Council of Europe

Project “Support for judicial institutions and processes to strengthen access to justice in Ukraine”

OVERVIEW

of the national mechanisms to ensure uniformity of judicial practice: in France, Germany, Italy, and Lithuania

December 2022, Kyiv

The Analysis was prepared within the framework of the Council of Europe Project “Support for judicial institutions and processes to strengthen access to justice in Ukraine” which is part of the Council of Europe Action Plan for Ukraine 2018-2022

Content

Abbreviations

COE – Council of Europe

EU- European Union

CCJE – Consultative Council of European Judges within the Council of Europe

ECHR – European Convention on Human Rights

ECJ - European Court of Justice

ECtHR – European Court on Human Rights

OSCE-ODIHR - Office for Democratic Institutions and Human Rights - Office for Democratic Institutions and Human Rights

I. Source and scope of the analysis

- The preparation of this analysis was requested by the Parliamentary Committee on Legal Affairs of Ukraine in September 2022.

- It has been prepared in the framework of the Council of Europe Project "*Support for judicial institutions and processes to strengthen access to justice in Ukraine"* and is part of the implementation of the Priority adjustments to the Council of Europe Action Plan for Ukraine 2018-2022 (CM(2022)89-final), as prepared with the Ukrainian authorities and adopted at the 132nd Session of the Committee of Ministers (Turin, Italy, 20 May 2022 - CM/Del/Dec(2022)132/2). More specifically, it is in line with intervention 6 from the adjusted Action Plan ("6. Support to the judiciary in time of war"), the objective of which is to " Provide support for the functioning of the judiciary (ordinary courts, Supreme Court, judicial self-governing bodies, National School of Judges) and enforcement in time of war".

- The recommendations experesed should be read in the spirit of the adjusted Action Plan, as immediate support and advice to the Ukrainian authorities, to help them tackle the consequences of the aggression in line with their commitments under the European Convention on Human Rights and inform their actions.

II. Background

1. The purpose of this Overview is to present different national mechanisms for ensuring uniformity of the judicial practice/case law in four member states of the Council of Europe identified for benchmarking purposes.

2.The analysis should primarily be focused on five main points of interest:

1. judicial body/bodies in charge of ensuring the uniformity of judicial practice of national courts; respective legal instruments to organize the uniformity of the national judicial practice;
2. accountability of a judge for an unreasoned departure from the uniform legal positions of the higher court;
3. rights of parties or other involved state officials to the appeal proceedings against a judgment which is not in correspondence with the uniform national judicial practice;
4. formal, semi-formal and informal mechanisms to ensure uniformity of the national judicial practice;
5. influence of the decisions of international courts, such as the European Courts of Human Rights and the European Court of Justice on the uniformity of national judicial practice in the country in question.

3.The description of the relevant practices of each of the four member states presented in this document will be benchmarked against the relevant practice of Ukraine wherever possible.

III. Executive Summary

4.The goal of this Overview is to present different approaches that countries take to secure uniform application of law. Though it must be emphasised, that there is no consistency in regulating the uniform application of law amongst European countries. These differences are mostly related to the type of the legal system of the country concerned, as well as to the legal tradition and judicial culture. As it is well known the uniformity in application of the law as well as the uniform case law, also including the status of precedents within the respective legal order, is one of the crucial criteria in distinguishing the civil (continental) law from the common (Anglo-Saxon) law legal systems. Although, different civil legal systems may vary, generally, judges are bound by the state's constitution, enacted laws, and international conventions, not by judicial decisions reached in similar cases. Consequently, in most of the civil law countries, case law has traditionally not been recognized as a binding source of law. Within civil legal systems the role judicial decisions play and what influence they have on subsequent judicial decision making varies, ranging from express prohibition in France to argumentative practice in Germany, as defined by theoretics. However, through a constitutional right to equality before the law, which also demands that like cases should be decided alike, a case law gains a position of an important legal source also in modern continental legal systems, similarly to a *stare decisis* doctrine.

5.Moreover, in accordance with the reasoning of the European Court of Human Rights (ECtHR – the Strasbourg Court) the right to a fair trial, is directly connected with requirements for uniform application of the law and Article 6 of the European Convention on Human Rights (ECHR) is the most invoked Article before the Strasbourg Court. Although not explicitly worded in the text of the Article 6, the right to a *consistent* and *reasoned* judgment is a crucial implicit component of the "fairness" of the hearing.

6.The Strasbourg Court has already acknowledged that the possibility of conflicting court decisions is a characteristic of any judicial system. Also, "*the need to ensure uniform*

application of the law should not lead to its rigidity and unduly restrict the proper development of law, nor should it call the principle of judicial independence into question"[1]. However, coming to different conclusions on the same evidence cannot always be considered contrary to the Convention, but this inconsistency must be explained. In that light the ECtHR noted: "*Case law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evaluative approach would risk hindering reform or improvement*"[2].

7.Countries selected as the case studies in this Overview are only civil law countries as Ukraine is. The countries were identified in close cooperation with the CoE project supporting the delivery of this Overview, taking into consideration diversified examples and practices which might be helpful to Ukrainian partners in improving national mechanisms for uniform application of law. France is taken as one of the oldest civil law system, Germany as a typical civil law country, Italy as a country with a minimal implementation of a stare decisis rule and Lithuania was selected because of the same as Ukraine post-communist background, and the only country in this group that has binding precedents.

8.The emphasis of the analysis is put on the judicial bodies in charge of ensuring the uniformity; the accountability of a judge for an unreasoned departure, rights of parties and the appeal proceedings, mechanisms to ensure uniformity, and the influence of the decisions of international/European Courts, on the uniformity of national judicial practice in the country in question. Specificities of the Ukrainian system are shadowed after each chapter to the extent possible taking into consideration the status quo elaborated in the "Overview of National Mechanisms Ensuring the Unity of Judicial Practice in Ukraine" from 2022 which was given by the CoE project.

9.The countries' briefs presented in this document have no intention to assess the level of compliance with the European standards or to analyse and criticise the model implemented in each of the country presented. The main goal of the analysis was to elaborate different approaches and practices that countries take to ensure equality before the law and secure legal certainty. The legislative solutions to which extent the judiciary can secure equality before the law and legal certainty in administering justice as well as the judicial practice in securing this uniformity are rather telling of the state of judicial culture and the role and status of the judiciary within the constitutional and political system of each country.

10.The European standards through the recommendations of the Committee of Ministries, opinions and reports of the Venice Commission and the opinions of the Consultative Council of European Judges in the area of the judicial independence and uniform application of law, serve as the orientation framework in this Overview.

11.The Overview is a one action in the number of activities that are planned to be undertaken within the Council of Europe project aimed at providing expert support to the national authorities to ensure uniformity of the judicial practice, including in the context of war, in line with their commitments under the European Convention on Human Rights.

[1]CCJE Opinion 20 § 1
[2] Judgment of 20 October 2011, 13279/05, par. 58

IV. Introduction

12.In a state governed by the rule of law, citisens rightly expect that they will all be treated equally and that in similar cases they will be able to rely on previous decisions and thus predict the legal effects of their actions or their omissions. Moreover, the public reacts to a conflicting case law, especially when it occurs within a single court, as this leaves an impression of certain partiality or bias. Therefore, the question of uniform application of the law takes central place when discussing the level of power and trust in the judiciaries. Justifiably, the legal uniformity strongly influences the perceptions and trust in the judiciary. Therefore, the mechanisms and instruments for securing uniform application of the law by the courts play an important role in shaping the perceptions of the legal community and the broader public regarding the judiciary.

13.The European standards in this regard are created mostly by the Council of Europe, on three tracks through recommendations of the Committee of Ministries, through opinions of the Venice Commission and the Consultative Council of European Judges (hereinafter: CCJE).

14.From the aspect of internal judicial independence, the issue of uniform application of law has first and foremost been dealt with the Venice Commission Report[3], *"Every judge, whatever his place in the court system, is exercising the same authority to judge. In judicial adjudication he or she should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts."*

15.As regards to the role and the powers of higher courts in the creation of the case law the Venice Commission emphasises the limited power that higher courts should exercise in relation to lower courts judgements. For instance, with its Opinion (CDL-INF(1997)06[4], par. 6) from 1997,. *"Giving to the Supreme Court the powers to supervise activities of general courts (Article 51, § 1) seems contrary to the principle of independence of those general courts. While the Supreme Court must have powers to overrule, or to amend, judgments of lower courts, it should not supervise them."* Furthermore, in the opinion on the draft of the Constitution of Ukraine, the Venice Commission says: *"Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches. The present draft fundamentally departs from this principle. It gives to the Supreme Court (Art.51.2.6 and 7) and, within narrower terms, to the Plenum of the Supreme Specialised Courts (art.50.1) the possibility to address to the lower courts "recommendations/ explanations" on matters of application of legislation. This system is not likely to foster the emergence of a truly independent judiciary in Ukraine but entails the risk that judges behave like civil servants who are subject to orders from their superiors. Another example of the hierarchical approach of the draft is the wide powers of the Chief Judge of the Supreme Court (Art. 59). He seems to exercise these extremely important powers individually, without any need to refer to the Plenum or the Presidium."*[5]

16.The Venice Commission also emphasises that individual accountability of a judge, exclusively based on the outcome of the proceedings further to the application to the ECHR, is contrary to the principle that allows a judge to freely interpret the law and assess evidence in individual cases, in compliance with the European standards. In line with those standards,

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[3] Report on the Independence of the Judicial System part I: the independence of judges (CDL-AD(2007)003, par. 61) https://rm.coe.int/1680700a63

[4] Opinion on the draft Constitution of the Nakhichevan autonomous republic (Azerbaijan Republic): prepared by a Working Group of the Venice Commission, https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1997)006-e

[5] Opinion on the draft law of Ukraine on the judicial system CDL-INF(2000)005-e

a wrong decision may be contested through appellate procedure and through individual accountability of a judge, except in case of gross negligence of the judge. „*Disciplinary liability of a judge should cover substantial violations of the code of professional conduct that have impact on the reputation of the judiciary. Disciplinary liability of a judge should not include the contents of their decisions or judgments, including differences in legal views among courts; or cases of judicial error; or of criticism of courts."*[6] (CDL-AD(2007)003, par. 40) The same is confirmed in the CCJE, Opinion. 20, §. 39). Namely, "*legal knowledge, including that of the case law, is an aspect of judicial competence and diligence; nevertheless, a judge acting in a good faith, who consciously departs from the settled case law and provides reasons for doing so, should not be discouraged from triggering a change in the case law. Such departure from the case law should not result in disciplinary sanctions or affect the evaluation of the judge's work and should be seen as an element of the independence of the judiciary."*

17.It seems that the most concerns are in defining the borderline between internal independence of a judge and a need to ensure uniform application of law. This has been dealt with several documents but most comprehensively with the CCJE Opinion No. 20 adopted in 2017.[7]

18.In the § 10 of this Opinion 20, the CCJE emphasizes that "*Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries."* Thus, the CCJE expects from judges to take case law into consideration when rendering decisions, hence the case law is useful and important. As expressed, in the paragraph 32: "…*while judges should in general apply the law consistently, it is of paramount importance that when a court decides to depart from previous case law, this should be clearly mentioned in its decision. It should explicitly follow from the reasoning that the judge knew that the settled case law was different concerning the relevant matter and it should thoroughly be explained why the previously adopted position should not stand. Only then can it be established whether the departure was conscious (whether the judge consciously departed from the case law in an effort to ultimately change it) or whether the court neglected or was simply unaware of the previous case law. In addition, only in such manner can a genuine development of law be achieved. Failing compliance with these requirements can be considered arbitrary and the individual's right to a fair trial would be violated.*"

19.The case law development is not, contrary to the proper administration of justice since a failure to develop and adapt the case law would risk hindering reform or improvement, as stated by the ECtHR. Changes in society and legislation may trigger the need for a new interpretation of the law and thus overruling of a precedent. Moreover, decisions from supranational courts and treaty bodies (such as the Court of Justice and the ECtHR) often result in adjusting the domestic case law as well. The need for improving a previous interpretation of the law might be the other reason for departing from the case law. This, however, should happen only when there are pressing needs to overrule. It is the view of the CCJE that considerations of legal certainty and predictability should support a presumption that a legal question, on which there already is a settled case law, shall not be reopened. *"Thus, the more the case law regarding a certain issue is uniformly settled, the greater is the burden on a judge who departs from such case law to provide persuasive reasons."*[8]

20.According to the CCJE, there are formal, semi-formal and informal mechanisms with regard to the role of the courts in achieving consistent case law. Appeal procedures appear as a formal mechanism; Semi-formal mechanisms include e.g. regularly scheduled meetings of

[6] Opinion on the laws on the disciplinary liability and evaluation of judges of "the former Yugoslav Republic of Macedonia" https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)042-e

[7] Opinion n° 20 (2017) The role of courts with respect to the uniform application of the law, https://rm.coe.int/opinion-ccje-en-20/16809ccaa5

[8] CCJE Op. No. 20, par 30-31

judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court; and informal consultations among judges can be qualified as informal mechanism. These semi-formal and informal mechanisms are intended to promote the uniform application of the law, but conclusions drawn in these contexts cannot infringe the independence of the individual judge. The CCJE recommends introduction of "filtering criteria" to enable access to supreme court only for cases of precedential value to be 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*."[9] Also, the guidelines included in the Recommendation CM/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 (Article 7 (c)), states: "*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*".

21.In addition, the CCJE also stresses the importance of the appellate courts especially in the legal systems where access to supreme court is limited. *"The CCJE is of the opinion that a divergent case law in appellate level of jurisdiction (either within the same appellate court or between different appellate courts) is best addressed by a possibility to file a further appeal on points of law to the supreme court"* is emphasised in the paragraph 25 of the CCJE Opinion 20.

22.Also, Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus, and Central Asia" of the OSCE-ODIHR[10] address the issue of uniformity of judicial decisions in relation to internal independence of judges. As stated in § 35: "*The issuing by high courts of directives, explanations, or resolutions shall be discouraged, but as long as they exist, they must not be binding on lower court judges. Otherwise, they represent infringements of the individual independence of judges. In addition, exemplary decisions of high courts and decisions specifically designated as precedents by these courts shall have the status of recommendations and not be binding on lower court judges in other cases. They must not be used in order to restrict the freedom of lower courts in their decision-making and responsibility. Uniformity of interpretation of the law shall be encouraged through studies of judicial practice that also have no binding force."*

23.Finally, the main position of all relevant bodies is that consistency in the case law needs to be achieved through the decisions of higher courts establishing a coherent and consistent jurisprudence and not through a higher court issuing general directives or instructions to lower courts. Recommendation CM/Rec(2010)12, par. 23 stipulates that "*superior courts should not address instructions to judges about the way they should decide individual cases, except in preliminary rulings or when deciding on legal remedies according to the law*."

[9] CCJE, Op. No. 20, par. 17-22
[10] https://www.osce.org/files/f/documents/a/3/73487.pdf

V.Judicial body/bodies in charge of ensuring the uniformity of judicial practice of national courts; respective legal instruments to organise the uniformity of the national judicial practice

24.National Supreme Courts play a crucial role in the protection of human rights guaranteed by the ECHR and the rule of law within the legal systems of each country. To be able to benefit from these guarantees individuals first and foremost need to be able to exercise their right of access to these highest courts. However, according to CCJE Opinion 20, the right of access to a court may be limited by provisions of national legislation regulating the functioning of the judicial system and rules of judicial procedure. Most of the Supreme Courts position themselves as serving more of a public than a private purpose. This is clearly reflected through the existence of various filters imposed regarding the possibility to appeal to the Supreme Courts. The CCJE recommends introduction of "filtering criteria" in order to enable access to supreme court only for cases of precedential value to be 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.

25.The Strasbourg Court has already acknowledged that the possibility of conflicting court decisions is a trait of any judicial system. Such divergences may also arise within the same court. Nevertheless, that cannot be considered contrary to the ECHR. Therefore, the Supreme Courts are crucial in securing the uniform application of the law and whenever they change the judicial practice, it is decisive that departure from the judicial practice is explained in a way that the applicant can understand how and why the law has developed from previous cases.

26.Consequently, it is important to set the mechanisms to ensure consistency in court practice and uniformity of the case law. On the other side, as mentioned before, the case law development is not contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement.

27.In all four countries presented in this document, the bodies responsible for the uniform judicial practice are the highest courts. Their role and competencies differ from one country to other especially with respect to the access to the court the "power (binding/non-binding)" of the decisions that they take. However, they all develop as well as apply the law.

France

28.The *Court of Cassation* **(**Cour de cassation) is the highest court in the French judiciary. There is only one single Court of cassation in France which is responsible for unifying case law and ensuring that the interpretation of law is the same across the country. This uniqueness of the Court of cassation enables uniformity of interpretation, and thus the development of authoritative case law.

29.Also French Court of cassation does not constitute a third level of jurisdiction above the lower courts and the courts of appeal. It is mostly called upon not to decide whether the rules of law have been correctly applied, based on the facts sovereignly assessed in the decisions. Thus, The Court does not, strictly speaking, rule on the disputes that gave rise to the decisions referred to it, but on the rulings themselves. It acts in fact as the judge of the judges' rulings: its role is to say whether they have applied the law correctly in the light of the facts, determined by them alone, of the case submitted to them and the questions put to them. Thus, the purpose of each appeal is to challenge a judicial decision, in respect of which the Cour de cassation (Court of cassation) shall say whether the rules of law were correctly or incorrectly applied. Not on the merits of the case.

30.The Court has jurisdiction to hear cases in civil, commercial, social, or criminal matters, which are first judged by the so-called courts of first instance (judicial tribunal, commercial courts, employment tribunals…). Depending on the importance of the dispute, the decisions of these courts are either given at last instance, when they concern the smallest cases, or, in most cases, at first instance; they may then be appealed to a court of appeal, where they are re-examined in all their aspects, in fact and in law. Final decisions of the courts of first instance and decisions of the courts of appeal may themselves be appealed to the Court of Cassation.

31.The Court reviews the legality of the contested decision and may annul it but does not review the facts. Since 1991, the Court of Cassation may also issue opinions on new and complex questions upon request from lower instance courts. Namely, the legislator has given the Court the possibility to issue advisory opinions, as part of its unifying mission, to interpret "a priori" a law before the judges of the court of first instance have ruled.

32.The Court of cassation is comprised of chambers between which the appeals to be examined are distributed according to criteria defined by the Court's Bureau. Currently there are six chambers: Commercial Chamber (Chambre commerciale, économique et financière), Labour Chamber (Chambre sociale), Criminal Chamber (Chambre criminelle) and three civil chambers: the First, Second and Third Civil Chambers. Each chamber has its own presiding judge (président).

33.The Bureau of the Court is composed of the First President, the presidents of the chambers, the Prosecutor-General and three first advocate-generals, with a specific expertise. In particular, the Bureau determines the number and duration of hearings and establishes the national list of experts. It also advises the First President, who may consult it on major issues relating to the organization and functioning of the Court. The Bureau regulates by deliberation the matters in which it is empowered by the laws and decrees.

34.The *Council of State* has an identical mission as the Court of Cassation for the jurisdictions of the administrative tribunals. The Council of State advises the Government on the preparation of laws, ordinances and certain decrees. It also answers the Government's queries on legal affairs and conducts studies upon the request of the Government or through its own initiative regarding administrative or public policy issues. At the same time the Council of State is the highest administrative jurisdiction – it is the final arbiter of cases relating to executive power, local authorities, independent public authorities, public administration agencies or any other agency invested with public authority.

35.In discharging the dual functions of judging as well as advising the Government, the Council of State ensures that the French administration operates in compliance with the law, it is therefore one of the principal guarantor of the rule of law in the country.

Germany

36.Germany is a typical civil law system, where the primary source of law is the national legislation as courts only deal with individual cases, and therefore a binding effect remains only *inter partes*. However, the decisions of the highest courts one could say, have *de facto* a binding legal effect.

37.The uniform application of the law is mainly achieved by the *Federal Courts* or *Federal Constitutional Court.* Their responsibility is primarily to ensure the uniform application of law, to clarify fundamental points of law and to develop the law. Although the binding effect of the judgments and rulings of the Federal Courts are technically confined to the individual case, lower courts follow their interpretation of the law with few exceptions. However, the far-

reaching effect of rulings of the Federal Court of Justice can also be determined by the fact that, particularly in the field of civil law, legal practice is often guided by these rulings.

38.When it comes to higher courts, Germany has a particular judicial structure, with five Higher Federal Courts: the Federal Court of Justice, (Bundesgerichtshof), the Federal Administrative Court, (Bundesverwal- tungsgericht), the Federal Finance Court, (Bundesfinanzhof), the Federal Labour Court, (Bundesarbeitsgericht), and the Federal Social Court, (Bundessozialgericht).

39.The responsibility of the Federal Constitutional Court is to ensure that the Constitution of the Federal Republic of Germany is followed. All government bodies are obliged to respect the Basic Law (Grundgesetz). Should any conflict arise in this respect, the jurisdiction of the Federal Constitutional Court might be invoked. The decisions of the Court are final. For instance, the binding effect of the decisions of the Federal Constitutional Court are most feasible in cases in which the court has asserted the incomparability of a certain law with the constitution. Under these circumstances court decision has the same binding legal effect as national legislation[11].

40.Each Federal Court consists of various chambers. The chambers of each Federal Court must ensure to rule in a uniform way. In case of the Federal Court of Justice there are two chambers Federal Civil and Criminal Court of Justice and their responsibilities with the organisational law of the courts.[12] According to that law, the chamber that would like to deviate from a decision of a different chamber has to ask whether the latter still upholds the (older) decision/opinion.

41.Moreover, the uniform application of law is ensured on a horizontal level within the Federal Court of Justice. The legislation requires that when one chamber believes that the jurisprudence on similar cases is faulty, and thus believes that it should be changed, the chamber must ask whether the other chambers still uphold the older interpretation. In those situations, the matter is referred to a joint chamber (Großer Senat) of judges, consistent of the president of the court and one judge from each chamber to solve the discrepancies of views and to ensure a unified decision. This procedure is called Divergenzvorlage (literally diverging submission).

42.Chambers can also request a decision of the joint chamber of judges if a uniform decision is needed in a question of fundamental importance for the development of legal principles or for securing a uniform jurisprudence. This procedure is called “Rechtsfortbildungsvorlage”. The deciding chamber is then bound by the rulings of the Großer Senat. This special procedure of submission to the joint chamber is unique in having this binding effect. In all the other cases there will be a binding effect only to the extent that the chamber will have to submit the case to the joint chamber if it plans to deviate from the decisions of the joint chamber.

43.There is no legal duty to submit a case to the joint chamber of judges. This chamber deals with the legal question of the submission issue. The submission is only permitted if the answer to the posed questions is of general importance for the development of the law. The answer to the legal question has either a prejudicial effect or will be shaping the material or procedural law.

44.The joint chamber of judges is not bound to the submission of the deciding chamber. However, the deciding chamber is bound by the rulings of the joint chamber. This binding effect only exists in the special procedure of submission to the joint chamber. In all the other cases

[11] paragraph 31 Organisational Law of the Federal Constitutional Court/Bundesverfassungsgerichtsgesetz – BVerfGG
[12] Gerichtsverfassungsgesetz

there will be a binding effect only to that extent that the chamber will have to submit the case to the joint chamber if it plans to deviate from the joint chamber of judges' opinion. The Federal Constitutional Court has no jurisdiction on the submission process.

45.This procedure is relevant for the Federal Court of Justice, however other Federal Courts also have similar rulings to guarantee the uniform application of law.

46.Furthermore, the Federal Court of Justice (in civil matters) decides on cases in which the Higher Regional Courts have permitted the appeal. If the appeal is not granted, that decision can be reviewed by the Federal Court of Justice in cases the amount in dispute exceeds 20.000 Euro. There are no discretionary powers in granting right to hear other cases. The Federal Court of Justice decides only legal questions on the facts established by the lower courts. This practice then secures the uniform application of law and contributes to legal certainty in other cases.

47.In family law there is another mechanism for a uniform application of the law on the horizontal level created through the practice of the courts. Specialized chambers for family law of the Higher Regional Courts have developed guidelines for the application of support law in their respective jurisdiction. There are even guidelines which apply across the jurisdictions of Higher Regional Courts. This practice is accepted by the courts and by the legislator.

Italy

48.According to the art. 65 of the Italian Law on the Judiciary: *"The Supreme Court of Cassation, being the supreme organ of justice, ensures the exact observance and uniform interpretation of the law, the unity of the national law, respect for the competences of the different jurisdictions; it settles conflicts of competence and fulfils other duties assigned to it by law."*

49.Thus, the *Supreme Court of Cassation* (Corte di cassazione) issues persuasive precedents, however those precedents are not binding, as Italy does not have a stare decisis rule too.

50.The Supreme Court is divided into five panels for private law trials (including labour and tax law) and seven panels for penal/criminal trials. In most important cases as well as in case of conflicts on issues of law (i.e., its interpretation and its correct application) among different sections of the Court itself, the overall sections form a sole panel (so called sezioni unite civili for private law and sezioni unite penali for penal law) which is in charge to solve conflicts on the interpretation and application of law provisions.

51.In Italy, in both, theory and practice the "nomophylactic[13]" function – or the task of ensuring compliance with the law and its uniform interpretation is being entrusted to the Supreme Court of Cassation. Unlike common law countries, the Supreme Court`s decisions have effect only in the trial they are related to. However, they are usually respected by lower courts, especially when it comes to consider sezioni unite decisions: this is the way through which its role to ensure the exact observance and uniform interpretation of the law is secured.

52.There is a general rule that allows an appeal of the first instance decisions to be held directly by the Supreme Court: it's a kind of "leapfrog procedure", known as ricorso per saltum, provided by art. 569 of the Criminal Code of Procedure. Besides, when there are no other means to seek review (i.e. appeal), art. 111, § 7 of the Constitution allows a direct remedy towards lower courts decisions that decide upon defendant's freedom (including pre-trial

[13] "Nomophylactic" – Greek - to protect the norm

measures, decisions passed at the end of the trial, decisions passed in the enforcement procedure). Nevertheless, the Supreme Court cannot decide on merits, but only on points of law: this Court is not allowed to review evidence and it can only check if both substantive and procedural law has been applied in the proper way. As a matter of fact, the Supreme Court decides only in two cases on merits, that is: a) in extradition and surrender procedures, because the first-instance Court in these procedures is the Court of Appeal and the defendant is then given only two level of jurisdiction; b) when deciding on pre-trial measures proceedings.

53.The Supreme Court can decide to confirm, annul (with or without sending the case back to the lower court whose decision has been annulled), or reform the decision.

54.In addition, in 2005 the Italian Parliament granted the executive power to issue secondary legislation to ensure uniformity of application of the law, at least within the civil area of law of the Supreme Court, with the aim of discouraging litigation. Consequently in 2006 a legislative decree introduced a minimal stare decisis concept. Namely, if a panel of the Supreme Court wished to overrule precedents of the joint chambers, the panel itself could not do so, but would have to refer the case to the same joint chambers. Following the same pathway, a similar rule has been introduced in the Code of Administrative Procedure; so the several panels of the Council of State are in a weak stare decisis relationship with the Plenary Chamber of the same Council, from the precedents of which they cannot depart except by further referral.

55.The Court of Cassation also has the task of establishing jurisdiction (that is, to indicate, when a conflict arises between the ordinary judge and the special one, Italian or foreign, who has the power to deal with the case) and the competence (i.e., to resolve a conflict between two trial judges). The Supreme Court is in fact the judge of legitimacy: its sole function is to take care that lower courts apply correctly and in a uniform way the law.

56.The Court of Cassation also performs non-judicial functions in matters of legislative elections and popular referendums for the abrogation of laws.

Lithuania

57.The *Supreme Court of Lithuania* was established on 15 June 1994 and started its activity on 1 January 1995, and it is the only court of cassation in the Republic of Lithuania for reviewing effective judgments and rulings passed by the courts hearing criminal cases at the first and appeal instances as well as decisions and rulings in civil cases passed by the courts of appeal instance. The Law on Courts provides that the Supreme Court of Lithuania secures the uniform case law of courts of general competence while interpreting and applying laws and other legal acts. The law also provides that the *Supreme Administrative Court of Lithuania* forms a uniform case law of administrative courts while interpreting and applying laws and other legal acts. Though it should be mentioned that the decisions reached by the Supreme Court of Lithuania as well as the Supreme Administrative Court do not compete.

58.Cassation as an extraordinary form of exercising supervision on the legitimacy of judicial decisions is applicable in Lithuania only in exceptional cases defined by the Codes of Criminal and Civil Procedure. The Supreme Court hears cases exclusively on the questions of law. The principal objective of the Supreme Court, as a classical court of cassation, is to ensure uniform judicial practice of courts of general jurisdiction in the country by means of **precedents** formulated in the cassation rulings. The precedents are exclusively formed by the Supreme Court of Lithuania only in the procedural documents while hearing the cases by cassation.

59.According to the Constitutional Court, *the court precedent is understood as a legal source in the vertical as well as horizontal aspect: the precedents present in the decisions reached by the higher instance courts are related to the lower instance courts, which have to reach*

decisions in the analogous cases. Also, in its decision the Constitutional Court has established that while examining the cases the courts can refer to earlier decisions which were reached in analogous cases, i. e. the precedent can only be applied in the cases, whose factual circumstances are identical to the case, which deals with the precedent.

60.In the competition process of the precedents (in cases when there are different decisions reached by the courts in analogous cases) the precedents created by the higher instance court shall be taken into consideration. The time of the precedent and other significant factors should also be taken into account, for instance: whether a particular precedent reflects the settled case law, or it is just a single case; persuasiveness of the decision argumentation; the composition of the court which reached a decision (whether the decision was reached by one judge, the chamber of judges or an extended chamber of judges, or the composition (division) of the court); whether there were any different opinions expressed by the judges; possible significant changes (social, economic, etc.), which had some impact on the decision which was reached, etc.

61.The Constitution does not provide for the regulation of the uniform application of the law. Article 109 of the Constitution deals with the provision stating that when considering the cases judges shall only obey the law. According to the doctrine of the Constitutional Court precedents are considered to be sources of law; reliance on precedents is a uniform (coherent, consistent) case law implementation condition together with the principle of justice provided in the Constitution. A uniform case law is formed by the courts of general competence as well as specialised courts. The Law on Courts establishes that courts, while reaching decisions in different cases, are bound by their own rules regarding interpretation of the law, which were formulated in analogous or similar cases. In compliance with the provisions of the above-mentioned law the Supreme Court of Lithuania forms a uniform case law of courts of general competence while interpreting and applying laws and other legal acts. The law also provides that the Supreme Administrative Court of Lithuania forms a uniform case law of administrative court's rulings while interpreting and applying laws and other legal acts. The decisions reached by the Supreme Administrative Court of Lithuania are final and not subject by appeal to the Supreme Court of Lithuania.

62.In some cases, the uniform practices are formed by the executive institutions and law enforcement bodies. For example, the practice of labour law is formed by the State Labour Inspectorate, the practice of application of the law regarding taxes is formed by the State Tax Inspectorate, etc.

63.While examining a particular case the courts follow the regulation provided by the executive power as much as this does not contradict the Constitution or the laws. If the court doubts whether the act of the executive power needs to be applied in a particular case, it avails itself of a right according to the law to apply to the Constitutional Court or the Supreme Administrative Court of Lithuania with the request for such legality of the act to be examined.

Ukraine

64.The Supreme Court of Ukraine is the highest court in the judicial system of Ukraine and the only court responsible for ensuring the uniform application of law by courts in order and manner established by the procedural law, as it is in all the countries subject of this analysis (although in the countries there are two (Italy, France, and Lithuania) or more (Germany) bodies responsible for uniform application of the judicial practice. The specificities in the Ukrainian model are mainly seen with the role given to the Prosecutor General of Ukraine. Namely, the Article 9 of the Law "On Prosecutor's Office" specifies the competence of Prosecutor General of Ukraine to approve general guidelines for prosecutors to ensure uniform application of the legislation of Ukraine in the exercise of prosecutors' functions.

65.The uniqueness in Ukraine is also seen in the area of administrative proceedings, where as additional procedural mechanism of ensuring the uniformity and consistency of judicial practice a “model case” is introduced.

VI.Accountability of a judge for an unreasoned departure from the uniform legal positions of the higher court

France

66.Precedents do not form part of the pyramid of norms and do not, therefore, constitute official sources of law, according to French constitutional theory. This approach arises from the set of rules which prevent judges from interfering with the legislature in its law-making function. In practice, however, French judges routinely make decisions, as judges do in other countries. In this respect, some branches of French law which were not originally statute based, such as administrative and private international law, have been almost entirely created based on the decisions of the judges.

67.Although some academics continue to deny the existence of precedents in the French judicial systems, case law is nowadays considered as a source of law, because case law of the highest courts are in some cases binding.

68.Although, according to the legislation, the lower court may not follow the case law of the higher court, provided that it **explains** in detail the reasons for its choice/departure from the case law. It is the plenary assembly of the Court of Cassation (bringing together representatives of all the chambers of the Court of Cassation) which, in the event of "resistance" from the trial judges, has the last word and has the power to make a decision which is binding on the lower courts.

69.Also, there is additional mechanism/procedure which allows judges from the lower courts to request an opinion from a superior court, when faced with a new and serious legal difficulty, likely to arise in many disputes. This opinion is not binding, but it has the merit, by giving the trial judges the position of a superior court on this legal issue.

Germany

70.As there is no binding case law in Germany, deviations from superior courts are permissible. This is a consequence of the legal independence of judges. According to the German Constitutional Court, a judge is bound by both the written as well as the unwritten law in order to guard against a too narrow positivistic approach being adopted: “*Out of the positive rules of public authorities, there can occasionally arise an overabundance of law which has its source in the constitutional order taken in its entirety and may be seen to operate as a corrective to the written law; to find this is the task of the courts*”. The concept of a judge being bound only to the letter of the law presupposes the completeness of any positive legal order, in other words, a solely theoretical situation. Although a judge must refrain from acting in an arbitrary fashion, it nevertheless remains his duty to bring full expression to the values represented in the constitutional order. Even if the legal question at hand has already been decided in a certain way courts may decide differently and thereby cause the higher court to review (again) its position. If the higher court confirms its position the decision of the lower court may be repealed. This is the factual binding effect of the legal hierarchy of the German Court system.

80.Consequently, precedents are not a source of law in the strict sense. In Germany, previous decisions of the same court or of other or higher courts are not legally binding; rather they function as a persuasive authority.

81.In so doing judges are expected to both recognise and evaluate the same elements on their own will as individuals. In this way judges are given an opportunity and at the same time responsibility to creatively develop the law.

82.Finally, having in mind that in the German law system there is no principle like stare decisis, the only obligation judges have is to apply the law and to observe the fundamental rights under the Constitution, as mentioned earlier. Judges in the lower courts tend to follow the opinions of the higher courts. They do not have a legal obligation to follow that case law. However, if they do not do so, their decision might be overruled by the court of higher instance, and eventually by the Federal Constitutional Court.

83.Only in cases, when the Federal Court of Justice reassigns a matter to a lower instance court for additional revue that court is legally bound to the decisions and their reasoning.

Italy

84.In Italian system the Constitution recognises independence and autonomy in the application of the law, thus guaranteeing, among other things, the possibility of the right to evolve as praetorian law (jus praetorium). The precedent, although not binding, has its own value and relevance. There have "persuasive efficacy", or "influential precedent". Judges of lower instances are not bound, to follow the new stare decisis rule, however the mere fact that the Supreme Court of Cassation (or Council of State) are (partially) bound by (some of) their precedents introduced an incentive for uniformity both on panels and judges from lower court instances, forced to either follow the previous decisions of the joint chambers or issue well-reasoned new referrals to the joint chambers to persuade them to overrule their precedent.

85.Finally, previous decisions while not binding on the judges who will have to deal with identical or similar cases, have weight and importance and the new judge cannot fail to take it into account. In deciding, he must interpret and apply the provisions of the law to the concrete case. If these provisions have already been interpreted and applied by other judges in identical or similar cases, and if in particular this operation was carried out by the Court of Cassation, the judge cannot ignore them. It may be that the solution adopted does not convince him, in which case he will have to choose whether to adapt or deviate from the previous ones. If the judge decides to deviate from it should do so by comparing the reasons for the innovation with the reasons for the previous ones, clearly specifying the reasons for the choice made. Which might lead to a new precedent.

86.Only in one case is the judge required to comply with the previous decision. According to the Code of Civil Procedure[14], the Court of Cassation, "*when accepting the appeal, cancels the sentence by referring the case to another judge, who must comply with the principle of law and in any case with what has been established by the Court*". If the trial judge addressee of the referral does not comply, his sentence may be appealed to the Supreme Court.

87.This is the only case in which there is a precise obligation to comply with the ruling of the Cassation, which, on reflection, does not constitute a precedent but another stage in the decision of the same case.

[14] article 384 of the Code of Civil Procedure

Lithuania

88.Usually, non-compliance to the binding court precedent is the ground for quashing of the court decision, and results in the renewal of the proceedings in those cases. The non-compliance with the settled case law only in exceptional cases can be evaluated as negligent performance of the duties of the judge and the judge then may be found disciplinary liable.

89.When deviation of the precedent happens, the precedent needs to be adjusted and new court precedent in that case can be created. Such adjustment of the case law (deviation from the earlier precedents and creation of the new ones) in all the cases shall be clearly argumentative in the decisions reached by the courts. This adjustment should be made only when it is inevitable, objectively necessary, and constitutionally justified.

Ukraine

90.Not much difference in regulating the accountability of the judge when departing from the case law is present in Ukraine. Namely, unequal application of the law by a court in the decision-making process in similar cases would imply breaching of constitutional principles in Ukraine. Judgements/decisions which do not consider a legal position of the Supreme Court on different issues, could be appealed. Judges are fully aware of the Supreme Court positions and take this into consideration in the decision-making process. However, it is possible that a judge, for instance, of the court of first instance, makes a judgement that is contradicting to the opinion of the Supreme Court, and risking this judgement to be quashed. This situation does not contradict the current legislation, therefore, there are no liability clauses nor disciplinary offense for a judge departing from the Supreme court positions.

91.Consequently, the judgement that departs should sufficiently explain the reason for such departure from "*Conclusions regarding application of the legal provisions specified in resolutions of the Supreme Court shall be taken into account by other courts in the application of such legal provisions. A court shall have the right to depart from the legal position expressed by the Supreme Court only if it simultaneously provides the respective substantiation/reasoning.*"[15]

VII.Rights of parties or other involved state officials to the appeal proceedings against a judgment which is not in correspondence with the uniform national judicial practice

92.The European Court of Human Rights has emphasised that the conditions for the admissibility of the appeal on points of law may be stricter than the ones for an ordinary appeal. The Court has clearly stated that the right of access to a court as protected under Article 6 § 1 of the ECHR is not absolute. Accordingly, limitations in place for such access are not per se incompatible with the Convention. However, "*these limitations must not be of such nature to "restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired" 16 (Guérin v. France 1998); specifically, such limitations will only be compatible with Article 6 § 1 if they pursue a legitimate aim and there is a proportionality between the measures that are being used and the aim that is being sought by those measures.*"

93.Limitations of right of access to Supreme Courts have their practical expression in the form of filtering mechanisms and procedures to be followed for a case to be eligible for examination at this, highest level of national jurisdiction.

[15] Aricle 13 § 6, On the Law on Judiciary and Status of Judges (2016)

94.Filtering mechanisms, models and procedure vary from one country to another. They generally depend on the functioning model of the Supreme Court and its legal position in the national judicial order especially if a Constitutional Court has also been set up.

France

95.Under French law, any litigant has the right to appeal to the superior, judicial, or administrative court as the case may be. The appeals procedures are regulated by internal procedures of the Court of Cassation and the Council of State, which enable them not to admit certain appeals when they lack serious means of cassation.

96.As mentioned earlier there are six chambers in the Court of Cassation. Each chamber is divided into sections, each one having its own respective bench of judges. A case is heard by three judges when the appeal is inadmissible; when there are no serious grounds to overturn the ruling of the lower court or when the outcome of the case "appears to be self-evident". In such cases, the Court declares that the appeal is "not admitted". Otherwise, the case is heard by a bench, which includes a minimum of five judges, each one having a right to vote. The presiding judge may decide to sit in a plenary session of chamber (assemblée plénière de chambre) when the ruling might overturn previous case law or when the chamber is required to rule on a sensitive issue.

97.The Court of cassation is also comprised of temporary benches, which either include judges from each of the six chambers (full court) or judges from at least three chambers (joint benches (chambres mixtes). These benches are presided by the First President or by the most senior presiding judge of one of the chamber of the Court.

98.The full court formation is composed of all the presiding judges and elder judges of the Court's chambers, as well as one judge of each chamber, making a total of nineteen members. This is the most formal judicial formation of the Court. It decides on matters of public importance. The decision to convene the plenary assembly is taken by the First President, the presidents of the chambers or the Prosecutor- General. Referral to the full court is decided when a case raises a question of principle or if a divergence between the lower courts and the Court of cassation occurs. An important feature of a cassation decision given in full court is that the referring court must comply with the decision of the Court of cassation on points of law already decided by the latter.

99.In addition, joint benches comprise four judges from each of the chambers of which it is composed (the presiding judge, the elder judge and two judges). A case is referred to a joint bench when it falls within the jurisdiction of several chambers or when the question has been or is likely to be resolved differently in the different chambers. Referral is also automatic if the Prosecutor-General requests so before the opening of the hearing. Decisions of joint bench are meant to set precedent and end chambers' divergent opinions on a point of law.

100.There are no special conditions, linked for example to the amount of the sums at stake in the dispute, as it is the case in Germany.

Germany

101.With the reform in 2001 the admissibility of appeals significantly changed. Namely, the reform has provided that the access to the Federal Court of Justice (Bundesgerichtshof, BGh) is limited to cases that present a matter of fundamental law issues or offer the Court an opportunity to ensure the uniformity of jurisprudence or the "improvement" of the law. The reform has therefore changed the discipline of the judicial cassation by limiting the use of the appeal and introducing, among other things, a preliminary verification by the appeal judge.

102.Regarding the eligibility of each ruling when the appeal is granted by the referring court, the respective Federal Court will not be able to refuse to examine the case. The procedure in question, which takes place before the Federal Court of Justice, is known as the "revision". The aim of the revision is to check the compliance of the decisions taken by the lower courts with law. The violation of a law is therefore the necessary requirement to request the cassation of a provision.

103.A definition of this violation is established by law according to which there is a violation of the law when a rule of law has not been applied or when it has not been correctly applied. The revision is therefore admissible only if following two requirements are met:

- first, there must be a question of law of fundamental importance and
- secondly, the situation must be such that a decision by the Federal Court of Justice is necessary for the evolution of the law or to guarantee the uniformity of the jurisprudence.

104.The first requirement exists in those cases in which the question of law, on the one hand, must be clarified for the decision of the "sub iudice" case and, on the other, has a significant effect in an indeterminate number of future cases. The issue on which doubts arose must not have previously been clarified by the Court and must have a fundamental value for the uniform application of the law. Therefore, often, in Germany the so-called pilot cases are brought in front of the Court.

105.The second requirement exists in cases where the jurisprudence is divergent with respect to that of the Court. For example, when there is a recurring mistake in the interpretation of the law. This hypothetical situation includes symptomatic errors in the application of the law with a possible non-negligible impact on the interests of the community.

106.Therefore, the admissibility of appeals has as a prerequisite the evaluation of public interest. The review is also considered admissible in the case of violation of procedural principles considered fundamental, such as the right to be heard guaranteed by the Constitution, and finally the right to a fair and due process.

Italy

107.According to Italian Constitution, every citizen can make an appeal to the Supreme Court of Cassation for violation of the law against any provision of the judicial authority, without having to make any appeal in civil or criminal matters, or against any provision that limits personal freedom. They can also challenge administrative acts departing from the case law in administrative tribunals.

108.The appeals system is the regular way to obtain uniformity. Before the Supreme Court, both the Prosecutor General and the Court ex officio (when declaring a case inadmissible) can obtain that the Court renders a judgment in abstracto.

109.In Italy the appeals that reach the Court are numerous, in comparison to other countries. Therefore, on several occasions legislative changes were introduced, regarding the appellate procedure before the Supreme Court. Furthermore, having in mind that the Supreme Court has no discretion in selecting cases, hence the Italian Constitution provides for an unlimited access of cases to the Court, legislative changes in 2009, introduced additional 'filter' to reduce/limit numerous civil cases that are traditionally brought before the Supreme Court. The reform of 2016 made the filter even stronger, i.e. only relevant cases will be treated in a public hearing, when uniformity is at stake; other cases, will be treated in camera, following

written/paper procedure without the participation of the private parties and the public prosecutor.

Lithuania

110.All the participants of the case can apply to the Supreme Court of Lithuania with the petition for cassation if they are not satisfied with the decision reached by the appellate court. The Supreme Court of Lithuania can verify the appealed judgment and/or ruling only from the aspect of the application of the law. The court does not deal with questions of facts/merits.

111.There are different grounds for the admissibility of a case dependent on the area of law. For instance, in the criminal area of law, the Code of Criminal Procedure states that cassation appeal is heard by the Supreme Court only if one of these grounds exist: violation of substantive criminal law or serious breach of the Code of Criminal Procedure. In all other cases, the court is entitled to refuse to admit cassation appeal. In civil cases cassation appeal is admissible only if one of these grounds for reviewing a case in a cassation procedure exist:

- a violation of the rules of substantive or procedural law, which is essentially important for the uniform interpretation and application of the law, if this violation could lead to adoption of an unlawful judgment/decision/ruling;
- if in the appealed judgment/decision/ruling, the court deviates from the practice of application and interpretation of the case law settled by the Supreme Court of Lithuania;
- if on the question at issue the case law of the Supreme Court of Lithuania is not uniform.

112.The law also provides that the Supreme Administrative Court of Lithuania forms a uniform case law of the administrative courts while interpreting and applying laws and other legal acts. The uniform case law of the administrative courts is formed while dealing with particular disputes, which occur because of legal administrative relations. Consequently, the participants of the administrative proceedings have the right to apply to the Supreme Administrative Court of Lithuania with the petition for appeal if they do not agree with the decision reached by the court of first instance.

Ukraine

113.There are no limitations imposed by the legislation regarding the access to the Supreme Court. The responsibility to ensure the consistency and uniformity of judicial practice in the manner determined by the procedural law is assigned to the Supreme Court as the highest court in the judicial system of Ukraine. Procedure and methods of ensuring the uniformity of judicial practice are determined by the procedural law. Thus, procedural mechanisms of ensuring the uniformity of judicial practice in the Supreme Court are referrals of the case to the chamber, united chamber, or Grand Chamber of the Supreme Court.

VIII. Formal, semi-formal and informal mechanisms to ensure uniformity of the national judicial practice

114.Due to differences in legal traditions and the organisation of judiciaries, the mechanisms used to secure uniform application of law across Europe are framed differently. According CCJE, there are formal, semi- formal and informal mechanisms to achieve consistent case law.

115.The *formal* mechanisms that can be found in most European civil law regulations can be explained as:

1. Mechanisms that allow deciding upon individual litigant's appeal on points of law (revision, cassation). It is in this field *par excellence* that courts are able to perform their unifying and often innovative action as regards the construction of the rule of law, whether substantive, procedural, or part of old or new legislation. It is essentially in this area that the case law of the highest courts is developed;
2. Special appeals brought by a *public prosecutor*, or another public body brought to the highest courts in civil cases, with the aim of ensuring the uniform application of the law;
3. Interpretational statements (persuasive opinions), also known as uniformity decisions or legal opinions, principled legal opinions that do not stem from any real trial. These statements/opinions/views do not have any direct impact on individual cases since they are decided *in abstracto*, based on the request made by different authorities: courts, minister or other similar authorities;
4. preliminary rulings adopted in pending cases on specific issues, usually upon the request of lower instance courts, such as jurisdictional questions.

116.*Semi-formal* mechanisms, on the other hand, can include regularly scheduled meetings of judges within a court, or with judges of different courts of the same level or with judges of a hierarchically senior court. Such meetings can on one hand be of a purely informal character or, by issuing certain guidelines/views/opinions, they might become "institutionalized".

117.In all the countries concerned, *informal* mechanisms to ensure uniformity of national judicial practice such as continued legal education and judicial training, meetings, conferences, informal consultations among colleagues, exist, and therefore they are not specifically mentioned under each country specifically. These mechanisms are of merely informal nature, nevertheless extremely important for uniformity and predictability of the case law.

France

118.France has regulated with the legislation the mechanisms available for the uniform application of the law. As already mentioned above, the unifying mission of case law has been given by law to two judicial bodies: for the judicial cases to the Court of Cassation, for the administrative cases to the Council of State. There is also an opinion procedure which allows the judge of a lower court, when faced with a new and serious legal issue, likely to arise in many disputes, to request an opinion from a superior court.

119.Semi-formal mechanisms are also present, at the level of the courts and courts of appeal, to ensure the consistency of the case law of these different jurisdictions depending on the various specialised jurisdictions.

120.The Court of Cassation also provides, in the form of a subscription, all the decisions of the Courts of Appeal, in electronic form, the computer servers of the Courts of Appeal being linked to a central server of the Court of Cassation which receives, as soon as they are rendered, the decisions of these courts of appeal (basis of JURICA case law).

Germany

121.There is no formal mechanism in a "pure sense of law" in place to secure uniform application of the law in Germany. The legislator rarely interferes in securing uniform application of judicial acts. However, one could say that the decisions of the Federal Courts

have an *informal* binding effect, as presented above. Court jurisprudence is recognised as an important rule of law tool and is mostly followed by the judges of the lower court instances.

122.The far-reaching effect of rulings of the Federal Court of Justice is also because legal practice is often guided by these rulings (especially in the field of civil law). For instance, banks and insurance companies, as well as landlords and divorce lawyers, often refer to the “ruling from Karlsruhe”, as happens in Italy with the “Milanese rulings”.

123.The Federal Courts provide their decisions on their own websites. These could be used free of charge by everybody. Various other public websites exist which cover the jurisprudence of lower instance courts. As a federal state, the Federal Republic of Germany is characterised by decentralised structures. Therefore, the federal states decide by themselves whether they provide judgements of first instance online. In addition, selected judgements of the courts of highest instance since 2010 are available to the public free of charge on the website www.rechtsprechung-im- internet.de. A broad range of judgements of first instance courts is available via the Federal Legal Information System.

Italy

124.The role of the Supreme Court of Cassation in the consistent and uniform interpretation of the law as regulated with the national legislation, includes issuing persuasive precedents. However, they are not binding, as Italy does not have a stare decisis rule too. However, the Italian Parliament in 2005 gave the executive (government bodies) the power to issue secondary legislation to ensure uniformity of application of the law, at least within the civil sector of the Supreme Court, with the aim of discouraging litigation. Consequently in 2006 a legislative decree introduced a minimal stare decisis concept: if a panel of the Supreme Court wished to overrule precedents of the joint chambers, the panel itself could not do so, but would have to refer the case to the same joint chambers. It is worth mentioning here that, along this pathway, a similar rule was introduced in the Code of Administrative Procedure. Therefore, it could be said that several panels of the Council of State are in a weak stare decisis relationship with the Plenary Chamber of the same Council, from the precedents of which they cannot depart except by further referral. Similarly like in Germany, one could say that some mechanisms exist though judges of the first and second instances are not, strictly speaking, obliged, in subsequent cases, to follow the new stare decisis rule. The mere fact that the Supreme Court of Cassation or the Council of State are partially bound by some of their precedents brought an incentive for uniformity both on panels and lower judges. This could be considered as a formal mechanism for unifying judicial practice.

125.In addition, an important role in uniformity (semi-formal) is played by the Supreme Court’s documentation service – that is, the sector of the Court composed of judges who select decisions to be indexed and who alert when inconsistent interpretations arise. The data base of decisions prepared by this service is widely used by judges and practitioners. This sector of the Court also issues yearly publications.

Lithuania

126.As a country with precedent law, Lithuania has also formal mechanisms to ensure uniform judicial practice. The legislative framework requires that the legal regulation established in the legal acts shall be logical, coherent, concise, comprehensible, precise, clear and unequivocal, the legal norms should be consistent with each other, *the legal acts of lower legal power cannot contradict the legal acts of higher legal power*, the legal acts regarding law enforcement shall

be prepared and adopted together with the laws and their provisions, which are implemented by the above mentioned laws.

127.The work of the Supreme Court is regulated by the Constitution of the Republic of Lithuania, the Law on Courts, the Code of Criminal Procedure, the Code of Civil Procedure, and other legal acts.

128.Also, consistency of the case law is observed by some divisions in the courts of the higher instance. They are responsible for the analysis of the case law which is being formed. They provide the judges and employees of the court with the reports, conclusions and other information, which is related to formation of the case law, if necessary – make offers for the case law to be unified. This could be considered as semi-formal instruments used in the uniform application of the national case law.

129.Cassation rulings in civil cases (since 1995) and criminal cases (since 2001) are published on the website of the Supreme Court of Lithuania, thus anyone interested is given an opportunity to get acquainted with the practice of cassation.

Ukraine

130.Similarly, as the other countries formal mechanisms are established with the legislation, with an aim to secure the uniform application of the law. In Ukraine much more than the other countries the letter of the law matters. Informal mechanisms though existing, and therefore not binding, are not given much appreciation when it comes to uniform application of national judicial practice.

131.Procedural legislation regulates the uniform application of law in Ukraine is regulated in 4 laws/codes; the Criminal Procedural Code of Ukraine, the Economic Procedural Code of Ukraine, the Civil Procedural Code of Ukraine and the Code of Administrative Court Procedure of Ukraine. The distinguishing feature related to ensuring the uniformity of judicial practice are referral of the case by the court considering the case in the cassation procedure to the chamber, united chamber, or Grand Chamber of the Supreme Court. Procedural codes determine grounds for the referral of the case and procedure for such referral. The legislation also provides the possibility to discuss “issues on the practice of the application of legislation, to develop relevant offers for the improvement of such practice and legislation” at the meetings of judges and to submit relevant offers for consideration by the higher specialised court and the Supreme Court of Ukraine.
Informal mechanisms for ensuring the uniformity of judicial practice include overviews of judicial practice, prepared by all cassation courts and the Grand Chamber of the Supreme Court on a regular basis, notifications about the most urgent or high-profile cases and participation in various educational events.

IX. Influence of the decisions of international courts, such as the European Courts of Human Rights and the European Court of Justice on the uniformity of national judicial practice in the country in questions

132.When it comes to international treaties, it is of utmost importance to achieve their uniform application in all contracting parties/countries. In case of the European Courts case law influence on the national judicial decision-making, different practices are noticed. Most of the national courts take the decisions of these courts into account even in cases where they are not binding. On the other side there are countries where the case law is conferred the status of a precedent, which national courts must follow.

133.According to the CCJE, in most of the countries the implementation of the judgements of the Court is not prescribed by national law, nevertheless judges, in applying the law, should as far as possible interpret it in a manner which conforms to international standards even if set by "soft law" as the courts decisions are defined. Therefore, the CCJE encourages judges, "*wherever possible, to use all resources available to them in interpreting the law or within existing procedural law: a) to re-open cases if a breach of the convention occurred, even before a judgement of the European Court of Human rights is issued and b) to grant compensation for violations as soon as possible."*

134.However, the CCJE also notes that complete and up-to-date information on international and European courts case law is not regularly offered to judges. Official legal journals of the countries rarely include information on international and European law. Mostly, other institutions such as judicial academies, training centres or court administrations provide information on the recent case law of international and European courts.

France

135.French national courts had the hardest time embracing the European Court of Justice (ECJ) and its supremacy doctrine. It took until 1989 for all three of France's supreme courts to accept a role enforcing European law supremacy, and there were significant enduring disagreements on this issue. French courts were faced with many challenges derived from the ECJ's jurisprudence and its authority during the twenty-five-year process of doctrinal change.

136.The case law of the ECtHR and the ECJ are essential in the domestic legal order and the Court of Cassation has already had the opportunity to say that the case law of the ECtHR must be followed, even if it concerns another State, if the procedures or practices sanctioned by the European Court exist identically in the French legislation.

137.However, if the text of internal law, is not in conformity with the law of the EU or the ECHR, in that case, it should not be applied by French courts/judges, similarly as in Italian situation.

138.French judges have language advantage in terms follow up of the European Courts case law. Free and open access website (Legifrance) provides access to all the case law of the ECHR, the CJEU, the Court of Cassation and the Council of State.

Germany

139.Ratification with a law of acceptance by the parliament (on the federal level) is needed to be able to transform an international treaty into German binding law. With the enactment of a ratification law through the German Parliament the treaty becomes part of the Germany body of law. In the hierarchy of norms these treaties stand on the same level as a normal law made by the Parliament.

140.Implementing a judicial decision by the European Court of Human rights or another supranational court is obligatory in Germany, hence the country has accepted the competence of the European Court of Human Rights. The Federal Constitutional Court has ruled that all courts in Germany must take into account the decisions of the European Court of Human Rights when interpreting a law, even if the decisions were about/against other countries than Germany. Also, the judgements of the European Court of Justice have a binding effect in questions of European law which are relevant for the case to be decided.

141.As a result, the level of influence of the decisions of the European courts on the judicial decision-making process in Germany, is similar as in the case of the influence that the national jurisprudence makes. Judges follow closely the development and the case law of the European

courts and sometimes even make citation of the ECJ and ECtHR rulings. Although, difficulties exist because of the volume of the case law and the diversity of languages and therefore the problems of translation.

142.Furthermore, the uniform application of the European law is guaranteed by the EU Treaty that allows a special submission procedure to the European Court of Justice if a national court has difficulties in reading and interpreting the European law. In that case the European Court of Justice then decides on the question regarding the European law and remits the case to the national court, which then decides the case. German courts respect diligently the obligations under which they have to submit cases to the European Court of Justice and use this mechanism.

Italy

143.At present, the Constitutional Court has construed different legal frameworks, depending on whether the case in question concerns European Union law or international law (which also includes the European Convention of Human Rights).

144.In the area of EU law, the Constitutional Court recognised that EU law has primacy over Italian law within the so-called doctrine of competence, establishing that European law is not hierarchically above national law, but has a sphere of competence into which national law cannot enter. However, the Constitutional Court reserved the final word for itself: should European law breach the basic principles of the Constitution or the fundamental rights of individuals, then the Court itself could declare European law inapplicable.

145.Concerning international law and the ECHR, under article 10 of the Italian Constitution, as interpreted by the Constitutional Court, national judges could not refuse to apply domestic law, even if this law conflicts the Convention rules as construed by the ECtHR. National courts could only refer such cases to the Constitutional Court and only Constitutional Court judges could have domestic law struck because of its incompatibility with principles of the Italian Constitution. The ECHR is placed in an intermediate position between the Constitution and ordinary domestic law. Therefore, judge can also directly use the Convention as a guideline for the interpretation of domestic law. This is possible when no direct and clear conflict exists.

146.The European courts decisions influence judicial decision making the same as national case law. Mostly translated case law relevant for Italy is followed by judges while small percentage of judges are familiar and follow the development of the case law of the European Courts due to language barriers.

Lithuania

147.The international treaties, which were ratified by the Parliament of the Republic of Lithuania, are part of the legal system of Lithuania and shall be applied as well as the national laws. The provisions of international legal acts are usually included into the national laws, although in some cases international acts are directly applied. In addition, in the case of non-compliance between the international treaties and national laws the international treaties have priority over the application of national laws. Consequently, the Constitutional Act of the Republic of Lithuania on “Membership of the Republic of Lithuania in the European Union” provides for the fact that the legal norms of the European Union comprise the legal system of the Republic of Lithuania.

148.In their procedural decisions while forming the case law the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania take into consideration the decisions

reached by the European Court of Human Rights and the European Court of Justice. Respectively, the courts of lower instances also take into consideration the decisions reached by these European Courts. While developing and protecting the uniform interpretation and application of the law these courts analyse the case law of the European Courts, as well as other sources of law.

149.The literature/cases, which deal with the decisions reached by the European Courts, and which are relevant for Lithuania, are published in the judicial bulletins and reports of the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania. Moreover, special divisions of these two courts are responsible for following the trends and development of the decisions reached by the Constitutional Court of Lithuania and the European Courts. If necessary, particular measures regarding the formation of the case law corresponding to the position of the above-mentioned international courts are taken.

Ukraine

150.Ukrainian legislation goes far beyond the other countries that are part of this Overview (only Lithuanian legislation is closer to the provisions given with the Ukrainian legislation). Namely, Ukraine has taken a step further in the implementation of the decisions of the Strasbourg Court by adoption of the Law of Ukraine “On enforcement and application of the European Court of Human Rights" which provides for the application of the Convention and the ECtHR case law as a source of law. Furthermore, the legislation does not limit the courts in the reference of the ECtHR decisions on Ukraine but on all ECtHR case law. How much of the provisions set in the law are used by judges from lower court instances could be part of a separate analysis. However, it seems that Ukrainian legislation encourages courts to take the decisions of European courts into account even in cases where they are not binding.

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- Kyiv Recommendations on judicial independence in Eastern Europe, South Caucasus, and Central Asia” of the OSCE-ODIHR
- Overview of National Mechanisms Ensuring the Unity of Judicial Practice in Ukraine
- Web pages materials from relevant judicial institutions of the countries presented in this Overview