



*Research and Documentation  
Directorate*

## **RESEARCH NOTE**

**Possibility and conditions of an incidental review of the procedure leading to a judge's appointment**

[...]

- Subject:
- Study on the possibility of carrying out an incidental review of the procedure leading to a judge's appointment in order to ensure that the fundamental right to a lawful judge and an impartial tribunal is observed.
  - Procedural and/or material conditions and the limits of the review carried out.
  - Examination of the conditions under which, according to national case-law, an irregularity in the appointment of a judge gives rise to an infringement of the abovementioned fundamental right.

[...]

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[...]



## SUMMARY

1. There is no doubt that in the vast majority of the 28 legal orders examined, it is possible to conduct a review as to the regularity of the composition of a panel of judges, either incidentally in the context of an appeal or – more rarely – by means of a review procedure once a decision delivered by that panel has become final.
2. However, with regard to the scope of such an incidental review, the detailed rules applicable to it and, more specifically, the more targeted review as to the regularity of the procedure leading to the appointment of a judge sitting in a panel, only a rather disparate and perhaps, in some respects, incomplete picture emerges from the research carried out.
3. That research has shown that an incidental review may cover, on the one hand, the regularity of the composition of a panel of judges in the sense that it examines, for example, the observance of the correct number of judges in the panel, the absence of particular incompatibilities associated with an individual judge that could potentially justify a challenge by a party, as well as compliance with particular conditions at the time of the judgment, such as the absence from the panel of a judge who has reached the legal retirement age or a lay judge who is no longer domiciled within the jurisdiction of the court.
4. In particular, the review may cover the matter of the regularity of the selection, to a court, of a judge or a panel in which he or she sits. In particular, it may thus cover irregularities associated with the assignment of a judge or the allocation of a case in accordance with the schedule for the division of responsibilities.
5. On the other hand, in some Member States, the incidental review may also cover the regularity of the procedure leading to a judge's appointment. For the purposes of the present note, that scenario covers both the existence of the appointment per se and compliance with the relevant procedural requirements. In that regard, the present note

seeks to distinguish between, first, the existence of the appointment per se, secondly, substantive irregularities associated, inter alia, with the eligibility criteria of the person concerned and, thirdly, formal irregularities, which include procedural flaws affecting the appointment procedure.

6. As regards an incidental review as to the regularity of the procedure leading to a judge's appointment, the research has shown that in the majority of the Member States examined there is no legislation or case-law specifically targeting that situation and it is often difficult to take a view on the specific aspects that a legal order may attach to its treatment, in particular in the wider context of the review as to the regularity of the composition of a panel of judges.<sup>1</sup>
7. While this note focusses on incidental reviews of the procedure leading to a judge's appointment, it would nevertheless appear useful, in the absence of specific data in that regard, to take into account the requirements on reviews as to the regularity of the composition of a panel of judges more generally. It would appear likely that those requirements constitute the framework within which, where applicable, the review of the appointment procedure falls, in particular with regard to procedural limits.
8. It is thus appropriate, as a first step, to present the information relating to the existence of a review as to the regularity of the procedure leading to a judge's appointment, or lack thereof, as well as its procedural framework (part I). As a second step, it will be necessary to examine the scope of the incidental review as to the regularity of the procedure leading to a judge's appointment in the Member States with relevant information in this respect (part II).

**I. EXISTENCE OF AND DETAILED PROCEDURAL RULES FOR THE REVIEW AS TO THE REGULARITY OF THE PROCEDURE LEADING TO A JUDGE'S APPOINTMENT**

9. The majority of the EU legal orders allow for an incidental or primary review as to the regularity of the procedure leading to a judge's appointment or, at least, do not

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<sup>1</sup> In many legal orders, the incidental review of the appointment of a judge to a court and, where applicable, of the procedure leading to his or her appointment falls within the more general framework of the incidental review as to the regularity of the composition of a panel of judges.

appear to preclude it (part A). That review is carried out under certain procedural rules, which are consistent with regard to consequences but which differ with regard to the arrangements for conducting the review (part B).

A. MECHANISMS FOR REVIEWING THE REGULARITY OF THE PROCEDURE LEADING TO A JUDGE'S APPOINTMENT

1. EXISTENCE OF AN INCIDENTAL REVIEW AS TO THE REGULARITY OF THE APPOINTMENT PROCEDURE

10. In some Member States, it can be said that there is the possibility of carrying out an incidental review of the procedure leading to a judge's appointment (**Germany, Austria** – at least for lay judges, **Denmark, Greece, Ireland, Italy, Latvia, Lithuania, the Netherlands** and the **United Kingdom**); however, the precise scope of that review varies.
11. As regards **Belgium**, while an incidental review is probably admissible for the judicial courts,<sup>2</sup> doubts emerge from an isolated precedent of the Conseil d'État (Council of State, Belgium) as to such a possibility for the administrative courts.<sup>3</sup>
12. In other legal orders, while specific case-law may be absent, in the light, in particular, of the more general case-law and legal literature, the possibility of an incidental review of the procedure leading to a judge's appointment appears admissible (**Cyprus, Spain, Estonia, Luxembourg, Portugal** and the **Czech Republic**) or at least not entirely excluded (**Hungary**). In **Austria**, the Verfassungsgerichtshof (Constitutional Court, Austria) expressly envisaged the possibility of such a review in the case of a professional judge, without, however, settling the matter definitively.<sup>4</sup>
13. In a number of Member States, sufficient information could not be found to take a view on the possibility of an incidental review as to the regularity of the appointment procedure per se (**Croatia, Estonia, Finland, Romania, Slovakia, Slovenia** and

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<sup>2</sup> See, to that effect, Cour de cassation (Court of Cassation, Belgium), 10 June 1926, *Pas.*, 1927, I, p. 12.

<sup>3</sup> See, in particular, Conseil d'État (Council of State, Belgium), No 179.579 of 14 February 2008.

<sup>4</sup> Verfassungsgerichtshof (Constitutional Court, Austria), judgment of 12 March 1979, G81/78 and G88/78.

**Sweden).**

14. It would appear that such an incidental review is excluded only in **Bulgaria** and **Malta**. In those States, the incidental review as to the regularity of the procedure leading to a judge's appointment in the context of an appeal does not fall within the competence of the court which must rule on the decision adopted with the participation of that judge.
15. In **France**, and likewise in relation to the division of jurisdiction, the matter of the regularity of the appointment of a judge cannot be the subject of an incidental review by a civil or criminal court. A court before which such matter is brought must nonetheless refer it to the competent administrative court for an assessment of the legality of each individual administrative act affecting the administration of justice.<sup>5</sup> On the other hand, the question of whether the assignment of a judge to a court or the selection of the members of the court is regular may be the subject of an incidental review.
16. Finally, it should be noted that certain restrictions on the possibility of an incidental review as to the regularity of the procedure leading to a judge's appointment may apply depending on the jurisdictional branch concerned. In **Germany**, for example, it is not possible to challenge the appointment of lay judges in employment disputes.

## 2. REGULARITY OF THE COMPOSITION OF A PANEL OF JUDGES AND POSSIBILITY OF REVISING A FINAL JUDGMENT

17. It would also appear useful to note that in some Member States, the question of the regularity of the composition of a panel of judges and thus, where applicable, of the procedure leading to a judge's appointment, can be raised within the framework of a procedure for revising decisions that have become final, in particular in **Germany, Denmark, Spain, France** (particularly in administrative disputes), **Finland, Ireland, Lithuania, Poland, Romania, Slovakia** and **Slovenia**.

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<sup>5</sup> See, inter alia, Cour de cassation (Court of Cassation, France), Criminal Chamber, judgment of 15 June 1982, 82-91.100.

18. As regards **Germany, Spain, Finland, Lithuania and Poland** more particularly, such a possibility is, however, excluded after a period of five years from the date on which the contested decision became final and, in any event and as in other Member States, in a situation where the applicant could have relied on the circumstances constituting the irregularity in the context of an appeal against that decision. In **Romania**, that possibility is limited to a situation in which the irregularity was raised in the context of an appeal and the court before which the matter was brought failed to rule on it.

B. CONSEQUENCES AND DETAILED PROCEDURAL RULES OF THE REVIEW

1. PROCEDURAL CONSEQUENCES OF THE EXISTENCE OF AN IRREGULARITY

19. In **all the legal orders examined**, as soon as an irregularity concerning the composition of a panel of judges or the selection or appointment of a judge is identified in accordance with the relevant criteria under national law, the consequence is systematically either the annulment or – in rare cases – the nullity of the decision handed down by the panel of judges affected by that irregularity.

2. REVIEW OF A COURT'S OWN MOTION OR SOLELY AT THE REQUEST OF THE PARTIES

20. Based on the information available, an irregularity affecting the composition of a panel of judges or, where applicable, the procedure leading to a judge's appointment may be the subject of a review of a court's own motion in **Denmark, Hungary, Latvia, Poland, Portugal, Slovenia and Sweden**. Such an approach is at least not excluded in **Finland**, the **Netherlands**, the **Czech Republic** and **Romania**. In **Belgium**, a review of an appointment decision of a court's own motion is an option, according to the Cour de cassation (Court of Cassation, Belgium), in all matters concerning trial judges and, with regard to itself, in criminal proceedings, to the exclusion of civil, social and commercial proceedings.
21. On the other hand, a review of an irregularity affecting the composition of a panel of judges must necessarily be requested in support of a plea in **Germany, Austria,**

**Spain, Estonia, Italy and Slovakia** (since 2016), in compliance with the general procedural conditions laid down for that purpose.

22. In some Member States, approaches differ depending on the jurisdictional branch involved. Thus, in **France**, such an irregularity may be the subject of a review of a court's own motion in administrative disputes but the review must be requested in civil disputes and may only be requested for the first time on appeal in criminal proceedings. In **Greece**, a review of a court's own motion is possible in administrative and criminal proceedings but the irregularity must be relied on by a party in civil disputes.

### 3. POSSIBILITY OF BEING TIME-BARRED

23. In some legal orders, the plea alleging an irregularity in the composition of a panel of judges may be subject to time-barring. Thus, in **Germany**, in criminal proceedings, a plea on appeal alleging irregularity of the composition of a panel of judges cannot be raised where the appellant was informed in advance of the composition of the trial court and would have had the possibility to challenge the regularity before the trial judges. Moreover, the irregularity relied on must have existed at the time of the last hearing or, in the case of a written procedure, the last deliberations within the panel.
24. Similarly, in particular in **France** (in civil litigation) and in **Spain**, such an irregularity must be relied on as soon as it is known to the parties, a late plea being liable to classification as procedural fraud.

### 4. OBLIGATION TO ESTABLISH THE EFFECT OF THE IRREGULARITY ON THE DECISION IN QUESTION

25. In some legal orders, a plea alleging the irregularity of the composition of a panel of judges has a particular (or 'absolute') importance, meaning that, contrary to the general rules concerning appeals, it is not necessary for a party to establish that the irregularity had an impact on the contested decision. Consequently, the mere finding of the irregularity necessitates the annulment of the decision. That is the case in particular in **Germany, Estonia, Hungary, Lithuania, Slovenia**, in some cases in **Denmark** and probably in **Finland** and **Romania**.

26. By contrast, the effect of the irregularity on the contested decision must be established, as a rule, in **Austria**. While that is also the case in **Sweden**, there appears to be a presumption in favour of the existence of such an effect provided that the irregularity concerns the composition of a panel of judges. Moreover, in some cases, it appears that the examination of the relevant case by a higher court is capable of remedying the irregularity.

## **II. SCOPE OF THE INCIDENTAL REVIEW AS TO THE REGULARITY OF THE PROCEDURE LEADING TO A JUDGE'S APPOINTMENT**

27. An examination of the relevant criteria for the purposes of the incidental review as to the regularity of the procedure leading to a judge's appointment reveals two divergent approaches within the Member States (part A), with importance given either to the fundamental rights or to the principle of legal certainty, depending on the approach favoured (part B).

### **A. RELEVANT CRITERIA WHEN CONDUCTING AN INCIDENTAL REVIEW AS TO THE REGULARITY OF THE PROCEDURE LEADING TO A JUDGE'S APPOINTMENT**

28. Among the legal orders for which the possibility of an incidental review of the procedure leading to a judge's appointment can be said to exist, two approaches should be distinguished: the purpose of the first, a priori the majority approach, is to sanction in principle only the absence of an appointment per se, substantive irregularities and, where applicable, particularly serious formal irregularities (1), while the second, a priori the minority approach, allows all formal irregularities to be sanctioned as well (2).

#### **1. MAJORITY APPROACH: LIMITED REVIEW**

##### **a) PRINCIPLE: ABSENCE OF APPOINTMENT AND SUBSTANTIVE IRREGULARITIES**

29. In the majority of Member States in which relevant information relating to incidental reviews of the procedure leading to a judge's appointment could be found, it appears

that such reviews are, in principle, only of a limited scope. They would appear to be limited, as a rule, to a review of the existence of an appointment per se and of any substantive irregularities linked to non-compliance with eligibility criteria.

30. In the **Netherlands**, the review appears to be limited to verifying the existence of a judge's appointment per se in accordance with national law.<sup>6</sup> Similarly, in **Latvia**, importance is placed on verifying whether the persons composing a panel of judges have been appointed and confirmed in accordance with the applicable regulations and, consequently, whether those persons are in fact judges.
31. However, in the absence of relevant case-law relating specifically to the appointment of a judge in those two Member States, it does not appear possible to make a definitive statement on the precise scope of that review.
32. In **Germany**, it is in principle necessary to verify, first, whether the appointment of the judge is valid in itself and, secondly, whether the person is actually qualified for the appointment. In the case of a professional judge, it must therefore be verified, in particular, whether he or she has been issued his or her appointment document; in the case of a lay judge, he or she must, inter alia, have taken an oath in accordance with applicable regulations.<sup>7</sup> A similar approach probably prevails in **Italy**, where, in the context of an infringement of the rules relating to the appointment or the other conditions on the capacity of a judge, it is necessary, in particular, to identify irregularities linked to the fact that a decision has been delivered by a person who is not invested with the function performed. Although there is no specific case-law in this respect, it appears that the review carried out in **Poland** at least relates to the existence of the appointment per se.
33. In that context, it would appear that in some Member States, the principle of a 'de facto judge' or 'de facto official' may come into effect in order to limit the impact of an irregularity linked to the appointment of a judge on court proceedings in which he

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<sup>6</sup> See, inter alia, Hoge Raad (Supreme Court, Netherlands), judgment of 13 April 2018, 17/04820.

<sup>7</sup> See, inter alia, Bundesgerichtshof (Federal Court of Justice, Germany), judgment of 22 May 2003, 4 StR 21/03, and order of 26 April 2005, X ZB 17/04.

or she participated.<sup>8</sup>

34. In that regard, the law of the **United Kingdom** has certain specific features, in that the scope of the review appears to be even more limited than in the abovementioned legal orders. According to the case-law, the acts of a judge remain valid in principle even in the event that the appointment of the latter is invalid. In order to ensure, inter alia, legal certainty and public confidence in the legal system, as well as to avoid disputes concerning the procedure leading to a judge's appointment, the principle of the 'de facto judge' applies in particular to a situation in which the appointment or election of a judge is irregular owing to circumstances, unknown to the public, such as non-compliance with eligibility criteria, the responsible entity's lack of power of appointment/election or a defect or irregularity relating to the exercise of the power of appointment/election.<sup>9</sup> In another decision, it was considered that whatever the circumstances in which a judge was appointed, the decisive factor is his or her due performance of the functions of a judge in accordance with the law ('it is the office that matters, not the incumbent').<sup>10</sup>
35. Consequently, a judgment delivered by a judge whose appointment is vitiated by an irregularity remains valid in principle, provided, however, that the legal solution adopted by that judge is not erroneous. It is therefore interesting to note that **United Kingdom** case-law clearly attaches more importance to the substantive solution than to the regularity of the appointment/election of the judge concerned.
36. In addition, it should be noted in this context that, in **France**, the effects which the Cour de cassation (Court of Cassation, France) recognises as being attendant in matters of criminal law upon the annulment of an appointment decision by the administrative judge differ depending on how serious the irregularity of that decision is. Once the appointment has been annulled on the grounds of a simple error of law,<sup>11</sup>

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<sup>8</sup> While this approach does not a priori constitute a review criterion per se, but rather a way of mitigating particular consequences relating to the existence of an irregularity, it nevertheless seems relevant – at least for the purposes of this note – to include it as part of the scope of the review.

<sup>9</sup> Court of Appeal (England & Wales) (United Kingdom), *Fawdry & Co (A Firm) v Murfitt v Lord Chancellor's Department* [2002] EWCA Civ 643, and *Edgar John Coppard v HM Customs and Excise* [2003] EWCA Civ 511.

<sup>10</sup> Court of Appeal (England & Wales) (United Kingdom), *In Re James (An Insolvent)* [1977] 1 Ch. 41, 65/6.

<sup>11</sup> The ground for annulment must be based on considerations extrinsic to the appointment decree, for

the judge concerned must be regarded as having been legally invested with his or her functions for as long as his or her appointment was not annulled. The annulment thus does not have a retroactive effect.<sup>12</sup>

37. Finally, as regards an irregularity in the procedure leading to a judge's selection to a panel, it would appear useful to note that in **Spain**, such an irregularity can in principle be justified on the basis of objective, reasonable and non-arbitrary criteria in the light of the circumstances of the case, more particularly the needs of the service, inter alia with regard to workload.<sup>13</sup> Account may also be taken of the composition of the panel as a whole, meaning that a change of judge rapporteur, for example, will be of no significance, since the judge initially appointed will still be a member of the panel.<sup>14</sup>

b) EXCEPTION: PARTICULAR SERIOUSNESS OF THE  
FORMAL IRREGULARITY

38. In a number of States, it nevertheless appears that a formal irregularity in the procedure leading to a judge's appointment may have an effect on a decision handed down by the latter where that irregularity is particularly serious. It should be recalled that the absence of information relating to other Member States does not necessarily imply that such an irregularity would in no event come into consideration for the purpose of setting aside a judicial decision.
39. In **Germany**, a review as to the regularity of the composition of a panel of judges is limited to the existence of a 'flagrant' – that is to say serious or obvious – formal irregularity based on an unacceptable legal opinion, meaning that the composition must be regarded as 'arbitrary'. A mere procedural error is therefore not sufficient; there must be an irregularity based on considerations which are incomprehensible, untenable or extraneous to the proper handling of the matter.<sup>15</sup>

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example sanctioning an infringement of a provision of the general civil service statute and not arising from an infringement of rules governing the organisation of the judiciary.

<sup>12</sup> Cour de cassation (Court of Cassation, France), Criminal Chamber, judgment of 31 March 1993, No 93-80126.

<sup>13</sup> Tribunal Constitucional (Constitutional Court, Spain), judgment 238/1998 of 15 December 1998, and Tribunal Supremo (Supreme Court, Spain), judgment 556/2006 of 31 May 2006.

<sup>14</sup> Tribunal Supremo (Supreme Court, Spain), judgment 875/1996 of 10 December 1996.

<sup>15</sup> Bundesgerichtshof (Federal Court of Justice, Germany), order of 29 April 2004, V ZB 46/03.

40. As regards the case of an irregularity affecting the procedure leading to a judge's appointment more specifically, the irregularity must be of such seriousness that the composition of the panel of judges, in the case in question, must appear to have been the subject of manipulation.<sup>16</sup> Without ever having had the opportunity to find the existence of such a circumstance, the Bundesgerichtshof (Federal Court of Justice, Germany) has nevertheless stated that where the regulations on judicial organisation provide for the election of a judge by a commission, the seat of that judge can be considered as having been manipulated only in the event that that election cannot be classified as an election in the legal sense.<sup>17</sup>
41. In that context, it is specified that in **Austria**, in the case of lay judges sitting in criminal proceedings, an irregularity linked to the selection of such a judge contrary to the order set out in the list laid down for that purpose will not render the judgment void unless that change of order was arbitrary.<sup>18</sup>
42. Likewise in the context of an irregularity affecting the selection of a judge to a panel, in **Spain**, such an irregularity may give rise to the annulment of a decision adopted by the latter as soon as that selection has an impact on the impartiality of the judge concerned, where the party to the dispute is deprived, in the case in question, of his or her possibility of objecting to that judge,<sup>19</sup> or where that selection entails an arbitrary alteration of the panel of judges.<sup>20</sup>
43. Moreover, the research shows that the seriousness of the irregularity can also have an impact on the application of the principle of the 'de facto judge' or 'de facto official'.
44. Thus, in the **United Kingdom**, the application of the principle of the 'de facto judge' reaches its limit with regard to persons having sat in a panel of judges while being

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<sup>16</sup> Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 27 October 1996, 2 BvR 1375/96.

<sup>17</sup> Bundesgerichtshof (Federal Court of Justice, Germany), order of 26 April 2005, X ZB 17/04, and judgment of 14 October 1975, 1 StR 108/75. See also Bundesverwaltungsgericht (Federal Administrative Court, Germany), judgment of 21 June 1988, 9 C 141/86.

<sup>18</sup> Oberster Gerichtshof (Supreme Court, Austria), decisions of 22 January 2007, 15Os48/06g and Others, and of 15 February 2005, 14Os100/04 and Others.

<sup>19</sup> Tribunal Constitucional (Constitutional Court, Spain), judgment 164/2008 of 15 December 1998.

<sup>20</sup> Tribunal Constitucional (Constitutional Court, Spain), judgment 152/2015 of 6 July 2015.

aware of their lack of competence to do so ('usurpers'). Where a balance must be struck between the principle of legal certainty, on the one hand, and that of the administration of justice by an 'honest' and impartial tribunal, on the other, the application of the principle of the 'de facto judge' reaches a limit in the partiality of the judge concerned.<sup>21</sup> It is important to emphasise that a person convinced of his or her fitness to sit as a judge without taking the appropriate measures to verify that fitness is not, as a result, a 'usurper'. It is therefore interesting to note the 'subjective' nature of this approach.

45. It is also important to note that in **France**, certainly in criminal proceedings, where the appointment of a judge has been declared void on the grounds of particular seriousness by the Conseil d'État (Council of State, France), the decision delivered with the participation of that judge may be set aside even if it was delivered before the decision of the administrative judge. The principle of the 'de facto official' is thus not applicable. A serious irregularity of that nature vitiates appointments of pure form, namely those intended to give a title to a judge without the latter actually occupying the function, for example in order then to be able to appoint him or her immediately to another post which requires that title.<sup>22</sup>

## 2. MINORITY APPROACH: REVIEW OF SUBSTANTIVE AND FORMAL IRREGULARITIES

46. In other Member States, a less restrictive approach appears to prevail, by which simply failing to have regard to the legal framework applicable to the appointment appears to be sufficient to justify the annulment of a decision delivered with the participation of the judge in question.
47. Thus, in **Belgium**, at least with regard to the practice of the judicial courts (Cour de cassation (Court of Cassation, Belgium)) when reviewing the appointment of a judge,

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<sup>21</sup> Court of Appeal (England & Wales) (United Kingdom), *Fawdry & Co (A Firm) v Murfitt v Lord Chancellor's Department* [2002] EWCA Civ 643, and *Edgar John Coppard v HM Customs and Excise* [2003] EWCA Civ 511.

<sup>22</sup> Cour de cassation (Court of Cassation, France), Criminal Chamber, judgment of 4 June 1981, No 80-92232.

simply failing to have regard to the legal framework applicable to the composition of a panel of judges is sufficient to justify the annulment of a decision handed down by the latter. More particularly, the review is not limited to manifest irregularities which could affect the act.<sup>23</sup> In the light of the Belgian legislation that allows for an incidental review of all acts, both regulatory and individual, and in particular acts of judicial organisation such as a decision appointing a judge, this broad approach would probably apply in the event of an incidental review of such decision and the related procedure. It should be noted, however, that there is no specific case-law in that regard.

48. In **Ireland**, on the one hand, a decision imposing a criminal conviction was overturned by the High Court on the ground that the appointment of the judge who delivered it was irregular in that he had not met the minimum requirements for his appointment, in this case prior activity as a lawyer for a particular period of time.<sup>24</sup>
49. On the other hand, as regards in particular a case concerning the irregularity of the maintenance in office of a criminal judge and the unconstitutional attempt by the Irish legislature to validate retroactively all the acts delivered by him, the convictions handed down by that judge were quashed by the High Court, a decision upheld on appeal by the Supreme Court, by reason, in essence, of an infringement of the right to a fair trial, which encompasses the right to be tried by a judge appointed in accordance with the applicable constitutional provisions.<sup>25</sup> A different approach, favouring legal certainty in view of the large number of acts delivered by the judge in question, was formulated only in one dissenting opinion of the Supreme Court.
50. Moreover, in **Lithuania**, likewise regarding the maintenance of the appointment of a judge by presidential decree, the Aukščiausiasis Teismas (Supreme Court, Lithuania) quashed a judgment handed down by a lower court by reason of an irregularity in the selection of the judge concerned, who had presided over a case which was not among

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<sup>23</sup> See, to that effect, Cour de cassation (Court of Cassation, Belgium), judgment No C.09.0130 of 4 November 2011.

<sup>24</sup> High Court (Ireland), *The State (Walshe) v. Murphy* [1981] IR 275.

<sup>25</sup> Supreme Court (Ireland), *Shelly v. District Justice Mahon* [1990] 1 IR 36; see also *Glavin v. Governor of Mountjoy Prison* [1991] 2 IR 421.

those covered by the extension of the mandate.<sup>26</sup> The argument based on the fact that the judge in question had been appointed because of the inability of a sitting judge to attend was expressly rejected. It is not apparent from either the legal literature or the case-law that a certain level of seriousness of the irregularity is required for the purposes of the review conducted; a simple failure to have regard to the legal framework applicable to the appointment is sufficient.

51. A broad approach also appears to be favoured in **Greece**, where any irregularity linked to non-compliance with the provisions on the composition of a court is in principle liable to entail the annulment of the decision under appeal. In the absence of specific case-law in that regard, the legal literature takes the view that that also applies to irregularities affecting the procedure for appointing judges.
52. Finally, a similar approach appears to prevail in **Hungary**, in so far as it appears possible to contest any infringement of the procedural rules relating to the composition of a panel of judges provided that it can be identified without necessitating an in-depth examination of the legal and factual framework of the particular case in question.

#### B. FUNDAMENTAL RIGHTS AND LEGAL CERTAINTY

53. It would appear difficult to draw conclusions of a general nature concerning the link, particularly with regard to the principle of legal certainty, between the irregularity found in the course of the review carried out, on the one hand, and a possible infringement of a fundamental right, on the other.
54. In some Member States, it is not necessary to rely on a fundamental right where the subject matter of the review is limited to compliance with procedural rules. That is the case, for example, in the **Netherlands**, where the absence of an appointment of a judge would mean a simple failure to have regard to the rules on the organisation of the court, resulting in the nullity of the contested decision.
55. It is nevertheless clear that in many legal orders, the purpose of the review as to the

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<sup>26</sup> Aukščiausiasis Teismas (Supreme Court, Lithuania), judgment of 21 March 2007, No 3K-3-117/2007.

regularity of the composition of a panel of judges and, where applicable, of the procedure leading to a judge's appointment is to guarantee either the right to a lawful judge (in particular in **Germany, Belgium, Greece** and, essentially, **Ireland**) or the right to be judged by an impartial judge (in particular in **Spain, Latvia** and **Slovenia**). Any assessment of an irregularity capable of justifying the annulment of a decision in accordance with the requirements set out above therefore necessitates an assessment of whether such a right has actually been infringed.

56. With regard to the minority approach and the Member States favouring, in essence, the principle of legality, in particular **Belgium**, it is apparent from the case-law of the Cour de cassation (Court of Cassation, Belgium) that any infringement of the procedural rules on the composition of a panel of judges constitutes in itself an infringement of the right to a lawful judge. Consequently, observance of the right to a lawful judge appears to cover the whole framework of the judicial organisation where the appointment of a judge is concerned. In **Ireland**, the Supreme Court clarified, particularly with regard to the constitutional requirements for appointing a judge, that there is nothing more fundamental in a democratic State than the administration of justice before a competent court established by a law which itself respects the Constitution.<sup>27</sup>

57. On the other hand, as regards the majority approach, it appears that, aside from situations in which an appointment is absent and those in which there is a substantive irregularity, such as where the conditions of a person's eligibility are not met, only a particularly serious formal irregularity can constitute an infringement of a fundamental right. In that regard, it appears that the seriousness of the irregularity affecting the composition of a panel of judges must include an element which could be regarded, in essence, as fraudulent (in **Germany** and, in the context of lay judges, in **Austria**: where the composition is arbitrary or manipulated; in the **United Kingdom**: where the judge is regarded as a 'usurper'; in **Spain**: where there is deprivation of part of the possibility of challenging a judge or an arbitrary alteration of the panel of judges; in **France**, but outside the context of fundamental rights: in

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<sup>27</sup> Supreme Court (Ireland), *Shelly v. District Justice Mahon* [1990] 1 IR 36, according to Mr Justice Walsh.

cases of appointments of pure form).

58. This approach appears to be justified by a desire to uphold the principle of legal certainty. In this regard, it should be noted that in **Germany**, the Bundesverfassungsgericht (Federal Constitutional Court, Germany) had the opportunity to specify that, notwithstanding its fundamental importance for individuals, the purpose of the right to a lawful judge, as enshrined in the German Constitution, is in principle only to prevent the risk of manipulation of judicial institutions and expressly emphasised that such a restriction is justified in terms of legal certainty.<sup>28</sup>
59. In that context, it should be noted that in the case-law of the **United Kingdom** applying the principle of the ‘de facto judge’, that approach is justified in particular with regard to Article 6 of the ECHR, in so far as that principle is intended to protect any person who has brought an action before a tribunal, considering it to be a duly constituted tribunal, and that that principle seeks to preserve the swiftness, legal certainty and stability of the court system and public confidence in it.
60. Finally, it may be observed that in the **Czech Republic**, during a primary review of the assignment of a judge to the Nejvyšší Soud (Supreme Court, Czech Republic) which resulted in the annulment of that assignment owing to a procedural flaw, the Ústavní Soud (Constitutional Court, Czech Republic) decided to uphold the decisions handed down by the chamber in which the judge in question sat, giving priority to the principles of the protection of the legitimate confidence of citizens in the law and the protection of good faith.<sup>29</sup>

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<sup>28</sup> Bundesverfassungsgericht (Federal Constitutional Court, Germany), order of 27 October 1996, 2 BvR 1375/96; see also Bundesgerichtshof (Federal Court of Justice), order of 26 April 2005, X ZB 17/04.

<sup>29</sup> Ústavní soud (Constitutional Court, Czech Republic), judgment of 12 December 2006, No Pl. ÚS 17/06-2.

## CONCLUSION

61. It can be stated that in the vast majority of the Member States examined, a review as to the regularity of the procedure leading to a judge's appointment in the course of a procedure is possible or at least not automatically excluded.
62. While in many Member States, that review is a priori limited to the existence of the appointment per se and, where applicable, the absence of substantive irregularities linked to the eligibility requirements of the person concerned, it nevertheless appears that a formal irregularity affecting the procedure leading to a judge's appointment may be the subject of an incidental review where that irregularity is particularly serious. It appears that that seriousness must, in essence, take the form of an element which could be regarded as essentially fraudulent.
63. It is only in a limited number of Member States that the annulment of a decision adopted by a panel of judges appears to be justifiable by any failure to have regard to the legal framework applicable to the composition of the latter, and therefore by both substantive and formal irregularities without the condition of particular seriousness. However, it is important to note that there is very little specific case-law in that regard and that this conclusion, which is based inter alia on the application of more general rules, remains, in part, hypothetical.
64. This difference in approach is reflected in the conditions under which an irregularity in the appointment of a judge involves, in the different Member States, an infringement of the right to a lawful judge or the right to be tried by an impartial judge. Indeed, the threshold used for the assessment of an irregularity generally corresponds to that used for the infringement of such a right. It may thus take the form of the failure to have regard to any particular rule of judicial organisation where the appointment of a judge is concerned or the suspected manipulation of a panel of judges, or even the presence of a judge who is aware of his or her lack of eligibility to exercise the function.
65. With regard to the detailed procedural rules for an incidental review as to the regularity of the composition of a panel of judges and, where applicable, of the procedure leading to a judge's appointment, all the legal orders of the European Union

that have information on this point penalise an irregularity found in this regard either by the annulment or – in rare cases – the nullity of the decision delivered by the panel of judges affected by the irregularity.

66. A number of Member States classify the issue of the regularity of the composition of a panel of judges as a privileged ground of appeal, in particular with regard to the absence of need to establish the effect of the irregularity on the contested decision.
67. Finally, while many Member States allow for a review of this matter of a court's own motion, such an approach is not systematic.

[...]