ANALYSIS

of the inadmissibility of cases for the consideration by a court of cassation and as to the definition of the significant public interest (including overview of criteria applied by the ECtHR to declare an application inadmissible under Article 35§3(b) of the Convention)

Kyiv

I. Introduction

1. In the framework of the Council of Europe (hereinafter "CoE") project "Support to the implementation of the judicial reform in Ukraine" the international consultant Ms Nina Betetto[1] was requested to deliver analysis to the Ukrainian Supreme Court as to the inadmissibility of cases and as to the definition of the significant public interest, including: a) an overview of criteria applied by the European Court of Human Rights (hereinafter "Court") to declare an application inadmissible under Article 35§3(b) of the Convention; b) description of the procedures/case-law of the CoE member states (2-3 counties as examples) as to how the respective national-level cassation filters function regarding the "minor" cases; c) a description of the procedures/case law of the CoE member states (2-3 counties as examples) as to how the respective national courts determine the cases of significant public interests or of exceptional interest of an applicant (with a focus on the cassation level); d) based on the practice above, recommendations as to the criteria that can be used by cassation courts in Ukraine to determine a "minor" case and cases that are of significant public interests or of exceptional interest of an applicant, in the light of the restriction of access to cassation courts.

2. The main objective of the present analysis is to facilitate the transition towards the unification of jurisprudence at the Ukrainian cassation courts seeking to avoid a "third"-instance-type internal system and concentrate on cases which warrant an examination on the merits. Chapter II. provides an overview of criteria applied by the Court to declare an application inadmissible under Article 35§3(b) of the Convention to be followed by the jurisprudence whereby the Court has found that conflicting decisions of domestic courts were in breach of the fair trial requirement enshrined in Article 6/1 of the Convention (Chapter III.). The analysis summarises selection criteria concerning access to a supreme court (court of cassation) from a comparative law perspective with special focus on Germany and Slovenia (Chapter IV.). Based on the comparatives good practices and European standards, the Chapter V. makes recommendations as to the selection criteria that could be used by cassation courts in Ukraine to determine cases that are of significant public interest, in the light of the restriction of access to cassation courts.

3. This analysis has been prepared on the basis of the CoE Report "Practical guide on admissibility criteria, update 30. 4. 2020, drawn up by the Court; Assessment of the 2014-2018 judicial reform in Ukraine and its compliance with the standards and recommendations of the Council of Europe", Consolidated summary, April 2020 (hereinafter "Assessment report"); the Recommendation No. R (95) 5 of the Committee of Ministers to member states concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases (hereinafter "Recommendation No. R (95) 5"); the Consultative Council of European Judges (hereinafter "CCJE") Opinion No. 20 (2017) on the role of courts with respect to the uniform application of the law (hereinafter "Opinion No. (2017) 20"); Analysis of the answers to the Questionnaire for the preparation of the CCJE Opinion No. 20 (2017): "The role of courts with respect to uniform application of the law", drawn up by the expert Aleš Galič; Reply with respect to Ukraine to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017); and the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe Opinion CDL-AD(2020)022 on draft amendments to the Law "on the judiciary and the status of judges" and certain laws on the activities of the Supreme Court and judicial authorities (Draft law No. 3711). Several relevant academic papers cited below have also been taken into account.

[1]Ms Nina Betetto is a judge of the Supreme Court of Slovenia, the President of the Consultative Council of European Judges.

II. Admissibility criteria from the perspective of the Court

II.1. Background of the new criterion

Article 35 § 3 (b) of the Convention – Admissibility criteria

"3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

...

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

4. A new admissibility criterion was added to the criteria laid down in Article 35 with the entry into force of Protocol No. 14 on 1 June 2010.[2] In accordance with Article 20 of the Protocol, the new provision will apply to all applications pending before the Court, except those declared admissible.[3] The introduction of this criterion was considered necessary in view of the ever-increasing caseload of the Court. It provides the Court with an additional tool which should assist it in concentrating on cases which warrant an examination on the merits. In other words, it enables the Court to reject cases considered as "minor" pursuant to the principle whereby judges should not deal with such cases ("*de minimis non curat praetor*").

5. According to Article 35 § 3 (b) the Court may declare inadmissible any individual application where the applicant has suffered **no significant disadvantage**. Next come **two safeguard clauses**: first, the Court may not declare such an application inadmissible where respect for human rights requires an examination of the application on the merits. Second, no case may be rejected under this criterion which has not been duly considered by a domestic authority.[4] While no formal hierarchy exists between the three elements of Article 35 § 3 (b), the question of "significant disadvantage" is at the core of the new criterion.[5] In most of the cases, a hierarchical approach is therefore taken, where each element of the new criterion is dealt with in turn.[6] However, the Court has also in some cases considered it unnecessary to determine whether the first element of this admissibility criterion is in place.[7]

6. The Court may raise the new admissibility criterion of its own motion[8] or in response to an objection raised by the government.[9] In some cases, the Court looks at the new criterion before

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[2] During the first two years following entry into force, application of the criterion was reserved to Chambers and the Grand Chamber (Article 20 § 2 of Protocol No. 14). From 1 June 2012 the criterion has been used by all of the Court's judicial formations.

[3] Accordingly, in *Vistiņš and Perepjolkins v. Latvia*, § 66, the government's preliminary objection raising no significant disadvantage was dismissed because the application was declared admissible in 2006, before the entry into force of Protocol No. 14.

[4] It should be mentioned that according to Article 5 of Protocol No. 15 amending the Convention, which is currently not yet in force, the second safeguard clause is to be removed.

[5] *Shefer v. Russia.*

[6] *Kiril Zlatkov Nikolov v. France*; *C.P. v. the United Kingdom*; *Borg and Vella v. Malta*.

[7] *Finger v. Bulgaria*; *Daniel Faulkner v. the United Kingdom*; *Turturica and Casian v. the Republic of Moldova and Russia*; *Varadinov v. Bulgaria.*

[8] E. g. *Vasyanovich v. Russia.*

[9] *Gaglione and Others v. Italy.*

the other admissibility requirements.[10] In other cases, it moves on to addressing the new criterion only after having excluded others.[11]

7. The application of the no significant disadvantage criterion is not limited to any particular right protected under the Convention. However, the Court has found it difficult to envisage a situation in which a complaint under Article 3, which would not be inadmissible on any other grounds and which would fall within the scope of Article 3 (which means that the minimum level of severity test would be fulfilled), might be declared inadmissible because the applicant has not suffered significant disadvantage.[12] In relation to complaints under Article 5, the Court has so far rejected the application of the "no significant disadvantage" admissibility criterion in the light of the prominent place that the right to liberty has in a democratic society.[13] The Court has also stated that in cases concerning freedom of expression (Article 10), the application of the no significant disadvantage criterion should take due account of the importance of this freedom and be subject to careful scrutiny by the Court. Such scrutiny should encompass elements such as the contribution made to a debate of general interest and whether the case involves the press or other news media.[14] As regards cases concerning freedom of assembly (Article 11), the Court should take due account of the importance of this freedom for a democratic society and carry out a careful scrutiny.[15]

II.2. A significant disadvantage

8. The main element contained in the criterion is the question of whether the applicant has suffered a "significant disadvantage". "Significant disadvantage" hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court. Violations which are purely technical and insignificant outside a formalistic framework do not merit European supervision.[16] The assessment of this minimum level is relative and depends on all the circumstances of the case. The severity of a violation should be assessed by taking into account both the applicant's subjective perception and what is objectively at stake in a particular case.[17] However, the applicant's subjective perception cannot alone suffice to conclude that he or she suffered a significant disadvantage. The subjective perception must be justified on objective grounds.[18] A violation of the Convention may concern important questions of principle and thus cause a significant disadvantage regardless of pecuniary interest.[19] The Court found that the applicant had suffered a significant disadvantage because the proceedings concerned a question of principle for him, namely his right to respect for his possessions and for his home. This was despite the fact that the domestic proceedings which were the subject of the complaint were aimed at the recovery of stolen goods worth 350 euros (EUR) from the applicant's own apartment.[20] Similarly, the Court took into account the fact that the fine concerned a question of principle for the applicant, namely the respect for his position as a lawyer in the exercise of

[10] E. g. *Korolev v. Russia*; *Rinck v. France.*
[11] *Ionescu v. Romania*; *Holub v. the Czech Republic.*
[12] *Y v. Latvia*, § 44.
[13] *Zelčs v. Latvia*, § 44.
[14] *Margulev v. Russia*, § 41-42 and *Sylka v. Poland*, § 28.
[15] *Obote v. Russia*, § 31.
[16] *Shefer v. Russia.*
[17] *Korolev v. Russia.*
[18] *Ladygin v. Russia.*
[19] *Korolev v. Russia*; *Biržietis v. Lithuania*; *Karelin v. Russia.*
[20] *Giuran v. Romania*, § 17-25.

his professional activities.[21] Moreover, in evaluating the (subjective) significance of the issue for the applicant, the Court can take into account the applicant's conduct, for example in being inactive in court proceedings during a certain period which demonstrated that in this case the proceedings could not have been significant to her,[22] the nature of the right allegedly violated, the seriousness of the claimed violation and/or the potential consequences of the violation on the personal situation of the applicant.[23]

9. In a number of cases, the level of severity attained is assessed in light of the financial impact of the matter in dispute and the importance of the case for the applicant. The financial impact is not assessed merely in light of the non-pecuniary damages claimed by the applicant.[24] As far as insignificant financial impact is concerned, the Court has thus far found a **lack of "significant disadvantage"** in the following cases where the amount in question was equal or inferior to roughly EUR 500: in a case concerning proceedings in which the amount in dispute was EUR 90;[25] in a case concerning a failure by the authorities to pay to the applicant a sum equivalent to less than one euro;[26] in a case concerning a failure by the authorities to pay to the applicant a sum roughly equal to EUR 12;[27] in a case concerning a traffic fine of EUR 150 and the endorsement of the applicant's driving licence with one penalty point;[28] delayed payment of EUR 25;[29] failure to reimburse EUR 125;[30] failure by the State authorities to pay the applicant EUR 12;[31] failure by the State authorities to pay the applicant EUR 107 plus costs and expenses of 121, totalling EUR 228;[32] in a case concerning a fine of EUR 135, EUR 22 of costs and one penalty point on the applicant's driving licence;[33] in a case where the Court noted that the amount of pecuniary damages at issue was EUR 504;[34] in a case where the initial claim of EUR 99 made by the applicant against his lawyer was considered in addition to the fact that he was awarded the equivalent of EUR 1,515 for the length of the proceedings on the merits;[35] in the case of salary arrears of a sum equivalent to approximately EUR 200;[36] in a case concerning EUR 227 in expenses ;[37] in the case concerning enforcement of a judgment for EUR 34;[38] in a case concerning non-pecuniary damages of EUR 445 for cutting off an electricity supply;[39] in a case concerning administrative fines of EUR 50;[40] where claims related to remuneration of

[21] *Konstantin Stefanov v. Bulgaria*, § 46-47.
[22] *Shefer v. Russia.*
[23] *Giusti v. Italy*, § 22-36.
[24] In *Kiousi v. Greece*, the Court held that the amount of non-pecuniary damages sought, namely EUR 1,000, was not relevant for calculating what was really at issue for the applicant. This was because non-pecuniary damages are often calculated by applicants themselves on the basis of their own speculation as to the value of the litigation.
[25] *Ionescu v. Romania.*
[26] *Korolev v. Russia.*
[27] *Vasilchenko v. Russia*, § 49.
[28] *Rinck v. France.*
[29] *Gaftoniuc v. Romania.*
[30] *Ştefănescu v. Romania.*
[31] *Fedotov v. Moldova.*
[32] *Burov v. Moldova.*
[33] *Fernandez v. France.*
[34] *Kiousi v. Greece.*
[35] *Havelka v. the Czech Republic.*
[36] *Guruyan v. Armenia.*
[37] *Šumbera v. the Czech Republic.*
[38] *Shefer v. Russia.*
[39] *Bazelyuk v. Ukraine.*
[40] *Boelens and Others. v. Belgium.*

between EUR 98 and 137, plus default interest;[41] failure to enforce decisions of relatively small awards, between EUR 29 and 62.[42]

10. The Court is conscious that the impact of a pecuniary loss must not be measured in abstract terms; even modest pecuniary damage may be significant in the light of the person's specific condition and the economic situation of the country or region in which he or she lives. Thus, the Court looks at the effect of the financial loss taking into account the individual's situation. The fact that the applicant was a judge at the administrative appeal court in Marseille was relevant for the court finding that the fine of EUR 135 was not a significant amount for her.[43]

11. Conversely, where the Court considers that the applicant has suffered **significant financial disadvantage,** then the criterion may be rejected. This has been so in the following examples of cases: in a case where delays were found of between nine and forty-nine months in enforcing judgments awarding compensation for length of proceedings where the sums involved ranged from EUR 200 to 13,749.99;[44] in a case concerning delays in the payment of compensation for expropriated property and amounts running to tens of thousands of euros;[45] in a case concerning disputed employment rights with the claim being approximately EUR 1,800;[46] in a case concerning length of civil proceedings of fifteen years and five months and the absence of any remedy with the claim being "an important amount";[47] in a case concerning length of civil proceedings where the sum in question concerned disability allowances which were not insignificant;[48] in a case where the applicant was required to pay court fees which exceeded, by 20 per cent, her monthly income;[49] in a case where the applicants were obliged to pay a recurrent standing charge, although the highest single monthly instalment payable by them did not exceed 30 euros, as the overall amount could not be said to have been insignificant in the overall context in which the payment requirement operated and in the light of the standard of living in the respondent State.[50]

12. However, the Court is not exclusively concerned with cases of insignificant financial sums, when applying the no significant disadvantage criterion. The actual outcome of a case at national level might have **repercussions other than financial ones**. In several cases, the Court based its decisions on the fact that the non-communicated observations of the other parties had not contained anything new or relevant to the case and the decision of the Constitutional Court in each case had not been based on them.[51] Similarly, the Court concluded that the non-pronouncement in public of a first-instance court decision has not resulted in any significant disadvantage of the applicant since he was not the aggrieved party.[52] The Court also took into account that the obligation to demolish the wall and remove the bricks, which was a result of the applicant's unlawful behaviour, did not impose a significant financial burden on him.

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[41] *Hudecová and Others v. Slovakia.*
[42] *Shtefan and Others v. Ukraine*; *Shchukin and Others v. Ukraine.*
[43] *Fernandez v. France.*
[44] *Gaglione and Others v. Italy.*
[45] *Sancho Cruz and other "Agrarian Reform" cases v. Portugal*, § 32-35.
[46] *Živić v. Serbia.*
[47] *Giusti v. Italy*, § 22-36.
[48] *De Ieso v. Italy.*
[49] *Piętka v. Poland*, § 33-41.
[50] *Strezovski and Others v. North Macedonia*, §§ 47-49.
[51] *Holub v. the Czech Republic; Bratři Zátkové, A.S., v. the Czech Republic; Matoušek v. the Czech Republic; Čavajda v. the Czech Republic; Hanzl and Špadrna v. the Czech Republic and Liga Portuguesa de Futebol Profissional v. Portugal.*
[52] *Jančev v. North Macedonia.*

Dealing with a complaint concerning the length of criminal proceedings the Court considered the fact that the applicant's sentence was reduced as a result of the length of the proceedings. It concluded that this reduction compensated the applicant or particularly reduced any prejudice which he would encounter as a result of the lengthy proceedings. Accordingly, the Court held that he had not suffered any significant disadvantage.[53] As to civil proceedings, the Court found that the applicant had actually benefited from the excessive length of proceedings because she remained in her property for another six years and two months.[54] Two further Dutch cases have also dealt with the length of criminal proceedings and the lack of an effective remedy. The applicants' complaints concerned solely the length of the proceedings before the supreme court as a consequence of the time taken by the court of appeal to complete the case file. However, in both, the applicants lodged an appeal on points of law to the supreme court without submitting any ground of appeal. Finding that no complaint was made about the judgment of the court of appeal or about any aspect of the prior criminal proceedings, the Court considered in both cases that the applicants suffered no significant disadvantage. [55] In a case where the only interference with the right to respect to home under Article 8 concerned the unauthorised entry of labour inspectors into a garage, the Court dismissed such a complaint as having "no more than a minimal impact" on the applicant's right to home or private life.[56] Similarly, the fact that the applicants' relatively small piece of land had been expropriated for a period of time did not appear to have had any particular consequence on them.[57] In a case where the applicant claimed that his temporary exclusion from school for three months had breached his right to education, the Court stated that "in most instances a three-month exclusion from school will constitute a "significant disadvantage" for a child". However, in the present case there were several factors diminishing the significance of any enduring "disadvantage" suffered by the applicant. Any prejudice sustained by the applicant regarding his right to education in substantive terms was thus speculative.[58] The Court has also applied the no significant disadvantage criterion in a freedom of expression case. The case concerned an unfortunate verbal confrontation between the applicant and a police officer, with no wider implications or public interest undertones which might raise real concerns under Article 10.[59]

13. Turning to the cases **where the new criterion has been rejected**, the Court found that the non-communicated observations could have contained some new information of which the applicant company was not aware. Distinguishing the *Holub v. the Czech Republic*, the Court could not conclude that the company had not suffered a significant disadvantage.[60] According to the Court the applicant had suffered a significant disadvantage in a case where the outcome of the proceedings, which the applicant claimed had been unlawful and conducted in an unfair manner, had a particularly negative effect on her professional life. In particular, the applicant's conviction was taken as a basis for her dismissal from work.[61] An Article 6 example is a case, which concerned the lack of an oral hearing in the proceedings before the constitutional court. The government argued that an oral hearing would not have contributed to the establishment of new or different facts and that the relevant facts regarding the applicants' removal from the Parliament gallery had been undisputed between the parties and could have been established on

[53] *Gagliano Giorgi v. Italy.*
[54] *Galović v. Croatia.*
[55] *Çelik v. the Netherlands* and *Van der Putten v. the Netherlands*.
[56] *Zwinkels v. the Netherlands.*
[57] *Borg and Vella v. Malta*, § 41.
[58] *C.P. v. the United Kingdom.*
[59] *Sylka v. Poland, §35.*
[60] *3A.CZ s.r.o. v. the Czech Republic*, § 34.
[61] *Luchaninova v. Ukraine*, § 46-50.

the basis of written evidence submitted in support of the applicants' constitutional complaint. The Court considered that the government's objection was at the very heart of the complaint, for which reason it examined it at the merits stage. The Court noted that the applicants' case was examined only before the constitutional court, which acted as a court of first and only instance. It also found that, although the applicants' removal from the parliament gallery, as such, was not disputed between the parties, the constitutional court's decision was based on facts which the applicants contested and which were relevant for the outcome of the case. Those issues were neither technical nor purely legal. The applicants were therefore entitled to an oral hearing before the constitutional court. Thus, the Court dismissed the government's objection.[62] The Court held that there were no grounds for concluding that the applicant had suffered no significant disadvantage, noting, *inter alia,* that the importance of the case for the applicant and its effects on her private and family life could not be underestimated in a case where the applicant had separated from her husband, with whom she had been living in Latvia, and moved to the couple's former residence in Germany. Unbeknown to the applicant, her husband had subsequently brought divorce proceedings in Latvia. He had informed the divorce court that he did not know her current address. After an initial failed attempt to serve the divorce papers on the applicant at the couple's Latvian address, the divorce court had published two notifications in the Latvian Official Gazette. Unaware of the proceedings, the applicant had not attended the hearing and the divorce had been pronounced in her absence. She had learned that her marriage had been dissolved and that her husband had remarried only when she came to what she thought was her husband's funeral. The applicant complained that the divorce proceedings breached Article 6.[63] The Court has on several occasions stated the importance of personal liberty in a democratic society and has not yet applied the no significant disadvantage criterion to an Article 5 case. In a case where the government submitted that the alleged restrictions on the applicants' rights not to be deprived of their liberty had lasted for only a few hours, the Court concluded that the applicants had suffered a disadvantage which could not be considered as insignificant.[64] Another example of the importance of personal liberty, in connection to Article 6, is the case where the subject matter and outcome of the appeals had been of crucial importance for the applicants, as they sought a court decision on the lawfulness of their detention and in particular the termination of that detention if it were to be found unlawful. In view of the importance of the right to liberty in a democratic society, the Court could not conclude that the applicants had not suffered a "significant disadvantage" in the exercise of their right to participate appropriately in the proceedings concerning the examination of their appeals.[65] In a case where the applicant complained under Article 5 § 4 of the Convention the government argued that the applicant had not suffered any significant disadvantage since the entire period of pre-trial detention had been deducted from his prison sentence. However, the Court found that it was a feature of the criminal procedure of many contracting Parties to set periods of detention prior to final conviction and sentencing off against the eventual sentence - any harm resulting from pre-trial detention is *ipso facto* nugatory for Convention purposes.[66] In interesting cases involving complaints under Articles 8, 9, 10 and 11, the government's objections on the basis of no significant disadvantage were also rejected. Internal regulations of the prison prohibited the applicant from growing a beard and he contended that the prohibition had caused him mental suffering. The Court considered that the case raised issues concerning restrictions on prisoners' personal choices as to their desired appearance, which was arguably an important matter of

[62] *Selmani and Others v. North Macedonia*, § 28-30 and 40-41.
[63] *Schmidt v. Latvia*, § 72-75.
[64] *Čamans and Timofejeva v. Latvia*, § 80-81.
[65] *Hebat Aslan and Firas Aslan v. Turkey.*
[66] *Van Velden v. the Netherlands*, § 33-39.

principle.[67] In a case concerning a house search devoid of any financial implications, the Court took into account the subjective importance of the matter for the applicant (his right to the peaceful enjoyment of his possessions and his home) as well as what was objectively at stake, namely the existence under domestic law of effective judicial supervision in respect of a search.[68] In a case concerning the alleged lack of reaction by the State to air pollution by a steelworks, to the detriment of the surrounding population's health, the Court took into account the nature of the complaints brought by the applicants (under Article 8) and the existence of scientific studies showing the polluting effects of the emissions from the steelworks on the environment and on the health of the persons living in the affected areas.[69] The applicant complained that by refusing to provide him with the vegetarian diet required by his Buddhist convictions, the prison authorities had infringed his right to manifest his religion under Article 9. The Court concluded that the subject matter of the complaint gave rise to an important matter of principle.[70] An Article 10 case concerned a prisoner's right to receive information. The applicant was denied access to a website containing information about learning and study programmes. Such information was directly relevant to the applicant's interest in obtaining education, which was in turn of relevance for his rehabilitation and subsequent reintegration into society. Having regard to the consequences of that interference for the applicant, the Court dismissed the government's objection that the applicant had not suffered significant disadvantage.[71] The applicants, who were members of a trade union, had been fined for attaching a banner stating "Workplace on Strike" to a fence in front of a secondary school on a day of national mobilisation. They complained under Article 11 of the Convention. The Court rejected the government's objection that the applicants had not suffered a significant disadvantage. It emphasized the crucial importance of the right to peaceful assembly and noted that the alleged violation was likely to have a considerable impact on the applicants' exercise of this right, since the fines could discourage them from participating in other assemblies as part of their trade union activities.[72] In two examples the Court has rejected governments' objections involving complaints under Article 1 of Protocol No. 1. The first case concerned detainees complaining about an obligation to place sums of money, intended to constitute a savings fund to be handed over to them on their release, in a savings account with an interest rate so low that the value of their reserve diminished. The second case concerned the legislation on housing in Croatia. The applicant complained that he was unable to use or sell his flat, rent it to the person of his choice or charge the market rent for its lease.[73]

II.3. Two safeguard clauses

14. Once the Court has determined, in line with the outlined approach, that no significant disadvantage has been caused, it proceeds to check whether one of the **two safeguard clauses** contained in Article 35 § 3 (b) would nevertheless oblige it to consider the complaint on the merits.

15. The application will **not be declared inadmissible if respect for human rights as defined in the Convention or the Protocols thereto requires an examination on the merits**. Such questions of a general character would arise, for example, where there is a need to clarify the

[67] *Biržietis v. Lithuania*, § 34-37.
[68] *Brazzi v. Italy*, § 24-29.
[69] *Cordella and Others v. Italy*, § 135-139.
[70] *Vartic v. Romania (no. 2)*, § 37-41.
[71] *Jankovskis v. Lithuania*, § 59-63.
[72] *Akarsubaşı and Alçiçek v. Turkey*, § 16-20.
[73] *Siemaszko and Olszyński v. Poland* and *Statileo v. Croatia*.

States' obligations under the Convention or to induce the respondent State to resolve a structural deficiency affecting other persons in the same position as the applicant.[74]

16. The wording of this element is drawn from the second sentence of Article 37 § 1 of the Convention where it fulfils a similar function in the context of decisions to strike applications out of the Court's list of cases. The same wording is used in Article 39 § 1 as a basis for securing a friendly settlement between the parties. The Convention organs have consistently interpreted those provisions as compelling them to continue the examination of a case, notwithstanding its settlement by the parties or the existence of any other ground for striking the case out of its list. Thus, even when other criteria for rejecting the complaint under Article 35 § 3 (b) of the Convention are met, respect for human rights could require the Court's examination of a case on the merits. Thus the Court did not feel the need to determine whether the applicant could be said to have suffered a "significant disadvantage", as the applicant's complaint raised a novel issue of principle under Article 5, an issue which warranted consideration by the Court.[75] This approach was taken in the cases concerning a potential systemic problem of unreasonable length of civil proceedings and the alleged lack of an effective remedy;[76] the inconsistent case-law of the District Court in Belgrade as regards the right to fair wages and equal pay for equal work to a certain category of police officers;[77] the payment of fees to police-appointed defence counsel in the course of a preliminary criminal investigation since they related to the functioning of the criminal justice system[78]. Conversely, the Court has already held that respect for human rights does not require it to continue the examination of an application when, for example, the relevant law has changed and similar issues have been resolved in other cases before it.[79] Similarly, respect for human rights does not require the Court to examine an application where the Court and the Committee of Ministers have addressed the issue as a systemic problem, for example non-enforcement of domestic judgments in the Russian Federation or Romania. This applies equally with respect to the public pronouncement of judgments or the opportunity to have knowledge of and to comment on observations filed or evidence adduced by the other party.[80]

17. Lastly, Article 35 § 3 (b) does not allow the rejection of an application under the admissibility requirement if the case has not been duly considered by a domestic tribunal. **The second safeguard clause** is consonant with the principle of subsidiarity, as reflected notably in Article 13 of the Convention, which requires that an effective remedy against violations be available at the national level. "Case" is therefore understood as the action, complaint or claim the applicant has lodged with the national courts. The purpose of that rule is to ensure that every case receives a judicial examination, either at the national or at the European level. The purpose of the second safeguard clause is thus to avoid a denial of justice for the applicant.[81] The applicant should have had the opportunity of submitting his arguments in adversarial proceedings before at least one level of domestic jurisdiction.[82] For example, the complaint for excessive length of civil proceedings under German law had not been duly considered by a domestic tribunal because there was no effective remedy yet enacted. Therefore, the case could not be regarded as complying with the second safeguard clause. The Court noted that the

[74] *Savelyev v. Russia*, § 33.
[75] *Daniel Faulkner v. the United Kingdom*, § 27.
[76] in *Finger v. Bulgaria*, § 67-77.
[77] *Živić v. Serbia*, §§ 36-42.
[78] *Juhas Đurić v. Serbia.*
[79] *Rinck v. France*; *Fedotova v. Russia.*
[80] *Bazelyuk v. Ukraine.*
[81] *Korolev v. Russia*; *Gaftoniuc v. Romania*; *Fedotov v. Moldova.*
[82] *Ionescu v. Romania*; *Ştefănescu v. Romania.*

applicant complained precisely about not having his case properly examined by the domestic courts.[83] In a case where the domestic courts had expressly refused to examine the applicant's appeal against a traffic fine as it concerned a sum under the statutory limit for judicial review the applicant's case, his complaint could not be considered inadmissible under Article 35 § 3 (b).[84] As for the interpretation of "duly", the present criterion is not to be interpreted as strictly as the requirements of a fair hearing under Article 6.[85] Moreover, the notion "duly examined" does not require the State to examine the merits of any claim brought before the national courts, however frivolous it may be. The Court held that where an applicant attempts to bring a claim which clearly has no basis in national law, the last criterion under Article 35 § 3 (b) is nonetheless satisfied.[86] Where the case involves an alleged violation committed at the final instance of the domestic legal system, the Court may dispense with the requirement of due consideration. To construe otherwise would prevent the Court from rejecting any claim, however insignificant, if the violation alleged occurred at the final national level of jurisdiction.[87]

III. Conflicting court decisions and the role of supreme courts in the light of Article 6/1 of the Convention

18. The first case where the Court found that conflicting decisions of domestic courts were in breach of the fair trial requirement enshrined in Article 6/1 ECHR was decided in 2007.[88] In recent years the number of applications to the Court invoking the problem of conflicting decisions of national courts (either departure from the uniform case law or lack of uniform case law) has been constantly growing. This has prompted the Court to devote a special attention to this aspect of the right to a fair trial. In 2011 the Court sitting as a Grand Chamber, delivered a landmark judgment in the case of *Şahin and Şahin v. Turkey* where the main principles applicable in cases concerning the issue of conflicting court decisions were elaborated.

19. The starting point is that the mere existence of conflicting decisions, in itself, cannot be considered contrary to the Convention and is not sufficient to warrant the intervention of the Court. 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 prevent any reform or improvement. The requirement of legal certainty and the protection of legitimate expectations do not involve the right to an established jurisprudence. Therefore two courts examining different cases may very well arrive at divergent but nevertheless rational and reasoned conclusions regarding the same legal issue raised by similar factual circumstances. The assessment is stricter where divergences arise within the same court.[89] Nevertheless, even such a case cannot, in itself, be considered contrary to the Convention.

20. **Nevertheless, conflicting decisions of domestic courts, especially courts of the last instance, can trigger a breach of the fair trial requirement enshrined in Article 6/1 of the Convention.** The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the

[83] *Dudek v. Germany.*
[84] *Varadinov v. Bulgaria*, § 25.
[85] *Ionescu v. Romania*; *Liga Portuguesa de Futebol Profissional v. Portugal.*
[86] *Ladygin v. Russia.*
[87] *Çelik v. the Netherlands.*
[88] *Beian v. Romania.*
[89] *Živić v. Serbia.*

essential components of a state based on the rule of law.[90] A flagrant inconsistency in the application of domestic law undermines the credibility of the courts.[91] The Court has developed criteria in which conflicting decisions of domestic supreme courts are in breach of the fair trial requirement. It is decisive whether (1) "profound and long-standing differences" exist in the case law of the domestic courts, (2) whether the domestic law provides for machinery for overcoming those inconsistencies, (3) whether that machinery has been applied and, (4) if appropriate, to what effect.[92]

21. It is primarily the role of the supreme court to resolve contradictions in case law.[93] The supreme court must ensure uniformity of case law so as to rectify any inconsistencies and thus maintain public confidence in the judicial system.[94] It is therefore especially problematic if a supreme court itself is the origin of the impugned divergences.[95] By adopting a different decision on the same issue in the same proceedings, thereby effectively overruling its previous decisions, without any reference to them or reasoning to the contrary, the supreme court can become the source of uncertainty itself.[96]

IV. Comparative law perspective

22. Concerning access to the supreme court (court of cassation) different models apply. Countries where there are no formal filtering criteria are rare. Italy is the best known example (access to *Corte di Cassazione* by way of a final appeal on a point of law is available as a constitutional right: resulting in this court dealing with tens of thousands cases annually). On the face of it, there are no filtering criteria in place in the Netherlands and in Belgium either – but one should note that there exists a specialised bar with a small number of highly reputable lawyers who are the only ones authorised to argue cases before the supreme court. They *ipso facto* represent a very efficient filtering mechanism. But in general three possible selection criteria can apply (or a combination thereof):

- value of claim in civil or in criminal cases severity of the crime and sanction as a threshold for admitting cases for the third appeal on points of law;[97]
- severity of the violation (e.g. "grave errors", "manifest breach", "blatant violation"; "gross misapplication of law", "violation of constitutional rights");
- objective importance of the case from the viewpoint of development of law or ensuring uniform application of the law.[98]

23. It can be argued that, when there are no filtering mechanisms or when the first two options are in place, the role of the supreme court is **private** in purpose. Here, the supreme court focuses on the private purpose of the just and correct resolution of every individual case (at least in cases, which are important for the parties – e.g. because of the high value), thereby striving to fulfil the expectations of litigants in the case at hand. The supreme court should intervene even

[90] *Vinčić and others v. Serbia; Živić v. Serbia.*
[91] *Stoilkovska v. Macedonia*
[92] For the first time applied in *Iordanov. v. Bulgaria*.
[93] *Schwarzkopf and Taussik v. the Czech Republic; Zielinski*, *Pradal and Gonzalez and Others v. France.*
[94] *Albu and others v. Romania*
[95] Schwarzkopf and Taussik v. the Czech Republic.
[96] *Balažoski v. Macedonia.*
[97] E.g. Montenegro.
[98] Typically: UK, Ireland, Norway, Sweden, Denmark, Germany, Slovnia but also (combining with one of the former criteria) Croatia, Switzerland, Bulgaria, the Czech Republic, Poland, Georgia, North Macedonia.

if such errors in application of law merely affect the interests of parties and its judgment does not help to develop the law generally.

24. In contrast, when the criteria for access to the supreme court are framed pursuant to the third option, the **public function** of the supreme court prevails. The public function of supreme courts' decision-making consists of safeguarding and promoting the uniformity of case law, the development of law, and offering guidance to lower courts thus, ensuring predictability in the application of law, oriented foremost to the effects of its decisions on the future. If a dispute is significant only for the parties to it, it will not be accepted for a review in the supreme court. This is typical for supreme courts not only in common law jurisdictions[99] but also in Scandinavia,[100] and might be said nowadays to be an expression of a world-wide trend.[101] The introduction of such criteria for granting leave to appeal implies that the supreme court's resolution of the matter will generally be accepted beyond the scope of the individual case, thus, in view of the benefit foremost for the justice system as a whole and all future litigants. As a general rule, the appeal to the supreme court is not allowed against judgements of first instance if they had not been reviewed by the courts of second instance. Nevertheless, in some countries, right to appeal the judgement of the court of first instance directly to the supreme court (»leapfrog« appeal) is granted in exceptional situations.[102]

25. The traditional divide between the cassation, the revision and the appeal model is not a reliable basis for defining functions of the supreme courts and their impact on the uniform application of law. What matters is whether the supreme court serves predominantly the public or the private function. Official proclamations, historical origins and programmatic rules are of little importance. It all depends on the (non-)existence of adequate filtering mechanisms and how these are applied in practice.

IV.1. Germany

26. There are two basic models in the German-speaking jurisdictions for restricting access to the supreme courts in civil cases. One is based on the importance of the legal questions at issue (*Grundsatzrevision*). The other, practiced in Austria and Switzerland in combination with the first one, is based on the value in dispute (*Wertrevision*).

27. In Germany, »revision« is a further appeal on points of law filed against the final judgement delivered by the appellate instance (§ 542 *Zivilprozessordnung*). The filtering of appeals to the Federal Court of Justice on the basis of the general importance of the case, combined with the requirement of leave to appeal (*Zulassungsrevision*), was first introduced in 1924. Originally, this was intended to be a temporary measure to ease the burden in matrimonial matters. Gradually, however, it has become the general criterion for filtering appeals to the supreme courts in Germany, not only in civil but also in administrative matters. Since the enactment of the *ZPO-Reformgesetz*,[103] appeal to the *Bundesgerichtshof* (Federal Court of Justice) has only been possible if there is a fundamental question of law or if a decision by the *Bundesgerichtshof* is required in the interest of the uniform application of the law or in the interest of the development of the law (§ 543 *Zivilprozessordnung*). The legislature altogether eliminated the

[99] UK, Ireland.
[100] Sweden, Denmark, Norway, Finland.
[101] See recent reforms in e.g. Slovenia, Croatia, Lithuania, Georgia, Poland, and already much earlier in Germany (*Zulassungsrevision*), Switzerland, Austria.
[102] UK, Denmark, Sweden, Ireland, Germany and Poland.
[103] *Gesetz zur Reform des Zivilprozesses (Zivilprozessreformgesetz – ZPO-RG)* of 27 July 2001.

value in dispute as a criterion for the admissibility of the appeal to the *Bundesgerichtshof*, as it was considered unfair to use economic criteria for measuring the importance of legal cases. Before that, *Revision* had always been admissible in cases where the value in dispute exceeded a certain amount (in the end, DEM 60,000 [€30,000]). In other cases, the admissibility of *Revision* depended on leave by the *Bundesgerichtshof*. In some small value cases, *Revision* was never admissible. The new system contains a real political decision to establish equal access to the Federal Court of Justice. Commercial cases of a high value in dispute can now no longer be brought to the third instance if their substance is without any general question of public importance, whereas quite opposite, economically small disputes can now be brought to the Federal Court of Justice if they raise problems of fundamental significance. Many areas of law with highly divergent decisions by the regional courts of appeal which were finally competent till then could now be improved and stabilized by a new uniform case law.

28. In addition to raising some difficulties of interpretation for parties and their lawyers, the reform was subject of debate among judges of the Federal Court of Justice. However, gradually most of the contentious points have been resolved and the judges have been successful in both stabilizing the access to the Federal Court of Justice and reducing the caseload.

29. The selection of cases to be adjudicated before the *Bundesgerichtshof* is done on the basis of rather abstract criteria.[104] According to the case law of the German *Bundesgerichtshof*, only questions that are relevant beyond the individual case are questions of fundamental importance. As mentioned, § 542 *Zivilprozessordnung* contains three grounds for leave to appeal: leave is granted if there is a fundamental question of law or if a decision of the Supreme Court of Justice is required in the interest of the uniform application of the law or in the interest of the development of law. In general, the Supreme Court of Justice has developed restrictive criteria - errors in individual cases cannot constitute questions of fundamental importance, no matter how grave or obvious they might be (unless perhaps the individual decision itself has far-reaching effects, especially economic ones; but again beyond the parties to the dispute). Only questions of law that can affect an indefinite number of cases apart from the one at hand can constitute questions of fundamental importance. A case may be qualified as a landmark case if its consequences touch upon the interests of the general public in an exceptional way, thus requiring the Federal Court of Justice to act, or if it calls for an intervention of the Court of Justice of the European Union to give a preliminary ruling. In contrast, a case lacks fundamental importance if old law or undisputed rules are applied or if the conclusion is mainly based on factual findings. If circumstances of the case presuppose development of law it is very likely that such case raises a fundamental question of law. These cases, typically including circumstances, which can be generalised, and aspects not precisely regulated by law, give rise to development of principles aiming to close a gap in the law. Development of law by interpretation is of particular significance in areas of law not sufficiently reflecting the steadily developing reality of life. In the case law of the Federal Court of Justice the ground for leave to appeal on points of law relating to the uniform application of law has gained the most practical relevance. If a lower instance judge departs from the settled case law, this can be on one hand a valuable contribution to the dialogue among judges and development of law; on the other

[104] See Domej, What is an important case? Admissibility of appeals to the supreme courts in the German speaking jurisdictions, in Uzelac, van Rhee, Hendrik, Nobody's perfect, Comparative Essays on Appeals and other Means of Recourse against Judicial Decisions in Civil Matters, Cambridge, Intersentia, 277-287; Gottwald, Review appeal to the German Federal Supreme Court after the reform of 2001, https://www.uv.es/coloquio/coloquio/ponencias/c4got.pdf (25. 11. 2020).

hand, the last word remains with the highest court which may in such manner be triggered to reconsider, and perhaps alter, its previous position.

30. After some differences of opinions the judges of civil divisions of the Federal Court of Justice have drawn a conclusion that mere obvious mistakes in applying the procedural and substantive law do not require an intervention of the Federal Court of Justice. It is not sufficient that a mistake is obvious or grave; leave to appeal can only be granted if the mistake has either led to a violation of the constitution or if there has been a risk that a lower court would repeat such »symptomatic mistake" and other courts would follow. Notwithstanding the likelihood of reoccurrence it is sufficient that there is a latent structural risk of reoccurrence of the mistake. A violation of procedural principles laid down in the constitution must end in permission to final appeal because such a violation undermines the confidence of general public in an efficient court system, not only when the violation is in breach of the fair trial requirement, but also of other constitutional procedural rights. It is therefore, in principle, not the task of the *Bundesgerichtshof* to correct errors in individual cases, no matter how grave or obvious they might be. Nevertheless, as shown above, the *Bundesgerichtshof* has created some possibilities for attacking severe errors made in individual cases. This is done in a somewhat indirect manner, by making reference to the general interest in safeguarding the uniformity of case law. But permission to appeal on this basis is only granted in very grave cases. In sum, the court is very restrictive in permitting appeals for the sake of correcting errors made in individual cases.

31. The power to grant leave to appeal is vested in courts of appeal. For that end, the leave must be explicitly granted within the reasons of the judgement. The permission may be restricted to a separable part of the matter in dispute. Additionally, after the reform the permission may be granted by any court of first appeal acting as a court of appeal against decisions of local courts. The Federal Supreme court may have thus to decide upon appeals on points of law against judgements of local courts. This is in particular relevant for landlord/ tenant cases and for specific fields of consumer protection.

32. The denial of leave to appeal is subject to the right to file a complaint against it to the *Bundesgerichtshof* which has the final say on the matter (§ 44 *Zivilprozessordnung*). Once the appeal has been upheld before the Federal Court of Justice, it is followed by the proceedings on the substance of the matter. In such event, provided that the complaint against the denial of leave to appeal was filed in due time, the appeal on points of law is deemed to have been lodged. Upon the decision being served on the parties the period for submitting the reasoning for the appeal on points of law commences.

IV.2. Slovenia

33. The revision (*revizija*) in Slovenian legal system is a further appeal on points of law, similar to the remedy of the same name in e.g. German or Austrian law. It enables for access to the supreme court and thereby strives to achieve that this court will be able to effectively fulfil its constitutionally determined role of the supreme judicial authority, responsible for the unifying of case law. In Slovenian law, a revision is considered to be an extra-ordinary legal remedy. It neither prevents the enforceability of the judgment it is directed against, nor its becoming *res iudicata* (Art. 369 Civil Procedure Act – hereinafter "CPA"). However, if the revision is well-founded, the attacked judgment can be altered or set aside. The grounds for revision consist of errors in substantive and procedural law (Art. 370 CPA). Findings of facts cannot be subject to review in the supreme court. With the CPA amendments in 2008 and 2017, the system of the revision has been considerably reformed. Previously, the decisive admissibility criteria for the

revision was solely the value in dispute (whereby this was set low – cca. 4000 EUR, causing that the access to the supreme court was widely available, which resulted in constantly growing backlogs in the supreme court).

34. With two consecutive reforms the legislator has changed the criteria of admissibility of the revision. The criteria of the amount in controversy were abolished. The revision now amounts to a remedy, the availability of which depends rather on the discretion of the supreme court. The importance of the role of the supreme court at the unifying of case law and the giving of guidance for the application of law is emphasized. Now, the revision is admissible only if a leave has been granted by the supreme court. The supreme court is supposed to give such permission if the case raises a question of law of fundamental significance or if the development of law or the preservation of uniformity of case law requires a decision by the Supreme court (Art. 367.a, CPA). Whether the leave to file a revision should be granted, depends on the significance of the case from the objective point of view, and this significance should, in any case, go beyond the particular case. It is concerned with the question of preserving or achieving the uniformity of case law or with achieving that the highest judicial authority will have an opportunity to resolve an important legal question and thereby contribute to the development of law.

35. As to the question, who and in what kind of procedure should decide whether to grant leave to appeal, different models were considered: The first option was to implement a system, in which a decision whether to grant a leave to file a revision should be made *ex officio* by the court of appeal when it delivers its judgment (whereby there are two sub-variants depending on whether an appeal to the supreme court should be admissible in case the court of appeal refuses to grant a leave). The second option was to adopt a solution to vest jurisdiction to grant leave to file a revision to the supreme court, whereby the appellant would need to file a complete revision already in the first step. This system could be described as an one-step procedure, at least from the viewpoint of the appellant. The third option (and this is the one that finally prevailed) was (just like with *the certiorari* system at the US Supreme Court) entirely to separate procedure for granting leave to file a revision on one hand and procedure for deciding the merits of the revision on the other hand, both from the viewpoint of the appellant as well as from the viewpoint of the supreme court. The party must first file a motion to grant leave to revision. This motion must be focused on arguments concerning the objective importance of the case (unsettled case law, important legal question, departure from uniform case law…). Only if the supreme court grants leave to appeal, the appellant then prepares a fully reasoned revision, focusing on the arguments concerning the violation of substantive and procedural law.

V. Selection criteria that could be used by cassation courts in Ukraine to determine cases that are of significant public interest, in the light of the restriction of access to cassation courts

V.1. European standards relating to selection criteria for admitting cases to the supreme court

36. The CCJE recalls that »the uniform application of the law is essential for the principle of the equality before the law. Moreover, considerations of legal certainty and predictability are an inherent part of the rule of law. In a state governed by the rule of law, citizens justifiably expect to be treated as others and can rely on the previous decisions in comparable cases so that

they can predict the legal effects of their acts or omissions.«[105] »The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system, which is one of the essential components of a state based on the rule of law. Uniform application of the law contributes to public confidence in the courts and enhances the public perception of fairness and justice.«[106] »If parties can know in advance where they stand, they might often decide not to go to court in the first place. It should be, to the greatest extent possible, for the lawyers to know how to advise their clients and hence for litigants to know their rights. Precedents/settled case law, setting out clear, consistent and reliable rules, may reduce the need for judicial intervention in resolving disputes. By being able to rely on previous decisions, reached in similar cases, in particular by higher courts, cases can be resolved more efficiently.«[107]

37. The CCJE further takes the view that »it is primarily a role of a supreme court to resolve contradictions in the case law. The supreme court must ensure uniformity of the case law so as to rectify inconsistencies and thus maintain public confidence in the judicial system. There is an inherent link between considerations concerning the uniformity of the case law, on the one hand, and mechanisms for access to the supreme court, on the other."[108] "The supreme court's responsibility to ensure uniform case law is likely to require the establishment of adequate selection criteria for admitting cases to the supreme court. Those countries which permit unfettered right to appeal may consider introducing a requirement for seeking leave or other appropriate filtering mechanism. The criteria for granting leave should facilitate the supreme court in fulfilling its role in promoting the uniform interpretation of the law (…).«[109] »The introduction of such criteria for granting leave to appeal namely implies that a supreme court's resolution of the matter bears significance beyond the scope of the individual case. It will generally be expected to be followed in future cases and therefore offers a valuable guidance for lower courts and all future litigants and their lawyers. Only such selection criteria ensure that only cases of precedential value are adjudicated by a supreme court. At the same time, these are also the only criteria which may ensure that all such cases can reach a supreme court. Therefore, a supreme court can effectively perform the function of stating rules that should be effective in future cases in all areas of law. Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve these purposes.«[110]

38. Similarly, according to the Recommendation No. R (95) "appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims".[111]

[105] Opinion No. (2017) 20, para. 5.
[106] Ibid., para 6.
[107] Ibid., para. 7.
[108] Ibid. para. 20.
[109] Ibid., para 21.
[110] Ibid., para. 22.
[111] Recommendation No. R (95), Article 7(c).

V.2. Uniformity of the law – a goal to pursue

39. In Ukraine, **the uniform application of the law is an inherent part of the principle of the equality before the law** enshrined on the constitutional level (Art. 24 and 129 of the Constitution of Ukraine). The amendments to the Constitution and the new version of the law "On the judiciary and the status of judges" were adopted on 2 June 2016 in order to align the legislative framework on the judiciary with European standards on judicial independence. The law introduces the structure of the judiciary, which involved changing from a four-tier system to a three-tier system (first and second instance courts, and the Supreme Court as the highest court in the judicial system with specialized integrated courts of cassation). **The re-organisation is aimed at promoting efficiency and improving the coherence and consistency of the jurisprudence**, by making also the case law of the Supreme court binding. The dissolution of the Supreme Court of Ukraine and of the three former high specialized courts (the High Specialized Court on Civil and Criminal Cases, the High Commercial Court and the High Administrative Court) imply that the judgments of the appellate courts should be final, except when there are grounds for cassation.[112]

40. In Ukraine, case law has traditionally not been recognised as a binding source of law. It follows however from the Reply with respect to Ukraine to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017) that, although lower courts are not formally bound by judgments of the Ukrainian Supreme Court, they usually will follow their decisions in similar matters. Court rulings of the Supreme Court and courts of cassation have a wider importance than in the specific case in respect of which that ruling was given and, from this perspective, **case law can be considered a *de facto* source of law in Ukraine**.[113]

V.3. How to do it: introduction of the "leave to appeal" system as a means of ensuring the uniform application of the law by cassation courts in Ukraine

41. On the face of it might seem that more uniformity is achieved if the Supreme Court is required to interfere as often as possible. However such approach – in spite of the proclaimed goal of ensuring uniformity – inevitably leads to the exact opposite results particularly in large countries. Equally important, it is practically impossible to adequately follow such a huge amount of output of case law. It inevitably gets frequently overlooked. Thus the issue of conflicting judgments of lower courts cannot simply be cured by opening wide the gates of the cassation courts. In addition to causing delays in the court's disposal of cases and diminishing the quality of its adjudication (on account of the inability to devote sufficient time and effort to each case), such a system inevitably causes a lack of uniformity and predictability. **Contradictions within the courts of cassation's case law are best avoided if the number of cases that they decide is kept relatively low and only cases with a real precedential value reach the courts of cassation.** The public function of courts of cassation' decision-making consists of safeguarding and promoting the public interest of ensuring the uniformity of case law, the development of law, and offering guidance to lower courts and thus ensuring predictability in the application of law. [114]

[112] See Assessment report, para 27 and 28.
[113] Reply with respect to Ukraine to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017), p. 9.
[114] Bobek, Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe, American Journal of Comparative Law, Vol 57/1, 2009, p. 41 et seq.

42. Safeguarding and promoting the public interest of ensuring the uniformity of case law can only be effectively achieved if the courts of cassation are **empowered to select the cases that it accepts for a full review (the leave to appeal system)**. Emphasising their responsibility to ensure uniform case law presupposes the establishment of adequate selection criteria for granting leave to appeal to the courts of cassation. **The German *Zivoprozessordnung*, which determines selection criteria for granting leave to appeal to the *Bundesgerichtshof* in a manner that very clearly emphasises the public function of the supreme court could serve as an example in this regard. Leave to appeal is granted if there is a fundamental question of law or if a decision of the *Bundesgerichtshof* is required in the interest of the uniform application of the law or in the interest of the development of law. Other selection criteria, such as the value of a claim in civil cases or the severity of the sentence at stake in criminal matters, cannot serve the public interest of ensuring the uniformity of case law.**

43. In this respect, two aspects need to be stressed. First, it should be recalled that it has already been established in the case law of the Court that, if the supreme court is entrusted with a role to ensure the uniform application and correct interpretation of the law and to promote its development, the introduction of the admissibility requirements and their application pursues »the aim of ensuring that the supreme court deals only with such appeals and issues raised in them which would enable it to perform the role conferred on it by the Constitution and to avoid its case list being overloaded with unmeritorious appeals.«[115] The Court therefore concluded that there was no breach of the fair trial requirement enshrined in Article 6/1 of the Convention. Second, concerning the abstract (or »too vague« as the applicants argued) wording of selection criteria, the Court held that »many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain«.[116]

44. **The leave to appeal system** (focusing solely on the public interest purpose of deciding legal issues of fundamental importance, unifying case law, and developing the law) **works best when it is implemented in a pure form**. The existence of two parallel systems – namely, that in principle a final appeal on points of law is admissible only if leave to appeal is granted (under the precondition that the case raises issues of general importance), but that in cases with a high value of claim in dispute final appeal on points of law is admissible *per se* – leaves the impression that the doors of the supreme court are left wide open only for rich parties and large commercial companies (it will usually be commercial disputes that will reach a high threshold concerning the value of the claim).[117] The lower the threshold where the final appeal becomes a matter of an automatic right is set, the more important in practice remains the private function of the supreme court.[118] On the other hand, in systems with a high threshold,[119] the leave to appeal system (based on pursuing the public purpose of judicial decision-making) is the main feature of access to the supreme court and the criterion of the value of the claim has become merely auxiliary.

45. Caution is also needed as regards compromises using a different method in an attempt to balance private and public functions of the supreme court. Besides public function oriented

[115] *Borisenko and Yerevanyan Bazalt Ltd v. Armenia*. The application was declared as inadmissible.
[116] Ibid.
[117] Galič, A Civil Law Perspective on the Supreme Court and its Functions, Warsaw, June 2014, http://colloquium2014.uw.edu.pl/wp-content/uploads/sites/21/2014/01/Ales-Galic.pdf, p. 14.
[118] Such is the case e.g. in Switzerland (30.000 CHF).
[119] For example before the reform in Spain – 600.000 EUR (now abolished).

criteria for admission (e. g. fundamental legal significance or need to preserve or achieve uniformity of case law) this method provides for another basis for access, which is purely private in purpose – such as "clear contradiction with the substantive law".[120] The approach has been heavily criticised arguing that it never works as the supreme court is "soon swamped with revision of individual cases and the public purpose becomes submerged".[121]

[120] For example in the Czech Republic.
[121] Bobek, »Quantity or Quality? Reassessing the Role of Supreme Jurisdictions in Central Europe«, American Journal of Comparative Law, Vol 57/1, 2009, p. 48.