NEJVYŠŠÍ SPRÁVNÍ SOUD

ACA-Europe Seminar

Measures to Facilitate and Restrict Access to Administrative Courts

9 September 2019, Brno

General Report

by Zdeněk Kühn and Pavel Molek

Supreme Administrative Court of the Czech Republic
ACA-Europe (German Presidency)

Co-funded by the Justice Programme of the European Union

1. Introduction

Our seminar is entitled Measures to Facilitate and Restrict Access to Administrative Courts. As can be seen from the title, both the seminar and this general report are defined by the tension between two tendencies. The first is the aim of restricting access to all administrative courts or to Supreme Administrative Courts and Councils of State (hereinafter "SAC") for those cases that do not deserve to be decided by these courts, for reasons that will be explained below. The second is the aim of facilitating access for participants who would otherwise be precluded from overcoming the general restrictions on, or conditions for, bringing their cases before administrative courts, or would be discouraged from doing so, despite the fact that they deserve it. In other words, our Brno seminar is – again, one would say – defined by a tension between the Scylla of opening the gates of administrative justice to everyone, resulting in our courts being flooded with thousands and thousands of cases every month, and the Charybdis of turning our courts into Kafkaesque gatekeepers, keeping the "*Gate to the Law*" closed to "*a man from the country wishing to gain entry into the law*".

This tension between opening and closing the gate to administrative justice formed the basic structure of our questionnaire and we would like to express our heartfelt thanks to the representatives of the 23 member institutions who responded in such detail and have provided us with insight into the measures used to "open" and "close" the gates to administrative justice that might be inspiring for all of our member institutions. Hereinafter we will use the following ISO codes for these 23 countries: Belgium (BE), Croatia (HR), Cyprus (CY), the Czech Republic (CZ), Estonia (EE), Finland (FI), France (FR), Germany (DE), Greece (EL), Ireland (IE), Italy (IT), Latvia (LV), Lithuania (LT), Luxembourg (LU), the Netherlands (NL), Norway (NO), Poland (PL), Portugal (PT), Serbia (RS), Slovenia (SI), Spain (ES), Sweden (SE) and the United Kingdom (UK).

The structure of this brief General Report will follow the logic of our questionnaire. Therefore, in the first part we compare a number of measures used for "closing the gates" and in the second part a number of measures for "opening the gates".

Not surprisingly, the measures used are strongly influenced by the size and structure of the administrative judiciary in the countries in question. The obvious variable is **the number of instances**. The number of countries with two instances (HR, CY, CZ, FI, IT, LT, LU, NL, PL, RS, SI) is almost the same as the number of countries with three instances (DE, EE, EL, ES, FR, IE, LV, NO, PT, SE, UK). A specific system operates in Belgium, where the only instance specialising in general administrative justice is the Council of State, which is in fact that

kingdom's only purely administrative court. Surprisingly, there is almost no correlation between the population of a country or its number of administrative judges on the one hand and the number of instances on the other. It may come as a surprise that 583 Polish administrative judges and 395 Italian administrative judges operate in two instances, while 72 Latvian administrative judges and 42 Estonian administrative judges are divided into three instances.

As regards the **size of the administrative judiciary** compared to with the judiciary as a whole, we can distinguish three models:

1. In the vast majority of countries, the administrative judiciary represents only a small proportion of the judiciary as a whole (from 2% in RS, 3% in BE, 4% in CZ, ES, IT and SI, 5% in HR and PL, 8% in LT and LU, to 10% in DE, FR and LV).
2. The second model could be called 'Scandinavian', because the proportion of administrative judges in Finland (33%) and Sweden (41%) shows that the importance attached to administrative justice is comparable with that attached to civil and penal justice. Greece (34%) has similar figures, while Cyprus and Estonia (both around 16%) sit between these two models.
3. Lastly, there is a model where administrative justice is not distinguished in institutional terms from the rest of the judiciary (IE, NL and supposedly NO).

2. Measures for restricting the access to administrative courts

Our questionnaire focused on a number of measures for restricting access to administrative courts.

2.1 Court fees

The vast majority of countries applies court fees, with the rare exceptions being Luxembourg and Sweden. France joined those two countries in 2014, when the legislator abolished the court fee of € 35. The French example calls into question the common sense view of the effectiveness of court fees as an effective measure for reducing courts' caseloads. The French legislator realised that the introduction of fees did not in fact lead to a reduction in the number of claims, whilst it increased courts' administrative costs, notably as a result of the obligation to send a registered letter requesting payment to each defaulting complainant. The Spanish Constitutional Court

reached a similar conclusion in 2016. It issued a judgment[1] declaring Article 7, paragraph 1 of Law 10/2012 unconstitutional, null and void, thereby removing court fees for administrative justice.[2]

The level of court fees generally correlates with countries' GDP *per capita*, starting with € 3 for some cases in Serbia, passing through € 15 in Estonia and ending up with approximately € 1,000 in the United Kingdom and € 2,830 in Norway. Special cases depending on the sum at dispute are Finland where for cases of public procurement with a value exceeding € 10,000,000 the court fee is € 6,140 and Germany where the Federal Administrative Court fee is more than € 5,130 for claims whose value exceeds € 100,000. In the majority of countries, the fee increases at the higher instances, the exception being the United Kingdom where the fee for bringing a case to the Supreme Court (€ 1,117) is slightly lower than the fee for bringing a case to the Court of Appeal (€ 1,340). Among the other countries, there is a distinction between those where the instance of the court is the only factor determining the court fee (HR, CY, LV, LI, UK) and those where the court fee depends both on the instance of the court and the content of the case (CZ, EE, EL, FI, IT, PT, RS, SI), with social security cases usually attracting the lowest fees. In Ireland, fees depend on the instance of the court and the type of procedure. In the Netherlands, the second factor taken into consideration alongside the instance of the court is the type of applicant, with higher fees for organisations than for individuals.

The result is a very complicated system of court fees, good examples of such systems being Portugal and Germany. In Germany, the level of fee rises degressively with the value of the claim, starting at € 105 for cases with value of € 500 at the court of first instance and over € 5,130 for claims valued above € 100,000 at the Federal Administrative Court. If the value of the claim cannot be estimated (especially in matters with no economic significance), the value of the claim is set at € 5,000. An original factor is taken into account in Norway where the fee rises with the number of days of the hearing and is reduced if leave to appeal is denied or the appeal is rejected. For example, at the court of first instance the fee is € 590, but if the case needs a hearing longer than one day, an amount of approximately € 350 is added for each additional day. Another complicated system is applied in Poland where there are two kinds of fees: a proportional fee and a fixed fee. Fixed fees range from € 23 to € 2,320, depending on the subject matter of the case.

[1] Constitutional Court, nº 140/2016, of 07/21/2016, Rec. Appeal of unconstitutionality 973/2013.

[2] Before, there were following fees:

- civil jurisdiction: appeal: € 800; cassation and extraordinary fee for procedural infringement: € 1,200;
- contentious/administrative jurisdiction: abbreviated: € 200; ordinary: € 350; appeal: € 800; cassation: € 1 200;
- social: supplication: € 500; cassation: € 750.

Proportional fees are set as a percentage of the value of the subject matter. As a result of this, fees range from € 23 to € 23,200.

Applicants generally pay a flat fee with some countries having specific reductions, e.g. a reduction for litigants-in-person (CY). In the Netherlands, a number of different factors influence the level of the fee: a) whether the Regulation on reduced fees applies; b) whether the appeal is lodged by an individual or by an organisation; c) whether the higher court is a court of first instance only or also a court of appeal; d) whether the individual has an income that is lower than the social minimum.

In the majority of countries, the fee has to be paid when the case or appeal is lodged, or within a set time-limit (CY, CZ, EE, EL, IE, IT, LV, LT, NL, PL, PT, SI). Exceptions are Finland and Croatia, where petitioners have to pay within a fixed period after the court has delivered its decision; if a party does not pay the fee, there are mechanisms to enforce payment. Similarly in Germany, claimants are informed by the court about the fees to be paid after they have initiated proceedings. If claimants do not pay the fee, this does not directly affect the judicial proceedings, but the fee can be enforced against them. In Belgium, the appeal is immediately lodged with the registry but the procedure is frozen until the fee has been paid: this is known as "procedural freezing". Before the Greek ordinary administrative courts, the fee has to be paid before the first hearing in the case, otherwise the application is rejected as inadmissible. Norway combines both approaches: the fee has to be paid after the petition is lodged, but before the proceeding commences. However, if the petitioner is represented by an attorney, the fee can be paid after the decision of court is delivered. If the fee is not paid, the case is rejected. In the United Kingdom, there are different phases: the fee for a "permission to apply" to an administrative court is payable with the application. Where the court gives permission to proceed with the claim for judicial review, a "permission to proceed" fee is payable within 7 days. Half of the amount (€ 430) would already have been paid if the claimant is requesting that the court reconsider the decision on permission.

Only a small minority of countries requires deposits for court fees or the costs of the other party (PT and UK); some countries require deposits to cover the costs of presenting evidence. In Serbia, if a party proposes that evidence be presented, they are obliged by court order to deposit the amount required to cover the costs. The court will abandon the presentation of evidence if the sum required to cover costs is not paid within the time limit determined by the court. Greece is another exception where cases with scientific or technical expertise are concerned: here, the required deposit is paid by the public authority. In Latvia (and similarly in

Spain), when an individual or public authority files an ancillary complaint to appeal procedural errors in lower courts or a cassation complaint before the Supreme Court, they have to pay a flat rate deposit. If the petition is successful, the deposit will be returned to the petitioner.

The compatibility of court fees for public procurement with the principles of effectiveness, speed, non-discrimination, accessibility and the right to effective judicial protection was reviewed by the Court of Justice of the EU on the basis of a preliminary question of the Regional Administrative Tribunal of Trentino Alto Adige. In its judgment C - 61/14, *Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino* of 6 October 2015, the Court of Justice declared the Italian court fees in public procurement cases to be compatible with Directive 89/665 and with Article 47 of the Charter of Fundamental Rights of the EU.

2.2 Costs of proceedings

All responding countries allow successful participants to recover the costs of proceedings. In Sweden, costs may only be recovered in tax and public procurement cases, if the costs are reasonable. In most countries allowing costs to be recovered, the process can be excluded at the discretion of the court for reasons of fairness or in the light of other important factors. No such discretion exists in Belgium, Germany, Portugal or Slovenia. These general rules are not applicable in some specific areas and costs are not recovered: in Estonia, in environmental law where reference has been made to Article 9 (4) of the Aarhus Convention (and similarly in Ireland); Finland has specific rules for proceedings concerning civil servants; in Lithuania, no costs are recoverable in proceedings on the legality of a general administrative act; in the Czech Republic, no party may recover costs relating to cases concerning elections; in Portugal, costs are not recoverable for cases relating to trade unions, occupational diseases and asylum law.

In several countries, costs may not be recovered by public authorities, i.e. public authorities have to bear their own costs. This is the case in Germany, Latvia and Sweden. In Belgium, public authorities may only recover costs if they have been represented by an attorney, and in France, justified attorneys' fees can be recovered, as can specific costs that helped to defend public authorities' interests. In Poland the situation varies: public authorities may recover costs of cassation proceedings, but not in courts of first instance; and costs are not recoverable at any instance in respect of disputes between public authorities. In the Czech Republic and Norway, public authorities are never permitted to recover costs in social security cases.

In the majority of countries, the level of recoverable costs is based on a generally applicable tariff (BE, HR, CY, CZ, DE, EL, LU, LT, LV, NL, PL, RS and SI); in the remainder it

is based on a price agreed between attorneys and clients (IE, NO, PT), with some countries applying a disclaimer in relation to unreasonable costs (EE, SE and UK). Italy combines both approaches with costs agreed between attorneys and clients taking priority; if they are not set this way, tariff-based costs apply. The most complicated system is in Finland: here, the level of costs is generally based on a price agreed between clients and attorneys (following Finnish Bar Association guidelines), but where the state legal aid is applicable, recoverable costs are set at € 110 per hour (this may be increased by 20% under certain circumstances), and in international protection cases, a flat fee of € 1,300/800/400 (administrative courts) or € 1,000/400/200 (SAC) applies. Norway has a similar system, with a tariff applying in cases covered by free legal aid. In France, the sum is determined by the judge, taking into account equity and the economic circumstances of the losing party. There are, however, tentative guidelines and judges may not increase the amount sought by successful parties. In Spain, the sum is determined by the court.

2.3 Mandatory steps prior to filing a petition with the administrative court

In few countries, before an individual files a petition with an administrative court, he or she has to follow some pre-trial procedures. In Estonia, in some cases (e.g. prisoners' right to file complaints and public procurement disputes), the law prescribes a pre-action procedure. An action may be filed with a court only if the pre-action procedure has been followed and the claim has not been satisfied within due time. In the United Kingdom, a claimant is required to consider alternative dispute resolution and send a letter before filing a claim to the defendant. France is currently experimenting with mandatory use of prior mediation for certain disputes relating to social matters and public functions (due to conclude in 2020). In Latvia, in some cases stipulated by law, the complaint must first be filed with a preliminary extrajudicial examination institution (e.g. Administrative Disputes Commission).

2.4 Exclusions of some types of cases

In the majority of countries, all decisions of public authorities (excluding authorities having personal immunity as discussed in chapter 2.5) are reviewable. A minority of countries listed measures or types of administrative decisions that are excluded: Belgium (administrative contracts, internal orders, executive acts, collective labour agreements and memos); Cyprus (regulations and by-laws issued by an organ of the Executive and policy decisions of administrative authorities); Finland (e.g. short-term appointments of civil servants); and Sweden (decisions in systems of public economic support granted voluntarily by the state).

The Greek response emphasized that exceptions are defined exclusively through the case law of the Supreme Administrative Court, not by the legislator. These exclusions include acts relating to government policy or international relations, government decisions appointing the heads of the judiciary, acts executing administrative decisions, administrative acts by public authorities as part of the exercise of private law, and management or internal organisational competences.

Several countries stated explicitly that administrative decisions concerning private law are not reviewable by administrative courts (CY, CZ, EL, IE, HR, LV, PL) and are usually reviewed by civil courts. The civil courts in Luxembourg have the competence to review matters of indirect taxation (in particular VAT or inheritance tax), while some social matters are resolved by the social courts. Dutch civil courts review orders with general effect and acts of authorities not defined as administrative authorities. Other countries mentioned specialized courts or public employment tribunals (e.g. the Labour Courts in Sweden) or other specific areas (several specialised tribunals in the United Kingdom).

On the other hand, administrative courts also resolve disputes that go beyond the traditional scope of administrative justice. In a number of countries, the administrative courts are responsible for judicial review of elections or referenda (FI, FR, IT, LV, LT, LU, SI) and in some countries they also handle disputes relating to political parties (BE, CZ). In Portugal, the administrative courts have jurisdiction over the election of leaders of public institutions (e.g. universities, hospitals). In Croatia, Estonia and Latvia, the administrative courts are competent to resolve disputes arising from administrative contracts. In Greece, one of the SAC benches is tasked under the constitution with drafting all Presidential Decrees once they have been proposed by the relevant ministers and before they are signed by the President of the Republic (the SAC exercises control over constitutionality, general legality, the legality of limits set by statutory authorisation and the technical correctness of draft decrees). There is a unique situation in Cyprus, where the Supreme Court operates as the highest body for administrative, civil and criminal justice and *de facto* as the country's constitutional court. In Lithuania, the administrative courts have the competence to assess petitions relating to breaches of oath or failure by members of the municipal council or the mayor to exercise the powers set down by law. In the Czech Republic the SAC acts as a disciplinary court for judges and other legal professions; in Poland it acts as a disciplinary court for administrative judges.

2.5 Immunity of particular public authority

Surprisingly, the list of public authorities whose acts are excluded from judicial review is rather short. The head of state has such immunity in Finland, Cyprus and Poland (with regard to certain acts, in particularly the refusal to appoint judges; furthermore, even resolutions of the National Council of Judiciary concerning applications for appointment of judges to the Supreme Court are no longer subject to judicial review). The head of state has similar immunity in Ireland and Sweden, because the Irish President and Swedish monarch do not have any administrative jurisdiction. In Estonia, there has been discussion of whether the President's resolutions regarding appeals for clemency are subject to judicial review. Regarding the review of the Estonian President′s individual acts, the law stipulates that decisions on appointments to or release from office are subject to review by the Supreme Court.

Other authorities excluded from the jurisdiction of the Cypriot administrative courts are the government and the Supreme Council of Judicature. In Luxembourg and Italy, acts or measures introduced by the central Government in the course of exercising political power cannot be challenged. Similarly, in Sweden, acts of the cabinet that do not affect individuals' civil rights are excluded.

In France, the President of the Republic and the Prime Minister both have immunity as regards governmental acts concerning relations between public constitutional powers or international affairs.

A long list of bodies with immunity was provided by Lithuania: the President of the Republic, the Seimas (the sole chamber of the Lithuanian parliament) and its members, the Prime Minister, the Government (as a collegiate body), judges of the Constitutional Court, the Supreme Court and the Court of Appeals. Furthermore, procedural acts of courts, prosecutors, investigators, persons conducting an inquiry, the Seimas ombudsman, the children rights protection ombudsman and court bailiffs are also not subject to review.

2.6 Frivolous petitions

Amongst the dangers which may result in flooding the courts with cases of no real importance one has to mention frivolous or abusive complaints. In some countries such complaints are either rejected as inadmissible (CY, EE, IE) or penalised by a fine (BE, FR, IT, PT) or by increased costs payable to the other party (EL, IT, NL, PT).

French administrative judges may impose fines of up to € 10,000 on individuals whose applications are based on bad faith, fraud or the use of fake documents, or who persistently

challenge confirmatory decisions against which appeals have already been lodged before an administrative judge. The size of the fine is entirely at the discretion of the judge, who is under no obligation to explain his or her decision.

The Greek administrative courts have the power to rule that between € 100 and € 500 by parties that have requested the postponement of the trial of their case, by way of a separately recorded decision and at the specific request of the opposing party. The SAC has recently been given the power to increase the costs awarded against the defeated party if his or her writ exceeds a reasonable length, taking into consideration the legal questions at issue. Costs can also be increased in Italy. The court may order unsuccessful parties presenting manifestly unfounded reasons to pay the opposing party a sum of up to double the incurred costs. Moreover, the court may *ex officio* order the unsuccessful party to pay a financial penalty of not less than twice and no more than five times the court fees due for the application to initiate proceedings, where the losing party has brought the legal action or resisted recklessly in court. In disputes concerning public contracts, the level of sanction may be increased by up to one per cent of the value of the contract, if this is greater than the above above-mentioned limit. In the United Kingdom, each party usually covers its own costs, but a frivolous petitioner can be ordered to pay a share of the costs of the respondent. Furthermore, if someone persistently takes legal actions against others in cases without merit, he or she may be designated a 'vexatious litigant' and forbidden from starting new cases without permission.

In Estonia, the court may return the action to the applicant if he or she has significantly abused his or her right to bring an action and if infringement of the right for which the action seeks protection is a minor one. In such cases, the court fee is not refunded. After hearing the parties' arguments, the Cypriot Supreme Court may strike out any appeal that appears *prima facie* to be frivolous, and may dismiss it if satisfied that it is in fact frivolous. The Irish Rules of the Superior Courts provide for a very specified list of abusive actions, stating that "*the Court may at any stage of the proceedings order to be struck out or amended any matter in any endorsement or pleading which may have been unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action; and may in such case, if it shall think fit, order the costs of the application to be paid as between solicitor and client.*" The Rules also state that "*the Court may also order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just.*"

Latvian courts can penalise frivolous actions in the subsequent procedures by rejecting future requests to decrease the level of the court fee due to financial difficulties. When deciding on such requests, the judge is obliged to assess whether the person has acted frivolously on previous occasions, i.e. whether during last three years the individual in question has made excessive submissions and whether they were well-founded or rejected by courts as unfounded.

2.7 Other measures for restricting access to court

Beyond the usual or standard measures for limiting access to courts, we noted other measures which are used only in one country, but might be interesting to others. Several ideas emerged from Greece: e.g. increasing the scope of jurisdiction of one-judge formations of administrative courts, setting a monetary limit for the filing of appeals before courts of second instance (currently: € 5,000 for general cases, € 3,000 for social security and salary claims) and the introduction of computer technology to the courts' organisation.

In Lithuania, the use of computer technology goes even further, with complaints being permitted to be filed in an electronic form and submitted by means of electronic communication which allows electronic cases to be generated. Latvia has decided not to make complaints electronic, but rather to force applicants to make them shorter: if a cassation complaint is too long, judges may request that a party submit a summary of the complaint.

In countries with language minorities, the requirement to write complaints only in the official language might prove to be an obstacle. For example, the Estonian courts use only Estonian as the working language of court proceedings and if an application is made in another language, the court requires the participant to provide a translation, unless this is impossible or unreasonably complicated for the participant. In some situations, the court may also arrange translation itself.

3. Measures for facilitating access to administrative courts

3.1 Exemptions from the duty to pay fees

In most countries where there is any duty to pay fees, state and public authorities are legally exempt from such duty.

In addition, some countries exempt certain types of litigation (cases) (typically IT), others certain types of persons, and others a mixture of both (i.e. exempting both some types of litigation and some types of persons).

Typical examples of exempted cases are those concerning asylum (e.g. HR, CZ, FI, DE, PL), detention of non-citizens (e.g. CZ, IE, PL), social security (e.g. HR, CZ, EE, DE, IT, LT, NO, PL, with FI also exempting some of these), electoral disputes (CZ, IT, LT), competence disputes (CZ, IT).

Less typical cases which are subject to the statutory exemption are those where civil servants are in dispute in relation to their service (HR, IT, LT, PL, some exemptions also in EE), applications for judicial review in proceedings for criminal offences (IE), guarantees of support for pupils with handicaps (IT), access to environmental information (IT), lawsuits against inaction by public authorities (LT).

In some countries statutory exemptions from the duty to pay reflect recent history (see e.g. Croatia, which exempts invalids of the Croatian War of Independence of the 1990s, and the spouses, children and parents of Croatian soldiers who were killed, missing or detained in the Croatian War of Independence, etc.).

Some systems exempt welfare recipients who receive a specific allowance (HR) while in most others it is up to individual courts to decide whether to exempt a person in need (see 3.6/ below).

The reports state there is no difference between the courts' instances in relation to statutory exemptions.

3.2 Non-governmental organisations

Explicit statutory exemption for NGOs is apparently very rare. Most systems generally do not provide for any exemption for NGOs.

Counter-examples include Croatia (for humanitarian organizations only), Poland (NGOs and entities listed under statute, in respect of matters concerning the carrying out of the public role with which they are tasked pursuant to provisions on public benefit and voluntary service), Slovenia (disabled people's organisations and charities where cases relate to their purpose).

A specific but very narrow exception exists in Latvia: according to Articles 29 and 128 (3) of the Administrative Procedure Law, if non-governmental organisations comply with the conditions for being deemed "*private legal persons (entities) who have the right to submit a submission to an institution or an application to a court in order to defend the rights and legal interests of private persons*" and if the person they are representing is poor and is thus exempted from duty to pay the fee, such an NGO is exempt from the duty to pay the fee.

3.3 The decision of the court to exempt a petitioner from the duty to pay the fee

In a few countries the law does not give judges the power to exempt petitioners from fees. This is the case in Italy and Ireland, where it is not possible, and only legal exceptions (as provided for by law) may be applied.

In Cyprus the law provides power for courts to exempt parties only in few specific proceedings.

In Croatia it has recently become the public administration rather than the judiciary that grants waivers.

In most other countries courts may decide to exempt. The decision to exempt the petitioner could be made either by the entire chamber deliberating on the case or by the presiding judge. Most reports do not distinguish between those two scenarios.

A typical example of such a system is the Czech Republic, where the presiding judge can exempt petitioners from the duty to pay the fee on request. Exemptions may be full or partial. Full exemption is only granted in exceptional cases. Decisions must be justified where full exception is granted or where the judge does not grant what the petitioner asked for. Exemptions are awarded if the financial situation of the petitioner justifies it (the court compares the earnings of the petition and any property with the court fee). Petitioners are obliged to disclose all documents that pertain to their living conditions.

In many systems the court will not grant an exemption if the petition has little chance of success (e.g. CZ) or has insufficient prospects of success (e.g. DE, EE).

Some reports refer to specific conditions for entities (legal persons under private law). This is the case in Greece (in order to be exempted from paying fees, entities must provide evidence that the payment of the fee would render it impossible or particularly problematic for them to fulfil their key goals) or Poland (such a person has to prove that they have no means to pay the costs of proceedings in order to be granted full exemption, or insufficient means to pay the total costs of proceedings in order to be granted partial exemption). Many other legal systems do not distinguish as a matter of law between people (natural persons) and entities (legal persons under private law). In Estonia legal persons may only be exempted if they are based in Estonia or in another EU member state.

In Finland where the fee is payable after the decision is handed down, the court can waive the fee if "imposing a court fee would be manifestly unreasonable".

It seems that most laws do allow judges sufficient discretion and do not define the financial need of petitioners in detail. It is different in the Netherlands. There the inability to pay

('*betalingsonmacht*') which is the reason for judicial exemption is governed by very high statutory thresholds:

> "The net income of the applicant and his/her fiscal partner should be lower than 90% of the maximum social welfare payment the individual is entitled to. As of January 1, 2019, an income of less than 90% of the net income is € 922.99 or less. Furthermore, neither the participant nor his/her partner should have any financial capital (shares, cash, claims etc.)."

3.4 Refunding fees after payment

In Finland where the fee is payable upon final judgment, the situation is straightforward: no fee is paid if the plaintiff wins the case. However, a court fee is charged in Finland even where a claim, appeal or petition is withdrawn.

Other issues arise in most European systems where fees are payable upon filing a lawsuit, appeal or cassation complaint.

It seems that where plaintiffs are successful, in most systems it is the defendant who reimburses them. However, in some systems – such as Latvia and Greece - this is not the case and the court refunds the fee. In these countries, this happens where the plaintiff wins his or her case before the court. Depending on the circumstances of the case, the court has the power to exempt successful applicants from the payment of fees in the context of the final decision on the case.

In many systems the fee is refunded if the petition is dismissed for inadmissibility or because it was delayed (e.g. CZ, EE, PL, EL). However, if the claim is withdrawn by the claimant then the court refunds a percentage of the fee (e.g. CZ, DE, LV, EE).

A specific rule exists in the systems where high courts have discretionary powers to select cases for review. In Norway the fee is returned if the case is not selected for the review.

3.5 The duty to be represented by a legal professional

Mandatory legal representation is usually required only when filing cassation complaints or appeals before the high (supreme) court or the council of state (BE, CZ, SI). This is also the case in France and Germany for submissions to the court of appeal. A specific situation exists in Poland where cassation complaints must be drafted by legal professionals but there are no other requirements for their participation (so the party does not need a professional during the hearing). In France, parties must be represented by a lawyer before the Council of State and the 'Cour de cassation' (Procedural Appeals Court).

In most jurisdictions petitioners are not obliged to be represented by a lawyer at any stage of the proceedings (CY, EE, FI, IE, LV, LT, NO, SE, UK, NL except for tax law cases before the Supreme Court).

By contrast, in a few systems, legal representation is mandatory at all procedural stages (EL, IT, LU, ES) although some specific cases may be excluded from this requirement, such as tax law cases in Luxembourg.

3.6 Free legal aid for participants

In most jurisdictions the court can appoint an attorney. This is usually done at the request of a participant (e.g. CZ, CY, EE, FR, DE, LV, SI). The law may limit the right to legal aid only to people, i.e. natural persons (this is the case in EE, IT and FR, where non-profit organisations and foundations may benefit from this in addition to natural persons).

In some jurisdictions attorneys are appointed by the bar, thereby this is not the responsibility of the court (BE, LU). Likewise, in the Netherlands it is the task of the Council for the Legal Counsel ('*Raad voor Rechtsbijstand*'). In Lithuania the state-backed Legal Aid Service, a state budgetary institution, is tasked with examining individual applications and making decisions on legal aid. In the United Kingdom the Legal Aid Agency performs the same role.

3.7 The forms and conditions of free legal aid

The conditions for appointing a representative to a party are usually linked to the financial needs of that party. Such conditions are therefore linked (though sometimes indirectly) to the conditions for exemption from the duty to pay judicial fees (BE, CZ, EE, FI, DE, EL, IT, LV, NL, NO, SI).

Legal aid is not given if this would clearly be pointless or if the pursuit of the matter would constitute an abuse of process (e.g. CZ, FI, SI). In Finland legal aid is also not granted if the matter is of little importance to the applicant.

In some countries the duty to pay fees is not dependent on the right to free legal aid (CY, FR).

Some jurisdictions do not have universal rights to free legal aid, but limit it to selected proceedings (CY).

4. Selection of cases by lower and higher jurisdiction

4.1 Do administrative courts have power to select cases?

The number of systems that provide no tools for their supreme (administrative) courts to restrict their case load is quite limited today. Although most European systems would not call it "*selection*" or "*filtering*" and would even emphasize that this procedure is rather formalized, their laws equip judges with flexible concepts for deciding which cases to deal with in detail and which cases do not merit close attention.

In the response to our questionnaires, only Cyprus, Italy, Poland and Serbia reported no filtering mechanisms whatsoever. Lithuania reported that although the situation is similar there too, there are draft laws aiming to change this in the foreseeable future.

The Czech Republic has a very limited range of mechanisms, which are restricted to asylum law cases (see below). Otherwise, the Czech Supreme Administrative Court deals with all cases, both factual and legal, no matter how insignificant, and no matter how often the legal issue in question has previously been adjudicated.

Most other jurisdictions do apply some sort of filtering or selection mechanisms, although many of these only apply to the court of final instance (HR, EL, BE, FR, IE, FI, SI, LV, NL). Some states apply filtering mechanisms at the appellate and supreme court levels, although as a rule the supreme courts enjoy more discretion (DE, ES, SE, NO).

The United Kingdom applies filtering mechanisms at all court levels. In Estonia, a very specific mechanism is also applied at all levels of the administrative courts.

4.2 The conditions for selecting cases

In virtually all systems where some sort of selection is applied, the law provides for criteria to determine which cases will be considered. Contrary to the views expressed in some reports, these almost always provide for considerable discretion on the part of judges, although such discretion should vary dependent on the level of court and whether its decision is subject to further appeal (or constitutional complaint in systems where this is applicable).

The criteria differ. In Belgium the arguments in cassation complaints are admissible only if they invoke an illegality "*insofar as the ground invoked by the appeal is not manifestly unfounded and the violation is actually of a nature that might lead to the cassation of the contested decision and may have influenced the scope of the decision*".

Belgium's neighbour, the Netherlands, applies similar rules. The law allows the Supreme Court to declare an appeal inadmissible when the grounds of cassation will evidently not lead to

cassation or when a party does not have a sufficient interest in a cassation appeal. The law also allows the Supreme Court not to deal with a case when the questions of law do not serve the interests of the unity and/or development of case law. The NL report provides an example from 2017, when cassation complaints were filed in 724 tax cases. In 272 cases, this led to a material assessment of the case, 131 cases were declared inadmissible on the basis of the first rule (the grounds of cassation would clearly not lead to cassation or the party did not have sufficient interest in a cassation appeal), and 321 cases were not dealt with by the Supreme Court on the basis of second rule (the case was not interesting from the point of view of case law development).

The second exception in the Netherlands is the Council of State Jurisdiction Division's 'moderate leave system' for asylum cases. The law permits the Council to judge that grounds for appeal will not lead to a different decision than has been reached by the court of first instance, and to offer no further justification. Therefore it allows the Council of State to give an extensive justification only in such cases as will add value to the unity and development of the law. In asylum cases this article serves an important purpose, since it prevents aliens from using the appeals process to lengthen the procedure.

Similar logic prevails in the Czech system, which limits filtering only to asylum cases. The Czech Supreme Administrative Court decides on merits only if i) no previous case law exists in the Supreme Administrative Court, ii) previous case law is inconsistent, iii) the Court decides to change its previous case law or iv) substantial violation of the law by the court may have an impact on the rights of the complainant. In practice, the fourth reason tends to prevail.

Slovenian law, which does not limit filtering to specific fields of law, takes a similar approach. It provides, rather bluntly, that the Supreme Court of Slovenia will deal with cases only where a decision by a lower court goes against the case law of the Supreme Court, or where case law does not exist or is not uniform.

German law grants some discretion to appellate and supreme court judges. The appellate court deals with cases only if there are serious doubts about the correctness of the judgment, special factual or legal difficulties, if the case is of fundamental significance, or where there is deviation from case law, or procedural shortcomings. The Supreme Court agenda is then limited only to legal issues, which further limits filter criteria to cases of fundamental significance, deviation from case law and procedural shortcomings.

Scandinavian supreme courts also emphasize their functions as law creators which further interpret the law. For instance, in Finland leave of appeal to the Supreme Administrative Court

shall be granted if: 1) with regard to the application of the act, in other similar cases, or because of the uniformity of case law, it is important to bring the matter to the Supreme Administrative Court for decision; 2) there is specific reason to bring the matter to the Supreme Administrative Court for a decision due to an obvious error in the matter; or 3) there is another important reason for granting leave.

In Norway, "*leave can only be granted if the appeal concerns issues that are of significance beyond the scope of the current case or if it is important for other reasons that the case is decided by the Supreme Court.*" Not surprisingly, leave to appeal is not granted in most cases. In 2018, leave to appeal was granted in relation to about 15% of civil case judgments.

A very specific discretion is enjoyed by Estonian judges at all levels. The law targets fraudulent or abusive claimants in particular. The court of first instance may refuse the action if: 1) it is manifest that the applicant has no right of action in the matter; 2) granting the action would not achieve the aim of the action; 2.1) the encroachment of the right that the action seeks to protect is minor and, in the circumstances, there is little probability of the action being granted; 2.2) the applicant has to a significant extent abused their right of action and the encroachment of the right that the action seeks to protect is minor [§ 121 (2) CACP]. The Supreme Court of Estonia enjoys even wider discretion.

4.3 The power to select cases restricted to certain fields of law

Selection of cases is not restricted to any particular area of law in most jurisdictions. The only exception is Finland, where certain subject matters are currently subject to the requirement of leave to appeal while others are not. A new administrative judicial procedure act is likely to come into force in 2020, and under the new act, the system of leave to appeal will become the rule, with direct appeals to the Supreme Administrative Court becoming the exception.

In the Czech Republic selection is limited only to international protection (asylum) cases.

Last but not least, the Netherlands' 'moderate leave systems' apply only in tax and asylum cases in the courts of the highest instance (see 4.2/ above).

4.4 Further procedural rules on the selection of cases

In most cases this is the panel that could potentially decide which cases were selected for full review; in Belgium a single judge selects the case.

In some systems, all that is required for a case to be rejected is a majority amongst the judges (HR); in other systems a unanimous decision to reject the case is required (CZ, LV).

France operates a sophisticated filtering mechanism. Appeals are divided between ten specialised chambers that play a directly role in the admission of cases. The admission phase entails three different procedures, which impact on the decision:

- If the appeal is 'evidently groundless', the presiding judge in the chamber examining it may order that its admission be refused.
- If on the other hand, the appeal should in said judge's eyes be admitted, he or she may directly pronounce a decision to admit.
- If finally the presiding judge in the chamber considers that there are doubts as to whether the appeal should be admitted, the claim is initially examined by the chamber's reporting judge and his supervisor (*réviseur*). If they both pronounce in favour of admission, the chamber's presiding judge issues a decision to admit. If however the reporting judge and/or the réviseur pronounces against admission, the appeal is then examined by the chamber´s public rapporteur and then heard by a three-judge section, which will decide to admit or to refuse admission.

4.5 The decision (not) to select a case

Some systems divide the decision on the merits of taking cases for decision from the final decision (HR), some systems merge this into a single decision (CZ, FI etc.).

Decisions by supreme courts not to take cases for the decision are as a rule not subject to appeal.

All systems require decisions rejecting a case to be justified (e.g. HR, BE, HR, EE), although in many systems such a justification is particularly succinct and merely sets out the grounds for the appeal before declaring in a standard format – that "none of the grounds serve to allow the admission of the claim" (FR) or is very brief and presented in a formal standardized document (FI).

The only two systems which do not require any justification are Norway and the Czech Republic. In the Czech Republic, however, the Supreme Administrative Court in practice provides detailed justifications of decisions not to deal with merits of cases, out of fear that otherwise the Constitutional Court would intervene to quash the (unjustified) decision on the grounds of lack of arguments.

4.6 The review of the lower court decision

In all systems which give the right to the lower court to select its cases it is open to petitioners to submit an appeal to the appellate or supreme court, challenging the decision of the lower court.

4.7 Lower courts' power to select cases for higher courts

No system provides such a power to the lower court. The only exceptions are Germany and the United Kingdom. In Germany higher courts are bound by the decision of lower courts to grant appeals. They can also grant appeals even if the lower court did not offer this right. By contrast, the UK Supreme Court is not bound by the lower court's ruling to grant leave.