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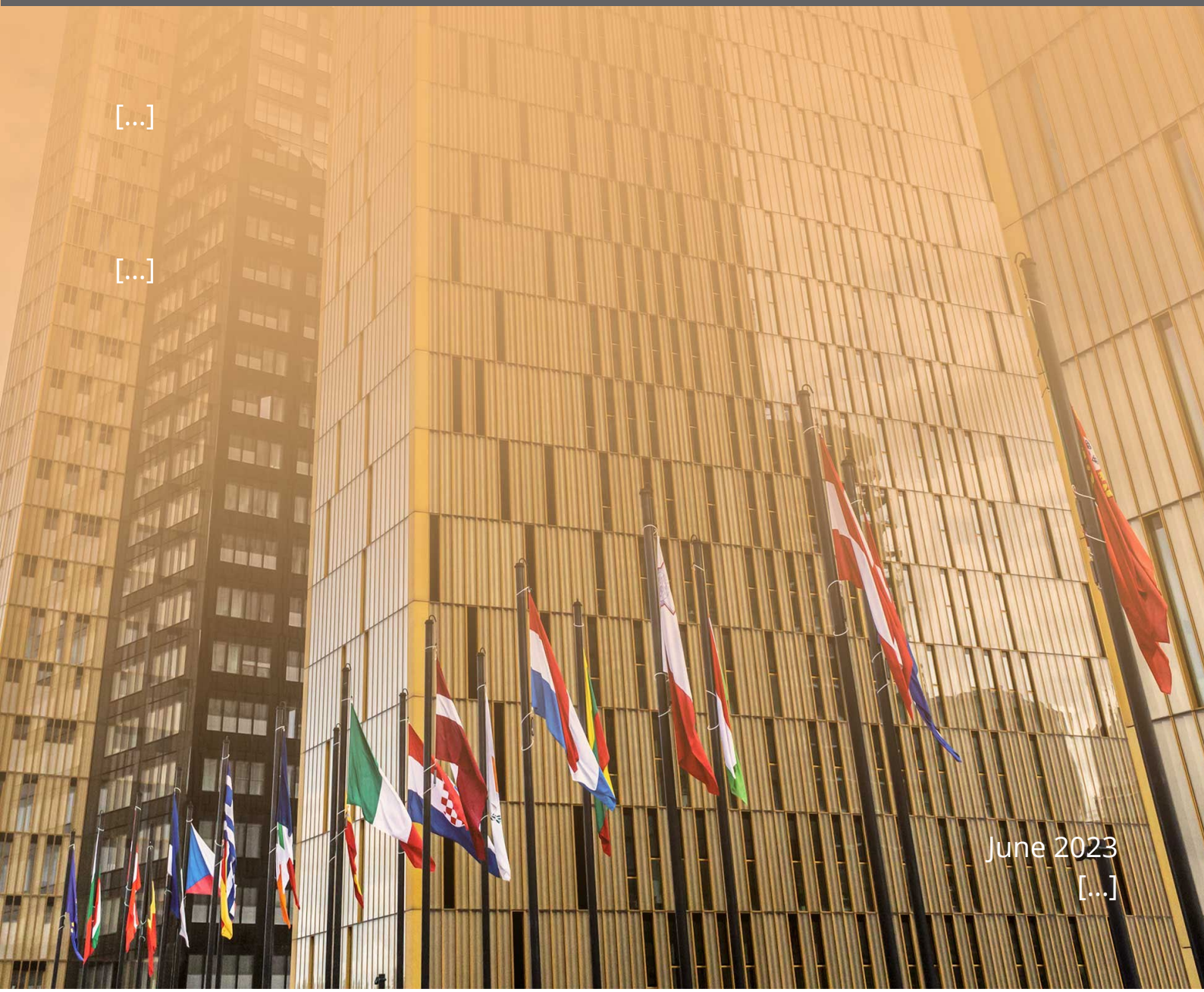
RESEARCH NOTE
OF THE RESEARCH AND DOCUMENTATION DIRECTORATE

Internal mechanisms within the higher courts of the Member States to ensure consistency of case-law



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SUMMARY

INTRODUCTION

1. The Research and Documentation Directorate (DRD) has been requested to prepare a research note on the internal mechanisms existing within the superior courts of the Member States that are aimed at ensuring consistency in the case-law, at a stage preceding and subsequent to the deliberations of the formation hearing the case.

2. The present research note covers the laws of the 27 Member States of the European Union.[1][2] It consists of a summary and 25 national contributions.

3. Depending on the legal orders, the research related to the regime applicable in one, two or all supreme courts, thus sometimes also covering the national Constitutional Court. In some Member States, information was also obtained about the mechanisms existing within the appellate courts.

4. The guidance for the request for a research note on the *internal* mechanisms designed to ensure consistency in the case-law that exist *within* the superior courts meant that both the mechanisms external to those courts, namely those aimed at obtaining a request for a binding interpretation from another court (mechanisms to prevent or resolve conflicts of jurisdiction between national superior courts or a reference to the Court of Justice of the European Union for a preliminary ruling) and those aimed at resolving divergence in the case-law between trial formations of lower courts (appeal on a point of law) could be excluded from the scope of the research.

I. OVERVIEW OF THE PROBLEM

5. As may be seen from the literature and from institutional studies, just like the search for consistency in the case-law within a legal order, maintaining consistency in the case-law within a superior court helps to ensure the generality of the law, equality before the law and legal

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certainty. [3] The last two aspects at least are essential components of the rule of law. [4]

6. However, the legitimate desire to achieve a uniform application of the law must not be pursued at any price, if it means calling into question another central component of the rule of law, namely the independence of the judges, which, moreover, is firmly entrenched both in EU law [5] and in **all** the Constitutions of the 27 Member States. [6] The desire to ensure that consistency is maintained in the case-law internal to a court cannot be synonymous with inflexibility that would restrict the necessary development of the law. Furthermore, that desire to maintain consistency cannot mean imposing a solution or giving instructions in the exercise of the judges' judicial role.

7. Nonetheless, the requirement of a uniform application of the law is also, like the fundamental right to an independent and impartial judge, one of the aspects of the right to a fair trial, guaranteed by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') [7] and by Article 47 of the Charter of Fundamental Rights of the European Union.

8. In that regard, it follows from the settled case-law of the European Court of Human Rights, embodied in the judgment in *Nejdet Şahin and Perihan*

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3 See, in particular, Council of Europe, Consultative Council of European Judges (CCJE), Opinion No. 20 (2017), 10 November 2017, 'The Role of Courts with Respect to the Uniform Application of the Law', disponible sous https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3, point 1. It might be added that such a quest increases confidence in the judicial system, enhancing, for individuals, the sense of equity and justice.

4 Council of Europe, European Commission for Democracy through Law (Venice Commission), 'Rule of Law Checklist', adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12March 2016), available at https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Checklist_FRA.pdf, paragraph 18: 'In its report [on the Rule of Law of 2011], the Commission concluded that, despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the Rechtsstaat and of the Etat de droit, which are not only formal but also substantive or material (materieller Rechtsstaatsbegriff). These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.'

5 The principle may be inferred from Article 2 and the second subparagraph of Article 19(1) TEU and also from Article 47 of the Charter of Fundamental Rights of the European Union.

6 It is apparent that the principle of the independence of judges, of the judiciary or of justice is contained in the Constitutions of all the Member States of the European Union.

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

Şahin v. Türkiiye, [8] that, on certain conditions, discrepancies in the national case-law may constitute a violation of that fundamental right. In application of that case-law, in order to determine whether contradictory national decisions adopted in similar cases have entailed a violation of that fundamental right, the ECtHR has regard to four criteria, namely '1 whether "profound and long-standing differences" exist in the case-law of a supreme court, [2] whether the domestic law provides for machinery overcoming these inconsistencies, [3] whether that machinery has been applied and, [4] if appropriate, to what effect'. [9]

9. It may be inferred that a legal order faced with the problem of a discrepancy in the case-law, may, and indeed must, have recourse to a number of mechanisms in order to reduce it. The introduction of mechanisms to ensure consistency in the case-law is recommended by the ECtHR:

> 'the Court has reiterated on many occasions the importance of setting mechanisms in place to ensure consistency in court practice and uniformity of the courts' case-law [...]. It has likewise declared that it is the States' responsibility to organise their legal systems in such a way as to avoid the adoption of discordant judgments [...]'. [10]

10. It follows that there is an obligation, for all legal orders in which the Convention is applicable, in order to ensure the consistency of the case-law, 'to organise their legal systems in such a way as to avoid the adoption of discordant judgments', that obligation having effects within each court or tribunal.

11. That consistency may be ensured by different types of mechanisms, including, in particular, mechanisms such as the establishment of courts of second instance and supreme courts, with jurisdiction to hear appeals against decisions of the lower courts. There is nonetheless a risk that those mechanisms will prove inadequate when, within the superior courts, which are required to ensure the consistency of the national case-law, discrepancies emerge in the opinions and

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8 ECtHR, judgment [GC] of 20 October 2011, *Nejdet Şahin and Perihan Şahin v. Türkiiye*, CE:ECHR:2011:1020JUD001327905, see, in particular, §§ 49 to 58.

9 Judgment in *Nejdet Şahin and Perihan Şahin v. Türkiiye*, § 53.

10 Judgment in *Nejdet Şahin and Perihan Şahin v. Türkiiye*, § 55.

interpretations expressed. It is in that context that the question arises of recourse to the internal mechanisms existing within the national superior courts that aim to ensure the consistency of their case-law.

12. The need for such mechanisms is not always obvious, however. It is clear from the research carried out that internal mechanisms that exist within the national courts designed to ensure the consistency of their case-law are not really known in the legal orders based on common law, namely the laws of **Cyprus** and **Ireland**. The absence of such mechanisms may be explained by the binding force of precedent and also by procedural rules according to which, in essence, it is for the parties, and not for the court, to show that a dispute should be settled in accordance with precedent.

13. Next, the limited number of judges in a particular court, owing to the size of the country, or to the somewhat low level of litigation – which may be attributable to the importance of arbitration or may be a consequence of the application of rules that restrict access to the supreme courts –, may be one of the reasons why particular mechanisms are not provided for or are not well developed (**Luxembourg**, **Sweden**). [11]

14. However, in the absence of such a mechanism of precedent within the meaning of the common law, numerous legal orders of continental Europe do indeed resort to mechanisms aimed at ensuring the consistency of the case-law within their courts.

15. On the basis of the results of research carried out in the context of the present research note, it seems that that objective may be achieved by mechanisms of different types. Discrepancies may be avoided, first, as a result of the establishment of organisational and procedural rules linked to a specific case (II.). Second, consistency in the case-law may be achieved by means of procedural mechanisms the application of which is not connected to a specific case (III.) and, finally, by the application of support mechanisms that indirectly contribute to the adoption of decisions that are consistent with the relevant case-law (IV.).

[11] In **Sweden**, although almost 8,000 cases are lodged before the Supreme Court and the Supreme Administrative Court, respectively, each year, only around 100 of these are accepted for consideration by each of those courts.

II. ORGANISATIONAL AND PROCEDURAL MECHANISMS APPLIED IN THE CONTEXT OF A CASE

16. The various mechanisms for ensuring that the decision to be taken by the formation hearing a case is consistent with the case-law of the court of which that formation forms part are applied at different stages of the proceedings. Thus, while some take place at the stage of the allocation of the case (A.), others are employed at the stage of the proceedings before the formation hearing the case (B.).

A. AT THE STAGE OF THE ALLOCATION OF THE CASE

17. It is apparent from the contributions that the superior courts of the Member States covered by the study resort to means connected with the internal organisation of their work to maintain the consistency of their own case-law. That applies to the rules governing the allocation of cases to specialist chambers (1.) or to specialist judges or judicial assistants (2.).

18. Generally, when the same issue is dealt with by the same individuals, the likelihood is that it will be determined in the same way. It is thus logical that divergence in the case-law may be avoided if connected cases are allocated to the same judges.

19. However, that concept clashes with provisions of national law that lay down strict rules requiring that cases be allocated in a way that precludes the judges being determined by reference to factors that characterise the case (**Germany**, **Austria**, **Estonia**, **Poland**). In some legal orders, it is considered inherent in the right to a lawful judge that cases are allocated in a predefined manner (**Germany**, **Austria**).

20. Such limitations, however, are not applicable to the designation of the judicial assistants responsible for preparing the case for trial, even in the legal orders in which they enjoy independence comparable to that enjoyed by the judges (**Sweden**, **Finland**).

1. ALLOCATION OF CASES TO SPECIALIST CHAMBERS

21. The allocation of cases to specialist chambers within the superior courts, which deal with designated disputes, is one of the structural means employed to maintain internal consistency in the case-law (this is the case, in particular, in **Germany**, **Austria** (Supreme Court and

Supreme Administrative Court), **Belgium** (Court of Cassation), **Spain** (Supreme Court and Courts of Appeal), **Finland** (Supreme Administrative Court), **France** (Court of Cassation and Council of State), **Greece** (Council of State, Court of Cassation and Administrative Courts of Appeal), **the Netherlands** (Supreme Court and Council of State), **Slovenia** (Courts of Appeal)). The choice of such specialisation by subject matter in the chambers suggests that a certain uniformity in interpretation will be achieved by the judges sitting in each of them.

22. Likewise, in the superior courts, the existence of a single chamber, sitting in a formation of limited size, is undoubtedly an effective means of avoiding as much as possible divergence in the case-law (**France** (Constitutional Court), **Luxembourg** (Constitutional Court)).

2. ALLOCATION OF CASES TO SPECIALIST JUDGES AND JUDICIAL ASSISTANTS

23. In some legal orders, the specialist knowledge of the judges themselves, together with their professional background, their experience or their knowledge in certain specific areas of law, determines, among other criteria, their appointment as Reporting Judges or as other members of the formation hearing a particular case (the idea was mentioned in the contributions relating to the following Member States: **Austria** (where the practice is followed in the Constitutional Court), **Estonia** (Courts of Appeal, Supreme Court), **Finland** (Supreme Court and Supreme Administrative Court), **Latvia** (Regional Administrative Court), **the Netherlands** (Supreme Court, Council of State, Higher Administrative Disputes and Economic Matters Court, Higher Social Security and Civil Service Court and Court of Appeal, 's Hertogenbosch), **Sweden** (Supreme Court)). A judge's specialist knowledge then becomes one of the criteria governing the allocation of cases, alongside the criteria governing the equitable allocation of cases and the 'taking turns' principle, among others. The Reporting Judge must, inter alia, ensure that the decision for which he or she is responsible is consistent with the case-law, and is able to modify the draft decision, sometimes prepared by a judicial assistant or an assistant.

24. In many legal orders, within the superior courts, judicial assistants (or judges' assistants) assist the Reporting Judges in preparing their case files or carry out research on request, thus making it easier to identify the relevant precedents. In doing so, they make an active contribution to maintaining consistency in the case-law. Where such posts exist in

the Supreme Courts, those occupying them are responsible, in the first place, for ensuring that the relevant precedents are taken into account when the case is being heard (**Germany**, **Belgium** (Court of Cassation, Constitutional Court), **Spain** (Constitutional Court and Supreme Court), **Finland** (Supreme Court and Supreme Administrative Court), **France** (Court of Cassation), **Greece** (units responsible for managing appeals, which must correlate pending cases with relevant pending or closed cases), **Lithuania**, [12] **Luxembourg** (Administrative Court [13]), **Sweden** (Supreme Court and Supreme Administrative Court [14]). The criteria governing the allocation of cases among the various judicial assistants of a court sometimes also include, as for the Reporting Judges, their specialist knowledge in one or more subject areas.

25. In **Spain** (Constitutional Court and Supreme Court), those judicial assistants or legal experts have in addition, or principally, the role of coordinators, with the task of identifying similar cases, so that they can be dealt with in a uniform manner; some of these are specialists in certain subject areas or are required to update the tools for monitoring and disseminating developments in the case-law.

B. AT THE HEARING STAGE

26. The principal mechanism for ensuring the consistency of the case-law consists in the involvement in the decision-making process of the trial court sitting in an enlarged formation, called upon to give a ruling on the case or on a point of law (A.). In addition, with a view to ensuring the consistency of the case-law, the participation of other persons also enables that objective to be achieved (B.).

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12 In **Lithuania**, it is the judges' assistants. They, working with the judges, are responsible for identifying any instances of inconsistency in the case-law. The service having such a role in the **Lithuanian** Court of Appeal brings cases found to be inconsistent with the case-law to the attention of the Presidents of the Criminal Division and the Civil Division.

13 In **Luxembourg**, moreover, a recent law aims to reinforce the personnel working in the courts by establishing a legislative framework for the post of *référendaire de justice*. Furthermore, a proposal for the creation of posts of *lecteurs d'arrêts*, as existing in the Court of Justice of the European Union, seems to be under discussion, which would further help to ensure the uniformity of the case-law.

14 In the **Swedish** Supreme Administrative Court, there are also units responsible for preparing the cases, organised by the Registrar of that court. In both of the **Swedish** Supreme Courts, moreover, Heads of Preparation, who sometimes replace the responsible judicial assistants, are responsible for managing the work of the judicial assistants and legal experts tasked with preparing the cases, grouped in preparation teams.

1. MECHANISMS INVOLVING AN ENLARGED FORMATION

(a) PRELIMINARY REMARKS

27. The principal procedural mechanism internal to a court that is capable of ensuring the consistency of its case-law is that of the referral, when a specific case is being heard, to an enlarged formation, to enable it to give a ruling on the case or on a point of law. This category encompasses all types of referrals to other judges of a court, where they deliver the decision in place of the initial formation or adopt a formal act capable of having an impact on the decision to be adopted by the initial formation.

28. Admittedly, the objectives of a mechanism consisting in such a transfer of a case to a special formation within the same court go much further than the simple need to ensure the consistency of the case-law. The significance of the case, the complexity of the problem in question, the unforeseen nature of the legal issues to be resolved are among the main reasons that justify the case being referred to an enlarged formation. However, that does not preclude that mechanism from also achieving other objectives, including that of ensuring the consistency of the case-law. [15]

29. Where such a referral to an enlarged formation is imposed by a national regulation in order to avoid divergence in the case-law, the importance of that mechanism must not be underestimated. The operation of such procedural rules is itself capable of preventing the national courts from adopting decisions that might give rise to divergence in their case-law, in so far as failure to observe those rules would entail the risk of the decision thus adopted being unlawful (in particular, **Czech Republic**, **Slovakia**).

30. In that context, as regards the legal orders that lay down an obligation to refer a matter to an enlarged formation, recourse to that mechanism reflects a principle according to which certain earlier decisions enjoy a

[15] It seems difficult to separate the objective of ensuring the consistency of the case-law from the abovementioned objectives. By way of example, in **Hellenic** law, in the Council of State, if it is envisaged that a case will be referred to an enlarged Chamber or to the Plenary Assembly because of the importance of the case, the fact nonetheless remains that, by reference to the case-law of that court, the concept of 'importance' also encompasses the need to ensure the consistency of the case-law.

special status, in so far as any departure from them, albeit possible, requires that particular steps be taken.

(b) SCOPE OF RECOURSE TO THE MECHANISM

31. As regards the types of courts in which this mechanism is applied, in the EU legal orders the tendency is for it to be employed by the Supreme Courts. That is because of their special role in ensuring the consistency of the case-law of all national courts, sometimes expressly stated in legislative provisions (in particular **Hungary**, **Poland**, **Romania**, **Slovakia**). Thus, subject to a sort of supervision on the part of the Supreme Courts, the courts of second instance often have mechanisms that allow points of law to be referred to the Supreme Courts.

32. Where such a mechanism for referring a matter to an enlarged formation is provided for within the courts of second instance, that may be justified by the fact that such courts adjudicate at last instance on a particular matter (that is the case of the Administrative Courts of Appeal in **Germany**, when they interpret the legislation of the *Land*).

33. An exception is made in **Finnish** law, where a referral to an enlarged formation by the court as initially composed is also possible within the courts of second instance.

34. That is also the case in **Croatia**, as regards the adoption of legal positions (*pravno shvaćanje*), which may be adopted not only in the Supreme Court but also within the courts of second instance.

(c) SITUATIONS THAT JUSTIFY THE INITIATION OF THE MECHANISM

35. In principle, the national laws which make provision for the involvement of the enlarged formation expressly set out, in their legislation, the situations in which its involvement is possible, or indeed compulsory. Some of these situations are very general: the enlarged formation may thus be involved where its involvement is appropriate in the light of the consistency or the development of the case-law (**the Netherlands**). There are nonetheless other, more specific, situations, which permit three categories of situations to be identified that justify a referral to an enlarged formation in order to ensure the consistency of the case-law.

36. First, such a referral is provided for in a situation in which the initial formation finds that it proposes a position different from that already formulated in previous case-law and/or envisages departing from that

case-law (**Austria**, **Germany**, **Croatia**, **Spain**, **Estonia**, **Greece**, **Finland**, **Hungary**, **Italy**, **Poland**, **Portugal**, **Czech Republic**, **Romania**, **Slovakia**, **Sweden**).

37. Some legal orders make no distinction between previous decisions that are relevant from that aspect and all previous case-law must therefore be taken into account (**Estonia**, **Finland**, **Czech Republic**, **Sweden**). In other legal orders, that situation applies only to previous case-law characterised as 'consistent' or 'uniform', or resulting from decisions of an enlarged formation (**Austria**, **Italy**, **Portugal**, **Slovakia**), or resulting from a decision having special status (**Croatia** as regards legal positions, **Poland** as regards resolutions having the status of 'principles of law', **Slovenia** as regards 'interpretative decisions').

38. Second, such a referral is provided for where divergence is found in the previous case-law, or in order to ensure the uniformity of the case-law (**Germany**, **Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Estonia**, **Spain**, **France**, **Hungary**, **Italy**, **Czech Republic**, **Romania**, **Sweden**).

39. Last, an enlarged formation may be requested to give a ruling adjudicate where the initial formation finds that a new question of principle is at issue, with which the court might also subsequently be faced (**Germany**, **Belgium**, **Finland**, **France**, **Romania**, **Sweden**).

40. It follows that a referral to an enlarged formation is provided for, in the first place, in order to avoid divergence in the case-law (first, where a departure from previous case-law is likely and, second, where it is necessary to resolve an unforeseen issue) and, in the second place, in order to eliminate divergence that already exists.

(d) Option or obligation to make a referral to the enlarged formation

41. Some legal orders (sometimes only as regards certain courts or certain proceedings before those courts) provide that, having established that one of the situations in which a reference may be made is satisfied, the initial formation is obliged to refer the matter to the enlarged formation (**Germany**, **Austria**, **Czech Republic**, **Spain**, **Hungary**, **Portugal**, **Romania**, **Slovenia**). That is most frequently the case where the court envisages departing from previous case-law.

42. In other legal orders, or even in the same legal orders, but in the context of different proceedings, the referral is presented rather as an option

(**Germany**, **Bulgaria**, **Croatia**, **Spain**, **France**, **the Netherlands**, **Czech Republic**, **Sweden**). That is envisaged, inter alia, for cases where divergence in the case-law is found to exist or where there is a likelihood of such divergence. In **Swedish** law, however, a referral to the enlarged formation is also optional when the enlarged formation envisages departing from previous case-law.

(e) COMPETENCE TO MAKE A REFERRAL TO THE ENLARGED FORMATION

43. As regards the decision initiating the mechanism in question, it is in essence for the ordinary formation dealing with the case to adopt it, without any validation by other persons being required (**Germany**, **Austria**, **Estonia**, **Greece**, **the Netherlands**, **Poland**, **Sweden**). Nonetheless, there are a number of legal orders in which, while the initiative to refer the matter to the enlarged formation originates in the ordinary formation, the decision to refer the matter to the enlarged formation is to be taken by other persons, such as, among others, the President of the court or of a section of the court (**Belgium**, **Greece**, **Portugal**).

44. The situation is more complex where a legal order has only mechanisms the application of which is not connected with a specific case (see below, III.). Thus, in **Bulgaria**, the formation hearing the case may only propose to the President of the Supreme Court concerned that a procedure be initiated with a view to adopting an interpretative judgment capable of ensuring the consistency of the case-law.

45. In **Croatian** law, a legal position of all the judges of a court or a section is adopted at the request of the President of the court in question, following a proposal by the formation hearing the case or the registration service.

46. Apart from a referral by the initial formation, the enlarged formation may also be requested to take action in order to ensure the consistency of the case-law, when a case is being heard, by other persons or bodies. It may, for example, be requested to do so by the President of the court or of the section, on his or her own initiative (**Finland**, **France**, **Greece**).

47. The fact that a matter is referred to the enlarged formation by the formation or by the competent person does not necessarily mean that the enlarged formation is required to give a ruling. The enlarged formation often has to ascertain whether the conditions for making the

referral are actually satisfied and refuse the request where they are not (in particular, **Germany**, **Poland**, **Slovakia**).

(f) ENLARGED FORMATIONS

48. In organisational terms, the mechanism presented in this section is based, by definition, on a formation other than the initial formation having been set up, with jurisdiction to give a ruling on the case or on a point of law. Various solutions have been identified in that respect.

49. In the first place, first of all, the formations involved in the decision-making process following the use of the present mechanism are characterised by the greater number of judges of which they are composed. Whereas the ordinary formations very often consist of only three judges, the formations to which a matter is referred in application of this mechanism are supplemented, at a first level, by two, four, six or more judges (**Germany**, **Austria**, **Estonia**, **Finland**, **France**, **Greece**, **the Netherlands, Poland**, **Czech Republic**). Some of them have the special title of Grand Chamber (**Germany**, **Czech Republic**, **Slovakia**). Their composition may take account of various factors, such as the need to ensure the participation of representatives of the different language sections (**Belgium**) or of judges from chambers with jurisdiction for different matters or who are experts in certain areas of law (**Germany**, **Belgium**). There are formations that provide for the participation of judges of chambers that deal with similar disputes (**Italy**). There may also be a specialist chamber, with jurisdiction to give rulings in order to ensure the consistency of the case-law (**Hungary**). Next, it frequently happens that certain cases or points may be dealt with by all the judges of a section (chamber, college) (**Belgium**, **Bulgaria**, **Croatia**, **Spain**, **France**, **Poland**, **Portugal**). Even larger formations may also be envisaged. It is possible that the decisions in question will be delivered by all the judges of two or more Chambers (**Belgium**, **Bulgaria**, **Poland**) or by the Plenary Assembly of a court (**Germany**, **Belgium**, **Croatia**, **Spain**, **Estonia**, **Finland**, **France**, **Greece**, **Hungary**, **Italy**, **Poland**, **Czech Republic**, **Slovenia**, **Sweden**), which may mean that one or more tens of judges are involved. [16]

[16] The resolution of the combined chambers of the **Polish** Supreme Court of 23 January 2020 in Case BSA I-4110-1/20 was adopted by a bench of 59 judges from three chambers of the Supreme Court (although that decision is an example of an abstract decision (see below, III.), such a decision might also be delivered when a specific case is being heard).

50. In the second place, it should be noted that certain legal orders make provision for certain cases or points to be dealt with by formations composed of judges from different Supreme Courts (**Germany**, [17] **Bulgaria**, **the Netherlands**).

(g) OBJECT, FORM AND PUBLICATION OF THE DECISION OF THE ENLARGED FORMATION

51. Depending on the particular legal order, various solutions have been envisaged as regards the scope of the decision delivered by the enlarged formation, which may either give a ruling on the case before the initial formation or give a ruling only on the point of law referred to it.

52. Thus, first of all, some legal orders, at least in certain proceedings, provide for only the first of these two possibilities (**Austria**, **Belgium**, **Spain**, **Estonia**, **France**, **the Netherlands**, **Portugal**, **Czech Republic**, **Sweden**). Next, in other legal orders, the enlarged formation may decide whether it will rule on the case or only on the point of law (**Finland**, **Greece**, **Italy**, **Poland**, **Slovakia**). Last, a small number of other legal orders provide only for the possibility that the enlarged formation will resolve only the legal problem and then refer the case back to the initial formation (**Germany**, **Hungary, Romania**).

53. The same essentially applies in **Bulgarian** law. In that legal order, that is nonetheless attributable to the fact that Bulgarian law provides only for the adoption of interpretative judgments, which are delivered in the context of a separate interpretative case, while proceedings in the actual case concerned by the answer to the legal problem examined are stayed. In that situation, the question of referring a case back to the initial formation does not arise.

54. Where the enlarged formation gives a ruling on the entire case, it adopts its decision in the same form as that prescribed for the initial formation. The position is otherwise when it gives a ruling only on a point of law and then refers the case back to the initial formation so that it may adjudicate having regard to the decision of the enlarged formation. In the latter situation, the decisions of the enlarged formation are adopted in a different form from the decision closing the proceedings, taking the

[17] In **German** law, the Basic Law provides, in paragraph 95(3), that an enlarged formation of all the Supreme Courts is to be established to ensure the consistency of the case-law.

form of, inter alia, a reasoned order (**Germany**, **Slovakia**) or a resolution (**Poland**).

55. As a general rule, for the courts concerned, the decisions adopted by the enlarged formations take a form similar to that of other judicial decisions of the court in question closing the proceedings. They state, in particular, the composition of the enlarged formation, they contain a statement of reasons and they are published.

56. The situation is different in **Croatian** law as regards legal positions. Their form is not determined by national provisions. On the basis of the legal positions of the Supreme Court available on the internet, it may be said that they do not mention the names of the judges who adopted them and do not state the reasons on which they are based. Their content is confined, in essence, to stating a point of law. [18]

(h) EFFECTS OF THE DECISION OF THE ENLARGED FORMATION

57. The decision of the enlarged formation may be advisory or binding in nature and, where the enlarged formation only settles a point of law and refers the case back to the initial formation so that it may adjudicate on the case, its force may be limited to the initial formation or may also be extended to other formations.

58. Not all legal orders have provisions that relate expressly to the force of decisions of the enlarged formations (**Belgium**, **Spain**, **France**). Sometimes the only requirement is that a formation that does not comply with such a decision must state its reasons for not doing so (**Spain**, **Italy** for decisions of the Combined Chambers of the Court of Cassation). In one legal order, the decision of the enlarged formation is considered to have advisory value (**Latvia**). In any event, it is appropriate to proceed from the assumption that the mere fact of having been adopted by an enlarged formation confers on that decision a special status in the case-law.

59. Some legal orders specify that the decision of the enlarged formation when it gives a ruling solely on a point of law is binding only on the initial formation to which the case is remitted (**Germany**, **Greece**).

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[18] See, for example, the following position: https://sudskapraksa.csp.vsrh.hr/decisionText?id= 090216ba805b6343&q=Pravna+shva%C4%87anja.

60. Several legal orders provide that decisions of the enlarged formation are to have binding force, since those legal orders require other formations to refer the matter to the enlarged formation when they envisage departing from a previous decision.

61. In that sense, binding force vis-à-vis other trial formations may be recognised either to all decisions of enlarged formations (**most Member States** provide that such decisions are to have binding force), or only to those having a special status (in **Poland**, decisions of enlarged formations of the Supreme Court having the status of 'principles of law').

62. Decisions of enlarged formations are sometimes binding either on all national courts (**Bulgaria**, **Hungary**, **Czech Republic**, **Romania** in the case of decisions of the Supreme Court), or on all courts in a branch of the judicial system (**Italy** in the case of the Council of State for the administrative order, **Poland** in the case of resolutions of the Supreme Administrative Court, which are binding on all administrative courts), or, last, on all formations of a court (**Polish** and **Slovenian** Supreme Courts, **Slovakian** Supreme Courts).

63. In that context, it is difficult to classify the **Croatian** legal order in one of the categories suggested above, in so far as the binding force, for trial formations of a section or a court, of legal positions seems to be the subject of debate within that legal order. Although a legislative provision states that they are binding on other formations, the Constitutional Court has established, in an order, that that provision does not lay down a strict obligation for judges to comply with it.

2. MECHANISMS INVOLVING OTHER PERSONS

64. Several categories of persons not called upon to give a ruling on the case or on a point of law may be involved in the decision-making process of the formation hearing the case.

(a) PERSONS TASKED WITH PRESENTING AN INDEPENDENT OPINION

65. In some superior courts, certain persons have been tasked with presenting an independent opinion on cases. Such persons may be members of the Attorney General's Department, Advocates General, Public Rapporteurs or Auditors. Although their opinions are not binding, they are frequently an important means of fostering unity in the case-law (**Germany** (Federal Court of Justice), **Belgium** (Court of Cassation

and Council of State), **France** (Court of Cassation and Council of State), **Greece** Auditor-General's Department), **the Netherlands** (all Supreme Courts)).

(b) PRESIDENTS OF COURTS OR OF SECTIONS

66. A special role may be given to the Presidents of courts or of sections to which the judges of the formation hearing the case belong

67. In that regard, in **Finland**, the formation hearing a case is required to notify the President of its draft decision, in particular where the decision departs from a legal principle or from an interpretation of the law adopted previously. On that basis the President may decide to refer the case to an enlarged formation.

68. A similar mechanism is applied in **Slovenia**. When the Section President of the Supreme Court, on consulting the draft grounds or the report of the Reporting Judge, finds that the decision envisaged by the formation hearing the case is inconsistent with an interpretative opinion of the Supreme Court, he or she informs the Chamber concerned and asks it to deliberate on the case again. If the chamber refuses to do so, the President of the section concerned informs the President of the Supreme Court, who may suspend notification of the decision to the parties until the Supreme Court adopts a new interpretative opinion.

69. Furthermore, in that Member State, the principal mechanism applied by the Supreme Court consists of a discussion forum of the Section Presidents, who, under the presidency of a judge of the Supreme Court, discuss the main arguments in a pending case, while leaving the adoption of the final decision to the Chamber concerned. The President of the section concerned may, exceptionally, propose such a discussion in a case that is being deliberated before a Chamber within his or her Section.

70. In a similar vein, in **France**, in the Council of State, an informal body, the 'troika', nowadays composed of the President and the three Deputy Presidents of the Administrative Jurisdiction Division, has been established. Each week it re-reads certain draft decisions. On that basis, the troika may decide that cases that would entail abandoning, significantly altering or departing from a decision delivered by combined Chambers or an enlarged Chamber, or determining a new legal problem with a high level of difficulty, be referred to an enlarged

formation. Next, it may decide that the investigation of a case be reopened and that the Investigating Chamber be invited to carry out further research. Last, in certain cases, the President of the formation hearing the case (a member of the troika) may notify to that formation the objections which the troika has raised. In a case where the Chamber concerned decided to maintain its position, the troika could then refer the case to a higher formation.

71. This participation by the Presidents of the Courts may thus be classified as a supervisory mechanism.

(c) OTHER JUDGES OF THE COURT

72. In **the Netherlands**, the rule is that other judges of the Supreme Court ('reservists') take part in the decision-making process of the formation hearing the case. 'Reservists' are not part of the formation hearing the case and do not take part in the vote. However, they take part in the discussion of the case and their participation is therefore advisory in nature.

73. This mechanism raises questions as regards its compatibility with Article 6 of the ECHR. It is also being challenged in a case currently pending before the ECtHR. [19]

74. Such a mechanism would in all likelihood be difficult to accept in other legal orders, in so far as its use might be considered to constitute a breach of the secrecy of the deliberations. Indeed, in **Belgium,** some judges have been convicted after having asked colleagues to re-read a draft decision or having sought an opinion on a point of law. [20]

(d) EXPERIENCED JUDGES OR SPECIALIST SERVICES

75. Some legal orders provide for the participation of experts or specialist services in the decision-making process (**Finland**, **the Netherlands**). In **the Netherlands**, there is a committee for the coherence of the case-law in administrative law ('*Commissie rechtseenheid bestuursrecht*'), set up by the Supreme Court, the Council of State, the Higher Administrative Court for Economic Matters and the Higher Social Security and Civil Service Court in order to promote the external uniformity of the law. Its role is more advisory. Furthermore, in that

19 Case No. 19365/19.

20 See contribution on **Belgian** law, point 3.

Member State (**the Netherlands**), it may be noted that within the Council of State there are Chamber Coordinators, Unit Coordinators and a Coordinator for EU law and Constitutional Law who, through their knowledge of the case-law of the Chamber or by proofreading preliminary draft judgments, help to ensure consistency in the administrative case-law by identifying points that may be submitted to consultation. In that jurisdiction, moreover, specialist consultations by Chambers or consultations taking place at President of Chamber level reduce the likelihood of diverging decisions. Last, within the Council of State, it is possible to refer the case, at least in part, to a working meeting, a consultation involving the different legal experts of the Chamber concerned.

76. In **France**, within the Council of State, the reviser (the President of the Chamber or one of his or her assessors) considers the file on the basis of the report of the Reporting Judge. He or she may confirm the draft decision or declare it invalid in whole or in part, on the substance or on the form. […]

77. In **Finland**, the judicial assistant, who prepares the case but is not part of the formation that hears the case, may present his or her own opinion where he or she does not agree with the decision of the formation hearing the case. In **Sweden**, the draft statements of grounds prepared by the judicial assistants are published with the judgments in the law reports.

78. This participation may thus, depending on the legal order concerned, be an advisory mechanism or a supervisory mechanism.

(e) PERSONS RESPONSIBLE FOR THE REGISTRATION OF DECISIONS

79. In some legal orders there is a special procedure for the registration of judicial decisions, which allows the compatibility of the decision adopted with the case-law to be checked before the decision is delivered or before it is notified to the parties.

80. Thus, in **Croatia**, at least in certain courts of second instance, and also in the Supreme Court, the Registration Judge, who is part of the registration service, is considered to be competent to ask the formation hearing the case to reconsider its decision on the ground that it is not consistent with the case-law or with a legal position. If the formation in question does not agree with that proposal, the Registration Judge may

so inform the President of the court, who may initiate the procedure leading to the adoption of a legal position. This mechanism is a supervisory mechanism.

81. In **Austria**, on the other hand, the role of the Registration Service of the Administrative Court is confined to administration and providing information (in that regard, see below, paragraph 91).

III. PROCEDURAL MECHANISMS THE APPLICATION OF WHICH IS NOT CONNECTED TO A SPECIFIC CASE

82. A significant number of legal orders of Central and Eastern Europe provide for the possibility of initiating a special procedure leading to the adoption of a decision that is not connected to a specific case and determining, in essence, the general and abstract interpretation of provisions the interpretation of which has given rise to divergence in the case-law (abstract decisions, unlike the actual decisions when a specific case is being heard).

83. This special procedure is known in the laws of **Croatia**, **Bulgaria**, **Hungary**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, and the **Czech Republic**. Previously it was also provided for in other legal orders which, however, have abandoned it (**Portugal**, **Latvia**). In that regard, although it is still provided for in **Slovenian law**, it has not been applied in recent years. The use of this type of procedure raises questions, at least in the view of the Venice Commission. [21]

84. In most Member States in which such a mechanism is available, it is applied alongside a mechanism of decisions delivered by an enlarged formations when a specific case is being heard (see above, II.) (**Croatia**, **Hungary**, **Poland**, **Czech Republic**, **Romania**, **Slovakia**). In **Bulgaria**, on the other hand, it is the only procedural mechanism designed to ensure the consistency of the case-law.

85. As a general rule, in all of these legal orders, this mechanism may be initiated in a situation in which divergence has been identified in the case-law of a court or of the national courts. The initiative to adopt a decision of this type may originate not only within the competent court

[21] By way of example, this mechanism of **Hungarian** law had to be modified following an Opinion of the Venice Commission (see Opinion vis CDL AD(2021)036 of the Venice Commission, adopted at its 128th Plenary Session, 15-16 October 2021, in particular paragraphs 39 to 43).

but also outside that court, including in the lower courts, or in other national bodies or institutions. In the decision closing the proceedings, the competent court presents, in essence, a general and abstract interpretation of the provisions the interpretation or application of which has been the subject of divergence. This decision is binding, either on all formations within the court concerned (**Poland** in the case of resolutions of the Supreme Court), or on all courts (**Bulgaria**, **Czech Republic**, **Romania**, **Slovakia**).

86. In most of these legal orders, this decision takes the form of a judicial decision which contains information about the composition of the formation that adopted it and the grounds on which it is based. It is then published like the other decisions of the court closing the proceedings.

87. In this context, an exception is the legal positions adopted within the **Croatian** courts, the effects and the form of which have already been presented above (see above, paragraphs 56 and 63).

IV. MECHANISMS TO SUPPORT THE DEVELOPMENT OF COHERENT CASE-LAW

88. In the legal orders examined, the way in which a court is structured and allocates the roles within it, entrusting a specific role to certain judges or legal experts (A.), or to a service responsible for researching and monitoring the case-law (B.), is one of the means frequently employed to ensure a certain unity in the interpretation of the law. Likewise, cross-cutting mechanisms, designed to ensure awareness of and the dissemination of the case-law, also contribute to the pursuit of that objective (C.). All the mechanisms of that type take effect after decisions have been delivered by the courts concerned, in that they consist mainly in monitoring the case-law. In this way they help to avoid discrepancies in the case-law or to deal with them.

A. THE SPECIFIC ROLE ENTRUSTED TO CERTAIN JUDGES OR LEGAL EXPERTS

89. Depending on the legal orders, wider or narrower tasks have been entrusted to certain members of the superior courts responsible for ensuring that the internal consistency of the case-law is maintained (1.). A number of types of mechanisms have been made available to them to that end (2.)

1. EXTENT OF THE SUPERVISORY FUNCTION ENTRUSTED TO CERTAIN MEMBERS OF THE COURTS

90. In a small number of Member States, some members of a superior court have a specific role in monitoring the uniformity of the uniform case-law. Thus, sometimes the Presidents or Vice Presidents of superior courts, Presidents of Chambers of those courts or some judges are given responsibility for matters linked to the coherence of the case-law (**Austria** (Constitutional Court), **Bulgaria**, [22] **Finland** (Supreme Court, Supreme Administrative Court and Court of Appeal, Helsinki [23]), **Hungary**, [24] **Latvia** (Court of Appeal), **Lithuania**, **Poland** (Supreme Court and Supreme Administrative Court), **Romania**, **Slovakia** (Supreme Administrative Court), **Sweden** (Courts of Appeal and Administrative Courts of Appeal)). They thus sometimes consider of their own motion any alerts or information concerning risks of inconsistency in the case-law raised by legal experts within their court and place these items on the agenda of the judges' meetings. More particularly, within the Courts of Appeal of one of these legal orders (**Sweden**), the deliberations and analyses of the conference made up of all the Vice Presidents of a particular Court of Appeal and working to ensure uniformity in the decisions delivered by that court are made available in such a way as to serve as a guide to the application of the law within that court. Within the Administrative Courts of Appeal of that Member State, the Vice Presidents are assisted by subject specialists, who are legal experts responsible for monitoring the development of the law in their specialist area and for disseminating the relevant information within their Chamber.

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22 In **Bulgaria**, the recommendations then issued by the general meeting of the judges of a court, convened by the President of that court to discuss divergent case-law, are not binding on the members of that court.

23 The Court of Appeal, Helsinki has established a committee to monitor the uniformity of the application of the law, which organises, in particular, training for its staff on subjects linked, inter alia, to recent national and international decisions.

24 In **Hungary**, the Heads of the College of Judges of the regional Courts of Appeal and of the Supreme Court are responsible for ensuring consistency in the application and interpretation of the law by the courts under their direction. The Head of the College of the Supreme Court concerned is one of the persons who can request a procedure in the interest of the uniformity of the case-law. On that subject, see below, paragraph 99. The President of the Supreme Court, on the other hand, is responsible for drafting the court's annual report on the court's activities aimed at ensuring consistency in the case-law and informs the staff of that court about those activities.

91. In another of these Member States, moreover, a Registration Service has been set up within the Administrative Court, with responsibility for registering that court's judgments and also, where necessary, those of the other Supreme Courts. Where the judgments and orders of that Administrative Court depart from previous case-law, its President must be informed by the Director of the Registration Service, who, while being required to respect in full the independence of the judiciary, is entrusted with the role of ensuring the consistency of the case-law (**Austria**).

92. In some Member States, the Reporting Judge drafts the summary of the decision for which he or she was responsible, all of the summaries being assembled by another legal expert in an annual case-law bulletin or report. The role entrusted to these two individuals, which helps to promote greater awareness of the case-law, thus reduces the risk of divergence in the case-law (**Denmark**, **Luxembourg** (Administrative Court)).

2. Mechanism made available to these members with the aim of establishing a common practice

(a) Non-binding measures

93. In a small number of Member States, the regulations provide that certain trial formations of the superior courts may adopt non-binding measures that serve to unify certain interpretative criteria, procedural practices (decisions relating to the interpretative lines of the **Italian** Court of Cassation, decisions of the Senators of the Sections of the **Latvian** Supreme Court on the interpretation of current legal norms), or the guidelines containing scales for the calculation of the household allowance in family law (**Germany** (courts of second instance)). Although legally non-binding, these tools, however, are for the most part followed, in particular by the judges of courts below the court that adopted such a measure.

94. In the superior courts of two Member States, model decisions, operative parts or points are distributed, mainly on targeted aspects and techniques, like compensation for physical injury, costs orders, procedural law, draft operative parts or orders in criminal matters. Although they are not binding, they are sometimes followed by the courts concerned, including the superior courts, and thus contribute to the uniformity of the case-law on those aspects (**the Netherlands**

(Council of State, Higher Social Security and Civil Service Court, Court of Appeal, 's Hertogenbosch), **Slovenia**).

(b) JUDGES' MEETINGS

95. It is apparent from the contributions, moreover, that a small number of national regulations allow meetings between judges to be convened by a Head of Court, in order to discuss questions linked to the conduct of cases (**Malta**) or legal problems that have given rise to a non-uniform practice (**Romania**). Meetings of this type sometimes relate to the discussion of the relevant annotations and comments concerning the case-law of a court (**the Netherlands** (Supreme Court, Higher Social Security and Civil Service Court, Court of Appeal, 's Hertogenbosch)). These meetings may also be held by area of specialisation. Such meetings, held on an *ad hoc* basis, sometimes allow divergent judicial practices to be identified. Next, in certain cases mechanisms are established to enable the judges participating in the meetings to vote on the possible legal solutions, which are then considered to be unitary judicial practice, and to transmit that problem to a national body that maintains an up-to-date list of non-uniform practices and of the solutions finally adopted (**Romania** (Courts of Appeal)). These meetings may adopt 'non-judicial agreements' in order to unify interpretative criteria and procedural practices (**Spain** (Constitutional Court, Supreme Court and Courts of Appeal)).

96. In **Croatia**, the Supreme Court holds, at least every six months, a joint meeting with the Presidents of Sections of all the County Courts for the purpose of unifying the case-law. In the wake of these meetings, the Supreme Court adopts the conclusions (*zaključci sa sastanka Vrhovnog suda*). They are not binding.

97. The judges' meetings are sometimes informal and then consist of discussions between judges. Probably taking place in all Member States, they enable the judges present to be informed of the most recent decisions delivered by their court in a certain area of law, each then ensuring that the internal consistency of that court is maintained (referred to explicitly the Court of Appeal in **Ireland**, the **Belgian** and **French** Courts of Cassation, the Administrative Courts of Appeal in **Greece** and the courts of second instance in **Poland**). [...]

B. SPECIFIC ROLE ENTRUSTED TO LEGAL RESEARCH SERVICES

98. In a significant number of Member States, services dedicated to research, documentation and/or the dissemination of the case-law [25] are responsible for selecting, analysing, summarising and/or indexing the case-law of some or all of the courts of a legal order or of a type of court, thus enabling the case-law to be disseminated and better known by all the judges (**Germany**, **Belgium** (Constitutional Court, Court of Cassation: proposed), **Croatia, Spain**, **Estonia** (Supreme Court), **France** (the three Supreme Courts), **Hungary** [26] (Supreme Court), **Ireland**, **Italy** (Court of Cassation and Council of State), **Latvia** (Supreme Court), **Lithuania** (Supreme Administrative Court, Supreme Court and Court of Appeal), **Luxembourg**, [27] **Poland** (the three Supreme Courts), **Romania** (High Court of Cassation and Justice), **Slovenia** (Supreme Court)). For that purpose, these services are sometimes entrusted with preparing 'points of law', keywords, brief notes or emails about current case-law, guides to the relevant applicable law, case-law studies and summaries, bulletins and reports of case-law, thematic case-law sheets, annual reports, and/or with maintaining an index of case-law. In some of the Member States covered by the study, they contribute to the research carried out in connection with specific cases or to the proofreading of decisions, thus helping the relevant case-law to be identified and consistency to be maintained within the court in which they work. Some of these services also manage and maintain internal or external databases of legal or case-law research.

99. In a small number of legal orders, the abovementioned legal research services are expressly tasked with helping to detect and identify conflicts in the case-law, and even to contribute to their potential resolution, by making suggestions to encourage consistency in the case-law or by placing the problems concerned on the agenda of a Chamber or Section of the court concerned (**Croatia** (Supreme Court), **France** (Court of Cassation), **Italy** (Court of Cassation), **Hungary** [28] (Supreme

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25 The research, indexation and documentation tasks undertaken by these services are sometimes carried out by judges.

26 In **Hungary** a publishing committee publishes the periodicals of the Supreme Court every month.

27 The **Luxembourgish** documentation service, established under the auspices of the State Attorney General, centralises all decisions of the national judicial courts in such a way as to be able to communicate them to the public.

28 The case-law-analysis group of the **Hungarian** Supreme Court issues a recapitulatory opinion on the results of its analysis of the case-law, the conclusions of which may be published on the

Court), **Latvia** (Supreme Court), **Lithuania** [29] (Supreme Administrative Court), **the Netherlands** (Higher Social Security and Civil Service Court), **Romania** (High Court of Cassation and Justice)).

C. CROSS-CUTTING MECHANISMS TO ENSURE AWARENESS OF AND THE DISSEMINATION OF THE CASE-LAW

100. In most legal orders, first of all, it appears that the activity of publication (based on the indexation activity) of the case-law is an important indirect mechanism for ensuring internal consistency. Sometimes one person in particular (Secretary-General of the Constitutional Court in **Spain**), certain judges of the superior courts, the research service or another service, or the court as such are responsible for the publication (and for the prior indexation) of important decisions (**Austria** [30] (Supreme Court, Administrative Court and Constitutional Court), **Belgium** (Court of Cassation, Council of State), **Cyprus** (around 10 legal experts are thus made available to the judges of the Supreme Court), **Croatia** (Supreme Court), **Denmark** (Supreme Court, Courts of Appeal), **France** (the three Supreme Courts), **the Netherlands** (Supreme Court, Council of State, Administrative Court of Appeal for Contentious Economic Matters, Higher Social Security and Civil Service Court, Court of Appeal, 's Hertogenbosch, Courts of Appeal), **Poland**, **Czech Republic** (Supreme Court, Supreme Administrative Court), **Romania**, **Slovenia** (Supreme Court)). In one of the Member States a national administrative authority is responsible for making available the search engine

Supreme Court's website. On the basis of these conclusions, the Head of the relevant College of the Supreme Court may, where there are grounds for doing so, request a procedure in the interest of the uniformity of the case-law.

29 The case-law department of the **Lithuanian** Supreme Administrative Court may trigger an alert to draw the judges' attention to the inconsistency of the case-law. This alert serves to indicate that it would be appropriate to refer a similar new case to an enlarged formation. The legal research group of the **Lithuanian** Supreme Administrative Court gathers information relating to the inconsistency of the case-law from the judges' assistants and, on the basis of this information, makes proposals on the cases that merit discussion by the judges.

30 In **Austria**, legal norms (*Rechtssätze*), which are a legal conclusion containing the principal elements of importance on which a decision of the Supreme Court (among others) is based, assume great importance in ensuring consistency in the case-law (in practice these rules consist of one or two sentences taken from the decision concerned). These legal norms are also published. Where other decisions are issued on the same problem as an existing legal norm, they are entered under the principal legal norm and together represent the state of the case-law on a specific problem. Legal norms also exist for decisions of the Constitutional Court and those of the Administrative Court, but with a slightly different structure. In that Member State there are also reports of decisions, issued by the Federal State or by private publishers, on various areas of law. The Austrian judges' association also publishes a journal of Austrian judges, which provides information to the judges about the most recent decisions of interest delivered by the supreme courts.

containing important national case-law (**Sweden**). In some cases it is not specified whether the preparation of all of these products and these publications falls within the competence of a research service or whether these tasks are assumed by the superior courts themselves (**Bulgaria**, **Finland**, **Luxembourg**, **Slovakia**: Supreme Court and Supreme Administrative Court).

101. Furthermore, the existence of internal or external case-law data bases, maintained by the superior courts themselves or by certain of their services, is mentioned on several occasions as one of the means of contributing to ensuring the uniformity of the case-law (that is the case, in particular, in the following Member States: **Belgium**, **Denmark**, **Finland**, **France**, **Latvia** (Supreme Court), **Lithuania** (Supreme Court and Supreme Administrative Court), **the Netherlands**, **Romania**, **Slovenia** (Supreme Court)).

102. Last, taking the form of annual programmes, conferences and various activities, the continuous training of judges is also a way of encouraging the maintenance of consistent case-law within each court (such training programmes were referred to, in particular, for judges practising in **Spain**, **Estonia**, [31] **Finland**, **Italy**, **the Netherlands** (Court of Appeal, 's Hertogenbosch)).

CONCLUSION

103. It is clear from the case-law of the ECtHR that contradictions in the case-law of a national Supreme Court are liable to undermine the requirements of the right to a fair trial, laid down in Article 6(1) of the ECHR. In order to avoid the risk of such contradictions, internal mechanisms to ensure the consistency of the case-law within the various superior courts may be set up. However, these mechanisms must not undermine the principle of the independence of the judges, enshrined in both EU law and the Constitutions of the Member States.

104. A comparative analysis of the relevant mechanisms that exist in the superior courts of the 27 Member States of the European Union highlights the fact that consistency in the case-law of the superior courts may be ensured, first, by organisational and procedural mechanisms,

[31] In **Estonia**, in the Plenary Assembly of judges, which brings together all **Estonian** judges at least once a year, conferences are held concerning, inter alia, questions linked to current case-law. They therefore also lead, indirectly, to the emergence of uniform case-law.

applied when a specific case is being heard. Second, the judicial consistency internal to a superior court may be ensured by procedural mechanisms the application of which is not connected with a specific case and, last, by means of support mechanisms.

105. As regards the organisational and procedural mechanisms applied when a specific case is being heard, the consistency of the case-law may already be ensured, in a way, at the stage of the allocation of the case. The choice of a specialist chamber, like the appointment of the Reporting Judges and the judicial assistances responsible for the case according to their specialisation or to the connection between the cases gives rise to circumstances that reduce the likelihood of divergence. However, recourse to mechanisms of that type is not evident in all the legal orders that enshrine the principle of the random allocation of cases.

106. The principal and very specific mechanism aimed at ensuring consistency in the case-law of a court is nonetheless applied at the stage following the allocation of the case and the designation of the formation that will hear the case. Numerous legal orders provide that, where a likelihood of divergence in the case-law becomes apparent, the formation hearing the case is entitled, or indeed required, to refer the matter to an enlarged formation so that it may give a ruling on the case or on a point of law. Generally, such a referral of the case to an enlarged formation is mandatory when the initial formation envisages departing from previous case-law, settled case-law or case-law originating in decisions adopted by enlarged formations. Where it is found that there is already divergence in the case-law, such a referral tends to be optional. In some legal orders, the effectiveness of this mechanism is guaranteed by the principle that decisions of enlarged formations are binding on other formations of that court, or indeed on all national courts.

107. In addition, in some Member States, when the case is being heard, provision is also made for other persons to participate in the decision-making process of the formation hearing the case. This involves judges who are not part of that formation – including, among others, the Presidents of Sections or of Courts –, or indeed of services that provide assistance in dealing with the case. Their role is often advisory, but it is also intended to permit the monitoring of the consistency of the decision proposed by the referring court with the case-law.

108. Apart from the procedural mechanisms available to the formations hearing specific cases, several legal orders of Central and Eastern Europe provide for a mechanism consisting in the adoption of decisions ensuring the consistency of the case-law that are not connected with a specific case, which are binding on other courts. Such decisions are generally adopted by the Supreme Courts, they have the status of a judicial decision and they determine the general and abstract interpretation of provisions the interpretation of which has given rise to divergence in the case-law.

109. As regards the mechanisms to support the development of consistent case-law, the study first of all makes it possible to state that, in most of the Member States covered by the present note, the superior courts allocate the roles within them in such a way as to entrust to certain legal experts the particular task of ensuring the consistency of the internal case-law. These are in some cases the Presidents or Vice-Presidents of the courts, in other cases a registration service, or the Attorney-General's department. In the legal orders concerned, various mechanisms have been made available to these members, aimed at encouraging the emergence of a common judicial practice. That applies, in particular, to the non-binding measures, which serve to unify certain interpretative criteria or procedural practices, or model decisions or points, which remain non-binding. The same also applies to judges' meetings, whether they are provided for in the regulations or whether they consist of informal discussions among the judges.

110. It is apparent, next, that in other legal orders such a function is attributed, for certain courts at least, to a legal research service. By their various activities relating to the analysis and indexing of the case-law, such services help to avoid the emergence of diverging case-law. In a small number of legal orders, these services explicitly help to detect and identify situations of divergence in the case-law, sometimes even proposing solutions to resolve them.

111. It is apparent from the study, last, that, in order to ensure the consistency of their own case-law, the superior courts of the Member States use cross-cutting mechanisms, sometimes entrusted to certain members of the superior courts, sometimes to research services, aimed at ensuring proper awareness and the dissemination of the case-law. These mechanisms then essentially consist in the publication of

important decisions, the maintenance of databases of case-law or continuous training for judges.

[...]