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Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights

EXPERT OPINION

On improving access to justice, removal of procedural barriers and ensuring the right to an impartial judge in Ukraine: Compliance with Article 6 of the ECHR and execution of the ECtHR judgments

October 2020

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List of Abbreviations

CoE	Council of Europe
CM	Council of Ministers of the Council of Europe
Convention or ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
LOPJ	Spanish Law on the Judiciary (Ley Orgánica del Poder Judicial)
GVG	German Law on Organization of Courts (Gerichtsverfassungsgesetz)

Executive Summary

1. The expert opinion is prepared within the framework of the Council of Europe project "Further support for the execution by Ukraine of judgments in respect of Article 6 of the European Convention on Human Rights" (the Project), which is funded by the Human Rights Trust Fund and implemented by the Justice and Legal Co-operation Department of the Council of Europe. The Project requested Prof. Dr Lorena Bachmaier[1], who had previously prepared the assessment of the 2014-2018 judicial reform in Ukraine, to conduct this expert opinion and participate in related project events.
2. The expert opinion is prepared on the basis of the Council of Europe standards stemming from the recommendations, including Rec(2000)19 of the CM to member states "On the role of public prosecution in the criminal justice system", relevant legislation in Spain and Italy, as well as the respective case law of the European Court of Human Rights. The expert has also been provided with relevant documents by the Project. The written materials include judgments from the European Court of Human Rights in the cases of "*Tserkva Sela Sosulivka v. Ukraine"*[2] and "*Mykhailova v. Ukraine"*[3], current Ukrainian legislation, government strategies and government communication action plans on measures to comply with the mentioned European Court of Human Rights judgments, as well as the handbook on European law relating to access to justice.
3. This expert opinion aims at addressing certain issues related to the right to a fair trial, in particular, the issues identified in two judgments of the European Court of Human Rights against Ukraine, the cases of "*Tserkva Sela Sosulivka v. Ukraine"* and "*Mykhailova v. Ukraine"*, as well as providing recommendations on how to improve Ukrainian court practices on access to justice. Indirectly, both cases touch upon the safeguards around the right to an impartial judge, though they come from diverse procedural situations.

Main issues of the *Tserkva Sela Sosulivka v. Ukraine* case

4. In the *Tserkva Sela Sosulivka* case, the ECtHR found a violation of Article 6 (1) of the ECHR arising from a negative conflict of jurisdiction that ended up in the applicant's clear denial of access to a court. After eight judicial decisions, the dispute was not subject to an examination on the merits by either the national courts of general jurisdiction or the courts of commercial jurisdiction.
5. The findings in the *Tserkva Sela Sosulivka* case, where the litigant was left without any response on the merits of his claim by the national courts, and where the Supreme Court did not even address such a serious violation of the Convention, showcased what extreme consequences an inadequate system for addressing negative conflicts of jurisdiction could entail.
6. While the rules on jurisdiction have to be strictly complied with, because they are inherently linked to the fundamental right to a court pre-established by the law and thus act as a safeguard of the right to an impartial judge and the right to a fair trial, in no way should they represent an insurmountable obstacle to access to a court.
7. Problems deriving from vague or uncertain rules on conflicting jurisdictions cause undue delays and have a negative impact on the costs and the efficiency of the proceedings. Mistakes in applying the rules on jurisdiction can cause even more complicated

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[2] European Court of Human Rights judgment *Tserkva Sela Sosulivka v. Ukraine,* Appl. no. 37878/02, of 28 February 2008.
[3] European Court of Human Rights judgment *Mykhailova v. Ukraine*, Appl. no. 10644/08, of 6 March 2018.

situations when, for example, once there is a final judgment, upon an *ex officio* review, the whole proceedings are declared void for lack of jurisdiction. The importance of the competing rights in play when ensuring compliance with the legal provisions on the jurisdiction cannot justify a breach of the right to access to a court or to have the dispute decided within a reasonable time.

8. The situation that gave rise to the application to the ECtHR in the *Tserkva Sela Sosulivka* case was very serious, because the national courts did not even enter into balancing competing interests, but deprived the litigant of any judicial decision on the merits of the dispute, causing an unacceptable breach of a fundamental right – the right to access to justice. Negative conflicts of jurisdiction should never end up in the situation that occurred in the *Tserkva Sela Sosulivka* case.

Recommendations

9. There should be clear rules on the jurisdiction and competence of courts. Also, there should be a regulation that obliges a court of first instance to check its jurisdiction at the beginning of the proceedings, upon hearing the parties to the case. Furthermore, the rules of procedure have to provide the opportunity to challenge the jurisdiction by parties, which also needs to be addressed at the beginning of the court proceedings. In a situation where all attempts to correctly determine a competent court and adequately apply the rules on jurisdiction are exhausted, and no court considers itself competent to rule over a dispute, there has to be a swift and reliable mechanism in place to solve the conflict promptly.

10. It is recommended that negative – as well as positive – conflicts of jurisdiction are decided by a special Chamber of the Supreme Court, as is done in Italy or Spain, so that they set out a clear interpretation of the limits of each jurisdiction, and thus prevent further uncertainty as to which court has jurisdiction over a certain subject matter.

Main issues of the *Mykhailova v. Ukraine* case

11. In the case *Mykhailova v. Ukraine*, the ECtHR found a violation of the right to an impartial judge as enshrined in Article 6 (1) of the ECHR due to the absence of a prosecuting authority in an administrative offence procedure.

12. At an appearance before the court in a civil case, the adjudicating judge considered that the defendant was in contempt of court for making false statements against the judge's honour and dignity, and for insulting him. The case of contempt of court was referred to a second judge who sentenced the applicant to an administrative detention for five days. In the absence of a prosecuting authority, the ECtHR recognised that the judge had assumed the functions of a prosecutor, by reading out the charges and also participating actively in the presentation of evidence. It is a well-established principle in the case law of the ECtHR that in order to safeguard the right to an impartial judge, the role of judge and prosecutor shall never be or appear to be confused because such confusion can raise legitimate doubts about the impartiality of the adjudicating court.

13. The absence of a prosecuting party from the court proceedings might have been caused by diverse circumstances, but in all cases where an adjudicating judge assumes the functions inherent to an accusing party, the appearance of functional impartiality will be affected.

14. In the cases of contempt of court, the defect is even more complicated because it is a type of procedure where it is not even foreseen that there should be a prosecuting authority. Thus, there can be a structural defect in the proceedings in ensuring the right to an impartial judge. The possibility that the same judge acts as "promoter of the action of contempt of court and imposes the sanction" is justified in common law legal systems upon the need of the court to act immediately to keep order in the courtroom. However, when contempt of court also entails sanctions in the form of a detention or a fine, being

an administrative sanctioning procedure with a punitive nature, the principles of the criminal procedure shall be respected. The adversarial principle and the right to an impartial judge require that there is a prosecuting body acting in such proceedings in a different capacity to the judge.

Recommendations

15. When no prosecuting authority is present at the trial in administrative sanctioning proceedings, the court should refrain from taking over the role of presenting the evidence, or reading the indictment, because such behaviour, even if it does not entail subjective bias, contributes to the appearance that the court is making the accusation. In so doing, not only would the principle of adversarial proceedings be affected, but also the image of impartiality, which is essential to maintaining confidence in the justice system.
16. To prevent the problems identified in the case of *Mykhailova v. Ukraine* from happening again – and, thus, ensuring the execution of this ECtHR judgment, it is recommended that the court suspends the hearing if a prosecuting party is not present in the administrative offences proceedings. It shall be prohibited to read out a police report or a report prepared by a judge in cases of contempt of court as the equivalent of an indictment in order to substitute the presence of a prosecuting party in the administrative offence proceedings.
17. Such conduct by the judge to a certain extent confuses the roles of prosecutor and judge and, thus, gives the grounds for legitimate doubts as to the impartiality of the adjudicating court, thus violating Article 6 (1) of the ECHR.

I. Introduction

18. This Opinion will address certain issues identified with regard to the right of access to justice by means of removing procedural barriers, in particular, the issues identified in the judgments of the ECtHR against Ukraine, the cases of *Tserkva Sela Sosulivka v. Ukraine*[4] and *Mykhailova v. Ukraine*.[5]

19. This expert opinion will seek to identify key problematic issues with regard to competing jurisdictions (*Tserkva Sela Sosulivka v. Ukraine*) and a lack of impartiality of the courts in the course of administrative offence proceedings (*Mykhailova v. Ukraine*) and to what extent such issues interfere in the right to access to justice, as understood by Article 6 of the ECHR. To that end, the relevant CoE standards on the right to access to court, as well as the applicable ECtHR case-law on similar issues in other member states will be analysed. This analysis should help in the drafting of some recommendations that might be useful for Ukraine to follow in order to improve compliance with the CoE standards and align with the practice of other CoE member states. The final aim of this assessment is to give support to the Ukrainian authorities to identify and implement general measures for the execution of the above-mentioned ECtHR judgments as to the removal of the procedural barriers in Ukraine and improve compliance with the right to access to justice.

20. As to the scope of the expert opinion, it is focused on the two topics addressed in the two judgments of the ECtHR mentioned. This means, that the expert will not assess the rules on the judicial organisation in Ukraine and whether these rules are adequate to ensure the right to a judge and provide for sufficient legal certainty in the identification of a competent court. It would be necessary as a future step to assess the adequacy and effectiveness of such rules envisaged in the Ukrainian Civil Code of Procedure, as well as in the Ukrainian Commercial Code of Procedure and the relevant rules on administrative proceedings.

21. With regard to the second judgment, this opinion will focus only on the impact that the absence of a prosecutorial authority in administrative proceedings and the involvement of an adjudicating judge in the production of the evidence may have upon the principle of impartiality and the right to an impartial judge. Other issues related to the report on contempt of court based on the excessive expressions used while recusing a judge, will not be discussed here.

22. The opinion is, thus, based on the desk research as the expert didn't have access to empirical data and actual Ukrainian court practice in order to identify the actual shortcomings, both in conflicts of jurisdiction and rules on judicial competence and in situations where the impartiality of the court may be questioned in administrative proceedings related to contempt of court. Thus, no recommendations will be made regarding the need for legislative action or what kind of model would be the most apt for overcoming the existing problems in the Ukrainian reality.

23. Therefore, this expert opinion is to be viewed as a preliminary assessment, and the issues addressed should be further discussed with the Ukrainian authorities.

II. The case of "*Tserkva Sela Sosulivka v. Ukraine"* and the right of access to justice

[4] ECtHR judgment *Tserkva Sela Sosulivka v. Ukraine,* Appl. no. 37878/02, of 28 February 2008.
[5] ECtHR judgment *Mykhailova v. Ukraine*, Appl. no. 10644/08, of 6 March 2018.

1. The right of access to justice

24. The right of access to justice is enshrined in Articles 6 and 13 of the ECHR, which guarantees the right to a fair trial and to an effective remedy. These rights are also provided for in international instruments, such as Articles 2 (3) and 14 of the United Nations International Covenant on Civil and Political Rights[6] and Articles 8 and 10 of the United Nations Universal Declaration of Human Rights[7]. The core elements of these rights, as interpreted by the ECtHR include effective access to a court (or a dispute resolution body), the right to a fair trial and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice[8].

25. "According to the interpretation of the ECtHR, the right to a court is inherent in Article 6(1) of the ECHR, the right of access being one aspect"[9]. The lack of access to a court may be relied upon by anyone who complains that he or she has not had the possibility to submit a claim to a tribunal having the jurisdiction to examine all questions of fact and law relevant to the dispute before it and to adopt a binding decision[10]. This right applies equally to persons seeking a determination of "civil" rights, or those charged with a "criminal" offence[11].

26. Everyone has the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal. The ECtHR first recognised this right in *Golder v. the United Kingdom* (1975)*,*[12] where it held that the detailed fair trial guaranteed under Article 6 of the ECHR would be useless if it were impossible to commence court proceedings in the first place.

27. In this way, Article 6(1) of the ECHR embodies the "right to a court" of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect[13]. Article 6(1) of the ECHR may, therefore, be relied on by anyone who considers that an interference with the exercise of one of his or her civil rights is unlawful and complains that he or she has not had the possibility to submit that claim to a tribunal so that to meet the requirements of Article 6.1 of the ECHR.

28. Where there is a serious and genuine dispute as to the lawfulness of such an interference going either to the very existence or to the scope of the asserted civil right, Article 6(1) of the ECHR entitles the individual concerned "to have this question of domestic law determined by a tribunal"[14]. The refusal of a court to examine allegations by individuals concerning the compatibility of a particular procedure with the fundamental procedural safeguards of a fair trial restricts their access to a court[15].

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[6] International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.
[7] Universal Declaration of Human Rights (UNDHR), 10 December 1948.
[8] FRA (2011), *Access to justice in Europe: an overview of challenges and opportunitie*s, Luxembourg, Publications Office, p. 9.
[9] Right to a fair trial under the European Convention on Human Rights (Article 6). Interights manual for lawyers, produced with the support of the Open Society Institute, available at: https://www.scribd.com/document/217013881/Manual-for-Lawyers-Right-to-A-Fair-Trial-under-the-ECHR
[10] *Le Compte, Van Leuven and De Meyere v. Belgium*, Appl. no. 6878/75, 7238/75, of 23 June 1981.
[11] *Deweer v. Belgium,* Appl. no. 6903/75, of 27 February 1980.
[12] *Golder v. the United Kingdom,* Appl. no. 4451/70, of 21 February 1975.
[13] *Golder v. the United Kingdom,* para. 36; also *Naït-Liman v. Switzerland* [GC], Appl. no. 51357/07, of 15 March 2018, para. 113.
[14] *Z. and Others v. the United Kingdom* [GC], Appl. no. 29392/95, of 10 May 2001, para. 92; *Markovic and Others v. Italy* [GC], Appl. no.1398/03, of 14 December 2006, para. 98.
[15] Al-Dulimi and Montana Management Inc. v. Switzerland [GC], Appl. no. 5809/08, of 21 June 2016. See in general the Guide on Article 6 of the European Convention on Human Rights (civil limb), p. 22, accessible at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf

Nevertheless, an applicant cannot claim the guarantees of Article 6 of the ECHR to be applicable autonomously to procedures determining a challenge of a judge or other procedural decisions taken in the context of a civil or criminal case. There is no separate right of "access to a court" under Article 6(1) of the ECHR to complain about procedural decisions – there is only a right of access with a view to obtaining judicial decisions, which determine the merits of that civil or criminal case.

29. The right of access to court, thus, also includes the right to obtain a decision from a court.[16] It is, of course, understood that, in civil as well as criminal spheres, the interests of the proper administration of justice will justify the imposition of reasonable time-limits and procedural conditions for the bringing of claims, such as the need to lodge an appeal with a proper court,[17] but those limits are to be construed in such a way that it does not prevent applicants' actions from being examined on the merits, as this would undermine the right of access to a court[18].

2. The judgment in the case "*Tserkva Sela Sosulivka v. Ukraine"*

30. This case reflects the problem of a negative conflict of jurisdiction in Ukrainian judicial proceedings, which ends up in complete denial of access to justice. The case concerned a dispute between the Ukrainian Greek Catholic Church and the local state administration over the shared use of a church's premises for religious ceremonies with another church (Orthodox Church, Kyiv Patriarchate). The facts that are relevant for this opinion (without the procedural nuisances) are as follow: the plaintiff (Catholic Church) initially filed a lawsuit in the commercial court, but the case was discontinued due to the fact that the case was to be heard in civil proceedings.

31. Three courts at different instances confirmed the lack of competence of the commercial courts. Subsequently, the plaintiff filed a lawsuit to a court of general jurisdiction, but the latter refused to initiate proceedings in the case, stating that the case belonged to the jurisdiction of commercial courts. Eventually, the case was closed after a second appeal to the court of commercial jurisdiction, which ruled to enforce the administrative procedure in this case (considering that the decision of the local state body was directly enforceable) instead of the judicial procedure for appealing the actions of the relevant state body. Finally, the Supreme Court declared the cassation inadmissible. Since the first claim was filed, there had been more than eight judicial decisions over the year, and no court addressed nor decided the case on the merits.

32. In the case the ECtHR found a violation of Article 6.1 of the ECHR based on the applicant's clear denial of access to a court, as the dispute had not been examined on the merits by either the courts of general jurisdiction or the courts of commercial jurisdiction. Apart from this clear violation of Article 6(1) of the ECHR, situations like this have also a negative impact on the efficiency of justice and the right to a fair trial without undue delay: more than one year had passed since the first claim was lodged, the eight judicial decisions were rendered, and the applicant did not obtain access to a court to

[16] See Ganci v. Italy, Appl. no. 41576/98, of 30 October 2003, relating to criminal proceedings, in particular the right to complain against the conditions of detention.

[17] ECtHR decision MPP Golub v. Ukraine, Appl. no. 6778/05, of 18 December 2005. See also the study of the European parliament, Effective Access to Justice, prepared for the PETI Committee, 2017, accessible at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596818/IPOL_STU(2017)596818_EN.pdf

[18] See Miragall Escolano and Others v. Spain, Appl. no. 38366/97 and eight more, of 25 May 2000, relating to a strict interpretation of the time limits.

get his dispute solved. In this expert opinion, the case will be considered from the point of view of the right to access to a court. The focus will lie on the problem originated by the rules on jurisdiction and the absence of a sound procedural mechanism to solve it efficiently.

3. The ECtHR and the rules on jurisdiction

33. No ECtHR cases similar to the "*Tserkva Sela Sosulivka* v. Ukraine" case were found. Yet it is worth mentioning other cases where the ECtHR considered issues concerning the rules on the jurisdiction of courts and their impact upon the rights of the litigants as enshrined in Article 6 of the Convention. The ECtHR has addressed these issues mainly from the point of view of the right to a court established by the law and the legal certainty.

34. The ECHR guarantees everyone the right to a case in a court to whose jurisdiction it is assigned by law, which is an integral part of the concept of "court established by law" envisaged in Article 6.1 of the ECHR. "The object of the term "established by law" in Article 6 of the Convention is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive power, but that it is regulated by law emanating from a parliament".[19] Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.[20] The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also compliance by the tribunal with the particular rules that govern it and envisages "the whole organisational set-up of the courts, including ... the matters coming within the jurisdiction of a certain category of courts..."[21].

35. As the ECtHR has set out in the case *Sutyazhnik v. Russia,*[22] the institution of judicial jurisdiction is inherently linked to the fundamental right to a trial by a court established by law[23]. The correct application of the rules of judicial jurisdiction is fundamental in terms of compliance with the guarantees of the right to a fair trial. At the same time, the problem of conflict of jurisdiction is often complicated by the need to resolve the issue of conflict between certain elements of the right to a fair trial in a particular case: on the one side ensuring compliance of the rules of jurisdiction and right to the judge established by the law, the legal certainty that provides the finality of the judgments and the right to access to court and to have the dispute decided within a reasonable time.

36. The ECtHR, in *Sutyazhnik v. Russia*, in which the commercial courts dealt with a dispute relating to the registering of an association (NGO), where the relevant public authority refused to register the applicant's association. The decision of the commercial court of the first instance was in favour of the claimant and it was later confirmed by the appellate court. However, after the decision came into force, the prosecutor lodged a supervisory review on the grounds that there had been an infringement of the rules on jurisdiction and the case was to be heard in civil rather than commercial proceedings. In

[19] *Zand v. Austria*, Appl. no. 7360/76, of 12 October 1978.
[20] *Coëme and Others v. Belgium*, Appl. nos. 32492/96, 32547/96, et al. of 22 June 2000.
[21] *Zand v. Austria*, application no. 7360/76, Commission's report of 12 October 1978
[22] *Sutyazhnik v. Russia,* Appl. no. 8269/02, of 23 July 2009.
[23] The concept of "court established by law" requires that there is: a) a legal basis for the functioning of the court; b) the powers of the court to consider a particular case in terms of substantive and subjective, instance and territorial jurisdiction, as well as the use of the court exclusively provided by law; c) the proper composition of the court and the authority to hear the case of each individual judge who is a member of the court.

addition, this decision was rendered in absentia, because of a defective notification of the appeal.

37. In considering the case, the ECtHR took into account on one side the principle of legal certainty –and the finality of judgments and the *res iudicata* effect– and on the other side the respect of the rules on jurisdiction under the right to access to court and in particular the right of a person to a trial by a court established by law. The issue was whether to let prevail the quashing of two sentences of the commercial courts upon the supervisory review filed by the public prosecutor almost ten months later, for the dispute should be solved by the courts of general jurisdiction, or upheld the sentences and determine that once the judgments had become final, the fundamental defect on the jurisdiction was not so relevant as to quash a final judgment.

38. The ECtHR recognises first the importance of compliance with the rules on jurisdiction and "agrees that, as a matter of principle, the rules of jurisdiction should be observed", and jurisdictional errors may be regarded as "a fundamental defect"[24] because they are essential for preserving the right to the court established by the law. However, in the specific circumstances of this case the judgment, where the laws were ambiguous and were the competence of the commercial courts had been decided already by two courts, the remedy of the supervisory review that led to overturning those final judgments, can be seen as used "rather for the sake of legal purism, than to correct a mistake that is fundamental to the judiciary."[25] The ECtHR considers in this case that the correct application of the rules on jurisdiction in this particular case should not prevail over the right to legal certainty, to rely on the decision taken by the courts once they are final, and the right to access a court.

39. The case is interesting, not so much for its impact on the right to access to justice, but because it underlines the importance of complying with the rules on jurisdiction and admits exceptions to it. This approach is not shared by two judges of the ECtHR in the case in question.

40. There is a dissenting opinion by two judges, stating that the civil procedural legislation clearly establishes the consequences of non-compliance with the rules of substantive and subjective jurisdiction. Thus, if during the opening of the proceedings it turns out that the case is not subject to civil proceedings, the court should refuse to open the proceedings; and if the lack of jurisdiction becomes clear after admitting the claim the proceedings should be closed. If the lack of jurisdiction is established by the courts of appeal or cassation, the latter must overturn the judgments of the lower courts and close the proceedings. The dissenting opinion considers that the violation of the rules of jurisdiction of general courts, is a mandatory ground for revocation of the decision, regardless of the arguments of the appeal or cassation,[26] even though the Supreme Court, contrary to the direct provisions of the Russian Procedural Code, in exceptional cases allows the possibility of considering a case that falls under the jurisdiction of commercial or administrative courts, in civil proceedings.

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[24] In this sense, see *Luchkina v. Russia*, Appl. no. 3548/04, of 10 April 2008, § 21.

[25] *Sutyazhnik v. Russia,* § 38. "In the circumstances of the case the quashing of the judgment of 17 June 1999, as upheld on 18 October 1999, was a disproportionate measure and respect for legal certainty should have prevailed. There has therefore been a violation of Article 6 § 1 of the Convention" (*Ibid.,* § 39).

[26] The dissenting opinion states: "That lack of jurisdiction was at its most fundamental and strict, as it meant a complete absence of authority to determine the case. Consequently, the judicial decisions adopted by the lower courts in the applicant association's favour were not only objectionable from the perspective of procedural or substantive legislation: they were simply void. The lower courts' decisions affected the whole organisation of the judicial system and the separation of powers within it. … we do not agree that 'the judgment was quashed primarily for the sake of legal purism, rather than in order to rectify an error of fundamental importance to the judicial system' (see paragraph 38)".

41. Another relevant case on the application of rules on jurisdiction is the case of *Sokurenko and Strygun v. Ukraine*[27]*.* In this case, a company filed a lawsuit with the first instance commercial courts on a dispute relating to certain plots of land. The appeal was dismissed and the Higher Commercial Court quashed the previous judgments and ordered remittal for new consideration. The company brought the appeal to the Supreme Court, which decided to quash the judgment of the Higher Commercial Court and confirmed the previous judgment of the appellate court.

42. The Ukrainian Supreme Court was faced with the question of balancing between the guarantees of the right to a fair trial as the right of access to a court and the correct application of the rules on the jurisdiction that safeguard the right to a trial by a court established by law, which is the court to whose jurisdiction the case belongs. The Supreme Court found that the Highest Commercial Court's findings were unsubstantiated, erroneous, and inconsistent with the circumstances of the case. The Supreme Court favoured the individual's right of access to a court, as the opposite approach would have precluded judicial protection of the right in question and would have led to a situation similar to that in *Tserkva Sela Sosulivka v. Ukraine*.

43. The ECtHR in the case of *Sokurenko and Strygun v. Ukraine* found a violation of Article 6(1) of the ECHR for infringement of the legal requirements that ensure "the right court established by law".[28] The Supreme Court instead of quashing and resending the case to the lower courts, or nullifying the decision of the lower courts for infringement of the rules on jurisdiction, ruled that the decision of the court of appeal was to be upheld. The applicants claimed under the Code of Commercial Procedure that the Supreme Court had the competence to terminate proceedings or remit the case for rehearing, but had no authority to uphold and reinstate the appellate commercial court's decision or to repeal the Highest Commercial Court's ruling. By doing so, the Supreme Court extended its competence beyond the law, as there was no legal basis for such competence. As a result, the applicants claimed that the Supreme Court could not be considered a 'tribunal established by law' within the meaning of Article 6(1) of the ECHR in their case, as it had exceeded its competence.

44. The ECHR observed that the purpose of the term "as established by law" in its practice is to guarantee that "the judiciary branch of the state power in a democratic society is independent of the executive, but is governed by the law passed by the parliament".[29] Thus, the phrase applies not only to the legal basis of the tribunal's authority but also to the tribunal's compliance with certain prescriptions regulating its activities[30].

4. Negative conflicts of jurisdiction and competence

45. It is a well-established principle that the rules on jurisdiction are peremptory rules, whose infringement shall lead to declaring the proceedings void. The rules on jurisdiction are aimed not only at providing a rational structure of the judiciary and fostering a specialised distribution of work but ensure the fundamental right to the court pre-established by the law. Thus, their compliance is not only a formality and in case of infringement, most legal systems provide for the consequence of nullity of the proceedings or procedural acts without jurisdiction. In this sense, the Ukrainian Law "On

[27] *Sokurenko and Strygun v. Ukraine*, Appl. nos. 29458/04 and 29465/04, of 20 June 2006.
[28] *Ibid*.
[29] *Ibid.*
[30] The ECtHR observed that as the Supreme Court had failed to offer convincing grounds for exceeding its authority and wilfully infringing the code, it had abused its powers and could not be considered "a tribunal established by law" for the purpose of Article 6(1) in this case. Therefore, the ECHR found that the Supreme Court had violated Article 6(1).

the Judiciary and the Status of Judges" correctly states under its Article 8 about the right to a competent court: *"No one may be deprived of the right to have his/her case heard by a court to whose jurisdiction it is assigned by procedural law."*[31]

46. Unfortunately, such cases, where national courts have problems in determining the type of proceedings to be heard in a particular case, are not isolated, and, therefore, a legitimate question arises as to whether it can be required that the plaintiff to applies the rules on competence and jurisdiction correctly and whether he is able to foresee the consequences of his procedural conduct, even if professional lawyers are sometimes unable to do so. Being quite frequent these cases at the national level, these conflicts should never end up as in the "*Tservka Sela Sosulivka v. Ukraine"* case with a blatant denial of the right to have the case heard by a court. Ambiguous rules and complex subject-matter issues where it is difficult to determine which is the competent jurisdiction are frequent, and this is why procedural mechanisms need to be put in place to provide a swift solution to negative conflicts of jurisdiction.

47. Examples of other national systems might be useful to identify best practices.

48. In Spain, the LOPJ provides in its Article 9.6 that the general rule for deciding on the jurisdiction by the court, besides the specific procedural provisions, contained in each of the codes of procedure.

49. In addition, Articles 42 to 50 of the LOPJ regulate the way to solve conflicts of jurisdiction between ordinary courts of different branches (criminal, civil, labour, and administrative courts). The criminal jurisdiction always prevails (Article 44 of the LOPJ), so that other courts cannot claim competence from a criminal court.

50. The own jurisdiction is to be checked at the very first moment after the filing of the complaint, as the rules on jurisdiction are *ius cogens*. Any action by a court that does not have jurisdiction is void (Article 238.1 of the LOPJ).[32] The nullity of any procedure for lack of jurisdiction can be decided at any stage of the proceedings until the judgment becomes final, but never after the sentence is final and has *res iudicata* effect. Even if the court *ex officio* or the parties can challenge at any moment the jurisdiction of the court, the right procedural moment to do it is at the very beginning of the proceedings, to avoid the effect of their nullity declared afterward.

51. Thus, it is for the court where the case is pending to determine its own competence/jurisdiction, and the parties to argue also why the chosen court is competent. If the court considers it does not have jurisdiction, after hearing the parties and the public prosecutor (usually within five days and deciding within other five days, but the terms may differ in the different codes of the procedure), it will give a motivating ruling on its own jurisdiction.

52. If the court finds it lacks jurisdiction, in the same decision, it shall indicate the parties which is the competent court. The parties shall then file the claim before the indicated court. In the event, this second court considers that it also lacks jurisdiction, at that very moment, the negative conflict of jurisdiction is to be referred to the special Court on Conflicts of Jurisdiction (*Sala de Conflictos de Competencia*).

53. This is a special Chamber of the Supreme Court, formed by three judges of the Supreme Court: The President of the Supreme Court, and one judge of each of the conflicting jurisdictions: for example, if the negative conflict is between the civil courts and the administrative courts, the composition of the Chamber will have one Supreme

[31]The Law of Ukraine "On the Judiciary and the Status of Judges", available at: https://zakon.rada.gov.ua/laws/show/1402-19#Text

[32] Article 238.1 LOPJ: "The procedural acts will be null and void in the following cases: 1. When they are performed by or before a court lacking subject-matter jurisdiction or competence."

Court judge from the Civil Chamber, one from the Administrative Chamber and the President of the Supreme Court. The precise judges to sit on this Chamber –besides their ordinary work in their respective Supreme Court Chambers –, is done by the Supreme Court non-jurisdictional Chamber (*Sala de Gobierno,* responsible for the administration of the Court), and the appointment is for a limited-term and follows objective criteria. The decision of the Chamber of Conflicts of Jurisdiction deciding which court has jurisdiction to decide on the instant dispute is final. Like all other decisions of the Supreme Court, it is to be published in the online database of the Supreme Court, which is publicly accessible.

54. In each legal system, despite the accuracy of the legal provisions, it is frequent that certain cases are not easy to classify as civil, administrative, or labour. According to the statistics of the Spanish Supreme Court for 2019, the Chamber of Conflicts of Jurisdiction received 23 cases, and decided 19. In a majority of them, the negative conflict arose between labour and administrative courts (for example, the rights of a doctor working for the public health system; or the work contracts of illegal immigrants, etc.).

55. As to the German systems, it has to be recalled that ordinary courts usually rule in criminal and civil matters such as marriage and family disputes. Non-contentious cases are also tried in ordinary courts. The German specialized courts are divided into labour courts, social courts, administrative courts, and financial courts. German labour courts will rule in matters derived from private law in employment disputes. Administrative courts will try cases that fall under the jurisdiction of public administrative law. The social courts in Germany will rule on social security matters. German financial courts are specialized in taxation matters.

56. The general rules on the decisions regarding the jurisdiction of the courts, are to be found mainly under Article 17a of the GVG. The German system provides for a different and more expedited way than the Spanish system. Article 17a GVG states:

"(1) If a court has declared with final and binding effect that it has jurisdiction for the complaint (zuständiger Rechtsweg), other courts shall be bound by this decision.
(2) If it considers it is not competent, the court shall declare this proprio motu after hearing the parties and shall at the same time refer the legal dispute to the competent court. If several courts are competent, the dispute shall be referred to the court to be selected by the plaintiff or applicant or, if no selection is made, to the court designated by the referring court. The decision shall be binding upon the court to which the dispute has been referred in respect of the jurisdiction (Rechtsweg).
(3) In considering its own jurisdiction, the court may give a preliminary decision to this effect. It must give a preliminary decision if a party challenges the jurisdiction."
(4) The decision pursuant to subsections (2) and (3) may be given without an oral hearing. Reasons must be given therefor. The immediate complaint (sofortige Beschwerde) shall be available against the decision pursuant to the provisions of the respective applicable code of procedure. The parties shall only be entitled to lodge a complaint against a decision of a higher regional court at the highest federal court if this has been granted in the decision. The complaint must be admitted if the legal issue concerned is of fundamental importance or if the court deviates from a decision of one of the highest federal courts or from a decision of the Joint Panel of the Highest Federal Courts (Gemeinsamer Senat der obersten Gerichtshöfe des Bundes). The highest federal court shall be bound by the admission of the complaint.
(6) Subsections (1) to (5) shall apply mutatis mutandis to adjudicating bodies with jurisdiction over civil disputes, family matters and non-contentious matters in relation to each other."[33]

[33] See also Article 17b GVG:

57. Without entering into details, the Italian system for dealing with negative conflicts of the jurisdiction (*conflitti di competenza*) is very similar to the Spanish one, having general rules regarding the judicial organization (*ordinamento giudiziario),* and specific rules in each of the procedural codes. Any conflict of jurisdiction – positive as well as negative – will be decided by a special Chamber of the *Corte di Cassazione in camera di Consiglio*, and its decision is binding for the lower courts.[34]

III. The case of "*Mykhailova v. Ukraine"* and the right to an impartial judge in administrative proceedings where there is no prosecuting party

1. The right to an impartial judge

58. Impartiality normally denotes the absence of prejudice or bias, and to that end, the first requirement is that no one shall decide in its own case, thus not being a party at the same time as a judge. The existence of impartiality can be tested in various ways, and the ECtHR, since its judgment in *Piersack v. Belgium*[35]*,* has differentiated between a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also, an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of the existence of impartiality[36]. In applying the objective test, it must be determined whether quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. When applied to a body sitting as a bench, it means determining whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts that may raise doubts as to the impartiality of the body itself.

59. The ECtHR emphasised that appearances may be of certain importance or, in other words, "justice must not only be done, it must also be seen to be done"[37]. What is at stake is the confidence, which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.

60. The possible situation of lack of appearance of impartiality is of a functional in nature and concerns, for instance, the exercise of different functions within the judicial process by the same person, or hierarchical or other links between the judge and other actors in the proceedings,[38] as for example, the participation of the same judge at different stages of the proceedings; where a judge has exercised advisory functions at the same case;

"(1) After the decision on referral has become final and absolute, the legal dispute shall be pending at the court designated in the decision upon receipt of the file by that court. The effects of pendency shall continue to exist.
(2) If a dispute is referred to another court, the costs of the proceedings before the first court shall be treated as part of the costs incurred at the court to which the dispute was referred. The plaintiff shall bear the additional costs incurred even if he prevails on the main issue.
(3) Subsection (2) sentence 2 shall not apply to family matters and non-contentious matters."

[34] See, for example, Articles 28, 29 and 568 of the Italian Criminal Code of Procedure (*Codice di Procedura Penale*).

[35] *Piersack v. Belgium*, Appl. no. 8692/79, of 1 October 1982.

[36] See *Micallef v. Malta* [GC], Appl. no. 17056/06, of 15 October 2009, para. 93; and *Nicholas v. Cyprus*, Appl. no. 63246/10, of 9 January 2018, para. 49.

[37] *See De Cubber v. Belgium* of 26 October 1984, Series A no. 86, p. 14, par. 26.

[38] See *Micallef v. Malta*, paras. 97-98.

or, where there is some confusion between the functions of bringing charges and determining the issues.[39]

61. In relation to Article 6(1) of the Convention the ECtHR found doubts as to impartiality to be objectively justified where there is some confusion between the functions of prosecutor and judge see,[40] and reiterated that the confusion between the functions of prosecutor and judge may prompt objectively justified doubts as to the impartiality of the persons concerned.[41] The ECtHR reached the same conclusion under Article 6(1) of the ECHR in the case of *Kyprianou v. Cyprus*[42] concerning contempt of court, in which the decision to prosecute was taken and a summary trial was conducted by the same judges as those sitting in the proceedings at which the conduct leading to contempt of court took place.

2. The judgment in the case "*Mykhailova v. Ukraine"*

62. The applicant was sued by the company seeking the payment of utility arrears. At her appearance before the court (made of one single judge), she went beyond the right to recusal accusing the judge of making unlawful decisions and after warning her, the judge drew up a report for contempt of court in respect of the litigant according to the law on administrative offences in Ukraine (Article 185.3 of the Code of Administrative Offences of Ukraine).[43] The hearing was suspended and the case on contempt of court was tried some minutes afterward before another judge.

63. The second judge found the applicant guilty of contempt of court, for making false statements against the judge's honour and dignity and insulting him, and sentenced her to administrative detention for five days. The court relied on the report of the first judge, the written witnesses' statements (two trainee judges), and the audio recording of the hearing, as no prosecuting authority was acting in this procedure. The sentence was upheld by the appellate court, which reviewed the case acting on its own motion.

64. The applicant claimed before the ECtHR, besides the breach of Article 6(1) of the Convention (the right to an impartial judge), also other infringements of the right to a fair trial (namely, the right to cross-examination, access to the file, right to legal assistance, sufficient time for preparing the defence, etc.). Such other infringements of Article 6 of the ECHR will not be addressed here, as this expert opinion focuses on the right to an impartial judge.

65. With regard to the judicial impartiality, the applicant alleged that there was a violation of Article 6(1) of the ECHR, as the court that tried her case on contempt of court was not impartial because "of the absence at the hearing of any party for the prosecution, the judge had assumed this function (…) thus undermining her own impartiality (para. 32). In addition, the case was seemingly handed over to the adjudicating judge, without entering the case into the register to be distributed.[44]

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[39] See *Kamenos v. Cyprus*, Appl. no. 147/07, of 31 October 2017.
[40] *Daktaras v. Lithuania*, Appl. no. 42095/98, of 10 October 2000.
[41] *Kamenos v. Cyprus*, para 104.
[42] *Kyprianou v. Cyprus*, [GC], Appl. no. 73797/01, of 15 December 2005.
[43] With regard to the challenging of the court's impartiality, see for example *Micallef v. Malta*, already cited.
[44] The issue of the alleged irregular assignment of the case to the judge is not analysed by the ECtHR in this case, because those facts are not sufficiently substantiated. In any event, with regard to this issue the Court has expressed that the assignment of a case to a particular judge or court falls within their margin of appreciation in such matters, but to be compatible with Article 6 § 1, it must comply with the requirements of independence and impartiality and the assignment cannot be solely

3. The ECtHR and proceedings in absence of a prosecutorial authority

66. The role of judge and prosecutor shall never be or appear to be confused because such confusion can raise legitimate doubts on the impartiality of the adjudicating court. With regard to the relationship between state prosecutors and court judges, the CoE recommendation Rec(2000)19 On the role of public prosecution in the criminal justice system,[45] adopted by the CM on 6 October 2000, provides as follows:

"17. States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of state prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular states should guarantee that a person cannot at the same time perform duties as a state prosecutor and as a court judge."

67. The case law of the ECtHR has addressed the possible breach of the right to an impartial judge where the proceedings took place without the presence of a prosecutorial body, where the adjudicating body took over some actions that correspond to the accusing party.

68. In the case *Thorgeir Thorgeirson v. Iceland,*[46] a criminal case for defamation, the applicant complained that, under the current Icelandic, less serious cases, which did not warrant an adversarial procedure, could be examined in the absence of the public prosecutor. This meant, according to the applicant, those district court judges were empowered in such cases to take over the prosecutor's functions, which was against the right to an impartial judge. In analysing the possible violation of Article 6(1) of the ECHR, the ECtHR recalls that its task is not to review the relevant law and practice *in abstracto*, "but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of Article 6(1) of the ECHR.

69. After realising that out of twelve sittings, the public prosecutor was, with one exception, present at all of them, and precisely at those at which evidence was submitted and witnesses were heard (para.52), the ECtHR found that in this case, such circumstances did not affect to the impartiality of the judge nor the principle of adversarial proceedings, and therefore held that Article 6(1) o fthe ECHR had not been violated.

70. There are several judgments against Russia relating also to the absence of the public prosecutor at the criminal trial. In the case *Ozerov v. Russia*[47] criminal proceedings were brought against the applicant on two charges – a traffic offence which resulted in the infliction of bodily harm, and burglary – and the public prosecutor failed to appear during the whole trial at first instance. The court, after asking the parties present whether they had any request or objection to proceed with the proceedings in such a way and no objection was raised, continued with the trial, read out the indictment and the parties presented their evidence (victim and defendant). The trial court decided to examine *ex officio* an additional witness.

71. The ECtHR found in this case that "by examining the case on the merits and convicting the applicant without the prosecutor the District Court confused the roles of prosecutor and judge and, thus, gave the grounds for legitimate doubts as to its impartiality (para. 54), and such fears as the applicant may have had on account of the prosecutor's

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dependent on the discretion of the judicial authorities. See for example *Pasquini v. San Marino*, Appl. no. 50956/16, paras. 103, 107 and 110.

[45] Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

[46] *Thorgeir Thorgeirson v. Iceland,* Appl. no. 13778/88, of 25 June 1992.

[47] *Ozerov v. Russia,* Appl. no. 64962/01, of 18 May 2010.

absence as regards the court's impartiality can be held to be objectively justified. The ECtHR found in *Ozerov v. Russia* that there had been a violation of Article 6(1) of the ECHR. Even if it could be assumed that the applicant might have waived his right by not objecting to the continuation of the trial in absence of the public prosecutor, the ECtHR in this case considered "that waiver of rights guaranteed by Article 6 of the Convention cannot depend on the parties alone where the right in issue is of essential importance, such as the fundamental right to an independent and impartial tribunal in view of the public interest involved".

72. In the case *Krivoshapkin v. Russia*[48], where the applicant was charged together with the other three persons with robbery. At the beginning of the hearing, it was found that all victims and certain witnesses had failed to appear as well as the public prosecutor, due to different reasons. The defendants objected to the continuation of the hearing, but the court decided to proceed with the trial. The presiding judge read out the indictment and questioned the defendants and the witnesses (para. 10). The applicant was sentenced to nine years imprisonment. The ECtHR is very clear in this judgment: "In these circumstances, the Court cannot but accept that the trial court did not preserve the guarantees of the adversary nature of the criminal proceedings (see para 20) and confused the functions of prosecutor and judge: it took up the prosecution case, tried the issues, determined the applicant's guilt and imposed the sanction. Accordingly, the Court finds that the applicant's doubts as to the impartiality of the trial court may be said to have been objectively justified"[49].

73. In the judgment *Karelin v. Russia*[50] the applicant was arrested by a police officer and accused of disorderly behaviour in a public place, an administrative offence under the Federal Code of Administrative Offences (CAO) punishable by a fine or up to fifteen days detention. The officer prepared a written report on the facts and his superior transferred the record to the court for adjudication. During the hearing, several witnesses were heard and the reporting officer was present and made an oral statement. The justice of the peace found the applicant guilty and imposed a fine.

74. However, "the ECtHR considers that the officer in question was not a "prosecuting authority" or a "prosecuting party" in the sense of a public official designated to oppose the defendant in the Code of Administrative Offences case and to present and defend the accusation on behalf of the State before a judge. Consequently, the Court concludes that there was indeed no prosecuting party in the case brought under the CAO."[51]

75. In this case, determining the nature and function of the police record is crucial. In this sense "the ECtHR observes that the administrative offence record served as the basis for the judge's examination of the case when the determination of the "charge" was first carried out. For the ECtHR, it is of central importance whether the offence record was or was not assimilated to a bill of indictment, in substance, articulating the essential elements of the "charge" and the "nature and cause of the accusation" within the meaning of Article 6 §§ 1 and 3(a) of the Convention, and substantiating them with reference to the available evidence."[52]

76. The conclusions of the ECtHR are reproduced below, as they are relevant to determine the impact that the absence of a prosecuting party in administrative proceedings may have upon the impartiality of the court. The judgment states:

[48] *Krivoshapkin v. Russia*, Appl. no. 42224/02, of 27 January 2011.
[49] *Krivoshapkin v. Russia*, Appl. no. 42224/02, of 27 January 2011, para 44.
[50] *Karelin v. Russia*, Appl. no. 926/08, of 20 September 2016.
[51] *Karelin v. Russia*, Appl. no. 926/08, of 20 September 2016, para 65.
[52] *Karelin v. Russia*, Appl. no. 926/08, of 20 September 2016, para 66.

"The Court accepts that the trial court had no alternative but to undertake the task of presenting – and, what is more pertinent, to carry the burden of supporting – the accusation during an oral hearing.

74. Furthermore, the CAO provided that the trial court could decide whether to require oral evidence or the production of documents or to commission a report. The Government submitted that such decisions could be taken "inter alia, at the defendant's request". By implication, this may also mean that such decisions could be taken by the trial court proprio motu. The Court has examined a number of constitutional decisions relating to the matter and does not find their rationale conclusive as regards the question of the search and collection of evidence by a court.

75. Having examined the available material and the relevant provisions of domestic legislation and case-law, the Court is not convinced that sufficient safeguards were in place to exclude legitimate doubts as to the adverse effect the procedure had on the trial court's impartiality. While noting that the impartiality issue here relates to the context of a relatively minor offence while arising from the specific procedure itself rather than from any action or inaction in the circumstances of the case, the Court considers that impartiality is not commensurate to the nature and severity of the penalties incurred or to what is at stake for the defendant in the proceedings."[53]

77. The case *Kamenos v. Cyprus*[54] deals with a disciplinary procedure against a judge for misconduct, where the applicant complains that the judges of the Supreme Court had charged him with the offence of misconduct and then, sitting as the Supreme Council of Justice (SCJ), had tried him and found him guilty of misconduct. The same judges, albeit in a different capacity, had also decided on his objection concerning the charge sheet, which they had drawn up. Taking into account that the same court framed the charges against the applicant and then, sitting as the SCJ, conducted the disciplinary proceedings, the ECtHR found confusion between the functions of bringing charges and those of determining the issues in the case, and such confusion could prompt objectively justified fears as to the impartiality of the administrative body deciding on the disciplinary offence against the judge.

78. Finally, it can be questioned whether in the cases of contempt of court, where the same court can impose the sanction for disorderly behaviour in a courtroom, the absence of a prosecuting authority also meets the functional objective test of impartiality of such court.

79. The ECtHR addresses this issue in the case of *Kyprianou v. Cyprus*[55] but stating beforehand that the Court does not consider it necessary neither desirable "to review generally the law on contempt and the practice of summary proceedings in Cyprus and other common-law systems. Its task is to determine whether the use of summary proceedings to deal with Mr Kyprianou's contempt in the face of the court gave rise to a violation of Article 6 § 1 of the Convention"[56].

80. In assessing whether, in the precise circumstances of the instant case, there are objective grounds to doubt about the objective impartiality of the national court, the ECtHR finds that:

"The present case relates to contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction, in this case a term of imprisonment. In such a

[53] *Karelin v. Russia*, Appl. no. 926/08, of 20 September 2016, paras 73-75.
[54] *Kamenos v. Cyprus*, cited above.
[55] *Kyprianou v. Cyprus*, cited above.
[56] See para. 125.

situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench."[57]

81. Upon this argument, the ECtHR finds that "the functional defect" of the court is capable of raising doubts on the impartiality of the court.

82. By circumscribing the issue of the case to a "personal" conflict of the lawyer and the judges in the courtroom, the ECtHR avoids to make a general statement on the flaws of the common law proceedings of contempt of court, where it is evident that the same judges that "charge" also impose the sanction. The alignment of the contempt of court institution with the requirements of objective impartiality as set out by the case-law of the ECtHR, is to be further analysed.

83. Nevertheless, this expert opinion has to focus on the execution of the judgment of *Mykhailova v. Ukraine*, and the problem does not lie in the structure of the proceedings on contempt of court. In the *Mykhailova v. Ukraine* case, the sanction for contempt of court had to be decided by another judge, different from the one that had been challenged by the applicant and reported on the possible contempt of court (no further issues will be analysed regarding the problems of the institution of contempt of court). The case of *Mykhailova v. Ukraine* might be seen as analogous, as in general in common law proceedings of contempt of court, there is not accusing or prosecuting party either, but the problem in the *Mykhailova v. Ukraine* case originated by the absence of a prosecuting party in the said proceedings, even if its presence is foreseen. The compliance of the common law proceedings on contempt of court with the principle of impartiality and the confusion between the functions of the judge and prosecutor should be discussed further.

4. Impartiality and adversarial administrative sanctioning procedures

84. The utmost importance of the principle of impartiality as an integral principle of the concept of justice and the judicial proceedings cannot be questioned. The entire structure of the judicial procedure is designed to ensure the separation of powers and to safeguard the right to a fair trial. The behaviours or situations that may raise doubts as to whether the judge is in a position to carry out his function objectively and exclusively abiding by the law are very diverse. But the criminal procedure (and also any administrative sanctioning procedure) has to be structured in such a way as to anticipate, avoid, minimize or exclude that the functions attributed to the judge undermine their position as an impartial third party: that the judge is not a party to the trial itself (*nemo iudex in causa sua*) and is not perceived as such. The accusatory or adversarial model with duality of parts is precisely aimed at this, as is the prohibition to initiate the proceedings by the judge (*nemo iudex sine actore*).

85. One of the situations that generate huge controversy regarding judicial impartiality is precisely the role a judge is to play in the adversarial criminal proceedings and its involvement in the presentation of charges or the indictment and production of evidence. The question is also to decide if all elements of the adversarial principle applicable in the criminal procedure should also apply in administrative sanctioning proceedings.

86. As it is well known, following the *Engel criteria*,[58] it is important to state that principles, general rules, proceedings, and penalties concerning the administrative offences fall

[57] See para. 127.

[58] See *Engel and Others v. The Netherlands*, Appl. no. 5100/71, of 8 June 1976.

under the concept of “criminal charge” of Article 6(1) of the ECHR and of course all other related rights with respect to that concept of a criminal charge (as the right to have adequate time and facilities for the preparation of person’s defence from Article 6(3) of the ECHR). This concept with respect to administrative offences derives from the well-known and settled case-law of the ECtHR, of which one of the most important and effective leading cases is the judgment in the case of *Öztürk v. Germany* from 1984.[59] Finally, even if there are no penalties with administrative imprisonment the “punitive nature” of administrative sanctions, still fall under the concept of “criminal charge” and all the rights and obligations arising from it, since "The relative lack of seriousness of the penalty at stake […] cannot divest an offence of its inherently criminal character."[60] This in a very general fashion described the position of the ECtHR is also well known and amply commented in legal literature concerning the ECHR and administrative offences,[61] also with respect to the position that the terms “criminal offence” and “criminal charge” have the same scope.

87. Therefore, the case-law cited above regarding criminal proceedings could be mutatis mutandis be applied to administrative sanctioning proceedings, even if not all the safeguards of a criminal case are applicable.

88. As a conclusion, in accordance with the ECHR case law, even if the ECtHR does not prescribe, how the administrative sanctioning proceedings should *in abstracto* be structured, it has repeatedly insisted that the absence of a prosecuting authority in the proceedings coupled with the active involvement of the adjudicating court in the presenting of charges and/or the gathering and presenting of evidence, increases the appearance of confusion between the role of the prosecution and a judge. Such confusion creates reasonable doubts as to the objective impartiality of the court and is a breach of Article 6(1) of the ECHR. Therefore, when no prosecuting authority is present at a trial in administrative sanctioning proceedings, a court should refrain from taking over the role of presenting the evidence, or reading the indictment, because such behaviour, even if it does not entail subjective bias, contributes to the appearance that a court accuses one of the parties. By doing so, not only the principle of adversarial proceedings would be affected, but also the image of impartiality, which is essential for raising public confidence in justice.

IV. Recommendations

1. Recommendations on the right to access to justice and to prevent problems as addressed in the judgment of “*Tserkva Sela Sosulivka v. Ukraine”*

89. Rules on judicial jurisdiction are mandatory because they are an essential element of the right to the court pre-established by the law, which is a safeguard of the right to an impartial judge.

90. Being *ius cogens* rules, they cannot be altered upon a decision of the parties or upon other than legally prescribed criteria. Procedural acts before a court that lacks jurisdiction are void.

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[59] *Öztürk v. Germany*, Appl. no. 8544/79, of 21 February 1984, §§ 47-56; and, also, *Demicoli v. Malta*, Appl. no. 13057/87, of 27 August 1991, §§ 30-35.

[60] See *Öztürk v. Germany,* §§ 18 and 54.

[61] See e.g. P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak, *Theory and Practice of the European Convention on Human Rights*, Antwerpen, Oxford, 2006, pp. 539-549.

91. To avoid problems in ascertaining, which is the competence of a court and to prevent positive and negative conflicts of jurisdiction, the law has to provide clear rules defining the subject-matter jurisdiction of each court.

92. If despite such clear rules on jurisdiction, doubts arise whether a certain court is competent, this needs to be clarified at the very beginning of the proceedings. The law shall require that each court checks its own jurisdiction before proceeding with the case. To that end, the law shall require that the complaint also contain reasons regarding the subject-matter jurisdiction. The defendant shall also have the right to challenge the jurisdiction of the court. This shall be also decided at the beginning of the proceedings, in any event before the trial.

93. When a court decides it does not have jurisdiction to try a certain case, this decision is to be taken always after hearing the parties. Once the court takes this decision refusing to try the case for lack of jurisdiction, it shall indicate which is the competent court.

94. In order to prevent violation of the right to access to court and undue delays (plus costs), in case of a negative conflict of jurisdiction, the decision is to be referred ideally to a superior court specialised in conflicts of jurisdiction. This shall ensure the application of harmonised criteria as to the limits and extensions of the subject-matter jurisdiction of each of the judicial branches. Its decision shall be final and binding to the relevant courts.

2. Recommendations on the right to an impartial judge in administrative proceedings without prosecuting authority as addressed in the judgment of "*Mykhailova v. Ukraine*"

95. The institution of criminal prosecution, the formulation of a charge, and sustaining the charge before the court are functions inherent for the prosecution (private or public). This also applies to the administrative sanctioning proceedings, regardless of the gravity of the penalty.

96. In the absence of any prosecuting party in the proceedings, the adjudicating judge shall not assume functions that are inherent to the prosecution.

97. Without any prosecuting party present in the administrative offences' proceedings, the hearing should, as a rule, be suspended.

98. The reading out of a police report or the report prepared by a judge as a result of contempt of court, should not be equalled to an indictment in order to substitute the presence of a prosecuting party in the administrative offence proceedings.

99. Certain involvement of the adjudicating court in the interrogation of the defendant, witness, or witness expert, as long as it is intending to clarify their statements and does not introduce new facts, is not against the principle of impartiality.