Programmatic Cooperation Framework for
Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus

Funded by the European Union and the Council of Europe

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Implemented by the Council of Europe

Theme II "Ensuring Justice" – Action 5: Regional dimension for 6 EaP
Project for Regional Dialogue on Judicial Reform in the EaP Countries

Working Group on Regional Dialogue on Judicial Reforms
in the Eastern Partnership Countries

Expert Report on the outcomes of the Working Group's meeting on:

COURTS OF CASSATION AND SUPREME COURTS

With focus on their role in ensuring harmonization of judicial practice

Chisinau, 28 June 2016

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The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.

BACKGROUND

The meeting of the Working Group (WG), on which this report is based, has been organized in implementation of the project for regional dialogue on judicial reforms, within the framework of the joint Council of Europe and European Union Eastern Partnership (EaP) Programmatic Co-operation Framework (PCF). The project aims at fostering dialogue, professional networking and exchanges of experiences among legal professionals in view of addressing outstanding common challenges and consolidating national processes of judicial reform. In this framework, representatives from judiciaries, ministries of justice and bar associations of the EaP countries selected a number of areas of shared interest perceived as most challenging for the respective national reform processes and established three Working Groups that were tasked to examine, with the support of international experts, one of the selected issues in a dedicated meeting.

Topics selected by participants for further analysis included: judicial ethics and disciplinary liability of judges, with a focus on their distinctions and interrelations; e-justice, in particular aspects of electronic case management; legal aid schemes, with special attention to ways to ensure independence of legal aid financed lawyers; independence of judges; selection, evaluation and promotion of judges; the role of Courts of Cassation/Supreme Courts; ways to ensure inclusive and transparent judicial reforms; alternative dispute resolution mechanisms, with a focus on criminal restorative justice and mediation in civil cases; equality of arms between lawyers and prosecutors.

The second meetings of the three WGs were hosted in Chisinau, Republic of Moldova, in June 2016 and focused on the following topics: judges' iselection and career (WG A), high courts (WG B) equality of arms (WG C). Discussions were facilitated by international experts, also tasked to produce a report on the outcomes of each meeting.

This paper provides an overview of the discussions held during the meeting of the WG B, focusing on high courts. It is based exclusively on the information provided by the participants by filling in a questionnaire prepared by the experts and the discussions held during the meeting, supplemented with the comments and inputs by the independent expert. It does not in any way aim at providing an exhaustive presentation or a thorough assessment of the situation in the countries considered, but rather at reporting about the issues presented and discussed by the participants with the purpose of exchanging experiences and possibly identifying areas of common interest for further examination or co-operation.

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Outline

This report establishes that, given the various types of superior courts systems, Eastern Partnership (EaP) countries have a preference for a 'pyramid' system, which gives – in terms of striving for unity of case law – an important advantage, as surely one single superior court (SC) at the top of a judicial pyramid at least avoids challenges in relation to other superior courts.

The basic problem at the heart of this report is a lack of unity of case law, in other words: inconsistency (or: divergence) of judicial practice. This problem can be described as the existence of different interpretations of the same legal norms resulting in different outcomes in cases which are – nevertheless – more or less similar (in the sense that the facts bear a strong resemblance and the applicable legal norms are the same). The following specific challenges are identified: 1) neglect of the case law from the SC by lower courts, 2) workload, 3) new legislation, 4) uniform application of case law from the European Court of Human Rights, 5) the SC not following its own case law at all times and 6) different outcomes in relation to fundamental rights in the case law from the SC and the Constitutional Court (CC).

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not give citizens (parties in legal proceedings) a right to consistency of case law; divergence as such is not an immediate violation to the rights protected by said provision. The principle of legal certainty, as well as other principles underlying the Convention, though, do not allow for a longstanding situation of divergence (conflicting court decisions) and require the application of suitable mechanisms to overcome such situations.

The following tools – mechanisms to face those challenges – are considered: a) the 'classic tools': appeal and cassation, b) research & analysis, c) consultation within and outside the superior courts, d) recommendations by the Plenary Board/Plenum as a tool for striving for unity of case law, e) e-justice as a mechanism for the lower courts to get acquainted with the SC's case law, f) unity of case law through SC judgments in concrete cases, g) specific tools for horizontal issues and h) means to diminish the workload of the SC.

According to European standards, the concept of judicial independence applies to individual judges, not only outside the judiciary but also within the courts. So on the one hand, tools involving a relationship of subordination of judges in their judicial decision-making activity ought to be avoided. On the other hand, an obligation of the lower judge to follow a previous higher court's decision on a point of law arising in later cases is allowed.

This report concludes with input for future discussions in either the EaP countries or the region, in the light of the Chisinau meeting and the applicable European standards. This input relates to, first, best practices from other superior courts systems, secondly, the need for (more) specific empirical data on divergence and the role of academic scholars in this respect and, finally, finding a balance between existing tools and their best application on the one hand and additional tools on the other hand.

List of frequently used acronyms and abbreviations

AJD	Administrative Jurisdiction Division
CC	Constitutional Court
CoE	Council of Europe
EaP	European Partnership
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
GC	Grand Chamber
RSG	Regional Steering Group
SC	Superior Court
WG	Working Group

1. Introduction

1.1 The road to the Chisinau WG-meeting

The meeting of the Working Group (WG) in Chisinau, Moldova, was organised within the framework of the joint Council of Europe and European Union Eastern Partnership (EaP) Programmatic Co-operation Framework implementing the project for regional dialogue on judicial reforms. The project aims at fostering dialogue, professional networking and exchanging experiences among legal professionals in view of addressing outstanding common challenges and consolidating national processes of judicial reform. In this framework, representatives from judiciaries, ministries of justice and bar associations of the EaP countries selected a number of areas of shared interest perceived as most challenging for the respective national reform processes and established three Working Groups that were tasked to examine, with the support of international experts, one of the selected issues in a dedicated meeting.

The present topic – Courts of Cassation/Supreme Courts with focus on their role in ensuring harmonization of judicial practice – was selected by the Regional Steering Group (RSG) to be debated in Chisinau, Moldova, in June 2016. The purpose of each WG meeting is first, to exchange information and views on experiences and lessons learned with regard to the topic concerned both from the region and the wider Council of Europe area; secondly, to increase awareness of relevant European and international standards; and finally, to identify shared challenges and possible ways in which these could be dealt with.

Participating in the WG's meeting were RSG members, international experts from the Netherlands, Sweden and Croatia, civil society representatives and institutional experts from the EaP countries (**annex 1**). On 6 June 2016 the CoE Secretariat sent out a questionnaire provided by the international consultant (**annex 2**) to the participating WG members and, as there would be no RSG Members representing Georgia, to an Institutional Expert from that country. On 20 June 2016 all six contributions were ready for analysis by the International Consultant who had the opportunity to receive some additional information from various contributors via e-mail. Together with information and ideas shared by the participants during the meeting, these replies are at the basis of this report. This report focuses, first, on identifying and analysing the critical issues and possible ways to tackle them and, secondly, on pointing out topics for future discussions in either the countries or the region.

1.2. The path followed in Chisinau

The programme (**annex 3**) basically followed the path set out in the questionnaire (**annex 2**), which meant that the meeting addressed: a) the superior courts systems in the various countries; b) challenges in ensuring harmonization of legal practice; and c) tools for ensuring harmonization of case law. Nevertheless, the path in particular followed the directions indicated by the WG members in their contributions and by the participants. In the morning session applicable European standards and the main problems and obstacles were discussed, whereas the afternoon sessions focussed on mechanisms to solve them and on experiences in Sweden, Croatia and the Netherlands.

As the meeting started with an introduction of the relevant European standards, first the relevant European standards for institutional judicial reforms in relation to superior courts were indicated, secondly those on the harmonization of case law and, finally, on judicial independence within the courts. The view of relevant European standards was presented as a bird's-eye view, for the role of Courts of Cassation/Supreme Courts in ensuring harmonization of judicial practice is indeed a very broad subject. Although the view was given prior to the discussions on 'challenges and (possible)

tools', during the meeting it turned out that these standards were indeed the most relevant to the discussions.

It was stressed that there is quite a variety of binding (such as provisions of treaties to which the EaP countries are a party) and non-binding (such as recommendations) standards on the European level. The meeting focussed on Council of Europe-sources. It was submitted that the European Union provides for some equivalent sources. As none of the countries currently is a member of the EU, the meeting decided not to elaborate on corresponding sources within the EU framework. Some standards have an equivalent on a global scale, too. However, the participants agreed that European standards would suffice for the time being. An extract of these European Standards (in a chronological order) had been sent to the WG members in advance (**annex 4**).

1.3 Guide to this report

The main part of this report is divided in three sections: superior courts systems (§ 2), challenges or critical issues (§ 3) and tools or possible ways to tackle them (§ 4). Each section will address the applicable European standards. The report concludes with input to future discussions (§ 5).

2. Superior courts systems

The term 'superior courts' refers – in the context of the meeting and of this report – to Courts of Cassation, Supreme Courts and other Highest Courts. For a court to be a superior court, its judgments must be final. Appeal (in cassation or otherwise) cannot be brought against its judgments. The WG agreed that Constitutional Courts and Tribunals have a distinct position in this regard.

2.1 A quick tour of European Superior courts systems

The WG took a (very) quick tour of Europe identifying the various superior courts systems.[1] As proposed in the questionnaire, four types of superior courts systems can be identified in the Council of Europe Member States.

a) 'Pyramid' system

Some countries have a 'pyramid' system as there is only one superior court at the top of the judicial pyramid.[2]

Best practice: Croatia
The Supreme Court of the Republic of Croatia is the highest court in every field of the law, including administrative law. The Supreme Court provides for both individual justice and system management, as Mr BRATCOVIC explained at the Chisinau meeting. System management is the term he used for uniformity of case law. It means offering guidance to lower courts. The task of the Supreme Court in ensuring uniform application of laws has a basis in the Constitution (Article 116(1)). The Supreme Court itself is divided in two Departments: a Criminal Department and a Civil Department. The Supreme Court hears cases in revision. In Croatian law, a revision is considered to be an extraordinary legal remedy. It neither prevents the enforceability of the judgment it is directed against, nor (unlike in Germany and Austria) does it prevent the judgment from becoming *res iudicata*. However, if the revision is well-founded, the judgment under discussion can be altered or set aside. Thus (unlike, for example, the French Court of Cassation), the supreme court is not only empowered to quash the appellate court`s judgments, but can replace them with their own.

A variant of a pyramid system (the 'pyramid plus' type) can be found in a state like the United Kingdom of Great Britain and Northern Ireland in which various countries or regions within the state have their own court structures and highest courts and in which a 'central' or 'common' superior court concentrates on cases of the greatest importance affecting the whole population on request.

b) 'Twin peaks' system

Other countries have a 'twin peaks' system for there are two superior courts, most often a Court of Cassation or Supreme Court and a separate Supreme Administrative Court.[3]

[1] For further reading in English *see* for instance: J. GOOSSENS, *The Future of Administrative Justice - Judicial Review of Administrative Action in Comparative Perspective*, Ghent: Faculty of Law 2016; E. MAK, *Judicial Decision-Making in a Globalised World*, Oxford/Portland: Hart 2013; S. MULLER & S. RICHARDS (eds.), *Highest Courts and Globalisation*, The Hague: Hague Academic Press 2010; N. HULS, M. ADAMS & J. BOMHOFF, *The Legitimacy of Highest Courts' Rulings*, The Hague: T.M.C. Asser Press 2009.

[2] E.g. Norway, Denmark, Estonia, Latvia; Russia; Ireland; Slovakia, Hungary, Slovenia, Romania; Spain, Malta, Croatia and Cyprus.

Best practice: Sweden
In Sweden there are basically two columns or twins; Justice ANDERSSON from the Supreme Administrative Court explained: the Supreme Court (in civil and criminal law cases) and the Supreme Administrative Court. Both courts have as their primary task the creation of precedents. The supreme courts' main task is to provide guidance to the courts of first and second instance as well as to lawyers, prosecutors, public authorities and others on how to apply the law (the precedent-forming function).

c) 'Columns' system

Moreover other countries may have a 'columns' system, because there are more than two superior courts, for example a Court of Cassation and two or three highest administrative courts.

Best practice: the Netherlands
The Netherlands at present has no less than four superior courts: the Court of Cassation (civil law, criminal law and tax law; cf. Article 118(2) of the Constitution) on the one hand and three appeal courts on the other hand: the Administrative Jurisdiction Division of the Council of State (AJD; general administrative law, planning law and aliens' law; cf. Article 73(3) of the Constitution), the Administrative Court for Trade & Industry (economic law) and the Central Appeals Court (civil servants' law and social security law). Against judgments from the AJD of the Council of State and the Administrative Court for Trade & Industry no appeal in cassation can be lodged. The judgments of the Central Appeals Court are also final, though in some cases appeal in cassation can be lodged (in relation to the meaning of words in a provision which are the same in civil law). Currently, draft legislation is debated in Parliament, introducing a 'Dutch version' of a 'twin peaks' system, with the Court of Cassation and the AJD of the Council of State as future 'twins'. In this model, the Court of Cassation hears tax law cases and the cases regarding civil servants' law and social security law, whereas the AJD will deal with all other administrative law disputes.

d) Comments

The WG agreed that there are various reasons for the country to make a choice between the various models. First, the historical background and legal traditions of the country concerned may play a role. For instance, it may be argued that countries which used to be part of the Soviet Union have gained experience with a 'pyramid' system. On the other hand, countries which are new or want to make a fresh start may naturally move into the direction of a 'pyramid' system, as it gives them an advantage in establishing unity of case law.

Secondly, a certain view on administrative law and on checks and balances may encourage a country to choose for a 'twin peaks' system. In this respect, France must be mentioned.

Thirdly, a State's structure is a factor to be taken into account. So in the United Kingdom of Great Britain and Northern Ireland, a 'pyramid plus' system guarantees that constitutional questions and certain questions of law which are important to all four countries can be answered by the Supreme Court.

[3] E.g. Sweden, Finland, Lithuania; Belgium, Luxembourg, France, Germany, Poland; Austria, the Czech Republic, Bulgaria; Portugal, Italy and Greece.

2.2 The EaP countries

a) Pyramids and reforms towards pyramids

It was confirmed that at present the superior courts systems in the EaP countries are – or soon will be – 'pyramid' systems. In many EaP Countries the task of the superior court in ensuring uniform application of the law has a basis in the Constitution and/or specific Acts of Parliament.

The system of superior courts in the Ukraine is undergoing change; it will become a pyramid system after the reforms. The courts system in the Ukraine will be changed from 4-layer system to 3-layer system, finally resulting in a classic pyramid. Thematic high courts will be merged into a Supreme Court aiming to make the Supreme Court smaller and sustainable. The Supreme Court will include a Grand Chamber (20 judges and 1 presiding judge) and a Lower Chamber (179 judges).

There were reforms which transformed the system into pyramid in Belarus in 2014. As a result of the 2014 reform the Supreme Court and the Supreme Economic Court now form a single supreme judicial body for civil, criminal, administrative and commercial laws – the Supreme Court at the top of a system of courts with general jurisdiction.

b) Comments

In the WG's meeting the question was brought up whether unity of case law may also have been a reason to choose a pyramid system, as surely one single superior court at the top of a judicial pyramid avoids challenges at the horizontal level (that is challenges to strive for unity of case law in relation to other superior courts, *see* below, § 3). Indeed it was submitted that the judicial systems in the EaP countries are 'more modern' as they are much more recent than systems chosen in Northern, Western and Southern parts of Europe.

2.3 Analysis in the light of European Standards

The key provision is Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the Convention or ECHR), which is given a broad interpretation by the European Court of Human Rights (hereafter: the ECtHR or the Strasbourg Court):

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The ECtHR respects the choice made by States which are a party to the Convention, merely setting some minimum standards:

> 83. (…) A State's choice of a particular criminal-justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention (…).[4]

This quote is from a case on the Belgium criminal law system, but it has been argued that it can be cited as a case with a broader meaning so that it can be applied to different types of system choices within the national States.[5]

[4] ECtHR (GC), *Taxquet v. Belgium*, judgment of 16 November 2010, No. 926/05, § 83.
[5] J. GOOSSENS, *The Future of Administrative Justice. Judicial Review of Administrative Action in Comparative Perspective*, Ghent: Faculty of Law 2016.

As often, the Strasbourg Court sets a minimum; the States can make their own choice, as long as the Convention is not contravened. So the WG looked into the matter which principles are to be taken into account, to find that the principle of legal certainty is of importance:

> 57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty (…).[6]

[6] ECtHR (GC), *Nejdet Şahin and Perihan Şahin v. Turkey*, judgment of 20 October 2011, No. 13279/05), § 57.

3. Challenges faced by Superior Courts

3.1 Identifying the basic problem: inconsistency (divergence) of judicial practice (conflicting court decisions)

The WG especially focussed on the challenges faced by superior courts in terms of ensuring harmonization of legal practice. The WG agreed that the basic problem is a lack of unity of case law, in other words: inconsistency (or: divergence) of judicial practice. This problem can be described as the existence of different interpretations of the same legal norms resulting in different outcomes in cases which are – nevertheless – more or less similar (in the sense that the facts bear a strong resemblance and the applicable legal norms are the same).

It was also felt that these challenges may concern every field of the law (so criminal law, private/civil law, administrative law including tax law) and procedural law as well as substantive law. Moreover, such challenges can occur at every level of the judiciary. Challenges may vary in duration, though. At present it is not entirely clear how big these challenges are; empirical data or many concrete examples have not yet been presented. Be that as it may, the topic had been chosen by the WG, and unity of legal practice is felt to be an issue in the EaP countries.

3.2 Challenges faced by (Superior Courts in) EaP countries and outside the region

Challenges for superior courts with regard to the harmonization of judicial practice may be identified from various perspectives:

- vertical perspective: vis-à-vis lower courts;
- horizontal perspective: in relation to other superior courts or within a superior court (between its divisions) or perhaps in relation to a Constitutional Court; and
- international perspective: in relation to international courts.

Challenges may be identified by judges but also by lower courts, other institutions and civil servants, by parties in legal proceedings especially members of the bar, academic commentators and NGO's.

In this part of the meeting extracts from the replies to the contribution and the correspondence via e-mail prior to the meeting were presented. Each issue was first introduced and in each case, delegations were invited to explain or to make comments.

a) Neglect of the Superior Court's case law (vertical perspective)

There are still judges who neglect the superior court's case law 'misusing the principle of [judicial] independence'. It certainly is a challenge to stimulate these judges to change their attitude. The Moldavian delegation stressed that this was not a tendency. In the beginning of the 2000, judges had the freedom to pursue the judgments as they wished appropriate, however Moldova had come a long way since then in unifying the court practice. What concerns superior courts there is a notable progress. No information on recent cases in which this type of challenge could be identified was available.

The Swedish experience
Justice ANDERSSON said there are very few challenges in terms of harmonization of judicial practice in Sweden. Although there is no provision stipulating that precedents are binding, the lower courts

and the authorities follow them. The challenge today is the international perspective. Since Sweden joined the European Union in 1995 there is an uncertainty as to whether the SC's precedents will be overruled by the Court of Justice of the European Union (ECJ). The preliminary ruling procedure at the ECJ has entailed that the courts bring the matter before the ECJ. That, she added, is not negative, though. Justice ANDERSSON also stressed that the judges in her country are ambitious. Thus they are eager to study the judgments and precedents from higher courts to secure that their judgments are affirmed.

b) New legislation (vertical perspective)

The reasons for the lack of uniformity in the application of the law in individual cases may be related to the adoption of new legislation. In Belarus this challenge has been clearly identified and it is recognized by more countries. Also in the Ukraine this challenge is known, for instance in relation to new legislation with regard to the national police.

c) Workload (especially vertical perspective)

It was reported that the expanding workload is one of the largest challenges for the judiciary as a whole. Because of this workload, the lower courts sometimes do not have enough time to do more thorough research into the case law from the superior court. For instance, the Armenian delegation pointed out a notable increase of civil cases (from 45,000 in 2013 to 115,000 in 2015). In Azerbaijan 40 judges hear 12,000 cases per year as opposed to e.g. Lithuania where 40 judges decide on 600 cases per year. It was argued that the number of cases in Moldova is not high as it is. However, cases differ greatly from one to another, thus 'the same approach' arguably cannot be taken in most of the cases, which creates a considerable workload.

The Croatian experience

In 2014 almost 50% of the cases brought before the Supreme Court of the Republic of Croatia was inadmissible. The caseload is increasing, whereas the number of judges decreases.

Mr BRATCOVIC discussed the decision taken by the Constitutional Court of Croatia on 20 December 2006 (Official Gazette nos. 2/07 and 96/08; Bulletin on Constitutional Case-Law of the Venice Commission, Edition 2007/1, CRO-2007-1-002). Several thousands of state employees had initiated proceeding on the non-payment of their so-called 'Christmas-money' (CC-report to the Croatian legislature of 24 February 2005, No. U-X-835/2005). The Constitutional Court of Croatia held that, starting from the fact that since 2000 most constitutional complaints were lodged against second-instance judgments in civil suits against which revision on points of law was not permitted, the constitutional complaint, and not revision on points of law, had become the legal remedy for ensuring the uniform application of laws and equality of all. Accordingly, there was a disruption of constitutionally-created jurisdiction in the Republic of Croatia between the Constitutional Court and the Supreme Court, because the legal framework did not enable the highest-ranking court in the country to ensure the uniform application of the law and equality for all on the entire territory of the Republic of Croatia. In short, the Constitutional Court ruled that the Supreme Court of Croatia could not fulfil its constitutional role.

d) Application of the ECtHR's case law (international perspective)

Stimulating correct and therefore uniform application of the ECtHR's case law is regarded as a challenge several countries have in common. For instance, the delegation from Azerbaijan found that one of the challenges that the superior court faces is ensuring harmonization of court practice from an international perspective and from the perspective of the ECtHR. In Georgia the main challenge for the judges is the barrier of the foreign language. In Armenia a serious handicap in the application of the ECtHR case law by the courts is also the limited knowledge of languages. Only the judgments with respect to Armenia are translated into Armenian by the Ministry of Justice, but the rest of the ECtHR case law, which is also compulsory for the Armenian courts, is not. At the same time, it felt that the Court of Cassation of Armenia has 'the crucial task' of setting standards and clarifying the interpretation and application of the ECtHR's case law in order to guide the lower courts.

This too, is a challenge for the superior courts as they are supposed to provide guidance. In Moldova the linguistic issue was apparently felt to be less challenging, as most of the judgments were said to have been translated into Romanian. In addition, a new law was mentioned during the meeting on the basis of which a judge can request translation of a specific case, if relevant.

e) Issues from a horizontal and/or constitutional perspective

The challenge was further defined as different approaches followed in relation to other superior courts or – in 'pyramid' systems such as in the EaP countries – *within* a superior court, so between its 'Divisions': 'Boards' (Moldova and Belarus) or 'Chambers' (Armenia, Azerbaijan, the Ukraine and Georgia). In order to know whether there are issues in terms of divergence on the horizontal level, it is of importance to know whether there are overlapping areas of the law covered by two or more Divisions within the superior court concerned.

The Dutch experience
In the Netherlands, with its columns system, horizontal issues may arise between the four highest administrative courts (for instance on provisions of the General Administrative Law Act or the ECHR) or between a superior administrative court and the Court of Cassation as the highest court in criminal or civil law cases (for instance on the Netherlands Constitution (as there is no Constitutional Court), the ECHR, 'public civil law' and 'administrative penal law'). An example is the case law from the Administrative Jurisdiction Division of the Council of State and Court of Cassation on alcohol-locks in cars in which the question had arisen whether there was a *criminal charge* in the sense of Article 6(1) of the Convention.

It became apparent that challenges in the horizontal perspective could not really be mapped, as there was not much information based on research in this respect. The problem was recognised, though. In the Ukraine for example it was recognised, as the judicial system was in constant reform, creating procedural uncertainties.

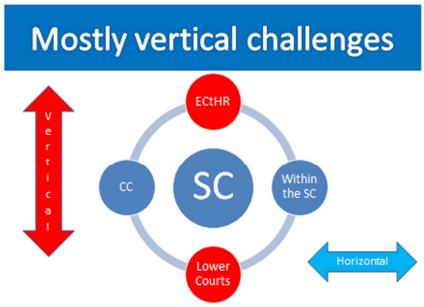
In Moldova research had been carried out by the Legal Resources Centre (an NGO) in relation to Recommendation No. 65 on application of Article 1811 § 3 of the Custom Code. It was established that in cases regarding the sanctions applied in corruption cases, the Supreme Court of Justice followed its own recommendation, whereas in other cases, regarding litigations with the custom

bodies, it was submitted that the Supreme Court of Justice only in about 50% of the cases observed its own recommendation.[7]

Whereas it was recognized by the WG that constitutional justice differs from ordinary justice (e.g. civil law, administrative law and criminal law), it considered the question whether there are problems in case of overlapping human rights protection, that is, if a fundamental right relied on in court is protected by both the Constitution (CC jurisdiction) and the ECHR (SC jurisdiction). In the Ukraine divergence between case law created by the Constitutional Court and superior courts was thought to be a possibility with regard to tax cases.

3.3 Comments

Whereas little can be said about the quantity and diversity of the issues identified by the WG, it is submitted that most challenges are 'vertical', that is from the superior court in relation to an international court (international perspective) or to lower courts.



It follows from this observation that the discussion on tools – that is: mechanisms for addressing these challenges – ought to take this perspective into account specifically.

3.4 Analysis of the challenges in the EaP countries in the light of European Standards

The question arises if and when divergence (lack of uniformity of case law) really becomes problematic in the light of European standards. In the case of *Santos Pinto v. Portugal* the ECtHR held that the possibility of conflicting court decisions (= 'divergence') is an inherent trait of any judicial system which is based on a network of trial and appeal courts (cf. 'vertical challenges') and within the same court (cf. 'horizontal challenges').[8] This means that divergence does *not as such* constitute a violation of Article 6 ECHR. In other words: conflicting judgments are *not in itself* a reason for the ECtHR to hold that Article 6(1) ECHR has been violated, as the ECtHR confirmed in *Şahin & Şahin v. Turkey*.[9] On the other hand, there is no right (for citizens, parties in legal proceedings) to consistency of case law. The ECtHR considers that the requirements of legal certainty and the protection of legitimate expectations do not confer a right to consistency of case law.[10] But when does divergence become unacceptable?

The WG looked into the way in which divergence (that is: conflicting court decisions, a lack of unity of case law) is reviewed by the ECtHR, in particular in the Grand Chamber judgment in the case of *Şahin*

[7] V. GRIBINCEA & I. CHIRTOACA, *Retroactive increase of customs duties – is the judicial practice in this area uniform?*, Chisinau: LRCM 2015.
[8] ECtHR, *Santos Pinto v. Portugal*, judgment of 20 May 2008, No. 39005/04, § 41.
[9] ECtHR (GC), *Nejdet Şahin and Perihan Şahin v. Turkey*, judgment of 20 October 2011, No. 13279/05).
[10] ECtHR, *Unedic v. France*, judgment of 18 December 2008, No. 20153/04, § 74.

& Şahin v. Turkey. From this judgment it stems that the Strasbourg Court will examine the following elements:

- whether 'profound and long-standing differences' exist in the case law of a superior court;
- whether the domestic law provides for machinery for overcoming these differences;
- whether that machinery has been applied;
- and, if appropriate, to what effect.[11]

[11] ECtHR (GC), *Nejdet Şahin and Perihan Şahin v. Turkey*, judgment of 20 October 2011, No. 13279/05), § 53.

4. Tools – mechanisms to face the challenges

4.1 The importance of effective tools and the choice for a (superior) courts system

Tools – mechanisms to ensure consistency in the sense of unity of case law in order to increase the level of legal certainty – are very important to the ECtHR. In *Şahin and Şahin v. Turkey* the Strasbourg Court held:

> "In this regard the Court has reiterated on many occasions the importance of setting mechanisms in place to ensure consistency in court practice and uniformity of the courts' case law (…). It has likewise declared that it is the States' responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments (…)."[12]

It follows from § 3.3 that especially challenges from a vertical perspective – towards lower courts – are to be carefully examined in future discussions.

4.2 Tools in the EaP countries and outside the region

In § 3 the basic challenge (how to respond to or prevent divergence; a lack of unity of case law) was discussed, as well as a number of specific challenges: 1) neglecting the case law from the SC, 2) new legislation, 3) workload, 4) application of case law from the ECtHR, 5) the SC not following its own case law at all times and 6) different outcomes in relation to fundamental rights.

a) 'Classic tools': appeal and cassation

Of course, appeal and cassation are important mechanisms to increase unity of case law, as they give the reviewing higher court the chance to put wrongs right.

[12] ECtHR (GC), *Nejdet Şahin and Perihan Şahin v. Turkey*, judgment of 20 October 2011, No. 13279/05), § 55.

Best practice: Croatia

Mr BRATCOVIC elaborated on attempts at legislative reform in his country. The Supreme Court of the Republic of Croatia can also hear cases in 'exceptional revision', that is based on the finding that the decision raises an important issue of substantive or procedural law that is relevant for securing the uniform application of the law and the equal treatment of citizens.
The mere introduction of the new form of secondary appeal, based on the new understanding of the role and function of the Supreme Court, is not in itself sufficient to change the day-to-day practice. Croatia maintained the value-based secondary appeal simultaneously with the new, public-purpose oriented form of exceptional review. In reply to the critique by the Constitutional Court, new amendments regarding secondary appeal were passed in 2008. The access to 'exceptional' revision was significantly reshaped. For instance, permission to appeal was taken out of the hands of the courts of appeal, and put into the hands of the Supreme Court. The existence of an 'important' issue of law has to be evaluated by a panel of three judges, who could dismiss the secondary appeal as inadmissible by a decision that had to contain the full statement of reasons. There are still open issues and doubts, Mr BRATCOVIC admitted, as one of the questions is whether the two means of recourse will be useful in practice. Perhaps the future will bring one single 'exceptional' recourse in civil law cases.

The past years have seen several reforms in this respect, notably in Belarus, the Ukraine (as mentioned in § 2 above) and in Moldova.

b) Research & analysis

The participating countries used research and analysis as tools to combat inconsistencies, like the summaries of judicial practice made by the Department Analysis of Judicial Practice and Statistics in Azerbaijan, the work of the Scientific Advisory Board with highly qualified specialists in the Ukraine, the Consultative Council with representatives of the legal profession in Georgia and the Superiour Court's Scientific Council in the Republic of Moldova. Also in Belarus the activities of the Supreme Court in the field of harmonizing legal practice include the generalization of judicial practice and explanation of the court's complex issues in relation to the application of new legislation. To this end, the Supreme Court requires and examines a significant volume of cases from the courts on different levels and prepares their review.

Such tools are used also in particular to face the challenges in relation to the application of the ECtHR's case law. The Supreme Court of Georgia has proposed the position of Human Right's consultant, who is to prepare the ECtHR's case law for the judges. In Armenia a Human Rights Unit, composed of three members, makes summaries of ECtHR judgments in Armenian, to analyse the ECtHR's case law and to inform the Court of Cassation on recent developments. Also in Azerbaijan a Human Rights Division has been established in the Supreme Court, the main task of which is learning and disseminating (via regular conferences and seminars for judges, publications and other activities) the case law of the ECtHR.

In any case such research units can facilitate the role of superior courts in striving for unity of case law, not only in respect to the ECtHR's case law, which seems to be a top priority at present, but also for divergence in other fields of the law: a very suitable tool for mapping the challenges.

c) Consultation within and outside the Superior Courts

Consultation is an important tool to face challenges in relation to divergence of case law in EaP countries. This is the case within the superior courts themselves, for instance in Belarus emerging issues are discussed in the judicial board to form a uniform practice.

But also outside the superior courts consultation is used as a tool. For example, in Moldova visits by the superior court to and meetings with lower courts take place.[13] The other way around in civil law cases, lower courts may make requests to the Supreme Court of Justice (advisory opinions under section 122 of the Civil Procedure Code), which may be seen as formal consultation.

d) The Plenary Board/Plenum as a tool for striving for unity of case law

The Plenary Board is "a kind of consultative structure between the Supreme Court and lower courts" according to the delegation from Azerbaijan. In fact, the Plenum or Plenary Board plays an important role in unifying judicial practice in the EaP countries.

In Azerbaijan summaries made by the Analysis Department are subsequently discussed by the Plenary Board which takes a guiding non-binding decision. For example, there is a decision of the Plenary Board of the Supreme Court 'On the court practice in theft, robbery and brigandage cases' from 3 March 2005, to remedy serious discrepancies in the approaches by the lower courts in similar type of cases. Government ministers may be present at hearings on general questions of court practice (*see* section 80 of the Law of the Republic of Azerbaijan on Courts and Judges), though they are not members and therefore they cannot vote.

Another example is Moldova where the Plenum issues explanatory judgments in which the Supreme Court of Justice explains the way in which an entire law can be explained. The Plenum also issues recommendations which are less comprehensive and reflect on a specific provision of the law. This practice started in 2012 and was aimed at 'eradicating the cases of un-harmonized jurisprudence within the courts of first instance and appeal courts', especially in the case of new legislation, in respect of which there is no judicial practice of the Supreme Court of Justice. These recommendations are prepared with representatives from academia and are announced to the courts by publication on the webpage of the Supreme Court of Justice. Since 2012, some 83 recommendations have been issued.

In the Ukraine the conclusion of the Supreme Court regarding the application of a law, set out in its resolution, is mandatory for all public authorities which apply the law concerned. The conclusion should be taken into consideration by other courts of general jurisdiction in the implementation of such law. The court has the right to deviate from the legal position, set out in the conclusions of the Supreme Court, providing the relevant reasons simultaneously.

e) E-justice as a mechanism for the lower courts to get to know the SC's case law

Search engines and other e-justice tools may also be called 'classic tools' which strengthen unity of case law. As this subject had been discussed by the WG in detail in Tbilisi in December 2015, it received less attention in the Chisinau meeting. Be that as it may, e-justice is an important tool while striving for unity of legal practice, for instance for highlighting new case law on new legislation.

[13] This practice is also known in Sweden and the Netherlands.

f) Unity of case law through SC judgments in concrete cases

As will be pointed out below, judicial independence does not stand in the way of a practice or rule striving for the lower courts following earlier judgments given by higher courts, especially superior courts. So usually the reasons for a certain interpretation of the law given in a judgment (together with the prospect of appeal and/or review or cassation if it is not followed) ought to suffice in order for a lower court to follow the superior court's lead. If the lower court disagrees, it can try to convince the superior court, providing reasons for its differing interpretation. If the superior court disagrees though, the lower court is obliged to follow.[14] The superior court should do everything in its power to give its reasons in the clearest possible way. This tool allows every opportunity to guide the lower courts.

Best practice: the Netherlands
In the Netherlands both the Council of State[15] and the Court of Cassation[16] have looked into their reasoning in judgments in recent years. They were inspired by the book *One Case at a Time* by the American scholar Cas SUNSTEIN. For instance the Council of State initiated a research project for which many judgments were studied. The style of reasoning in judgments was studied: was it deep (argumentative) or shallow (leading); was it narrow (not referring to earlier case law) or rather broad (referring to earlier case law). It was submitted that the Council of State would give deeper and broader reasons in cases which are expected to be leading in future cases, when it is about to change its standing case law and on topics on which lower courts differ and for instance in fundamental right cases.

[14] If it does not, there may be exceptional tools like disciplinary sanctioning of judges for non-observance of the harmonized judicial practice, *see* section 4 § 1 under b of Law No. 178/2014 on the disciplinary liability of judges.
[15] J.C.A. DE POORTER & H.J.Th.M. VAN ROOSMALEN, *Motivering bij rechtsvorming*, Den Haag: Raad van State 2009. Available on the Internet (in Dutch) at: <www.raadvanstate.nl/publicaties/publicaties.html>.
[16] *See* for instance (in Dutch): M. LOTH et al., 'Rechtsvinding door de Hoge Raad; de breedte en/of de diepte in?', *Trema* 2007, pp. 317-325.

Best practice: Sweden

In Sweden there has been a strong focus on plain language for more than 20 years. There is a law which provides that official language ought to be appropriate, simple and comprehensive. It is common practice for the courts to cite their own judgments (precedents). If the Superior Court sees that no court follows its case law, it might have to ask itself if its judgment was the best. If not, it might have to quash a previous precedent. In Sweden this is possible, but then the matter must be referred to a plenum, which consists of all the justices in the Supreme Court. That is not often practiced, as there are plenum-cases once or twice a year only and the quashed precedents are often old.

In Armenia the Court of Cassation not only cites its own earlier case law, but also consistently develops it in different judgments. For example, started from 2007, the case law on different aspects and issues of the pre-trial detention was developed in different decisions. The same holds true in fraud cases for instance. In other countries, though, it does not seem to be common practice for superior court to cite from its own earlier case law. In other EaP countries the superior court does cite from its own case law, for instance in Georgia and, if applicable, in Moldova. It is not common, though, it is done from time to time, at least in Azerbaijan.

g) Tools for horizontal issues

Pursuant to section 16 § 3 of the Organic Law on 'General Courts of Georgia' horizontal issued are solved by a Grand Chamber of the Supreme Court of Georgia:

> "Based on a substantiated ruling, the court reviewing a case under cassation procedure may refer the case for examination to the Grand Chamber of the Supreme Court if:
>
> a) in terms of its contents, the case is a rare legal problem;
>
> b) the Grand Chamber does not concur with the earlier legal assessment (interpretation of a norm) of another chamber of review;"

In Azerbaijan a joint temporary Chamber may be created, if a panel of (3) judges of Administrative-Economic Chamber wants to make a decision containing a different approach from the one taken by another panel of the same Chamber. According to section 98 of the Administrative Procedure Code, the panel of judges considering the case shall send it to the created Chamber in a written statement. The decision of the Chamber has a binding effect for all the panels of the Administrative-Economic Chamber. However, if a panel of judges wants to make a decision differing from the one taken by the Chamber, it shall resend it to the Chamber.

Best practice: the Netherlands

In the Netherlands various tools have been introduced to respond to challenges on the horizontal level, so between the various superior courts.[17] For instance, a Committee on Legal Unity has been established, representing all judges and aimed at decreasing the amount of different interpretations and 'prevention'. Superior courts may give judgment on the same day, in order to underline the unity of judicial practice. Here again, the alcohol-lock cases (*see* above, § 3.2 under e) can be mentioned as an example. Besides, there are 'personal unities': judges in one of the three Superior Administrative Appeal Courts have an additional appointment in one the other Supreme Administrative Appeal Courts. Moreover, since 2013 a Grand Chamber can be established *ad hoc*, consisting of 5 rather than 3 judges, representing all 4 superior courts. What's more, since 2013 a conclusion can be taken by an Advocate-General.

h) Diminishing the workload of the Superior Court

The second challenge, the workload experienced by the courts, is a problem in its own right, which also touches on the topic of unity of practice. For instance in Moldova, where the Supreme Court of Justice deals with some 12,000 cases on a yearly basis, in relation to some cases two levels of jurisdiction are introduced rather than the standard three levelled-jurisdiction, in order for the Supreme Court of Justice to concentrate in recourse on points of law. Inspiration may be derived from one of the presentations from outside the region.

Best practice: Sweden

In Sweden 'leave to appeal' is regarded as a useful tool to lower the amount of cases taken up by the Supreme Courts:

- if it is of importance in guiding the application of the law (precedent forming);
- when there has been a judicial error in the lower instances, i.e. a violation of a procedural law;
- if new important evidence or new decisive circumstances have emerged, grounds for a new trial.

4.3 European Standards, in particular on judicial independence within the judiciary

It follows from the ECtHR's case law that mechanisms which are to ensure consistency – that is: unity of case law – are important. The WG also felt that it would be useful to look into the European standards applicable to the situation in which judges – members of lower courts – would actually not be prepared to follow a superior court's guidance, as they felt that such would hamper their independence as a judge.

Recommendation on the Independence, Efficiency and Role of Judges of the Committee of Ministers to Member States of the Council of Europe of 13 October 1994 provides for a starting point, in particular Principle I (2) (d):

[17] *See* a recent lecture by J.E.M. POLAK, the President of the Administrative Jurisdiction Division of the Council of State (*Maaskantlezing 2015*), available on the Internet in Dutch: <www.jhs.nl/binaries/content/assets/jhs/publicaties/maaskantlezing-2015-digi.pdf>.

> "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law. Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary."

The WG recognised that this principle relates to the independence that is required for every judge. Cf. the European Charter on the statute for judges of 1998:

> "1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. (…)"[18]

It was stressed by a Civil Society Representative that independence vis-à-vis others outside the judiciary may also be important in ensuring unity of case law, arguing that a judge in the lower court who wishes to follow the lines set out in the superior court's case law, needs to be independent towards anyone outside the court holding him or her back. Be that as it may, the WG felt that independence within the judiciary itself was of additional importance to the present subject.

In this respect it was stressed that judicial independence does not stand in the way of a practice or rule striving for the lower courts following earlier judgments given by higher courts, especially superior courts. Cf. Opinion No. 1 of the Consultative Council of European Judges:

> "[A] potential threat to judicial independence that might arise from an internal judicial hierarchy (…)
>
> The terms in which [the R (94) 12 Principle] is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case)."[19]

The circumstance that judicial independence does allow for an obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in later cases, does not change, though, the principle of internal judicial independence in the sense that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity.[20]

[18] European Charter on the statute for judges and Explanatory Memorandum, Strasbourg, 8-10 July 1998, General Principles.
[19] Opinion of the Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, CCJE (2001) OP No.1.
[20] Report on the Independence of the Judicial System, Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004.

5. Input for future discussions

It is evident that a lot of hard work has been done in the EaP countries to facilitate the tasks of the superior courts to decrease the amount of conflicting court decisions as much as possible. And it is equally clear, that this topic will be under debate for long, as it is complex and very much linked to other challenges in the EaP countries. For these future discussions, the following input is suggested.

I Superior courts systems

It seems that in choosing for and working towards the establishment of 'pyramid' systems, the EaP countries follow a trend seen in more but not all Eastern European countries. From the point of view of unifying judicial practice, this system gives the countries a good starting position. In Chisinau there were no signs of draft legislation amending the present superior courts systems. The position of the Ukraine is a bit different in this respect, as judicial reform is underway.

Best practices outside the region

It is submitted that best practices from countries with 'twin peaks' or 'columns' systems may be of relevance to the EaP countries as those countries are often forced to pay extra attention to unity of case law, because if they don't, their systems may run extra risks in terms of conflicting court decisions.

II Mapping the challenges

In the Chisinau meeting the following specific challenges have been discussed: 1) neglect of the case law from the SC by lower courts, 2) workload, 3) new legislation, 4) uniform application of case law from the ECtHR, 5) the SC not following its own case law at all times and 6) different outcomes in relation to fundamental rights in the case law from the SC and the CC. Not many judges or advisers to superior courts were present in Chisinau. The same holds true for academic commentators and researchers.

Empirical data

It may be useful for the EaP countries to collect and to share (more) specific data on inconsistencies in case law for the benefit of future discussions in their countries or in the regional context. This makes discussions less abstract and more concrete. There are many tools in the countries; it is their usage and how they work out which seems to be most interesting for further debate on unity of case law. The various Research & Analysis units within or affiliated with the superior courts provide a suitable infrastructure for this purpose.

Moreover, not only the superior courts and their research units but especially academic commentators are likely to oversee inconsistencies. It is respectfully suggested that also academic commentators take part in future (regional) discussions on the role of superior courts in establishing unity of case law, from their independent signalling positions. Superior courts at the end of the day may benefit from sharp analysis in case law reviews and legal reviews.

III In terms of tools

It stems from this report that there are many different tools available for superior courts in EaP countries. Future discussions could easily and primarily focus on the use of existing tools, especially the hidden tool which can be described as better reasoning in decisions.

Superior courts speak through their judgments, too

The Chisinau meeting on tools was much about recommendations and statements by the Plenum. In this respect, the WG explored the boundaries of judicial independence within the courts and within the judiciary. Future discussions in the countries, but surely also in the regional context, may also concentrate on the idea to strengthen unity of case law through the superior court's own case law: by focussing on the justification of judgments. Better reasoning in judgments may be a powerful tool to harmonise legal practice, especially in combination with other tools like e-justice (including case law bulletins) and visits to and from lower courts.

Future discussions could address the question if a doctrine of precedence could be an answer to problems with judges in lower courts who neglect the superior court's guidance and who oppose against unity of legal practice as they wish to make up their own mind in absolute 'freedom'. The Council of Europe's organs have made it clear that the principle of judicial independence within the judiciary does not stand in the way of the obligation for a lower judge to follow a previous decision of a higher court on a point of law arising in later cases.

A first topic for such discussions may be to consider possible benefits for Superior courts of citing their own case law more often or more systematically. Further inspiration may be drawn from the Dutch experience, described above (§ 4.2 under g).

Exploring additional tools

Leave to appeal (from the Swedish experience) or exceptional recourse (from the Croatian experience) may be worth exploring, especially for those countries in which the workload of the superior court itself is a focus point. In any case several participants in the Chisinau meeting took an interest in these tools, described above. Future debates may find a way in balancing the discussion between existing tools and their (best) application on the one hand and possible additional (new, extra) tools on the other hand.

ANNEXES

Annex 1: Extract of relevant European standards

Prepared by the international expert: Ms MARJOLEIN VAN ROOSMALEN

European Standards (extract in chronological order)

- Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6;[21]
- Recommendation on the Independence, Efficiency and Role of Judges of the Committee of Ministers to Member States of the Council of Europe of 13 October 1994, No. R(94) 12;
- European Charter on the statute for judges and Explanatory Memorandum, Strasbourg, 8-10 July 1998;
- Opinion of the Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, CCJE (2001) OP No.1;
- Opinion of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE (2002) OP No. 3;
- Checklist for promoting the quality of justice and the courts adopted by the CEPEJ at its 11th plenary meeting by the European Commission for Efficiency of Justice (Strasbourg, 2-3 July 2008);
- Report on the Independence of the Judicial System, Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004;
- OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (23-25 June 2010);
- Magna Carta of Judges, Fundamental Principles, CCJE (Strasbourg, 17 November 2010); and
- Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)007.

[21] Cf. Article 47 of the Charter of Fundamental Rights of the European Union.

Section 1. Superior Courts Systems: Preconditions for a State's Choice

The choice for a specific superior courts system (cf. the models described in the questionnaire) is to a very high extent a matter for the individual State to determine.

- Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- EHRM (Grand Chamber), *Taxquet v. Belgium*, judgment of 16 November 2010, No. 926/05, § 83

> 83. (…) A State's choice of a particular criminal-justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention (see Achour v. France [GC], no. 67335/01, § 51, ECHR 2006-IV). (…)

Section 2. The Role of Superior Courts in ensuring harmonization of legal practice: Challenges

2.1. Rule of Law

Legal certainty and equality before the law ('equal' application of the law) are elements of the Rule of Law. Cf. the Rule of Law Checklist adopted earlier this year by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), CDL-AD(2016)007. These principles are underlying the European Convention (ECHR), too. Below you may find some cases on Article 6 which are of relevance to our subject.

2.2. Article 6 ECHR and the European Court of Human Rights Case-Law (extract)

Divergence does <u>not</u> constitute a violation of Article 6 ECHR <u>in itself</u>

- ECtHR, Santos Pinto v. Portugal, judgment of 20 May 2008, No. 39005/04, § 41:

> 41. A cet égard, la Cour reconnaît que l'éventualité de divergences de jurisprudence est naturellement inhérente à tout système judiciaire reposant sur un ensemble de juridictions du fond ayant autorité sur leur ressort territorial. Elle admet par ailleurs que de telles divergences peuvent également apparaître, comme en l'espèce, au sein d'une même juridiction. Cela, en soi, ne saurait être contraire à la Convention. [* translation : see § 51 of the *Şahin*-judgment below]

No right to consistency of case-law

- ECtHR, *Unedic v. France*, judgment of 18 December 2008, No. 20153/04, § 74:

La Cour considère cependant que les exigences de la sécurité juridique et de protection de la confiance légitime des justiciables ne consacrent pas de droit acquis à une jurisprudence constante. [* Unofficial translation: "The Court considers, though, that the requirements of legal certainty and the protection of legitimate expectations do not confer a right to consistency of case-law."]

Requirements for establishing consistency of the law and of the legitimate confidence of the public

- ECtHR (Grand Chamber), *Nejdet Şahin and Perihan Şahin v. Turkey,* judgment of 20 October 2011, No. 13279/05), § 49-58:

1. General principles

49. The Court reiterates at the outset that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation (…). Its role is to verify whether the effects of such interpretation are compatible with the Convention (…).

50. That being so, save in the event of evident arbitrariness, it is not the Court's role to question the interpretation of the domestic law by the national courts (…). Similarly, on this subject, it is not in principle its function to compare different decisions of national courts, even if given in apparently similar proceedings; it must respect the independence of those courts (…).

51. The Court has already acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (…).

52. The Court has been called upon a number of times to examine cases concerning conflicting court decisions (…), and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention (…).

53. In so doing it has explained the **criteria** that guided its assessment, which consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied and, if appropriate, to what effect (…).

54. The Court has also been called upon to pronounce judgment on conflicting decisions that may be made within a single court of appeal (…) or by different district courts ruling at last instance (…). In addition to the "profound and long‑standing" nature of the divergences in issue, the legal uncertainty resulting from the inconsistency in the practice of the courts concerned and the lack of machinery for resolving the conflicting decisions were also considered to be in breach of the right to a fair trial (…).

55. In this regard **the Court has reiterated on many occasions the importance of setting**

mechanisms in place to ensure consistency in court practice and uniformity of the courts' case-law (…). It has likewise declared that it is the States' responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments (…).

56. Its assessment of the circumstances brought before it for examination has also always been based on **the principle of legal certainty** which is implicit in all the Articles of the Convention and constitutes one of the fundamental aspects of the rule of law (…). Indeed, uncertainty – be it legal, administrative or arising from practices applied by the authorities – is a factor that must be taken into consideration when examining the conduct of the State (…).

57. In this regard the Court also reiterates that the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty (…). The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (…).

58. The Court points out, however, that the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (…). Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (…).

Section 3. Tools for ensuring harmonization of judicial practice by Superior Courts: Preconditions for Harmonization, in particular (internal judicial) independence

It turns out that discussing tools for superior courts for the purpose of harmonizing judicial practice raise specific questions in relation to the independence of individual judges vis-à-vis the (superior) courts. In this respect the following documents can be cited.

- Recommendation on the Independence, Efficiency and Role of Judges of the Committee of Ministers to Member States of the Council of Europe of 13 October 1994, No. R(94) 12 (extracts);

Principle I - General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges.

2. In particular, the following measures should be taken:

a. The independence of judges should be guaranteed pursuant to the provisions of the Convention and constitutional principles, for example by inserting specific provisions in the constitutions or other legislation or incorporating the provisions of this recommendation in internal law. Subject to the legal traditions of each state, such rules may provide, for instance, the following:

i. decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law; (…)

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect,

from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner. **Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law.** Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary.

(…)

Principle V - Judicial responsibilities

1. In proceedings, judges have the duty to protect the rights and freedoms of all persons.

2. Judges have the duty and should be given the power to exercise their judicial responsibilities to ensure that the law is properly applied and cases are dealt with fairly, efficiently and speedily.

3. Judges should in particular have the following responsibilities:

a. to act independently in all cases and free from any outside influence;

b. to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention;

(…)

f. except where the law or established practice otherwise provides, to give clear and complete reasons for their judgments, using language which is readily understandable;

g. to undergo any necessary training in order to carry out their duties in an efficient and proper manner.

- European Charter on the statute for judges and Explanatory Memorandum, Strasbourg, 8-10 July 1998, General Principles (extract)

1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects **from the courts of law and from every judge** to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. (…)

- Opinion of the Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judges, CCJE (2001) OP No.1, § 64-69

Independence within the judiciary

64. The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

65. Recommendation No. R (94) 12, Principle I(2)(a)(i) provides that "decisions of judges should not be the subject of any revision outside the appeals procedures as provided for by law" and Principle I(2)(a)(iv) provides that "with the exception of decisions on amnesty, pardon or similar, the

government or the administration should not be able to take any decision which invalidates judicial decisions retroactively". The CCJE noted that the responses to questionnaires indicated that these principles were generally observed, and no amendment has been suggested.

66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d). **This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case).**

67. Principle I (2)(d) continues: "Judges should not be obliged to report on the merits of their cases to anyone outside the judiciary". This is, on any view, obscure. "Reporting" on the merits of cases, even to other members of the judiciary, appears on the face of it inconsistent with individual independence. If a decision were to be so incompetent as to amount to a disciplinary offence, that might be different, but, in that very remote case, the judge would not be "reporting" at all, but answering a charge.

68. The hierarchical power conferred in many legal systems on superior courts might in practice undermine individual judicial independence. One solution would be to transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary. This brings one back to the recommendation of the European Charter on the statute for judges, to which attention has already been invited under the heading of The appointing and consultative bodies.

69. Court inspection systems, in the countries where they exist, should not concern themselves with the merits or the correctness of decisions and should not lead judges, on grounds of efficiency, to favour productivity over the proper performance of their role, which is to come to a carefully considered decision in keeping with the interests of those seeking justice.

- Opinion of the Consultative Council of European Judges on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, CCJE (2002) OP No. 3:

12. The powers entrusted to judges are subject not only to domestic law, an expression of the will of the nation, but also to the principles of international law and justice as recognised in modern democratic societies.

13. The purpose for which these powers are entrusted to judges is to enable them to administer justice, by applying the law, and ensuring that every person enjoys the rights and/or assets that are legally theirs and of which they have been or may be unfairly deprived.

14. This aim is expressed in Article 6 of the European Convention on Human Rights which, speaking purely from the point of view of users of the judicial system, states that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". **Far from suggesting that judges are all-powerful, the Convention highlights the safeguards that are in place for persons on trial and sets out the principles on which the judge's duties are founded: independence and impartiality.**

(…)

16. Independence of the judge is an essential principle and is the right of the citizens of each State, including its judges. It has both an institutional and an individual aspect. The modern democratic State should be founded on the separation of powers. Each individual judge should do everything to uphold judicial independence at both the institutional and the individual level. The rationale of such independence has been discussed in detail in the Opinion N° 1 (2001) of the CCJE, paragraphs 10-13. It is, as there stated, inextricably complemented by and the pre-condition of the impartiality of the judge, which is essential to the credibility of the judicial system and the confidence that it should inspire in a democratic society.

- Report on the Independence of the Judicial System, Part I: The Independence of Judges, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), CDL-AD(2010)004 (extract);

10. Independence within the judiciary

68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that "judges are subject only to the law". This principle protects judges first of all against undue external influence. It is, however, also applicable within the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle.

69. The basic considerations are clearly set forth by the CCJE:

"64. The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law. It is axiomatic that a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary.

66. The CCJE noted the potential threat to judicial independence that might arise from an internal judicial hierarchy. It recognised that judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges. "Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law" (Recommendation No. R (94) 12, Principle I (2)(d). This means judges individually. The terms in which it is couched do not exclude doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case)."

70. The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries is problematic in this respect.

71. **The Venice Commission has always upheld the principle of the independence of each individual judge**:

"Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the

judgments of lower courts, it should not supervise them." (CDL-INF(1997)6 at 6).

"Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art. 51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art. 50.1) the possibility to address to the lower courts "recommendations/explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium." (CDL-INF(2000)5 under the heading "Establishment of a strictly hierarchical system of courts")

"Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary. The best protection for judicial independence, both "internal" and "external", can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence." (CDL(2007)003 at 61)

72. To sum up, the Venice Commission underlines that **the principle of internal judicial independence means that the independence of each individual judge is incompatible with a relationship of subordination of judges in their judicial decision-making activity.**

- OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (23-25 June 2010):

Internal Independence

35. The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges. In addition, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on lower court judges in other cases. They must not be used in order to restrict the freedom of lower courts in their decision-making and responsibility. Uniformity of interpretation of the law shall be encouraged through studies of judicial practice that also have no binding force.

- Magna Carta of Judges, Fundamental Principles, CCJE (Strasbourg 17 November 2010):

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence. (…)

10. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.

(…)

Annex 2: Programme of the meeting

Second round of meetings of the three Working Groups for Regional Dialogue on Judicial Reform in EaP Countries

Jazz Hotel, Chisinau, Moldova – 28 June 2016

WORKING GROUP B

Courts of Cassation/Supreme Courts
with focus on their role in ensuring harmonization of judicial practice

PROGRAMME

Strasbourg, 21 June 2015

09.00 – 09.30	**Opening and Introduction** By Marjolein VAN ROOSMALEN (the international Consultant)
09.30 – 10.30	**A bird's-eye view of relevant European standards** By the international Consultant, followed by Q&A and discussions
10.30 – 10.45	Coffee Break
10.45 – 12.30	**Mapping the challenges** *Overview and analysis of the most challenging issues faced by the participating countries* By the international Consultant, with comments and inputs by all participants
12.30 – 14.00	Lunch Break
14.00 – 15.30	**Three country reports** *Very short introduction* By the international Consultant, followed by three country reports: *Sweden* presented by Ms Mari ANDERSSON *Croatia* presented by Mr Marko BRATKOVIÆ *The Netherlands* presented by Ms Marjolein VAN ROOSMALEN
15.30 – 15.45	Coffee Break
15.45 – 17.30	**Tools** *Overview and analysis of the tools used in the participating countries* By the international Consultant, with comments and inputs by all participants; followed by discussion of the tools presented in the three country reports and of possible regional approaches or cooperation initiatives **Final remarks**

Annex 3: List of participants

Working Group B

Courts of Cassation/Supreme Courts

28 June 2016

Jazz hotel, Chisinau, Republic of Moldova

List of Participants

Strasbourg, 21 June 2016

International Experts

1.	Ms Marjolein van Roosmalen	Official Secretary to the Constitutional Law Committee of the Dutch Council of State
2.	Ms Mari Andersson	Justice of the Supreme Administrative Court of Sweden
3.	Mr Marko Bratkovic	Teaching Assistant at the Zagreb University

RSG Members

4.	Mr Georgi Khachatryan	Director of the Judicial Projects Implementation Unit SA of the Ministry of Justice of Armenia
5.	Ms Anna Vardapetyan	First Deputy Head of the Judicial Department of Armenia
6.	Mr Farid Madatli	Head of Division of International Relations at Supreme Court of Azerbaijan
7.	Ms Tatiana Moraru	Head of Department of Analysis, Monitoring and Evaluation of the Ministry of Justice of the Republic of Moldova
8.	Ms Tatiana Iurco	Director of Cabinet of the Minister of Justice of the Republic of Moldova
9.	Mr Viacheslav Panasyuk	Deputy Director, Directorate for Justice and Security of the Ministry of Justice of Ukraine
10.	Ms Ina Uhnivenka	Judge of the Judicial Division for Civil Cases of the Minsk City Cassation Court

Civil Society Representatives

11.	Ms Ketevan Kukava	Lawyer at EMC NGO
12.	Mr Giorgi Beraia	Lawyer/Analyst at Transparency International Georgia
13.	Ms Anahit Chilingaryan	Legal Research and Legal Initiatives Department Coordinator at Helsinki Citizens' Assembly-Vanadzor

14.	Mr Vladislav Gribincea	Executive Director of Legal Resources Centre NGO Moldova

Institutional Experts

15.	Ms Iryna Berestova	Head of the Legal Department of the Supreme Court of Ukraine
16.	Ms Inna Berdnik	Judge of the Supreme Court of Ukraine
17.	Ms Ana Shalamberidze	Chief Consultant on Local and International Organisations at the Supreme Court of Georgia
18.	Mr Vazgen Rshtuni	Member of the Council of Court Chairmen, Chairman of the Criminal Appellate Court of Armenia
19.	Mr Emil Alakbarov	Public Official at the Supreme Court of Azerbaijan

CoE Secretariat

Ms Sophio Gelashvili	Head of Unit
Ms Rita Marascalchi	Project Manager
Ms Zaruhi Gasparyan	Project Assistant