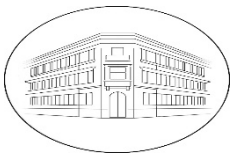

VISOKI UPRAVNI SUD REPUBLIKE HRVATSKE

HIGH ADMINISTRATIVE COURT OF THE REPUBLIC OF CROATIA

MÉCANISMES PERMETTANT DE PALLIER LES DÉCISIONS CONTRADICTOIRES DE DIFFÉRENTES JURIDICTIONS NATIONALES, DE LA CJUE ET DE LA CEDH

La présidence finno-suédoise de l'ACA durant la période 2023-2025 mettra l'accent sur le dialogue vertical entre les juridictions administratives suprêmes, les cours de l'Union européenne et le Conseil de l'Europe dans sa dimension procédurale. Dans ce cadre, le séminaire organisé par l'ACA et la Haute cour administrative de la République de Croatie, qui se tiendra en février 2024 à Zagreb, aura pour thème les mécanismes existants pour pallier les décisions contradictoires de différentes juridictions aux niveaux européen et national. Tenant compte du ressort des juridictions membres de l'ACA, le questionnaire soumis a trait aux litiges administratifs.

Le questionnaire contient des questions sur l'observation et l'étude de la jurisprudence de la Cour de justice de l'UE (ci-après, la « CJUE ») et de la Cour européenne des droits de l'homme (ci-après, la « CEDH »). Des questions relatives à la mise en œuvre des décisions de la CJUE, à ses positions de principe, sont également soulevées, ainsi que les possibilités de pallier les décisions finales contradictoires des juridictions nationales et de la CJUE.

En ce qui concerne la CEDH, les questions portent principalement sur la place et l'application de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (ci-après, la « Convention ») dans l'ordre juridique d'un pays donné. En outre, les questions ont trait à la procédure applicable dans le litige administratif spécifique ayant donné lieu à l'arrêt de la CEDH, mais aussi à l'application des positions exprimées dans d'autres affaires, c'est-à-dire à la possibilité de pallier toute divergence entre les décisions finales des juridictions nationales et la jurisprudence de la CEDH. Des questions ont également trait à la place du Protocole nº 16 à la Convention et au rôle potentiel des avis consultatifs dans la prévention des contradictions entre la jurisprudence des juridictions nationales et celle de la CEDH.

D'autres questions portent sur les relations entre les juridictions nationales et la cour constitutionnelle nationale (s'il y en a une), ainsi que sur l'harmonisation de la jurisprudence des juridictions nationales et de celle de la cour constitutionnelle.

Enfin, le dialogue entre les cours suprêmes nationales et la possibilité de pallier la jurisprudence contradictoire de celles-ci font aussi l'objet d'un examen.

Cofinancé par l'Union européenne

I CJUE

1. Comment la jurisprudence de la CJUE est-elle étudiée et observée au sein de votre Cour ? Un département se consacre-t-il, par exemple, à cette tâche ?

The case-law of the CJEU is studied and analysed by the European Law Delegation (DDE) of the Report and Studies Division of the Council of State.
The Centre for Legal Research and Dissemination (CRDJ) also monitors preliminary questions referred to the CJEU by the administrative courts.

1.1. En cas de réponse affirmative à la question précédente, combien de personnes sont-elles employées dans ce département et quel est leur niveau de formation ? Quel est le rôle du département (par exemple, consultatif) ?

The European Law Delegation (DDE) of the Report and Studies Division of the Council of State is headed by a Councillor of State specialising in EU law. He is assisted in his duties by three trainees assigned to him or her every 6 months.

The delegation's mission is twofold. On the one hand, it distributes a monthly summary of the judgments handed down by the CJEU and the ECtHR to the judges of the administrative tribunals and administrative courts of appeal, as well as to all members of the Council of State. The DDE distributes a number of bulletins internally to the administrative courts (Directory of European Case-Law; Compilation of EU and ECtHR Case-Law on the Law on Foreign Nationals; Compendium of European Commission Decisions and Case-Law of the EU Courts on State Aid; Practical Guide to European Environmental Law; Practical Guide to European Health Law; Annual Reports on CJEU/ECtHR Case-Law); Practical Guide to European Environmental Law; Practical Guide to European Health Law; Annual Reports on CJEU/ECtHR Case-Law; as well as Newsflashes on some major case-law and a Tutorial on how to use the ECtHR website). It also monitors the legal status of European Union and Council of Europe texts prior to their adoption.

Secondly, it plays an advisory role by answering legal questions relating to EU law or the application of the ECHR posed by members of the advisory divisions and the Administrative Claims Division of the Council of State (thematic notes distributed internally to members of the Council of State).

The CRDJ monitors preliminary questions referred to the CJEU by the administrative courts and may also contribute to legal research on EU law requested by the Administrative Claims Division and the administrative divisions. Its Legal Research Department, which carries out these tasks, has a staff of around 10 lawyers specialising in public law.

2. Est-il possible d'annuler une décision définitive prise dans le cadre d'un litige administratif si la CJUE rend un arrêt dans une autre affaire dont il ressort qu'une décision définitive antérieure d'une juridiction nationale est erronée ? Si une telle

procédure existe, dans quelle formation (nombre de juges) la juridiction administrative statue-t-elle ?

French law does not provide for a procedure for setting aside a decision of an administrative court that has become irrevocable (because no appeal has been lodged, or because a decision of the Council of State is at issue) on the grounds that a subsequent judgment of the CJEU would call into question the solution adopted by the national court.

2.1. Les parties sont-elles autorisées à prendre l'initiative d'annuler une décision définitive dans l'affaire susmentionnée ? Outre les parties, un autre organe (autorité, etc.) est-il impliqué dans cette procédure ? Faut-il introduire cette demande dans un délai déterminé ?

As indicated in the previous question, under French law there is no procedure for a party to apply for the annulment of a final decision handed down by an administrative court, including on the grounds of a contradiction with the more recent case-law of the CJEU.

2.2. La juridiction administrative est-elle autorisée à réagir *ex officio* dans l'affaire susmentionnée ? Un délai est-il prescrit pour une telle action ?

In the absence of such a procedure, this question is irrelevant as far as the French administrative courts are concerned.

2.3. En cas de contradiction entre une décision d'une juridiction nationale et un arrêt plus récent de la CJUE, quelle est la procédure suivie pour établir que la décision finale antérieure n'est pas conforme à la position de la CJUE ? Comment les positions des parties sont-elles recueillies dans le cadre d'une telle procédure ?

As mentioned above, there is no such procedure for final decisions handed down by the administrative courts.

In the case of a non-final decision handed down by an administrative tribunal or an administrative court of appeal, a party to the dispute who has not obtained satisfaction may refer the decision handed down by the lower court to the competent court – administrative court of appeal or Council of State – by way of appeal or cassation within the time limits provided for by the administrative litigation rules. In this context, if the court referred to at first instance has interpreted Community law in a manner contrary to that resulting from a subsequent judgment of the CJEU, the party having lodged an appeal or an appeal in cassation, as the case may be, may plead before the administrative court of appeal or the Council of State that the decision of the administrative court disregarded Community law as interpreted by the case-law of the CJEU that arose after the first contentious decision. The court of appeal or cassation will then be able to assess whether the court of first instance correctly applied Community law interpreted in the light of the most recent case-law of the CJEU and, where appropriate, draw the necessary conclusions by challenging the initial contentious decision.

The positions of the parties are then gathered in accordance with the rules of ordinary law applicable to administrative disputes, the submissions of the applicant and the defendant being subject to compliance with the principle of adversarial proceedings.

2.4. Une telle décision peut-elle faire l'objet d'un recours juridique ?

As indicated in the previous question, the question of whether a decision handed down by an administrative court that is not irrevocable infringes EU law, as interpreted by the most recent case-law of the CJEU, may be examined in the context of an appeal or cassation.

2.5. Si la procédure susmentionnée existe, dans environ combien ou dans quels types de litiges administratifs, au cours de la période 2012-2022, la possibilité de modifier une décision finale qui diverge de la position ultérieure de la CJUE a-t-elle été utilisée ?

In the absence of a procedure for challenging an irrevocable decision of an administrative court, the question in this respect is irrelevant.
There are no statistics on decisions by the administrative courts of appeal and the Council of State challenging decisions handed down by administrative tribunals or administrative courts of appeal on the grounds of a contradiction with EU law interpreted by a judgment of the CJEU handed down after that first decision.

3. La législation a-t-elle été modifiée en raison de contradictions observées entre la jurisprudence des juridictions nationales et celle de la CJUE ? Dans l'affirmative, veuillez fournir un exemple.

The Council of State and all the French administrative courts apply Community law in accordance with the interpretations given in the judgments handed down by the CJEU.

Administrative case-law takes account of developments in the case-law of the CJEU and, where appropriate, participates in these developments by referring questions to the CJEU for preliminary rulings and by applying the rulings it issues in this context.

For example, noting the evolution of the case-law of the CJEU on traditional hunting methods towards a more restrictive interpretation of the provisions of the Birds Directive of 30 November 2009 with regard to derogations from the ban on the capture of certain species (see CJEU, 9 December 2004, Commission v Spain, Case C-79/03 and CJEU, 21 June 2018, Commission v Malta, Case C-557/15 concerning hunting with glue or nets), and taking account of the reasoned opinion sent to France by the European Commission on 2 July 2020 as part of an open procedure, the Council of State referred a question to the CJEU for a preliminary ruling on the practice of hunting with birdlime (CE, 29 November 2019, association One Voice and Others, No 425519). Applying the interpretation adopted by the Court (CJEU, 17 March 2021, Case C-900/19), it went back on its previous case-law (CE, 16 November 1992, Rassemblement des opposants à la chasse and Association pour la protection des animaux sauvages, Nos 110931, 111136; CE, 28 December 2018, LPO, No 419063) to annul orders relating to the use of birdlime to capture black thrushes and blackbirds for use as decoys (CE, 28 June 2021, Association One Voice and Others, No 425519).

On the other hand, we are not aware of any recent example where the legislator intervened to take account of a contradiction between the case-law of the national courts and that of the CJEU.

II CEDH

1. Comment la jurisprudence de la CEDH est-elle étudiée et observée au sein de votre cour ? Un département se consacre-t-il, par exemple, à cette tâche ?

The case-law of the ECtHR is studied and observed within the Council of State by the European Law Delegation (DDE), which is attached to the Report and Studies Division. The CRDJ has a unit dedicated to the law of the European Convention on Human Rights.

1.1. En cas de réponse affirmative à la question précédente, combien de personnes sont-elles employées dans ce département et quel est leur niveau de formation ? Quel est le rôle du département (par exemple, consultatif) ?

The European Law Delegation (DDE) of the Report and Studies Division of the Council of State is headed by a Councillor of State. He is assisted in his tasks by three trainees assigned to him every 6 months.

The delegation's mission is twofold. On the one hand, it distributes a monthly summary of the judgments handed down by the CJEU and ECtHR to the judges of the administrative tribunals and administrative courts of appeal, as well as to all members of the Council of State. The DDE distributes a number of bulletins internally to the administrative courts (Directory of European Case-Law; Compilation of EU and ECtHR Case-Law on the Law on Foreign Nationals; Compendium of European Commission Decisions and Case-Law of the EU Courts on State Aid; Practical Guide to European Environmental Law; Practical Guide to European Health Law; Annual Reports on CJEU/ECtHR Case-Law); Practical Guide to European Environmental Law; Practical Guide to European Health Law; Annual Reports on CJEU/ECtHR Case-Law; as well as Newsflashes on some major case-law and a Tutorial on how to use the ECtHR website). It also monitors the legal status of European Union and Council of Europe texts prior to their adoption.

Secondly, it plays an advisory role by answering legal questions relating to EU law or the application of the ECHR posed by members of the advisory divisions and the Administrative Claims Division of the Council of State (thematic notes distributed internally to members of the Council of State).

The CRDJ also carries out missions in connection with the law of the European Convention on Human Rights. Three specialised lawyers, supervised by an administrative magistrate, are assigned to this task. In particular, they carry out expert research into the law of the European Convention on Human Rights, for the needs of

the Council of State or for its relations with its partners. Together with the Council of State's ECHR focal point, who is an experienced judge, they also monitor the forum of national supreme courts (RCS/SCN*).*

2. Quelle place la Convention occupe-t-elle dans la hiérarchie des normes juridiques de votre État membre ?

By virtue of the provisions of Article 55 of the French Constitution, according to which 'treaties or agreements that have been duly ratified or approved have, from the time of their publication, an authority superior to that of laws (...)', the European Convention for the Protection of Human Rights and Fundamental Freedoms has a supra-legislative value in the French hierarchy of norms.

International law is superior to statute law, but remains, at least in the domestic legal system, subordinate to the Constitution (in this sense, CE, Ass., 30 October 1998, Sarran and Levacher, No 200286 and CE, Ass., 21 April 2021, French Data Network and Others, No 393099). The Court of Cassation (2 June 2000, Pauline Fraisse) and the Constitutional Council (Decision No 2004-505 DC of 19 November 2004, relating to the Treaty establishing a Constitution for Europe) have also affirmed the supremacy of the Constitution in the domestic legal order.

However, the Constitution may be revised to allow the ratification of treaties and conventions that do not comply with it. Although the Constitution has already been revised several times for this reason, it has never been revised in relation to the law of the European Convention on Human Rights.

2.1. Quelle est l'incidence de cette place sur l'application de la Convention dans le cadre des litiges administratifs (la Convention est-elle appliquée directement) ?

With France's ratification of the European Convention on Human Rights in 1974, and the recognition in 1981 of the right of individual petition, the law of the Convention is now fully accepted in French law.

The Council of State and all administrative courts apply the terms of the Convention directly. Based on the provisions of Article 55 of the Constitution, the case-law of the Council of State guarantees the effectiveness of the rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms in the light of the case-law of the European Court of Human Rights and within the national margin of discretion left to the Member States.

Within this framework, the administrative courts may review the compatibility of individual administrative acts with the terms of the Convention, where the administrative authority has the discretionary power to do so. This is particularly the case in the area of the law on foreign nationals, where the administrative courts may review expulsion decisions on the basis of arguments to this effect in the light of Articles 3 and 8 of the Convention (CE, Ass, 19 April 1991, Mr Belgacem, Rec. 152, No 107470; CE Ass, 19 April 1991, Ms Babas, Rec. 280, No 117680). The administrative court may also be called upon to set aside the application of a legislative

provision that is itself in breach of the terms of the Convention (see, for a recent example: CE, 24 May 2017, Syndicat de la magistrature and Others, Nos 395321, 395509) or annul an administrative act tainted by such a conflict. Pleas alleging failure to comply with the Convention may therefore be raised directly before the administrative courts in all types of disputes.

The court also takes into account the interpretation of the Convention by the ECtHR. This is reflected in the use, in the case-law of the Council of State, of qualifications or legal categories derived from decisions of the Court. This applies to the requirement of compelling reasons of general interest in the context of the review of validation laws exercised on the basis of the first paragraph of Article 6 of the Convention (CE, 23 June 2004, Société Laboratoires Genévrier, Rec. p. 256), or the interpretation of the concept of 'property' within the meaning of Article 1 of the First Protocol (CE, Ass., 30 November 2001, Minister for Defence v Mr Diop, Rec. p. 605 and CE Ass. 6 December 2002, Draon, Rec. p. 423).

2.2. Un organe spécifique (tribunal) contrôle-t-il l'application de la Convention dans les litiges administratifs ?

All administrative courts, administrative tribunals, administrative courts of appeal and the Council of State, as well as specialised administrative courts (such as the National Court of Asylum), may be required to apply the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms in administrative disputes brought before them.

3. Selon le droit national (ou la jurisprudence), une violation de la Convention ou tout écart par rapport à la jurisprudence de la CEDH, constaté(e) par une juridiction nationale (comme une cour d'appel), constitue-t-elle/il un motif potentiel d'annulation de la décision d'un tribunal inférieur qui s'est rendu coupable de cette violation ? Dans l'affirmative, quels sont les recours ou instruments juridiques disponibles et comment la procédure se déroule-t-elle ?

In the case of a non-final decision handed down by an administrative tribunal or an administrative court of appeal, a party to the dispute who has not obtained satisfaction may refer the decision handed down by the lower court to the competent court – administrative court of appeal or Council of State – by way of appeal or cassation within the time limits provided for by the litigation rules. In this context, if the court referred to at first instance has interpreted the terms of the ECHR in a manner contrary to that resulting from a judgment of the ECtHR, the party having lodged an appeal or an appeal in cassation, as the case may be, may plead before the administrative court of appeal or the Council of State that the decision of the administrative court disregarded the principles and rights guaranteed by the Convention as interpreted by the case-law of the ECtHR. The court of appeal or cassation will then be able to assess whether the court of first instance correctly applied the terms of the Convention interpreted in the light of the most recent case-law of the ECtHR and, where appropriate, draw the necessary conclusions by challenging the initial contentious decision. It should, however, be noted that certain rules may restrict the invocation of arguments based

on failure to comply with the provisions of the Convention where such arguments were not first raised before the courts first seized of the case.

The positions of the parties are then gathered in accordance with the rules of ordinary law applicable to administrative disputes, the observations of the applicant and the defendant being subject to compliance with the principle of adversarial proceedings.

4. Quelles sont les options procédurales dont dispose une partie dont le litige administratif est clos, alors que la CEDH a conclu à une violation de la Convention à cet égard ?

French law does not provide for a procedure for reopening administrative court proceedings that have been definitively closed.

In this respect, the Council of State ruled that it 'does not follow from any clause of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 46 thereof, or from any provision of domestic law, that a decision by which the European Court of Human Rights has convicted France may have the effect of reopening judicial proceedings closed by a decision of the Council of State following which the matter was referred to the Court' (CE, 11 February 2004, Ms Chevrol, No 257682).

The Council of State also ruled that, under Article 46 of the Convention, full compliance with a judgment of the European Court of Human Rights convicting a State implies, in principle, that the State must take all necessary measures to remedy the consequences of the violation of the Convention for the applicant and to remove the source of the violation. The authority accorded to the judgments of the Court therefore implies not only that the convicted State, which is responsible, in view of the essentially declaratory nature of the judgments of the Court, for determining the means of discharging the obligation thus incumbent on it, should pay to the person concerned the sums awarded by the Court by way of just satisfaction under Article 41 of the Convention, but also that it should adopt the individual and, where appropriate, general measures necessary to put an end to the violation found. On the other hand, it reiterated that the enforcement of the judgment of the Court cannot, in the absence of procedures organised to provide for the re-examination of a case that has been finally decided, have the effect of depriving court decisions of their enforceability (CE, 4 October 2012, Baumet, No 328502).

With regard to the situation in which the violation found by the Court in its judgment concerns an administrative penalty that has become final, the Council of State ruled that the enforcement of this judgment does not imply, in the absence of a procedure organised for this purpose, that the competent administrative authority should re-examine the penalty. Nor can it have the effect of depriving court decisions, which include in particular those that amend an administrative penalty in whole or in part in the context of an appeal of full jurisdiction, of their enforceability. On the other hand, the finding by the Court of a breach of the rights guaranteed by the Convention constitutes a new factor that must be taken into consideration by the authority vested with the power to impose penalties. It is therefore for that authority, when it receives a

request to that effect and the penalty imposed continues to have effect, to assess whether the continued implementation of that penalty fails to meet the requirements of the Convention and, if so, to put an end to it, in whole or in part, having regard to the interests for which it is responsible, the grounds for the penalty and the seriousness of its effects and the nature and seriousness of the breaches established by the Court (CE, Ass., 30 July 2014, Mr Vernes, No 358564, A).

Special procedures have been provided for by the legislator outside the scope of administrative disputes: the re-examination of a conviction handed down by the ECtHR for a serious violation of the Convention may result in the French judge re-examining the previous decision, in criminal matters since the Act of 15 June 2000 strengthening the protection of the presumption of innocence and the rights of victims, as well as in matters of personal status since the Act of 18 November 2016 on the modernisation of justice in the twenty-first century.

4.1. La partie doit-elle réagir dans un délai prescrit ?

Not applicable since French law does not provide for a procedure to reopen court proceedings that have been definitively closed (see answer to question 4 in the previous point).

4.2. Si la partie n'a pas présenté de demande de modification de la décision finale (c'est-à-dire, par exemple, de reprise d'instance), la juridiction administrative est-elle autorisée à réagir *ex officio* ?

The administrative court does not have a self-referral procedure to challenge ex officio a final decision it has made that appears to contradict an ECtHR judgment.

4.3. Dans quelle formation (nombre de juges) la juridiction administrative adopte-t-elle ses décisions de modifier la décision finale ?

Not applicable, in view of what has been said above.

4.4. En cas de contradiction entre une décision d'une juridiction nationale et un arrêt plus récent de la CEDH, quelle procédure permet-elle d'établir que la décision finale antérieure n'est pas conforme à la position de la CEDH ? Le fait que la décision finale antérieure n'est pas conforme à la position de la CEDH est-il établi dans le cadre d'une procédure spéciale ? Les parties à d'autres litiges administratifs sont-elles autorisées à demander la modification de leurs décisions définitives sur la base de la décision rendue par la CEDH dans une autre affaire ? Faut-il introduire cette demande dans un délai déterminé ? Comment les positions des parties sont-elles recueillies dans le cadre d'une telle procédure ? Est-il permis d'introduire un recours juridique contre une décision de la juridiction nationale statuant sur l'affaire ?

As mentioned above, French law does not provide for a procedure to annul or review a final decision of a French administrative court on the grounds that it conflicts with a subsequent judgment of the ECtHR.

On the other hand, in the case of a non-final decision handed down by an administrative tribunal or an administrative court of appeal, a party to the dispute who has not obtained satisfaction may refer the decision handed down by the lower court to the competent court – administrative court of appeal or Council of State-, by way of appeal or cassation within the time limits provided for by the litigation rules. In this context, if the court referred to at first instance has interpreted the terms of the Convention in a manner contrary to that resulting from a subsequent judgment of the ECtHR, the party having lodged an appeal or an appeal in cassation, as the case may be, may plead before the administrative court of appeal or the Council of State that the decision of the administrative court disregarded these terms as interpreted by the case-law of the ECtHR that arose after the first contentious decision. The court of appeal or cassation will then be able to assess whether the court of first instance correctly applied the terms of the Convention in the light of the most recent case-law of the ECtHR and, where appropriate, draw the necessary conclusions by challenging the initial contentious decision.
The positions of the parties are then gathered in accordance with the rules of ordinary law applicable to administrative disputes, the observations of the applicant and the defendant being subject to compliance with the principle of adversarial proceedings.

4.5. Dans approximativement combien ou dans quels types de litiges administratifs, au cours de la période 2012-2022, une demande de modification de la décision finale a-t-elle été introduite, parce que celle-ci était contradictoire à la position de la CEDH ?

Not applicable to statistics concerning requests for the amendment of 'final' decisions of administrative courts, given the previous responses indicating that French law does not provide for a procedure for the annulment or review of a final decision handed down by an administrative court, including in the event of conflict with a judgment of the ECtHR.

5. Dans quels types de litiges administratifs les violations des droits garantis par la Convention sont-elles le plus souvent établies ? Y a-t-il une explication à cela ?

According to the Court's statistics[1], the types of dispute most frequently leading to a finding of a violation of the ECHR between 2021 and 2022 are:

- *Cases concerning conditions of detention, relating to inhuman or degrading treatment resulting in a violation of Article 3 of the ECHR (21 findings of violation).*
- *Disputes concerning the expulsion of foreign nationals based on a violation of Article 3 of the ECHR (12 decisions finding a violation).*

[1] Data taken from the Country Fact Sheet for the Press (France), Press Unit of the European Court of Human Rights, last updated: August 2023 CP_France_FRA (coe.int).

- *Cases concerning freedom of expression involving a violation of Article 10 of the ECHR (19 findings of violation).*
- *Cases relating to private and family life involving a violation of Article 8 of the ECHR (12 decisions finding a violation).*

6. Un organe spécial est-il chargé dans votre pays de l'exécution des arrêts de la CEDH (à l'exception du gouvernement, en ce qui concerne la satisfaction équitable accordée dans les arrêts de la CEDH) et quel est son nom ? S'il existe un tel organe, quelle est sa composition et quels sont ses pouvoirs (à quels instruments recourt-il pour éviter que la jurisprudence des juridictions nationales ne contredise celle de la CEDH) ?

In France, this task is entrusted exclusively to the Government, and more specifically to the Ministry of Europe and Foreign Affairs and, within it, to the Sub-Directorate for Human Rights and Humanitarian Affairs. This sub-directorate is responsible for ministerial coordination of the enforcement of ECtHR judgments. In France, therefore, there is no special body as referred to in the question.

7. La législation a-t-elle été modifiée en raison de contradictions observées entre la jurisprudence des juridictions nationales et celle de la CEDH ? Veuillez donner un exemple.

The Council of State and all the French administrative courts apply the terms of the ECHR in accordance with the interpretations given in the judgments handed down by the ECtHR and the development of its case-law.

The Baumet decision of 4 October 2012 and the Vernes decision of 30 July 2014, cited in response to question 4, thus recall that 'it follows from the terms of Article 46 of the ECHR that full compliance with a judgment of the European Court of Human Rights convicting a State party to the Convention implies, in principle, that that State must take all necessary measures, on the one hand, to make reparation for the consequences that the violation of the Convention has entailed for the applicant and, on the other, to remove the source of that violation.' This requirement to 'remove the source of that violation' is also addressed to the national court, insofar as it may be up to it to take a position (conclusions of the public rapporteur on decision CE, 12 December 2014, Mr Guillaume and Others, No 365779).

In its decision in plenary session of 15 April 2011 (No 1017049), the Court of Cassation, the supreme court of the judiciary, ruled that 'States that are parties to the Convention for the Protection of Human Rights and Fundamental Freedoms are bound to comply with the decisions of the European Court of Human Rights, without waiting to be challenged before it or to have amended their legislation', thus repeating the grounds of a decision of the European Court of Human Rights (ECtHR, 22 April 1993, Modinos v Cyprus, app. No 15070/89).

To our knowledge, the French legislator has not intervened to amend the rules of national law to ensure that the terms of the European Convention on Human Rights and the case-law of the European Court of Human Rights are respected by the national

courts, and in particular by the French administrative courts. Rather, that legislator intervenes to amend national legislation following the Court's findings of violations of the terms of the ECHR.

A number of changes have been made to French law following France's conviction by the ECtHR. For example, the Act of 10 July 1991 on administrative phone tapping brought French legislation into line with the European Convention on Human Rights, following a ruling by the European Court of Human Rights (ECtHR, 24 April 1990, Kruslin and Huvig v France, application No 11801/85). Similarly, following a number of judgments handed down by the ECtHR in 2010, the Act of 14 April 2011 made sweeping changes to the rules governing police custody (assistance of a lawyer, right to silence) in order to comply with the Convention. More recently, Act No 2021-403 of 8 April 2021 aimed at guaranteeing the right to respect for dignity in prison was adopted, in particular to take account of a judgment of the ECtHR on conditions of detention.

8. Votre pays a-t-il ratifié le Protocole nº 16 à la Convention (en vertu duquel il est possible de solliciter des avis consultatifs) ?

By Act No 2018-237 of 3 April 2018, the French legislator authorised the ratification of Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, the implementation of which is intended to enable the courts to submit to the ECtHR, in connection with cases pending before them, requests for advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined by the Convention or its protocols.

This protocol was ratified by France on 12 April 2018. France being the tenth State to ratify the Protocol, allowed its entry into force on 1 August 2018.

8.1. Croyez-vous qu'un avis consultatif pourrait empêcher la prise par une juridiction nationale d'une décision qui ne serait pas conforme à la jurisprudence de la CEDH ? Justifiez votre réponse.

Advisory opinions given by the ECtHR on questions of principle concerning the interpretation or application of the rights and freedoms defined by the Convention or its Protocols under Protocol No 16 are not binding (Article 5 of the Protocol). However, in the dialogue between national and European courts, the opinions issued by the ECtHR on the initiative of the national court take on a certain authority, and the court requesting the opinion, which is optional, will naturally be inclined to apply it to the dispute in question. It could also be taken into account in the appeal or cassation review of court decisions.

8.2. Avez-vous sollicité un avis consultatif dans le cadre du Protocole nº 16 à la Convention ? Donnez un exemple.

Yes, the Council of State has already referred a request for an advisory opinion to the ECtHR under Protocol No 16 to the Convention.

It did so for the first time in a decision of 15 April 2021 (CE, 15 April 2021, Forestiers privés de France, No 439036, A). This request for an opinion concerned the difference in treatment between owners' associations 'having a recognised existence on the date of creation of an approved communal hunting association' and owners' associations created subsequently, and more specifically the relevant criteria enabling the Council of State to assess whether the difference in treatment established by Article L.422-18 of the Environment Code, relating to withdrawal from the territory of an approved communal hunting association (ACCA), as recently amended by Act No 2019-773 of 24 July 2019 creating the French Biodiversity Office, modifying the missions of hunting federations and strengthening environmental policing, was compatible with Article 14 of the Convention (prohibition of discrimination) combined with Article 1 of the First Additional Protocol (right to respect for property). The Act of 24 July 2019 was intended to revisit a recent reversal of case-law by the Council of State (CE, Sect., 5 October 2018, Association Saint-Hubert, No 407715), which had itself been motivated by the administrative judge's questions about the compatibility of the previous case-law with the Convention, as is clear from the conclusions of the public rapporteur.

The ECtHR issued its advisory opinion on 13 July 2022, telling the Council of State that, in order to determine whether the difference in treatment at issue was 'legitimate and reasonable' and therefore compatible with Article 14 of the Convention combined with Article 1 of Protocol No 1, it had to ensure: firstly, that by distinguishing between categories of owners or holders of hunting rights on the basis of the date on which their association was set up, the legislator was pursuing one or more 'legitimate aims'; secondly, that the law satisfied the requirement of legality laid down in Article 1 of Protocol No 1 and, thirdly, that there was a 'reasonable relationship of proportionality' between the means employed and the legitimate aim(s) pursued. In that regard, the Court specified that its assessment should be made in the light of the criterion of the 'manifest lack of a reasonable basis' for regulating the use of property, within the meaning of the second paragraph of Article 1 of Protocol No 1, and indicated the criteria for assessing that point.

The Council of State applied the criteria laid down by the European Court of Human Rights to the case before it and dismissed the application in question (CE, 23 March 2023, Forestiers privés de France, No 439036, C).

III COUR CONSTITUTIONNELLE

1. Existe-t-il une cour constitutionnelle dans votre pays ?

Yes, France has a constitutional court. This is the Constitutional Council, established by the Constitution of the Fifth Republic of 4 October 1958.

1.2. Dans l'affirmative, quels sont les pouvoirs de la cour constitutionnelle ?

The Constitutional Council, which guarantees compliance with the Constitution, can be called upon to hear various types of dispute.

Firstly, it has jurisdiction in disputes relating to legislation.

On the one hand, it exercises a priori control over the conformity of laws that have not yet been promulgated with the Constitution, international treaties and the rules of procedure of parliamentary assemblies. This control is compulsory for the regulations of the National Assembly and the Senate, organic laws and, since the constitutional revision of July 2008, for the draft laws provided for in Article 11 (see Article 61 of the Constitution); it is not systematic when it comes to France's international commitments.

On the other hand, since the constitutional amendment of 23 July 2008, it has exercised a posteriori review of laws already promulgated, as part of the application for a priority preliminary ruling on the issue of constitutionality (QPC) procedure, raised during any proceedings before an administrative or ordinary court, at all stages of the procedure (Article 61-1 of the Constitution). This procedure allows any party involved in a legal dispute to request a constitutionality review of a legislative provision that they believe infringes the rights and freedoms guaranteed by the Constitution. The QPC must always be the subject of a separate, reasoned written submission. The judge hearing the case decides whether or not to refer the application for a priority preliminary ruling on the issue of constitutionality, depending on which court has jurisdiction to hear the case, to the Court of Cassation or the Council of State, which then has a period of 3 months to examine it and, if necessary, refer the issue to the Constitutional Council. The Council must also reach a decision within 3 months.

An application for a priority preliminary ruling on the issue of constitutionality may not be referred directly to the Constitutional Council, except where the Council of State or the Court of Cassation has not given a ruling within a period of 3 months.

In addition, the Constitutional Council is responsible for verifying that legislative and Senate elections, presidential elections and referendums are conducted in accordance with the law. It examines complaints that have been referred to it and declares the results of the ballot.

Lastly, the Constitutional Council has powers relating to the proper functioning of institutions. With regard to the status of Members of Parliament, it assesses ineligibility and incompatibility. Cases must be referred to the Constitutional Council if the exceptional powers conferred on the President of the Republic by Article 16 of the Constitution are to be exercised. The Constitutional Council may also declare that the President of the Republic is unable to exercise his functions.

2. La juridiction administrative suprême a-t-elle des pouvoirs similaires à ceux de la cour constitutionnelle ? Veuillez décrire la compétence/le ressort de ces deux juridictions.

As stated in the previous point, the Constitutional Council has the power to review, a priori, the conformity of laws that have not yet been promulgated with the Constitution and, since the constitutional amendment of 23 July 2008, to review, a posteriori, laws

that have already been promulgated, within the framework of the application for a priority preliminary ruling on the issue of constitutionality (QPC) procedure, raised in the course of any proceedings before an administrative or ordinary court (Article 61-1 of the Constitution).

The competences of the Council of State, the supreme administrative court, and the Constitutional Council are clearly distinct. The Council of State has jurisdiction to review the legality of administrative acts on grounds of ultra vires. It does not have jurisdiction to rule on the constitutionality of the law, by virtue of long-standing case-law (CE, 6 November 1936, Arrighi and Dame veuve Coudert) and recently confirmed case-law (CE, 6 December 2012, Société Air Algérie, No 347870; CE, 27 October 2011, CFDT and Others, No 343943).

The Council of State only examines systematically the conformity of legislative texts with the Constitution as part of its consultative, non-jurisdictional role as legal advisor to the Government and Parliament.

The Council of State and the administrative courts as a whole contribute to the review of the constitutionality of the law, particularly in the context of the application for a priority preliminary ruling on the issue of constitutionality procedure, which allows a party to a dispute before the administrative or ordinary courts to put a separate question on the constitutionality of a law applicable to the dispute. For the administrative jurisdictional order, this question passes through the filter of the Council of State, when the question is put before an administrative tribunal or an administrative court of appeal. However, it cannot itself censure the contested legislative provisions, as only the Constitutional Council is empowered to do so. The Council of State, to which a party to the dispute has referred this application for a priority preliminary ruling on the issue of constitutionality directly or to which another administrative court has referred this application to the Constitutional Council, does not carry out too strict a filtering of the QPC and confines itself to stating, summarily and even laconically, the reasons for the referral decisions it issues when the application is 'new' and 'serious', without demonstrating the unconstitutionality of the law.

Nonetheless, the Council of State's litigation powers help to ensure the supremacy of the Constitution in the domestic legal order through various techniques, such as interpreting legislation in accordance with the Constitution. It also ensures that administrative acts comply with constitutional norms and the interpretations of these norms by the Constitutional Council (in particular reservations of interpretation of the law by the Constitutional Council).

3. Si la juridiction administrative suprême est d'avis qu'une disposition de la loi applicable dans un cas particulier est inconstitutionnelle, doit-elle engager une procédure appropriée devant la cour constitutionnelle ou est-elle autorisée à interpréter la disposition litigieuse en tenant compte de la Constitution ?

It is not for the Council of State itself to refer to the Constitutional Council the constitutionality of a law that it has to consider in the context of a dispute pending before it. No such procedure exists in French law.

On the other hand, it may be seized of an application for a priority preliminary ruling on the issue of constitutionality raised before it in the course of a dispute or referred to it by another administrative court seized of such a question. It then decides whether or not to refer the application to the Constitutional Council, depending on whether it meets the conditions laid down by the Constitution and the Organic Law of 10 December 2009 on the application of Article 61-1 of the Constitution. In particular, when examining the plea that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, it must rule on the new and serious nature of the question, which must relate to a legislative provision applicable to the dispute before the administrative court.

In deciding whether or not to refer the application to the Constitutional Council, it does not itself rule on the constitutionality or unconstitutionality of the law, but merely verifies whether or not the conditions for referral to the constitutional court have been met and whether there is reasonable doubt as to the constitutionality of the law in question, or whether a new application should be referred to the Constitutional Council.

In addition, when examining the legality of an administrative act, it sometimes interprets the law in accordance with the Constitution and in full compliance with the case-law of the Constitutional Council (for example, CE, Ass., 29 April 2004, High Commissioner of the Republic in New Caledonia, Lebon p. 205.; CE, Sect., 22 June 2007, Lesourd, Lebon p. 253).

4. Les parties à un litige administratif peuvent-elles demander l'annulation des décisions définitives rendues sur la base d'une norme que la cour constitutionnelle a jugée inconstitutionnelle (dans le cadre du processus de contrôle abstrait de constitutionnalité) ? Un délai est-il prescrit pour une telle action ?

When the Constitutional Council, seized in the context of an application for a priority preliminary ruling on the issue of constitutionality, pronounces a declaration of unconstitutionality on the basis of Article 61-1 of the Constitution, the provisions declared contrary to the Constitution are, by virtue of Article 62 of this text, repealed for the future, as from the publication of the decision of the Constitutional Council or a later date fixed by this decision. These provisions also state that the Constitutional Council must determine the conditions and limits under which the effects produced by the provision may be called into question, in order to strike a balance between the obligation to purge the legal system of an unconstitutional legislative provision and the guarantee of legal certainty, which must lead to a cushioning of the impact and avoid calling into question existing situations and past legal effects.

While, in principle, the declaration of unconstitutionality must benefit the author of the application for a priority preliminary ruling on the issue of constitutionality and the provision declared contrary to the Constitution cannot be applied in proceedings pending on the date of publication of the decision of the Constitutional Council, the provisions of Article 62 of the Constitution reserve to the latter the power both to set the date of repeal and to postpone its effects in time and to provide for the reconsideration of the effects that the provision produced before the intervention of this

declaration (decisions of the Constitutional Council, No 2010-108 QPC and No 2010-110 QPC, handed down on 25 March 2011).

On the other hand, there is no procedure enabling a party to an administrative dispute to seek the annulment of a final decision handed down by the administrative court on the grounds that it was based on a legislative provision deemed unconstitutional by the Constitutional Council.

5. Les parties à un litige administratif peuvent-elles demander l'annulation des décisions définitives qui ne sont pas conformes à l'arrêt de la cour constitutionnelle rendu dans l'action constitutionnelle d'une autre personne ? Un délai est-il prescrit pour une telle action ?

French law does not provide for a procedure enabling a party to an administrative dispute to seek the annulment of a final decision handed down by the administrative court on the grounds that it does not comply with the declaration of unconstitutionality made by the Constitutional Council in the context of a QPC in a dispute concerning another applicant.

IV RELATION ENTRE LA JURIDICTION ADMINISTRATIVE SUPRÊME NATIONALE ET UNE AUTRE COUR SUPRÊME NATIONALE

1. Existe-t-il une autre juridiction suprême dans votre système judiciaire ?

In France, the judicial system comprises two orders of jurisdiction: the judicial order, headed by the Court of Cassation, and the administrative order, headed by the Council of State. The Constitutional Council is responsible for reviewing the constitutionality of laws.

2. Veuillez décrire la compétence des deux juridictions suprêmes.

This dual system of jurisdiction is based on two complementary blocks of exclusive powers of the administrative and judicial orders, some of which are constitutionally protected (for example, Article 66 of the Constitution establishes the judicial authority as the guardian of individual freedom).
The apportionment of jurisdiction between the two levels of court is difficult to summarise in a few lines, but it is broadly along the following lines.

The administrative courts have jurisdiction to rule on disputes concerning the legality of administrative acts. It hears cases involving the annulment or reversal of decisions taken, in the exercise of public prerogatives, by the authorities exercising executive power, their agents, the local and regional authorities of the Republic or the public bodies placed under their authority or control.

Some matters are by their nature reserved to the judicial authority, such as personal liberty, deprivation of ownership of immovable property, the status and capacity of persons and the operation of the ordinary courts.

Apart from these cases, the jurisdiction of the administrative courts is guaranteed by the Constitution, provided that a material criterion, the exercise of prerogatives of public authority, and an organic criterion, the action of a legal person governed by public law, acting directly or through a body placed under its authority or control, are identified.

The Constitutional Council has recognised the possibility for the legislator to modify the boundaries of the division between the two orders of jurisdiction in 'the interests of the proper administration of justice', when 'the application of a specific law or regulation could give rise to various disputes that would be divided, according to the usual rules of jurisdiction, between the administrative jurisdiction and the judicial jurisdiction' (CC, 23 January 1987, Act transferring litigation concerning decisions of the Competition Council to the courts, No 86-224 DC). This requirement for the proper administration of justice and the creation of 'blocks of jurisdiction' for the benefit of one or other level of court are intended in particular to eliminate or avoid divergences in case-law between the various courts likely to be seized of the matter.

The constitutional and legislative determination of the rules of jurisdiction does not prevent other criteria, based on case-law, from specifying the division of matters between the two levels of court. It is the role of the administrative court to apply the rules of public law to disputes arising from administrative action, the purpose and legitimacy of which are based on the pursuit of the public interest. The concept of public service or the exercise of prerogatives of public authority, which reflect the specific nature of the administration's objectives and resources, determine both the application of a public-law regime and the jurisdiction of the administrative court. However, as soon as the administration acts under the same conditions as a private person and therefore ceases to assert the specific nature of its action, the rules of private law must be applied to it by the ordinary court. Thus, for example, disputes arising from the operation of a public service fall within the jurisdiction of the administrative courts if the service is administrative, but within the jurisdiction of the ordinary courts if it is of an industrial or commercial nature. The same applies to disputes involving staff employed in those public services. Acts relating to the management of a public entity's public domain also come under the jurisdiction of the administrative courts, but those relating to its private domain generally come under the jurisdiction of the ordinary courts.

3. En général, comment les contradictions entre les différentes décisions des juridictions nationales sont-elles contrebalancées dans votre système juridique ? Comment les éventuelles positions contradictoires des (deux) juridictions (suprêmes) sont-elles contrebalancées ?

The apportionment of jurisdiction between the administrative and ordinary courts, as described in the answer to the previous question, makes it possible firstly to avoid contradictions in case-law, since most matters are dealt with by only one court.

The Court of Jurisdictional Disputes, a court made up of equal numbers of members of the Council of State and the Court of Cassation and presided over alternately by a member of the Council of State or the Court of Cassation, also has the task of settling any difficulties arising from the apportionment of jurisdiction between the two levels of

court. The number of referrals each year (around 30 in recent years) shows that the apportionment of jurisdiction between the different levels of court is not as complex as it might at first appear. In this way, the case-law of the two orders on questions of jurisdiction is harmonised.

On the other hand, the Court of Jurisdictional Disputes has no powers to harmonise the case-law of the two levels. Rather, it is the dialogue between the administrative and ordinary courts that makes it possible to overcome any contradictions in case-law (see next point).

4. Est-il possible, selon vous, de prévenir les contradictions ?

As indicated in the previous point, the clear apportionment of jurisdiction between the two levels of court and the role of the Court of Jurisdictional Disputes make it possible to avoid, in many cases, contradictions between the decisions handed down by the administrative court and the ordinary court. However, it may happen that the administrative and ordinary courts rule on the scope of the same acts or apply similar rules.

Furthermore, the fear that conflicting case-law might emerge between the two orders of court as a result of the apportionment of disputes between two separate orders of court is largely unfounded. Jurisdictional dualism actually contributes to the reciprocal enrichment of case-law, with the Council of State and the Court of Cassation closely observing each other's case-law, particularly in areas they share, such as medical liability.

Outside the case of shared matters, the administrative courts do not hesitate to borrow certain principles or rules of positive law from private law (consumer law, competition law, rules of the civil code) and the courts regularly borrow certain elements from the case-law of the Council of State. The emulation between the two levels of court through the comparison of procedures and case-law actually contributes to strengthening French justice far more than to dividing it up and making it more complex.

The dialogue between the Council of State and the Court of Cassation is also very active. The two supreme courts are therefore organising a biennial colloquium on subjects of common interest (public policy in 2017, employment law in 2019, environmental law in 2021, regulation and compliance in 2023), enabling them to discuss their case-law, compare their views and overcome any differences of opinion. Informal exchanges may also take place on issues of common interest. In this dialogue, they will also work together to ensure that the principles of European Union law and European human rights law are incorporated and that domestic rules are interpreted in accordance with France's European and international commitments.