



**ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE  
JURISDICTIONS OF THE EUROPEAN UNION**

**ASSOCIATION DES CONSEILS D'ÉTAT ET DES JURIDICTIONS  
ADMINISTRATIVES SUPRÊMES DE L'UNION EUROPÉENNE**

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## TABLE OF CONTENTS

INTRODUCTION .....	4
CHAPTER I: GENERAL INFORMATION - SCOPE OF ADMINISTRATIVE DECISIONS AND MEASURES .....	6
§1. OVERVIEW OF THE LEGAL SITUATION IN COUNTRIES PARTICIPATING IN THE SURVEY.....	6
§2. FIRST SITUATION – SCOPE OF REVIEW BY THE SUPREME ADMINISTRATIVE COURT IF IT ACTS PRINCIPALLY AS A JUDGE IN FIRST AND LAST INSTANCE .....	7
1. Brief analysis.....	7
2. Summary.....	9
§3. SECOND SITUATION – SCOPE OF REVIEW BY THE SUPREME ADMINISTRATIVE COURT IF IT ACTS PRINCIPALLY AS A LAST INSTANCE JUDGE .....	9
1. Brief analysis.....	9
2. Summary.....	11
§4. SCOPE OF REVIEW BY THE SUPREME ADMINISTRATIVE COURT .....	11
1. Brief analysis.....	11
2. Summary.....	12
§5. COHERENCE IN JURISPRUDENCE .....	12
1. Brief analysis.....	12
2. Summary.....	13
CHAPTER II: CASES IN WHICH THERE IS REASON FOR UNIFORMISATION OF JURISPRUDENCE.....	14
§1. INTRODUCTION .....	14
§2. FIRST TYPICAL SITUATION: THE SUPREME ADMINISTRATIVE COURT WANTS TO LEAVE ITS WELL-ESTABLISHED LINE AND ESTABLISH A NEW LINE .....	14
§3. SECOND TYPICAL SITUATION: THE SUPREME ADMINISTRATIVE COURT WANTS TO RECONCILE DIVERGENT LINES OF ITS CHAMBERS OR FORMATIONS .....	15
§4. THIRD TYPICAL SITUATION - THE SUPREME ADMINISTRATIVE COURT DOES NOT WANT TO LEAVE ITS WELL-ESTABLISHED LINE BUT WOULD LIKE TO REDRESS DEVIATING LINES OF JUDGES BELONGING TO OTHER COURTS .....	16
§5. FOURTH TYPICAL SITUATION - THE SUPREME ADMINISTRATIVE COURT OBSERVES THAT ONE OR MORE OF ITS DECISIONS ARE OUT OF ITS WELL ESTABLISHED LINE (SO CALLED "WHITE RAVEN") .....	16
1. Analysis of the principal .....	16

2. (Non) decisive criteria to justify uniformisation in the case of a "White Raven".....	17
§6. FIFTH TYPICAL SITUATION:THE SUPREME ADMINISTRATIVE COURT WANTS TO DEPART NOT FROM THE OUTCOME BUT FROM THE REASONING OF PREVIOUS DECISIONS.....	18
CHAPTER III: TECHNIQUES OF UNIFORMISATION .....	19
§1. INTRODUCTION .....	19
§2. HAVING AN EXPANDED TRIAL BENCH TO ENSURE CONSISTENCY OF THE SUPREME ADMINISTRATIVE COURT’S CASE-LAW.....	19
1. A prevalent system.....	19
2. Different solutions.....	21
3. The practicalities of having an expanded bench .....	21
§3. THE USE OF "SPECIAL COMMISSIONS" IN CHARGE OF HARMONISING THE JURISPRUDENCE OF THE VARIOUS BENCHES OF THE SUPREME ADMINISTRATIVE COURT .....	24
1. An uncommon solution .....	24
2. Contrasting implementation .....	25
§4. THE USE OF "SPECIAL COMMISSIONS" IN CHARGE OF HARMONISING THE JURISPRUDENCE OF THE VARIOUS SUPREME COURTS OF THE SAME STATE.....	26
1. An uncommon solution .....	26
2. Diversified implementation.....	26
§5. INFORMAL TECHNIQUES DERIVED FROM PRACTICE (OR SOFT LAW).....	27
§6. PARTICULAR ASPECTS.....	27
1. The connection between a particular case and the moment of uniformisation .....	27
2. Influence of the parties or third parties in the uniformisation process.....	27
3. The technique of the "pilot" case.....	27
4. The form of decision following the uniformisation process .....	27
5. The initiation of a procedure for reviewing the jurisprudence in the event of revocation by a supreme jurisdiction.....	28
CHAPTER IV: VALUE OF REVISED JURISPRUDENCE .....	29
§1. PROCEDURE LEADING TO THE REVISION OF CASE LAW (JURISPRUDENCE) .....	29
§2. IMPACT OF NEW LEGAL OPINIONS ON THE RULINGS ISSUED IN ACCORDANCE WITH OVERRULED CASE LAW .....	29
§3. APPLICATION OF THE REVISED CASE LAW (JURISPRUDENCE).....	30

§4. DISRESPECTING THE REVISED CASE LAW .....	30
§5. FORM OF A DECISION TO REVISE JURISPRUDENCE .....	31
§6. BINDING EFFECT OF THE REVISING DECISION.....	31
§7. COMMUNICATION OF THE NEW JURISPRUDENCE.....	32

## INTRODUCTION

1. ACA-Europe has set the following key objectives in its action plan for 2015-2017, established during the "*Call for proposals*"<sup>1</sup>:

- To contribute to proper legislative implementation and correct application of the EU law in courts;
- To improve the rule of law and the compliance with the Charter of Fundamental Rights;
- To promote the convergence of national administrative law when possible and to develop common principles of law and administrative procedure in the case-law of the member courts;
- To improve access and governance of administrative justice by comparing and sharing national best practices;
- To increase mutual awareness, trust and cooperation between the legislative formations and between the Supreme Administrative Courts of Member States.

2. One of the main activities to attain these objectives comprises conducting three cross-sectional studies over this period of three years in order to collect, analyse, share and provide information, best practices and recommendations.

The first cross-sectional study was conducted in 2015, and focused on the access to the administrative law judge and the decisions of the Supreme Administrative Courts. These two elements are essential in an operational area of justice. The summary report of this first survey can be found on the Association's website (See [www.aca-europe.eu](http://www.aca-europe.eu)).

A second cross-sectional survey was carried out in 2016 and covers the following subject: "Uniformisation of administrative jurisprudence". This synthesis report is the result.

3. The methodology involved establishing a working group called "Uniformisation of administrative jurisprudence" within the organisation. This group includes Ms. Mylène BERNABEU, Mr. Joris CASNEUF, Mr. Jacek CHLEBNY, Mr. Frank CLARKE, Mr. Geert DEBERSAQUES, Mr. Carsten GÜNTHER, Mr. Auke KUIPERS, Mr. Ales ROZTOČIL, Ms. Susanne RUBBLACK and Ms. Viola VAN DIJK.

This group first defined the methodology and prepared the questionnaire<sup>2</sup>. From the methodological point of view, it was decided to develop an easy-to-complete questionnaire to be answered by the members of the Association (by mostly resorting to closed-ended questions). Even if this methodology does not establish all the existing nuances in the legal systems of the different countries in a precise manner, the group being well aware of this fact, it has nevertheless enabled a quick questioning of the members as well as provided a very good outline of the key aspects. All the member

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<sup>1</sup> JUST/2014/SPOB/OG/NETW 3-YEAR FRAMEWORK PARTNERSHIP AGREEMENTS ANNEX 1 - ACTION PLAN FOR 2015 – 2017 - JACC - Effective access to justice for all, including rights of victims of crime and rights of the defence.

<sup>2</sup> See annex.

courts of the Association participated in this study, except for Denmark, Estonia, Italy, Malta, Montenegro, Portugal, Romania, Switzerland, Turkey, the Council of State of Luxembourg and the Court of Justice of the European Union. It can thus be concluded that the results obtained reliably reflect the state of affairs in the member courts of the Association.

Finally, the results have been analysed and synthesised by this working group and communicated to the correspondents of the Association for a final approval.

4. The questionnaire comprised 159 questions. Some of these questions could be answered with "yes" or "no", others required a choice between one or more possible answers<sup>3</sup>. In some cases, the questionnaire allowed for more detailed responses. Indeed, it is obvious that it is sometimes difficult to grasp all legal nuances by simply answering "yes" or "no", or by being limited to the selection of one or more of the listed answers, the quantitative nature of the study aims to find the answer which applies to the majority of cases. The answers that were provided and the analysis must therefore be assessed in this light and within these limitations.

The questions were spread over 4 chapters, each addressing one aspect of the study. The different chapters correspond to one of the following topics:

- 1° Scope of the review of administrative decisions and measures
- 2° Reasons for uniformisation
- 3° Techniques of uniformisation
- 4° Value of revised jurisprudence

These groups will be examined in the chapters below.

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<sup>3</sup> See annex.

## **CHAPTER I: GENERAL INFORMATION - SCOPE OF ADMINISTRATIVE DECISIONS AND MEASURES**

### **§1. OVERVIEW OF THE LEGAL SITUATION IN COUNTRIES PARTICIPATING IN THE SURVEY**

5. The first question was as to whether in administrative judicial systems of the Member States, the Supreme Administrative Court acts: principally as a judge in first and last instance; principally as a last instance judge; in the two aforementioned qualities, depending on the circumstances.

One answer was to be chosen by the respondents of the questionnaire.

6. Only one respondent (Bulgaria) gave the answer "principally as a judge in first and last instance" (4,35%), while according to thirteen (56,52%) the answer regarding their judicial systems is "principally as a last instance judge" and nine (39,13%) decided to choose the last option ("in the two aforementioned qualities, depending on the circumstances").

The analysis of the answers to this part of the questionnaire shows that, as it has been mentioned above, the majority of the Supreme Administrative Courts act principally as a court of final instance; however in Belgium, Germany, Croatia, Serbia, Lithuania, Greece, the Netherlands, France the Supreme Administrative Court acts as a court of first and last instance, as well as a last instance court, depending on the circumstances.

For example, in the Netherlands the Council of State acts as a first and last instance in cases of spatial planning and elections, and as last instance in cases of general administrative law, building law, environmental law and alien law.

The Federal Administrative Court of Germany (which in the majority of cases only acts as a last instance court) is competent in first and last instance in matters such as planning decisions of nationwide importance or cases concerning the Federal Intelligence Service.

In Lithuania the Supreme Administrative Court is the first and last instance for the cases assigned to its jurisdiction by the law – cases concerning the legality of normative acts. It is also the last instance court when hearing petitions to provide court's opinion as to whether a member of municipal council has broken an oath or the law. In this regard the competence of administrative courts resembles that exercised by the Constitutional Court. It is also the final instance for the cases regarding the legality of the decisions adopted by the Central Electoral Commission where provided for in applicable legislation; the appellate instance for cases heard by the regional administrative courts as courts of the first instance; the instance hearing petitions for reopening of proceedings in administrative cases after the court judgment becomes effective.

7. The case of Bulgaria is worth mentioning, as only Bulgaria declared that the Supreme Administrative Court acts principally as a judge in first and last instance. In Bulgaria the Supreme Administrative Court acts as a first instance court in challenges against the by-laws, except for these of the municipal councils; challenges against the acts of the Council of Ministers, the Prime Minister, the deputy prime ministers and the ministers; challenges against decisions of the Supreme Judicial Council; claims against the bodies of the Bulgarian National Bank; cassation complaints and protests against court decisions of the first instance; private complaints against definitions and orders; claims on

cancellation of in force court acts upon administrative cases and challenges against other acts, determined by law.

In all other cases the Supreme Administrative Court acts as a cassation jurisdiction of first instance judgments of the administrative courts.

## **§2. FIRST SITUATION – SCOPE OF REVIEW BY THE SUPREME ADMINISTRATIVE COURT IF IT ACTS PRINCIPALLY AS A JUDGE IN FIRST AND LAST INSTANCE<sup>4</sup>**

### 1. Brief analysis

8. When it comes to the scope of review by the Supreme Administrative Court acting principally as a judge in first and last instance, five Member States (Ireland, Bulgaria, Belgium, Germany and Greece) concluded that the Supreme Administrative Court has power only to quash administrative decisions and measures, while five other Member States (the Netherlands, Croatia, Serbia, Lithuania and France) were not limited, in certain cases, to only quashing administrative decisions and measures.

Only Bulgaria stated that the Supreme Administrative Court has the power only to alter administrative decisions or measures. Five Member States (France, the Netherlands, Croatia, Serbia, Lithuania) state that the Supreme Administrative Court has the power to quash or to alter administrative decisions or measures, while five other (Ireland, Bulgaria, Belgium, Germany, Greece) stated that they do not have such a possibility.

The Supreme Administrative Courts have power to hear a case *de novo* only in two Member States – in Bulgaria and in Lithuania.

9. The next question asked whether the Supreme Administrative Court has power to quash or alter administrative decisions or measures in particular situations being where:

- any error of law is apparent in the administrative decision or measure concerned (according to Ireland, Bulgaria, Germany, Serbia and Greece);
- only certain types of error of law are disclosed (France, the Netherlands, Belgium and Lithuania);
- any errors of fact are apparent in the administrative decision or measure concerned (Croatia).

According to the Netherlands, Belgium and Lithuania an error which cannot be demonstrated to have affected the decision challenged or the making of the measure challenged may not be sufficient to warrant a relevant administrative decision or measure being quashed. France stated that a situation where there is an error of law, but nonetheless the same administrative decision or measure could have been determined with correct legal reasons, may not be sufficient to warrant a relevant administrative decision or measure being quashed.

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<sup>4</sup> Those questions were meant to be answered if the response to the previous question was either "in the two aforementioned qualities, depending on the circumstances" or "principally as a judge in first and last instance".

10. Another important topic was as to the extent to which The Supreme Administrative Court reviews facts decided by the decision-maker. Six Member States answered that it always does, three that this occurs only where an error of fact is considered to be sufficiently serious to render the decision unlawful and according to Germany it never happens.

Three Member States (that is: the Netherlands, France and Croatia) claimed that - in considering whether to come to a different conclusion on the facts than the decision-maker - the Supreme Administrative Court can consider additional evidence or materials only in special circumstances, two (Greece and Belgium) that it can consider only the evidence and materials which were before the decision-maker and one answer (of Lithuania) to that question was negative.

Moreover, in considering whether to come to a different conclusion on the facts than the decision-maker, the Supreme Administrative Court in some jurisdictions can consider evidence and materials which were not before the decision maker provided the evidence existed at the time the decision was issued (Croatia, Lithuania, France). According to Greece and the Netherlands, the Supreme Administrative Court can consider the evidence and materials which were not before the decision maker-provided the party was not able without his/her fault to present them to the decision-maker before the decision had been issued. One answer to this question was negative (Belgium).

11. Some of the respondents (21,74%) to the questionnaire stated, that the Supreme Administrative Court can come to a completely independent view of the facts based on whatever evidence or materials are placed before the Supreme Administrative Court without placing weight on the facts as determined by the decision-maker. Only Greece denied such possibility.

12. The same percentage of positive answers was given by the Member States to the question of whether the Supreme Administrative Court can consider the facts afresh, but placing weight on the original view of the decision-maker, when considering whether to come to a different conclusion on the facts than the decision-maker. Lithuania claimed that such a situation is not possible.

13. Finally, according to four Member States (Lithuania, France, the Netherlands and Belgium) the Supreme Administrative Court can consider new evidence, including evidence that was not available at the time of the decision, which leads to the view that the decision is now unlawful. Two answers in this regard were negative.

14. In Bulgaria the Supreme Administrative Court needs to be sure that there was an error which undoubtedly affected the decision in order to quash or change the decision concerned, while two answers were negative and most of them (95,45%) were not displayed at all by the participants.

Three negative answers were given to the question of whether, in order to quash or change the decision, the Supreme Administrative Court needs to be persuaded that there was an error, which may reasonably be considered to have affected the decision. Only three answers (two negative and one positive) were given to the question of whether the Supreme Administrative Court needs to be persuaded that there was an error which no reasonable decision-maker could have made to quash or change the decision concerned.

## 2. Summary

Significant variation in the law of Member States can be observed in relation to scope of review.

While few Supreme Administrative Courts have power to hear a case *de novo* the criteria by which a court determines whether it should interfere with the determination of the decision maker and the extent of the power of the Court to alter or quash that decision appears to vary quite significantly so that it is not possible to say that there is any consensus in the Member States as to the precise scope of the role of a Supreme Administrative Court in this matter. Similarly the position in respect of the consideration new evidence appears to vary significantly from court to court.

### **§3. SECOND SITUATION – SCOPE OF REVIEW BY THE SUPREME ADMINISTRATIVE COURT IF IT ACTS PRINCIPALLY AS A LAST INSTANCE JUDGE<sup>5</sup>**

#### 1. Brief analysis

16. A part of the survey was focused on the situation where the Supreme Administrative Court acts principally as a last instance court.

According to eight Member States the first instance administrative courts have power only to quash administrative decisions and measures, while fourteen had an opposite opinion. Most of the respondents (nineteen Member States) gave a negative answer to the question of whether the first instance administrative courts have the power only to alter administrative decisions or measures, while three answers were affirmative. In the jurisdiction of nineteen Member States, the first instance administrative courts may quash and alter administrative decisions or measures (while three do not have such power). The first instance administrative courts have power to hear a case *de nouveau* in the legal systems of seven Member States, while fifteen Member States stated no such competence existed in their courts.

17. The subsequent topic concerned the specific circumstances in which the administrative courts have power to quash or alter administrative decisions or measures. This may happen when: any error of law is apparent in the administrative decision or measure concerned (according to eleven Member States); only certain types of error of law are disclosed (nine Member States); any errors of fact are apparent in the administrative decision or measure concerned (two Member States).

18. When listing the types of errors of law which may not be sufficient to warrant a relevant administrative decision or measure being quashed, nine respondents indicated an error which cannot be demonstrated to have affected the decision challenged or the making of the measure challenged, one indicated an error of law concerning the matters which should or should not have been taken into account by the decision-maker, and four in a situation where there is an error of law, but nonetheless the same administrative decision or measure could have been determined with correct legal reasons.

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<sup>5</sup> Those questions were meant to be answered if the response to question 001 was either "principally as a last instance judge" or "in the two aforementioned qualities, depending on the circumstances".

According to fifteen Member States, insofar as the decision or measure under challenge involves a consideration of facts, an administrative court can always review facts decided by the decision-maker. However, five added a restriction that this may only take place when an error of fact is considered to be sufficiently serious to render the decision unlawful while two stated that no such power existed.

The courts of five Member States can consider only the evidence and materials which were before the decision-maker (even when coming to a different conclusion on the facts than the decision-maker), while in seven cases it is possible to consider additional evidence or materials only in special circumstances while the courts of three Member States do not have such a limitation.

Most respondents (ten) stated that, in considering whether to come to a different conclusion on the facts than the decision-maker, the courts can consider the evidence and materials which were not before the decision maker provided they existed at the time the decision was issued, the courts of four Member States can do so provided the party was not able without his/her fault to present them to the decision maker before the decision had been issued. Only one answer (by Greece) was negative.

19. Once again, many Member States (thirteen) declared that the courts can come to a completely independent view of the facts different from the decision-maker, based on whatever evidence or materials are placed before the court without placing weight on the facts as determined by the decision-maker.

An equal amount of positive answers (thirteen) were given by the Member States to the question of whether the court can consider the facts afresh, but placing weight on the original view of the decision-maker, when considering whether to come to a different conclusion on the facts than the decision-maker.

Consequently, according to thirteen Member States the court can consider new evidence, including evidence that was not available at the time of the decision which leads to the view that the decision is now unlawful.

According to four respondents the court needs to be sure that there was an error which undoubtedly affected the decision in order to quash or change the decision concerned, while one answer was negative.

Three negative and two positive answers were given to the question of whether, in order to quash or change a decision, the court needs to be persuaded that there was an error, which may reasonably be considered to have affected the decision. Two negative and three positive answers were given to the question of whether the court needs to be persuaded that there was an error which no reasonable decision-maker could have made in order to quash or change the decision concerned.

Where the decision or measure under challenge involves an consideration of facts in respect of which there is either contradictory evidence or questions concerning the credibility of evidence, the administrative courts of twelve Member States review the way in which the decision-maker determined the facts based on such evidence in all cases (while four have such empowerment only where the resolution of the evidence by the decision-maker cannot be rationally supported, two where the administrative court considers that the determination of the decision-maker was against the weight of the evidence, two where the decision maker has failed to give persuasive and logical reasons for a conclusion of fact).

## 2. Summary

20. In much the same way as it must be acknowledged that there is a wide variation between the roles of Supreme Administrative Courts covered by this questionnaire, like considerations seem to apply to first or first and last instance courts of the Member States. This is, perhaps, hardly surprising for the underlying role of the courts in reviewing and interfering with administrative decisions is likely to be governed by the administrative law of each Member State. While there may be some differences between the way in which that law operates in respect of a Supreme Administrative Court when acting as a first and last instance court as opposed to a last instance court, it might not be expected that there would be very significant variations.

## **§4. SCOPE OF REVIEW BY THE SUPREME ADMINISTRATIVE COURT**

### 1. Brief analysis

21. In eighteen cases a Supreme Administrative Court, when considering a decision of a lower court exercising administrative jurisdiction, whether by appeal or cassation quashes (cassates), overturns or reverses the decision of the lower court in some but not all circumstances where an error of law is disclosed. In five Member States it always happens.

When the Supreme Administrative Court considers a decision of a lower court exercising administrative jurisdiction - whether by appeal or cassation - most respondents (fifteen) suggested that the Supreme Administrative Court must always quash (cassate), overturn or reverse the decision of the lower court where there is an error of law which might have affected the result of the case in that lower court. Only three negative answers were provided.

According to twelve Member States, the Supreme Administrative Court does not have to be satisfied that it would have come to a different conclusion had it not been for the error of law concerned in order to overturn a decision of a lower court. On the other hand six responses were affirmative.

22. What seems interesting is that in eleven Member States the Supreme Administrative Court is not empowered to quash (cassate), overturn or reverse the decision of the lower court if there was not an error of law attributed to the lower court, but, in the light of a new evidence and facts that occurred after the judgment of the lower court had been delivered, the judgment violates substantive or procedural law. Seven respondents stated the opposite.

23. In the case of twelve Member States, the Supreme Administrative Court must quash (cassate), overturn or reverse the decision of the lower court where it contradicts a judgment of the ECJ delivered after the lower court judgment. The Supreme Courts of six Member States do not have such obligation.

Finally, according to eleven respondents, the Supreme Administrative Court must quash (cassate), overturn or reverse the decision of the lower court where it contradicts ECHR as a result of a new interpretation by a judgment of the ECtHR delivered after the lower court judgment (seven negative answers).

24. Errors of law are taken into consideration by the Supreme Administrative Court: *ex officio* in thirteen Member States and on demand of the parties in ten. The same principle applies to EU law according to twenty-one Member States (only two negative answers were given – by Hungary and Greece).

A higher level of divergence is noticeable within the issue of whether the Supreme Administrative Court can consider evidence or materials which were not before the administrative decision-maker – there were seven affirmative, nine negative, seven "in certain circumstances" answers. On the other hand, most respondents (eleven) stated that the Supreme Administrative Court cannot consider evidence or materials which were not before the lower court (the law of four Member States grants such possibility, while in eight it depends on the circumstances).

In the opinion of twelve Member States, where the Supreme Administrative Court may, but will not always, consider additional evidence or materials, the criteria which best describes the circumstances in which such new materials will be admitted would be a situation where there is a reasonable explanation as to why important evidence or materials were not placed before the lower court. Nine also indicated that new evidence can be considered in a case where the supreme jurisdiction is satisfied that the proposed additional evidence or materials might have a significant effect on the proper outcome of the proceedings and two indicated that this may occur in a case where new evidence suggests that the rights of third parties may have been interfered with.

In eighteen Member States the Supreme Administrative Court may not consider additional evidence or materials also *ex proprio motu* and only in five the Supreme Administrative Court does have such empowerment.

## 2. Summary

25. Given that this part of the questionnaire was concerned principally with the role of the Supreme Administrative Court as a cassation or appellate court from lower administrative courts it is perhaps not surprising that there is a greater level of common ground between the systems of the Member States. For example, a significant majority of Supreme Administrative Courts will overturn (in whatever way is appropriate in the context of its legal system) a decision of a lower court which has made an error of law which might have affected the decision. However, there is a greater degree of divergence in respect of the admissibility of new evidence, perhaps reflecting the general approach to that issue in the respective Member States.

26. Perhaps of particular interest is the fact that in one third of the Member States answering the relevant question it was stated that the Supreme Administrative Court is not required to overturn a decision of a lower court which contradicts a judgment of the ECJ.

## **§5. COHERENCE IN JURISPRUDENCE**

### 1. Brief analysis

27. According to fourteen Member States, so far as a court exercising administrative jurisdiction is concerned, a decision or measure of an administrative body will be considered unlawful by reason of the fact that the same administrative body has come to different conclusions of fact in relation to the same question in another case, unless there

is a proper explanation for the difference. In seven Member States coming to different conclusions on the same question in other cases is not a basis for considering a decision unlawful, in two the answer was affirmative.

28. In thirteen Member States, where the Supreme Administrative Court is reviewing a decision of a lower court exercising administrative jurisdiction, it will interfere with the decision of the lower court because the decision of that court on the law is inconsistent with another decision of the same court (although not necessarily the same judge or panel of judges) on the same question of law, unless there is a good explanation for the difference in the decision. In nine Member States that would not occur. Only in Slovakia will the Supreme Administrative Court always interfere in such circumstances.

29. Thirteen Member States declared that the Supreme Administrative Court is empowered to depart from its jurisprudence while reviewing a decision of a lower court that is consistent with the existing jurisprudence of the Supreme Administrative Court. In nine cases this is said to be possible but only by an enlarged bench. Bulgaria is the only State where the Supreme Administrative Court does not have such empowerment at all.

30. In most Member States (thirteen), the Supreme Administrative Court relies on the case law of foreign supreme courts while interpreting law, in particular international or EU law, but, at the same time, the respondents declared that this happens very rarely. However, seven answers to this question were positive (the Supreme Administrative Courts rely on the case law of foreign supreme courts with no restriction about how often it occurs) while three were negative.

31. The last issue in the part of the questionnaire concerning consistency was as to whether the Supreme Administrative Courts of the Member States are bound by the interpretation of the ECHR by the ECtHR. Eight Member States declared that the Supreme Administrative Courts are bound by the interpretation of the ECHR by the ECtHR, fourteen Member States answered that, although the court is not formally bound, in practice it always follows the jurisprudence of the ECtHR. The answer of the United Kingdom was negative.

## 2. Summary

32. The majority position appears to be that courts will attempt to ensure consistency in decision makers and lower courts by interfering with decisions which appear to be inconsistent with previous decisions of the same body or court although there is a significant minority that do not appear to take the view that the Supreme Administrative Court necessarily must seek to achieve complete consistency. While reliance on the decisions of other Supreme Administrative Courts is considered possible in the majority of cases it appears to be less common in practice. It might be said that devising methodology to enhance the possibility of Supreme Administrative Courts being able to consider and, if appropriate, have regard to the decisions of other Supreme Administrative Courts may be a matter worth pursuing further.

## **CHAPTER II: CASES IN WHICH THERE IS REASON FOR UNIFORMISATION OF JURISPRUDENCE**

### **§1. INTRODUCTION**

33. In general, it is conceivable that the Supreme Administrative Court would see a reason for considering uniformisation among others in the following five types of situations:

1° The Supreme Administrative Court wants to leave its well-established line and establish a new line;

2° The Supreme Administrative Court wants to reconcile divergent lines of its Chambers or formations;

3° The Supreme Administrative Court does not want to leave its well-established line but would like to redress deviating lines of judges belonging to other Courts;

4° The Supreme Administrative Court observes that one or more of its decisions are out of its well established line (so called "White Raven");

5° The Supreme Administrative Court wants to depart not from the outcome but from the reasoning of previous decisions;

34. These five typical situations are analyzed below.

### **§2. FIRST TYPICAL SITUATION: THE SUPREME ADMINISTRATIVE COURT WANTS TO LEAVE ITS WELL-ESTABLISHED LINE AND ESTABLISH A NEW LINE**

35. When the legal context in which case-law was established, has undergone normative changes, this gives Supreme Administrative Courts in general an important reason for uniformisation in the sense that the Supreme Administrative Court will establish a new line of jurisprudence (on a scale of 1 to 5, eighteen out of twenty-three Member States answered 5). When it comes to expected changes in law, or in other words anticipation on normative changes, Member States indicate that it is less likely to give reason for uniformisation by establishing a new line (on a scale of 1 to 5, six Member States answered 1, six Member States answered 2, three Member States answered 3, one Member State answered 4 and one Member State answered 5).

36. Besides a change in law, (a change in) jurisprudence from a higher court, such as the Court of Justice of the European Union, the European Court of Human Rights and constitutional jurisdictions, is an important reason for Supreme Administrative Courts to leave a well-established line and establish a new line (fourteen Member States answered 5 on a scale of 1 to 5, six Member States answered 4).

Of course also jurisprudence from other national courts needs to be taken into consideration in this part of the analysis. Questions were asked on whether it is conceivable that a Supreme Administrative Court establishes a new line of jurisprudence due to jurisprudence developed by other national courts, specifically (if applicable) the Supreme Civil Court, the Supreme Criminal Court and a specialized Supreme Administrative Court. It is possible, for example, that certain questions of law are dealt

with both by the Supreme Administrative Court and the other national courts mentioned (e.g. general principles of law and article 6 of the European Convention on Human Rights). Participants were divided on whether the situation of divergent lines between its own jurisprudence as a (general) Supreme Administrative Court and (if applicable) the Supreme Civil Court and the Supreme Criminal Court gives reason to establish a new line. Member jurisdictions were also divided on the question of whether divergent lines between its own jurisprudence and that of lower courts gives reason for a new line of jurisprudence.

37. Other factors – jurisprudence of national Supreme Administrative Courts in other ACA Member States or elsewhere, comments from legal publicists and discussions on the ACA forum – will in general less likely lead a Supreme Administrative Court to leave its well-established line and establish a new line. For example regarding divergent lines between the jurisprudence of the Supreme Administrative Court and that of national Supreme Administrative Courts in other ACA Member States or elsewhere, none of the Member States answered 4 or 5 on the scale of 1 to 5 and most Member States answered 1. Developments in civil society are a bit more likely to lead a Supreme Administrative Court to leave its well-established line (on a scale of 1 to 5, thirteen Member States answered 1 or 2, four Member States answered 3, four Member States answered 4 and zero Member States answered 5).

38. Member jurisdictions, on being asked, pointed out that a new line can also be established if the existing jurisprudence leads to difficulties in practice or in case there is an informal initiative of the state authority.

39. Most participants (twelve) answered that there remains a margin of appreciation between the formations in the Supreme Administrative Court.

### **§3. SECOND TYPICAL SITUATION: THE SUPREME ADMINISTRATIVE COURT WANTS TO RECONCILE DIVERGENT LINES OF ITS CHAMBERS OR FORMATIONS**

40. The statistics show in general a similar image as described in paragraph 2. A change in law or (a change in) jurisprudence from a higher court, such as the Court of Justice of the European Union, the European Court of Human Rights and constitutional courts, are important reasons for the Supreme Administrative Court to reconcile divergent lines of its Chambers or formations.

However, with regard to the questions on developments in civil society and comments from legal publicists certain differences emerge. Compared to paragraph 2., more Member States endorsed that it is conceivable that the Supreme Administrative Court sees reason for uniformisation in the situation that it wants to reconcile divergent lines of its Chambers or formations if there are developments in civil society (three member jurisdictions answered 5 against zero Member States in the situation that the Supreme Administrative Court wants to leave its well-established line and establish a new line, paragraph 2.). The same applies to the question on comments from legal publicists (five member jurisdictions answered 5 against zero member jurisdictions in the situation that the Supreme Administrative Court wants to leave its well-established line and establish a new line, paragraph 2.).

41. Member jurisdictions, on being asked, stated that divergent lines of its Chambers or formations can be addressed if legal certainty is at stake and no reasonable explanation

can be given for the divergence (the Netherlands) or if professional complaints are made by the chief of jurisdiction or the ombudsman publishes a report in this sense (Belgium). It should be mentioned that less Member States answered the questions on divergent lines of its Chambers or formations. France explained that this situation never occurs: either the Chamber's decision will bring the jurisprudence of the whole Court to evolve, or the case is brought before an extended Judgment Panel in which all the Chambers participate.

42. Most member jurisdictions (11) answered that there remains a margin of appreciation between the formations in the Supreme Administrative Court.

#### **§4. THIRD TYPICAL SITUATION - THE SUPREME ADMINISTRATIVE COURT DOES NOT WANT TO LEAVE ITS WELL-ESTABLISHED LINE BUT WOULD LIKE TO REDRESS DEVIATING LINES OF JUDGES BELONGING TO OTHER COURTS**

43. The participants that answered this question were divided with regard to the question whether the Supreme Administrative Court would like to use available techniques to come to an understanding with judges belonging to other Courts if there are divergent lines between its own jurisprudence as a general Supreme Administrative Court and that of the Supreme Civil Court or the Supreme Criminal Court. An equal number of Member States answered 1 (four) and 5 (four), on a scale of 1 to 5. When it comes to divergent lines between the jurisprudence of the Supreme Administrative Courts and that of lower courts it is more likely that the a Supreme Administrative Court will address the issue (fourteen Member States answered 4 or 5).

Supreme Administrative Courts will however in general not see reason in the decisions of national Supreme Administrative Courts in other ACA Member States or elsewhere.

#### **§5. FOURTH TYPICAL SITUATION - THE SUPREME ADMINISTRATIVE COURT OBSERVES THAT ONE OR MORE OF ITS DECISIONS ARE OUT OF ITS WELL ESTABLISHED LINE (SO CALLED "WHITE RAVEN")**

##### *1. Analysis of the principal*

44. This question concerns the situation that one or more previous decisions diverge from the well-established line. All member jurisdictions that participated in the survey, responded to this question.

A clear majority of the participants sees reason for uniformisation in this situation (twenty to three).

45. Nonetheless, from the explanations given by the Member States it appears there are different ways in which uniformisation is realized in this respect.

- A possible way is that the Supreme Administrative Court clarifies, emphasizes, completes or specifies its well-established line. This presupposes the well-established line as such is not affected by the erroneous decision(s) and the Supreme Administrative Court, in order to continue its well-established line, does not have to come to a jurisprudential turnaround. For example, in Germany, if a "White Raven" is observed the Supreme Administrative Court will see reason to clarify and/or emphasize its well-established line. According to the Council of State of the Netherlands, in order to avoid

confusion caused by the erroneous decision(s), it may be desirable to clarify the well-established line in a subsequent decision. In France, if the jurisprudence is difficult to apply, frequently considerations of principle will be completed or clarified, without being truly reversed.

- Another way in which uniformisation is realized in situations as mentioned in the question, is to conduct a unification procedure or to bring about a reversal in the jurisprudence. This presupposes the well-established line has been affected by the erroneous decision(s) indeed, and the Supreme Administrative Court, in order to continue its (formerly) well-established line, has to come to a jurisprudential turnaround (again) in order to alter its jurisprudence back to the (formerly) well-established line.

For example, in Hungary a unification procedure shall be conducted if an adjudication chamber of the Supreme Administrative Court intends to deviate in a question of law from the decision of another adjudication chamber published as a Supreme Administrative Court decision on principle or from a court decision on principle. In Austria, under these circumstances the Supreme Administrative Court Act offers the possibility to create a uniform jurisprudence by an increased panel. In Slovakia the unifying decision is adopted by a majority of votes of judges of the Supreme Administrative Court. The full Bench of the Supreme Court of Cyprus in its Administrative jurisdiction may not follow its own precedent if it appears, on the face of it, to be undoubtedly erroneous, under an objective test or the circumstances have changed completely. In Luxembourg there is only one section within the Supreme Administrative Court, so that there is no divergence at the level of the case-law, but only, as the case may be, judicial reversals. In France, if difficulties call into question the very foundation of the solution of the case-law, it can be overturned; there is, however, an objective of stability in the case-law.

46. Although a clear majority of the Member States sees reason for uniformisation if the Supreme Administrative Court observes that one or more of its decisions are out of its well-established line, still there are differences regarding the influence of the number, the importance and the age of the previous erroneous decision(s).

## 2. (Non) decisive criteria to justify uniformisation in the case of a "White Raven"

### **a. Is the number of deviating cases decisive?**

47. Most participants (eighteen) answer that the number of previous erroneous decisions is no decisive factor or that no more than one decision is needed to see reason for uniformisation. One participant answers two to five decisions are needed and one participant answers six to fifteen decisions are needed to come to action. According to the Slovakian Supreme Administrative Court one important decision can change existing case-law. However, according to the Bulgarian Supreme Administrative Court permanently established differences in judgments require two or more judgments.

### **b. Is it decisive whether these are minor or major cases?**

48. According to most member jurisdictions (sixteen) it is not decisive whether the erroneous decisions are minor or major cases. Solely legal arguments are taken into consideration (Hungary). Also a non-major case may reveal difficulties in applying the jurisprudence (France). Nevertheless, the importance of the case may have some influence. In the Netherlands irregularities that are not very conspicuous generally do not need to be redressed explicitly in order to uphold the well-established line. According to the

Slovenian Supreme Administrative Court it depends on the circumstances of the case. The Polish Supreme Administrative Court states that it depends on the area of the law and the importance that uniformisation would have in the particular situation for the predictability of the law and for safeguarding the rights of individuals.

**c. Is decisive how much time has elapsed since the case was decided upon?**

49. A slightly smaller majority (fourteen) feels it is not decisive how much time has elapsed since the erroneous decision was taken. Uniform reasoning is a rule, no matter how much time has elapsed since the decision (Croatia). Unless there has been a change in law, it does not matter how much time has elapsed (Austria). Still, the time elapsed can be a factor (Ireland). According to the German Supreme Administrative Court, theoretically the time elapsed does not matter. But in fact, the motivation of the German Supreme Administrative Court to emphasize its well-established line will be higher the younger the deviating decision is. In the Netherlands, irregularities that are dating from long time ago generally do not need to be redressed explicitly anymore in order to uphold the well-established line. On the other hand, the elapsed time since the establishment of jurisprudence may be important in assessing the appropriateness of a change in jurisprudence (France). Because the national and international legal framework changes in time as well as the mentalities, a change in jurisprudence may prove indispensable in these circumstances (Greece). Since differences in jurisprudence may occur over several years, there is a possibility that the Supreme Administrative Court may conclude that there is a need to unify the jurisprudence after a few years of adjudicating in a certain category of cases (Poland).

**§6. FIFTH TYPICAL SITUATION: THE SUPREME ADMINISTRATIVE COURT WANTS TO DEPART NOT FROM THE OUTCOME BUT FROM THE REASONING OF PREVIOUS DECISIONS**

50. Most Member States (eighteen to five) answer this question positively. The Polish Supreme Administrative Court points out that from the legal point of view only the operative part of the judgment of the Supreme Administrative Court has a binding force, but in practice the reasons for a judgment are also of significant importance. According to the German Supreme Administrative Court, the reasoning of a decision is an important part of jurisdictional culture. So, if not the result, but the reasoning of a decision is found deficient, the German Supreme Administrative Court will use its power of uniformisation to present the reasoning it considers more convincing. Spain mentions the incorporation of new legal arguments. According to Luxembourg, from time to time, the reasoning must be refined, in particular in the light of the pleas and arguments put forward by the parties to the proceedings. In France this subject is less a matter of adopting purely innovative reasoning than of making clearer the principles of jurisprudence already established, for the sake of pedagogy and intelligibility of the law. However, in Bulgaria and Slovakia no cases are known in which change concerns only the motives of the interpretative decisions.

## **CHAPTER III: TECHNIQUES OF UNIFORMISATION**

### **§1. INTRODUCTION**

51. The various Supreme Administrative Courts of the Member States of the ACA-Europe are required, as supreme courts, to ensure the unity and consistency of jurisprudence, to settle any matters of principle and to adapt their case-law-based solutions to the transformations of the context that created them. In this respect, they are equipped with instruments that are more or less formalised to enable them to fulfil this fundamental role with all the required efficiency.

A summary of the answers to the questions makes it possible, in particular, to understand the various techniques implemented within various judicial systems of the Member States to guarantee, in a formalised manner, the consistency of jurisprudence and prevent risks of discrepancies or divergences, both within the trial benches of these Supreme Administrative Courts and, if necessary, between different supreme courts of the same State.

The following analysis presents only the main aspects of the systems implemented by the various States. It focuses on establishing common features or underlining the differences that may exist between the various adopted systems. It is clear that the aim of this review is not to deal with each of these systems in detail and that it only allows highlighting the significant trends that must be clarified by the legal context specific to each State.

52. It must also be pointed out that, in addition to formalised systems, more informal and generic solutions very often allow, within the same supreme administrative court and also between different supreme courts of the same State, a dialogue between the courts to ensure internal consistency of the administrative jurisprudence and consistency of such jurisprudence with that established by other supreme courts.

### **§2. HAVING AN EXPANDED TRIAL BENCH TO ENSURE CONSISTENCY OF THE SUPREME ADMINISTRATIVE COURT'S CASE-LAW**

#### **1. A prevalent system**

53. A large majority of the various ACA-Europe Member States that responded to this questionnaire indicated that the procedural law provides that certain decisions pronounced by the Supreme Administrative Court are taken by a court bench comprising a higher number of judges than usual, in order to ensure the consistency of the case-law.

Within these States, the trial bench that is required most often consists of a plenary session of the judges constituting the court (ten Member States replied to that effect, including Sweden, Serbia, Belgium, Spain and Finland) or, to a lesser extent, of an amalgamation of divisions, chambers or other regular benches of the court (six Member States replied to that effect, including Slovakia, Lithuania, Belgium and the Czech Republic).

It should be noted that, as regards France, the answer to this question must be highly nuanced because, in reality, it is more of a practice than a procedural obligation. In fact, from a strictly legal point of view, there is no obligation whatsoever to use the expanded or plenary benches of the Conseil d'Etat to ensure the consistency of its case-law. However, there are two distinct benches that fundamental issues can be referred to for ensuring such consistency. The most important cases that are likely to result in a shift or even a change in the jurisprudence are thus ruled on by the higher trial benches: the litigation section and the litigation assembly. These two benches mainly comprise the President of the litigation section, his three deputy Presidents and several Presidents of the chambers (or all of them, when it comes to the section). This composition makes it possible to ensure the consistency of the jurisprudence since at least one member of each trial bench is present. At a weekly meeting between the President of the litigation section and its three deputy Presidents, all the situations likely to cause problems relating to the consistency of the jurisprudence are also discussed (see below p. 25).

54. Thus, there are multiple implementations of this solution, although, they generally result in cases presenting a particular jurisprudential challenge being entrusted to a more or less expanded panel of judges depending on the importance of the case. In other words, the trial bench appears to have higher or lower number of judges depending on the nature of the case.

For example, in Belgium, similar to what has been mentioned in the case of France, there are two formal benches: firstly, a plenary session of judges that corresponds to the general assembly of the administrative litigation section of the Conseil d'Etat, and secondly, the combined chambers of the administrative litigation section of the Conseil d'Etat in the context of cassation in administrative matters.

In Finland, there are two types of plenary sessions: one consisting of the meeting of all the judges of the court and the other consisting of the meeting of all the judges that administratively belong to the division concerned, for example seven or eight judges instead of the usual five. In the Netherlands, the bench, which consists of one to three judges and is called upon to rule on a case, may refer the case to a higher chamber<sup>6</sup> consisting of five judges including ones who are also members of other (specialized) Supreme Administrative Courts. In Austria, the usual five-member bench is expanded to add four additional members in cases defined by the law on Supreme Administrative Courts (especially when the decision may differ from the solution adopted by the previous decisions of the court). In the Czech Republic, the expanded bench consists of seven or nine judges, depending on the case. In Poland, the resolutions are adopted by a bench of seven judges, by the entire chamber or by all the members of the Supreme Administrative Court depending on the case.

It is slightly different in Greece, where each of the sections of the Conseil d'Etat provides for two types of benches within them. Each of the six sections of the Conseil d'Etat thus consists of two benches: one comprising five members and hearing most of the cases and the other comprising seven members and hearing cases that present certain difficulties. If the case is seen as raising even more significant questions, it is referred to the Assembly of the Conseil.

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<sup>6</sup> Section 4, section 8:10 a of the General Administrative Law Act.

Conversely, in some cases, only the plenary assembly of the members of the Supreme Administrative Court is required. This is particularly the case in Croatia, Slovakia and Sweden.

## 2. Different solutions

55. Six Member States of the ACA-Europe indicated that their procedural law did not require certain decisions to be taken by a court bench comprising a higher number of judges than usual to ensure the consistency of the case-law. These include the United Kingdom, Ireland, Luxembourg, Germany, Slovenia and Hungary.

In that respect, Luxembourg explained that there was only one section within the Supreme Administrative Court and that the judgments are necessarily consistent, except in the case of a change in the case-law.

In Slovenia, the President of the Supreme Administrative Court may convene a general plenary session of judges without being required to do so by a procedural rule, to ensure the unification and consistency of its judicial decisions. There is also an informal way of coordinating the jurisprudence between the various departments of the Supreme Administrative Court.

In Hungary, within the "Curia", there are benches that are variable in terms of their composition but are still chaired by the President or the Vice-President of the court, to standardise the jurisprudence with regard to criminal matters, civil and commercial law and the administrative branch of labour law. All the judges of this court will be part of the bench if the purpose of the unification procedure is the amendment or withdrawal of a decision rendered to ensure the standardisation of the case-law, which has been taken previously, or if it has to decide on a question of principle relating to improvements in the case-law.

56. The other three Member States mentioned above did not elaborate on this aspect in the questionnaire.

However, the United Kingdom and Ireland indicated in the remainder of the questionnaire that there were informal techniques resulting from practical experience (or from soft law) allowing judges to meet to discuss changes or shifts in the jurisprudence which need to be considered. The United Kingdom also indicated that such an informal dialogue could be held with a view to adopting a common position on new questions of law or in case of divergent jurisprudence between trial courts with a view to standardising them.

In the case of Germany, the techniques used to standardise the jurisprudence are set out in paragraphs 3. and 4. below.

## 3. The practicalities of having an expanded bench

### **a. The functioning of the expanded bench**

57. The Member States having an expanded bench were in a narrow majority (nine States including France, Cyprus, Bulgaria, Czech Republic, Sweden and Austria) and responded that such a bench was permanent while seven other States indicated that its

composition is decided on a case-by-case basis (including Finland, the Netherlands, Belgium and Poland).

In most of the cases (nine Member States), the appointment of the members to be included in this expanded bench is subject to a legal requirement, whereas in five States (the Czech Republic, Serbia, Greece, Belgium and the Netherlands), it is a decision of the "Chief Justice" or the President of the Supreme Administrative Court. Only one State, i.e. Poland, responded that the President of the division or chamber had the right to make this decision. In Greece, within the Assembly of the Conseil d'Etat, the councillors and the maîtres des requêtes required to sit therein, are appointed by the President in turn at the end of each year for the following year. Thus, at the start of every year, the dates of hearings and the participating judges as well as their substitutes are already known.

58. In addition, six States, including Poland, Sweden, the Czech Republic and Cyprus, stated that there were no special rules governing the procedures for such an expanded bench. However, there are such rules varying in nature in eleven States (five indicating they were taken from the legislation, including Belgium, Austria and Slovakia; five indicating that they were derived from internal directives, including Lithuania, the Netherlands and Spain, and one State - Croatia - indicating that they fell under soft law)<sup>7</sup>.

#### **b. The cases in question and the authority deciding on the referral**

59. The cases that can be transferred to an expanded bench are mostly those that deal with legal issues for which there are divergent jurisprudential precedents (this is the case in nine Member States including Finland, the Czech Republic, Spain, Belgium, Poland, Austria and Sweden). These are followed by cases perceived to be "highly significant" for six other Member States (including the Netherlands, Bulgaria and France).

In Greece, the cases referred to an expanded bench are, in principle, those which raise important legal issues (for example whether an internal standard of EU law complies with the constitution and conventions or is contradictory in nature) or new questions of law, when a change in the jurisprudence is recommended or when the various sections of the Conseil d'Etat have a divergent case-law. It is also possible that the case is referred to the Assembly in the event that the Court of Cassation or the Court of Auditors has adopted jurisprudence on the same issue which is not in line with the jurisprudence of the Conseil d'Etat.

60. In most cases, there is a margin of discretion in deciding whether to leave it to the expanded bench to rule on the matter, with only five Member States responding negatively to this question, namely Latvia, the Czech Republic, Austria, Croatia and Serbia.

In a majority of cases, the competent authority to transfer a case or a matter to the expanded bench is the "Chief Justice" or the President of the Supreme Administrative

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<sup>7</sup> In the latter case, i.e. when the rules are determined under soft law, they are not brought to the attention of the parties to the proceeding. At present, no discussion is under way to transpose this procedure governed by soft law into legislative or regulatory law.

Court. For three other States (the Czech Republic, Slovakia and Sweden), it is the President of the trial bench concerned. In France, there is a variety of persons or authorities vested with the power to refer cases to any of the higher benches, since the President of the litigation section may, from the outset, decide to bring a case before the litigation assembly by entrusting the investigation thereof to the litigation section itself<sup>8</sup>. Furthermore, the judgment of all cases falling within the jurisdiction of the Conseil d'Etat may also be referred to the litigation section or the litigation assembly at the request of either the Vice-President of the Conseil d'Etat or the President of the litigation section or the President of the trial bench or the trial bench or the chamber in whose report the case is examined, sitting as an examining bench or the public rapporteur<sup>9</sup>. In Finland, based on the assumptions, it may be the President of the Supreme Administrative Court or the President of one of its divisions. In Poland, it may also be a trial bench that can refer the case.

61. No State, however, indicated that the case could be referred by an entity outside the Supreme Administrative Court, such as the Ombudsman<sup>10</sup>.

### **c. The extent of the jurisdiction of the expanded bench and frequency of its decisions**

62. For the most part, the Member States (nine States including Finland, the Netherlands and Spain) indicated that the expanded bench ruled on a case as a whole, while two States - Belgium and Croatia - stated that the referral to the bench was limited to a specific question of law that is relevant as regards the final decision of the court. Six States responded positively to these two options, including Sweden, Poland and the Czech Republic.

In Greece, it is necessary to distinguish between referral benches. Thus, the seven-member expanded bench adopts a solution for the entire case, while the plenary Assembly rules, in principle, only on the issue raised by the order for referral; the Assembly in turn then refers the case to the relevant section. Nevertheless, if the Assembly is seized not after an order for referral by the section but after an order of the President, it rules on the case as a whole.

In France, the litigation section or the litigation assembly is intended to resolve the case referred to it as a whole. However, it must be noted that there is a special procedure for "opinions on questions of law", created to harmonise the jurisprudence of the administrative courts and administrative courts of appeal. The administrative trial courts can, before ruling on an application raising a new question of law presenting a serious difficulty and arising in several disputes and by a decision that is not subject to appeal, use this procedure to pass on the case to the Conseil d'Etat, which shall examine the question raised within a period of three months. Any decision on the merits is suspended until an opinion of the Conseil d'Etat is obtained, or failing that, until the expiry of that

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<sup>8</sup> Art. R. 611-20 of the Code of Administrative Justice.

<sup>9</sup> Art. R. 122-17 of the Code of Administrative Justice.

<sup>10</sup> In Poland, the Supreme Administrative Court shall adopt resolutions in order to explain legal provisions whose application has caused differences in jurisprudence of administrative courts on the basis of an initiative of the President of the Supreme Administrative Court, the Public Prosecutor General, the Human Rights Defender (Ombudsman) or the Ombudsman for Children.

period<sup>11</sup>. In such a case, the Conseil d'Etat rules only on the question of law before it, leaving it to the trial courts to rule on the case that resulted in the referral. A similar procedure also exists for the National Court of Asylum<sup>12</sup>. Thanks to these procedures, the Conseil d'Etat ensures, very early on, that its judicial system is properly regulated in the face of a need for constant adaptation or clarification.

63. The frequency of having various expanded benches varies according to the Member States. It is distributed equally between zero to five cases per year (the Netherlands, Spain, Austria, Slovakia, Sweden and Belgium) and six to ten cases per year (Cyprus, Finland, Latvia, Croatia, Serbia and Greece). For two Member States, however, it is used for a much higher number of cases: eleven to fifteen times for Bulgaria and sixteen to twenty for the Czech Republic. For three Member States, it exceeds twenty cases per year. This is particularly the case in France. In 2015, the litigation section rendered twenty-eight decisions (seventeen in 2014 and twenty-six in 2013) while the litigation assembly, the most formal bench whose composition is expanded compared to the previous one, met less frequently: it ruled only on eighteen cases in 2013, nine in 2014 and ten in 2015. This frequency also exceeds twenty cases per year for Lithuania and Poland.

### **§3. THE USE OF "SPECIAL COMMISSIONS" IN CHARGE OF HARMONISING THE JURISPRUDENCE OF THE VARIOUS BENCHES OF THE SUPREME ADMINISTRATIVE COURT**

#### *1. An uncommon solution*

64. For the purposes of this questionnaire, these "special commissions" correspond, contrary to an expanded bench, a hypothesis of which was considered above, to one or more bench(es) comprising members of various regular trial benches that will be specifically in charge of the prevention of divergent decisions in the case-law.

Only six Member States have thus appointed "special commissions" to harmonise the jurisprudence of the various benches of the Supreme Administrative Court: the Czech Republic, Serbia, Spain, Bulgaria, Germany and Hungary.

For the other States, such a solution was not adopted. Thus, for example, in France, there is no "standardisation commission" of this type within the Conseil d'Etat. However, in practice, every week, the Presidents of the combined chambers meet (the deputy-Presidents of the litigation section who preside over a formation of nine judges, hailing from two different chambers), under the chairmanship of the President of the litigation section, to set out the solutions examined by the benches that they chaired during the previous week, and ensure, in a final verification, that they do not lead to jurisprudential discrepancies, or do not breach (deliberately or by accident) the jurisprudence of the Conseil d'Etat. It is on the occasion of this examination, which cannot in any case lead to a decision modifying the solution discussed by the trial bench, that the case is referred to either the litigation section or the litigation assembly.

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<sup>11</sup> Art. L. 113-1 of the Code of Administrative Justice.

<sup>12</sup> Art. L. 733-3 of the Code of entry and residence of foreigners and right of asylum; see, not. EC, opinion, 20 November 2013, Fall, No. 368676.

In Belgium, no "special commission" is appointed specially for this question, while getting acquainted with the draft orders as a preventive measure. The problem is most often solved retrospectively by the referral of a case to the General Assembly of the administrative litigation section of the Conseil d'Etat or before the combined cassation chambers.

Moreover, in Poland, while such commissions do not exist within the Supreme Administrative Court, a special unit called the "Judicial Decisions Bureau" performs tasks related to the actions of the President of the court relating to the effectiveness of judicial proceedings and the jurisprudence of the administrative courts. It conducts analyses concerning the standardisation of the jurisprudence of the trial courts and may signal an urgent need for action on the President's part to standardise the jurisprudence in a specific legislative field within the jurisdiction of administrative tribunals. In Austria, there is a department of the Supreme Administrative Court which is responsible for reviewing the jurisprudence and which indicates, where appropriate, the need for harmonisation. In the Netherlands, the informal<sup>13</sup> bodies are responsible for addressing such difficulties.

65. Thus, it is clear from the analysis of responses to the questionnaire that, the "informal" solutions in the Member States of ACA-Europe seem to play a significant role in addressing the difficulties involved in any jurisprudential discrepancies, as a preventive measure, within the trial benches of the Supreme Administrative Courts.

## 2. Contrasting implementation

66. In all the States that have opted for a formalised mechanism for prevention of jurisprudential discrepancies, the cases that can be transferred to the "standardization commission" are those that deal with legal issues for which there are divergent jurisprudential precedents. In a majority of cases, there is a margin of discretion in deciding whether to refer the case to the commission, with only Serbia and Germany responding negatively to this question.

67. The issue of the initiator of the referral has further divided the States (Bulgaria and the Czech Republic indicated the "Chief Justice" or the President of the Supreme Administrative Court; Serbia and Spain indicated the President of the division or chamber; the other two States - Hungary and Germany - checked the "others" box without any further details).

68. Four States also indicated that the bench was permanent (Bulgaria, Germany, Spain and Serbia), while Hungary and the Czech Republic indicated that it was created on a case-by-case basis. The members of this commission are mainly appointed in accordance with a legal requirement. Special procedural rules govern the proceedings before this commission, a majority of which are prescribed by law. Only Bulgaria indicated that they were subject to internal directives.

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<sup>13</sup> "the Council of Section Presidents" and "the Sectoral Councils".

#### **§4. THE USE OF "SPECIAL COMMISSIONS" IN CHARGE OF HARMONISING THE JURISPRUDENCE OF THE VARIOUS SUPREME COURTS OF THE SAME STATE**

##### *1. An uncommon solution*

69. Only seven out of the twenty-three Member States responding to the questionnaire have a "special commission" to harmonise the jurisprudence of the various existing supreme courts. These include Hungary, Spain, Serbia, Germany, Bulgaria, Slovenia and the Netherlands.

##### *2. Diversified implementation*

70. In a vast majority of States that opted for such a mechanism, the cases that can be transferred to the "standardization commission" are those that deal with legal issues for which there are divergent jurisprudential precedents (six out of seven countries replied to that effect).

In some of these States, there is no margin of discretion in deciding whether to refer the case to the commission. Thus, for example, in the case of Germany, in case the Supreme Administrative Court intends not to follow a decision of another court on the same question, there is an obligation to refer this question to the common section of these supreme courts. In the Netherlands, on the other hand, there is a margin for assessing the need for a referral to the commission.

71. The issue of the initiator of the referral has further divided the Member States (Bulgaria, Slovenia and the Netherlands indicated the "Chief Justice" or the President of the Supreme Administrative Court; Serbia and Spain indicated the President of the division or chamber; the other two Member States checked the "others" box without any further details).

Serbia, Spain, Slovenia, the Netherlands and Bulgaria indicated that this was a permanent bench, while Germany and Hungary stated that it was created on a case-by-case basis. The members are mostly appointed as per a legal requirement (Serbia and the Netherlands, however, indicated that they were appointed by the "Chief Justice" or the President of the Supreme Administrative Court). Special rules govern the proceedings before this commission, some of which are prescribed by law while others are prescribed by internal directives.

The "standardisation commission" gives a ruling in most cases on a specific question of law relevant to the final decision of the Supreme Court in question. Spain indicated that it ruled on the case as a whole, while Serbia and Bulgaria said they could do both.

In most cases, the "standardisation commission" gives a ruling for zero to five cases per year. In Serbia, Bulgaria and the Netherlands, the frequency is respectively greater with six to ten cases for Serbia, eleven to fifteen for Bulgaria, and sixteen to twenty for the Netherlands.

## **§5. INFORMAL TECHNIQUES DERIVED FROM PRACTICE (OR SOFT LAW)**

72. In contrast or in preparation of the work of official bodies in the majority of Supreme Administrative Courts the judges also have developed informal techniques to meet and commonly reflect on uniformisation issues. This may involve the change of jurisprudence to be envisaged (77 %), the uniformisation of divergent jurisprudences between various panels of the same court (64 %), the uniformisation of divergent jurisprudences between different lower courts (55 %) or the necessity of adopting a common position on new questions of law (64 %).

## **§6. PARTICULAR ASPECTS**

### 1. The connection between a particular case and the moment of uniformisation

73. The reversals or the changes of jurisprudence of the Supreme Administrative Courts are decided in the vast majority of Member States on the occasion of a particular case with which it is seized. In only three Member States (Bulgaria, Hungary, Slovakia) decisions are met apart from particular cases, fixing the principles without the appreciations of an individual situation.

### 2. Influence of the parties or third parties in the uniformisation process

74. Apparently, in most Member States neither the parties to a particular court proceeding nor third parties play a major role in the uniformisation process. In only five Member States parties and third parties have any influence on the use of uniformisation instruments. Only in Lithuania the parties have the right to initiate a uniformisation process whereas this right exists in three Member States (Hungary, Lithuania and Slovakia) for third parties. In Hungary and Lithuania the parties involved in such a way are notified of the proceedings, have the right to present their own arguments and are notified of the outcome of such proceedings. In Slovakia only the notification of the proceedings is guaranteed.

### 3. The technique of the "pilot" case

75. If the Supreme Administrative Court is dealing with a larger number of cases in which the same or similar legal questions arise, it may be an efficient tool to pick a pilot case. Such a technique may also contribute to the uniformisation of court decisions. Most Member States (over 80 %) are familiar with the concept of "pilot cases". Yet, only in four Member States there are formal rules as to when a court may or must pick a pilot case.

### 4. The follow-up to the uniformisation process

76. In most Member States the uniformisation process ends with the court decision in the particular matter. Only three Member States answered that they provide for follow-up or monitoring instruments to ensure that its decision is being followed in the specific case or in the future jurisdiction. Yet, these instruments appear to be of an informal type. They may include reports by coordinators within the section (Netherlands) or by a legal research an information department (Lithuania). In Bulgaria the President of the Supreme Court may refer deviating jurisprudence to the General Assembly to reach an "interpretative" decision.

Mostly, there seems to be no formalized procedure to monitor the implementation of the results of uniformisation proceedings.

5. The initiation of a procedure for reviewing the jurisprudence in the event of revocation by a supreme jurisdiction

77. Even the jurisprudence of the Supreme Administrative Courts may be overruled (revoked) by decisions of higher courts. These may be on the national level Constitutional Courts and on the international level the European Court of Justice or the European Court of Human Rights.

Such a ruling may lead to the initiation of the procedure of revision within the Supreme Administrative Court. Yet, such a procedure is only applicable in some Member States (14 % concerning rulings of the Constitutional Court, European Court of Justice 18 % and European Court of Human Rights 32 %).

In most Member States such a procedure for revision of jurisprudence does not have to be initiated. Instead the ruling of the higher court is directly binding for further decisions of the Supreme Administrative Court without the necessity to initiate a procedure for revision. This counts for the overruling by a Constitutional Court (45 %), the European Court of Justice (82 %) and the European Court of Human Rights (68 %) of a decision by the Supreme Administrative Court.

## **CHAPTER IV: VALUE OF REVISED JURISPRUDENCE**

### **§1. PROCEDURE LEADING TO THE REVISION OF CASE LAW (JURISPRUDENCE)**

78. In the area of administrative law, the objective to keep the case law uniform is vested to Supreme (Administrative) Courts, Councils of the State, or similar supreme judicial bodies. The procedure leading to the uniformisation consists of several steps and has some specifics in the surveyed states which will be further examined.

79. In vast majority of jurisdictions the initiation of procedure which may lead to the revision of case law in administrative matters is announced to the members of Supreme Administrative Courts or Councils of State (nineteen Member States, i.e. 82,61 %).

In France, Hungary, Poland, Lithuania, Slovakia, and Greece the lower administrative courts are notified about the fact that the procedure leading to review of the case-law has been initiated. French, Polish, Serbian, and Slovak supreme administrative jurisdictions notify administrative bodies (although these may coincide with the parties of the litigation, like e.g. in the Czech Republic) and finally French, Dutch, Polish, and Serbian supreme administrative jurisdictions inform also the public.

In twelve Member States (52,17 %) the parties of the litigation are also notified of the initiation of the procedure. In seven (30,43 %) of the surveyed States the revision procedure is contradictory which means that the parties can submit their observations. This is not possible in France, Latvia, Czech Republic, Poland, and Republic of Serbia.

80. The pending proceedings before the supreme administrative jurisdiction in which the issue subject to review of the case-law is relevant are to be suspended. This happens obligatorily in six Member States (26,09 %), optionally in sixteen of the surveyed States. One Member State reported that there was no room for suspension of pending proceedings.

Also the pending proceedings before the lower courts relating to the jurisprudence to be changed are suspended optionally in sixteen Member States and obligatorily in four Member States (17,39 %). In Greece, the lower courts do not have to suspend the proceedings, although they often do so. However, if the case is submitted to the Council of the State in so called "pilot proceedings" (usually a case which raises new and important question of law affecting a large number of citizens), the lower courts dealing with the similar cases must suspend the pending cases obligatorily.

### **§2. IMPACT OF NEW LEGAL OPINIONS ON THE RULINGS ISSUED IN ACCORDANCE WITH OVERRULED CASE LAW**

81. In all examined jurisdictions, the overruling of the case law does not constitute a reason for reopening the cases decided in the past. In most of them – twenty-one (91,30 %) it also does not establish a title for claims for compensation raised by parties in the proceedings decided pursuant to the old ("incorrect") case law. However this is possible in Bulgaria and Belgium.

### **§3. APPLICATION OF THE REVISED CASE LAW (JURISPRUDENCE)**

82. In almost all of Member States – twenty-two (95,7 %) the new (revised/revising) case law is applied both prospectively in new cases and retrospectively in all pending cases. In Serbia, it may be applied only in new cases. In some cases, some Supreme Administrative Courts have special rules to apply the revised case law. For example, in the Netherlands or Slovenia, the court may for reasons of legal certainty apply an interim period or opt for prospective overruling. However, this is not possible in case of directly applicable EU law. In Lithuania, the postponement of the execution of the judgement may be decided in accordance with the Code of Civil Procedure. In France, the basic principle is such that jurisprudence and interpretation constitute one body so if the interpretation changes, the court acts as it has always been as such. Jurisprudence is of normative and retroactive character and these are inseparable. Nevertheless, in order to protect rights of petitioners or in the interest of legal certainty, this rule might be breached, e. g. in cases of public contracts, contractual rights, rights to a remedy, etc.

83. It is interesting that the legitimate expectation of individuals based on the jurisprudence which is later revised is not protected in eighteen Member States (78,26 %) <sup>14</sup>. In contrary the legitimate expectation connected with the overruled case law is protected in the Netherlands, Slovenia, the United Kingdom, Slovakia, and Greece. In the Netherlands, the protection of the legitimate expectation of individuals is a reason for granting an interim period, sometimes it can even be grounds for compensation. In Slovenia, the Supreme Court may follow the overruled jurisprudence with the explanation of changes of the judicial opinion in the judgement if the proceedings had been initiated before the new case law was adopted. The Slovak Supreme Court emphasizes that decision must be in accordance with the due process, the principle of legal certainty and legitimate expectations of individuals.

84. Once revised, the case law may itself be subject to further revision. This has already happened in fourteen Member States (60,87 %) and it is generally considered possible in eight Member States. The jurisprudence of supreme administrative jurisdictions may change due to a legislative change or pursuant to rulings of Constitutional Courts, Court of Justice of the European Union or the European Court of Human Rights. In Latvia or Poland, the case law on tax issues undergoes constant development. This is also the case in the United Kingdom where the courts in the common law system are able to control the direction of case law. Nevertheless, the jurisprudence tends to be rather rigid in order to support the stability of law and legal certainty of its recipients. The Republic of Serbia is the only country which does not allow once revised case law to be revised again.

### **§4. DISRESPECTING THE REVISED CASE LAW**

85. Some of the members or formations (Chambers, Sections) of the supreme administrative jurisdictions might not follow the revised case law. The course of action differs between the questioned bodies in such cases. In Spain, Poland, Luxembourg, Croatia and Greece it may represent a reason for further revision of the jurisprudence. In Hungary, Slovenia and Austria this is considered an "excess" and it has no influence on the validity of the revised jurisprudence. In the Netherlands, Latvia, the Czech Republic,

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<sup>14</sup> I is necessary to point out, that under the case law of the European Court of Human Rights the requirement of judicial certainty and the protection of legitimate expectations do not involve the right to an established jurisprudence (see judgments from December 18th, 2008, no. 20153/04, Unédic v. France, § 74, and from January 1st, 2010, no. 36815/03, Atanasovski v. Macedonia, § 38).

Belgium, Germany, Lithuania, the United Kingdom, and Slovakia both options mentioned above apply. In Finland, France, Cyprus, Ireland, Bulgaria, and Sweden this has never happened; the new case law is kept uniform.

86. Disrespecting the revised jurisprudence may have some consequences even for judges who do not follow it. In Slovenia, informal sanctions may be imposed on judges. In Slovakia even disciplinary proceedings against the deciding judges may be initiated if such case occurs. In most countries (seventeen countries, i.e. 73,91 %) it is, however, at discretion of the deciding independent judges and the way they decide cases may not have any adverse consequences for them. The Supreme Court of Cyprus stressed that judgements of an enlarged or full bench are binding in accordance with the doctrine of precedent so new case law should not be in conflict with such a constant jurisprudence. In the Netherlands, the judges cannot be formally held accountable for their decisions. However, the President of the Court and/or section can discuss the decision with the formation. Also, the decisions can be discussed in informal meetings.

#### **§5. FORM OF A DECISION TO REVISE JURISPRUDENCE**

85. The decision to revise the jurisprudence is usually taken in the form of an ordinary jurisdictional decision. In Bulgaria it is taken in the form of an interpretative decision of the General Assembly. Similar instrument of a binding general opinion with regard to application of certain provisions of the law may be adopted by the plenum of the Czech Supreme Administrative Court. The Hungarian Supreme Court adopts the Uniformity Decision, Division Opinion, Supreme Administrative Court Decision on Principle or Court Decision on Principle. The Polish Supreme Administrative Court adopts the Resolutions which either contain solutions of legal issues raising considerable doubts in respect to a particular administrative court case or interpret legal provisions which raised divergence in jurisprudence of administrative courts. Finally in Slovakia, the Plenary of Judges of the Administrative Division of the Supreme Court observes the case law of the administrative courts and in order to unify it adopts the opinions of the court which are published in the Collection of Opinions and Decisions of the Supreme Court of Slovakia. The recently introduced Extended Panel is a new body whose purpose is also the unification of jurisprudence. Its decisions are taken in the form of ordinary judicial decisions.

#### **§6. BINDING EFFECT OF THE REVISING DECISION**

88. When the supreme administrative jurisdiction adopts a new revising decision, it is in most cases binding for all its members. The exceptions are France, the Netherlands, Ireland, Spain, Germany, and Belgium. These decisions are usually binding also for all the lower courts. However, this rule does not apply to France, the Netherlands, Spain, Belgium, Slovenia, Germany, Austria, and Croatia. If a lower court does not follow the new jurisprudence, its decision may however be successfully contested and it will be quashed by higher administrative court. In contrary, the revising decisions are mostly not binding for other national courts or any other authority including constitutional court. These decisions bind constitutional courts and/or other judicial bodies only in Finland, Cyprus, Bulgaria, Lithuania, the United Kingdom, and Sweden.

89. In the absolute majority of cases the changes of jurisprudence come into effect immediately in all the pending proceedings. Only Latvia stated that changes of

jurisprudence come into effect when respective judgement which explains the new line of jurisprudence comes into effect.

In some countries the application of the new case law may be limited to pending cases. The reasons for such limitation include legal certainty (France) and in several countries (e.g. in the Netherlands) also legitimate expectations; in Latvia, the reason for such limitation of applicability may be the possible violation of Article 7 of the European Convention on Human Rights in tax litigations. In Poland it may be limited also by relevant case law of the Court of Justice of the European Union, in Lithuania the new rules may be limited in time since the panel of judges is entitled to set the date when the execution of the decision shall become effective. As was said above, in Greece the application of new jurisprudence may be limited in order to protect the legitimate interest of petitioners.

## **§7. COMMUNICATION OF THE NEW JURISPRUDENCE**

90. One of the basic legal principles, based on Roman law, says that "*ignorantia iuris neminem excusat*" – ignorance of the law does not excuse. Thus it is crucial for the state to communicate its law to the citizens. This applies on the jurisprudence as well<sup>15</sup>.

The change of previous case law is usually published on the websites of courts (twenty Member States) and in collections of jurisprudence (twenty Member States). Quite often it is communicated to the public by press (thirteen Member States). In France, Cyprus, Latvia, Bulgaria, Slovenia, and Lithuania, a specific communication for the legal professionals (information for the attention of attorneys at law etc.) is used. In the Netherlands, the new jurisprudence is announced as a digest included in the annual report. In the United Kingdom, there is no specific difference from usual procedures. All judgments and press summaries are posted online. In Belgium, the new jurisprudence may also be mentioned in the Annual Report of Activities of the Council of the State.

In some jurisdictions, judges who participated in the adoption of the decision contribute to the publication of the revising case law. In eleven Member States (47,83 %) out of total twenty-three, judges communicate their opinion on that decision publicly, including their dissenting opinion. In nine Member States (39,13 %) out of total twenty-three, there are "authorized comments" in which the members of the supreme administrative court clarify the motives for a change of jurisprudence.

91. Some countries have also particular methods to inform the lower courts and other national supreme courts including the constitutional court and/or even CJEU, ECHR and other national supreme courts within Europe about jurisprudential changes.

In Cyprus, the lower courts are informed by the Registrar, law reports and online legal portals. Changes of jurisprudence in administrative matters are held by the enlarged or full bench of the Cyprus' Supreme Court.

In the Netherlands, the Council of the State uses website, year reports, press releases, and correspondents select decisions and it communicates them to legal journals. There is

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<sup>15</sup> The European Court of Human Rights requires that the obligations interfering with the fundamental rights must be set forth in the law. However the case law of the courts of a member state may specify the obligations in more detail, if it is published and so the rules are foreseeable for the recipients (e. g. decision of the ECtHR from January 8<sup>th</sup>, 2007, No. 18397/03, *Witt v. Germany*).

also a Commission for Legal Unity which ensures unity between the national supreme courts.

In Latvia, besides the website of the court, the jurisprudence is communicated through a judicial training centre and in informal meetings between the judges of the Supreme Court and lower courts.

The Bulgarian Supreme Administrative Court organizes seminars and discussions.

The German Federal Administrative Court sends a copy of the decisions taken in the proceedings reviewing the jurisprudence to the lower courts; other courts are informed by press releases or collections of jurisprudence.

The Polish Judicial Decisions Bureau oversees the quality and uniformity of jurisprudence (also by issuing statements concerning resolutions of the Supreme Administrative Court). The resolutions with the reasoning are published on the website of the Supreme Administrative Court. The Supreme Court and the Constitutional Court receive Annual Reports on the Activities of the Supreme Administrative Court and of the Voivodship Administrative Courts. The Report also covers information about the resolutions of the Supreme Administrative Court adopted in a given year.

The Administrative Court of the Republic of Serbia participates in joint Sessions of all judges and in working meetings within the Case Law Department. During sessions all judges may consider the legal opinions in question and they adopt legal opinions and conclusions which are important for the relevant subject matter. These opinions are published on the court's website and in various legal bulletins of the case law.

In Lithuania, the Legal Research and Information Department of the Supreme Administrative Court publishes information notes and distributes them to all the courts of first instance. It also prepares the Report of the Case Law of the Court on a monthly basis and publishes the Bulletin twice a year. Both forms of information are designed to disseminate relevant news among interested parties and legal professionals.

92. For information of judicial bodies across the Europe, the national administrative courts use mainly the ACA database (JURIFAST) or provide information about judgements on request. The Lithuanian Supreme Administrative Court publishes an Annual Report in English which is distributed to the selected colleagues working in European institutions. It is also available online on the website of the Court and on the website of ACA-Europe.

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