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GREATER UNIFORMITY OF PRACTICE IN UKRAINE

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I. Introduction

1. The Strategic Plan of the Judiciary for 2013–2015, approved by the XIth Congress of Judges of Ukraine, the highest body of judicial self-governance, states the mission of the Judicial System of Ukraine – through the timely, effective and just resolution of legal disputes on the basis of the rule of law to protect rights, freedoms and legitimate interests of persons and citizens, to protect rights and legitimate interests of legal entities, as well as interests of the state. Thus one of the basic principles and objectives governing the functioning and activities of the Judiciary of Ukraine is the principle of the rule of law.
2. The European Commission for Democracy through Law (hereinafter – the Venice Commission) in its Report on the Rule of Law states that the principle of legal certainty is essential to the confidence in the judicial system and the rule of law. Legal certainty is also essential to productive business arrangements so as to generate development and economic progress. The state has a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. The existence of conflicting decisions within a supreme or constitutional court may be contrary to the principle of legal certainty. It is therefore required that the courts, especially the highest courts, establish mechanisms to avoid conflicts and ensure the coherence of their case-law[1].
3. The importance and indispensable character of a coherent case-law for the principle of the rule of law is clearly echoed in the jurisprudence of the European Court of Human Rights (hereinafter – the ECHR). The ECHR stresses that the right to a fair trial must be interpreted in the light of the Preamble to the Convention, which declares the rule of law to be part of the common heritage of the Contracting States. Now, one of the fundamental aspects of the rule of law is the principle of legal certainty, which, *inter alia*, guarantees a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law[2]. Conflicting decisions in similar cases heard in the same court which, in addition, is the court of last resort in the matter may, in the absence of a mechanism which ensures consistency, breach the principle of legal certainty and thereby undermine public confidence in the judiciary, such confidence

[1] *Report on the Rule of Law*. The European Commission for Democracy through Law. Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011).
[2] *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 57, 20 October 2011.

being one of the essential components of a State based on the rule of law. The ECHR identified the issues that need to be assessed when analysing whether conflicting decisions in similar cases stemming from the same court violate the principle of legal certainty under Article 6 of the Convention: 1) the existence of "profound and long-lasting divergences" in the relevant case-law; 2) whether the domestic law provides for a mechanism capable of removing the judicial inconsistency; and 3) whether this mechanism was applied and, if so, what were the effects. Consequently, the Contracting States have the obligation to organize their legal system so as to avoid the adoption of discordant judgments[3].

4. Based on aforesaid, every state governed by the rule of law in principle must strive for coherent and harmonious case-law within the judicial system. The aim of this Report is to assist the Judiciary of Ukraine in its aspiration to develop harmonious case-law and strengthen the principle of the rule of law. The Report analyzes current situation regarding case-law harmonization in Ukraine, means and mechanisms employed for this purpose and provides experts' observations and recommendations in this respect.
5. The Report is based on meetings with the judges and other representatives from the Supreme Court of Ukraine, the High Administrative Court of Ukraine, the High Economic Court of Ukraine and the High Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter – the Courts), as well as with private lawyers (advocates) practicing at the courts. The meetings were organized and took place in Kiev on 4–6 April 2016. During the preparation of this Report experts reviewed relevant legislation of Ukraine, officially available information on the websites of aforementioned Courts. When drafting the Report, experts researched and took into account the situation on case-law harmonization in other countries of Europe, especially Lithuania, which is best known for the experts due to their academic activities and working practice therein.
6. This Report is not aimed to provide with comprehensive and detailed analysis of each and every aspect related to case-law harmonization and / or functioning of certain mechanisms employed for this purpose. The experts decided to concentrate on selected in principle major questions and issues, because in essence they are the most important for the effectiveness of all the means used for case-law harmonization. As the case-law harmonization in a country cannot be achieved by individual attempts, experts decided to give general analysis of a situation. Therefore, the Report as a general rule does not go into the analysis of the situation in a concrete court. Possibility of a more detailed and / or individual assessment

[3] See, for example, *Balažoski v. the former Yugoslav Republic of Macedonia*, no. 45117/08, § 30, 25 April 2013.

may be discussed following the presentation of this report and anticipated round-table discussion.

7. This report does not deal with the implementation and following the jurisprudence of the ECHR in the judicial practice of Ukrainian courts, as well as implementation and following decisions of the Constitutional Court of the Republic of Ukraine. In accordance with the Law of Ukraine on the Enforcement of Judgments and the Application of the Case-Law of the European Court of Human Rights, while adjudicating cases courts shall apply the Convention and the case-law of the ECHR as a source of law. The Constitutional Court of Ukraine does not belong to the system of courts of general jurisdiction. The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction, therefore, its functions are different than those of courts of general jurisdiction. In addition, the Law of Ukraine on the Constitutional Court of Ukraine provides that decisions and opinions of the Constitutional Court of Ukraine are binding.

II. Background

II.1. The Judicial System and Case-Law in Ukraine: Basic Legal Provisions

8. The Constitution of Ukraine lays down a framework of judicial system of Ukraine. The Supreme Court of Ukraine is the highest judicial body in the system of courts of general jurisdiction. The respective high courts are the highest judicial bodies of specialized courts. Courts of appeal and local courts operate in accordance with the law. Thus according to the Constitution of Ukraine and respective procedural laws, the system of courts of general jurisdiction consists of four levels (instances) of jurisdiction. The Constitution of Ukraine provides that in the administration of justice, judges are independent and subject only to the law. Justice in Ukraine is administered exclusively by the courts.
9. According to the Law of Ukraine "On the Judiciary and the Status of Judges", the Supreme Court of Ukraine is the highest judicial body of general jurisdiction of Ukraine, which ensures unity of judicial practice following the procedures and in the manner specified by the procedural law. According to procedural laws of Ukraine, an application for revision of the decision of the court of cassation may be submitted to the Supreme Court of Ukraine in case of:

    1) unequal application by the cassation court (courts) of the same substantive law, which resulted adoption of the different content decisions in similar legal relationships (in criminal cases – unequal application by the cassation court (courts) of the same substantive law on criminal liability, which resulted adoption of the different content decisions in similar legal relationships (except the issues of unequal application of sanctions of criminal law, exemption from criminal liability or punishment);
    2) unequal application by the court of cassation of the same procedural rules in an appeal procedure, which prevents further proceedings on the case or is taken in violation of the rules of jurisdiction of the courts or statutory competence in a relevant kind of cases (in criminal cases – unequal application by the court of cassation of the Code of Criminal Procedure in an appeal procedure, which resulted adoption of the different content decisions in similar legal relationships); ;
    3) contradiction of the judgment of the court of cassation to the conclusions of the Supreme Court of Ukraine on application of the substantive law (in criminal cases – just law) in similar legal relations;

4) recognition by an international court, jurisdiction of which is recognized by Ukraine, that international obligations of Ukraine have been violated while adjudicating the case in the court.

10. According to the Law of Ukraine "On the Judiciary and the Status of Judges", within the system of courts of general jurisdiction, high specialized courts functions as courts of cassation appeal for consideration of civil and criminal, economic and administrative cases. The courts of cassation deals only with the questions of application of law, legal qualification of the facts established by the lower courts. In principle, it is possible to refuse opening the cassation procedure, if the cassation court establishes that cassation appeal is clearly unfounded.
11. According to the Law of Ukraine "On the Judiciary and the Status of Judges", conclusion regarding application of the law provisions specified in resolutions of the Supreme Court of Ukraine shall be taken into account by other courts of general jurisdiction in the application of such legal provisions. A court shall have the right to depart from a legal position set out in the conclusions of the Supreme Court of Ukraine, while providing the respective substantiation. If the decisions of the cassation courts of different jurisdiction are conflicting, the case in the Supreme Court shall be heard in a joint meeting of respective Chambers of the Supreme Court (no such rule is provided in the Code of Criminal Procedure). If the Supreme Court intends to deviate from previous judicial practice established by other Chamber(s) of the Supreme Court, the case shall be heard in a joint meeting of respective Chambers of the Supreme Court (no such rule is provided in a Code of Criminal Procedure).
12. According to the Law of Ukraine "On the Judiciary and the Status of Judges", the Supreme Court of Ukraine shall *inter alia* analyze judicial statistics and summarize judicial practice; ensure uniform application of the law provisions by courts of different specializations following the procedure and in the manner stipulated by the procedural law. A judge of the Supreme Court of Ukraine shall *inter alia* analyze judicial practice and take part in its summarizing. Judicial Chambers of the Supreme Court of Ukraine shall *inter alia* analyze judicial statistics and study judicial practice, and carry out summarizing of the judicial practice. The Secretary of the Judicial Chamber shall *inter alia* organize the analysis of judicial statistics, studying and summarizing judicial practices.
13. According to the Law of Ukraine "On the Judiciary and the Status of Judges", High Specialized Court shall *inter alia* study and summarize the judicial practice; provide

technical assistance to courts of lower level to ensure uniform application of the Constitution and laws of Ukraine in the judicial practice based on its generalization and analysis of judicial statistics; provide specialized courts of lower level recommendation explanations on application of the law for decisions in cases within the respective judicial specialization. The Chairperson of a high specialized court shall *inter alia* inform the plenary session of the high court on the status of justice in the respective judicial specialization and practice of resolution of certain categories of cases; organize accounting and analysis of judicial statistics, examination and summarizing of court practices, information and analytical support for judges to improve the quality of justice; facilitate fulfillment of the requirements regarding the maintenance of the qualification level of judges of the high specialized court and improvement of their professional knowledge. Plenary Session of the High Specialized Court shall *inter alia* in order to ensure uniform application of provisions of the law in resolution of certain categories of cases within the respective judicial specialization, summarize the practice of substantive and procedural laws, systemize and procure the publication of legal positions of the High Specialized Court with reference to the court decisions which contain such positions; hear information about the status of justice in the respective judicial specialization and practice of resolution of certain categories of cases; proceeding from the analysis of judicial statistics and summarized judicial practice, provide guidance, of the recommendation nature, regarding the application of law by specialized courts in consideration of cases of the respective judicial specialization.

14. The Law of Ukraine "On Access to Judicial Decisions" provides establishment of a united register of judicial decisions. Basically all judicial decisions of courts of general jurisdiction are submitted to this register, the access to which is public via special website, which includes a search mechanism.

15. According to the publicly available statistics, in 2015 the High Economic Court has adjudicated 17,5 thousand appeals under cassation procedure and decided 11,4 thousand cassation appeals on the merits, the High Administrative Court has adjudicated almost 62 thousand cassation appeals under cassation procedure, of which 27,3 thousand on the merits, and the High Specialized Court of Ukraine for Civil and Criminal Cases adjudicated: civil cases – 41 thousand cassation appeals, of which in almost 18 thousand cases preliminary hearings were held; criminal cases – 7,6 thousand cassation appeals, of which 2,2 thousand cases decided on the merits. In 2015 the Supreme Court of Ukraine has finished proceeding

in almost 11 thousand cases, 1,4 thousand of which have ended in a decision on the merits of a case.

II.2. The Role of a (Coherent) Case-Law

16. It has been already mentioned that both the ECHR and the Venice Commission stresses the need for consistency of case-law. The ECHR reiterates that "it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases"[4].
17. The Venice Commission in its opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina[5] points out that legal certainty could be defined as including the following requirements: publicity, precision, consistency, stability, non-retroactivity and the finality and binding force of decisions. Publicity means that legal instruments and judicial decisions must be publicly accessible. Access to them should not involve undue hurdles and should take into account the capacities of an ordinary individual. Precision requires that legal instruments and judicial decisions must be clear and precise as to their legal basis and content (par. 27).

    Under the consistency requirement, legal instruments must not contradict one another or be mutually incompatible. Judicial decisions must be based on legal instruments. Like cases must be treated alike both within one judicial institution and as between various courts (located on either a horizontal or vertical level). Stability means that legal instruments must not change so often as to make the principle *ignorantia juris non excusat* impossible to be applied by an ordinary individual. Courts should not depart from a previously held interpretation of a legal instrument, unless they have a good reason to do so. Finality and binding force of decisions means that judicial decisions must be regarded as binding and, once adopted at the last instance, final (par. 28).
18. The Constitutional Court of the Republic of Lithuania in its landmark ruling as of 28 March 2006 stated that "the principle of a state under the rule of law entrenched in the Constitution implies continuity of jurisprudence <…>. In this context, it should be emphasised that the instance system of courts of general jurisdiction established in the Constitution must function so that the preconditions are created to form the same (regular, consistent) practice of courts of general jurisdiction, i.e. such, which would be based on the principles of a state under the rule of law, justice, equality of all persons before the law (and other constitutional principles) enshrined in the Constitution, on the maxim inseparably linked with the said principles and arising from them that the same (analogous) cases must be decided in the

[4] *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 153, 12 November 2008.
[5] Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012).

same way, i.e. they have to be decided not by creating new court precedents, competing with the existing ones, but by taking account of the already consolidated ones. When ensuring the uniformity (regularity, consistency) of the practice of courts of general jurisdiction, which arises out of the Constitution, thus, also the continuity of the jurisprudence, the following factors (along with other important factors) are of crucial importance: the courts of general jurisdiction, when adopting decisions in cases of corresponding categories, are bound by their own created precedents – decisions in the analogous cases; the courts of general jurisdiction of lower instance, when adopting decisions in the cases of corresponding categories, are bound by the decisions of the courts of general jurisdiction of higher instance – precedents in the cases of the same categories; the courts of general jurisdiction of higher categories, while revising decisions of the courts of general jurisdiction of lower instance, must assess these decisions by always following the same legal criteria; these criteria must be clear and known *ex ante* to the subjects of law, *inter alia,* to the courts of general jurisdiction of lower instance (thus, the jurisprudence of courts of general jurisdiction must be predictable); the practice of courts of general jurisdiction in cases of corresponding categories has to be corrected and new court precedents in these categories may be created only when it is unavoidably and objectively necessary; such correction of practice of courts of general jurisdiction (deviation from the previous precedents, which had been binding on courts until then and creation of new precedents) must in all cases be properly (clearly and rationally) argued in corresponding decisions of courts of general jurisdiction. The fact that the courts of general jurisdiction that adopt decisions in cases of corresponding categories bind themselves by their own created precedents (decisions in analogous cases) and the fact that the courts of general jurisdiction of lower instance that adopt decisions in cases of corresponding categories are bound by decisions of the courts of general jurisdiction of higher instance (precedents in cases of such categories) inevitably imply that the said courts have to follow such concept of the content of corresponding provisions (norms, principles) of law, also of the application of these provisions of law, which was formed and which was followed when applying these provisions (norms, principles) in the previous cases, *inter alia,* when previously deciding analogous cases. Disregarding the maxim that the same (analogous) cases have to be decided in the same way, which arises out of the Constitution, would also mean disregarding the provisions of the Constitution on administration of justice, that of the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles."

19. Thus, as is seen from above, the Constitutional Court of Lithuania declared that the constitutional principles of the rule of law, justice and equality require the courts to follow their own previous decisions and the lower courts to follow previous decisions of the higher courts. This led that the Parliament has respectively changed the Law on Courts. Article 33, paragraph 4 of the latter now provides that "when taking decisions in cases of appropriate categories the courts shall be bound by the rules of interpretation of law created by them, formed in analogous or similar cases. The courts of lower instance when taking decisions in cases of appropriate categories shall be bound by the rules of interpretation formulated in analogous or conceptually similar cases. The court practice in cases of appropriate categories must be amended and new rules for the interpretation of law in analogous or similar cases may be created only in cases when it is inevitable or objectively necessary."
20. Similar trends can also be seen in other countries of Europe, which share very much in common both with Lithuania and Ukraine. For example, Czech Constitutional Court emphasized that consideration of the predictability of the law (its consequences) cannot be restricted only to its grammatical text. It is judicial decision making which – although it does not have a classical precedential nature – interprets the law, or completes it, as the case may be, and its relative constancy guarantees legal certainty and also insures general confidence in the law. This applies particularly to the Supreme Court of the Czech Republic, which is the supreme judicial body in the field of the general judiciary. This, of course, does not deny that judicial case-law can develop and change with regard to a number of aspects, in particular with regard to changes in social conditions. However, this changes nothing about the fact that in the adjudicated matter the appealed decision of the Supreme Court of the Czech Republic principally diverged from the fundamental legal opinion which the same court expressed a mere 5 months before.

    As a result the Supreme Court overruling its own case-law without any reason or explanation, the Constitutional Court reversed the Supreme Court's decision[6].
21. In addition, in Czech Republic it is prohibited for a small panel (composed of three judges) of the Supreme Court and Supreme Administrative Court, which decides cases routinely, to deviate from its earlier legal opinion. Instead it is obliged to send the issue to its respective grand chamber. Grand chambers are the only judicial body empowered to overrule previous precedents of the Supreme Court. According to the Constitutional Court of the Czech

[6] Zdeněk Kühn. Precedent in the Czech Republic. In *Precedent and the Law*. Reports to the XVIIth Congress, International Academy of Comparative law. Bruylant, 2007, p. 394.

Republic, if the high court deviates from its previous case-law without the approval of its grand chamber the party's fundamental right to a lawful judge is violated.

22. Taking into account the jurisprudence of the Czech Constitutional Court, in 2012 the legislature affirmed the conception of precedent envisaged by the Constitutional Court's case-law. The Civil Code of Czech Republic enacted in 2012 provides as one of its basic principles that everyone who seeks legal protection can expect that his / her case would be decided in the same way as another case decided by law courts which is similar in essential features; if his / her case is decided in a different way the party who seeks legal protection is entitled to persuasive explanation of reasons relating to this deviation (Section 13 of the Civil Code)[7].
23. Still the Czech Constitutional Court emphasizes that a judge is not bound by the case-law of the Supreme Court and is entitled to deviate therefrom if he / she finds good and legitimate reason to do so. Replying to the arguments of an ordinary judge that the decision is correct because the ordinary judge is bound by case-law, the Czech Constitutional Court emphasized that the ordinary court must assess the validity of the established case-law by taking into account societal and legal development. This means that the conception of precedent in the Czech Republic is discursive, not formally binding. Lower courts are supposed to follow precedents, at the same time they might provoke overruling by bringing new arguments and trying to persuade higher courts to change their legal opinions[8].
24. In the same manner Slovenian Constitutional Court declared that the right to the equal protection of rights (Art. 22 of the Constitution) of the complainant was violated when the Supreme Court in his case applied statutory law differently from the case-law established in particular by the decisions of that court, and did not explain or substantiate such different application in any manner[9].
25. The Concluding remarks of the Third Colloquium (Ljubljana, 2008) of the Network of the Presidents of the Supreme Judicial Courts of the Member States of the European Union seem to accurately reflect the general attitude towards the case-law throughout the Europe:

    "A judgment is primarily rendered in order to solve a conflict. But its impact is usually not confined to the individual case. In almost all European states precedents are followed by all

[7] Zdeněk Kühn. Prospective and Retrospective Overruling in the Czech Legal System. *The Lawyer Quarterly*, 2014, Vol 4, No 2, p. 143.
[8] Zdeněk Kühn. Prospective and Retrospective Overruling in the Czech Legal System. *The Lawyer Quarterly*, 2014, Vol 4, No 2.
[9] Decision of Slovenian Constitutional Court as of 15 June 2000, Up-297/96.

courts although in the vast majority of the states precedents are not legally binding. The reasons are manifold.

Judges must often interpret the same statute or other general regulations. It would be a waste of resources if they did not take into consideration what they had said on the same topic in another case.

This is one aspect; the other side of the issue is of much more importance for the *Rechtsstaat*, the constitutional state founded on the rule of law. The same facts should lead to the same decisions; like cases should be decided alike. To achieve legal certainty, the decisions that are rendered must be predictable. This implies that the courts adhere to the Supreme Court's case law even if they are not bound by law to do so."

26. Besides what was said above, experts are of the opinion that consistent case-law, based on following earlier judicial decisions at least as persuasive authorities both horizontally (following a prior decision made by a court of the same hierarchical level) and vertically (following a prior decision made by a higher court), may produce additional advantages including:
    - Reducing numbers of incoming cases. Coherent case-law creates certainty and stability in the legal system, which essentially means that citizen can foresee or anticipate the probable outcome of their case, i.e. people can make decisions expecting interpretations of the legal rules previously declared by judges will be taken into account in other cases as well;
    - Increasing efficiency and reducing the burden of courts, because the judge is able to motivate his current decision on a previous decision. Thanks to established judicial practice some initially hard cases can be easily disposed as easy ones. For example, empirical studies in the field of civil law have demonstrated that in 95 % of its decisions the Federal Court of Justice in Germany (*Bundesgerichtshof*) decides on matters with reference to its previous judgments, and in most cases such reference is used as a main argument. In addition, the courts of first and second instance commonly refer to the judgments of the Federal Court of Justice without any further scrutiny of those decisions or attention to (potential) counterarguments[10].
    - Reducing arbitrariness, because the delivery of a decision in a case would not depend on the whims or personal preferences of the individual judge;

[10] Adam Sagan. Changing the Case Law pro futuro – A Puzzle of Legal Theory and Practice. In *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions. Ius Comparatum – Global Studies in Comparative Law.* Springer, 2015.

- Confirming the judiciary's place in the separation of powers, a prerequisite for a democratic society. It is universally accepted that the courts are not restricted to a literal interpretation of statutory laws; the courts are not merely *'la bouche qui pronounce les paroles de la loi'*. Their function implies a certain aspect of rule-setting, which confirms their importance in the mechanism of the separation of powers[11]. The application of doctrine of binding or persuasive precedent proves that application of law is not merely a mechanical process, based on Aristotelian syllogism, but involves creative and discursive elements. If the court shows little respect for its own decisions, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind[12];
- Decreasing the pressure on the courts from outside sources (e. g. state, business community);
- Discouraging fears of corruption;
- Curbing anarchy in judicial decision making;
- Bringing de-personalisation and neutrality and thus increasing appearance of impartiality. This implies constraint and direction, to the point that judges cannot be faulted for a decision if it relies on a previous one;
- Increasing transparency of the judicial system;
- Bringing in notion of equality and formal justice by ensuring that similar cases are treated alike. When an earlier decision has been well thought out and grounded the community has a right to regard judicial decision as a just declaration or exposition of law, and to regulate their actions by it. It would therefore be inconvenient to the public if previous judicial decisions were not duly regarded[13];
- Encouraging predictability, which in turn convinces people to rely on a legal system and strengthens the public's confidence in the judiciary's fundamental competence. This can be especially important in a legal system with a fast changing legislation. Stability of case-law can bring and ensure at least some predictability in a fluctuating legal environment.

[11] Adam Sagan. Changing the Case Law pro futuro – A Puzzle of Legal Theory and Practice. In *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions. Ius Comparatum – Global Studies in Comparative Law.* Springer, 2015

[12] *Payne v. Tennessee*, 501 U.S. 808, 853-854 (1991) (J. Marshall, dissenting).

[13] Marina Gascon. Rationality and (Self) Precedent: Brief Considerations Concerning the Grounding and Implications of the Rule of Self Precedent. In *III. On the philosophy of precedent* (ed. by Thomas Bustamante and Carlos Bernal Pulido). Proceedings of the 24th World congress of the International Association for Philosophy of Law and Social Philosophy, Beijing, 2009. Steiner, 2012, p. 37–38.

27. Still experts fully acknowledge that following the previous case-law can have certain negative sides. First of all, it is sometimes said that it inflicts judicial independence. As we heard this argument during our visit in Ukraine, we will address this issues in the next part of this Report (please see section III.3). Moreover, unthinking and obsequious adherence to earlier decisions of the courts (even of the highest courts) is not a proper way to do justice. Stability of case-law should not be achieved at the expense of a paramount principle of justice. Earlier jurisprudence of the courts might be not appropriate for the situation for any number of reasons. Thus the courts must be aware of and take due account to the fact that relying on an earlier decision as a legal shortcut may ultimately result in failing to see the differences that exist in seemingly like cases[14]. The ECHR points out that the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law[15]. Case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement[16].

[14] Neil Duxbury. *The Nature and Authority of Precedent*. Cambridge University Press, 2008, p. 26.
[15] *Unédic v. France*, no. 20153/04, § 74, 18 December 2008.
[16] *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, no. 36815/03, § 38, 14 January 2010.

III. The Experts' Observations and Recommendations

III.1. Summary: Main Observations and Recommendations

- *The experts are of the opinion that in general the Courts of Ukraine do a huge work and show very positive attitude towards case-law harmonization.*
- *Stability of legislation is of key importance in this respect. It is impossible to build a body of coherent case-law, where frequent changes in laws and regulations take place.*
- *It is worth having a general discussion on potential incongruity between judicial independence on the one hand and the values of case-law harmonization on the other hand in order to reach a wide agreement and consistent view on aforementioned issue in the Judiciary of Ukraine.*
- *The experts would like to accentuate the importance of providing reasons for departing from previously established case-law in a similar case at the horizontal level of higher jurisdictions.*
- *The experts suggest considering requiring (by law, interpretation of it) or recommending (by soft-law instruments) the lower courts of Ukraine, especially in a situation when a party relies on a case-law of the High Court, to provide reasons for departure from the case-law established by respective High Court, when there is no judicial practice of the Supreme Court of Ukraine on relevant legal issue.*
- *Reference to national, European or international case-law, including reference to case-law from courts of other countries, as well as reference to legal literature, can be useful and should be even more encouraged.*
- *It is the Supreme Court, which has to take a leading role in ensuring unity of case-law. However, it seems that the legislator in Ukraine is not fully consistent on the role and functions of the Supreme Court of Ukraine.*
- *The grounds on which application to the Supreme Court of Ukraine is allowed to some extent limit the powers of the Supreme Court to ensure harmonization of case-law.*
- *It is worth considering to introduce so called "leapfrog appeal" (on questions of law) directly from the court of first instance to the Supreme Court or, probably, to the respective High Court in order to reduce the time necessary for the court system to provide the society and lower courts with a guidance on interpretation of certain laws. As an alternative to a "leapfrog appeal" one may also consider introducing possibility to refer question(s) for a*

preliminary ruling to the Supreme Court of Ukraine concerning the interpretation of certain provision of law.

- *The experts recommend strengthening vertical and horizontal communication and cooperation between the courts of Ukraine on issues of case-law harmonization.*
- *The experts recommend considering setting in the courts of Ukraine (at least of higher instance) clear internal rules and procedures based on which case-law of the Supreme Court of Ukraine and, sometimes, the High Courts, which is relevant to the resolution of the case, as a general rule has to be collected and presented to the judge (panel / chamber of judges) in advance of a case hearing.*
- *Information technologies can be introduced and its use can be expanded for the harmonization of case-law in various ways.*
- *The experts want to draw attention not only to the specialization of judges, which to some extent are implemented in the Courts of Ukraine, but to likely additional efficiency in the specialization of other court personnel working with the case-law harmonization. And in general it is important to attribute proper amount of human resources for case-law harmonization efforts.*
- *The experts advice, where appropriate, publishing (e.g., on the websites) or sending drafts of non-judicial documents related to harmonization of case-law for public or target groups' (e.g., the Bar) comments.*
- *The issuing by high courts of abstract directives, explanations, or resolutions should be discouraged.*
- *It is rather untypical that abstract interpretations of laws can be adopted not by the Supreme Court, but by the High Court.*
- G*roup and model (test) case litigation can well serve for the consistency of case-law.*
- *Introduction of a special institution for preventive and subsequent resolution of jurisdictional conflicts might be considered.*
- *It might be convenient to have internal rules, descriptions and / or schemes of procedures related to the case-law analysis and harmonization.*
- *The experts recommend considering adopting a joint (the Supreme Court plus all the High Courts) strategy / action plan on efforts of harmonization of case-law in Ukraine.*

III.2. General Impression

28. At the outset it has to be emphasized that the Courts of Ukraine performs a lot of work on analyzing and summarizing judicial practice. It is evident that only by knowing what the practice of the courts is, it is possible to build a coherent and harmonious case-law. The results of Courts' work are also published on websites, bulletins of Courts. The Courts also employ various preventive and *ex post* monitoring measures and methods in order to ensure coherent case-law[17]. Courts have special units vested with the task of analyzing and summarizing judicial practice. Therefore, *the experts are of the opinion that in general the Courts of Ukraine do a huge work and shows very positive attitude towards case-law harmonization*. There are factors beyond the control of courts which is likely to amplify an impression of unstable case-law. In this respect *stability of legislation is of key importance. It is impossible to build a body of coherent case-law, where frequent changes in laws and regulations take place*. Especially major laws should be kept from changes as long as possible. It is not a rare feature of the laws that legal provisions can be interpreted in different ways, therefore, sometimes particular problem may have roots in interpretation of law rather than the letter of it and thus can be solved by a development in case-law.
29. However, there are also some issues, at the doctrinal, theoretical level too, which are subject to consideration in the context of case-law harmonization efficiency in Ukraine. First of all it is sometimes said that the requirement to take into account prior judicial decision can inflict judicial independence.

[17] Recommendatory interpretative statements of Plenary Session of Court (*Постанови Пленуму*); informative or surveying letters to lower courts (*Інформаційні та оглядові листи*; e. g., on final judgments of the ECHR, pressing issues in interpretation and application of new legislation, etc.); publication of legal positions of the Court (by subject and/or for certain period of time), compilations of decisions, studies and summaries of judicial practice, scientific-practical commentaries, annual reports, bulletins; analysis (monitoring) of case-law and based on it raising issues of application of laws to the attention of the Chamber of the Court, Secretary of the Chamber or other managing judge of the Court followed by subsequent procedure intended to solve a problem by a decision of Plenary Session or other mean (e.g. discussion by judges); receiving legal opinion of scientific-consultative council on an issue in a case; discussing topical issues on interpretation of laws in judges' meetings, visits, trainings; individual and collective acquaintance with decisions of the higher courts overruling decisions of the lower courts; spreading information on new trends in case-law through judges' meetings, visits, trainings; collecting relevant case-law during preparation of a case for hearing; discussions with external customers of the judicial system on pressing issues; usage of websites providing the text of law with references to relevant case-law, etc. Please note that not all courts performs the same activities, therefore, previously mentioned methods provides rather generalized and indicative list.

III.3. Judicial Independence

30. The experts are of the opinion that *it is worth having a general discussion on potential incongruity between judicial independence on the one hand and the values of case-law harmonization on the other hand*. If it is agreed that judicial independence is much more important than consistent case-law, it is hardly possible to achieve tangible results in case-law harmonization. In such a situation any divergence in case-law may be explained and any attempt to strengthen consistency may be blocked by an argument of judicial independence. Therefore, *it is advisable to seek for a wide agreement and consistent view on aforementioned issue in the Judiciary of Ukraine*. The experts are of the opinion that it is better to discuss and try to find a common understanding on this question first of all within the courts. Results that are achieved by a dialogue and involvement of all interested parties often are better accepted and thus more efficient than the changes which are brought from outside, e.g. by the legislator adopting certain rules and thus instructing the courts to act in one or another way.
31. In this respect the experts want to draw attention that independence of judges is not an end in itself. The chief object of courts must be to secure that justice is done and it requires acting carefully in order not to break judicial authority and remaining public trust in it. Independence of a judge is not a prerogative or privilege in his / her own interests, but is granted in the interests of the rule of law and of those seeking and expecting justice (par. 10 of Opinion No 1 (2001) "On standards concerning the independence of the judiciary and the irremovability of judges" of the Consultative Council of European Judges (hereinafter – CCJE). Thus judicial independence in fact is a mean to achieve that a judge will deliver a just decision in a case in accordance with a law in a procedure governed by the principle of the rule of law. Therefore, it is possible to argue that independence of judges must be balanced with other values and tenets, where the paramount object that it serves – justice – so requires.
32. It has been already indicated that following earlier judicial decision at least as persuasive authority may be attributed to bringing in more equality and formal justice into a judicial system. Thus harmonization of case-law is not an aim in itself, but a tool to reinforce justice. The uniform judicial practice to certain extent reflects the quality of the judiciary in the given society[18]. One of the most famous legal philosophers of all times H. L. A. Hart

[18] Virgilijus Valančius. The Uniform Judicial Practice: Few Remarks in Favour. *International Journal of Legislative Drafting and Law Refor*m, 2012, 1(1), p. 134.

suggests that there is one leading "principle latent in <…> (the foregoing) diverse applications of the idea of justice". His thesis is that "the structure of the idea of justice <…> consists of two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike (and different cases differently) <…> and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different". He says, further, that "the criteria of relevant resemblances and differences may often vary with the fundamental moral outlook of a given person or society"[19].

33. In addition, it is agreed that the judge is bound by the law. This is reflected in the Constitution of Ukraine too: in the administration of justice, judges are independent and subject only to the law. But, for example, the ECHR goes even as far as declaring that the case-law is a part of the law: "the Court considers that when speaking of "law", [it] alludes to the same concept to be found elsewhere in the Convention, a concept which comprises statutory law as well as case-law"[20]. The Federal Constitutional Court of Germany stated that "traditionally judges are bound to statutory law and this is a constituent component of the principle of separation of powers and the rule of law [Rechtsstaatsprinzip]. The Basic Law, however, stipulates that the judiciary is bound to 'law and justice' – article 20(3) of the Basic Law. According to a universally held view, this is incompatible with strict legal positivism. The formulation reflects that the 'law' de facto and in general is in accordance with justice; however, this is not necessarily and not always the case. The law is not identical with the entirety of written statutory law. There may be more laws than the positive rules set by the public authorities as the law has its roots in the constitutional order taken as a whole which can have the effect of correcting written law. It is the task of the judiciary to find and to apply such law. According to the Basic Law, judges are not limited to applying the rules of the legislature in their literal sense to each individual case. This would presuppose the principal absence of any lacunae in the positive legal order, a condition that might be defensible with regard to the principle of legal certainty, but is unattainable in practice. The task of the judges is not limited to finding and pronouncing the decisions of the legislature. It can include shedding light on and applying the ideals of justice which are imminent to the constitutional order but which are not or merely imperfectly reflected in

[19] Robert S. Summers. H. L. A. Hart on Justice. *Cornell Law Faculty Publications*. Paper 1263.
[20] *Teodorescu v. Romania*, no. 33751/05, 5 April 2016.

written statutory law; this task requires a critical assessment which is not free of voluntative elements"[21].

34. Aforementioned decisions show that the law to which the judge is bound in a European tradition does no longer represent just the letter of the law. The judge is not absolutely bound by the literal wording of a legal provision. Textual positivism became an impractical obstacle to legal development and to the proper functioning of the law[22]. In finding the true meaning of a law in a particular situation, especially when the law is unable to unequivocally determine a clear result, the judge is called to creative approach and must substantiate the decision on rational arguments. It seems acceptable that treating like cases alike and unlike cases differently is a general axiom of rational behavior[23].
35. It must also be emphasized that a judge is always entitled and thus is in principle independent to depart from previous case-law, without any immediate consequences to him / her, if he / she finds and gives reasons that the case-law must be further developed, supplemented or changed. The Constitutional Court of Lithuania in it is ruling as of 28 March 2006 indicated that although under the Constitution, when adopting decisions in the cases of corresponding categories, the courts of general jurisdiction of lower instance are bound by decisions of courts of general jurisdiction of higher instance, the instance system of the courts of general jurisdiction arising from the Constitution may not be interpreted as restricting the procedural independence of the courts of general jurisdiction of lower instance.
36. Based on a aforesaid it is no surprise that Opinion No 1 (2001) of the CCJE clearly states that judicial independence does not exclude doctrines such as that of precedent in common law countries (i. e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case) (par. 66). In Opinion No 11 (2008) "On the Quality of Judicial Decisions" the CCJE emphasizes that while recognizing the judges' power to interpret the law, the obligation of the judges to promote legal certainty has also to be remembered. Indeed legal certainty guarantees the predictability of the content and application of the legal rules, thus contributing in ensuring a high quality judicial system (par. 47). The Explanatory Memorandum of the Recommendation CM/Rec(2010)12

[21] Adam Sagan. Changing the Case Law pro futuro – A Puzzle of Legal Theory and Practice. In *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions. Ius Comparatum – Global Studies in Comparative Law*. Springer, 2015.
[22] Zdeněk Kühn. Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement. *The American Journal of Comparative Law*, 2004, Vol. 52, No. 3.
[23] *Matadeen v Pointu1* [1999] 1 AC 98, 109.

"Judges: Independence, Efficiency and Responsibilities", adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, states that "internal independence prevents superior courts addressing to lower courts instructions on the way they should decide individual cases, other than through their case law and judgments when deciding on legal remedies against decisions of lower courts. This should be without prejudice to superior courts' ability to develop the law in member states where their legal systems permit. This is not intended to interfere with the functions of appellate courts to ensure legal consistency as well as the clarification of existing judicial practices. Moreover, a court may be bound by decisions taken by other courts, such as the referral decision, *res iudicata* or decisions on preliminary questions."

III.4. Deviation from Previous Case-Law

37. According to the Law of Ukraine "On the Judiciary and the Status of Judges", conclusion regarding application of the law provisions specified in resolutions of the Supreme Court of Ukraine shall be taken into account by other courts of general jurisdiction in the application of such legal provisions. A court shall have the right to depart from a legal position set out in the conclusions of the Supreme Court of Ukraine, while providing the respective substantiation.
38. Aforementioned rule in principle establishes a vertical force of legal positions of the Supreme Court of Ukraine. However, we have heard that sometimes the courts depart from legal position set out in the conclusion of the Supreme Court of Ukraine by providing rather formal reasons, which in essence do not substantiate the deviation. Such practice should be avoided.
39. The Law of Ukraine "On the Judiciary and the Status of Judges" does not explicitly allow departing from legal position set out in the conclusion of the Supreme Court of Ukraine, even if a judge deals with a different case than the one previously decided by the Supreme Court. The legal rule established in the Law of Ukraine "On the Judiciary and the Status of Judges" in principle requires to take into account legal position of the Supreme Court whenever the same legal provision is invoked, without specifying that the cases should be in fact similar enough. Thus authoritative force of a judicial decision of the Supreme Court of Ukraine is defined in rather wide terms. This is not common to other jurisdictions.

40. For example, the Constitutional Court of Lithuania in its decision as of 24 October 2007 stated that "it is not permitted to overestimate, let alone make absolute, the significance of court precedents as sources of law. Court precedents must be invoked with particular care. It needs to be emphasised that in the course of consideration of cases by courts, only those previous decisions of courts have the power of a precedent, which were created in analogous cases, i.e. the precedent is applied only in those cases whose factual circumstances are identical or very similar to the factual circumstances of the case in which the precedent was created, and with regard to which the same law should be applied as in the case in which the precedent was created." In Common Law jurisdictions too (e.g., England) a court is not bound by a binding precedent when the present case can be distinguished, i.e., if the case is on its material facts sufficiently different from the precedent[24]. This seems to be the case also in the courts of the European Union. For example, the General Court of the European Union in one of its recent judgments pointed to the differences between the case at hand and the one the Republic of Germany relied on and, based on it, dismissed Germany's arguments from the previous judgment of the Court of Justice of the European Union[25].
41. Therefore, the experts are of the opinion that it is worth having at least some guidance on grounds[26] for departure from a legal position set out in the conclusion of the Supreme Court of Ukraine. It is subject to discussion whether the Supreme Court of Ukraine can provide such explanation by giving a judgment in a particular case and interpreting relevant legislation or it can be done, for example, in a soft-law document (guideline, recommendation, quality standard, judges' training modules, compendium of best practices, etc.). For example, we have found out that National School of Judges of Ukraine in 2013 published a Manual of Writing Judicial Decisions (*Посібник із написання судових рішень*), which too addresses question of referring to case-law.
42. The Constitutional Court of Lithuania in its landmark ruling as of 28 March 2006 also stated that the already existing precedents in cases of corresponding categories, which were created by courts of general jurisdiction of higher instance, not only are binding on the courts of general jurisdiction of lower instance that adopt decisions in analogous cases, but also the

[24] Eric Tjong Tjin Tai; Karlun Teuben. European Precedent Law. *European Review of Private Law*, 2008, Vol. 16, Issue 5.
[25] Judgment of the General Court of the European Union as of 10 May 2016, *Germany v Commission*, no T-47/15.
[26] E.g., exceptional facts of a case requires different decision for the sake of justice; previous interpretation proved to be unworkable in practice; due to changes of related legislation, public policy, social or economic life previous interpretation became obsolete; previous interpretation created greater uncertainty; in relation to some broad issue or other principles previous interpretation is not considered just; new reasons which was not previously considered are advanced in a new case before the court; etc.

courts of general jurisdiction of higher instance that created those precedents *(inter alia,* the Court of Appeal of Lithuania and the Supreme Court of Lithuania). Courts have to follow such concept of the content of corresponding provisions (norms, principles) of law, also of the application of these provisions of law, which was formed and which was followed when applying these provisions (norms, principles) in the previous cases, *inter alia,* when previously deciding analogous cases. Disregarding the maxim that the same (analogous) cases have to be decided in the same way, which arises from the Constitution, would also mean disregarding the provisions of the Constitution on administration of justice, that of the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles. The practice of courts of general jurisdiction in cases of corresponding categories has to be corrected and new court precedents in these categories may be created only when it is unavoidably and objectively necessary, when it is constitutionally grounded and justified. Such correction of practice of courts of general jurisdiction (deviation from the previous precedents, which had been binding on courts until then and creation of new precedents) must in all cases be properly (clearly and rationally) argued in corresponding decisions of courts of general jurisdiction. No creation or reasoning of a new court precedent may be determined by accidental (in the aspect of law) factors. It is such correction – only when it is unavoidably and objectively necessary, and when it is properly (clearly and rationally) argued in all cases – of the practice of courts of general jurisdiction (deviation from the previous precedents that had been binding on courts by then and creation of new precedents) that must be respectively ensured by the Court of Appeal of Lithuania and the Supreme Court of Lithuania within their competence. If the said requirements arising from the Constitution are disregarded when the court decisions are adopted, not only the preconditions for the irregularities and inconsistencies to occur in the practice of courts of general jurisdiction and the legal system are created, not only the jurisprudence of courts become less predictable, but also there are grounds for doubts on whether the corresponding courts of general jurisdiction were impartial when adopting the decisions, and whether these decisions were not subjective in other aspects.

43. The ECHR considers that the well-established jurisprudence imposes a duty on the Supreme Court to make a more substantial statement of reasons justifying the departure from the already established case-law. A technique of scarce reasoning by providing a mere statement of new interpretation of law might be not enough. It in fact can lead to a violation of Article

6, paragraph 1 of the European Convention on Human Rights[27]. Still one have to note in this connection that the ECHR reiterates that, in the absence of arbitrariness, a reversal of case-law falls within the discretionary powers of the domestic courts, notably in countries which have a system of written law and which are not, in theory, bound by precedent[28]. However, it seems that the ECHR is far stricter on the departures from case-law towards the states of Eastern Europe and rather lenient towards countries of old democracy.

44. CCJE in its Opinion No 11 (2008) stresses that judges should in general apply the law consistently. When a court decides to depart from previous case law, this should be clearly mentioned in its decision. In exceptional circumstances, it may be appropriate for the court to specify that this new interpretation is only applicable as from the date of the decision in issue or from a date stipulated in such decision (par. 49).
45. In addition, the rules providing that discrepancies in judicial practice of the High Courts of Ukraine is a ground for application to the Supreme Court of Ukraine and requiring a joint meeting of respective Chambers of the Supreme Court, if one Chamber intends to deviate from a case-law of the other Chamber, points to the direction that the legislature put strong emphasis on the need of consistency of case-law at the horizontal level in the High Courts and the Supreme Court.
46. Based on the aforesaid, the *experts would like to accentuate the importance of providing reasons for departing from previously established case-law in a similar case at the horizontal level of jurisdiction,* i. e. when the High Court or the Supreme Court deviates from a position approved in its earlier decisions. To the best of our knowledge there is neither legislative provision, nor requirement laid down by an interpretation of law (case-law), tradition or common practice to do this in the High Courts, which in accordance with the current legislation have certain rights and obligation with regard to harmonization of case-law. This practice is likely to put at a risk the values of case-law harmonization indicated hereinabove (see par. 26). Having no knowledge of the reasons for departure the participants of a case and / or the public are left wondering why the court adopted different interpretation of the law and what causes have led to it (differences between cases, changes in social or economic relations, aspiration for ideals of justice, necessity to correct mistakes, corruption or external pressure, etc.). Moreover, when no explanation is provided, it is not clear whether a new decision is a reversal of case-law which has to be followed in a future or is it just an example of discordant decisions leading to a greater uncertainty in application

[27] *Atanasovski v. "the Former Yugoslav Republic of Macedonia"*, no. 36815/03, § 38, 14 January 2010.
[28] *Borg v. Malta*, no. 37537/13, § 111, 12 January 2016.

of law. This can create an impression of arbitrariness and injustice, which is harmful to the public trust of a legal system, the State and the Courts.

47. The experts think that amending the legislation is not the only solution how to deal with this issue. In many European countries this is not the question of the statutory law. It basically concerns standards, rules and traditions of legal argumentation, which is left for the courts and judges to create and develop in their daily work and practices. It is subject to discussion whether the Supreme Court in principle has competence to provide an interpretation of law on this subject in its jurisprudence. Moreover, opportunities provided by an internal dialogue and administration mechanisms (e. g. meetings of Chambers, Plenary Session, individual discussions) might be first of all exhausted. Perhaps this can even lead to an adoption of certain recommendations, internal agreements, memorandums, other soft-law documents, etc. Thematic discussions, round tables of judges, specific training programs may also be involved as means to change a current attitude.
48. For example, the Civil Chamber of the Supreme Court of Lithuania has approved recommendatory Methodology of Preparation of Cassation Rulings in Civil Cases, which *inter alia* states that it is advisable in every decision of the Supreme Court to indicate that there is no case-law on an issue, or the case-law remains unchanged, or it is supplemented or reversed, or the case-law already exists but the lower courts did not follow it in an appealed decision. If the party to the proceedings refers to a certain judicial practice, it is not enough to state that the Supreme Court does not rely on a referred case, because the latter and the one the Supreme Court currently deals with are different. The Court shall at least briefly motivate the latter conclusion.
49. In this context it is also worth mentioning that the Council of the Judiciary of the Republic of Lithuania intends to adopt recommendatory Standards of Quality for Judicial Decisions. Draft Standards provides that a deviation from the established case-law is allowed only when it is unavoidably and objectively necessary, constitutionally substantiated and reasoned. Any deviation has to be properly (clearly and rationally) motivated by indicating the practice from which the court deviates and arguments supporting the departure. Where the judicial decision relied on by the court in a certain aspect(s) is different from the case at hand, the court reasons why it follows that decision.
50. Based on aforesaid, the fact that the High Courts of Ukraine currently take place of cassation courts and play significant role in unification of judicial practice, *the experts suggest considering requiring (by law, interpretation of it) or recommending (by soft-law*

instruments) the lower courts of Ukraine, especially in a situation when a party relies on a case-law of the High Court, to provide reasons for departure from the case-law established by respective High Court, when there is no judicial practice of the Supreme Court of Ukraine on relevant legal issue.

III.5. Making References to Existing Case-Law

51. The experts also would like to draw the attention that *where appropriate, reference to national, European or international case-law, including reference to case-law from courts of other countries, as well as reference to legal literature, can be useful* (par. 44, CCJE Opinion No 11 (2008). In civil law countries decisions can provide valuable guidelines to other judges dealing with a similar case or issue, in cases that raise a broad social or major legal issue (par. 45, CCJE Opinion No 11 (2008). As there is no tradition in the High Courts to rely on its earlier decisions, the experts consider that there is a potential for encouraging wider usage of the case-law in the High Courts when motivating new decisions. The fact that the court takes all relevant opinions seriously gives the decision maker the legitimacy to provide "right" answer, which is a necessary condition for the decision to become authoritative.
52. It is worth mentioning that the ECHR, the Court of Justice of the European Union, German, Lithuanian and many other courts of the European Union constantly refers to the already established case-law in their decisions. This helps to improve efficiency and quality of legal argumentation, enrich motivation, harmonize case-law, increase judicial transparency and prevent impression of arbitrariness or influence of external powers. The Czech Constitutional Court even proclaimed that unless it is the case when the legal solution is a direct result of the text of the law, the general court must explain sufficiently its legal reasoning, if possible by quoting published case law or doctrinal opinions. If the party argues by doctrinal opinions or case law, the general court must address the opinions mentioned in those sources, including the possibility that the general court explains why it does not consider those opinions significant for the case. Only in this way might the opinion of the court be persuasive and only in this way might it justify that the correct interpretation is the interpretation selected by the court[29].

[29] Decision no. I. ÚS 403/03 of 17 August 2005.

53. The Methodology of Preparation of Cassation Rulings in Civil Cases, approved by the meeting of judges of the Civil Chamber of the Supreme Court, provides that the Court has to provide reasons not only when it does not follow certain interpretation given in another decisions, but also when it relies on a particular judicial practice. This is especially the case when the party argues that the Court should not take into account certain judicial decision(s). The Court should avoid such a situation in reasoning of a decision, when the resolution of a dispute is presented as a new one, when in fact already established case-law exists.

III.6. The Role of the Supreme Court

54. According to the Law of Ukraine "On the Judiciary and the Status of Judges", the Supreme Court of Ukraine is the highest judicial body of general jurisdiction of Ukraine, which ensures unity of judicial practice following the procedures and in the manner specified by the procedural law. It is a common feature in Europe that the highest court's task includes ensuring the uniformity of case law. However, *it seems that the legislator in Ukraine is not fully consistent in this respect*.
55. First of all, reading the Law of Ukraine "On the Judiciary and the Status of Judges" gives an impression that more rights related to the harmonization of case-law are given to the High Court (its Plenary Session) than to the Supreme Court (its Plenary Session). According to the websites of the Courts, it is likely that in fact the High Courts do more work on analysis and summarization of case-law, as well as providing the lower courts with recommendations or other kinds of guidance on interpretation of law. We were informed that in some areas of law the High Court itself extracts legal positions from the decisions of the Supreme Court, which appears to be not very practical and efficient and looks like overlapping of functions of the Supreme Court and the High Courts, which can even lead to a duplication of the same work. The experts in general acknowledge and appreciate the importance of the work done by the High Courts of Ukraine. However, we are of the opinion that according to the European traditions *it is the Supreme Court, which has to take a leading role in ensuring unity of case-law.*

56. Second, *the grounds on which application to the Supreme Court of Ukraine is allowed to some extent limit the powers of the Supreme Court to ensure harmonization of case-law*[30]. The law in principle does not allow the Supreme Court of Ukraine to hear cases which involve a matter of general importance, if there is no contradiction in case-law of cassation court(s) or deviation from the Supreme Court's legal position. Therefore, although uniform judicial practice of cassation court can differ from the position reached by the appellate and first instance courts, application to the Supreme Court in such a situation to the best of our understanding would not be allowed. In addition, we were informed that decision of appellate court in administrative offence case can be reviewed neither in the High Court, nor in the Supreme Court of Ukraine.
57. For example, the Code of Criminal Procedure of Lithuania states that cassation appeal is heard by the Supreme Court of Lithuania only if one of these grounds exists: violation of substantive criminal law or serious breach of the Code of Criminal Procedure. The Court is entitled to refuse to admit cassation appeal when it is evident that no violation of substantive criminal law or serious breach of the Code of Criminal Procedure has been done. The Code on Administrative Offences of Lithuania provides an opportunity asking the Supreme Court to reopen proceedings in administrative offence case on a basis of fundamental violation of substantive or procedural law; the Supreme Court may reject such application, if the Court considers that it is clearly unfounded. The latter mechanism enables the Supreme Court to take appropriate measures in harmonization of case-law on administrative offences.
58. In civil cases cassation appeal is admissible only if one of these grounds for reviewing a case in a cassation procedure exist: 1) a violation of the rules of substantive or procedural law, which is essentially important for the uniform interpretation and application of the law, if this violation could lead to adoption of an unlawful judgment (ruling); 2) if in the appealed judgment (ruling) the court deviates from the practice of application and interpretation of the law formulated by the Supreme Court of Lithuania; 3) if on the question at issue the case law of the Supreme Court of Lithuania is not uniform. Prima facie unlawfulness / lawfulness of an appealed judgment plays an important role in selection process as is seen from above mentioned legislative provisions and from practice of the Court. On the other hand, in civil cases general importance of a case for uniform

[30] In case the legislator decides to broaden the grounds of appeal to the Supreme Court, in order to manage the workload of the Supreme Court mandatory representation by a lawyer or other filters may be introduced. It is quite common practice in Europe that there is a compulsory legal representation before the Supreme Court at least in civil and commercial cases.

interpretation of law is emphasized. The Court often recalls that it is not sufficient that the issue raised in the cassation appeal in civil case is of a legal nature, it must also be an important one, significance of which goes beyond particular case and its parties.

59. In civil cases in Germany the appeal will only, and indeed must, be admitted if the case is of fundamental legal importance, or if the development of the law or ensuring uniform application of law calls for a ruling of the Federal Court of Justice. Unlike in civil cases, an appeal on points of law to the Federal Court of Justice is not subject to admission in criminal matters and is thus available in all cases. If the responsible criminal panel of the Federal Court of Justice – or, to be more precise, the five-member panel of judges – holds that an appeal is inadmissible, it may decide the case by way of a court order without a main hearing. The same applies, if, in accordance with the Federal Prosecutor General's request, it holds that the appeal is manifestly unfounded, or if it considers an appeal lodged for the benefit of the defendant to be well-founded. In the last two constellations, the ruling must be unanimous. In the remaining cases (approximately 5 percent of appeals on points of law), a judgment will be handed down following the main hearing.

60. In Estonia a panel of three justices reviews the appeal filed with the Supreme Court in order to determine whether there are grounds for proceedings at the Supreme Court. If at least one justice reviewing the case is of the opinion that the matter should be accepted for proceedings at the Supreme Court the case is accepted. For example, the Code of Civil Procedure of Estonia states that the Supreme Court accepts an appeal in cassation 1) if the circuit court has evidently applied a provision of substantive law incorrectly, 2) the circuit court has materially violated a provision of procedural law or 3) when the adjudication of the appeal in cassation has fundamental importance with respect to guaranteeing legal certainty and developing a uniform judicial practice or for the further development of law. The rules for deciding on acceptance of appeal in cassation are more or less uniform across the other branches of law.

61. Thirdly, during the meeting with advocates of Ukraine we were informed that it can take few years until the case of general importance (e.g., on a new legislation) can reach the Supreme Court. Taking into account the latter fact and that there are four levels of jurisdiction in Ukraine, *it is worth considering to introduce so called "leapfrog appeal" (on questions of law) directly from the court of first instance to the Supreme Court or, probably, to the respective High Court in order to reduce the time necessary for the court system to*

provide the society and lower courts with a guidance on interpretation of certain laws. For example, leapfrog appeal is available in the United Kingdom, Ireland, Norway, Germany.

62. In civil case in Germany upon corresponding application being made, an appeal on points of law may be filed directly with the competent (Supreme) court against final judgments delivered in proceedings before the court of first instance, where an appeal against such judgments is admissible, thus passing over the appellate instance on fact and law (leap-frog appeal). Two conditions are required for the leap-frog appeal: the opponent consents to passing over the appellate instance on fact and law; and the court hearing the appeal on points of law allows the leap-frog appeal. Leave to file a leap-frog appeal shall be granted only if: (i) the legal matter is of fundamental significance; or (ii) the further development of the law or the interests in ensuring uniform adjudication require a decision by the court hearing the appeal on points of law. The leap-frog appeal may not be based on irregularities in the proceedings.
63. However, in other countries there might be no requirement of consent of the opponent for a "leapfrog appeal". In Norway appeal against a judgment that would otherwise fall within the jurisdiction of the court of appeal may, with leave from the Supreme Court, be directly appealed before the Supreme Court. Leave may only be granted if the case gives rise to particularly important issues of legal principle upon which it is important to promptly ascertain the view of the Supreme Court. The exception allowing direct appeal is interpreted narrowly. Since the Supreme Court does not hear witnesses, leave will not be granted for cases in which witness testimony is important. In England application for permission of a leap-frog appeal must be first of all filed with the court of first instance.
64. *As an alternative to a "leapfrog appeal" one may also consider introducing possibility to refer question(s) for a preliminary ruling to the Supreme Court of Ukraine concerning the interpretation of certain provision of law*[31]. For example, since 2012 in Netherlands the Preliminary Questions Act provides that a court may ask a preliminary question at the request of a party or *ex officio*, if an answer to this question is necessary in order to decide on the claim or petition, and is of direct relevance: to a great number of rights of action that are based on the same or similar facts and arise from the same or similar related causes, or to the resolution or termination of numerous other disputes arising from similar facts, in which

[31] Please note that the question of introducing preliminary ruling procedure in Ukraine was addressed at a round table dedicated to this issue in November 2014: <http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/4D27E7E5DECC7CCDC2257D94003772B4?OpenDocument&year=2014&month=11&>.

the same question occurs. The rationale behind this instrument is justified by the interest of the development of the law or the forming of law, as well as promoting unity of case law. The procedure on preliminary rulings permits the Supreme Court to establish its line of reasoning in cases or fields of law where large aggregations of legal questions arise. With regard to these preliminary rulings, the amended Code of Civil Procedure obliges lower courts to take the preliminary ruling of the Supreme Court into account in their judgments[32].

65. According to the procedural laws of Ukraine, some applications can be submitted to the Supreme Court within one year following adoption of the appealed decision. In addition, one may rely in this application on a decision of the cassation court, which was adopted later than the appealed decision. These rules diminish legal certainty. For example, the Supreme Court of Lithuania decided that reversal of a case-law has prospective effect, i.e. change in case-law is not a basis to review already finished case.

III.7. Communication Between the Courts

66. During the meetings in Kiev the experts have been informed that there is a memorandum signed between the High Courts on procedures regarding adoption of the Plenary Session recommendations related to interpretation of laws which can become object of a dispute of courts of various jurisdictions. There is also possibility of a joint Plenary Session of the High Courts. We were informed that the High Courts send each other draft recommendations and take into consideration opinion of the other High Court. This practice is very much welcomed and it is recommended that in a situation where the same legal provision may be applied by courts of different jurisdiction, sending draft non-judicial documents[33] related to case-law harmonization efforts for comments by the other High Courts would become a constant (best) practice. Where appropriate, making decision in a joint Plenary Session of High Courts or submitting the feedback to the received comments from the other Court (e.g. reasons why certain proposed position was not accepted) would be also welcomed.
67. Still the experts received an impression that there might be a lack of communication and cooperation between the Supreme Court and the High Courts. *The experts recommend*

[32] C. H. van Rhee. Effects in Time of Judgments in the Netherlands: Prospective Overruling and Related Techniques. In *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*. Ius Comparatum – Global Studies in Comparative Law. Springer, 2015.

[33] For example, recommendatory interpretative statements of Plenary Session of Court (*Постанови Пленуму*), informative letters to lower Courts (*Інформаційні листи*).

strengthening vertical and horizontal communication and cooperation between the courts of Ukraine on issues of case-law harmonization, for example, by signing a memorandum of cooperation or joint action plan for case-law harmonization, appointing respective contact persons in the courts (e.g. a judge and / or a civil servant at the relevant department), holding more joint meetings, conferences and / or discussions between judges and / or departments working with case-law analysis and harmonization, inviting representatives from other courts to the meetings, where adoption of case-law harmonization documents are discussed and hearing their position. The aforementioned contact persons, for example, can act as a gateway for exchange of drafts or already adopted non-judicial documents related to the harmonization of case-law, participating in regular meetings of contact persons in order to share best practices of the Courts, bring and discuss ideas for improvement, preliminary address issues of case-law harmonization, etc. Whenever possible, it would be appropriate to send draft non-judicial documents related to case-law harmonization efforts for comments of the Supreme Court.

68. For example, in Serbia the Supreme Court at least few times per year meets with judges of the lower courts to discuss various issues of judicial practice, participates in a joint meeting of courts of appeal, the Supreme Court is informed about major issues of application of law at a lower levels of jurisdiction. In Lithuania the Supreme Court and the Court of Appeals cooperates in analysis and publication of a joint periodic review of the jurisprudence of the Court of Justice of the European Union.
69. In addition, all answers to inquiries related to interpretation of law (case-law) from one or few lower courts should as a general rule be made available to all lower courts (e.g., by sending them to those courts), because it might be of interest to them too.

III.8. Case Preparation

70. In order to ensure internal consistency of case-law the ECHR established a procedure according to which draft judgments and decisions are scrutinized as soon as the file is distributed to judges. This is done by a group of the ECHR's lawyers under the authority of Jurisconsult collectively known as the Case Law Conflict Prevention unit. Where a potential conflict is noted, the unit informs the relevant President of the Court Section[34].

[34] David Harris, *et al*. *Law of the European Convention on Human Rights*. Oxford University Press, 2014, p. 126.

71. In the practice of the Court of Justice of the European Union similar mechanism is adopted. The Legal Department analysis every request for preliminary ruling and indicates already existing case-law on the issues raised in the request.
72. The Rules on Case Preparation in the Supreme Court of Lithuania sets forth that an assistant of a judge shall collect case-law of the Supreme Court of Lithuania relevant to the adjudication of the case and shall present it in an electronic form (if required, orally too) to the judge at least seven days before the hearing of the case. Together with an introductory and descriptive part of the decision, which shall be prepared by an assistant, he / she shall also provide the judge with extracts from the case-law answering to the legal issues in the case, history of evolution of case-law, if necessary.
73. Based on aforesaid, in order to strengthen consistent application of law, *the experts recommend considering setting in the courts of Ukraine (at least of higher instance) clear internal rules and procedures based on which case-law of the Supreme Court of Ukraine and, sometimes, the High Courts (e.g., when the party relies on a certain judicial decision of the High Court; when the case is adjudicated by the High Court itself; when there is no case-law of the Supreme Court), which is relevant to the resolution of the case, as a general rule has to be collected and presented to the judge (panel / chamber of judges) in advance of a case hearing*. It is subject to availability of internal human resources and particular features of organization of court work to consider establishing special unit(s) reading draft judgments and decisions with the aim to note a potential conflict in case-law.
74. In addition, it might be useful to invoke specialists from a unit, which currently deals with analysis and summarizing judicial practice, in a phase of case preparation. It seems important that the knowledge gained by the specialists of the latter unit be used not only *ex post*, i.e. after the delivery of a decision, but as far as possible *ex ante*, i. e. during the preparatory phase of adjudication process. Taking preventive steps towards avoidance of case-law conflicts seem to be more effective and meaningful way than dealing with it after the case is decided, especially taking into account the aspect of judicial independence.
75. For example, both in the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania the judge (panel of judges) dealing with a particularly difficult question of law can receive assistance not only from his / her judicial assistant, but also from consultants working, respectively, in the Legal Research and Summarization and the Legal Research and Information Department. These consultants specialize in certain areas of law (e.g., in application of European Convention on Human Rights in criminal matters) and can

effectively and promptly provide judges with respective information on case-law, legal doctrine. In addition, when a cassation appeal on an important question of the European Union law, the European Convention on Human Rights or national law is admitted to the Supreme Court of Lithuania, the Case Selection Panel consisting of three Judges of the Supreme Court may request appointment of a special consultant to the case, who subsequently presents written (sometimes oral) legal opinion on legal issues in a case at least three working days before the hearing. Whenever possible, the legal opinion includes analysis both of national and international case-law (e. g., the European Court of Justice, the ECHR, other Supreme Courts of the EU), which later is taken into account by judges resolving the case.

76. The Rules on Case Preparation in the Supreme Court of Lithuania also provides that an assistant to judge working on a particular case shall inform the judge rapporteur and the Deputy Director of the Legal Research and Summarization Department, if during the preparation of the cases he / she finds out that on issue to be decided in a case the case-law is contradictory. The President of the respective (Civil or Criminal) Chamber can subsequently bring this problem to the attention of the Chamber judges, put it to a discussion during the meeting of judges, hear their opinions and comments on alleged divergences in judicial practice.

III.9. Use of Information Technologies (IT)

77. *Information technologies can be introduced and its use can be expanded for the harmonization of case-law in various ways*. First of all IT can help quickly find relevant case-law and use it when adjudicating a case. In addition, it might be used to register or to draw attention to likely divergences in case-law.

78. For example, the Supreme Court of Lithuania has internal database of judicial decisions, where summaries of them reflecting major legal positions of the Court (rules of interpretation of legal provisions) are placed. This saves time in searching for a relevant case-law. If certain decisions of the Court are likely to contradict each other, note (in a red color) by a respective specialist of the Court is entered in this database by attaching it to respective decisions. These notes later can be seen by the judges or their assistants and discussed during the preparation of a new case, where similar legal issue arises. In addition, the President of the respective Chamber can put an alleged contradiction to the attention of

judges during regular meetings by providing an opportunity for them to express their views on it. If an issue is discussed during the meeting of judges, respective note to this database is once again entered, this time in a green color, providing information on solution(s) proposed or opinion(s) received during the meeting. Moreover, the database contains information on relations between various decisions (e.g., that the case-law is supplemented or changed by a respective decision or that there is no new interpretation in a newly entered decision). It has a search mechanism providing an opportunity to search for a case-law by various criteria (words / phrase in the text, classification scheme, etc.), which *inter alia* allows looking for a note on allegedly divergent judicial practice.

79. Similar mechanism is adopted in the Supreme Administrative Court of Lithuania. If certain decisions of the Court are likely to contradict each other, e-mail message to judges and assistants of judges is sent by the Head of Legal Research and Information Department indicating allegedly contradicting legal positions in respective decisions of the Court. All such messages are registered in an internal website and categorized by a subject matter to make search of them easier. Opinions elaborated or solutions proposed in the meetings of judges are also kept on internal website.
80. In Lithuania there is also website with integrated legislation and case-law database. This website is administrated by a private company for a certain fee to users, but is also available to judges. This company receives in principle all judgments of courts and processes them in order to make the search engine more efficient (e.g., search based on a phrase in a motivating part of a decision, classification scheme, etc.). The database also includes texts of laws with references to all the case-law on a particular legal provision, summaries of decisions with the legal positions adopted by the courts.
81. It is worth mentioning that courts of Lithuania use press releases on their websites to inform about the most important decisions and other events, e.g., publication of a new Court bulletin or case-law review (summarization). The National Courts' Administration of Lithuania administers Facebook account of a whole court system, where the most important decisions of the courts can be published. Some Lithuanian courts have Twitter or separate Facebook accounts. In this context it is worth noting that both the European Court of Human Rights and the Court of Justice of the European Union quite intensively uses Twitter account, which provides references to the summaries of the most recent important decisions. The Court of Justice of the European Union has just introduced mobile application for search of case-law and press-releases of the Court. On the website of the Court of Justice

one can also find the *Répertoire de jurisprudence* (Digest of case-law) – a systematic collection (based on an approved classification scheme) of the summaries of judgments and orders of the Court of Justice, the General Court and the Civil Service Tribunal delivered or made since they commenced their activities.

82. Based on analysis of the websites of the Courts of Ukraine, we would also like to submit some minor notes:
    - Collection of legal positions sometimes goes back to the first half of 2013, i. e. is quite old;
    - It is subject to discussion whether half of a year is not too long time period for a periodic review of certain case-law, because the more recent the information is, the more valuable and relevant it is;
    - One can find some old information on judicial practice. It would be grate that only information which is still relevant would be made public;
    - Sometimes it is hard to find information on date of publication or preparation / adoption of a certain document (e.g. summarization / review of case-law);
    - Some documents are published based on a date of their adoption. It can be more user friendly to publish some of them based on certain category / uniform classification scheme.

III.10. Human resources

83. CCJE Opinion No 15 (2012) "On the specialisation of Judges" states that specialization often stems from the need to adapt to changes in the law rather than from any deliberate choice. The constant adoption of new legislation, whether at the international, European or domestic level, and changing case-law and doctrine are making legal science increasingly vast and complex. It is difficult for the judge to master all these fields, while at the same time society and litigants demand more and more professionalism and efficiency from the courts. Specialization of judges can ensure that they have the requisite knowledge and experience in their field of jurisdiction. An in-depth knowledge of the legal field in question can improve the quality of the decisions taken by a judge. Specialist judges can acquire greater expertise in their specific fields, which can thereby enhance their courts' authority. Concentrating case-files in the hands of a select group of specialist judges can be conducive to consistency in judicial decisions and consequently can promote legal certainty.

84. However, *the experts want to draw attention not only to the specialization of judges, which to some extent are implemented in the Courts of Ukraine, but to likely additional efficiency in the specialization of other court personnel working with the case-law harmonization*. For example, both in the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania consultants from respectively Legal Research and Summarization and Legal Research and Information Departments to some extent specialize in certain areas of law and as far as possible are attributed to provide assistance in cases falling within their specialization. The same principle is applied towards assistants of judges in the Supreme Court of Lithuania as the judges do not have constant assistants; assistants are rotated between the judges.
85. And in general *it is important to attribute proper amount of human resources for case-law harmonization efforts*.

III.11. Communication with the Society

86. The experts welcome initiatives by some courts to organize various public events (e. g. round-table discussions or other kinds of meetings with the society, legal professionals, associated structures) to discuss certain legal issues. This increases transparency of the judiciary and helps to receive feedback from external customers of a judicial system, the society in general, which in fact can provide view from the outside beneficial for developing constant case-law. *We advise, where appropriate, publishing (e.g. on the websites) or sending drafts of non-judicial documents related to harmonization of case-law for public or target groups' (e. g. the Bar, other interested organizations, persons, associations or groups) comments*[35].

III.12. Limiting the Appeals

87. It is evident that the volume of cases reaching higher courts can also affect both the speed and the quality of judicial decision-making. For example, with respect to Italy it is sometimes said that the case law of the Supreme Court of Italy "resembles a supermarket"

[35] For example, this practice is adopted in the Supreme Administrative Court of Lithuania, which is used to send or publish its drafts of thematic case-law review.

where the losing party in the trial can always find a favorable precedent[36]. This results in unpredictability and inevitably triggers the influx of a huge number of new cases and then new appeals[37]. Therefore, the CCJE recommends the introduction of mechanisms appropriate to the legal traditions of each country to regulate access to such courts (par. 50, CCJE Opinion No. 11 (2008).

88. Analysis of statistics of the High Courts of Ukraine shows that they deliver quite a big number of decisions and the workload of judges seems to be considerable at least in some jurisdictions. In addition, the High Courts mostly act as courts of third instance. In this context it cannot be taken for granted that the more instances of courts are available, the more are the chances of reaching a just result. The higher court can also make a mistake. And often there is no clear answer of what is a just decision, because there is no single measure of justice. Besides, the more instances of courts there are, the less certainty there is that an enforceable judgment will not be reversed at some point. This leads to indirect private costs borne by economic agents when the assets involved in proceedings are affected by the uncertainty about the proceeding's outcome. In addition, more instances costs more both for the state and for those participating in the proceedings.
89. The Committee of Ministers of the Council of Europe in its recommendation No 95(5) "Concerning the Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases" suggests that appeals to the third court should be used in particular in cases which merit a third judicial review, for example cases which would develop the law or which would contribute to the uniform interpretation of the law. They might also be limited to appeals where the case concerns a point of law of general public importance. The appellant should be required to state his reasons why the case would contribute to such aims.
90. Based on aforesaid, it seems worth considering additional measures that can discourage filing of (unfounded) appeals to the High Courts at least in non-criminal cases (e.g. requiring mandatory professional representation; allowing a stay of execution of appealed decision only in exceptional circumstances (e.g., when the execution will cause the appellant irreparable or serious harm and security in respect of the amount of the judgment is

[36] S. Chiarloni. Fundamental Tasks of the *Corte di Cassazione*, Hetereogenous Objectives Arosen form the Constitutional Right to Appeal and Recent Reforms. In *Los recursos ante Tribunales Supremos en Europa. Appeals to Supreme Courts in Europe*. Ortells Ramos, Manuel (coord.). Barcelona: Difusión Jurídica y Temas de Actualidad, 2008, p. 79.

[37] A. Galic. A Civil Law Perspective on the Supreme Court and its Functions. Paper presented at the conference *"The functions of the Supreme Court – issues of process and administration of justice"*.

provided, unless it is impossible for an applicant); increasing stamp-duty; restricting grounds of appeal, if before the proceeding in a court, the case was heard by an independent pre-trial dispute resolution body) or optimizing the current structure of the court system of Ukraine.

III.13. General (Abstract) Interpretative Statements

91. Some High Courts of Ukraine adopt general (abstract) interpretative statements in a form of resolutions adopted by the General Session of respective High Court or informative letters to the lower courts. In this respect the experts want to reiterate that in accordance with Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, *the issuing by high courts of directives, explanations, or resolutions shall be discouraged*. In this context one may note that general (abstract) interpretative statements curbs judicial creativity and independence; is of authoritarian nature and inflicts natural discursive development of case-law through decisions in concrete cases; resembles legislation, which in accordance with the principle of separation of powers is in principle granted to the Parliament and is a public procedure organized in a specific manner; creates issue of legitimacy of such abstract statements; devalue decisions in concrete cases; cannot take into account the real life facts of a future dispute involving the same legal question.
92. In addition, *it is rather untypical that these abstract interpretations can be adopted not by the Supreme Court, but by the High Court, although its position may be reversed on an appeal to the Supreme Court.* This is likely to create even bigger uncertainty for those outside and inside the judicial system and may lead to even greater discrepancies in case-law, because nobody knows what the Supreme Court thinks about certain recommendation. Providing a mechanism for a joint approval of abstract interpretations by respective Chamber of the Supreme Court and respective High Court may be one of possible solutions in this respect.
93. Nevertheless, the experts understand that aforementioned general (abstract) interpretative statements can be very helpful to the lower courts, especially on issues of new legislation, and can have positive effect on case-law harmonization. However, instead of using these instruments one can consider the ones already mentioned in this Report – leapfrog appeal, reference for preliminary ruling. In addition, *group and model (test) case litigation can also well serve for the consistency of case-law.*

94. The experts will not go into details on group litigation in this Report, because it was already subject of a round-table discussion in the Supreme Court of Ukraine[38]. We also were informed that there is a project to use model (test) case in administrative jurisdiction of Ukraine. Thus in this respect situation is similar to the one in Lithuania. The draft Law on Administrative Proceedings of Lithuania provides for a model litigation procedure, the basic features of which are:
    1) 20 legally and factually similar cases are needed in order to declare one or more of them (after joining them) as a model case;
    2) Model case is started by a decision of the President of Administrative Court upon a proposal of a judge (panel of judges) hearing the case;
    3) Following initiation of a model case other similar individual cases are suspended;
    4) Administrative Courts shall take appropriate measures to adjudicate a model case as fast as possible;
    5) Following entrance into force of the Supreme Administrative Court's decision in a model case, other similar individual cases will be reopened. However, if applicant's claims are rejected by the final decision in a model case, individual cases will be reopened only upon the request of the parties to the proceedings. If there is no such request, the case is finished by a decision to leave it without a resolution;
    6) Reopened individual cases are decided in a written procedure (unless the party requests oral hearing) by a single judge. The decision must include introductory part and a resolution, as well as a brief statement of arguments.

III.14. Issues of Jurisdiction

95. During the meetings with representatives of the High Courts of Ukraine we have been informed that sometimes the High Courts take different position whether particular type of dispute falls within a respective jurisdiction. In this context *introduction of a special institution for preventive and subsequent resolution of jurisdictional conflicts might be considered*.
96. For example, according to the Law on Courts of Lithuania, when the court has doubts whether the case fall under specific jurisdiction of the courts of general jurisdiction or administrative court, these questions shall be resolved in a written procedure by a special

[38] http://www.scourt.gov.ua/clients/vsu/vsu.nsf/%28print%29/14654D4C2E7A3702C2257E610049A51F

judicial panel composed of the President of the Civil Chamber of the Supreme Court, the Deputy President of the Supreme Administrative Court and two judges – one assigned by the President of the Supreme Court, another by the President of the Supreme Administrative Court[39]. The court can apply to the special judicial panel even before admitting a case or in any other stage of the proceedings, including proceedings before the higher court. Sessions of the special judicial panel are presided over by the President of the Civil Chamber of the Supreme Court. Decisions shall be delivered by consensus or a majority of votes of the members of the judicial panel; in the event of a tie the presiding judge shall have the casting vote. An order on the jurisdiction of the case shall be final and conclusive (not subject to appeal). After resolution of the question of specific jurisdiction of the case, the case shall be send to a competent court within 3 working days after the day of the adoption of the order of the special judicial panel. The special judicial panel has also a right to separate the submitted requirements into separate individual cases for hearing them at the court of general jurisdiction and at administrative court. When the court of appellate instance or a court of the cassation instance, hearing the case, applies to the special judicial panel with the question of specific jurisdiction and the special judicial panel finds that the rules of specific jurisdiction have been infringed, procedural decisions adopted by the courts of lower instance, by which the dispute (case) was settled in substance, shall lose its legal validity and the case shall be transferred to the court of relevant competence in accordance with the rules of specific jurisdiction.

97. Similar mechanism exists, for example, in France (*Tribunal des conflits*).

98. In addition, it is worth mentioning that in Germany, that have five supreme courts of different jurisdictions, Common Senate of the Supreme Courts can be summoned in order to ensure uniformity of case-law, when one Supreme Court intends to depart from the legal position adopted by the other Supreme Court. As Ukraine has three third instance High Courts of different jurisdictions, introduction of a joint panel of judges from respective High Courts for the situation, where one High Court intends to deviate from the case-law of the other High court, may also be discussed. This would help to avoid divergent judicial practice at the level of the High Courts.

[39] In Ukraine such an intuition may consist, for example, of 3 (6) judges of the Supreme Court and 1 (2) judge(s) from each High Court.

III.15. Other Aspects of Case-Law Harmonization

99. The Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania regularly publishes periodic review of the most important decisions delivered over a certain period of time (usually one month), where summaries of the decisions are provided in accordance with categories of the uniform classification scheme of judicial decisions. Thus interested persons can easily get acquainted with the most recent case-law. In addition, preparation of such periodic review helps the Court to find out likely divergences in a judicial practice and take appropriate actions, if necessary.

100. The Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania also periodically publishes (twice per year) bulletin of the court, which includes decisions selected for publication by the judges. Every decision has an annotation / headnote, which briefly summarizes what and on what reasons have been decided (rule and main reasons of interpretation of a certain legal provision).

101. The Supreme Court of Lithuania as a general rule prepares and publishes four (two related to criminal law and procedure and two in non-criminal matters) thematic reviews / summarizations of case-law per year. This review can even be performed in the area of law, in respect of which appeal cannot be brought before the Supreme Court (e.g. on interim measures of protection in civil procedure). The Supreme Administrative Court of Lithuania prepares and publishes at least two thematic reviews / summarizations of case-law per year.

102. The Supreme Courts of Lithuania as far as possible uses both periodic and thematic (e.g., based on uniform classification scheme) methods of analysis and summarization of case-law.

103. According to the Code of Civil Procedure of Lithuania, every decision of the Supreme Court of Lithuania shall as a general rule include a statement of the rule of interpretation or application of legal provision topical to the case-law. In civil cases the Supreme Court more and more discern this rule by using italics. This practice resembles the one used by the Federal Court of Justice of Germany, where the decision in civil case[40] usually starts with a brief statement of main reasons and conclusions of the Court, including reference to legal provisions that were interpreted.

[40] Other courts adopt similar practice. For example, Section 13 of the Internal Rules of the Federal Labour Court of Germany provides that regular judges of the division concerned shall decide which decisions shall be preceded by headnotes and formulate the wording.

104. The fact that judges themselves formulate clear and concise rule of interpretation in a decision makes the work of the Supreme Court more efficient. There is no need to employ specialists from other departments of Court in order to extract the main idea of a decision. In addition, the judges, who participated in delivering a decision, are in the best position to explain and point out what they decided, why they decided like this and what is the most important part of their judgment (*ratio decidendi*). This practice also improves quality of motivation. The decision of the higher court must be well reasoned, clear and precise. Such practice also gives easily comprehensible guidance to attorneys and other judges, simplifies indexation (categorization) of decisions and makes search and research of leading legal interpretations of courts easier.

105. Similar practice is adopted in Switzerland (Federal Tribunal). Cases selected for publication in the Official Collection are furnished with *Indexes*. They describe the determinative facts of the case in a few keywords, followed by an executive summary of court's considerations. Hence they are the court's core deliberations – often interpretation of the rule in application – or conclusions of law that add novelty to doctrine or jurisprudence. The sentences of *Indexes* are highly condensed. They usually give account of the essential legal problem, with reference (in brackets) to the consideration, where the topic is extensively discussed. When an important question is left open, the sentence can be formulated in question form. On top of the sentence(s) is cited in official abbreviation (in bold) of the statutory rule pertinent to the issue in dispute, on the basis of which the court has made its respective considerations[41].

106. The Supreme Administrative Court of Lithuania has standardized the management of the case-law analysis in accordance with the international standard ISO 9001:2008 and received respective certification. One of the basic ideas of certified procedure of case-law analysis is that every analysis and summarization of case-law performed by the Legal Research and Information Department is not an end in itself. It is understood as providing good opportunity to find out certain problematic areas of case-law. The latter information cannot be left without consideration or notice at the Court. It is discussed in meetings between specialists from Legal Research and Information Department with the two or more judges attributed to every project of summarization of certain area of case-law and, later, with judges specializing in this area, and, if need be (that is usually the case for most complicated issues), in a meeting of all judges of the court. In any case all the information

[41] Fan Wu. Legal Reasoning in Chinese and Swiss Appellate Judgments – Exploring China's Path Toward Rule of Law. *Tsinghua China Law Review*, 2009, vol. 2, no. 1.

on questions discussed during the preparation of summarization and opinions received is shared via e-mail, often introduced to judges and assistants of judges by oral presentation (usually using PowerPoint slides), and placed in internal database. It is believed that sharing of information and discussing it by providing opportunity for open and constructive internal dialogue and hearing of each other's opinions within the Court is essential for ensuring uniformity of case-law. It makes analysis and summarization of case-law valuable instrument in finding common position on various topical questions. The practice of the Supreme Administrative Court of Lithuania also shows that *it might be convenient to have internal rules, descriptions and / or schemes of procedures related to the case-law analysis and harmonization*. It is also worth considering making part of them public in order to show the society what work is done in order to secure uniformity of case-law.

107. The Constitutional Court of Lithuania in its ruling as of 24 October 2007 states that "in a situation where there is competition of precedents (i.e. when there are several differing court decisions adopted in analogous cases) one must follow the precedent that was created by the court of higher instance (a higher court). Also, account should be taken of the time of the creation of the precedent and of other factors of significance, as, for instance: of the fact whether the corresponding precedent reflects the established court practice, or whether it is a single occurrence; of whether the reasoning of the decision is convincing; of the composition of the court that adopted the decision (whether the corresponding decision was adopted by a single judge, or by a college of judges, or whether by the enlarged college of judges, or whether by the entire composition of the court (its chamber)); whether there were any dissenting opinions of judges expressed because of the previous court decision; of possible significant (social, economic etc.) changes which took place after the adoption of the corresponding court decision, which has the significance of a precedent, etc."

III.16. Strategy

108. Based on the fact that there are both doctrinal and practical issues related to the harmonization of case-law, *the experts recommend considering adopting a joint (the Supreme Court plus all the High Courts) strategy / action plan on efforts of harmonization of case-law in Ukraine*. It seems important to have a strategy on this issue especially taking into account that there are four courts that currently performs sometimes similar job related to the harmonization of case-law. The existence of four courts also leads to different practices within different jurisdictions with limited ways and opportunities to share the best

knowledge and practices. The Action Plan would help to coordinate the work, provide an opportunity to enhance cooperation between the Courts and thus increase efficiency of case-law harmonization efforts. The Action Plan can address some doctrinal and practical issues in a non-obligatory manner, by providing a platform for reaching consensus and coherent view towards various problems of case-law harmonization in Ukraine.

III.17. Final Remarks

109. At the end of this Report the experts want to emphasize that observations and recommendations provided hereinabove do in no way diminish or compromise the value of work of the Courts of Ukraine for the sake of consistency of case-law. It is important to recall that in general the Courts of Ukraine do a huge work and show very positive attitude towards case-law harmonization. Many of the methods and procedures already employed in case-law harmonization efforts of Ukrainian Courts correspond to the ones used in the EU Member States. And many observations and recommendations provided in this Report are subject to further internal discussions, dialogue and search for consensus on ambiguous issues within the Judiciary of Ukraine. The answers to the latter are sometimes far from uniform in the European Union states and even inside a particular state as well. It seems to us that the Judiciary of Ukraine is keen and is capable, sometimes with some assistance, to find the way moving further in a sometimes bumpy road of strengthening the administration of justice in the spirit of the rule of law.

ANNEX 1

APPROVED
by Resolution of the Judicial Council
No 13P-65-(7.1.2) of 27 May 2016

RECOMMENDED QUALITY STANDARDS FOR PROCEDURAL DECISIONS RENDERED BY COURTS

These Recommended Quality Standards for Procedural Decisions Rendered by Courts (hereinafter referred to as the 'Standards') are intended primarily for final judicial acts (hereinafter referred to as the 'court decisions') irrespective of the type of proceedings. The Standards are of recommendatory nature and do not replace the requirements for the court decisions prescribed by law or derived from established case-law. They apply to other procedural decisions rendered by courts as appropriate. Recommendations contained in the Standards and pertaining to the form, content and structure of the court decisions are set out in greater detail in the Annex thereto.

1. A court decision shall be fair and lawful:

1.1. A court decision shall be substantiated by the relevant factual circumstances (merits) of the case established by the court (hereinafter referred to as the 'factual circumstances') and by the law.

1.2. The reader of a court decision shall get a clear understanding of what factual circumstances have been established by the court.

1.3. A court decision shall specify the legal sources that the court has relied on when rendering the decision. A court decision shall accurately specify the article, paragraph, subparagraph or another structural part of the law or another legal act based on which the court has rendered its decision.

1.4. In the process of consideration of a case the court shall determine to what extent the applicable laws and other legal acts apply to the legal relations relevant to the case. In the event of a dispute, the court shall clearly state which version of a legal provision has been applied and why.

1.5. Lawfulness of a court decision shall not depend on the number of legal sources specified by the court. It shall not be necessary to rely on, refer to or cite the Constitution of the Republic of Lithuania, the Convention on Human Rights and Fundamental Freedoms or another legal act of higher authority that has been duly implemented by laws and other legal acts. Normally it shall be sufficient to specify a legal provision/provisions whereby legal regulation of a higher level is implemented.

1.6. The court shall take guidance from the case-law in the proceedings of the relevant categories as stated in the Republic of Lithuania Law on Courts. However, relying on or citing the case-law of the Constitutional Court of the Republic of Lithuania or other Lithuanian or foreign courts shall not be an end in itself. Case-law must help to decide the case fairly and to justify the court decision, therefore, it shall be provided in the court decision only to the necessary extent. Where the court relies on case-law, the name of the court, the date of the relevant procedural decision and the number of the case must be specified.

1.7. Deviations from established case-law shall only be allowed where an unavoidable and objective necessity exists and where this can be constitutionally substantiated and justified. Each deviation shall be well-founded (i. e. clearly and reasonably motivated) by specifying the case-law from which the decision deviates and the underlying argumentation. Where a judicial precedent the

court is relying on differs, in a certain respect/respects, from the case concerned, the court shall justify its reliance on that particular precedent.

1.8. In its interpretation and application of the law, the court shall take account of the principles of fairness, reasonableness and good faith. Where a court decision *directly* relies on the principles of fairness, reasonableness and good faith, it shall specify the content imparted to these principles by the court in a specific situation (e. g. by reducing the size of damages awarded by the court of first instance for causing harm to health, the court of appeal shall not only state that it is following the principles of fairness, reasonableness and good faith but shall also provide *its own* evaluation of what, in the opinion of the court, these principles require in the situation concerned: 'should payment of millions be awarded against the hospital, interests of many other patients would be infringed, they would not receive full services needed by them, and damage would be done to the overall healthcare situation in the district. The living standards of society as a whole should be taken into account as well. The majority of Lithuania's residents would not be able to earn a million throughout their lives').

1.9. The court shall specify the legal grounds for the *direct* application of soft law such as the principles of the European law of contract, the principles of the European law of torts, the Draft Common Frame of Reference, the UNIDROIT *Principles* for International *Commercial Contracts etc. In the absence of legal grounds, the court may rely on measures of soft law only as supplementary sources of legal argumentation.*

1.10. The court may rely on a legal doctrine as a *supplementary source of legal argumentation. Where the court relies on a legal doctrine, its source must be specified.*

1.11. Where the court relies on soft law or a legal doctrine, the decision shall also specify measures of the soft law or the legal doctrine of contrary content, if any, as well as motives underlying the relevant choice of the court.

2. A court decision shall be convincing:

2.1. The court decision should convince the interested parties that it is fair and lawful.

2.2. Motives set out in the court decision should not be confined to reasoning or statements of a general nature. Too general wording (such as 'these arguments are unjustified and contradict materials of the case' etc.) that is used to reply to specific arguments relevant to the case and could be inserted in any decision, without providing any additional details or decision-specific motives, shall not be deemed to be proper reasoning.

2.3. In considering matters related to establishing factual circumstances, the court shall specify why it is rejecting certain evidence. Stating reliance on other evidence is not sufficient.

2.4. In considering matters related to the qualification of the legal dispute relations and the application of law, the court shall specify why it rejects certain arguments provided by the parties to the dispute.

2.5. It is most likely that the court decision will not be convincing to those to whom it is unfavourable, therefore, sufficient attention shall be devoted, in the reasoning part of the decision, to the evaluation of the argumentation by the unsuccessful party. It has to be evident from the court decision why supporting the argumentation or position of the unsuccessful party would contradict legal provisions or evidence gathered in the case.

2.6. In providing arguments for its decision, the court may approve of one or more arguments of a participant in the proceedings, already stated in the decision, without repeating them, however, it has to be evident from the court decision that the court has made an independent evaluation.

2.7. In the court decision, the judge should not moralise or try to impose his/her own moral, religious or other convictions or attitudes. The court decision should be reticent and unbiased, without sarcasm or humour directed at participants in the proceedings, and without dogmatic orating, pompousness or rhetorical questions.

3. A court decision must be transparent:

3.1. The court decision shall state all the factual circumstances established by the court that were relevant to the rendering of the decision, and all the motives underlying the decision, even when not all the arguments are of a legal nature (e.g. economic, social etc.).

3.2. The factual circumstances established by the court shall be set out in a chronological order in a separate part of the decision. The circumstances shall be clearly separated from the underlying evidence or versions provided by participants in the proceedings, i. e. upon establishing a factual circumstance, the court must clearly identify it as a circumstance established *by the court* (e. g. 'At 18.30 on 23 November 2015, the claimant arrived at the defendant's place for the signature of the contract'; 'the water got into the claimant's flat from the defendant's flat') rather than provide it together with the underlying evidence (e. g. 'according to the expert examination report, the water got into the claimant's flat from the defendant's flat') or with the version of a participant in the proceedings (e. g. 'as indicated by the claimant, at 18.30 on 23 November 2015 he arrived at the defendant's place for the signature of the contract'). Where there is a dispute over a specific factual circumstance in the case and/or the evidence in the case is conflicting, the court shall present, according to the rules for the distribution of the burden of proof, admissibility, relationship and sufficiency of evidence, its own assessment of why it considers the disputed circumstance to be an established or not established one.

3.3. The reasoning underlying the court decision shall be concise, clear, logical, unequivocal, specific, objective and unbiased.

3.4. A court decision may be based on an aspect of the case that has been obviously omitted or considered insignificant by participants in the proceedings, or on which they had agreed, or in respect of which the court has powers to decide *ex officio*, usually provided that the court has informed the participants in the proceedings about such an aspect and has enabled them to express their opinion thereon.

3.5. Where the court has seriously considered a number of alternative options of the decision, they shall be set out in the reasoning part of the court decision, with all 'for' and 'against' discussed.

3.6. Where a participant in the proceedings provides argumentation concerning a potential contradiction between a law/another legal act and a higher-ranking legal act, the court shall present its conclusions on such argumentation in the reasoning part of the decision.

3.7. Any reference to and/or citing of legal acts, case-law, legal doctrine or other legal sources, or sources of interpretation thereof shall be related to the substance of the case. Where this relationship is not clear, it must be substantiated and explained in the reasoning part of the court decision. It must be clear from the court decision why the court is relying on a specific case-law and how it is used in the case concerned.

4. A court decision shall be consistent and its reasoning shall be sufficient:

4.1. *Consistency* of a court decision means a logical relationship between different parts and paragraphs of the decision. All factual circumstances shall be established and all legal issues shall be resolved one by one, in a reasonable sequence.

4.2. Greater clarity of the decision is achieved if, first of all, the main arguments provided by the participants in the proceedings are separated out in a clear and focussed manner, after which an evaluation of all the arguments is presented consistently, without avoiding complicated issue and without dwelling on simple issues excessively.

4.3. The reasoning set out in the court decision shall not be contradictory.

4.4. *Sufficiency* of the reasoning of the court decision shall mean, first of all, that explicit answers to the main issues raised in the case must be provided.

4.5. It must be clear, from the reasoning of the court decision, which aspects of the case were disputed and which not, therefore, the reasoning is normally formulated having regard to the relevant issues.

4.6. The reasoning presented in the court decision shall be sufficient for its justification. Fewer arguments are required for the justification of the court decision in a case in which the defendant, the offender or the accused admit the claim (complaint), the offence/crime committed, and his/her guilt.

4.7. The reasoning of the court decision shall demonstrate that the court has its position on all the evidence admitted and on all questions/issues arising from the case. This does not mean, however, that the court shall express its position on each issue comprehensively and broadly. The duty of the court to provide reasoning for tis decisions shall not be understood as the requirement to provide a detailed answer to each argument. Sometimes a very concise reasoning may be sufficient. Detailed reasoning is not required when the court replies to arguments that are obviously insignificant, ungrounded, abusive or unacceptable for other reasons, having regard to explicit legal provisions or established case-law on arguments of similar type.

4.8. The court decision shall not contain information that is not relevant to the case, in particular personal data the use of which is not necessary for deciding the case concerned (e. g. cadastre number and address of a land plot, number, make, colour of a vehicle etc.) and shall not repeat information that has already been presented in the decision (e. g. title and date of a contract etc.).

5. A court decision shall be clear and understandable:

5.1. The court decision shall be written in an easily understandable, generic Lithuanian language. Scientific, technical, artistic or other special terms should be used as rarely as possible, or shall be explained. Use of words of a language other than the Lithuanian language and Latin terms and phrases should be avoided in the court decision (any Latin words used should be translated).

5.2. If the court relies on a legal act or a law interpretation source in a foreign language, the court decision should normally provide a translation of the relevant provision, or a part thereof, into Lithuanian. The translation shall be proper and of good quality. Normally, texts in foreign language are not included in court decisions.

5.3. Where the reasoning part of the court decision is long, the court shall write clear summarising conclusions on each main issue resolved; where possible, a resume of the arguments set out in detail in the court decision is provided.

5.4. Excessive citing of legal acts not related to the merits of the case (e. g. the whole article or a part thereof is provided even though only one paragraph or subparagraph is relevant to the case) should be avoided in the court decision.

5.5. The reasoning of the court shall be clearly separable from clarifications, evaluations or considerations provided by the parties and from the content of the evidence contained in the case.

5.6. After referring to or citing an evidence or other information the court shall normally state what meaning it imparts to such information (e. g. that the court holds that citing a statement by a person proves a specific factual circumstance). It must be clear from the reasoning in the court decision that certain information has been referred to or cited. It is not sufficient to formally list the evidence and/or content of the evidence, provisions of legal acts or numbers of structural parts thereof. The reasoning of the court decision must demonstrate a legal evaluation as well as an analysis and assessment of evidence (e. g. whether the evidence is sufficient, convincing and relevant to the outcome of the case) made by the court.

5.7. Procedural documents, evidence given by witnesses and other persons that has been recorded in the minutes of the hearing or the indictment, or other case materials shall not be rewritten in the court decision unless valid reasons exist. Only the information that is of paramount

importance for the case shall be cited, and only to such extent that is necessary for deciding the case and for substantiating the decision.

5.8. The court decision may include figures, photographs or other graphic information provided that it is directly related to the case and can make the decision clearer, better understandable and more transparent.

5.9. Graphs and tables may be used as a means to present complicated information in a clear and understandable manner.

5.10. Where certain calculations are required for the rendering of the decision, detailed calculations, formulas applied, and specific arithmetic actions etc. (e. g. EUR 1,750 X 20 % / 100 % = EUR 350) may be used.

5.11. The wording of the operative part of the court decision shall be clear. In cases where the decision can be enforced, the operative part shall be worded in a way which makes it clear how the decision will; have to be enforced. The court must render a decision that would be possible to enforce in practice. The order of the court set out in the operative part of the court decision shall not give rise to opportunities for different interpretations of the content of the court decision in terms of how specifically and to what extent it should be enforced.

5.12. The operative part of the court decision shall resolve all the claims that have been made.

5.13. Where a decision whereby a participant in the proceedings is obligated to take or terminate certain actions is rendered, such actions must be specified.

5.14. The operative part of the court decision shall clearly state the time limit and the procedure for appealing against it, or a statement to the effect that the decision comes into force from the date of its rendering shall be provided.

6. A court decision shall have a clear structure and form and shall be correct both linguistically and legally:

6.1. The court decision shall be written without linguistic or spelling mistakes, consistently and in the same style.

6.2. Court decisions are better understandable if they have a clear structure. Structural parts that are required by law or have been selected by the court (in cases where a statutory structural part is divided additionally by the court) must be clearly separated.

6.3. The court decision shall clearly show the substance of the case, the factual circumstances established by the court, reasoning of the court in respect of issues raised in the case, and the decision adopted by the court.

6.4. Where more than one important issue is analysed in the court decision, it is recommended that each issue is considered individually, e. g. by separating out a structural part and giving it a title that would reflect the essence of the issue. The title of the part may be worded as a question (e. g. ‘Can A.B.‘s actions qualified as a theft?’; ‘Was a sale and purchase agreement concluded?’), which is answered in the part, or otherwise, ensuring that the title reflects the content of the part clearly and concisely (e. g. ‘Concerning the form of the guilt of the convict and the qualification of the act’; ‘Concerning the purpose of the bill and the mistake made by the surety’).

6.5. Where the court decision is long, a table of content and/or summary of the court decision may be provided after the introductory part.

6.6. Paragraphs in the court decisions rendered by courts of appeal and cassation instance shall be number (the descriptive part and the reasoning part). Each paragraph in the decision should deal with an independent (new) thought/idea or other relevant information.

6.7. Normally, a paragraph of the reasoning part of the court decision should not consist of one sentence or few sentences. However, the paragraphs should not be too long either (normally, maximum 0.5 of the page).

7. A court decision rendered by a court of relevant instance shall reflect the peculiarities of the court of such instance:

7.1. Decisions rendered by courts of first instance and courts of appeal shall be, first of all, clear and understandable to parties to the case, therefore, preparation of decisions shall take account of who are the parties, are they capable of understanding the content of the reasoning of the court, whether they receive professional legal aid etc. In preparing a decision of the Supreme Court of Lithuania or the Supreme Administrative Court of Lithuania, account shall be taken of the fact that these two courts develop the uniform case-law of courts of general jurisdiction and administrative laws, therefore, a rule of application or interpretation of the law that is relevant to the case-law should be sought to be set out in each case being considered.

7.2. A summary of claims and replies by the parties shall be set out, in a concise manner, in the descriptive part of a decision rendered by a court of first instance.

7.3. The main task of the court of first instance shall be to clearly define and identify the factual circumstances established by the court. Attention should be focussed on evidence as well as its summarisation, grouping and assessment. A legal assessment of the factual circumstances established by the court (qualification of relations) shall be presented, specifying those legal provisions which, in the opinion of the court, are applicable based on the factual circumstances, and the application of these provisions shall be substantiated.

7.4. In providing a legal assessment of the situation, a court of first instance shall not have an objective to describe the case-law of cassation court and the legal doctrine in the greatest detail possible.

7.5. A court of appeal that reverses the decision rendered by a court of first instance and delivers a contrary decision (in criminal cases - reverses the acquittal by a court of first instance and delivers a new decision) shall write the decision according to the main requirements set for a decision of a court of first instance as the case is being reconsidered.

7.6. The higher the instance of the court, the greater the importance of law interpretation and development. Legal matters considered in a decision of a court of appeal as well as the relevant solutions and arguments shall be clearly identifiable and separable from other information.

7.7. Where only matters of law are decided by a court of appeal, factual circumstances shall be specified to the extent necessary for the due examination of the matter of law.

7.8. A court of higher instance that remands the case to the court of first instance or the court of appeal shall clearly specify the reasons for the remanding and the relevant deficiencies.

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Annex to the Quality Standards for Procedural Decisions Rendered by Courts

RECOMMENDATIONS FOR THE FORM, CONTENT AND STRUCTURE OF COURT DECISIONS

SECTION I
FORMALISATION AND STRUCTURE OF A COURT DECISION

1. The court decisions shall be written using *Times New Roman* 12-point font size, with the following margins: left 30 mm, right 10 mm, upper 20 mm, and lower 20 mm. Single-spaced lines and the text with straight margins on both sides, i. e. left and right justified..

2. Indentation of the first line of paragraphs shall be used, with the indent being at least 1.25 cm but not more than 1.75 cm. throughout the text, uniform indentation of paragraphs shall be maintained.

3. Numbering of the pages of the court decision shall begin from the second page; page number shall be indicated in the centre on top of the page; the page number shall be written using *Times New Roman* 12-point font size without any dots or hyphens.

4. The following information shall be provided on the top right corner of the first page (in a column, left justified), on separate lines: number of the case, number of judicial proceedings, category/categories of procedural decision). Where the court decision contains information that shall not be published under the law, this shall be noted by writing ‘N‘ in brackets, on a line below the category of procedural decision. Where a court decision is subject to publication online, letter ‘S‘ shall be written in brackets, on a line below the category of procedural decision, upon removing all personal details from the decision to be published.

5. The reference to the category of procedural decision shall start with the words ‘Category of procedural decision’ (without a colon). Where more than one category of procedural decision is specified, they shall be separated by commas and written in a line in the ascending order, left justified. No dot is required after the reference to the category of procedural decision.

6. The state emblem of the Republic of Lithuania shall be placed centrally and longitudinally on a separate line, below the details referred to in Clause 5 above, and adding a space between these details and the state emblem.

7. The name of the court and the title of its decision shall be written on separate lines (with a space between them) below the state emblem (with a space between the emblem and the court name), in bold, centrally and longitudinally, using a 14-point font size (for procedural decisions of the Supreme Court of Lithuania a 16-point font size), in letter-spaced capitals. Where a preliminary, partial, interim or additional decision or a decision *in absentia* is rendered, the relevant word describing the decision (preliminary, partial, interim, additional, *in absentia*) shall be inserted before (or after, in case of a decision *in absentia*) the word ‘decision‘, in the same format. Where a decision is rendered in a case of a group claim, no additional information shall be added to the word ‘decision‘.

8. The words ‘In the name of the Republic of Lithuania’ shall be written in final judicial acts, centrally and longitudinally, on a separate line below the title of the court decision, without a space between them, using 12-point font size, in capitals.

9. In final judicial acts, no headings of court decisions (concisely describing the substance of the text) shall be used. Where a heading is written in a procedural decision, its place shall be below the title of the procedural document, written centrally and longitudinally on a separate line, without a space, using a 12-point font size without bold, in capitals.

10. The date and place of rendering the court decision shall be written below the details referred to in Clauses 7, 8 and 9 above, with a space, centrally and longitudinally, on separate lines. The date shall be written in mixed format, i. e. the year and the day in figures with abbreviations ‘m.‘ and ‘d.‘, and the month shall be written in words. The place of rendering the court decision shall be written on a line below the date, without a space between the lines.

For example,

(Proceedings) Case No
Judicial proceedings No
Categories of procedural decision: 1.1.4.2; 1.1.4.3; 1.3.9.4; 3.4.3.9

VILNIUS CITY DISTRICT COURT

D E C I S I O N
IN THE NAME OF THE REPUBLIC OF LITHUANIA

25 October 2015
Vilnius

11. The introductory part of the court decision shall be written below the date and place of the decision, on a new line, with a space. No abbreviations shall be used in the introductory part of the court decision except for criminal cases.

12. The judges, secretary of the hearing and participants in the proceedings shall be identified in the introductory part and the operative part of the court decision by their full names (first name and surname for natural persons and name and legal form of a legal person). The gender of the nouns denoting parties to the proceedings shall be written accordingly (e. g. claimant *First Name Surname*; defendant *First Name Surname*; claimant *Company private company. (*Translator‘s note*: not relevant to the English version*)

13. Members of a judicial panel shall be written in the introductory part and the operative part of the court decision in alphabetical order according to surnames; where a judge has a double surname – according to the first surname. Where a judge is the Chairperson and/or the Rapporteur of the panel, this shall be stated in the introductory part immediately after his/her surname, in brackets. The Secretary of the hearing and the participants in the proceedings shall be identified in the introductory part on separate lines, without an indent. A representative of a participant in the proceedings shall be specified after the represented person, on the same line. It is important to specify the composition of the court that has considered the case (e. g. an extended judiciary panel, a plenary session etc.) and the procedure of the hearing (by way of a written/oral procedure); where the case is considered on an appeal or a cassation basis, this must be specified as well. It is recommended that the introductory part is formatted according to the model forms provided, and the content of the introductory part shall meet the requirements of procedural laws:

Court of first instance (civil case):

Mr Justice *First Name Surname* of the Civil Division of Kaunas Regional Court,
with <...> acting in the capacity of the Secretary,
with the participation of Claimant *First Name Surname* and her representative <...>,
<...> representing the Defendant,
<...> representing the third party <...>,

has considered, in an open hearing, by way of an oral procedure, a civil case based on the claim filed by the Claimant *First Name Surname* against the Defendant the State of Lithuania represented by the Ministry of Justice of the Republic of Lithuania for indemnification for damage; *Company* public company being a third party that has not made independent claims, on the side of the Claimant; the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania on the side of the Defendant.

The Court has

e s t a b l i s h e d :

Court of first instance (criminal case):

Mr Justice <...> of Panevėžys Town District Court,
with <...> acting in the capacity of the Secretary,
with the participation of Prosecutor <...>,
the accused <...> defended by Solicitor <....>, and
the injured party <...>,

has considered, in an open hearing, by way of an oral procedure, a criminal case in which <...>, date or birth [*date and place of birth*], personal ID No <...>, Lithuanian citizen, [*nationality*], residing at <...>, educational attainment 12 years of basic education, single, [*data on criminal record and other data on the accused, relevant to the case*], is accused of a criminal act provided in Article 178(1) of the Criminal Code of the Republic of Lithuania.

The Court has

e s t a b l i s h e d :

Court of first instance (administrative case):

Mr Justice <...> of Klaipėda Regional Administrative Court <...>
with <...> acting in the capacity of the Secretary,
with the participation of the Appellant <...> represented by <...>,
<...> representing the Defendant,
<...> representing the third party – the interested party,

has considered, in an open hearing, by way of an oral procedure, an administrative case based on the complaint filed by the Appellant <...> against the Defendant Klaipėda City Municipal Administration and the third interested party the Drugs, Tobacco and Alcohol Control Department concerning annulment of a disciplinary penalty.

The Court has

e s t a b l i s h e d :

Court of appeal (civil case):

The Judicial Panel of the Civil Division of Kaunas Regional Court consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),
with <...> acting in the capacity of the Secretary,
with the participation of <...> representing the Claimant,
the Defendant *First Name Surname* and <...> representing the Defendant,
<...> representing the third party <...>,

has considered, in an open hearing, by way of an oral procedure in appeal proceedings, a civil case based on the appeal filed by the **Claimant *Company* private company** against the decision rendered by Kaunas City District Court on 11 May 2015 in a civil case based on the claim filed by the Claimant *Company* private company against the Defendant *First Name Surname* concerning indemnification for damage; *Company1* public company being a third party that has not made independent claims, on the side of the Claimant; <...> on the side of the Defendant.

The Judicial Panel has

e s t a b l i s h e d :

or

The Judicial Panel of the Civil Division of Kaunas Regional Court consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

has heard, by way of a written procedure, in appeal proceedings, a civil case based on the appeal filed by the **Claimant *Company* private company** against the decision rendered by Kaunas City District Court on 11 May 2015 in a civil case based on the claim filed by the Claimant *Company* private company against the Defendant *First Name Surname* concerning indemnification for damage; *Company1* public company being a third party that has not made independent claims, on the side of the Claimant; <...> on the side of the Defendant.

The Judicial Panel has

e s t a b l i s h e d :

Court of appeal (criminal case):

The Judicial Panel of the Criminal Division of the Lithuanian Court of Appeal consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

with <...> acting in the capacity of the Secretary,
with the participation of the Prosecutor <...>,
the accused <...> and his defender, Solicitor <....>,

has considered, in an open hearing, by way of an oral procedure, in appeal proceedings, a criminal case based on the appeal filed by the **convicted person *First Name Surname*** against a judgment of Klaipėda Regional Court of 23 June 2015 whereby ***First Name Surname*** was found

guilty under Article 184(2) of the Criminal Code of the Republic of Lithuania (CC RL) and sentenced to imprisonment for the term three years and six months.

According to Article 75 (1) and (2) of CC RL, the carrying out of the custodial sentence has been deferred for two years, the convicted person *First Name Surname* has been obligated not to leave the city/district of his place of residence without permission of the institution exercising supervision over the convict and to indemnify for the damage inflicted by the crime within one year.

The Judicial Panel has

e s t a b l i s h e d :

The Supreme Administrative Court of Lithuania, in appeal proceedings:

The Judicial Panel of the Supreme Administrative Court of Lithuania consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

with <...> acting in the capacity of the Secretary,
with the participation of <...> representing the Appellant,
<...> representing the Defendant,
third interested party *First Name Surname* represented by <...>,

has considered, in an open hearing, by way of an oral procedure in appeal proceedings, an administrative case based on the appeal filed by the **Appellant *Company* private company** against the decision rendered by Vilnius Regional Administrative Court on 15 April 2013 in an administrative case based on the claim filed by the Appellant *Company* private company against the State Tax Inspectorate under the Ministry of Finance and third interested party *First Name Surname* concerning annulment of decisions.

The Judicial Panel has

e s t a b l i s h e d :

or

The Judicial Panel of the Supreme Administrative Court of Lithuania consisting of Judges <...>,

has heard, by way of a written procedure in appeal proceedings, an administrative case based on the appeal filed by the **Appellant *X* private company** against the decision rendered by Vilnius Regional Administrative Court on 15 April 2013 in an administrative case based on the claim filed by the Appellant *X* private company against the State Tax Inspectorate under the Ministry of Finance and third interested party *First Name Surname* concerning annulment of decisions.

The Judicial Panel has

e s t a b l i s h e d :

Cassation court (civil case):

The Judicial Panel of the Civil Division of the Supreme Court of Lithuania consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

with *First Name Surname* acting in the capacity of the Secretary,
with the participation of the Claimant *First Name Surname* represented by *First Name Surname*,
and the Defendant *First Name Surname* represented by *First Name Surname*,

has considered, in an open hearing, by way of an oral procedure in cassation proceedings, a civil case based on the cassation appeal filed by the **Claimant/Defendant/Appellant /Interested Party *First Name Surname*** for the review of the [*decision*] rendered by [*court*] in a civil case based on [*parties to the dispute and the claim giving rise to the dispute*].

The Judicial Panel has

e s t a b l i s h e d :

or

The Judicial Panel of the Civil Division of the Supreme Court of Lithuania consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

has heard, by way of a written procedure in cassation proceedings, a civil case based on the cassation appeal filed by the **Claimant/Defendant/Appellant /Interested Party *First Name Surname*** for the review of the [*decision*] rendered by [*court*] in a civil case based on [*parties to the dispute and the claim giving rise to the dispute*].

The Judicial Panel has

e s t a b l i s h e d :

Cassation court (criminal case):

The Judicial Panel of the Criminal Division of the Supreme Court of Lithuania consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),
with <...> acting in the capacity of the Secretary,
with the participation of the Prosecutor <....>,
the convicted person <...> and his defender, Solicitor <....>,

has considered, in an open hearing, by way of an oral procedure in cassation proceedings, a criminal case based on the cassation appeal filed by the **convicted person *First Name Surname*** and his defender, **Solicitor *First Name Surname*** for the review of the [*final act*] delivered by [*court*] whereby the **convicted person *First Name Surname*** [*operative part of the final act*].

Furthermore, decision/judgment rendered by the Judicial Panel of the Criminal Division of the [*court*] on xx xxxxxxxx 20xx, whereby [*operative part of the final act of the court of appeal*] is being appealed against.

The Judicial Panel has

e s t a b l i s h e d :

or

The Judicial Panel of the Criminal Division of the Supreme Court of Lithuania consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

has heard, by way of a written procedure in cassation proceedings, a criminal case based on the cassation appeal filed by the **convicted person *First Name Surname*** and his defender, **Solicitor *First Name Surname*** for the review of the [*final act*] delivered by [*court*] whereby the **convicted person *First Name Surname*** [*operative part of the final act*].

Furthermore, decision/judgment rendered by the Judicial Panel of the Criminal Division of the [*court*] on xx xxxxxxxx 20xx, whereby [*operative part of the final act of the court of appeal*] is being appealed against.

The Judicial Panel has

e s t a b l i s h e d :

14. In criminal cases:

14.1. the introductory part of the decision shall be completed with the word ‘e s t a b l i s h e d :’, written on a new line, with a space from the top and the bottom, without a left indent, with letter-spacing including a space between the letter and the colon;

14.2. the descriptive part and the reasoning part shall be separated by the word ‘d e c i d e s’ or ‘r u l e s’, written on a new line, with a space from the top and the bottom, without a left indent, with letter-spacing including a space between the letter and the colon.

For example,

The Judicial Panel (the Court) has

e s t a b l i s h e d :

<...>

The Judicial Panel (the Court) acting pursuant to <...> of the Code of Criminal Procedure hereby

d e c i d e s :

15. In civil and administrative proceedings as well as proceedings on administrative offences, the descriptive part of the court decision shall start with the word ‘established’, written on

a new line, with a space from the top and the bottom, with letter-spacing including a space between the letter and the colon. The reasoning part of the court decision shall be separated from the descriptive part by the word 'holds', written on a new line, with a space from the top and the bottom, with letter-spacing including a space between the letter and the colon. The operative part of the court decision shall begin with the word 'rules' (judgment, resolution) or 'decides' (decision) and shall be started on a new line, with a space from the top and the bottom, with letter-spacing including a space between the letter and the colon. The words 'established', 'holds', 'rules' ('decides') shall be written without a left indent.

For example,

The Judicial Panel (the Court) has

e s t a b l i s h e d :

<...>

The Judicial Panel (the Court)

h o l d s :

16. Where the descriptive part of a decision of a court of first instance rendered in criminal proceedings or the reasoning part in civil and administrative proceedings as well as proceedings on administrative offences is long, it is recommended to structure it having regard to the provisions of Article 305 of the Code of Criminal Procedure of the Republic of Lithuania, Article 270(4) Article of the Code of Civil Procedure of the Republic of Lithuania, Article 87(4) of the Republic of Lithuania Law on Administrative Proceedings, and Article 636(4) of the Code of Administrative Offences of the Republic of Lithuania (e. g. 'I. Circumstances of a Criminal Act', "II. Evidence and Reasoning for Its Evaluation', 'III. Reasoning for the Qualification of a Criminal Act', 'IV. Reasoning for the Imposition of Penalty' or 'I. Claims Made by the Claimant and Argumentation by the Claimant and Third Parties on the Side of the Claimant', 'II. Argumentation by the Defendant and Third Parties on the Side of the Defendant').

17. It is recommended that the following is separated in the descriptive part of a decision of a court of appeal: e. g. description of the substance of the dispute ('I. Substance of the Dispute'); description of the substance of the decision of the court of first instance ('II. Substance of Decision (Judgment, Ruling) of the Court of First Instance'); argumentation set out in the appeal/cross-appeal and in the reply to the appeal/cross-appeal ('III. Argumentation of the Appeal and the Reply to the Appeal'). The headings of the additional structural parts of the court decision shall be separated by spaces (empty lines) on both sides. The headings of the additional structural parts of the court decision shall be written without a left indent and shall be justified at the centre of the page. The text of the court decision shall be allocated in such a way that the headings would be on the same page with the beginning of the relevant part of the text, i. e. such part may not start on a new page, separated from its heading.

18. Where the descriptive part of the court decision is structured using Roman numerals or headings, it is recommended that the reasoning part of the decision should also be assigned a Roman numeral, continuing the numbering of the descriptive part, or a heading (e. g. in appeal civil and administrative proceedings as well as appeal proceedings on administrative offences: 'IV. Circumstances of the Case Established by the Court of Appeal, Legal Reasoning and Conclusions'). Where the reasoning part of the decision contains a broader analysis of a number of issues, such

part may be structured by dividing it into smaller parts identified by headings and/or Roman numerals continuing the previous numbering.

For example,

V. Concerning interpretation of Article 159(2) of the Law on Tax Administration
<...>

VI. Concerning the meaning of the right to VAT deduction as well as conditions and moment of arising of such right

<....>

19. Where paragraphs of the descriptive part and the reasoning part of the court decision are numbered, no indentation of the numbered paragraphs shall be used, and the paragraphs shall be separated by a 6-point space after each numbered paragraph. Paragraphs of court decisions are recommended to be numbered as follows:

Civil case No 3K-x-xxx-xxx/201x
Judicial proceedings No x-xx-x-xxxxx-xxxx-x
Categories of procedural decision: x; xx

SUPREME COURT OF LITHUANIA

D E C I S I O N
IN THE NAME OF THE REPUBLIC OF LITHUANIA

xx xxxxxxxxxxx 201x
Vilnius

The Judicial Panel of the Civil Division of the Supreme Court of Lithuania consisting of Judges *First Name Surname*, *First Name Surname* (Chairperson of the Panel) and *First Name Surname* (Rapporteur),

has heard, by way of a written procedure in cassation proceedings, a civil case based on the cassation appeal filed by the **Claimant/Defendant/Appellant /Interested Party *First Name Surname*** for the review of the [*decision*] rendered by [*court*] in a civil case based on [*parties to the dispute and the claim giving rise to the dispute*].

[*single space*]

The Judicial Panel has

[*single space*]

e s t a b l i s h e d :

[*single space*]

I. Substance of the Dispute

[*single space*]

1. The matter of interpretation and application of [*the issue of application of provisions of substantive and/or procedural law*] has to be resolved in the cassation proceedings.
2. The Claimant has requested the Court to [*concise statement of the subject and the basis of the claim (the basis can be described in a separate paragraph)*].
3.

[*single space*]

II. Substance of Procedural Decisions of the Court of First Instance and the Court of Appeal

[*single space*]

4. By its decision of xx xxxxxxxxx 20xx, Vilnius (or Kaunas etc.) Local / Regional Court has [*operative part of the court decision*] the claim.
5. The court has stated that [*concise statement of the reasoning of the court*].
6. The Judicial Panel of Vilnius (or Kaunas etc.) Regional Court (or of the Civil Division of the Lithuanian Court of Appeal), having considered the case based on the appeal/cross-appeal filed by the Claimant/Defendant/Appellant /Interested Party, [*operative part of the decision of the court of appeal*] by its decision of xx xxxxxxxxx 20xx.
7. The Judicial Panel has stated [*concise statement of the reasoning of the court of appeal concerning the merits of the case*].

[*single space*]

III. Legal Argumentation of the Cassation Appeal and the Reply to the Cassation Appeal

[*single space*]

8. In the cassation appeal, the Claimant/Defendant/Appellant /Interested Party requests to [*content of the request*]. The cassation appeal contains the following argumentation [*substance of the cassation appeal and argumentation; no headings assigned to the arguments or groups thereof*]:

   8.1.

   8.2.

   8.3.

9. In the reply to the cassation appeal, the Claimant/Defendant/Appellant /Interested Party requests to [*content of the request*]. The reply contains the following argumentation [*essential arguments in the reply; if only one group of arguments is specified they shall not be numbered*]:

   9.1.

   9.2.

   9.3.

[*single space*]

The Judicial Panel

[*single space*]

h o l d s :

[*single space*]

IV. Reasoning and Clarifications by the Cassation Court

[*single space*]

Concerning [*brief statement as to the matter of law to be discussed*]

[*single space*]

10. [*Reasoned conclusions of the Judicial Panel on the specified matter of application of law*]

11.

12.

13. In view of the foregoing, the Judicial Panel states that (In view of the foregoing and acting in accordance with Article 361(4) subpara. 2 of the Code of Civil Procedure of the Republic of Lithuania, provides the following rule [for the interpretation/application of law]) [*the conclusion (rule formulated) by the Judicial Panel on the matter of application of law*].

[*single space*]

Concerning litigation expenses

[*single space*]

14. [*Allocation of litigation expenses*]

[*single space*]

The Judicial Panel of the Civil Division of the Supreme Court of Lithuania acting in accordance with Article 359(1) [*the relevant Article/paragraph is specified depending on the decision*] and Article 362(1) of the Code of Civil Procedure of the Republic of Lithuania, hereby

[*single space*]

d e c i d e s :

[*single space*]

[*statement of the decision of the Court rendered according to the relevant paragraph of Article 359 of CCP; start writing each part of the procedural decision on a new line*]

This decision of the Supreme Court of Lithuania is final and not subject to appeal and takes effect on the date of rendering thereof.

Judges *First Name Surname*

First Name Surname

First Name Surname

20. Under the operative part, separated by double spacing, the signature part shall be allocated, with signature/signatures of the judge (or members of the Judicial Panel) preceded by the word ‘Judge’ / ‘Judges’. The word ‘Judge’ / ‘Judges’ shall be written without left indentation. First

names and surnames of members of the Judicial Panel shall be written in a column which shall be left- justified according to the first letter of the first name and not according to the right margin of the page. The first names and surnames of members of the Judicial Panel shall be double-spaced.

For example,

The Judicial Panel acting in accordance with Article 45(2) and Article 140(1) subpara. 1 of the Republic of Lithuania Law on Administrative Proceedings hereby

d e c i d e s :

To reject the appeal filed by the Appellant X private company.

To uphold the decision rendered by Vilnius Regional Administrative Court on 26 February 2013.

To award payment of EUR 1,210 (one thousand two hundred ten euro) against the Appellant X private company for the benefit of the Third Interested Party Y sole proprietor company as litigation expenses incurred at the court of appeal.

This Decision is not subject to appeal.

Judges Antanina Antanaitienė

Jonas Jonaitis

Petras Petraitis

Note. The text of the court decision shall be allocated in such a way that the signature part is not transferred to a separate page.

SECTION II
CONTENT OF A COURT DECISION

21. Court decisions shall be written according to the standards of the generic Lithuanian language and legal terminology, without excessive or incorrect words and phrases and without comments or ambiguities, i. e. correct administrative-style language. The text shall be accurate, clear and logical, and information contained in it shall be correct, well-grounded, not contradictory and not repetitive.

22. Court decisions shall be written in short and uncomplicated sentences.

23. Abusive, insulting, banal, domestic, patronising or excessively complicated legal language shall not be used.

24. Latin sayings shall be written in italics. Where a Latin saying is used for the first time (such as *inter alia*, *mutatis mutandis*, *ultima ratio* etc.), a translation into Lithuanian shall be provided in brackets.

25. A text in a foreign language, where necessary, shall be provided after its translation into Lithuanian, in italics in brackets. The foreign language shall be specified before such text.

For example,

‘Atsižvelgiant į šį reglamentą, asmenims, kurių nuolatinė gyvenamoji (buveinės) vieta yra valstybėje narėje, ieškiniai turi būti pareiškiami tos valstybės narės teismuose, neatsižvelgiant į šių asmenų pilietybę’ (in English: *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*).

26. Clauses 21 through 25 of this Annex shall apply to citations as appropriate. For example, except for cases of unavoidable necessity, the court should not cite swear words or texts that are abusive, insulting, insolent or do not meet linguistic or moral requirements otherwise.

27. It is recommended that italics, bold or underlined text should be used in court decisions only where necessary, in moderation, consistently, and without overloading the text with various means of emphasis.

28. Where the title of a legal act or the name of an organisation, which is long and consists of several words, is mentioned for the first time, the full title/name should be provided (the institution that has adopted the legal act should also be specified if necessary, in particular if the legal act implements a law), with the abbreviation specified in brackets and used subsequently (e. g. the Criminal Code of the Republic of Lithuania (hereinafter also referred to as the ‘CC RL’); the State Commission on Lithuanian Language (hereinafter also referred to as the ‘SCLL’ or the ‘Commission’); the Criminal Act Imitation Model (hereinafter also referred to as the ‘CAIM’); the European Court of Human Rights (hereinafter also referred to as the ‘ECHR’) etc.), or an abbreviated title/name may be used (e. g. ‘the Republic of Lithuania Law on Bar’ for the first time, and subsequently ‘the Bar Law’).

29. Only abbreviations that have been explained should be used in the court decision, e. g. the Law on Central Credit Union (hereinafter also referred to as the ‘LCCU’), and no specific terms or symbols that have not been explained should be used.

30. It is recommended that dates in the text of the court decision should be written in mixed format, i. e. the year and the day in figures with abbreviations ‘m.‘ and ‘d.‘, and the month shall be written in words.

For example,

3 April 1997 (not ‘03 April 1997’).

31. A line may not be ended by a person’s initial or first name or a number without abbreviations describing it (e. g. the numeral from an article/paragraph/subparagraph of the law or from a date) or abbreviations that are inseparably related to the text that follows (e. g. ‘No’ on one line and the number itself, e. g. ‘387’, on another line).

32. Numerals expressing thousands should be grouped using a space (e. g. LTL 12 150 000.99). Large numbers starting from a thousand may be denoted in numerals and words or abbreviations thereof (e. g. 10 thousand, 5 million or 5 m).

33. When referring to structural parts of a legal acts (articles, paragraphs, subparagraphs etc.), the court has to take account of the terms provided in the Republic of Lithaunia Law on the Law Development Framework and the Recommendations for the Drafting of Legal Acts approved by Order of the Minister of Justice of the Republic of Lithuania No 1R-298 of 23 December 2013 (a clear identification of paragraphs and subparagraphs).

34. The words denoting articles, paragraphs, subparagraphs and items of legal acts shall not be abbreviated, e. g. Article 63 paragraph 1, paragraph 5 subparagraph 1.

35. In the introductory part and the operative part of the court decision, foreign first names and surnames shall be written with Lithuanian endings but the name as stated in a personal

document shall be additionally provided in brackets. Subsequently in the text the first name and surname shall be written according to the rules of declension of the Lithuanian language.

For example,

Abdulas Abdulazizas (Abdul Abdulaziz); Janas Petrovičius (Jan Petrovič).

36. Versions of legal provisions shall be indicated as follows: Article 288(3) of the Labour Code of the Republic of Lithaunia (version of the Law of 16 December 2014). If no version is indicated in brackets, it shall be deemed that the version of the law that is current as of the date of the court decision has been indicated.

37. Amendments to a legal act replace the primary legal act (which is being amended), therefore, in order to refer to the new version of a legal provision, established by the amendment, a reference shall be made to the amended primary legal act and not to the amendment (e. g. not 'pursuant to Article XX of the Law Amending the Code of Civil Procedure' but 'pursuant to Article YY of the Code of Civil Procedure (version of the Law No XII-2011 of 12 November 2015').

38. Where a long text is cited in a court decision, it should be written as a separate paragraph in inverted commas. Such paragraph should be written further from the margin (e. g. additional 1 cm distance). The same font and its size should be maintained; italics should not be used.

For example,

15. The legal doctrine states:

> *'Šių laikų teisininkai į ginčo dėl nedidelių sumų teisminės gynybos poreikį bando žvelgti per proceso ekonomijos principą*. <...>.'

39. Dots in square brackets shall be used to denote the omitted parts of a citation (with no spaces on both sides of the dots). The citation shall be written in inverted Lithuanian commas: „ at the beginning of the citation and " at the end of the citation (not " and "). Where a paragraph has been omitted from the citation, dots in square brackets shall be written between two lines.

For example,

It is universally recognised that „the financial impact on the budget <...> would be very strong".

or

Requirements for an appeal are established in Article 130 of the LAP, paragraph 2 of which states that 'an appeal shall specify

1) the name of the court to which the appeal is addressed;
<...>
7) the appellant's request (subject of appeal);
<...>'.

Note. Use of square brackets in the text of court decisions should be avoided ('[' and ']'), except for cases where additional words that add clarity to the citation are inserted in it (e. g., '<...> [IPPC] may be issued or renewed provided that procedures of environmental impact assessment of

the planned economic activity have been completed (screening for an environmental impact assessment and/or an environmental impact assessment), where according to the [Republic of Lithuania] Law on Environmental Impact Assessment of Planned Economic Activities <...>'). However, where only one letter is changed in a citation (e. g. from/to a capital letter/small letter), writing it in square brackets is not necessary.

40. In the text of a court decision, the word 'per cent' and not '%' symbol shall be used. Common abbreviations such as 'LTL' may be used in the text. Two abbreviated words must be separated by a space, e. g. '*š. m.*' and not '*š.m.*'. Abbreviations of word combinations may not be separated by a slash: '*a. k.*' and not '*a/k'*.

41. The abbreviation 'p.' for 'page' shall be a small letter preceding the page number because 'p.' written after a number means 'paragraph'.

42. Where a reference to materials of the case is made in the text of the court decision, pages of the file shall be specified using an abbreviation 'f. p.'. Where the file consists of more than one volume, the volume shall be specified in Arabic numerals using the abbreviation 'Vol.'. Where a reference is made to file pages from the same volume that are not consecutive, they shall be separated by commas, and pages from different volumes shall be separated by semi-colons.

For example,

Materials contained in the case (Vol. 1, f. p. 9–10, 54–80,102; Vol. 3, f. p. 5–7) show that <...>.

Note. Where a reference is made to materials from another case appended to the case concerned, the number of the former shall be specified together with a reference to other data identifying the materials.

For example,

The said case dealt with the matter of <...> (administrative case No I-579-201-12, f. p. 54).

43. It is recommended that a reference to an audio recording of the hearing in the text of the court decision should be worded as follows:

A witness questioned at the hearing has confirmed that <...> (Audio recording of the hearing held on 11 May 2015: 16 min. 42 s - 17 min. 22 s).

Note. Where a reference is made to an audio recording of a hearing made in a case other than the case concerned, the number of such other case shall be specified:

<...> (Audio recording of the hearing in civil case No 2-705-705/2014 held on 11 May 2015: 16 min. 42 s – 17 min. 22 s).

44. All words in the tile of a document of special significance shall be capitalised.

For example,

The Statute of Lithuania, the Act of Independence of Lithuania, the Constitution of the Republic of Lithuania.

45. Non-Lithuanian (international) abbreviations made of Latin letters should be left unchanged in Lithuanian texts.

For example,

NATO (North Atlantic Treaty Organisation), UNESCO (United Nations Educational, Scientific and Cultural Organisation), ICAO (International Civil Aviation Organisation), ISO (International Organisation for Standardisation).

46. Abbreviations in languages using a script other than Latin script shall be rewritten in the Lithuanian script.

For example,

ITAR-TASS (Russian Information Agency), GOST (a standard).

47. Where titles in foreign languages translated into Lithuanian are widely used, the abbreviations shall be formed of the Lithuanian version of the title.

For example,

JTO (United Nations Organisation), NVS (Commonwealth of Independent States), ES (European Union).

SECTION III
REFERENCES

48. Where a reference to a legal act of the European Union is made in the text for the first time, the following details shall be specified in the following order:

48.1. date of adoption of the legal act;
48.2. name/names of an institution/institutions that has adopted the legal act;
48.3. type of the legal act;
48.4. number of the legal act;
48.5. full title of the legal act.

For example,

1995 m. spalio 6 d. Tarybos direktyva 95/50/EB dėl pavojingų krovinių vežimo keliais vienodų tikrinimo procedūrų. [Council Directive 95/50/EC of 6 October 1995 on uniform procedures for checks on the transport of dangerous goods by road]

49. Where the text of the court decision refers to the same legal act of the European Union more than once, it may be stated, upon the first reference, that hereinafter its title will be abbreviated.

For example,

2001 m. birželio 27 d. Europos Parlamento ir Tarybos direktyva 2001/42/EB dėl tam tikrų planų ir programų pasekmių aplinkai įvertinimo (toliau – ir Direktyva 2001/42/EB). [Directive of

the European Parliament and of the Council 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (hereinafter referred to as 'Directive 2001/42/EC)]

Note. Where full title of a legal act of the European Union is provided:

a) the first letter in the name of an institution shall be capitalised (e. g. Council, Parliament etc.);
b) the first letter in the title of a legal act shall be capitalised (e. g. Council Directive 2000/101/EC, Regulation (EC) No 3283/94).

Where a reference is made to an abbreviated title of a legal act of the European Union, the first letter of the first word shall be capitalised (e. g. Directive 2000/101/EC *or* the Sixth Directive, Regulation (EC) No 3283/94).

For more details see 'Europos Sąjungos institucijų vertimo į lietuvių kalbą vadovas' C.7 p. (http://ec.europa.eu/translation/lithuanian/guidelines/documents/interinstitutional_translation_guide_lt.pdf).

50. Where a legal act of the European Union that has been amended or supplemented is applied, and new provisions thereof are applied as well, all the amendments and additions to the legal act should be specified. However, where the legal act of the European Union as amended is applied, only the first (main) legal act may be specified, followed by (in brackets) the legal act of the European Union whereby amendments/additions were made last time.

For example,

<...> (as amended by Directive of the European Parliament and of the Council 2000/64/EC of 7 November 2002).

51. Where a reference to judgments delivered by the European Court of Justice is made for the first time, the following should be specified:

51.1. name of the court;
51.2. date of the judgment cited;
51.3. title of the case (parties to the case) (title of the case in italics);
51.4. number of the case.

For example,

Judgment of the General Court of the European Union of 18 January 2005 in *French Republic v. Commission of the European Communities*, T-93/02

52. Where a reference to a judgment of the European Court of Justice is made for a second time, it is sufficient to state as follows: e. g. 'The said judgment of the in *France v. Commission* <...>'.

53. Where a reference to judgments delivered by the European Court of Human Rights is made for the first time, the following should be specified:

53.1. name of the court;
53.2. date of the judgment cited;
53.3. title of the case (parties to the case) (title of the case in italics);
53.4. number of the petition/application.

For example,

Judgment of the European Court of Human Rights of 12 February 2013 in *Yefimenko v. Russia (*application No 152/04).

54. Where a reference to a procedural decision rendered by a national court is made, the full name of the court, the type and date of the procedural decision, and the case number shall be specified (where a reference is made to a procedural decision rendered by the Constitutional Court of the Republic of Lithuania, the name of the court and the date of the procedural decision are sufficient). In addition, a reference to a source in which the procedural decision was published may be provided.

For example,

Judgment of the Supreme Court of Lithuania of 15 December 2015 in civil case No 3K-7-525-916/2015; Judgment of the Supreme Court of Lithuania of 22 December 2015 in criminal case No 2K-P-498-746/2015; Decision of the Supreme Administrative Court of Lithuania of 31 August 2015 in administrative case No A-2564-520/2015; Resolution of the Constitutional Court of the Republic of Lithuania of 29 September 2005.

55. Where a bibliographical reference to a book a brochure is made, the surname of the author shall be specified, followed by the first name or initial, after a dot – title of the book/brochure in italics; after a dot – place (city) of publication; after a colon – publisher or publishing house (if known); after a comma – year of publication.

For example,

Bagdanskis, Tomas. *Materialinė atsakomybė darbo teisėje*. Vilnius: VĮ Registrų centras, 2008.

56. Where there are two or three co-authors of the book or the brochure, all of them must be specified, separating their names by a semi-colon and adding ‘and’ before the last name.

For example,

Dapšys, A.; Misiūnas, J.; ir Čaplinskas, A. *Bausmės individualizavimo teisinės problemos. Baudžiamojo įstatymo normų ir jų taikymo teismų praktikoje sisteminė analizė*. Vilnius: Teisės institutas, 2008.

57. Where there are more than three co-authors of the book or the brochure, only the first one shall be specified followed by a comma and ‘et al.’ in italics.

For example,

Andrulis, V., *ir kiti*. *Lietuvos teisės istorija*. Vilnius: Justitia, 2002.

58. Where a book/brochure was written by a group of co-authors (an institution), the official name of the institution shall be written without capitalising it.

For example,

Lietuvių kalbos institutas. *Lietuvių kalbos žodynas* [interaktyvus]. <http://www.lkz.lt/startas.htm>. [Institute of the Lithuanian Language. Dictionary of the Lithuanian language [interactive]. http://www.lkz.lt/startas.htm]

59. Where a bibliographical reference to an article published in a journal or another periodic or continued publication is made, the title of the article shall be followed by a dot, the title of the journal or another publication in italics, a comma, the year of publishing, a comma, the volume or issue number, a comma, and page numbers.

For example,

Fedosiuk, O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*): teorija ir realybė. *Jurisprudencija*, 2012, t. 19, Nr. 2, p. 715–738.

60. Where a bibliographical reference to an article published in a one-off publication (a collection, materials of a conference etc.) is made, the title of the article shall be followed by a dot, the word 'In:', the title of the publication in italics, a dot, compilers of the publication if known, a dot, the place (city) of publication, a colon, the publisher or a publishing house (if known), a comma, the year of publication, a comma, and page numbers

For example,

Kūris, E. Atskiroji nuomonė Konstituciniame Teisme. Pirmosios patirtys. Iš Nepriklausomos Lietuvos teisė: praeitis, dabartis ir ateitis: recenzuotų mokslinių straipsnių rinkinys Liber Amicorum profesoriui Jonui Prapiesčiui. Vilnius: Vilniaus universiteto Teisės fakulteto Alumni draugija, 2012, p. 163–182.

61. Where a bibliographical reference to a thesis or its abstract is made, the title shall be followed by a colon, a reference to the type of the source (doctoral thesis, abstract etc.), a dot, the area and field of science, a dot, the place (city) of publication, a colon, the publisher or a publishing house (if known), a comma and the year of publication.

For example,

Griškevič, L. *Autentiškos teismų sistemos sukūrimas Lietuvoje*: daktaro disertacija. Socialiniai mokslai, teisė (01S). Vilnius: Vilniaus universitetas, 2013.

62. Where a bibliographical reference to an electronic source (primary or secondary) is made, the above-stated general rules must be followed; in addition, the title shall be followed by a reference to the data carrier - [interactive], [CD-ROM] etc. – in square brackets, beginning with a small letter; for Internet sources – the accurate address of the source shall be provided in '<…> after the place of publication, the publisher and the year of publication (if known) and a dot.

For example,

Sakalauskas, Gintautas. *Lygtinio paleidimo sistema ir korupcijos rizika* [interaktyvus]. Vilnius: Teisės institutas, 2010. <http://teise.org/data/1lygtinio-paleidimo.pdf>.

European Court of Justice. *Press Release No 122/12* [interactive]. <http://europa.eu/rapid/press-release_CJE-12-122_lt.htm?locale=FR>.

63. Where a bibliographical reference to an institutional document is made, the name of the institution (and its division if necessary) shall be written in small letters followed by the type and number of the document in italics (if necessary, also other data required for the identification of the document).

For example,

Nacionalinė teismų administracija. *Nuomonė Nr. 6 (2004) dėl teisingo teismo proceso per įmanomai trumpiausią laiką ir teisėjo vaidmens teismo procese atsižvelgiant į alternatyvius ginčų sprendimo būdus* [interaktyvus]. <http://www.teismai.lt/lt/tarpt-bendr/tarpt-org-dok/ccje-dokumentai/>.

64. References to sources published in foreign languages in the Latin script shall be provided in the original language following the above rules. Bibliographical references to sources published in other scripts (Greek, Chinese) shall be transliterated (written in the Latin script) except the Cyrillic script.

For example,

Zajdało, J. *Fascynujące ścieżki filozofii prawa*. Warszawa, 2008.

Von Bogdandy, A. Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic law. *International Journal of Constitutional Law*, 2008, Vol. 6, Number 3 & 4, p. 397-413.

Жалинский, А. *Современное немецкое уголовное право*. Москва: Проспект, 2004.

65. References shall be written in the text of a procedural decision of a court. No footnotes shall be used in procedural decisions of courts.

SECTION IV
FINAL PROVISIONS

66. Where forms of court decisions are established in legal acts, these Recommendations shall be applied to the extent that they do not contradict the document form approved by a legal act.