**SEMINAR ORGANISED BY THE FRENCH COUNCIL OF STATE
IN COOPERATION WITH ACA-EUROPE**

***ETHICS AND RECRUITMENT
OF MEMBERS OF THE SUPREME ADMINSTRATIVE COURTS AND COUNCILS OF STATE***

Questionnaire

The Versailles seminar will address two related topics: ethics and recruitment.

The first topic will be discussed on Friday morning, 29 November, in two round tables. The first will focus on the legal and institutional framework. The second, based on practical cases, will address the content of ethical rules.

The second topic will be addressed on Friday afternoon during the third round table.

Ethics for magistrates was discussed at the seminar organised by AIHJA/IASAJ in September 2020 in Athens. It was also discussed at a meeting of the European Association of Administrative Judges (AEAJ) in May 2023 focusing on the freedom of expression of magistrates. Some of the questions below repeat those asked in the Athens questionnaire. You can, of course, use the answers you provided in 2020 to respond to this questionnaire.

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I Ethics: Legal and institutional framework

1.1. General framework

1.1.1. Are the ethical obligations of public officials in general enshrined in your country's positive law?

☒ Yes

☐ No

If yes, they are enshrined (please check all applicable answers):

☐ in the Constitution

☒ in the law

☐ in a regulatory text

☐ in a Charter of Ethics or a Collection of Ethical Principles

☐ other

Please explain if necessary:

Obligations of judges – including those which may be considered ethical – are enshrined mainly in Sec. 80 of the Act on Courts and Judges (No. 6/2002).

Sec. 80

(1) A judge shall perform their function diligently and, in the performance of their function and in their civil life, shall refrain from anything that could undermine the dignity of the judicial function or jeopardise public confidence in the independent, impartial and fair decision-making of the courts. A judge shall make declarations of personal interests, activities, assets, income and liabilities in accordance with a special law.

(2) In order to guarantee the independence and impartiality of the performance of judicial function, a judge, in particular:

a) shall promote and defend the independence of the judiciary and its reputation,

b) shall conduct themselves in such a manner that does not diminish public confidence in the judiciary and the dignity of the judicial function,

c) shall refuse any interference, pressure, influence, wish or request that could jeopardise the independence of the judiciary,

d) shall not be influenced by the interests of political parties, public opinion or the media in the performance of their function,

e) shall act impartially and treat all parties or participants in proceedings without economic, social, racial, ethnic, sexual, religious or other prejudices,

f) shall ensure that his impartiality is not reasonably questioned.

(3) A judge shall perform their function in accordance with the interest of the proper functioning of the judiciary. In particular, in the performance of decision-making, a judge:

a) shall give every party or participant in proceedings or their representatives full opportunity to exercise their rights; however, except in cases provided for by law, they shall not unilaterally receive from them or provide them with information or discuss with them the merits of the case or procedural issues that may affect it,

b) shall ensure that his decision is clearly and carefully reasoned.

(4) A judge shall conduct themselves in their activities outside the performance of judicial function and in the exercise of their political rights in such a manner does not jeopardise or undermine public confidence in the independent, impartial and fair decision-making of the courts, or undermine the dignity of the judicial function, or prevent them from duly performing the judicial function.

(5) A judge shall, in their personal life, ensure that their conduct does not undermine the dignity of the judicial function or jeopardise or undermine public confidence in the independent, impartial and fair decision-making of the courts. In particular, a judge:

a) shall not allow their function to be misused to promote private interests,

b) shall not act as an arbitrator or mediator in a legal dispute, or as a representative of parties in court or administrative proceedings, except in the case of representation ex lege and in cases of representation of another participant in proceedings in which the judge themselves is a participant.

(6) A judge shall maintain due respect for other judges, other legal professionals, other employees of the court, and participants or parties in court proceedings. They shall refrain from expressing sympathy, affection or negative attitudes towards representatives of the participants or parties.

Even though some foundations can be derived from the Constitution and the Charter of Fundamental Rights and Freedoms (hereinafter "the Charter"), these documents do not expressly address ethical obligations of judges.

Back in 2005, the Judges' Association developed and approved the *Ethical principles for judicial conduct*, inspired by the Bangalore principles. The principles are binding only on members of the Association, which is roughly one-third of all judges in the Czech Republic. Additionally, in 2020, the Association drafted the so-called *Open Set of Judicial Ethical Dilemmas*, which is a set of questions each judge should ask themselves when facing various "problematic" situations. It is intended merely a useful practical guidance for all judges, which will be regularly updated. In the same year, a group of judges led by the current president of the Supreme Court compiled a non-binding *Code of Ethics.* It is based on the *Ethical principles for judicial conduct*, complemented by a commentary with examples and findings arising from case-law of the disciplinary chambers of the SAC (which is – since 2008 – the disciplinary court for all judges).

1.1.2. Are the ethical obligations of members of your institution specifically enshrined in your country's positive law?

☐ Yes

☒ No

~~**If yes, they are enshrined (please check all applicable answers):**~~

~~☐in the Constitution~~

~~☐in the law~~

~~☐in a regulatory text~~

~~☐in a Charter of Ethics or a Collection of Ethical Principles~~

~~☐other~~

~~**Please explain if necessary:**~~

1.2. Charter of Ethics

1.2.1. Does your institution also have a Charter of Ethics or a Collection of Ethical Principles?

☐ Yes

☒ No

If the answer is yes: On which date was this document adopted?

1.2.2. Is the adoption of this document an obligation for your institution?

☐ Yes

☒ No

Please explain if necessary:

~~**1.2.3. Was this document adopted in response to a particular event that stirred public opinion?**~~

~~☐ Yes~~

~~☐ No~~

~~**If yes, please explain the legal and political context that led to the adoption of this text:**~~

~~**1.2.4. Who drafted this document?**~~

~~☐ A working group composed exclusively of members of your jurisdiction~~

~~☐ A working group expanded to include outside persons~~

~~☐ A working group involving associations of administrative judges~~

~~☐ Other~~

~~**Please explain if necessary:**~~

~~**1.2.5. Which authority signed and enacted this document?**~~

~~☐ The president of your institution~~

~~☐ A collegiate body of your institution~~

~~☐ Other~~

~~**Please explain if necessary:**~~

~~**1.2.6. Has this document undergone one or more revisions?**~~

~~☐ Yes~~

~~☐ No~~

~~**Please explain the purpose of these revisions if necessary:**~~

~~**1.2.7. What is the legal value of this document?**~~

~~☐ This document contains binding legal rules (hard law)~~

~~☐ This document contains soft law standards~~

~~☐ Other~~

~~**Please explain if necessary:**~~

~~**1.2.8. Please attach this document to your response, if possible in a French or English translation, in the form of an attached document or a web link.**~~

1.3. Scope of application of ethical rules:

1.3.1. Whether a Charter of Ethics or equivalent text has been adopted or not, do the ethical rules applicable to members of your supreme court apply identically to magistrates in the lower courts of your judicial system?

☒ Yes

☐ Partially

☐ No

Please explain if necessary:

The obligations under Sec. 80 of the Act on Court and Judges apply equally to all judges.

1.3.2. To whom do these ethical rules apply?

☒ To members of your institution who are active within it

☒ To members of your institution who are temporarily not serving there, under secondment or availability arrangements, in other administrations or in the private sector

☒ To resigning members

☐ To retired members

☐ To administrative staff (referendary judges, legal assistants, clerks, interns, etc.) assisting members of your institution

☐ Other

Please explain if necessary:

Obligations under Sec. 80 of the Act on Courts and Judges apply to "active" judges. Resigning judges [during the three-month resignation period pursuant to Sec. 95(2) of the Act on Courts and Judges] continue to perform the function, therefore, the obligations under Sec. 80 still apply to them. In contrast, the obligations do not apply to retired judges. However, even after retirement (or other termination of the function), judges shall maintain the confidentiality of anything learned in connection with the performance of their function (Sec. 81 thereof). Judges temporarily seconded to other "ordinary" courts (under conditions of Sec. 68 thereof) continue to perform the function of a judge. Therefore, the obligations apply to them as well. The question, which has not yet been addressed by case-law, is whether the obligations under Sec. 80 of the Act on Courts and Judges apply to suspended judges, in particular, at least the restrictions concerning activities in their civil or private life (i. e, which are not directly related to the performance of the function). Judges may be suspended because of their appointment to the Constitutional Court or to international courts [Sec. 99(1)(a) and (b) of the Act on Courts and Judges] – as is frequently the case for the SAC judges (currently, three of them serve as Constitutional judges, Jan Passer is a judge of the CJEU and Kateřina Šimáčková is a judge of the ECtHR). In addition, judges may be suspended after due to their temporary secondment to the Judicial Academy [Sec. 68(1) thereof], or to foreign/international institutions or organisations, peacekeeping or rescue operations or to humanitarian aid [Sec. 70a in conjuction with Sec. 99(1)(c) and (d) thereof].

1.3.3. In the event that your institution exercises both a judicial and a consultative function, do the ethical obligations imposed on members exercising one or the other of these functions differ?

☐ Yes

☐ No

☒ Not applicable

Please explain if necessary:

~~**1.3.4. If there is a duality of jurisdiction in your country distinguishing an administrative jurisdictional order and a judicial jurisdictional order, are the ethical rules applicable to magistrates of these two orders different?**~~

~~☐ Yes~~

~~☐ Partially~~

~~☐ No~~

~~**Please explain if necessary:**~~

~~**1.3.5. If the ethical rules are wholly or partly different for magistrates of these two orders, please indicate one or more examples of obligations that apply to magistrates of only one order or that apply differently to magistrates of each order of jurisdiction:**~~

1.3.6. If the magistrates who make up your institution belong to several different categories (for example, a bench and a public prosecutor's office), are they subject to different ethical rules?

☐ Yes

☐ No

☐ Partially

☒ Not applicable

If these ethical rules are wholly or partly different for magistrates of different categories, please give an example.

1.4. Relationship between ethical and disciplinary rules:

Is a breach of ethical obligations necessarily an offence that may result in disciplinary action?

☐ Yes

☒ No

If not, please give an example:

Section 87(1) of the Act on Courts and Judges defines disciplinary offence as *a culpable breach of the judge's obligation as well as culpable conduct which undermines the dignity of the judicial function or jeopardises public confidence in independent, impartial, professional and fair decision-making of the courts*. Therefore, a judge may be found disciplinary liable only in cases of culpable – intentional or negligent – breach of obligations or other conduct. Thus, if a judge is not culpable, the breach or conduct does not constitute a disciplinary offence (typically, in cases of undue delays, the culpability may be excluded by the failure of the courts' administration to ensure that judges of the court can deal with their cases within a reasonable time). It is also settled case-law of the disciplinary chambers of the SAC that not every breach of obligations constitutes a disciplinary offence (for example, the decision of 3 October 2013, no. 16 Kss 8/2013-45). The breach must be of a certain intensity and must be capable of undermining the dignity of the judicial function or jeopardising public confidence in decision-making of the courts.

1.5. Training on ethical rules:

Are members of your institution made aware of or trained in ethics?

☒ Yes

☐ No

If yes, how and how often?

Personal qualities and character (moral integrity, objectivity, courage, humility etc.) and immaculate, transparent career are among the "soft" criteria for selecting new SAC judges (according to the *Memorandum on the selection of candidates for judges of the SAC*). It is expected that only those well trained in ethics may become SAC judges. Nevertheless, the Judicial Academy, which is the main educational institution for the judiciary, offers lectures or seminars on ethics, available to all judges. It is mainly up to judges themselves

to enhance their professional legal and other knowledge necessary for the due performance of their function through continuous education [Sec. 82(2) of the Act on Courts and Judges].

1.6. The College of Ethics

1.6.1. Has your institution created or does it have a collegiate body or a single authority responsible for answering ethical questions that may arise for members of your institution?

☐ Yes

☒ No

~~**1.6.2. If yes, how is it appointed?**~~

~~**1.6.3. If yes and in the case of a collegiate body, how is it composed?**~~

~~**1.6.4. Who can refer to this body?**~~

~~☐ A member of your institution for an ethical question concerning them~~

~~☐ A magistrate from the lower courts for an ethical question concerning them~~

~~☐ The president of your institution~~

~~☐ Other members of your institution~~

~~☐ A litigant who believes that a magistrate has disregarded their ethical obligations~~

~~☐ This body can refer to itself~~

~~☐ Others~~

~~**Please explain if necessary:**~~

~~**1.6.5. Are the opinions given by this body made public?**~~

~~☐ Yes~~

~~☐ No~~

~~**1.6.6. If yes, are the published opinions anonymised?**~~

~~☐ Yes~~

~~☐ No~~

~~**1.6.7. Can these opinions be challenged before the court?**~~

~~☐ Yes~~

~~☐ No~~

~~**Please explain the legal scope of these opinions:**~~

1.7. Declaration of interests

1.7.1. Must members of your institution complete a declaration of interests?

☒ Yes

☐ No

If yes, please briefly describe the modalities of its submission:

According to Art. 80(1) of the Act on Courts and Judges, as amended in 2017, a judge shall make declarations of personal interests, activities, assets, income and liabilities in accordance with a special law. Accordingly, in 2017, judges were added to the list of public officials who are obliged to declare personal interests, activities, assets, income and liabilities [Sec. 2(2)(f) of the Act on Conflict of Interests (No. 159/2006)].

- The declaration of personal interests (Sec. 8 thereof) generally consists in a declaration of a personal relationship to the matter under consideration at a meeting of a public institution, if the concerned public official participates in a discussion, submits a motion or is entitled to vote, and if he/she could incur a personal advantage or disadvantage with regard to the outcome of the consideration or if he/she has other personal interest in the matter. Regarding judges, the obligation to declare personal interests is rather redundant, as the procedural rules on disqualification for bias apply (see the answer to question 2.1.1 below).

- Other profitable activities are generally forbidden to judges, excluding management of their own property, scientific, pedagogical, literary, journalistic, artistic or sportsman activities [Sec. 85(1) of the Act on Courts and Judges]. Regarding the permitted activities, judges are obliged to declare such activities, except for the management of their own property, for the preceding calendar year not later than 30 June of the following calendar year; the declaration shall be submitted to the president of a court and shall include information on the type of the activity, the person or organisation for which the activity was conducted, the place where the activity was conducted and the temporal extent of the activity [Sec. 85a(1) thereof]. However, judges are not obliged to submit declarations if they do not engage in such activities or if the amount of the total gross annual income from these activities does not exceed 20 % of their annual salary as judges [Sec. 85a(2) thereof].
- Judges shall also declare specified assets, income and liabilities upon assuming the function and annually thereafter. Declared assets include, for example, real estate, securities, interests in business corporations, other movable property the price of which exceeds the sum of 500 000 CZK (nearly 20 000 EUR) [Sec. 10(2) of the Act on Conflict of Interests]; for most assets, the price and manner of acquisition shall be included in the declaration [Sec. 10(3) thereof]. Declared income and liabilities generally include any income or outstanding liabilities exceeding, in aggregate, 100 000 CZK [Sec. 11(1) and (2) thereof]; the declaration shall include amount, type and source of any income, or amount and type of liability and identification of the creditor [Sec. 11(3) thereof]. Declarations of judges on assets, income and liabilities are submitted in writing and in the form and structure prescribed by a decree of the Ministry of Justice to the Supreme Court, which maintains the register of such declarations (receives and registers them, supervises completeness of information etc.). Unlike the declarations of other public officials, declarations of judges are not publicly available (neither without or on request) on the central register of notifications (cf. Sec. 13 and 14 of the Act on Conflict of Interests).

1.7.2. Is there a specific procedure or *ad hoc* body responsible for examining conflicts of interest that may arise when a member of your institution leaves for the private sector?

No.

1.8. The oath

Do members of your institution have to take an oath?

☒ Yes

☐ No

If yes, what does this oath consist of and how is it taken?

According to Art. 93(1) of the Constitution, judges shall assume the function upon taking an oath. Section 62(1) of the Act on Courts and Judges provides that judges shall take the following oath:

"*I swear on my honour and conscience that I will abide by the legal order of the Czech Republic, that I will interpret it to the best of my knowledge and conscience, and that I will rule independently, impartially and fairly in accordance with it*." The oath shall be taken into the hands of the President of the Republic [Sec. 62(3)(a) thereof], who has the power to appoint judges [Art. 62 (1)(i) of the Constitution]. In practice, the oath is taken during a traditional appointment ceremony.

II Ethics: Content of rules

2. 1. Independence, impartiality and prevention of conflicts of interest

2.1.1. In which circumstances should a member of your institution abstain from sitting or risk being disqualified from a judgement panel?

☒ In cases of familial ties that may link the magistrate with a party

☒ In cases of friendly ties that may link the magistrate with a party

☒ Due to previous functions performed by the magistrate

☒ Other

Please explain, citing any relevant jurisprudential examples

According to Sec. 8(1) of the Code of Administrative Justice (No. 150/2002), *judges shall be excluded from hearing and deciding a case if, having regard to their relationship to the case, to the parties or to their representatives, there is reason to doubt their impartiality*. Relationship to the case involves, for example, being one of the parties or otherwise related to the case (for example, as a witness). Apart from ties to the parties, a reason to doubt impartiality may arise from judge's ties to their representatives. Familial or friendly ties may be a reason for disqualification.

According to case-law, not every familial or friendly tie constitutes such a reason. For example, the disciplinary chamber of the SAC (in decision of 24 May 2017, no. 16 Kss 1/2017-183) explained criteria for assessment of friendships of judges with other legal professionals. It considered it natural that judges will not close themselves off from the outside world and will form relationships with other professionals. The legal community of the Czech Republic is not large, thus it is quite common, especially in certain specialised agendas or in smaller regions, for members of the community to have known each other for years and to maintain more or less close friendly or professionally friendly relations. The fact that for such reasons, as well as for other reasons (meetings at lectures or seminars, conferences, joint publishing activities etc.), professional friendships may arise between a judge and other legal professionals cannot be considered in itself in the least a breach of a judge's obligations under Sec. 80 of the Act on Courts and Judges. On the contrary, in normal circumstances, i. e. when judges possess sound self-confidence, discretion, restraint, and are aware of the professional standards to be maintained, professional friendships deepen their understanding of the practice in their field of work and broaden their professional knowledge. Such relationships, especially if they are of a long-term nature, may result in less formal contact between the actors (joint lunches or dinners, cultural or sporting activities etc.). None of this in itself can be considered as a defective relationship. However, such relationships become dangerous if they develop dependency, one-

sidedness or hints of opportunism. Completely "out of line" would be cases when a judge accepts benefits that go beyond the bounds of common courtesy. The disciplinary chamber thus concluded:

> "*Professional friendship is not normally a ground for doubting the impartiality of a judge. […] The mere fact that a judge has known a certain procedural actor (an attorney, a prosecutor, an insolvency administrator, a person who repeatedly represents a party, e. g., a certain administrative authority) for a long time, has informal conversations with him and otherwise meets him within the boundaries of professional friendship described above, cannot constitute a reason for disqualification of the judge. Such a ground would only be based on further, special circumstances, from which it would have to be concluded that the judge may not be able to keep a sufficient distance from the procedural actor concerned and to assess his or her conduct (procedural acts, legal reasoning, general conduct in the exercise of his or her procedural role, etc.) without bias*."

According to Sec. 8(1) of the Code of Administrative Justice, judges shall also be disqualified from a case if they have been previously involved in hearing or deciding of the case, either in the proceedings before the concerned administrative authority (for example, a civil servant who becomes a judge and is assigned an action against a decision which he/she wrote), or in the court proceedings (a regional judge who is promoted to the SAC and assigned a cassation complaint against their own judgment).

~~**2.1.2. If your institution exercises both a jurisdictional function and an advisory function, what individual measures does it implement to comply with the *Procola* case law of the European Court of Human Rights dated 28 September 1995, according to which the fact that certain members successively exercise, regarding the same decisions, advisory and jurisdictional functions is likely to compromise the structural impartiality of the institution?**~~

~~☐ Prohibition of a member's participation in the judgement of an appeal directed against an act taken after advisory opinion from your institution if they participated in the deliberation of that opinion~~

~~☐ Prohibition for members of a judgement panel to consult the files of advisory panels~~

~~☐ Other~~

~~**Please explain if necessary:**~~

2.1.3. If your country allows members of your institution to temporarily leave to take up other functions in the public or private sector, what ethical rules govern such a departure and, when the time comes, such a return?

☐ Obligation to abstain, before departure, from participating in any deliberation involving a future employer from the moment the individual enters into negotiations with them

☐ Prohibition for the members concerned, during this temporary period outside the institution, from intervening in cases they became aware of in the exercise of their jurisdictional activities

☐ Prohibition for a member practising as a lawyer from submitting requests and briefs and appearing in court before your institution for a specified period

☐ Obligation to abstain, if applicable for a specified period after the return, from participating in the judgement of disputes concerning decisions taken by the authority with which the member previously served

☒ Other

Please explain if necessary:

As explained above (see the answer to question 1.3.2), judges may be temporarily seconded to other "ordinary" courts; the same obligations apply to them as judges, thus no specific ethical rules govern their departure or return. Regarding judges appointed to the Constitutional Court or to an international court, such departure (and return) does not raise any particular ethical issues, thus no specific rules apply. However, both situations may give rise to grounds for disqualification due to previous involvement in cases. Other temporary secondments provided for by law are very rare in practice. Although judges are regularly active as lecturers at the Judicial Academy [one of their general obligations is to contribute their knowledge and experience to the professional training and education of judges, judicial candidates, and other employees of courts – Sec. 83(1) of the Act on Courts and Judges], but only externally, alongside their work at the court. In this context, the possibility of temporary secondments to the Academy is rather impractical.

As regards other functions in the public sector, according to Art. 82(3) of the Constitution, *the function of a judge is incompatible with the function of President of the Republic, Member of Parliament, or with any function in public administration; the law shall provide which other activities are incompatible with the performance of the judicial function*. Section 74(2) of the Act on Courts and Judges then provides that with the exception of the function of a president or vice president of a court, judges cannot hold any other function in the public administration.

Interestingly, the Act on Courts and Judges, as adopted in 2002, used to provide that judges may be temporarily seconded – with their consent, under the condition of "utilising their experience" – not only to the Judicial Academy, but also to the Ministry of Justice. In addition, Sec. 74(3) of the Act used to provide that such temporary secondment, as well as membership in advisory bodies of the Ministry, the Government and the Chambers of Parliament, shall not to be considered as a function in the public administration [within the meaning of Sec. 74(2)]. Based on an application of the President of the Republic, the Constitutional Court repealed the possibility of secondments to the Ministry and the cited provision as contrary to the principle of the separation of powers (ruling of 18 June 2002, no. Pl. ÚS 7/02). Few years later, the possibility of such secondments was reintroduced as a part of a larger amendment to the Act on Courts and Judges. The Constitutional Court did not hesitate to repeal it for the second time:

> "*In the cited ruling (no. Pl. ÚS 7/02), the Constitutional Court concluded that an inherent feature of the judicial function is the continuity of its performance. Therefore, membership in advisory bodies of the Ministry, Government and both Chambers of Parliament, as well*

as the performance of tasks of these different branches of state power, is contrary to the principle of separation of powers, regardless of the fact that the personal and extra-judicial ties that arise from such activities inevitably increase the likelihood of a possible conflict of interest and make the impartiality of judges questionable. In the current version of the Act on Courts and Judges, this unconstitutional state of affairs was further underlined by the fact that the period of secondment has now been extended to three years […]. This further undermines the requirement of continuous performance of the judicial function, and on the contrary, the objection of ties with the executive power becomes even more serious […]. Therefore, the Constitutional Court has maintained its legal opinion given in the ruling no. Pl. ÚS 7/02 and continues to consider the secondment of judges to perform tasks within another branch of state power as an activity contrary to Art. 82(3) of the Constitution." (ruling of 6 October 2010, no. Pl. ÚS 39/08)

As regards the private sector, according to Sec. 85(1) of the Act on Courts and Judges, judges cannot hold any other paid position or engage in any other profitable activities, with the exceptions listed therein (management of their own property, scientific, pedagogical, literary, journalistic, artistic or sportsman activities). The provision essentially excludes any "full-time" position in the private sector. In the context of the general obligations of judges, the exceptions are conceived merely as permitted "side activities" in which judges may engage alongside performing their function. To take any other "full-time" position in the private sector, a judge would have to resign, or otherwise risking disciplinary action with the possibility of a removal from the function.

2.1.4. Can a member of your institution receive gifts?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

Judges are not explicitly prohibited from receiving gifts. However, the general obligations under Sec. 80 of the Act on Courts and Judges apply.

In addition, gifts – depending on their nature and/or amount – shall be included in the declaration of interests (see the answer to question 1.7.1).

2.1.5. Can a member of your institution receive an honorary decoration from their country or a foreign country?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

Judges are not explicitly prohibited from receiving honorary decorations. However, general obligations under Sec. 80 of the Act on Courts and Judges apply.

2.2. Exercise of individual liberties

2.2.1. Are there limits placed on the freedom of expression and opinion of members of your institution?

☒ Yes

☐ No

Please explain if necessary:

Freedom of expression and opinion is guaranteed to all (Art. 17 of the Charter). However, it may be restricted if necessary to protect the rights and freedoms of others, the state security, public safety, public health or morals. Regarding judges, the freedom is restricted by the general obligations under Sec. 80 of the Act on Courts and Judges.

2.2.2. In particular, is the use of social media by members of your institution regulated?

☐ Yes

☒ No

Please explain if necessary:

Judges are not prohibited from using social media. However, general obligations under Sec. 80 of the Act on Courts and Judges apply.

In 2017, the Judges' Association drafted the *Guidelines on the Ethical Restrictions of a Judge's Social Media Activity*. The *Code of Ethics* (2020) also addresses the issue: "*A judge shall use social networks and similar platforms with caution to ensure that their opinions, published information, images or sound recordings do not undermine the judicial dignity*." (III.11)

2.2.3. As an example, can a member of your institution participate in a public debate of general scope (for example, on immigration or euthanasia), provided that they do not specifically mention a particular case they may have been involved in judging?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

Judges are not explicitly prohibited from participating in public debates of general scope (regardless of specifically mentioning a particular cases). However, general obligations under Sec. 80 of the Act on Courts and Judges apply.

2.2.4. Can a member of your institution write and publish an article or a book? Can they teach at a public university or a private educational institution?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

Scientific, pedagogical, literary, journalistic and artistic activities are permitted to judges, provided that such activities do not undermine the dignity of the judicial function or jeopardise public confidence in the independence and impartiality of the judiciary [Art. 85(1) of the Act on Courts and Judges]. In addition, judges may contribute their knowledge and experience not only to the professional training and education of judges, judicial candidates, and other employees of courts [Sec. 83(1) thereof], but also of other legal professionals, provided that it does not prevent them from the due performance of the judicial function [Sec. 83(2) thereof].

Scientific and pedagogical activities are generally regarded as valuable extra-judicial activities. Teaching at public universities generally does not raise any issues; a number of SAC judges are indeed part-time lecturers. The only relevant disciplinary case involved a judge (of a regional court) who continued to give lectures while being temporarily incapacitated and thus had not work at the court for nearly four months. Therefore, the judge was found disciplinary liable for the breach of a regime of temporary incapacitation under the Sickness Insurance Act (No. 187/2006) by travelling to the faculty and giving lectures on three occasions (decision of 7 December 2020, no. 11 Kss 3/2020-186).

Restrictions on literary and artistic activities were the focal point in a well-known disciplinary case in 2016 (decision of 6 June 2016, no. 11 Kss 6/2015-53). The case involved a judge who published – on a controversial, moderately right-wing platform – three satirical articles containing fictional stories related to the migration crisis and Islamic extremism. The disciplinary chamber deduced where the line is drawn beyond which a judge should not venture when exercising the right to freedom of expression mainly from the case-law of the ECtHR. Judges have the right to their own opinion and the right to express it publicly, even (critically) on public issues, specific events, even by artistic or journalistic means. They may also express themselves on issues which are perceived as political and conflictual. However, they are prohibited from expressing public support for particular political entities or programmes or from promoting ideas contrary to the principles of a democratic society. They must not give impression that the views they present could affect the performance of the judicial function. The general rule that speech which is offensive, motivated by personal antagonism (etc.), does not enjoy the protection Art. 10(1) of the ECHR nor Art. 17(1) of the Charter applies doubly in case of judges. According to the disciplinary chamber, two of the articles were

beyond the line, as their overall message was a generalising, biased and largely dehumanising portrayal of immigrants, NGO workers and civil activists, using vulgarities, sexual and violent references. Even the use of satirical means (exaggeration, irony and sarcasm) could not change this conclusion. Although the aim of satire is to ridicule social ills and therefore does not necessarily have to give a benign impression, but in the articles at issue, the manner of the narrative used and, in particular, the extreme expressiveness of the language used were at the very limit of taste and decency, and in some respects exceeded that limit (for example, a blanket portrayal of all NGO workers as people who do not stand up in practical life and in fact parasitise on the aid to refugees, or of all migrants as frauds and pure opportunists). The explicit use of some vulgarisms seemed rather purposeless, in a first-rate attempt to attract the reader's attention. Although judges have the right to express themselves freely by artistic means on any subject, even using expressive language, they shall always be borne in mind the imperative of judicial restraint. In this context, the disciplinary chamber referred to work of the former president of the SAC, who published a collection of poetry titled "Mistakes and Delusions" in 1939, while he was still an active judge, which clearly illustrates that literary/artistic work itself does not necessarily undermine the dignity of the judicial function. However, in this case, the disciplinary chamber considered that the acceptable limit of (authorial) expression was exceeded, and the publication of the articles could have undermined the dignity of the judicial function.

2.2.5. If yes, must they seek prior authorisation from the head of your institution?

☐ Yes

☒ No

Please clarify if necessary:

The aforementioned profitable activities are permitted by law. Therefore, judges do not have to seek any prior authorisation. However, such activities shall be included in the declaration of activities under Sec. 85a(1) of the Act on Courts and Judges (see the answer to question 1.7.1).

2.2.6. Are members of your institution allowed to engage in political activities?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

General obligations under Sec. 80 of the Act on Courts and Judges apply. In particular, the obligation to conduct activities outside the performance of the judicial function and to exercise political rights in a manner which does not jeopardise or undermine public confidence in the independent, impartial

and fair decision-making of the courts, or undermine the dignity of the judicial function, or prevent them from duly performing the judicial function [Sec. 80(4)].

In addition, since amendment in 2022, the Act on Courts and Judges explicitly prohibits judges from membership in political parties [Sec. 85(3)]. Even before then, however, the majority doctrinal view was that such membership was incompatible with the general obligations of judges.

A disciplinary case worth mentioning concerns a well-known criminal judge who let election leaflets to be distributed on his behalf and indicating his status as a judge. In these leaflets, he commented critically on the various parties running in municipal elections and their candidates for the office of mayor, clearly preferring one of the parties and their candidate. After the elections, he further commented on the results in an article written for a local magazine. The disciplinary chamber reiterated that judges are restricted in their political rights, including in their freedom of expression and opinion. Although such restrictions do not prohibit judges from involvement in the pre-election events (in a municipality where they live and thus may vote, or where they have other ties), they shall do so in a moderate, restrained manner. Judges may even be "politically" critical, however, the criticism must be kept within the framework of substantive criticism. Given the disciplinary chamber considered the criticism at issue rather confrontational, the judge was found disciplinary liable (decision of 11 June 2015, no. 16 Kss 7/2014-92).

2.2.7. Can members of your institution run for elections?

☐ Yes

☐ Yes, under certain conditions

☒ No

Please explain if necessary:

Although judges are not explicitly prohibited from running for elections, it would be perceived – at least – as controversial, rather as contrary, in principle, to general obligations under Sec. 80 (such is the prevailing view of the doctrine). Even if not eventually elected, a judge who runs for elections would risk disciplinary action with the possibility of a removal from the function. Therefore, judges should resign before running.

2.2.8. If a member of your institution is elected, can they continue to perform their functions in your institution?

☐ Yes

☐ Yes, under certain conditions

☒ No

Please explain if necessary:

As explained above (see the answer to question 2.1.3), the function of a judge is incompatible with any other function in the public administration.

It is undisputed that judges who were elected cannot continue to perform the judicial function. However, the law does not address such situations, i. e., by explicitly providing for the termination of the judicial function as a result of an election (in municipal, regional, parliamentary or presidential elections) or appointment to any other function in the public administration. For example, although the Constitution clearly states that the mandate of a Member of Parliament shall expire on the day of assuming the function of judge [Art. 22(2)], it says nothing – and neither does the Act on Courts and Judges – on the reverse situation.

2.2.9. If a member of your institution is elected, can they, in the event of full-time elective office, rejoin your institution upon the expiration of their mandate?

☐ Yes

☐ Yes, under certain conditions

☒ No

Please explain if necessary:

As implied in the answer to the previous question, assuming of an elected function would inevitably (one way or another) result in the termination of the judicial function. Upon the expiration of their mandate, the former judge would have to be reappointed by the President of the Republic.

2.2.10. Can a member of your institution sign a petition?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

Judges are not explicitly prohibited from signing a petition. However, the general obligations under Sec. 80 of the Act on Courts and Judges apply.

2.2.11. Can a member of your institution participate in a demonstration?

☐ Yes

☒ Yes, under certain conditions

☐ No

Please explain if necessary:

Judges are not explicitly prohibited from participating in a demonstration. However, the general obligations under Sec. 80 of the Act on Courts and Judges apply.

In contrast, judges are prohibited from participating in a strike [Sec. 20(i) of the Act on Collective Bargaining (No. 2/1991), Art. 27(4) of the Charter].

2.2.12. Can a member of your institution invoke a "conscience clause" to refuse to apply the law – for example, by refusing to sanction a doctor who, in violation of the provisions obliging him to do so, failed to inform his patients about the possibility of terminating their pregnancy?

The freedom of conscience is guaranteed to all by Art. 15(1) of the Charter. The Czech legal system explicitly recognises the conscientious objection in two types of situations – performance of military service [Art. 15(3) of the Constitution, Sec. 6 of the Conscription Act (No. 585/2004)], and provision of health services [Sec. 50(2) of the Health Services Act (No. 372/2011)]. The Constitutional Court has recognised the objection with respect to obligatory vaccination. However, the case-law of the Constitutional Court (for example, ruling of 22 December 2015, no. I. ÚS 1253/14) indicates that the objection may be invoked in various other situations, even if it is not explicitly recognised by law. However, it is subject to certain criteria: (1) the constitutional relevance of the allegations contained in the objection, (2) the urgency of the reasons advanced in support of the objection, (3) the consistency and plausibility of the allegations, and (4) the societal impact that an accepted objection may have in a particular case.

According to Sec. 79(1) of the Act on Courts and Judges, *judges are independent in the performance of their function and are bound only by the law. They shall interpret it according to their best knowledge and conscience* (cf. the wording of oath taken by judges cited in the answer to question 1.8). Therefore, the judges are bound by law, and may not refuse to apply it, however, they – concurrently – shall interpret it according to their best conscience.

One of the disciplinary chambers of the SAC mentioned the conscientious objection as one of possible reasons justifying the failure to comply with a binding legal opinion and instructions of a superior court, which may generally constitute a disciplinary offence (decision of 7 March 2018, no. 16 Kss 7/2017-223). Given that it was undisputed that the defendant judge was not invoking the objection, the disciplinary chamber merely suggested that the objection could indeed be invoked, but only under certain circumstances, and did not find reason to elaborate in more detail.

In another case concerning the same type of disciplinary offences, the same disciplinary chamber hinted on such circumstances in criminal cases:

> "*A conscientious objection could be a justification for avoiding the legal opinion of a superior court in specific circumstances, the details of which can only be speculated upon and which there is no reason to consider further, if the legal opinion implied an obligation on the bound court to find the accused guilty. However, that situation did not arise in the cases which are the subject of the disciplinary proceedings. On the contrary, an obligation not to use criminal repression imposed in a situation in which the judge considers that repression should be used will not, in principle, constitute a situation in which the judge*

could effectively invoke the conscientious objection for the purposes of possible disciplinary liability." (decision of 26 May 2021, no. 16 Kss 6/2020-119)

Nevertheless, in disciplinary cases, the conscientious objection has never been effectively invoked. In the above-mentioned cases, the possibility of invoking the objection was outlined beyond the neccesary reasoning (*obiter dictum*).

2.3. Case studies

To add substance to our discussion, the organisers of the symposium would like to discuss specific questions that you have encountered and on which your College of Ethics, if you have one, would have pronounced.

The French Council of State proposes four questions to you, as an example:

- On impartiality: Can a consultant judge (*rapporteur public*) of the Council of State [responsible for presenting to the members of the judgement panel the case before them, the legal issues it raises, and proposing a solution] receive a gift from a third party, not a party to the litigation, for the direction of the findings he has made in a case concerning the euthanasia of an elephant? (Opinion no. 2013/4 of 17 June 2013)
- On conflicts of interest: Which cases can a head of jurisdiction assign to a magistrate whose spouse is one of the most important members of the French Government? (Opinion no. 2017/4 of 18 September 2017)
- On conflicts of interest: Under what conditions can a former administrative magistrate practise as a lawyer? (Recommendation no. 2017-1 of 15 November 2017)
- On the obligation of discretion and freedom to produce intellectual works: Can a judicial magistrate seconded to the Council of State, during their secondment period, publish a historical essay on the *Ranucci* case, which had caused a stir and led to one of the last capital executions in France in 1976? (Opinion no. 2016/4 of 17 January 2017)

III. Recruitment of members

3.1. Who can be recruited in your institution?

3.1.1. How many members do you recruit on average each year in your institution?

Several years after the establishment of the SAC in 2003, the number of judges stabilised at 30 (10 chambers of 3 judges each). On average, one new judge was recruited – typically to replace a retired judge or a judge appointed to another court (Constitutional Court, Court of Justice etc.) – each year. However, due to the increased caseload and backlog in recent years, it was agreed with the Ministry of Justice to increase the number of judges to 36. Therefore, in the last couple of years, two new judges were recruited on average each year.

3.1.2. Are all new members recruited at the same rank, or are the members of your institution divided into several ranks for which different recruitment methods exist? Please explain:

All new judges are recruited at the same rank.

3.1.3. Are age conditions set for the recruitment of these new members?

☒ Yes

☐ No

Please explain if necessary:

One of the conditions for appointment as a judge is minimum of 30 years of age [Sec. 60(1) of the Act on Courts and Judges].

Due to further requirements, in particular, of professional experience (see the answer to question 3.1.6), the minimum age is naturally set around 35 years. Considering the fact that the SAC recruits one or two judges on average each year and the number of potential suitable candidates, the age of new SAC judges ranges between 40 and 45 years.

3.1.4. Are diploma conditions set for the recruitment of these new members?

☒ Yes

☐ No

Please explain:

Another condition for appointment as a judge is a university degree obtained by duly completing a master's degree programme in law [Sec. 60(3) of the Act on Courts and Judges].

3.1.5. Is it possible to become a member of your institution directly after completing university studies or, if applicable, after a training college?

☐ Yes

☒ No

Please explain:

Direct appointment to the SAC is subject to condition of professional experience (see the answer to question 3.1.6). Due to such requirement, it is not possible to become a judge of the SAC directly after completing university studies. Moreover, due to the minimum age requirement (most of the

lawyers graduate around the age of 25), and the requirement to pass the judicial or other professional exam [Sec. 60(3) and (5) of the Act on Courts and Judges; such exams may be taken only after at least 3 years of legal practice], it is not possible to become a judge directly after completing university studies, let alone a judge of the SAC.

3.1.6. Are conditions of prior professional experience required to become a member of your institution?

☒Yes

☐No

Please explain:

Direct appointment to the SAC is subject to the condition of legal practice or scientific/pedagogical activities in the field of constitutional, administrative or financial law for at least 10 years [Sec. 121(2) of the Code of Administrative Justice].

3.1.7. Can members of the lower courts become members of your institution?

☒ Yes

☐No

Please explain:

The promotion of judges from the lower courts to the SAC is subject to the condition of 10 years of legal practice and the "soft" condition of expertise and experience guaranteeing the due performance of the function (Sec. 122 thereof).

If yes, what is their proportion in the number of new members?

More than half of the SAC judges are recruited from the ranks of judges of administrative divisions of regional courts (the 1st instance administrative courts). The recruitment policy of the SAC has always been to strike a balance between career judges and other legal professionals (former attorneys, civil servants, academics etc.) who bring different experience and perspectives from various backgrounds, with the aim to create a diverse and pluralistic opinion environment.

3.1.8. How old is the youngest of your colleagues?

The two youngest judges of the SAC were born in 1983. Both were directly appointed to the SAC at the beginning of 2024.

3.1.9. Are the members of your institution recruited without a time limit - that is, for a career that will end with retirement - or for a fixed-term contract?

All judges are appointed without a time limit [Art. 93(1) of the Constitution], respectively until the age of 70 years [Sec. 94(a) of the Act on Courts and Judges]. The function of SAC judge is also not limited in time. Therefore, direct appointment or promotion to the SAC is permanent.

3.2. How does the recruitment procedure work in your institution?

3.2.1. Does the executive branch intervene in the recruitment procedure for members of your institution?

☒ Yes

☐ No

Please explain:

The executive branch may intervene in the recruitment procedure.

The recruitment procedure of SAC judges (in terms of finding suitable candidates) is in the hands of the president of the court, who is mainly responsible for the management of the court [Sec. 26(2), 27 and 29 of the Code of Administrative Justice]. In contrast with recruitment of judges of lower courts, there is no formal selection procedure. The president, based on own insights or suggestions from others, handpicks potential candidates. The recruitment procedure, as well as desired professional and personal qualities of candidates, are described in the *Memorandum on the selection of candidates for judges.* The document was drawn up by the former (first) president of the SAC and, despite its non-binding nature, following presidents have proceeded accordingly. The autonomy of both supreme courts (the SAC and the Supreme Court) to establish their own rules and procedures for recruitment was explicitly recognised by Sec. 117a of the Act on Courts and Judges, adopted in 2022.

The recruitment procedure begins with a less formal interview with the president. Information on a potential candidate (CV, "cover letter" etc.) is then published on the SAC's website to inform the general public and the media. Subsequently, the candidate presents him/herself (career path, experience, motivation, views on the functioning of the court and his/her potential role in it) at the plenary session of judges, who are then free to ask any questions. In a closed session, the judicial council of the SAC, consisting of representatives of judges of the court, gives its opinion on the candidate [Sec. 25(1)(b) of the Act on Courts and Judges]. The opinion of the judicial council is not binding, however, the president shall take it into consideration [Sec. 26(3) thereof].

Nevertheless, the president needs to cooperate with the Ministry of Justice, which is responsible for the state administration of courts and is tasked to ensure the proper functioning of the SAC in terms of organisation, personnel and financing [Sec. 26(1) and 28 of the Code of Administrative Justice]. It is the Ministry which, based on formal proposal from the court presidents, compiles a list of candidates for approval to the Government and subsequent proposal to the President of the Republic. In practice, the Ministry has restricted itself to verify whether the candidate formally

proposed by the president of the SAC meets the legal requirements for the appointment. However, given the "soft" requirement of experience and moral qualities guaranteeing the due performance of the function [Sec. 60(1) of the Act on Courts and Judges] and potential for differing interpretations of what constitutes legal practice or scientific/pedagogical activities in the field of constitutional, administrative or financial law [Sec. 121(2) of the Code of Administrative Justice], the Ministry has the opportunity to intervene and block the selection of a particular candidate. The same applies for the President, who has discretionary power to appoint judges [Art. 62 (1)(i) of the Constitution]. In practice, however, neither the Ministry, the Government, nor the President has rejected a candidate selected by the president of the SAC.

In cases of promotion of judges from lower courts, the procedure slightly differs. Selected judges from administrative divisions of regional courts are frequently temporarily seconded to the SAC for six-month to one-year "internships". As interns, they participate on decision-making as regular judges of the SAC, however, they rotate between chambers each 3 months. The rotation system gives them the opportunity to experience working in different chambers, while providing the president with insights on the potential candidates from a variety of judges. Temporal secondment, as well as permanent promotion to the SAC, is subject to the decision of the Minister of Justice [Sec. 68(2)(c) and 73(1) of the Act on Courts and Judges], who can thus block the recruitment of judges from the lower courts. In practice, the president of the SAC needs to cooperate not only with the Minister, but also with the presidents of the courts of respective candidates, as they usually have to ensure replacements. Even though the law requires only their consultation on secondment or promotion of "their" judges to the SAC, obtaining their consent fosters good relations within the system of administrative justice.

3.2.2. Does the recruitment procedure for members of your institution involve an individual interview?

☒ Yes

☐ No

3.2.3. If yes, is this interview an opportunity to assess the candidate's motivation as well as their legal knowledge?

☒ Yes

☐ No

~~**3.2.4. Does the recruitment procedure vary depending on the rank the candidate is applying for – in the event that recruitments in your institution may be made at different ranks (cf. above 3.1)?**~~

~~☐ Yes~~

~~☐ No~~

~~**Please explain if necessary:**~~

3.3. What is the procedure for appointing members of your institution?

3.3.1. The appointment of members of your institution results from a decision:

☒ by the executive branch (for example, a presidential decree)

☒ by the judicial branch (by the president of your institution or a panel of independent judges)

☐ other

Please explain if necessary:

Ultimately, the appointment of judges to the SAC results from a decision of both branches. As explained above (see the answer to question 3.2.1), in cases of direct appointments, the president of the SAC selects the potential candidate and submits a formal proposal to the Ministry of Justice. The Ministry, following a verification of fulfilment of all the legal requirements, submits a list of candidates to the Government for approval and formal proposal for appointment to the President of the Republic. The Ministry, the Government and the President may essentially "veto" the candidate. In cases of promotions, the president of the SAC proposes the permanent secondment of a selected candidate to the Minister of Justice, who decides. In any case, the direct appointment or promotion of a judge to the SAC is subject to the consent of its president [Sec. 121(2) the Code of Administrative Justice and Sec. 73(3) of the Act on Courts and Judges]. Therefore, all of the involved actors need to cooperate; none of them may force the selection and appointment/promotion of a candidate on others.

3.3.2. Can the appointment of members of your institution be challenged in court?

☐ Yes, through an action at the time of the appointment of said members

☐ Yes, as an exception regarding the regularity of the composition of the members of the judgement panel

☒ No

If yes, before which judge?

The law does not provide an explicit answer for this question. Regarding the competences of the President of the Republic, the SAC has developed case-law which distinguishes between acts of the President of the Republic as a constitutional authority (on one side) and as an administrative authority (on the other). In particular, regarding the appointment of

"ordinary" judges (i. e., all judges except the judges of the Constitutional Court), the SAC held that the President – as a part of the executive branch – exercises public administration:

> "*His actions are therefore also subject to the strict requirement that state power shall be exercised only in cases provided for by law and within its limits [Art. 2(3) of the Constitution and Art. 2(2) of the Charter of Fundamental Rights and Freedoms]. When appointing judges, the President of the Republic exercises the discretion conferred on him by law, which must remain within the limits of the law. He is bound by the number and content of the statutory conditions and is not entitled to impose conditions of his own which are not contained in the law itself. Nor is he entitled to waive any of the statutory conditions and to appoint a candidate who does not fulfil any of them. If the President of the Republic decides not to appoint a candidate proposed by the Government, he is obliged to give clear and comprehensible reasons for his refusal*."

The case concerned one of judicial candidates proposed by the Government (the Ministry of Justice) to be appointed as judges. The President, however, refused to appoint all of the candidates, giving their "lower age and life inexperience" as a reason later in the press and in his letter to the Minister of Justice. One of the judicial candidates then challenged the refusal before the administrative courts, which eventually ordered the President to formally decide on the appointment (i. e., either to appoint the candidate, or to issue a decision giving reasons for refusal). Curiously enough, the President never complied with the order.

The SAC (in its judgment of 27 April 2006, no. 4 Aps 3/2005-35, and then of 21 May 2008, no. 4 Ans 9/2007-197) recognised the procedure of appointing "ordinary" judges, which is unregulated in detail by law, as an established constitutional customary practice. Although the SAC maintained that there is no legal entitlement to be appointed as a judge and thus the President has discretion whether to appoint candidates proposed by the Government, however limited to verifying whether a candidate meets the legal requirements for the appointment (listed namely in the Act on Courts and Judges), the approval of (a list of) specific candidates by a Government resolution and a formal proposal for their appointment gives rise to a legitimate expectation of the approved candidates that their candidature will be resolved in a lawful manner consistent with previous practice. The fact that the candidate has been selected by a public authority as a suitable candidate is decisive for the standing to bring an action, alleging interference with their legal sphere and invoking the right to equal opportunity to hold elected and other public functions [Art. 21(4) of the Charter] and, consequently, of the principle of non-discrimination in fundamental rights [Art. 1 and 3(1) thereof]. Nevertheless, the SAC further held:

> "*This process of individualisation, on the other hand, principally excludes the formation of legitimate expectations in the legal sphere of all other potential candidates for the position of judge, not only from the ranks of judicial candidates, but also from other persons who would meet the legal requirements for the appointment as a judge*."

The SAC thus afforded judicial protection to candidates approved by the Government and proposed to the President for the appointment against the President's refusal to appoint them (or the President's inaction). Conversely, other – not approved, merely potential – candidates may not challenge their non-appointment, nor the appointment of others.

Recently, the SAC ruled that the appointment to (and dismissal from) the office of the Prosecutor General by the Government constitutes an exercise of public administration (within the meaning of

Sec. 4 of the Code of Administrative Justice); therefore, the administrative courts have jurisdiction to review the procedure of such appointment. However, the SAC further held that, under the law, only a prosecutor can be appointed as the Prosecutor General. Consequently, only a person who meets the requirements for appointment to the office may challenge the decision to appoint another person (for example, on the grounds of arbitrariness, discrimination or other serious procedural defects (judgment of 12 October 2022, no. 6 As 68/2022-70).

Recent case-law regarding the appointment of constitutional judges may also be relevant:

Last year, the Municipal Court in Prague dealt with an action of a lawyer against unlawful interference [Sec. 82 et seq. of the Code of Administrative Justice] challenging the appointment of four new constitutional judges, who were – in accordance with the Constitution – selected and appointed by the President of the Republic with the consent of the Senate [Art. 84(2)]. The Municipal Court concluded that the appointment of constitutional judges is not an exercise of public administration, but a constitutional act, and the President of the Republic does not act as an administrative authority, but a constitutional authority in this matter, thus the administrative courts lack the jurisdiction to review the selection and appointment procedure. The key argument of the Municipal Court was that the selection and appointment of constitutional judges is regulated – albeit very generally – directly by the Constitution, in contrast with the selection and appointment of "ordinary judges", which is regulated mainly at the statutory level by the Act on Courts and Judges, and also by a ministerial decree (resolution of 7 September 2023, no. 9 A 106/2023-38).

At the end of the last year, the Constitutional Court also dismissed a complaint of the same lawyer challenging the appointment of another constitutional judge. The Constitutional Court ruled:

> "*The President of the Republic has complete discretion in the manner and procedure for selecting candidates for the position of a judge of the Constitutional Court. This procedure is not a 'selection procedure' in which the complainant could participate and in which he would have any rights or obligations. From the mere fact that a particular citizen meets the requirements for the position of a judge of the Constitutional Court as set out in the Constitution, but is not considered by the President of the Republic as a candidate for this position, it is not possible to infer an interference with his right within the meaning of Art. 21 (4) of the Charter, nor any of his other constitutionally guaranteed rights*." (resolution of 6 December 2023, no. Pl. ÚS 43/23-2)

3.3.3. If your institution is competent to hear this litigation, how does it ensure respect for the right to a fair trial?

The SAC has not dealt with a case concerning appointment of its members. Provided the SAC would be competent to hear such a case and the question of impartiality would arise, the *doctrine of necessity* would assumably apply.

The doctrine was most recently interpreted and applied in a case concerning the pronouncement of the aforementioned judgment in case no. 6 As 68/2022. The judgment was pronounced, in accordance with the law and case-law of the Constitutional Court, by publishment on the SAC's official notice board – both in the court's building and electronically – in a non-anonymised version for 14 days. By an action against unlawful interference, the complainant challenged the publishment

before a regional court, alleging a violation of his right to privacy by disclosing his personal data (first name, last name, and address). The regional court held that the pronouncement of judgments is not an exercise of public administration, but of judicial power, and dismissed the action. The complainant then challenged the judgment of the regional court before the SAC. *Inter alia*, he objected to the bias of all judges (as "employees") of the SAC, which was defendant in the case and thus was to decide on the lawfulness of its own actions. The objection was rejected in the following manner:

> "*The SAC has already dealt with this type of objection of bias in several of its decisions, concluding that it is 'precluded for another authority to decide on the cassation complaint, since the SAC is the only court authorised to hear and decide on a cassation complaint against a final decision of a regional court in the administrative justice system [Sec. 12(1) of the Code of Administrative Justice]', while 'viewed in the logic of the objection thus raised, there would be no judge at the SAC who could rule on the issue of bias' […]. In this respect, when deciding on the disqualification of a judge for bias, it is necessary to bear in mind 'the preservation of the functionality of the court, or the prohibition of denegationis iustitiae, which implies that the interpretation and application of the provisions on the disqualification of judges cannot result in a situation in which no judges are left to decide on the case' […]. In its resolution of 14 November 2013, no. Nao 49/2013-9, the SAC also referred to the so-called doctrine of necessity, according to which 'a judge who would otherwise be disqualified may decide a case if a different course of action would result in a denial of justice'. A more restrictive approach must therefore be adopted in assessing the bias of the judges of the SAC and the mere fact that the administrative action was directed against an act of the SAC or its president cannot be regarded as a reason for disqualification of judges from deciding on the cassation complaint in the case in question*."
> (judgment of 9 October 2023, no. 6 As 48/2023-52)