Research and Documentation Directorate

RESEARCH NOTE

Cross-appeals

[…]

Subject :
- Cross-appeals before the Court and the highest courts of the Member States.
- The power of the highest courts of the Member States to rule on the merits of a case.

[…]

June 2021
[…]

SUMMARY

INTRODUCTION

1. The Research and Documentation Directorate (DRD) has received a request for a Research Note on the practice of the highest courts of the Member States of the European Union with regard to cross-appeals and the power of those courts to address the merits of cases.

2. The DRD is asked to examine, in Member States' legal systems which empower the highest courts to reserve cases for determination by themselves, whether or not parallelism exists between the main appeal and the cross-appeal and whether the absence of cross-appeals means that the pleas of the successful party before the lower court that have been rejected by that court are no longer addressed by the higher court once it has reserved the case for determination by itself.

3. This Research Note covers the practice of the highest courts of 15 Member States, namely **Austria**, **Belgium**, **Bulgaria,** the **Czech Republic**, **Finland**, **France**, **Germany**, **Ireland**, **Italy**, **Luxembourg**, the **Netherlands**, **Poland**, **Romania**, **Slovenia** and **Sweden**.

4. First of all, before examining the existence of any parallelism between the main appeal and the cross-appeal, it will be necessary to determine which legal systems provide for the right to lodge a cross-appeal and to examine the conditions for the exercise of that right (Part I). Then, as regards the power of highest courts to reserve cases for determination by themselves, the extent of the highest courts' power to rule on the merits of a case will be measured (Part II). Lastly, in the event of a case being remitted to a lower court after being set aside, the receiving court must be determined (Part III).

I. RIGHT TO LODGE A CROSS-APPEAL

5. For the purposes of this Research Note, a cross-appeal is defined as an appeal lodged in response to a main appeal brought before a highest court. It is a cross-appeal in the sense that it implies the prior existence of a main appeal and may, in principle, be lodged after the expiry of the time limit for a main appeal.

A. STATES WITH NO PROVISION FOR CROSS-APPEALS

6. First of all, it should be noted that **Austria**, **Belgium**, the **Czech Republic**, **Finland**, **Poland**, **Slovenia** and **Sweden**[1] *make no provision in their legislation for the possibility of lodging a cross-appeal.*

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[1] With the exception of some areas of administrative law, such as fiscal procedure, in which the respondent of a main appeal may lodge his or her own appeal after the expiry of the time limit (Chapter 69, Paragraph 29, of the Skatteförfarandelag (2011:1244) [Law (2011:1244) on fiscal procedure]).

7. In **Austrian law**, each party intending to contest a judgment is required to lodge an appeal independently of the other party. The appeal, moreover, may only be brought by one of the parties that has been wholly or partially unsuccessful in its submissions. The same applies in **Polish law**, in which the respondent to the appeal cannot itself contest the impugned decision after service of the main appeal[2]. In **Czech** law, the appeal must always challenge the operative part of the contested decision and not only its grounds.

8. In **Belgium**, if both parties lodge an appeal on points of law against the same decision, each of them is required to observe the prescribed formalities and time limits[3]. In addition, the highest court can adjudicate only on the parts of the decision indicated in the application initiating the proceedings, which means that a cross-appeal is not permitted.

9. In **Finland** and in **Sweden**, the admissibility of any appeal is subject to a *leave to appeal*, which is granted only on condition that the importance of the case for the consistency of case-law or the existence of a procedural defect or of a serious error justifying the setting aside of the decision is demonstrated[4]. Accordingly, if the respondent party to an appeal also wishes to challenge the contested decision, it must also apply in its turn for leave to appeal.

B. STATES PROVIDING FOR CROSS-APPEALS

10. In the case of legal systems that provide for the possibility of lodging a cross-appeal, a distinction must be made between those in which the admissibility of the cross-appeal is subject to the same conditions as the main appeal, except for the time limits for lodging the respective appeals[5], which means that challenging the operative part of the decision is a condition of admissibility of the cross-

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2 The respondent may, however, bring a counterclaim [*roszczenie wzajemne* ; see, for example, Article 204 of the Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure, Dz. U. 1964, No 43, item 296, consolidated text as amended ; 'the KPC')]. Such a counterclaim is admissible if it is associated with the appellant's claim or if it relates to a debt likely to be counterbalanced by the debt included in the initial claim. This instrument cannot, however, be classed as a cross-appeal, because it cannot have the effect of extending the subject matter of the dispute and implies a relationship between the respondent's debt and that of the appellant.

3 Article 1083, first paragraph, of the Code judiciaire/Gerechtelijk Wetboek (Judicial Code).

4 For **Finland**, see Chapter 30, Paragraph 3(1) of the Oikeudenkäymiskaari (Code of Judicial Procedure), described at https://korkeinoikeus.fi/en/index/lausunnot/leavetoappeal.html, as well as Paragraphs 109 and 110 of the Laki oikeudenkäynnistä hallintoasioissa (Law No 808/2019 on Administrative Judicial Procedure) [Administrative Judicial Procedure Act - Korkein hallinto-oikeus (kho.fi)]. For **Sweden**, see Chapter 54, Paragraph 10, of the Rättegångsbalk (1942:740) (Swedish Code of Judicial Procedure), as well as Paragraph 36 of the Förvaltningsprocesslag (1971:291) (Law (1979:291) on Administrative Judicial Procedure ; 'the FPL').

5 This is the case in **Bulgaria**, **Germany** and **Italy**.

appeal (Part 1), and those in which the cross-appeal need not necessarily seek the setting aside of the decision as set out in the operative part[6] (Part 2).

1. CHALLENGING THE OPERATIVE PART OF THE DECISION AS A CONDITION OF ADMISSIBILITY OF A CROSS-APPEAL

11. In **Bulgaria**[7], **Germany**[8] and **Italy**[9], it is open to the respondent to the main appeal to lodge a cross-appeal contesting the decision impugned by the main appeal on condition that he or she contests the operative part of that decision. To be admissible, the cross-appeal must consequently be lodged by a party whose submissions were at least partly unsuccessful, and so it cannot challenge only the grounds of the decision impugned by the main appeal. Furthermore, the cross-appeal must be lodged within the time limit for responding to the main appeal[10] and is subject to the same admissibility conditions as the main appeal, with the exception of the time limit for lodging the appeal. Lastly, its fate is linked to that of the main appeal. In practice, the withdrawal or inadmissibility of the latter will result in the rejection of the cross-appeal.

12. As regards its relationship with the main appeal, in some legal systems the cross-appeal may relate to a part of the impugned decision that has not been contested by the main appeal. In **Germany**, a cross-appeal, in the context of civil proceedings, requires a complaint by the party lodging the cross-appeal, a complaint that must arise from the decision delivered by a lower court[11]. In addition, the criterion used to assess the admissibility of a cross-appeal is a *connection with the subject of the appeal* ; in other words, the cross-appeal must be directly related, economically or legally, to the main appeal.

13. In **Bulgaria**, the *interest* of the respondent to the main appeal *in bringing appeal proceedings* is taken into account. The cross-appeal may thus relate to a part of the impugned decision that was not the subject of the main appeal in circumstances in which that part of the decision would have unfavourable consequences for the respondent if the main appeal were allowed. In any other

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6 The systems in question are those of **France**, **Ireland**, the **Netherlands** and **Romania**

7 Article 287 of the Grazhdanski protsesualen kodeks (Code of Civil Procedure ; 'the GPK').

8 Bundesgerichtshof (Federal Court of Justice, Germany), order of 16 March 1983, IVb ZB 807/80, *Neue Juristische Wochenschrift* (NJW), 1983, p. 1858, and of 31 May 1995, VIII ZR 267/94, paragraph 18.

9 Article 371 of the Codice di procedura civile (Code of Civil Procedure ; 'the CPC').

10 In **Germany**, a cross-appeal may be lodged within one month following the notification of the appeal. See the second sentence of Paragraph 554(2) of the Zivilprozessordnung (Code of Civil Procedure ; 'the ZPO') as well as the second sentence of Paragraph 127(2) and the first sentence of Paragraph 141 of the Verwaltungsgerichtsordnung (Code of Administrative Court Procedure) of 21 January 1960 (BGBl. I, p. 686), as amended by the Law of 3 December 2020 (BGBl. I, p. 2694) ; 'the VwGO'.

11 Bundesgerichtshof (Federal Court of Justice) ; see footnote 8.

circumstances a cross-appeal cannot extend the subject matter of the original appeal.

2. THE POSSIBILITY OF LODGING A CROSS-APPEAL WITHOUT CONTESTING THE OPERATIVE PART OF THE DECISION

14. In **France**, **Ireland**, the **Netherlands** and **Romania**[12], the party that has been wholly successful may lodge a cross-appeal concerning the rejection of some of the pleas that it had submitted before the lower court. This means that contesting the operative part of the impugned decision is not a condition for the admissibility of the cross-appeal. In those legal systems, a cross-appeal may extend the subject matter of the dispute by requiring the highest court to examine the pleas rejected by the lower court which have not been contested within the scope of the main appeal.

15. In **Romania**, provision has been made for the option of contesting only the grounds of a decision in order to avoid the possibility that considerations which could be prejudicial to one of the parties are vested with the *authority of res judicata*. Considerations which have not been contested by means of an appeal or cross-appeal take on the authority of *res judicata*.

16. In **France**, the criterion laid down in the legal system is that of an *interest in bringing proceedings*. Respondents whose situation is liable to be changed if the main appeal is allowed may therefore contest the grounds of the decision that are prejudicial to them. In the system of administrative law, the admissibility criterion is *indivisibility of the dispute*. Although the cross-appeal may relate to grounds other than those contested by the main appeal, to be admissible it must nevertheless concern the same dispute – a concept that is not to be confused with the impugned decision but seems to correspond to the German concept of *connection with the subject of the appeal*.

17. In **Ireland**, cross-appeals are not limited, in principle, to contesting the operative part of the decision but must nevertheless be the subject, on the same basis as the main appeal, of *leave to appeal* granted by the highest court, which implies the need to demonstrate the existence of a question of general or legal interest.

II. EXAMINATION OF THE MERITS BY THE HIGHEST COURT

18. In the event that the highest court allows an appeal – be it the main appeal or a cross-appeal – and sets aside the decision of the lower court, apart from an order remitting the case to a lower court, most legal systems also provide for an option or obligation for the highest court to bring the dispute to a conclusion by ruling on the merits. This mechanism may be described as the power of the highest court to reserve a case for determination by itself. A study of the national

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[12] Articles 461, 472(1) and 491 of the Codul de procedură civilă (Code of Civil Procedure), adopted by Legea nr. 134/2010 (Law No 134/2010), of 1 July 2010 (*Monitorul Oficial al României*, No 485 of 15 July 2010).

contributions, however, reveals that 'examining the substance of the dispute' or the option of 'ruling on the merits' reflects the more commonly used terminology in the legal systems under examination. For the purposes of this Research Note, we shall therefore use these terms in preference to 'the power to reserve a case for determination by itself'. Having studied the conditions in which highest courts can rule on the merits of a case (Part A), we must now consider the scope of the examination that these courts are able to conduct (Part B).

A. CONDITIONS FOR EXERCISING THE POWER TO RULE ON THE MERITS

19. While some highest courts have an obligation to bring disputes to a conclusion[13] (Part 1), others, on the contrary, are prohibited, in principle, from ruling on the merits of a case[14] (Part 2). In most of the legal systems in which it is open to the highest court to examine the merits of a case, the examination may be conducted on a discretionary basis, provided that certain conditions are fulfilled (Part 3).

1. OBLIGATION TO RULE ON THE MERITS

20. While **Austria** and **Bulgaria**, as well as **Germany** in civil cases, provide for an obligation in principle for the highest court to rule on the merits when it sets aside a decision, this obligation exists only in specific cases in **France** and **Romania**.

21. In the **Austrian** legal system, the highest court, when seised of contentious civil or criminal proceedings, is required to adjudicate on the substance of the dispute[15]. Cases are remitted to the lower court only in exceptional circumstances, inter alia if the proceedings before the latter were vitiated or if a new hearing is indispensable.

22. In **Bulgaria**, the obligation to rule on the merits exists in the general legal system and in the administrative court system ; the highest court in in both systems must adjudicate on a dispute if the decision of the lower court was set aside because of an infringement of substantive law and if there is no need to obtain new evidence. Conversely, the highest courts are bound to remit the case if the procedural rules have been significantly infringed, if new evidence has to be collected[16] or if there is a need to draw up new judicial documents[17].

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13 This is the case for the highest court of justice in **Austria** and, to a lesser extent, the highest courts in **Bulgaria** and the highest court in **Germany** when it adjudicates on civil cases. Lastly, in an exceptional case, the highest administrative court in **France** also comes into this category.

14 The systems in question are those of **Belgium**, of **Romania** in civil cases and of **Germany** in criminal cases.

15 Paragraphs 288, 288a, 349 and 351 of the Strafprozessordnung (Code of Criminal Procedure ; 'the StPO') and Paragraph 510 of the ZPO.

16 Article 222 of the Administrativnoprotsesualen kodeks (Code of Administrative Procedure).

17 Article 293(3) of the GPK.

23. In **Germany**, the highest court rules on a civil dispute if the contested decision has been set aside on grounds of an *infringement of the law* and *the state of the proceedings permits a final decision*[18]. In the absence of these conditions, the case is to be remitted to the court of appeal[19].

24. In **France**, this obligation applies to the highest administrative court when it is *seised of a second appeal* in the same case[20]. In that situation, the duration of the proceedings justifies their being brought to a conclusion by the said court.

25. In **Romania**, the highest court itself adjudicates on the merits, in principle, in criminal cases[21]. However, if the lower court has no jurisdiction, or if the court that pronounced judgment is lower than the normal court of jurisdiction, the case will be referred to the competent court.

2. OBLIGATION TO REMIT

26. **Belgium** and, in civil matters, **Romania** prohibit their highest courts, in principle, from ruling on the merits of a case. In **Germany**, it is compulsory, in principle, to remit criminal cases.

27. In **Belgium**, this prohibition in principle is enshrined in the Constitution, which prescribes that the highest court of justice 'shall not rule on the substance of cases'[22]. This principle is also applied within the system of administrative justice[23]. It is possible, however, not to remit in certain cases, particularly when, after a decision has been set aside in appeal proceedings brought on a point of law, there is *no more substance for adjudication*, for example if the courts have no jurisdiction because of an arbitration clause or for want of a legal basis. In **Romania**, the principle is essentially the same in civil matters, where a case must be remitted unless the lower court has overstepped the bounds of its jurisdiction or the authority of *res judicata* has not been respected[24].

28. In criminal proceedings in **Germany**, the highest court is bound, as a general rule, to remit the case[25]. The law provides for some derogations[26] from this rule,

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18 Paragraph 563(3) of the ZPO. The labour courts follow a very similar approach – see Paragraph 72(5) of the Arbeitsgerichtsgesetz (Law on Labour Courts) of 2 July 1979 (BGBl. I, pp. 853 and 1036), as amended by the Law of 12 June 2020 (BGBl. I, p. 1248).

19 Paragraph 563(1) of the ZPO.

20 Second paragraph of Article L821-2 of the Code de justice administrative (Code of Administrative Justice).

21 Article 438 of the Codul de procedură penală (Code of Criminal Procedure), adopted by Legea nr. 135/2010 (Law No 135/2010), of 1 July 2010 (*Monitorul Oficial al României,* No 486 of 15 July 2010).

22 Article 147 of the Belgian Constitution.

23 Article 14(2) of the consolidated Lois sur le Conseil d'État (Laws on the Council of State).

24 Article 497 of the Code of Civil Procedure.

25 Paragraph 354(2) of the StPO.

however, with a view to ensuring a simpler and faster procedure, when that procedure does not affect the outcome of the proceedings, and it thus helps to speed them up in accordance with the first sentence of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

3. OPTION TO RULE ON THE MERITS

29. Most of the highest courts that were examined for the purposes of this Research Note may rule on the merits if the conditions for exercising that power are fulfilled. In the majority of the legal systems, this implies that the matter must be ready for final decision[27] (Part a), but the power to rule on the merits may also be justified in the interests of sound administration of justice[28] (Part b)[29].

(a) NEED FOR THE STATE OF THE PROCEEDINGS TO PERMIT A FINAL DECISION

30. In the **Czech Republic**[30], **Finland**, **Germany**, **Italy**, **Poland**[31], **Slovenia** and **Sweden**, the highest court may rule on the merits of a case if the state of the proceedings permits a final decision. The same applies in administrative cases in **Austria** and in criminal cases in **France** and **Romania**.

31. In **Germany**, as a general rule, the highest administrative court takes a discretionary decision whether to remit the case or to rule on the dispute[32]. It does not rule on the dispute, however, unless the state of the proceedings permits a final decision[33]. It should be noted that the highest court's option to rule on the dispute flows from the general principle of dealing with cases in the shortest possible time and in the best possible conditions.

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26 Paragraph 354(1), (1a) and (1b) of the ZPO.

27 This applies in the **Czech Republic**, **Finland**, **Germany**, **Italy**, **Poland**, **Slovenia** and **Sweden** as well as, in administrative cases, **Austria** and, in criminal cases, **France** and **Romania**.

28 This is the case in **France** and in **Ireland**. In the **Netherlands**, a balancing of interests is carried out by the highest court.

29 It should be noted that, in **Luxembourg**, while the highest court may, in principle, 'reserve the right to rule on the merits', that option has fallen into abeyance in practice and so will not be exercised. In that legal system, in fact, the Cour de cassation (Court of Cassation) is intended to be a review body and not a court of third instance.

30 Paragraph 243d(1)(b) of zákon č. 99/1963 Sb., Občanský soudní řád (Code of Civil Procedure), Paragraph 265m(1) of zákon č. 141/1961 Sb., o trestním řízení soudním (Trestní řád) (Code of Criminal Procedure) and Paragraph 110(2) of zákon č. 150/2002 Sb., Soudní řád správní (Code of Administrative Procedure).

31 For example, Article 188 of the Ustawa z dnia 30 sierpnia 2002 r. prawo o postępowaniu przed sądami administracyjnymi (Law of 30 August 2002 concerning proceedings before administrative courts, Dz.U. 2002 No 153, item 1270, consolidated text as amended).

32 Paragraph 144(3) of the VwGO. The same applies to fiscal and social litigation.

33 Paragraph 173 of the VwGO, read in conjunction with Paragraph 563(3) of the ZPO.

32. *The state of the proceedings* is the predominant criterion in **Finland** too. In **Poland**, the substance of any administrative case must have been sufficiently clarified[34]. In criminal cases in **France**, the highest court may settle a dispute 'if the facts, as they have been sovereignly established and appraised by the court adjudicating on the merits, permit it to apply the appropriate legal rule'[35].

33. In **Austria**, the Federal Administrative Court may rule on the merits if it considers the state of the proceedings to permit a final decision and if such a decision *will contribute to the simple, efficient and cost-effective settlement of the case*[36].

34. In **Italy**, the highest court, in both civil[37] and criminal cases[38], may rule on the merits without remitting the case. It will, however, be bound by the facts that have been established by the lower court. It cannot rule on the merits of the case[39] if further factual investigations are required.

35. In **Slovenia**, the highest court may bring a dispute to its conclusion if no additions have been made to the factual context and the case concerns an *infringement of substantive law*[40]. In the event of a breach of essential procedural requirements, the case will be remitted. This condition of infringement of substantive law also exists in **Poland** in civil matters. The Polish legal system, moreover, has an additional condition, namely that the merits of a case cannot be examined by the highest court except *on the request of the appellant*[41].

36. In **Sweden**, the highest court settles the case on the merits with final effect. However, it may also remit the case, particularly in the event of a procedural defect or if it holds that the lower court should examine a question or a piece of

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34 Article 188 of the Law of 30 August 2002 concerning proceedings before administrative courts.

35 Third paragraph of Article L411-3 of the Code de l'organisation judiciaire (Code of Judicial Organisation).

36 Paragraph 42(4) of the Verwaltungsgerichtshofgesetz (Law on the Federal Administrative Court) of 4 January 1985 (BGBl. 10/1985), as amended on 5 January 2021 (BGBl. I, 2/2021).

37 Article 384(2) of the CPC.

38 Cassazione penale, Sezioni Uniti (Criminal appeal on points of law, joint chambers), judgments, 30 November 2017 – 24 January 2018, No 3464.

39 Article 65 of the Legge Fondamentale sull'ordinamento giudiziario (Fundamental law on the organisation of the courts), enacted by Regio Decreto (Royal Decree) No 12 of 30 January 1941 (GURI No 28 of 4 February 1941).

40 Articles 378 and 381(1) of the Zakon o pravdnem postopku (Code of Civil Procedure, *Uradni list RS*, No 73/07) and Article 427 of the Code of Criminal Procedure.

41 Under Article 398^{16} of the KPC, if the grounds of appeal relating to the infringement of substantive law are manifestly well founded, and if the appeal on points of law is not also founded on procedural grounds or if the latter have been shown to be ill-founded (and the proceedings have not been held invalid), the Sąd Najwyższy (Polish Supreme Court) may, upon the appellant's request, set aside the judgment under appeal and rule on the merits of the case.

evidence that it has not previously considered. If the case is remitted, the lower court is bound to respect the decision of the highest court. In practice, where a decision of the Högsta domstolen (Supreme Court) requires a closer examination of the case, the latter is often remitted to the lower instance. And so, although this is not clearly specified in Swedish legislation, the state of proceedings seems to be a key criterion in determining whether the highest court exercises its power to rule on the merits of a case.

(b) CONSIDERATION OF THE INTEREST OF SOUND ADMINISTRATION OF JUSTICE

37. In **Ireland** and in civil and administrative cases in **France**, the highest courts may rule on the merits after setting aside a case in appeal proceedings brought on a point of law if the *interest of sound administration of justice* so warrants[42].

38. In **France**, one of the determinant factors is the *length of the proceedings*. The highest court in the system of administrative law thus takes into account the risk of the State incurring liability for the unreasonable duration of judicial proceedings. Sometimes it also uses its power to settle the substance of a case in order to establish a landmark ruling in a new area or on a matter which divides judges in lower courts.

39. In **Ireland**, the *length of the proceedings* as well as the *costs already incurred* by the parties and the fact that the *points at issue have already been debated* before a lower court are the factors that the highest court considers in order to determine whether the interest of sound administration of justice requires it to settle the whole dispute.

40. In the **Netherlands**, although there is no explicit reference to the interest of sound administration of justice, various pragmatic factors connected with procedural economy are weighed in the balance by the highest court to determine whether there is a need to remit the case. The state of proceedings is also taken into account in the sense that the highest court may rule on the merits in cases where there is no need to undertake a new examination of the facts[43].

B. THE EXTENT OF EXAMINATION AFTER SETTING ASIDE

41. When the highest courts rule on the substance of the dispute after setting aside a decision, the majority of them have their competence limited to the pleas raised in the main appeal and in any cross-appeals (Part 1). The judicial system of the Netherlands, for its part, provides for the possibility of ruling on pleas which were not addressed by the lower court (Part 2). Finally, a minority of highest

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42 This condition is expressly stipulated by law in **France**, in Article L8212-2, first paragraph, of the Code of Administrative Justice and in Article L411-3, second paragraph, of the Code of Judicial Organisation. In **Ireland**, it was highlighted especially by the judgment in *McDonagh* v *Sunday Newspapers Ltd* [2018], Case No 2 IR 79.

43 Articles 421 and 422 of the Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure).

courts may address the dispute in its entirety as it was brought before the lower court (Part 3).

1. EXAMINATION LIMITED TO THE GROUNDS OF APPEAL

42. In **Austria**[44], **Bulgaria**[45], **the Czech Republic**[46], **Finland**, **Germany**[47], **Italy**[48], **Poland**[49], **Romania**[50], **Slovenia**[51] and **Sweden**, the examination of the substance of the dispute is limited by the pleas raised in the appeal or by the forms of order sought in the appeal. The highest courts thus do not analyse the pleas which were raised in the lower court but not contested in the main appeal or cross-appeal proceedings. Whether or not such pleas were examined by the lower court, moreover, has no bearing on the extent of the examination undertaken by the highest court. Besides, as underlined by the contributions relating to **German**, **Italian** and **Romanian** law, the pleas not contested by a main appeal or a cross-appeal will, in principle, have the authority of *res judicata*.

43. Strict respect in these judicial systems for the principle that the subject matter of an action is defined by the parties[52] does not, however, prevent the court from raising pleas of its own motion, particularly arguments concerning the admissibility of the appeal before the lower court or relating to matters of public policy. Moreover, in the context of non-contentious proceedings eligible for initiation of its own motion, it is possible for the highest court not to be bound by the pleas raised in the appeal[53].

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44 Paragraph 504(1) of the ZPO.

45 Article 290(2) of the GPK.

46 Paragraph 242(3) of the Code of Civil Procedure, Paragraph 265i(3) of the Code of Criminal Procedure and Paragraph 109(4) of the Code of Administrative Procedure.

47 Paragraph 557(1) of the ZPO ; Paragraph 129 of the VwGO, read in conjunction with the first sentence of Paragraph 141 of the VwGO.

48 Article 112 of the CPC, Article 609(1) of the Codice di procedura penale (Code of Criminal Procedure) and Article 104 of the Codice di procedura amministrativa (Code of Administrative Procedure).

49 Article 398^{13} of the KPC.

50 Article 442 of the Code of Criminal Procedure.

51 Articles 378 and 381 of the Code of Civil Procedure.

52 According to the principle that the subject matter of an action is defined by the parties, it is for the parties to take the initiative in pursuing proceedings. Consequently, the power of the court to raise points of its own motion is limited by its obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it (Opinion of Advocate General Saugmandsgaard Øe in *Braathens Regional Aviation*, C-30/19, EU:C:2020:374, point 124).

53 This is particularly the case in **Austria**, by virtue of Paragraph 70(1) of the Außerstreitgesetz (Law on non-contentious proceedings) of 12 December 2003 (BGBl. I 111/2003), as amended on 22 May 2019 (BGBl. I 38/2019).

44. In **Finland**, due to the existence of the leave-to-appeal procedure, the extent of the case before the highest court is circumscribed not only by the pleas raised in the application initiating the appeal but also by the application for leave to appeal and the decision by the highest court to grant it in part or in full.

45. In **Sweden**, the appeal is also subject to an authorisation procedure, as a result of which leave to appeal is granted for specific questions. Nevertheless, when the highest court – which has the particular power to adjudicate on questions of fact in addition to questions of law – adopts a different position to that of the lower court, the highest court can *reopen the case in its entirety* and rule on the merits in order to decide the residual questions[54].

2. EXAMINATION OF PLEAS NOT ASSESSED BY THE LOWER COURT

46. In the **Netherlands**, after a case has been set aside in appeal proceedings brought on a point of law, the state of proceedings is the same as when the appeal was lodged. Consequently, even though the Hoge Raad (Supreme Court) is bound, in ruling on the merits of the case, by the pleas raised in the appeal, it can nonetheless decide on the pleas which were raised before the lower court but not examined by the same and which need to be examined after the case has been set aside in order to bring the dispute to a conclusion. However, the findings of the lower court regarding pleas not contested by an appeal bind the highest court, which cannot re-examine them. The absence of a cross-appeal thus has an influence on the extent of the examination conducted by the highest court after the decision has been set aside. In short, a plea rejected by the lower court which has not been contested by means of a main appeal or cross-appeal cannot be re-examined by the highest court.

3. EXAMINATION OF THE DISPUTE AS A WHOLE IN THE INTERESTS OF SOUND ADMINISTRATION OF JUSTICE

47. Only the highest courts in the **French** and **Irish** legal systems can, after setting aside a decision in appeal proceedings brought on a point of law, rule on the dispute in its entirety as it was brought before the lower court and therefore, with a view to bringing the dispute to a conclusion, examine the pleas and arguments which were relied on before the lower court but not reprised in the main appeal or cross-appeal. As mentioned above, to reserve the dispute as a whole for determination by themselves, the French and Irish courts refer to the same criterion, namely *the interests of sound administration of justice*.

48. In **Ireland**, the role of the Supreme Court is, in principle, limited to analysing the pleas for which leave to appeal has been granted. Exceptionally, however, the Supreme Court can, if the interests of sound administration of justice so warrant, examine pleas other than those covered by the leave to appeal. In fact,

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[54] Bill 1988/89:78, pp. 26 to 31, 81 and 82, 94 et seq., 106 and 113 to 115, as well as Bill 2004/05:131 p. 188 ; Paragraph 36b of the FPL. Von Essen, U., *Kommentar till förvaltningsprocesslagen*, JUNO digital database 7C, commentary on Paragraph 36 of the FPL.

the highest court has all the powers and duties of the lower instance and may make any judgment or any order which ought to have been made[55]. In principle, pleas which have not been debated before a lower court will not be admitted[56].

49. In **France** as in **Ireland**, the existence or absence of a *cross-appeal has no effect on the extent of the examination* conducted by the highest court when it rules on the merits after setting aside a decision. In fact, it is seised of the dispute as a whole by virtue of the devolutive effect of the appeal and is responsible for examining all of the pleas raised before the lower court. It can therefore analyse the pleas which have already been examined by the lower court and do so on the same basis as those that have not yet been examined. However, it should be noted that, in the French system of administrative justice, when the appellant's pleadings hypothesise that the highest court will rule on the merits of the case, only the pleas mentioned in that context will be examined, while the other pleas will be considered abandoned.

50. Lastly, it should be pointed out that, in practice, whichever legal system is under examination, courts make little use of their power to rule on the substance of a dispute when there are still points to be settled after a decision has been set aside, particularly if this implies an assessment of the facts. In these cases, the matter is generally remitted to a lower court.

III. DETERMINATION OF COURT RESPONSIBLE FOR SETTLING THE DISPUTE AFTER SETTING ASIDE

51. In the event of remittal following the setting aside of a decision by a highest court, the way in which the court responsible for settling the dispute and the competent formation of that court are determined differs between legal systems. While some legal systems rule out having the same formation of a court adjudicate on the case after it has been remitted[57] (Part A), other legal systems, in contrast, hold that sound administration of justice requires the same judges to be seised of the case again[58] (Part B). Lastly, for a minority of legal systems, the court to which the case is remitted and the formation of that court are governed by more flexible rules that are contingent on the circumstances of the case[59] (Part C). We shall nevertheless see that, in most legal systems, the rules on determining to which court a case is remitted are subject to qualifications based

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55 Order 58, rule 29, of the Rules of the Superior Courts, which are founded on section 48 of the Courts (Supplemental Provisions) Act 1961.

56 Judgments in *Lough Swilly Shellfish Growers Co-operative Society Ltd & Atlanfish Ltd* v *Bradley & Ivers* [2013] IESC 16, [2013] 1 IR 227, and *Fitzpatrick* v *an Bord Pleanála* [2018] IESC 60.

57 The legal systems in question are those of **Belgium**, **Bulgaria**, **France**, **Italy**, **Luxembourg**, **Poland** and, in criminal proceedings, **Austria** and **Germany**.

58 This is the case in **Austria**, the **Czech Republic**, **Germany**, **Romania**, **Slovenia** and **Sweden**.

59 Freedom for the highest court to determine the court to which a case is remitted was observed in **Ireland** and the **Netherlands**. In **Finland**, neither the highest court nor the law defines the composition of the chamber hearing the case.

on the particular circumstances of the case, primarily because of the risks of bias on the part of judges or structural difficulties resulting from the nature of the court receiving a remitted case.

A. REMITTAL TO A DIFFERENT COURT OR TO THE SAME COURT IN A DIFFERENT COMPOSITION

52. For those legal systems which rule out the same chamber adjudicating on the case again, it is remitted to a different court of the same type or to the same court in a different composition. The concept of a 'court of the same type' should be understood in the sense of a court of the same level as that which handed down the decision subsequently set aside by the highest court. The court is in a different composition when a chamber comprising different judges is charged with adjudicating on the case.

53. In **Belgium**, **Bulgaria**, **France**, **Italy**, **Luxembourg** and **Poland**, the rules of procedure, in principle, exclude the possibility of remitting the case to a chamber including a judge who participated in adopting the decision set aside.

54. In **Belgium**[60], **France**, **Luxembourg**[61] and **Poland**[62], the case is remitted to a *court of the same type or to the same court differently composed*.

55. In **France**, this principle is strictly applied within the general legal system[63], as the decision issued by the court receiving a remitted case will be set aside if a judge who participated in the decision set aside sits on that court[64]. Within the system of administrative law, the court receiving a remitted case must be composed differently unless this is rendered impossible by the nature of that court[65]. The same judge can therefore rule on a case again if the court is the only one of its kind and it is structurally impossible for the chamber hearing the case to be composed differently[66]. This exception was found to be in conformity with the Convention for the Protection of Human Rights and Fundamental Freedoms in the judgment of 26 September 1995, *Diennet v. France*[67].

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60 Article 1110, first paragraph, of the Judicial Code.

61 Article 27 of the Loi du 8 février 1885 sur les pourvois et la procédure en cassation (Law of 8 February 1885 on appeals and cassation proceedings) (*Mémorial* A 1885, p. 317), as amended by the Loi du 6 avril 1989 tendant à l'humanisation de la procédure de cassation (Law of 6 April 1989 to clarify cassation proceedings).

62 Article 398^{15}(2) of the KPC.

63 Article L431-4 of the Code of Judicial Organisation.

64 Cour de cassation (**French** Court of Cassation), Second Civil Chamber, judgment of 14 October 1987, No 86-11.617.

65 Article L821-2, first paragraph, of the Code of Administrative Justice.

66 Council of State (**France**), Decision No 110332 of 29 October 1990, *Diennet*.

67 ECtHR, judgment of 26 September 1995, *Diennet* v. *France*, 18160/91, CE:ECHR:1995:0926JUD001816091.

56. Likewise, in **Bulgaria** and **Italy**, when the highest court sets aside a decision, it remits the case to the same court differently composed[68].

57. This rule is subject to a qualification in **Italy**, however. If it is necessary, after a judgment has been set aside, to rule on the questions which the court adjudicating on the merits did not examine, the Corte suprema di cassazione (Supreme Court of Cassation) remits the case to the lower court which gave that judgment[69]. Specifically, if the Supreme Court of Cassation has set aside an order, it remits the case to the same judge who issued it. A similar exception exists in **France** as well. In that legal system, in civil matters, if a decision has been set aside because of procedural irregularities, the court to which the case is remitted may be composed of the same judges who sat on the panel which set aside that decision. On this subject, the European Court of Human Rights has ruled that such an exception does not violate Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms as no new substantive element is at issue[70]. In fact, the said Court considered that there was a need to *distinguish between an appeal involving a substantive defect irredeemably affecting the impugned decision and one in which only a procedural question* is at issue. While it is possible, in the first of those scenarios, to imagine litigants having doubts as to the impartiality of the judges called upon to rehear the case, this no longer applies, in fact, in the second scenario[71].

58. Lastly, in **Austria**[72] and **Germany**[73], the principle of remitting cases to a lower court of the same type or another chamber of the same court which adopted the decision subsequently set aside is only provided for *in the context of criminal proceedings*. In other matters, the formation of the court which adopted the decision set aside by the highest court should, in principle, adjudicate on the case again in the event of remittal.

B. REMITTAL TO THE SAME CHAMBER

59. In **Austria** in non-criminal proceedings[74] and in the **Czech Republic**[75], **Germany**, **Romania**, **Slovenia** and **Sweden**, cases are remitted, in

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68 This principle flows, for **Bulgaria**, from Article 293(3) of the GPK and, for **Italy**, from Article 383 of the CPC.

69 Article 623 of the Code of Criminal Procedure.

70 ECtHR, judgment of 18 December 2008, *Vaillant v. France*, 30609/04, CE:ECHR:2008:1218JUD003060904, § 33.

71 Ibid.

72 Paragraph 43 of the StPO.

73 Paragraph 354(2) of the StPO.

74 Paragraph 510(1), read in conjunction with Paragraph 503(2) of the ZPO.

75 Paragraph 243e(2) of the Code of Civil Procedure ; Paragraph 265l(1) of the Code of Criminal Procedure ; Paragraph 110(1) of the Code of Administrative Procedure.

principle, to the same chamber of the court which adopted the decision set aside by the highest court. By way of exception, the case may be remitted to a different chamber or to a different court of the same type.

60. In **Germany**, by virtue of the right to the jurisdiction of one's 'lawful judge' (*Recht auf den 'gesetzlichen Richter*'), everyone is entitled to objective and predetermined definition of which court is responsible for which case[76]. In the event of remittal, the highest court therefore has an obligation to indicate which court will be seised of the remitted case. In civil and administrative matters, the highest court may, on a discretionary basis, remit the case to a different chamber of the lower court[77]. Remittals of this kind, however, are the exception. It may nevertheless occur for *imperative reasons of parties' confidence in the administration of justice* or for reasons of *serious doubt as to the impartiality of justice*[78]. Similarly, in the **Czech Republic**, in view of the right to the jurisdiction of one's lawful judge, the case will, in principle, be remitted to the same chamber. The Nejvyšší soud (Supreme Court) nevertheless has the option, for example, in the event of *serious procedural defects* or *doubts as to the fair assessment of the case*, especially in relation to the *impartiality of a judge or a chamber*, of remitting the case to a different chamber or, in exceptional cases, to a different court[79].

61. In the same spirit, in **Romania**, the *interest of sound administration of justice* may justify a case being remitted to another court of the same level. Lastly, *resistance from the lower court* is taken into account in **Slovenia**, where, in the event of the court of appeal refusing to follow the instructions of the highest court, the latter remits the case to a different chamber. In the **Czech Republic**, particularly in civil matters, failure to respect a binding legal assessment made by the highest court confers on that court the option of remitting the case to a different formation or a different court.

C. Determination of the court to receive a remitted case based on the circumstances of the case

62. In some legal systems, the court to which a case is to be remitted is not strictly circumscribed but depends on the circumstances of the case.

63. In **Ireland**, if the court receiving a remitted case must re-examine it in full, the remitted case is, in principle, heard by a different judge from the one who participated in the adoption of the impugned decision. However, if only one

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76 Second sentence of Article 101(1) of the Grundgesetz (Basic Law). This right is put into practice by the law and the jurisdictional order.

77 Second sentence of Paragraph 563(1) of the ZPO and Paragraph 173 of the VwGO.

78 Posser, H., Wolff, H. A. (eds), Berlit, *Beck'scher Online-Kommentar VwGO*, 56th ed., 2021, C.H. Beck, Munich, annotation No 30 under Paragraph 144 of the VwGO (as updated on 1 January 2021).

79 Paragraph 243e(3), of the Code of Civil Procedure and Paragraph 265l(3) of the Code of Criminal Procedure.

aspect of the case needs to be re-examined, the same judge hears the remitted case. In each instance, the highest court, when deciding to remit a case, can take any decision it deems appropriate in this regard and can order that the case be remitted to the court of first instance or the court of appeal, depending on the circumstances of the case.

64. In the **Netherlands**, the Hoge Raad (Supreme Court) can remit the case to the court which issued the decision set aside but also, in the event that the quashed decision came from a court of appeal, to a different court of the same type or, if it came from a court of first instance, to the court of appeal of the relevant geographical jurisdiction. The same applies in **Finland**, where the case is remitted to the same court without the highest court or legislation specifying how the chamber hearing the case is to be composed. However, when the case is being reassigned, the *risk of partiality on the part of a member of the chamber* which issued the decision set aside is taken into consideration and can justify remitting the case to a differently composed chamber[80].

CONCLUSION

65. Among the fifteen legal systems examined, seven provide for the right to lodge a cross-appeal. In four legal systems (**France**, **Ireland**, the **Netherlands** and **Romania**), challenging the operative part of the decision is not a condition of admissibility for cross-appeals, as is also the case with the provision made in Article 178(1) of the Rules of Procedure of the Court of Justice. For the three other legal systems (**Bulgaria**, **Germany** and **Italy**), parallelism exists between the main appeal and the cross-appeal in that the successful party cannot lodge a cross-appeal.

66. As regards the power of highest courts to rule on the merits of the dispute, in almost all the legal systems examined those courts cannot examine pleas which have not been raised in the context of the main appeal or cross-appeal. The appraisals made in the decision undertaken by the lower court which have not been challenged therefore cannot be re-examined. As for the pleas raised before the lower court but not examined by it, they will not be examined by the highest court either unless they are challenged by an appeal.

67. Only three legal systems (**France**, **Ireland** and the **Netherlands**) clearly provide for the option for the highest court to decide on pleas which have not been challenged by the appeal, in order to bring the dispute to a conclusion. In **France** and **Ireland**, that option confers the same powers on the highest court as those possessed by the lower court. The highest court can thus examine all the pleas raised before the lower court, including those which the latter did not examine, as well as those which were examined but have not been challenged by a main appeal or cross-appeal.

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[80] See, in this sense, Korkein oikeus (Supreme Court), judgment of 1 November 2010 (ECLI:KKO:2010:78).

68. In the **Netherlands**, this option is limited to the pleas which were not examined by the lower court. Consequently, the power of the Court of Justice to reserve a case for determination by itself, as put into practice in its judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona* (C-362/19 P, EU:C:2021:169), presents similarities with that of the Hoge Raad (Supreme Court) in the sense that the highest court can evoke pleas which have not been raised in the appeal, in order to bring the dispute to a conclusion, but that this power does not extend to pleas already examined by the lower court.

69. In the event that the case is remitted to a lower court after being set aside, the court to which it is remitted is determined according to two different principles, depending on the system under examination. On the one hand, six legal systems (**Belgium**, **Bulgaria**, **France**, **Italy**, **Luxembourg** and **Poland**) exclude, in principle, the possibility that the same judge rehears the case. This prohibition is primarily justified by the right to a fair trial and, more particularly, by the right to access to an impartial tribunal. On the other hand, the highest courts of six legal systems (**Austria** in the context of non-criminal proceedings**,** as well as the **Czech Republic**, **Germany, Romania**, **Slovenia** and **Sweden**), guided particularly by the right to the jurisdiction of one's lawful judge, remit the case in principle to the same chamber that adopted the decision set aside. Apart from these two principles, the particular circumstances of the case are generally taken into account for the purposes of determining the court to which a case is remitted.

[…]