appeals Selection Committee only conducts written hearings whereas there are oral hearings if leave to appeal is granted. A large number of legal systems differentiate in a similar way in regard to the requirements of oral hearings between the admittance procedure and the procedure of the admitted appeal. In several legal systems there is no oral hearing in the procedure of admittance, whereas in the procedure of the admitted appeal the conduction of an oral hearing is in the discretion of the court (CZ, EE, ES, LV). In Slovenia there are no oral hearings in the procedure of granting leave to revision, whereas in the procedure of the admitted revision (only on points of law) the court may call a public hearing. Yet, in practice the court usually decides in closed sessions. In appeals (also on facts) the court may render its decision with an appellate hearing if evidence is to be presented again or if new facts should be established. In Germany the procedure of admittance does not require an oral hearing, but the procedure of the admitted appeal does, although the parties can waive it, if both do so. In Cyprus and in Poland there is no

procedure of admittance. An oral hearing is obligatory for all court decision-making, although in Poland the parties can waive the oral hearing. Also in Luxembourg as a general rule in all cases an oral hearing is held for the parties to plead, supplement their written allegations and to answer questions the court may have, although the procedure is essentially a written one. In contrast in Bulgaria the court has closed meetings, unless it orders otherwise. Comparably in Switzerland there is usually no oral hearing, unless a judge demands so or if there is no unanimity in the judges' vote. In Austria, once the preliminary proceeding has terminated an oral hearing is to be held if requested and none of the (many) exceptions apply. On the other hand the court can decide to have an oral hearing. In Ireland the determination of applications for leave to appeal is based rather on written submissions than on oral hearings, unless the court decides that an oral hearing is necessary. The constitutional requirement that justice shall be administered in public is met by publishing the application for leave, the respondent's notice and the determination of the court. Similarly, in the United Kingdom the permission to appeal applications are usually decided without oral hearing. Only in a small number they are dealt with orally, for example if they raise a possibility of a reference to the ECJ or are exceptionally sensitive. The substantive appeals are always decided after an oral hearing. In France finally the question whether an oral hearing is held depends on the stage of the procedure: the admittance can be refused in the form of an order by the president of the chamber which is done without public hearing or in a judgement after conclusions of the rapporteur public and public hearing.

6. Binding Effect in Subsequent Cases of Lower Courts and of the SAC

In most jurisdictions the decisions of the SAC in general have no binding effect by law upon lower courts (AT, BE, BG, CH, CZ, DK, DE, EE, ES, FI, FR, HR, IT, LU, LV, PL, PT, RS, SE, SI, SK), although some exceptions have been reported. These apply in those jurisdictions in which a case can be remitted to lower court for a further decision after a cassation/revision decision of the SAC (AT, DE, IT, LV). In Poland the SAC does not only have the possibility to make judgements in concrete cases, but also to adopt uniformity resolutions, both abstract and concrete, which are binding for all lower courts. Abstract uniformity resolutions are to clarify legal provisions whose application have caused disparities in the jurisprudence. They are delivered on request of specified public actors like the President of the SAC or the Public Prosecutor General without a specific link to a concrete case. In contrast, concrete uniformity decisions are to clarify legal issues that raise considerable doubt in the context of a pending case on the request of the panel handling this case. In Greece a decision is binding on lower courts in specific cases, especially when the Special Highest Court declares a statute to be unconstitutional. This also accounts for model or pilot trials which oblige lower courts to stay their proceedings to await the decision of the SAC, which is then binding for them. A comparable

option exists in Austria where the SAC can issue an order if there is a substantial number of similar cases pending or there is the reasonable presumption that this will be the case. This procedure is applied in order to prohibit other courts to make any definite decisions on such cases and to halt time limits for revision appeals. In Portugal there is a possibility to extend the binding effects of a decision in a specific case to other cases in which different persons have challenged an identical administrative act.

Yet, all jurisdictions which do not know a generally binding effect stated that the lower courts tend to follow the decisions of the SAC in similar cases. Some of the members invoked that diverging decisions of lower courts might be subject to appeal giving the SAC the possibility to decide on the proposed alternative solution (CH, CZ, DE, ES, LU, LV, SE, SI), some referred to the principles of legal certainty, coherence and predictability and of equality in combination with the respect for the jurisprudence of the SAC (FR, SI). Italy called it good practice that lower courts follow the decisions of the SAC and Sweden referred to the legal reasoning of the SAC as a guide for lower courts whose "binding" effect depends on its legal soundness and clarity.

Furthermore, some members stated that there are specific requirements for lower courts that want to deviate from a decision of the SAC. Reference was made especially to an increased reasoning that has to address and discuss the jurisprudence of the SAC from which a deviation is intended (CZ, ES, GR, LV [fundamental reasons], SK).

Denmark remarked that the (factual) binding force of decisions of the SAC weakens over the time.

In contrast, in some legal systems the decisions of the SAC are binding to lower courts (CY, GB, HU, IE, LT, NO). The common law members referred to the doctrine of *stare decisis* (CY, GB, IE). This makes deviations of lower courts only permissible, when they can distinguish the case sufficiently to say that either there are factual differences which justify a different decision or that there are different legal issues raised by the case. The same mechanism applies to lower courts in Lithuania.

The SACs in all jurisdictions have the possibility to deviate from its own previous decisions, although there are significant differences in regard to both substantive and procedural requirements. Some members state that they are not bound by their previous decisions (BG, CH, DE, DK, ES, FI, IT, NL, PT, SI). For a number of members a change of the jurisprudence requires an enlarged bench or even a decision of a plenary session (AT, CY, CZ, EE, FI, GB, NO, SE) or an increased reasoning (BE, IT [should be well motivated], LV). For Sweden it is noteworthy that this is based on an internal tradition to follow previous decisions. In France there is an unwritten rule that a deviation should not take place within ten years from the adoption of the decision. Additionally, the deviating decision should be taken by a formation which is more solemn. Some members

made reference to the principles of legal coherence or of legal certainty that should be considered, when deviating from previous decisions (LU, LV, SK). Slovenia pointed out that it is possible to change the reasoning if this is needed to further develop the law or to bring it in accordance with other relevant courts (like the Constitutional Court, the ECJ or the ECtHR). In Ireland courts generally follow decisions of courts of equal jurisdiction. Although it is rare that the SAC deviates from previous decisions it is not legally impermissible ("will depart from an earlier decision for any but the most compelling reasons"). In the United Kingdom the SAC will normally regard a previous decision of the very court (or its predecessor), but will depart if it "appears right to do so".

In Greece the same restrictions to deviating from (previous) decisions of the SAC apply for the SAC as for lower courts.

Some members state that the SAC is bound by its previous decisions (HR, HU, LT, NO). For Italy this is true for the decisions of the plenary which are binding for other panels. For Norway this is to be regarded as a general rule with the possibility to deviate. If the SAC in Norway considers deviating it shall normally bring the case to the Grand Chamber or the plenary. Also, in Croatia there is the possibility to refer the issue to a meeting of all judges. For Bulgaria interpretative decisions have binding effect. Similarly, the conformity resolutions in Poland can be requested by a panel of the SAC to be changed. Also in Hungary, where the SAC is bound by previous decisions, there is the possibility to clarify the question in uniformity proceedings. In Serbia a legal opinion adopted by all judges of a department of the SAC is binding for all panels of this department.

7. Binding Effect of Decisions of other Sections of the SAC

As far as the SACs have different sections, in most cases they are not bound by the decisions of other sections (BE, BG, ES, FI, IT, NL, PL, PT, SI). In Belgium, though, decisions of the plenary enjoy a higher respect.

In some legal systems it requires a decision of an enlarged bench or the plenary to deviate from the decision of another section (AT, CY, EE [special panel], FI, SK). In France departing from the principle of unity of the SAC the same rules apply as for previous decisions.

The SAC in Luxembourg has obliged itself informally to stay as coherent as possible. Also in the Netherlands there are informal means to ensure coherence in the jurisprudence of the SAC: there is a number of informal working groups where issues are discussed that are relevant for a broader discussion.

In some legal orders decisions of other sections of the SAC have a binding effect. In Sweden this the case on the basis of an internal tradition – just as it is with decisions of the same section. In Hungary a departure is only possible on the basis of a uniformity decision. In Switzerland there is the possibility to deviate in a procedure of exchange of views, if there is an understanding. In Italy and in Serbia only decisions of the plenary have a binding effect. In Latvia a deviation is only possible under exceptional circumstances.

In Germany a section cannot deviate freely from decisions of another section. If the other section declares to adhere to its legal opinion, the Grand Senate has to decide (only on the legal question, binding in the instant case). A similar procedure is provided for by special law for situations in which one of the five supreme courts wants to deviate from rulings of another supreme court in a question that affects both jurisdictions.