Network of the Presidents of the Supreme Judicial Courts of the European Union

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THE MOTIVATION OF SUPREME COURT DECISIONS

Report on the questionnaire, Part I

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Part I

A - The Assistance in Drafting the Motivation

*1) For all decisions, must a reasoned judgment be rendered, and, if not, what is the percentage of such unreasoned decisions as compared with the number of reasoned decisions?**

On the question of whether supreme court decisions must contain reasoning, there is a clear distinction to be made depending on whether a decision constitutes a judgment on the merits of the case.

We generally find that decisions which do not deal with the merits of the case need not be reasoned. Thus, there is an important difference between those supreme courts that operate under a system of leave to appeal and those that do not.

In countries where access to the supreme court is subject to a leave to appeal being granted, decisions whereby leave to appeal is denied or granted are unreasoned.

> This is the situation in England and Wales, Estonia, Finland, Norway and Sweden.
>
> In Austria and Germany, only civil cases are subject to a requirement of leave to appeal. Decisions denying or granting leave to appeal in civil cases are unreasoned.
>
> In systems based on leave to appeal unreasoned decisions on the refusal or granting of leave to appeal represent a large proportion of the total of cases dealt with, but the proportion varies from country to country. The figures mentioned are about 80-90 per cent for Estonia, Finland and Sweden, 75 per cent for Norway and 60 per cent for Germany (in respect of civil cases only).

* In some replies, references are made to rules applicable in the lower courts as well. In this report, however, the situation is covered only in respect of the supreme courts, which is the actual theme of the questionnaire and of the conference.

By contrast, without exception, we find that there is a requirement that judgments on the merits of a case must be reasoned.

Sometimes, the requirement of a reasoned decision may be satisfied by a very concise formula. In particular, in systems (or groups of cases) where a requirement of leave to appeal is not applied, decisions dismissing manifestly unfounded appeals may only contain a short statement to the effect that the appeal is unfounded.

> This is the case in Germany and Poland as far as criminal cases are concerned, and in France and the Netherlands for civil as well as criminal cases.

Furthermore, in cases where the supreme court simply concurs with the reasoning given by the lower court, its reasoning may be confined to a corresponding short formula.

> This practice is mentioned by Cyprus, Denmark and Scotland in particular.

Certain supreme courts (notably Ireland, Northern Ireland and Scotland) report that in some, less complex cases, a decision with reasons may be announced orally at the end of a hearing (ex tempore judgment). Such a decision is recorded and the parties may subsequently obtain a written version or transcript of the decision.

2) Does the court refer to interpretative principles for the interpretation of statutory law and, if yes, which ones? Does the court give a reasoning for the interpretation of a statute?

All supreme courts have recourse to interpretative principles when determining the precise (or more precise) meaning of statutory law. Many colleagues have refrained from providing any list of such principles, either mentioning or implying that relevant principles are numerous and vary by context in such a way that it is difficult to enumerate them. Others have mentioned examples of principles applied. Generally speaking, there seems to be plenty of common ground in this respect.

In some of the replies, reference is also made to the European Convention on Human Rights and the case-law of the European Court of Human Rights, as well as to EU law and the case-law of the European Court of Justice as sources of law having an important impact on the interpretation of national law. This of course is a common feature, even if only a few have mentioned it in the present context of the questionnaire.

While all the courts make use of interpretative principles, whether or not such principles are referred to in the judgment is to some extent another matter. As is expressly pointed out in some of the replies, it is widely seen to be the crux of the function of supreme courts to give guidance, and this function is essentially carried out through the reasoning provided. It seems that most supreme courts are either required to set out the arguments and interpretative principles that lead them to the adoption or endorsement of a particular interpretation of statutory law, or that they habitually do so.

A notable exception seems to be France, where judgments on cassation are traditionally drafted in a manner that does not lay out the underlying reasoning. As for the Netherlands, the report tells us that it is “not excluded” that interpretative principles are referred to in the judgment. This seems to suggest that it is uncommon to do so.

3) Does the court take into account non legal considerations in the motivation of its judgments (economic, social, ethical...)?

On the basis of the replies, the prevailing position seems to be that non-legal considerations can and are taken into account, but always within the limits of the law.

For Bulgaria and Portugal, however, it is reported that only legal considerations are pertinent. For England and Wales, it is reported that non-legal considerations are not taken into account except where this arises from the application of established legal principles. In the Netherlands, it is “not excluded” that non-legal considerations are taken into account but it is an exception.

Evidently, this is an area where we are partly talking about “shades of grey”, and the way in which the situation is described may in part be a semantic or philosophical matter, especially as there can hardly be any clear-cut borderline between “legal” and “non-legal” arguments.

Again, it is to some extent another matter whether such considerations, when pertinent, are disclosed in the judgment itself. In this regard, the position in a number of countries, ranging from the Nordic and the Baltic countries to Slovenia, appears to be that arguments actually taken into account will also be presented in the reasoning of the judgment.

On the other hand, the position in France is that the reasons given for judgments are strictly legal, and even if non-legal considerations may play a role in interpretation, they do not appear in the judgment itself. A similar situation seems to prevail in Belgium, Italy and Luxembourg. In the Czech Republic, non-legal considerations will not be mentioned unless the statutory provision itself makes reference to them. In Hungary, non-legal considerations may play a role but are seldom referred to in judgments.

4) How many decisions per year are drafted by each judge?

This question poses particular difficulties because of the differences that exist between the various supreme courts in terms of their basic framework of functioning - in particular between courts that operate under a strong filtering mechanism (leave to appeal) and those operating without such a mechanism. These differences have a majour impact on the number and proportion of unreasoned decisions in relation to reasoned judgments, and consequently on the work effort involved in the drafting of such decisions or judgments. Numbers alone do not provide comparable information on the actual work load of judges. I am therefore presenting two separate tables to describe the situation, one for countries applying a filtering system based on leave to appeal, another for those that don’t.

Filtering by leave to appeal

	England & Wales	Estonia	Germany (civil)	Finland	Lithuania (civil)	Norway	Sweden
Reasoned judgments	participation 80	18-23	56	participation 50 reporting 20	36	10 +	participation 80 reporting 20
Un-reasoned decisions	n.a.	n.a.	n.a.	300 +	146	n.a.	n.a.

No filtering by leave to appeal

Austria	Bulgaria	Belgium	Cyprus	Czech Rep.	Denmark	France
100 civil 75 criminal	220 civil 200 comm. 110 crim.	100	100-120	125	100 civil 25 criminal	120

Germany	Greece	Hungary	Italy	Latvia SC senate	Luxembourg	Malta
94 criminal	80 civil 200-250 crim.	87 civil 73 criminal	200 civil 400 criminal	96 civil 123 crim.	40	79

Netherlands	Poland	Portugal	Romania	Slovak Rep.	Slovenia
50 civil (1/3 unreasoned) 130 criminal (1/2 unreasoned)	90 civil 51 criminal 129 labour	100	250	133	110

5) What if any assistance is provided in drafting the reasons for the decision? What is the proportion of judicial assistants to the number of judges?

As a general feature we find that the supreme courts do not have arrangements similar to those prevailing at the European Court of Justice, where each judge has a number of legal secretaries working solely for him/her. In the supreme courts, judicial assistants are generally a shared resource rather than allocated full-time to a particular judge. Only the answers from the Czech Republic and Lithuania indicate that each judge has an assistant attached to him/her.

A second observation is that the legally trained assistance that is available appears to be mainly for the purposes of research and preparatory work rather than for the purpose of assisting the judge in the drafting of the reasoning that goes into the judgment.

- There are some countries that do have in place a system where a referendary or similar judicial assistant also produces (first) drafts of judgments. This is the case in Finland and Sweden, where a referendary is involved in each case and formally required to present a draft, but involvement by assistants in the drafting of judgments is also mentioned as regards Belgium, Denmark, Hungary, Malta, Poland, Romania and Slovenia.

- Some replies are not very explicit in describing the tasks of assisting legal staff, in particular whether it includes preparation of drafts (e.g. Estonia, Bulgaria France, Germany, the Slovak Republic).

- Some expressly report that judges are not assisted in the drafting of the reasons for judgments. These include Austria, Cyprus, England and Wales, Greece, Ireland, Italy, Luxembourg, Northern Ireland, and Scotland. Norway indicates that the work of the judicial secretariat is mainly concerned with the Appeals Committee, and thus not with the drafting of judgments given on the merits of a case. The Netherlands and Portugal only refer to research assistance.

As regards the number of assisting legal staff, see table under question B(1) below.

B- Is the Decision Taken by Way of a Single Judgment or by Individual Judgment?

1) How many Members of the Supreme Court are there?

The number of members in each supreme court are summarized in the following tables.

The number of judges is listed on line one.

In addition, line two lists the number of assisting legal staff referred to under questions A(5) above.

AT	BE	BU	CY	CZ	DK	E & W	EE	ES	FR	FI	DE	GR	HU
57	30	90	13	59	19	12	19	70+20	196	19	126	68	78
10	15	10	*	73	11	4	1,5/judge	140	53	32	3/7-8,2/7		127

* In Cyprus, the Supreme Court has 13 legal assistants but they work only on administrative cases.

IE	N IRL	IT	LT	LU	LV	MT	NL	NO	PL	PT	RU	Sc	SK	SI	SE
8	14	359	37	3+2	23#	8	34	19	90	60	121	34	73	43	16(14)
	6	**	37+6		21#	5	2/10,1/1	17	49	10	84	4	20	0.65/judge	ca 30

** In Italy, a bill is pending before Parliament aimed at providing judges with judicial assistants.

As for Latvia, the number indicated here represents the size of the Supreme Court Senate, which exercises cassation function (and thus excludes the chambers constituting an appellate instance court).

2) How many Members constitute a quorum? Does this vary on the importance of the appeal?

In the following tables,

- line one lists the usual quorum for judgments on the merits of a case
- line two lists the quorum for decisions on leave to appeal or dismissal of manifestly unfounded appeals (or similar)
- line three lists the quorum for special situations, such as cases involving issues of particular importance, deviation from previous case-law.

AT	BE	BU	CY	CZ	DK	E & W	EE	ES	FR	FI	DE	GR	HU
5	5	3	3	3	5	3(5)	3	3	5	5	5	5	3
						3			3	2(3)			
11	9 (11)		7 (13)	9	7	7 / 9	5/6 11	10/13/15	13/19	11 (19)	11/13 (24)		5/7

IE	N IRL	IT	LT	LU	LV	MT	NL	NO	PL	PT	RO	Sc	SK	SI	SE
3	3	5	3	5	3	3	5	5	3	3(4)	3	3	3(5)	3(5)	5
							3			1					1(3)
5/7		9	7/12		7			11 (19)	7		9			7	14

Note: Special rules that may be applicable to administrative or constitutional cases are not taken into account in the above tables.

3) Are decisions reached by a bare majority? If not, how are they reached?

Bare majority is the governing rule in all jurisdictions.

In some cases, however, unanimity is required if a decision is to be adopted in a limited composition of judges. In Belgium, for instance, a panel of three judges must decide unanimously, otherwise the case must be referred to a panel of five judges.

4) Is it a single judgment or an individual judgment?

Most importantly, a distinction can be made between systems where dissenting opinions (or separate opinions reaching the same conclusion for different reasons) are allowed and made public, and systems where the judgment is always single and unitary and no dissent is disclosed.

This division is presented in a table below. By number of countries, the latter system, based on single judgment and no disclosed dissent, appears to be slightly more common.

Among countries where dissenting or separate opinions are public, there is a sub-distinction between systems where a single judgment based on common reasoning is the normal way of formulating a judgment in the absence of dissent, and systems where the normal way of presenting a judgment is for each judge to give an individual opinion (even where its content may largely concur with another opinion).

This latter distinction is presented in the table below by an asterisk in the left column indicating systems where judgment by individual opinion is the norm. The more common practice among countries allowing public dissent is, however, to aim at a single judgment

with common reasoning. In these systems, individual opinions are given only in the event that there is dissent on the outcome or disagreement on the reasoning.

Judgment with disclosure of dissent	**Single judgment with no disclosure of dissent**
Cyprus	Austria
Denmark	Belgium
England and Wales∗	Bulgaria
Estonia	Czech Republic
Finland	France
Greece	Germany
Ireland∗ (except for certain constitutional review cases)	Hungary (dissent recorded but not made public)
Lithuania (disclosed on request?)	Italy
Northern Ireland	Luxembourg
Norway∗	Malta
Romania	The Netherlands
Scotland	Poland
Sweden	Portugal
	Slovak Republic
	Slovenia
	Spain

∗ Judgment by individual opinion