



**SEMINAR ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND
IN COOPERATION WITH ACA-EUROPE**

**MAPPING THE MULTILEVEL PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPEAN ADMINISTRATIVE
COURTS**

Questionnaire

The Finnish presidency of ACA-Europe focuses on the vertical dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This questionnaire addresses this vertical dialogue from the perspective of the pluralist framework of European fundamental rights protection on the one hand and the national constitutional framework of fundamental rights on the other hand.

The term "fundamental right" in the title of the questionnaire is used as an umbrella concept. It refers to rights recognized as fundamental by the respective legal orders. This implies that those rights are in some sense supreme norms, often judicially protected against violation by public authorities, including the legislature.

In national legal systems, these rights are usually laid down by the constitution, or they may be provided by domestically applicable international human rights conventions. Within the scope of application of European Union law, the Charter of Fundamental Rights (CFREU) provides the main source of fundamental rights. Quite often, these various sources of law are simultaneously applicable in concrete cases. Furthermore, each individual system usually provides for specific court(s) or other authorities regarded as supreme or authoritative. In this sense, the fundamental rights protection in Europe may be regarded as "pluralist".

As legal norms, fundamental rights norms in Europe have several features that complicate their application in national courts. First, they are usually open to different interpretations, which in turn emphasises the role of precedents delivered by both national and European courts. Secondly, because of the pluralist nature of the European fundamental rights system, national courts sometimes need to decide which of the different sources of fundamental rights should be given primacy over the others and on what grounds. Third, it seems that there is not a single right answer to the second question. For instance, European Union law has primacy over national law, and this also applies to national constitutions. However, as provided by Article 52.4 of the CFREU, fundamental rights recognized by the Charter should be interpreted in harmony with the constitutional traditions of the Member States.

Building on the above-mentioned framework, the following questionnaire is prepared with a view to a comparative assessment of the functioning of the system of fundamental rights protection in the light of the legal practice of supreme administrative jurisdictions in Europe.

For this purpose, the questionnaire starts with questions concerning the basic institutional framework for the application of fundamental and human rights in the domestic legal order and then moves to questions about the modes in which the interpretation of national and European fundamental rights norms interact in the practice of national courts.

Acknowledging the differences between European legal cultures, please, feel free to complement any answer with additional and/or clarifying information.





I Background information

1. *The formal title of your court? Please include the country.*

Supreme Administrative Court of Portugal.

2. *The number of decisions your court gives annually (average)?*

Within this last three years, the Supreme Administrative Court delivered an annual average of 1 793 decisions. More specifically:

- In 2020 – 1 741 decisions.
- In 2021 – 1 897 decisions.
- In 2022 – 1 740 decisions.

3. *The number of published precedents your court gives annually (average)?*

Since 2007, due to the greater capacity of the storing equipment and search data, it started to be inserted in the database entitled "Decisions of the Supreme Administrative Court"¹, the generality of the full text decisions delivered by the Supreme.

II Constitutionality of legislation and the applicability of fundamental rights norms. Mark your answer with bold letters.

4. *Does your country have a written Constitution?*

- Yes
- No

5.a *Is your court authorised to apply the (written or unwritten) Constitution directly in its decisions?*

- Yes
- No

5. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes
- Often

5. c. *If yes, what areas of constitutional law are typically involved in these cases?*

¹ Available through www.dgsi.pt.





- Fundamental rights
- Democratic principles
- Rule of law
- Federalism and local self-government
- Legislative process
- Finance
- Other. Please describe below.

5. d. If your court is not authorized to apply the Constitution directly, please explain briefly how your national system works.

6. a. Is your court authorised to repeal a piece of ordinary legislation if it is found unconstitutional?

- Yes
- No

6. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often
- Very often

6. c. If not, which institution, if any, has the power to decide on the constitutional validity of ordinary legislation (either in abstracto or in concreto)?

7. During the last 10 years, has your court given precedents involving the following topics:

- Right to asylum
- Social rights
- Environmental rights
- Rights of future generations
- Rights of indigenous peoples
- Human Dignity
- Fundamental rights in the context of national security
- Fundamental rights in the context of state of emergency

8. In the cases where your court has referred to the Constitution, what kind of role has the Constitution had in the reasoning? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision which is inherently based on ordinary legislation
- source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (i.e. fundamental rights friendly interpretation)





- A decisive role so that the decision is based solely on constitutional grounds in a situation where ordinary legislation is silent or unclear on the issue at hand
- An overriding role so that otherwise applicable ordinary legislation is set aside/declared invalid on constitutional grounds
- Other. Please explain and/or provide an example.

III Interplay of national and European fundamental rights and international human rights norms

9.a. *Is your court authorised to apply international human rights conventions and follow their international case law in its decisions?*

- Yes
- No

9. b. *If yes, how often does this happen in practice?*

- Rarely
-
- Sometimes
- Often
- Very often

10.a. *Is your court authorised to apply the Charter of Fundamental Rights of the European Union (CFREU) in its decisions?*

- Yes
- No

10. b. *If yes, how often does this happen in practice?*

- Rarely
- Sometimes
- Often
- Very often

11. *When applying fundamental rights provisions of the Constitution, is your court also simultaneously applying similar provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR)?*

- Very rarely
- Sometimes
- Often
- Very often

12. *When applying fundamental rights provisions of the Constitution in the field of application of European Union law, is your court also applying corresponding provisions of the CFREU?*

- Very rarely
- Sometimes
- Often





X Very often

- My court does not apply the Constitution in the field of application of European Union Law.

13. In the cases where your court refers to the ECHR, what kind of role does the convention have in the reasoning? Choose all applicable options.

- Symbolic / Decorative
 - X An additional argument supporting a decision which is inherently based on ordinary legislation
 - X A source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand (i.e. human rights friendly interpretation)
 - X A decisive role so that the decision is based solely on the ECHR in a situation where national legislation is silent or unclear on the issue at hand
 - X An overriding role so that otherwise applicable ordinary legislation is set aside /declared invalid based on the ECHR.
- Other. Please explain and/or provide an example.

14. It follows from the case law of the CJEU (see, eg, C-14/83, von Colson) that national courts must interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of EU law. Within the scope of the application of EU law, how frequently does this kind of interpretation and application of law appear in the argumentation of your court?

- Never
- Rarely
- Sometimes
- X Often

15. The obligation to interpret national legislation in line with EU law is extensive, but it is not without limits. According to the case law of the CJEU (eg, C-12/08, Mono Car Styling), that obligation is limited by the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem. Where there is any inconsistency between national law and Union law, which cannot be removed by means of such a construction, the national court is obliged to declare that the provision of national law which is inconsistent with (directly effective) Union law is inapplicable (eg 152/84, Marshall). How frequently does this kind of reasoning appear in the argumentation of your court?

- Never
- X Rarely
- Sometimes
- Often

16. Has your court given any precedents regarding the application of Article 51 (Field of application) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s)

The EU Charter is part of the Portuguese law since the Treaty of Lisbon was approved by the Parliament and ratified by the President of the Republic (Resolution no. 19/2008, of 19 May and Decree of the President of the Republic no. 31/2008, of May 19).





The Supreme Administrative Court decision of 15 October 2015 (Case 0438/14)² dealt with a special administrative action brought by the Portuguese Judges Union Association (ASJP) against the Court of Auditors, asking the annulment of the administrative acts regarding the salaries processing which, under article 33 of the State Budget Law, reduced judges' salaries. In short, the appellants claimed, the illegality of the salaries processing under a budgetary norm which they considered to be unconstitutional.

In this context, the Portuguese Judges Union Association asked the CJEU if the reduction of judges' salaries, due to the country's financial difficulties, offended the principle of judicial independence enshrined in both EU legislation and CJEU case law, arguing that there were being a violation of the rules set out in articles 19 of the CJEU and article 47 of the CFREU.

The Supreme Administrative Court, invoking the content of no. 1 and 2 of article 51 of the CFREU, ruled out, clearly and unequivocally, the applicability of article 47, on the grounds that the "scope of application of the CFREU - and consequent duty to refer questions relating to its interpretation – it is the defined by the competences of the Union (...). The criteria governing the division of competences between the Member States and the Union derive from the combination of article 5 of the TEU and articles 2 to 6 of the TFEU, from which there is no attribution to the Union of the competence in matters relating to the statutes of the members of the sovereign bodies of the Member States, in particular the remuneration of their judges".

Considering that, the Supreme decided not to grant the request for a preliminary ruling.

17. Has your court given any precedents regarding the application of Article 52 (Scope and interpretation of rights and principles) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

Yes. In the decision no. 2/2023, of 9 March 2023 (Case no. 2586/14.3BELSB)^[1] the Court considered (at the appeal) that the deliberation of the Board of Directors of the Bank of Portugal of 3 of August 2014 that applied a resolution to Banco Espírito Santo – determining, immediately and definitely, the activity and assets' transfer of Banco Espírito Santo S.A. to Novo Banco – did not infringe any constitutional or infra-constitutional command, nor did it constitute an attack to European Union law, more specifically, weren't violated "articles 17, 41 no. 2, item a) and 52 of the CFREU, 36, 73, 74, 130 and 131 of the Directive 2014/59/UE] and CEDH [article 1 of Additional Protocol no. 1 to CEDH], therefore, the illegalities and unconstitutionality attributed to the deliberation of 03.08.2014 do not arise.

In these circumstances the Supreme dismissed the application for review and upheld the contested decision.

18. In the cases where your court has referred to the CFREU, what kind of role has the Charter had in the argumentation? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision based on EU law and ordinary domestic legislation
- A source of interpretation which provides for a correct application of EU law and ordinary legislation in the concrete case at hand

² Available at

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/b11d6b6de7cfc1a280257ee40051c01c?OpenDocument&ExpandSection=1#_Section1

^[1] Available at

http://www.dgsi.pt/jsta.nsf/35fbbbf22e1bb1e680256f8e003ea931/fdafd3367f41d29980258989003b48d0?OpenDocument&ExpandSection=1#_Section1





- A decisive role so that the decision is based solely on the CFREU in a situation where EU law and national legislation is silent on the issue at hand
- An overriding role so that otherwise applicable ordinary legislation is set aside / declared invalid on grounds based on the CFREU

Other. Please provide an example.

19. Has your court given any precedents regarding the application of Article 53 (Safeguard for existing human rights) of the ECHR? If yes, please provide a brief description of the context and outcome of the decision(s).

Yes. The decision of 14 September 2023 (Case no. 0777/15. 9BEPRT) ³, although briefly, refers to the issue of compensation for non-pecuniary damage caused by delays on the administration of justice "that the subsidiarity system of conventional human rights protection in relation to national systems means that the violation of rights enshrined in the ECHR, such as the right to a judicial decision within a reasonable time, by the authorities of a State party to that Convention must, before being submitted to the European Court of Human Rights (ECtHR), be examined by the internal jurisdiction of that State".

Within this scope, the decision also mentions that "by virtue of the connatural subsidiarity of the rights recognised in the Convention in relation to the rights and freedoms enshrined in the constitutions of each of the States that are bound by it (cf. article 53 of the ECHR), the ECtHR has sought to transform the "Convention into a constitutional instrument of the European public order".

20. Has your court given any precedents regarding the application of Article 53 (Level of protection) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

No.

21. Has your court applied fundamental rights laid down in the Constitution in a way that provides for a better standard of protection of individual rights than those provided for in international human rights conventions? If yes, please explain and/or provide an example.

Within its judicial decisions, the Supreme Administrative Court did not examine the multi-level protection issue regarding the fundamental rights, which means, it did not match the level of protection given by the Constitution with the level of protection conferred by international conventions but applies the existing constitutional provisions in the light of international conventions and treaties⁴.

For its part, the Constitutional Court, while not presenting "a position on the issue of equivalence of the level of protection in the context of the relationship between the Constitution and the Charter, in its decision no. 544/2014, assigned a subsidiary function (and minimum standard of protection) to the European catalogues of fundamental rights (ECHR and CDTFEU) and its system of protection (ECtHR and CJEU) in relation to the protection conferred by the constitutional order, by affirming the principle of the supremacy to the highest level of protection (with express reference to article 53 of the Charter)" ⁵.

⁴ Cf. Supreme Administrative Court decision in 11th May 2017 (Case no. 01004/16).

⁵ Available at https://www.tribunalconstitucional.pt/tc/content/files/conferencias/ctceu_2021_xviii.pdf





22. *Has your court applied fundamental rights laid down in the Constitution in a way in which the substance of a fundamental rights provision has been defined by reference to either international human rights conventions or to CFREU, and the case law relating to them? If yes, please explain and/or provide an example.*

Based on the premiss that "fundamental rights carry within a shared universal sense of common values", the Supreme Administrative Court believes that international instruments (and the case law which is related to them) serves, in fundamental rights matters, as interpretative and integrative guidelines for constitutional requirements.

In these circumstances, the 11th of May 2017 Supreme decision held that the infringement of access to justice within a reasonable timeframe confers to the injured party the right to obtain damages which include not only the damage resulting from the delays in settling the dispute, but also the non-material damage suffered in the meantime.

Thus, it is for the national judge to apply and interpret domestic law consistent with the ECHR, since it is the national judge that ensures the obligation to bring into conformity, at national level, according with article 13 of the ECHR, the existing mechanisms effectiveness in order to give protection to the recognised rights and freedoms in the Convention, by interpreting and applying domestic law in accordance with it.

