



VISOKI UPRAVNI SUD
REPUBLIKE HRVATSKE

HIGH ADMINISTRATIVE
COURT OF THE REPUBLIC
OF CROATIA



**Seminar organized by the High Administrative Court of the
Republic of Croatia and ACA-Europe**

**“Mechanisms of counteracting conflicting rulings from
different domestic courts, the European Court of
Justice and the European Court of Human Rights”**

Zagreb, 19 February 2024

Answers to questionnaire: Belgium



**Co-funded by
the European Union**

ACA EUROPE QUESTIONNAIRE – SEMINAR FEBRUARY 2024 – MECHANISMS OF COUNTERACTING CONFLICTING RULINGS FROM DIFFERENT DOMESTIC COURTS AND FROM THE CJEU AND ECtHR

I. CJEU

1. How is the case law of the CJEU studied and observed at your Court? Do you have, e.g., a department for this purpose?

There is no specific department responsible for monitoring the case law of the CJEU at the Belgian Council of State. The case law of the CJEU is studied and observed by the magistrates themselves, with assistance from legal clerks in some cases. Given the high degree of specialisation within administrative law, this is logical to a certain extent.

However, there is an internal data file containing preliminary questions referred to the CJEU by the Council of State. An email notification is sent to all magistrates when this datafile is updated with new questions or with the answers given by the CJEU. The internal general case law data file (and the external Juridict) also allows to search case law on preliminary questions in general and the questions referred to the CJEU.

When a significant CJEU judgment is published within a particular field of administrative law (e.g., public procurement, environmental, state aid, asylum, and migration law), it is often informally shared between colleagues who are also involved in that same field. If the judgment is of general importance, it is usually sent by email to all magistrates and legal clerks.

Furthermore, there are also internal newsletters that signal important judgments from the CJEU to all magistrates. These newsletters are prepared by magistrates who volunteer to contribute.

The Council of State also organises informal internal lunch seminars on specific current legal topics, including those pertaining to significant judgments of the CJEU. Speakers at these seminars include both Council magistrates and external speakers such as law professors and scholars as well as magistrates or legal clerks from the other Belgian highest courts, namely the Constitutional Court and the Court of Cassation.

Of course, information on the case law of the CJEU is also obtained by means of national and international publications, seminars, the website and newsletters of the CJEU, the Judicial Network of the European Union and the ACA Europe forum.

1.1. If the answer to the previous question is affirmative, how many people are employed in that Department and what education have they completed? What is the role of the Department (e.g., advisory)?

Not applicable.

2. Is there a possibility of repealing a final ruling made in an administrative dispute if the CJEU adopts a ruling in another case indicating that an earlier final ruling of a domestic court is erroneous? If there is such a procedure, in what formation (number of judges) does the administrative court adopt its decisions?

In the majority of cases, the judgments of the Council of State are rendered in first and final instance. They are final and conclusive, essentially unchangeable in accordance with the legal principle of *res judicata*. Belgian legislation does not provide for a possibility to revise an earlier final judgment of the Council of State if the CJEU should make a later ruling in another case that could potentially impact an earlier ruling.

Pursuant to Articles 30 and 35 of the coordinated laws on the Council of State, only three legal remedies can be invoked against the judgments of the Council of State: opposition, third-party opposition and a petition for revision.

At first sight opposition and third-party opposition seem to have no relevance in this context (these remedies only concern parties who were not involved in the initial proceedings before the Council of State).

According to article 31 of the coordinated laws on the Council of State, a petition for revision of an earlier judgment is only admissible if decisive documents, which, were withheld by the opposing party, have been discovered since that ruling or if the ruling was made based on documents which have been recognised as false or which have been declared false by a criminal court. A petition for revision, therefore, does not provide an opportunity to alter a previous ruling based on later case law from the CJEU.

It seems important to note in this context that the CJEU itself has already ruled multiple times that the legal principle of *res judicata* is an essential part of the EU legal order and of the national legal systems of member states. The CJEU held that in order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that regard, can no longer be called into question and that in particular EU law does not require a national judicial body automatically to reconsider a decision having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the CJEU (CJEU 7 April 2022, C-116/20, ECLI:EU:C:2022:273, SC Avio Lucos SRL; CJEU 16 July 2020, C-424/19, ECLI:EU:C:2020:581, Cabinet de avocat UR; CJEU 10 July 2014, C-213/13, ECLI:EU:C:2014:2067, Impresa Pizzarotti & C. SpA).

2.1. Are the parties authorized to initiate the repealing of a final ruling in the aforementioned case? Apart from the parties, is any other body (authority etc.) involved in such a procedure? Is there a deadline for submitting such a request?

Not applicable - see the answer to question 2.

[2.2. Is the administrative court authorized to react *ex officio* in the aforementioned case? Is there a prescribed deadline for such action?](#)

Not applicable - see the answer to question 2.

[2.3. In the case of conflict between a domestic court decision and a newer CJEU judgment, what kind of procedure is adopted for establishing that the earlier final ruling is not in accordance with the position of the CJEU? How are the positions of parties collected in such a procedure?](#)

In later legal proceedings before the Council of State in a different case in which a similar or the same legal issue arises, the parties can argue in their written pleadings and during the court hearing that earlier case law of the Council of State conflicts with more recent case law from the CJEU. This can, in certain cases, also be *ex officio* invoked by the auditor, an independent magistrate examining the file and proposing a solution to the case, in his report which is sent to the parties, or in his oral advice at the court hearing. If such indeed turns out to be the case, the Council of State will naturally conform to the new case law of the CJEU in its judgment in the new case. Additionally, the Council of State could potentially submit a preliminary question to the CJEU on this matter, in accordance with the regular procedure established under article 267 TFEU.

See also the answer to question 3.

[2.4. Is a legal remedy permitted against such a ruling?](#)

Not applicable to final judgments of the Council of State - see also the answer to question 2.

[2.5. If the aforementioned procedure exists, in approximately how many or what kinds of administrative disputes in the period 2012 - 2022 was the possibility of changing a final ruling that is not in accordance with the later position of the CJEU used?](#)

Not applicable to final judgments the Council of State - see also the answer to question 2.

[3. Has the legislation been changed due to observed conflicts between the case law of domestic courts and the case law of the CJEU? In the affirmative, please provide an example!](#)

When a conflict arises between the case law of domestic courts including the Council of State and the case law of the CJEU, the courts will in principle adapt its case law and adjust it to the case law of the CJEU.

If the Council of State were to be uncertain about the compatibility of Belgian law or its case law with EU law and/or the case law of the CJEU, the Council of State would not hesitate to refer a preliminary question to the CJEU.

If the case law of the domestic courts or of the Council of State conflicts with the case law of the CJEU and this finds its origin in the national legislation, it can also be expected that, in principle, the national legislation will be adapted in accordance with the case law of the CJEU.

II. ECtHR

1. How is the case law of the ECtHR studied and observed at your Court? Do you have, e.g., a department for this purpose?

The answer to this question is *mutatis mutandis* the same as the answer to the question about the Court of Justice of the European Union *sub* I.1. Reference is therefore made to that answer.

Regarding the ECtHR in particular mention can be made of the ECHR Knowledge Sharing platform (**ECHR-KS**), the Superior Courts Network and the regular seminars organised by the ECtHR, e.g. the judicial seminar at the start of each judicial year (preceded by a working meeting with the judge elected in respect of Belgium and representatives of the Department for the Execution of Judgments of the EctHR).

1.1. If the answer to the previous question is affirmative, how many people are employed in that Department and what education have they completed? What is the role of the Department (e.g., advisory)?

Not applicable.

2. What is the hierarchical status of the Convention in the legal order of your member state?

The European Convention on Human Rights (ECHR) holds a significant status in the Belgian legal order. Belgium was one of the original signatory states of the Convention on 4 November 1950.

The Belgian Constitution does not contain a provision which explicitly determines the position of international law (including the ECHR) in the Belgian legal order. Nonetheless, the case law of all three highest courts (Constitutional Court, Court of Cassation and Council of State) has recognised the ECHR as a primary source of human rights protection and has granted direct effect to the provisions of the ECHR. The ECHR is thus considered one of the highest legal norms in the Belgian legal hierarchy, taking in principle (see art. 53 ECHR) precedence over all domestic laws and regulations.

The rights and freedoms protected by the ECHR are directly applicable and can be invoked before Belgian courts. As a result, Belgian judges, including the Council of State, are obligated to interpret and apply domestic laws and regulations in a manner that is consistent with the ECHR and the case law of the ECtHR and may even, if necessary, set Belgian laws and regulations aside. If there is a conflict between Belgian laws (in general) and regulations on the one hand and the ECHR on the other, the latter takes precedence (subject to article 53 ECHR). The provisions of the ECHR can be invoked before the Constitutional Court, together with similar provisions of the Belgian Constitution, to challenge the constitutionality of Belgian laws *sensu stricto*. Article 26 of the Special Law of 6 January 1989 on the Constitutional Court provides for a special set of regulations concerning the interaction of fundamental rights guaranteed by both the Belgian Constitution and the ECHR and provides the courts, including the Council of State, with a system of preliminary questions on the constitutionality of laws (*sensu stricto*) which can and sometimes must be submitted to the Constitutional Court. See also part III.

In summary, the ECHR is a fundamental and hierarchically superior legal instrument in the Belgian legal order, and its provisions hold significant weight in safeguarding human rights within the country. Belgian courts regard the ECHR as a minimum standard for safeguarding fundamental rights. Belgian law and jurisprudence sometimes provide for broader protection of fundamental rights.

[2.1. How does this status affect the application of the Convention in administrative disputes \(is the Convention applied directly\)?](#)

Yes. All three highest courts (Constitutional Court, Court of Cassation, Council of State) have granted direct effect to the provisions of the ECHR.

The Council of State and the lower administrative courts, as well as the ordinary courts, directly apply the provisions of the ECHR and the case law of the ECtHR to the cases submitted to them.

Parties involved in administrative disputes can invoke the ECHR before Belgian courts and tribunals to challenge decisions that they believe violate their ECHR rights, and Belgian courts have a duty to consider and apply ECHR principles in their decisions.

See also the answer to question 2.

[2.2. Is there a specific body \(court\) that controls the application of the Convention in administrative disputes?](#)

No. The Council of State and the lower administrative courts, as well as the ordinary courts, apply the provisions of the ECHR and the case law of the ECtHR themselves. There is no specific body or court that oversees the application of the ECHR in the Belgian legal order.

The argument that the ECHR was misinterpreted or applied incorrectly by the first judge, can however, if an appeal is possible, usually be invoked before the appeal court, and, within the limits of the cassation procedure, before the cassation judge (see also the answer to question 3 and *sub* part IV.)

See also the answers to questions 1 and 3, and the answers to the questions *sub* part III on the specific role of the Constitutional Court.

[3. According to the domestic law \(or case law\), is a violation of Convention or a deviation from the ECtHR case law, determined by a domestic court \(e.g. court of appeal\), a possible reason for repealing the ruling of a lower court that committed the violation? If the answer is affirmative, which legal remedies or instruments are available and what is the procedure like?](#)

Since the provisions of the ECHR have direct effect in the Belgian legal order, a violation of those provisions by a lower court is indeed a reason for a higher court to annul that judgment of a lower court, if such a violation is invoked, usually by the parties to the case.

The Belgian judicial system is, to a large extent, dualistic: it includes both lower administrative courts, which are under the cassation supervision of the Council of State, and a hierarchy of ordinary courts,

which are under the supervision of the Court of Cassation. The ordinary courts are also competent to handle cases related to administrative law. However, in contrast with the administrative courts and the Council of State, they cannot suspend and annul administrative decisions and regulations and their judgments only have power *inter partes*¹.

Against a judgment of a lower administrative court that is claimed to have violated one of the provisions of the ECHR, a cassation appeal can be filed with the Council of State. If the Council determines that the lower administrative court has indeed violated the ECHR in its judgment, the Council will annul that judgment and refer, where appropriate, the case again to the administrative court. In a cassation appeal, the Council of State does not act as a court of fact. In such an appeal, there is a preliminary admissibility procedure in place to filter out manifestly unfounded appeals.

Within the hierarchy of the ordinary courts, the first avenue for appeal is to the Courts of Appeal². Appeals against the judgments of the Courts of Appeal can be brought before the Court of Cassation. The Court of Cassation conducts a strict legality review and does not assess the case itself. If the Court of Cassation determines that the Court of Appeal has indeed violated the ECHR in its judgement, it will annul the judgment and refer, where appropriate, the case to another Court of Appeal.

4. What are the procedural possibilities of a party whose administrative dispute has been concluded, and in relation to which the ECtHR found that a violation of the Convention has been committed?

As mentioned in our answer to question 1.2 the Council of State renders the majority of its judgments as a first and final instance court. These judgments are final and conclusive, essentially unchangeable in accordance with the legal principle of *res judicata*. Belgian legislation does not provide for a possibility to revise an earlier final judgment pronounced by the Council of State if the ECtHR should make a later ruling in another case that could potentially impact an earlier ruling.

The same principle applies in case the ECtHR should rule that a violation of the ECHR has been committed by the Council of State in its final judgement in a specific administrative dispute. Such a ruling by the ECtHR does not result in the final judgment of the Council of State losing its binding legal force, nor does this result in an opportunity for the parties to ask the Council of State or another jurisdictional body to reform the relevant final judgement of the Council of State in light of the ruling of the ECtHR. There are no provisions in Belgian law to that effect.³

The only apparent option to obtain legal redress seems to be a civil liability claim against the Belgian State, based on the violation by the Council of State, as an organ of the Belgian State, of the provisions of the ECHR. The ordinary courts will then rule on this claim and may award financial compensation. However, they do not have the authority to annul the relevant judgement of the Council of State. The ultimate jurisdictional ruling regarding such a civil liability claim against the Belgian State lies with the Court of Cassation.

¹ Within its competence, an ordinary court can however declare illegal an administrative decision or act and, in summary proceedings, issue interim measures valid only between the parties.

² Or a first instance court deciding as appeal judge.

³ The possibility of reopening a case after a ruling by the ECtHR finding that a violation of the Convention has been committed only exists in criminal cases in Belgian law (article 442*bis* of the Code of Criminal Procedure).

4.1. Must the party react within a prescribed deadline?

Since there are no procedural means to revise a decision of the Council of State in light of a judgment of the ECtHR, there is also no legally specified deadline.

With regard to a civil liability claim against the Belgian State, the general rule in Belgian law is that all claims for compensation for damage based on non-contractual liability become statute-barred after a period of five years has elapsed (article 2262*bis* of the Civil Code). The exact method of calculation of this period is a matter of civil liability law and lies beyond the scope of this questionnaire.

4.2. If the party has not submitted a request to change the final ruling (that is, for example, to renew the dispute), is the administrative court authorized to react *ex officio*?

Not applicable to final judgments of the Council of State.

4.3. In what formation (number of judges) does the administrative court adopt its decisions on amending the final ruling?

Not applicable to final judgments of the Council of State.

4.4. In the case of conflict between a domestic court decision and a newer ECtHR judgment, what kind of procedure is adopted for establishing that the earlier final ruling is not in accordance with the position of the ECtHR? Is there a special procedure adopted establishing that the earlier final ruling is not in accordance with the position of the ECtHR? Are the parties from other administrative disputes authorized to request the change of their final rulings based on the decision of the ECtHR made in another case? Is there a deadline for submitting such a request? How are the positions of parties collected in such a procedure? Is a legal remedy permitted against a ruling of the domestic court deciding the case?

As mentioned in the answer to question 1.2 and *sub* question 4 above, in the majority of cases judgments of the Council of State are rendered in first and final instance. They are final and conclusive, essentially unchangeable in accordance with the legal principle of *res judicata*, there is no way in Belgian law to reopen an earlier case and revise an earlier final ruling.

In later legal proceedings in a different case in which a similar or the same legal issue arises, the parties can argue in their written pleadings and during the court hearing that earlier case law of the Council of State conflicts with more recent case law from the ECtHR. If such indeed turns out to be the case, the Council of State will naturally conform to the new case law of the ECtHR in its judgment in the new case. In case of doubt, the Council of State could potentially request an advisory opinion from the ECtHR on the basis of Protocol No. 16 on this matter, *vide infra*.

4.5. In approximately how many or what kinds of administrative disputes in the period 2012 - 2022 was a request for changing the final ruling submitted due to it being conflicting with the position of the ECtHR?

Not applicable to the Council of State.

5. In what types of administrative disputes are violations of Convention rights most often established? Can you provide a reason therefor?

Violations of the provisions of the Convention by the Belgian State are most often established in cases related to asylum and migration, particularly concerning issues like detention conditions, access to fair and effective asylum procedures, and protection from inhumane or degrading treatment.

In addition, violations of article 6 of the ECHR by the Belgian State are also regularly established concerning the breach of the reasonable time requirement as the length of proceedings before Belgian courts can sometimes be considered as excessive.

6. Is there a special body in your country responsible for the execution of ECtHR rulings (apart from the Government as regards just satisfaction afforded in judgments by the ECtHR) and what is its name? If there is such body, what is its composition and its powers (which instruments does it apply to prevent case law of domestic courts from conflicting with the case law of the ECtHR)?

There is no such body in the Belgian legal system.

7. Has the legislation been changed due to observed conflicts between the case law of domestic courts and the case law of the ECtHR? Please, provide an example!

When a conflict arises between the case law of domestic courts including the Council of State and the case law of the ECtHR, the courts will in principle adapt its case law and adjust it to the case law of the CJEU.

If the Council of State were to be uncertain about the compatibility of Belgian law or its case law with the ECHR and/or the case law of the ECtHR, the Council of State would not hesitate to request an advisory opinion from the ECtHR in accordance with Protocol No. 16 to the ECHR. It could also submit a preliminary question to the Constitutional Court. When the Council of State determines, in the context of a case pending before it, that a legal provision in a law *sensu stricto* might be unconstitutional and contrary to the fundamental rights and liberties guaranteed in the Constitution, the Council is in fact in most cases obliged to submit a preliminary question to the Constitutional Court regarding the (un)constitutionality of that legal provision and this is often linked to similar rights and freedoms in the ECHR (see below the answers to the questions *sub III*).

If the case law of the domestic courts or of the Council of State conflicts with the case law of the ECtHR and this finds its origin in the national legislation, it can also be expected that, in principle, the national legislation will be adapted in accordance with the case law of the ECtHR.

8. Has your country ratified Protocol No. 16 to the Convention (which provides for the possibility of seeking advisory opinions)?

Yes. Belgium signed Protocol No. 16 to the ECHR on 8 November 2018 and ratified it on 22 November 2022. Protocol No. 16 entered into force with regard to Belgium on 01 March 2023.

The law of 30 October 2022, by which the Belgian Federal Parliament consented to the ratification of Protocol No. 16, provides that the Constitutional Court, the Court of Cassation and the Council of State can request an advisory opinion from the ECtHR.

8.1. Do you believe that an advisory opinion could prevent the adoption of a ruling by a domestic court that would not be in accordance with ECtHR case law? Explain your answer.

An advisory opinion from the ECtHR will serve as valuable guidance for domestic courts, including the Council of State. It is self-evident that the advisory opinions will greatly influence the decision-making process of domestic courts, as it seems safe to assume that such advisory opinions will primarily be sought in challenging and uncertain cases, situations where guidance from the ECtHR as to the correct interpretation of the dispositions of the Convention and the case law of the ECtHR will be highly valued by the domestic courts.

Such opinions will provide the courts with an authoritative interpretation of the dispositions of the ECHR. While not strictly legally binding, advisory opinions will have great persuasive and normative force, and will be very influential in shaping legal interpretations and decisions by the three highest Belgian courts. Belgian highest courts will consider ECtHR advisory opinions very seriously and it can be assumed that they will normally align their rulings with the guidance provided in the advisory opinions to ensure compliance with the ECHR and the case law of the ECtHR.

8.2. Do you have practical experience with seeking an advisory opinion provided for in Protocol No. 16 to the Convention? Provide an example.

In its judgment No. 256.222 dated 4 April 2023, the Council of State, applying Protocol No. 16, was the first Belgian highest court to seek an advisory opinion of the ECtHR.

The request was submitted in the context of an application lodged by a security guard before the Council of State, seeking the annulment of a decision by the Ministry of the Interior to withdraw an identity card entitling him to work as a security or surveillance guard, on the grounds that he was in contact with individuals associated with the “scientific” strand of Salafism, and that he had been assessed as a “supporter of this ideology” by the intelligence services. It concerns an interpretation of Article 9 (right to freedom of thought, conscience and religion) of the Convention.

The Council of State held that, assuming that, as assessed by the State Security, the applicant is indeed a supporter of this ideology and maintains contacts with several individuals of this Salafist tendency, the question arises as to whether this sole element is sufficient to justify the decision to withdraw his private security guard identification card under Article 9 of the ECHR. The Council of State requested an advisory opinion from the ECtHR on the following question: “La seule proximité ou appartenance à un mouvement religieux, considéré par l’autorité administrative compétente, compte tenu de ses caractéristiques, comme présentant à moyen ou à long terme une menace pour le pays, constitue-t-elle au regard de l’article 9, § 2, de la CEDH un motif suffisant pour prendre une mesure défavorable à l’encontre de quelqu’un, telle que l’interdiction d’exercer la profession d’agent de gardiennage”

(free translation : “Does the mere fact of closeness to or membership of a religious movement that is considered by the competent administrative authorities, in view of its attributes, to present a medium- or long-term threat to the country, amount under Article 9 § 2 (freedom of thought, conscience and religion) of the Convention to sufficient grounds for taking an unfavourable measure against an individual, such as a ban on working as a security or surveillance guard?”).

The panel of the Grand Chamber accepted the request on 10 May 2023.

III. CONSTITUTIONAL COURT

1. Is there a Constitutional Court in your country?

Yes. Belgium has a Constitutional Court (in Dutch: Grondwettelijk Hof / in French: Cour constitutionnelle / in German: Verfassungsgerichtshof).

By Belgian standards, the Constitutional Court is a relatively young institution, established only with the constitutional reforms of the 1980s. The Constitutional Court was originally primarily focused on resolving conflicts of legislative competence between the various legislative bodies of the Belgian federal state structure and equal treatment by the law. The Court's jurisdiction was later expanded, partly by law, partly by the Court itself, to that of a true constitutional court in the proper sense, with the power to review the compliance of legal provisions - in Belgium in a law *sensu stricto* (i.e., a formal law) - with certain articles of the Constitution and to answer preliminary questions from other jurisdictional bodies.

1.1. If the answer to the question is affirmative, what are the powers of the Constitutional Court?

The Constitutional Court operates within the highly complex and many-layered Belgian federal state structure. Consequently, it has many powers, which are not easily summarised. The main powers of the Court include:

- the Constitutional Court has the power to assess, suspend and annul legislative or equivalent norms; by legislative or equivalent norms, both the substantive and formal provisions adopted by the federal parliament (laws *sensu stricto*) are meant as well as those adopted by the parliaments of the communities and regions (decrees and ordinances);
- the Constitutional Court also has the power to assess decisions of the Chamber of Representatives or its bodies concerning the control of election expenses for the election of that legislative assembly;
- the Constitutional Court renders a decision on each popular consultation (referendum) that the regions may organise on matters that fall within their sphere of competence, before the organisation of the popular consultation; the popular consultation may not be organised until the Court has issued a favourable ruling.

2. Does the Supreme administrative jurisdiction have powers similar to those of the Constitutional Court? Please describe the competence/jurisdiction of these two jurisdictions!

The Council of State also operates within the highly complex and many-layered Belgian federal state structure. Consequently, it has many powers, which are not easily summarised. The main powers of the Council include:

- the Council of State has the power to assess, suspend and annul administrative decisions and regulations; these include decisions and regulations made by governmental authorities at all levels, such as federal government services, regional governments, linguistic community governments, local authorities or other public entities;
- the Council of State can in the aforementioned cases also grant financial compensation for the damage caused by the unlawful act of a government authority;

- the Council of State serves as a court of cassation (strictly a legality review) regarding the rulings of lower administrative courts;
- in some (very limited) cases the Council of State serves as the highest administrative court of appeal with regard to certain types of administrative appeal procedures within administrative entities;
- the Council of State decides disputes related to local elections, including the annulment of election results and challenges to the legality of electoral procedures;
- the Council of State has jurisdiction on disputes regarding the financing of political parties;
- in very rare cases, if no other court has jurisdiction, the Council of State rules on claims for compensation for extraordinary moral or material damage caused by administrative authorities.

In summary, whereas both the Constitutional Court and the Council of State play crucial roles in the Belgian legal system, they have distinct powers and functions. The Constitutional Court focuses on constitutional issues and has the exclusive jurisdiction to assess the constitutionality of laws and to declare them null and void, whereas the Council of State deals with administrative and governmental decisions and regulations. The Constitutional Court is not able to suspend or annul regulations; that power belongs to the exclusive jurisdiction of the Council of State.

3. In the event that the Supreme administrative jurisdiction deems that a provision of the law to be applied in a specific case is unconstitutional, must it initiate appropriate proceedings before the Constitutional Court, or is it authorized to interpret the contested provision taking the Constitution into consideration?

If the Council of State determines, in the context of a case pending before it, that a legal provision (law *sensu stricto*) might be unconstitutional, the Council is in most cases obliged to submit a preliminary question to the Constitutional Court regarding the (un)constitutionality of that legal provision. Certain exceptions apply to this obligation, such as when the Council of State deems the appeal inadmissible or when the Constitutional Court has already ruled on a question or an appeal with an identical subject matter.

The Council of State is in any case not authorised to assess the constitutionality of such a formal law directly and independently; that is the exclusive jurisdiction of the Constitutional Court.

4. What are the possibilities of the parties in an administrative dispute to request the repeal of the final rulings that were made on the basis of a regulation that the Constitutional Court found unconstitutional (in the process of abstract review of constitutionality)? Is there a prescribed deadline for such action?

As described in our answer to question 1.2., Belgian legislation offers only very limited possibilities to revise an earlier final judgment of the Council of State. In normal circumstances, only three legal remedies can be invoked against the judgments of the Council of State: opposition, third-party opposition, and a petition for revision. None of these three options, as described before, appear directly relevant.

However, an exception is made in the case where a final ruling of the Council of State is based on a legal provision that has been annulled by the Constitutional Court (article 17 of the Special Law of 6

January 1989 on the Constitutional Court). In that case, the relevant judgment of the Council of State can be wholly or partially revoked.

The deadline for filing such a request is six months from the day on which the relevant judgment of the Constitutional Court is published in the Belgian Official Gazette (*Moniteur belge*).

5. What are the possibilities of the parties in an administrative dispute to request the repeal of the final rulings that are not in accordance with the ruling of the Constitutional Court made in the constitutional action of another person? Is there a prescribed deadline for such action?

Belgian law does not make a distinction based on which person obtained the annulment of the relevant legal provision by the Constitutional Court. It is sufficient that the Constitutional Court has determined the unconstitutionality of the relevant legal provision, for the possibility of revoking a previous ruling of the Council of State to become available. The judgments of the Constitutional Court have *erga omnes* legal effect as soon as they are published in the Belgian Official Gazette (article 9 of the Special Law of 6 January 1989 on the Constitutional Court).

IV. RELATIONSHIP OF THE DOMESTIC SUPREME ADMINISTRATIVE JURISDICTION WITH ANOTHER DOMESTIC SUPREME COURT

1. Is there another supreme jurisdiction in your system?

Yes. According to the provisions of the Belgian Constitution, Belgium has three supreme courts, each with their own responsibilities:

- the Constitutional Court (article 142 of the Constitution);
- the Court of Cassation (article 147 of the Constitution);
- the Council of State (article 160 of the Constitution).

The Constitutional Court has already been covered in our answers *sub* part III of this questionnaire, so now we will focus on the Court of Cassation and its relationship with the Council of State.

2. Please describe the competence/jurisdiction of the two supreme jurisdictions.

The Belgian judicial apparatus is, as far as administrative law is concerned, largely a dual system: it includes both lower administrative courts with the Council of State as cassation judge, and several ordinary courts with the Court of Cassation as cassation judge.

Furthermore, the ordinary courts also have the authority to handle cases regarding administrative law (in case of a civil matter between the petitioner and the relevant public body), but unlike the administrative courts and the Council of State, the ordinary courts cannot suspend or annul administrative decisions and regulations *erga omnes* and their judgments only have legal force *inter partes* (see also II, 3 above).

The Council of State passes judgment in its capacity of supreme administrative court of Belgium and provides legal and legislative advice to the various parliamentary assemblies of the Belgian federal state, as well as to the various levels of government (federal and regional governments, Flemish, French-speaking and German-speaking communities).

In its judicial capacity, the Council of State has specific competences. It is a court which passes judgment in first and final instance on several cases on administrative law. Lower administrative courts do not always exist; that depends on the Belgian federal entity and on the branch of administrative law they belong to (e.g., there is a federal administrative court for immigration law, and there is a Flemish regional court for disputes regarding urban planning). If there is no lower administrative court, the Council of State itself passes judgment in first and final instance on the matter. If the legislator has provided for lower administrative courts, the Council of State acts as a court of cassation as far as the judgments of those lower administrative courts are concerned.

The Court of Cassation is the supreme court of the regular judiciary courts, i.e., the civil, criminal, and social courts. The Court of Cassation does not engage in the factual assessment of the cases themselves, because it can only examine the legality of the judgments and rulings of the lower judiciary courts, i.e., did the lower courts apply the law correctly in a certain case and/or did the lower courts follow the correct procedures. The Court of Cassation plays a crucial role in maintaining uniformity and consistency in the application and enforcement of the law by the various judiciary courts throughout the country.

The differences between the Council of State and the Court of Cassation do not only lie in their areas of jurisdiction but also in their focus and function. The Council of State is specialised in administrative and public law, and its rulings primarily concern disputes involving government decisions and regulations and, as cassation judge, the judgments of administrative courts. The Court of Cassation acts as the highest court, by focusing on the correct application and enforcement of the law by the other lower (non-administrative) courts and by ensuring that those courts interpret correctly the legislation and the legal principles in civil, criminal and social matters.

3. In general, how is the conflict of different rulings of domestic courts counteracted in your legal system? How is a possible conflict of positions between the (two supreme) jurisdictions counteracted?

As already mentioned above, the Belgian legal apparatus is, with regard to administrative law, largely a dual system. Hence, the relationship between the Belgian Council of State and the Belgian Court of Cassation is characterised by their independence and their distinct roles within the judiciary. While there may occasionally be an interaction between the Council of State and the Court of Cassation on matters concerning administrative law, in practice it remains so that their primary functions differ. They coexist as independent pillars of the country's judiciary, but within their own hierarchy. There is no legal or other formal arrangement to resolve conflicting rulings of the Council of State and the Court of Cassation. For example, there is no mixed court consisting of members from both judicial bodies which could make a final decision or reach a compromise. If the conflict concerns a difference in case law regarding the constitutionality of a law *sensu stricto*, the case can – and sometimes must – be referred to the Constitutional Court through a preliminary question. The ruling of the Constitutional Court is then binding on both the Council of State and the Court of Cassation.

Another form of interaction and conflict resolution between the Council of State and the Court of Cassation can be found in the provisions regarding attribution conflicts. According to article 158 of the Constitution and articles 33 and 34 of the Coordinated Laws on the Council of State, the Court of Cassation rules on attribution conflicts, i.e., conflicts regarding the division of jurisdiction between the Council of State (and the lower administrative courts) on the one hand and the ordinary courts on the other hand.

This provision of the Constitution makes it possible for the Court of Cassation to annul judgments of the Council of State which, in the view of the Court, infringe upon the jurisdiction of the ordinary courts. To that limited extent, the Council of State is subject to the rulings of the Court of Cassation, but this does not work the other way round, i.e., the Court of Cassation unilaterally rules on these matters, without any input from the Council of State. Some legal scholars argue that an *ad hoc* court composed of a member of the Council of State, a member of the Court of Cassation, and a member of the Constitutional Court should rule on this matter. However, such a court does not exist at present and to create it a revision of the Constitution would be necessary.

In legal disputes concerning administrative law the distribution of jurisdiction between the Council of State and the administrative courts on the one hand, and the ordinary courts and the Court of Cassation on the other hand, is a particularly complex issue which lies outside the scope of this questionnaire.

4. In your opinion, is conflict prevention possible?

Preventing conflicts between the rulings of different highest courts is complex and challenging. In any legal system (and especially one as diverse as Belgium's legal system) conflicts between the decisions of various courts and also highest courts are inevitable. That it is very likely that conflicts will arise has to do with the very nature of legal interpretation, in which case multiple judicial bodies and multiple perspectives (also within those bodies) coexist. One of the reasons why conflict prevention is that difficult is that the application of the law, the judicial resolution of disputes and the upholding of the rule of law is in fact a human ambition. Even at the highest level, judges bring their own experience, background, and interpretation to the bench. As a result, differences in legal reasoning and conclusions can arise, even if the same legal texts or principles are used to come to a ruling. These disparities do not necessarily suggest discord between jurisdictions. They rather reflect the diversity and the complexity of the legal issues faced by those jurisdictions. Nonetheless, it is essential to prevent conflicts between the rulings of different supreme courts to maintain legal consistency and uphold the rule of law.

According to us there could be a larger focus on mitigation and conflict resolution instead of seeking complete conflict prevention. Highest courts and legislators should have to consider establishing mechanisms for addressing arising conflicts. Such mechanisms might involve respectful dialogues, formal referral procedures, or legislative interventions to harmonise conflicting interpretations. The object should not be to make an end to the diversity of legal thought, but to manage it in a way that ensures legal coherence and fairness. In essence, we think that the legal landscape will inevitably always show some degree of tension between the highest courts. This tension is not strictly negative and can also be a source of dynamism, encouraging legal evolution and adaptability. What seems to matter most is not the absence of conflict, but the ability to address it constructively, ensuring that justice remains accessible, consistent, and fair for all.

Conflict prevention between highest courts seems to require a combination of legal, institutional, and 'diplomatic' efforts.

Informal consultations between the highest judicial bodies could have a preventive effect, but their significance should probably not be overrated, and they need to remain of limited scope within a democratic legal system which is based on the rule of law and the respect of the specific powers of each jurisdiction.

Internships and exchanges between the highest courts of various countries on the one hand and the CJEU and the ECtHR on the other hand can probably play a significant role in this matter. Such initiatives add to the comprehension of each other's practices and to mutual understanding between these courts. They are also an important source of contact between the courts.

Although there are no such formal initiatives pending in the Belgian context right now, the following legal and institutional measures could be considered to prevent conflicts between the rulings of the highest courts:

- encouraging regular communication and coordination among different highest courts to discuss and resolve potential conflicts; this could include sharing information about pending cases and legal interpretations;
- promoting the harmonisation of legal precedents across different jurisdictions and encouraging courts to consider the rulings of other supreme courts when making decisions, especially in cases with similar legal issues;

- establishing cross-jurisdictional panels or committees composed of judges from different highest courts, which panels could provide opinions or recommendations on cases involving potential conflicts;
- providing training and education for judges with regard to the importance of harmonising legal interpretations and avoiding conflicts; this could promote a culture of cooperation among the judiciary;

- ensuring that court decisions and legal interpretations are readily accessible to the public and to other courts since transparency can help identify potential conflicts and inconsistencies more easily.

27 November 2023