



VISOKI UPRAVNI SUD REPUBLIKE HRVATSKE

HIGH ADMINISTRATIVE COURT OF THE REPUBLIC OF CROATIA

## **MECHANISMS OF COUNTERACTING CONFLICTING RULINGS FROM DIFFERENT DOMESTIC COURTS AND FROM THE CJEU AND ECtHR**

The focus of the Finnish - Swedish presidency of the ACA 2023 - 2025 will be on the vertical dialogue between the Supreme administrative jurisdictions, the Courts of the European Union and the Council of Europe in its procedural dimension. Within this framework, the seminar organized by ACA and the High Administrative Court of the Republic of Croatia, which will be held in February 2024 in Zagreb, will feature the topic of existing mechanisms of counteracting conflicting rulings from different courts at the European and domestic level. Considering the jurisdiction of the courts - members of the ACA, the submitted questionnaire refers to administrative disputes.

The questionnaire contains questions about observing and studying the case law of the Court of Justice of the EU (hereinafter: CJEU) and the European Court of Human Rights (hereinafter: ECtHR). Questions related to the implementation of the decisions of the CJEU, its principled positions, are also raised, as well as the possibilities of counteracting conflicting final rulings from domestic courts and the CJEU.

In relation to the ECtHR, the issues primarily relate to the status and application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention) in the legal order of a particular country. Furthermore, the questions are related to the procedure in the specific administrative dispute in which the ECtHR ruling was made, but also to the application of the positions expressed in other cases, that is, to the possibility of counteracting the inconsistency of final rulings from domestic courts with the case law of the ECtHR. Questions were also raised about the status of Protocol No. 16 to the Convention and the possible role of advisory opinions in preventing conflicts between the case law of domestic courts and the case law of the ECtHR.

Further questions deal with the relationship of domestic courts and the domestic Constitutional Court (if there is any), as well as the harmonization of the case law of domestic courts with the case law of the Constitutional Court.

Finally, attention is paid to mutual dialogue between the domestic supreme courts and the possibility of counteracting conflicting case law of these courts.



## 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?

*By decree of the President of the Council of State, a Department called the 'Massimario' was established, based in Rome at the Council of State. One of the tasks of the aforementioned department is to regularly publish a collection of the most relevant decisions of the Court of Justice of the European Union, the European Court of Human Rights, the Constitutional Court and the Court of Cassation, as well as new legislation of interest to administrative justice (newsletter).*

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)?

*The Department is headed by the Deputy President of the Council of State, who, after consulting the Council of the Judiciary, appoints an organisational coordinator and a deputy coordinator each year from among the appointed judges. A maximum of twelve administrative judges are appointed to the department, four from the Council of State and eight from the regional administrative courts, following a call for applications.*

*In addition to publishing weekly on the administrative justice website the decisions of the CJEU of major importance, together with a brief summary and an indication of the reference legislation and the main related decisions, the Department also publishes the preliminary rulings referred to the CJEU, under Article 267 TFEU, whether they are referred by the Council of State or by the administrative courts of first instance.*

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?

*According to Article 91 of the Code of Administrative Procedure: "The remedies against decisions [of administrative judges] are appeal, revision, third party objection and cassation only on grounds of jurisdiction".*

*According to Article 106 of the Code: "(...) the judgments (...) of the Council of State may be challenged by appeal in the cases and in the manner provided for in Articles 395 and 396 of the Code of Civil Procedure".*

*The revision is distinguished in ordinary and extraordinary.*

*In ordinary cases of revision, the ground is directly deducible from the judgment because it conflicts with another judgment which has already become res judicata or because there was an error in the reading of the procedural documents submitted by the parties as regards the presentation of the facts in dispute. The error must relate to the documents as such and must not lead to an error of assessment or an error of law.*



*In cases of extraordinary revision, the grounds of appeal of the judgment shall be deductible for the discovery of facts after the delivery of the judgment and of its becoming res iudicata and which lead to the conclusion that the judgment has been falsified.*

*It means that Italian legal system does not provide for a procedure for changing a final ruling of an administrative judge due to a different later decision or position of the CJEU.*

*The CJEU has made two significant decisions on this specific topic adopted, following two preliminary rulings under Article 267 TFEU of the Court of Cassation and the Council of State.*

*The Randstad case in which the CJEU was asked to rule on the conformity with the principles of EU law of Italian procedural rules which do not provide for an action for annulment to be brought before the Court of Cassation for setting aside a judgment of the Council of State delivered in breach of the CJEU's previous case-law and without a further reference for a preliminary ruling.*

*The Court notes that it is for the national legal system of each Member State to establish the remedies available to individuals in matters governed by Union law to ensure respect for their right to effective judicial protection, according to Article 19 TEU. However, it must be ensured that these arrangements are not less favorable than those relating to similar situations governed by national law (principle of equivalence) and that they do not make the exercise of the rights conferred by Union law impossible or excessively difficult (principle of effectiveness).*

*Union law does not oblige the Member State (in this specific case Italy) to provide for an appeal to the Court of Cassation against a decision of inadmissibility of the Council of State in conflict with a ruling of the CJEU, but states that the individuals, who may be affected by the violation of their right to an effective remedy, due to a decision of a Court of last instance, can enforce the liability of the Member State concerned (in this regard, see in particular the judgments of 30 September 2003, Köbler, C-224/01, EU:C:2003:513, item 59 and of 21 December 2021, Randstad Italia, C-497/20, EU:C:2021:1037).*

*The Hoffmann-La Roche case provided the Court with a further opportunity to examine, in the light of European Union law (and in particular Article 19 TEU, Article 47 of the Charter and Article 267 TFEU), the national provisions which restrict an action for revision to mandatory grounds and do not cover the case of a possible conflict between the decision of a court of last instance (the Council of State) and the principles expressed by the CJEU in the same proceedings.*

*The core of the argument is Article 19 TEU, which obliges Member States to establish the judicial remedies necessary to ensure that individuals have their right to effective judicial protection in areas governed by Union law. Article 19 TEU essentially codifies the principle of procedural autonomy of the Member States, within the well-known limits of respect for the principles of equivalence and effectiveness.*

*In the present case, both conditions seem to be met. (see judgment C-261/21 of 7 July 2022, ECLI:EU:C:2022:534)*

*The solution must be sought within the internal system through the legislative introduction of a new ground for revision for contrast with the sentences of the CJEU, also suggested by the Constitutional Court in sentence no. 6 of 2018, and along the lines of the provisions of the Delegated Law of 21 November 2021, n. 206 which provides for the introduction of a new hypothesis of revision for sentences whose*



*content has been declared by the European Court of Human Rights contrary to the Convention for the Protection of Human Rights or to one of its Protocols (with effect for sentences introduced with appeal notified starting from 1 January 2023).*

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?

*As mentioned above, such a procedure is not foreseen.*

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

*There is no possibility for the Italian Council of State ex officio repeal a final ruling because it is contrary to a later decision of the CJEU.*

*As mentioned before the Italian legal system does not provide for a procedure for changing a final ruling of an administrative judge due to a different later decision or position of the CJEU.*

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?

*As stated by the CJEU in its judgement of 7 July in case C-261/21, article 106 of the Code of Administrative Procedure, read in conjunction with Articles 395 and 396 c.p.c., is not contrary to Union law, because it equally limits the possibilities of applying for a revision of a judgment of the Consiglio di Stato, "irrespective of whether the application for revision has its basis in provisions of national law or in provisions of European Union law" and Italian procedural law does not make it impossible or excessively difficult to exercise, in the field of competition law, the rights conferred on individuals by EU law.*

2.4 Is a legal remedy permitted against such a ruling?

*If the ruling of the administrative tribunal of first instance was made in the renewed dispute, the parties have the option of filing an appeal before the Council of State.*

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?

*The aforementioned procedure is not prescribed.*

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!



*As suggested by the Italian Constitutional Court in Judgment No. 6 of 2018, the legislation should introduce a new ground for revision due to conflict with CJEU rulings, but so far there has been no legislative change.*

## **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?

*See answer 1 | CJEU*

*By decree of the President of the Council of State, a Department called the 'Massimario' was established, based in Rome at the Council of State. One of the tasks of the aforementioned department is to regularly publish a collection of the most relevant decisions of the Court of Justice of the European Union, the European Court of Human Rights, the Constitutional Court and the Court of Cassation, as well as new legislation of interest to administrative justice (newsletter).*

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)?

*See answer 1.1. | CJEU*

*The Department is headed by the Deputy President of the Council of State, who, after consulting the Council of the Judiciary, appoints an organisational coordinator and a deputy coordinator each year from among the appointed judges.*

*A maximum of twelve administrative judges are appointed to the department, four from the Council of State and eight from the regional administrative courts, following a call for applications.*

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

*The Constitutional Court clarified that the art. 117 does not attribute constitutional status to the rules contained in international agreements ratified by ordinary law, as is the case with the rules of the ECHR.*

*The constitutional parameter entails the obligation of the ordinary legislator to respect the convention rules, with the consequence that the national rule incompatible with the ECHR rule violates the art. 117 Constitution.*

*The article 117 of Italian Constitution makes a mobile reference to the conventional norm which gives life and content to those generally mentioned international obligations (see Constitutional Court n. 348/2007 and n. 349/2007).*



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

*The Council of State directly applies the ECHR.*

*According article 6 of Treaty of Lisbon the Union adheres to the European Convention on Human Rights, and therefore submits to the jurisdiction of the European Court of Strasbourg (which, as is known, judges on violations of the Charter carried out by signatories).*

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

*No there is no a specific body dedicated to control the application of the Convention in administrative disputes.*

*Acting on an appeal, the Council of State controls whether the administrative courts applied the Convention and whether the Convention was applied correctly.*

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?

*If the judgment of the first instance Administrative Court is inconsistent with a decision of the Court of Human Rights, this inconsistency may constitute a ground for appeal as a violation of the Convention.*

*There are no specific rules on appeals against the judgement of the first instance, nor are there any specific rules on the effectiveness of the judgement of the court of last instance.*

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?

*The European Court of Human Rights in Strasbourg, in its judgment of 4 February 2014 (Mottola and Others v. Italy, case no. 29932/07), found that the Italian law, by setting 15 September 2000 as the limitation date for actions relating to civil servants for relations prior to 30 June 1998 (Article 69 of Legislative Decree no. 165 of 2001), created a procedural obstacle constituting a substantial denial of the applicants' rights. The applicants appealed against the judgment of the Council of State 4001 of 2013, arguing that, in the light of the judgment of the European Court of Human Rights in the Mottola case, the interpretation given by the Administrative Court was contrary to the right to judicial protection recognised by Article 6 of the Convention.*

*The Court held that the appeal was admissible in order to prevent the contested judicial measure, once it had become res iudicata, from having in a manner contrary to a supranational rule which the Italian State is bound to apply.*



*The Court of Cassation noted that the Consiglio di Stato had based its decision on a lapse of jurisdiction and the consequent absolute denial of jurisdiction. Therefore, any consideration of the correctness of this refusal is subject to a determination of the constitutionality of the rule in question, which makes the question of constitutionality under the first aspect raised, namely the conflict with Article 117 of the Constitution, a matter of first impression. The Court of Cassation therefore referred the matter back to the Constitutional Court.*

4.1. Must the party react within a prescribed deadline?

*The party must comply with the time limits laid down for an appeal on grounds of jurisdiction (Article 362 Code of Civil Procedure).*

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*?

*In no case, not even in the case of a violation of the Convention, is the Administrative Court authorised to renew the dispute ex officio.*

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

*As mentioned above, the Italian legal system does not provide for cases of revision of the administrative judge's final ruling, unlike the judgement of the criminal court, for violation of a judgement of the European Court of Human Rights.*

*There are no special rules in our legal system for the composition of the panel of judges (three judges at first instance, five judges at second and last instance).*

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?

*In Judgments No. 123 of 2017 and No. 93 of 2018, the Constitutional Court, after having recalled that with Judgment No. 113 of 2011 it introduced a hypothesis of revision of the final criminal judgment for the case that is in conflict with a subsequent judgment of the Court of Strasbourg, wondered whether such an additive operation is also imposed for the case of administrative and civil judgments.*

*The negative answer is based on the analysis of the case law of the Court of Strasbourg and, in particular, of the arrest of the Grand Chamber, 5 February 2015, *Bochan v. Ukraine*. The ECtHR court does not see the reopening of trial as stemming from the obligation to comply with Article 46 of the ECHR.*



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This position of the ECtHR is explained by the need to protect bona fide third parties, i.e. persons other than the State and the conventional victim who took part in the domestic trial concluded with the res judicata judgment and who are not necessary parties to the conventional trial, on the ground that the trial before the Strasbourg Court allows the participation of third parties in a sporadic and limited manner.

The rejection of the question is based on the assertion that, in the current state of ECtHR jurisprudence, there is no obligation to reopen civil and administrative proceedings as an appropriate individual measure of restitutio in integrum because the ECtHR itself does not wish to assume responsibility for prejudicing third parties.

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?

*As mentioned above, our legal system does not provide for revision of the final ruling not in accordance with the position of the ECtHR' s judgment.*

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

*In 2022, the largest number of established violations of the Convention in all Italian courts refers to Article 6 of the Convention, related to the length of the procedure. Next in number are violations of Article 1 of Protocol 1 to the Convention. There are no special statistics on this kind of violations.*

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)?

No it does not exist a special body.

In the field of control over the enforcement of sentences, it is worth mentioning the adoption of Law No. 1242 of 9 January 2006, according to which the Government is obliged to communicate "promptly to the Chambers" the sentences handed down by the European Court in order to allow them to be examined by the Parliamentary Standing Committees, supplemented by the Prime Ministerial Decree of 1 February 2007 entitled "Measures for the implementation of Law no. 12 of 9 January 2006, containing provisions concerning rulings of the European Court of Human Rights", which makes it possible to provide immediate information to Parliament on the Strasbourg judgments and to highlight the necessary necessary steps can be taken to prevent the State from serial condemnations and the payment of compensation.

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!

The so called 'Pinto' law, which came into force in 2001, represented



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the response in domestic law to the pressing demands from the European Court of Human Rights, overwhelmed by appeals against the abnormally long duration of national proceedings, in the name of Article 6 of the 'Convention for the Protection of Human Rights and Fundamental Freedoms', signed in Rome on 4 November 1950 and ratified by Italy with Law No. 848 of 4 August 1955

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

*Italy has not yet ratified Protocol No. 16 to the Convention.*

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.

Beyond the deflative purpose with respect to the enormous caseload of appeals to the European Court, such a mechanism could solve, at least in part, an obvious aporia in the system of the European Convention, given the circumstance that the current system of ex post verification is possible, in most cases, only in the presence of national judgments that make it very difficult, if not impossible, to activate restitutive remedies.

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

*No, because as mentioned above, the Protocol has not yet been ratified.*

### III CONSTITUTIONAL COURT

1. Is there a Constitutional Court in your country?



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*Yes, Italian legal system provide for a Constitutional Court.*

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

The Constitutional Court is the supreme body for guaranteeing and monitoring compliance and conformity with the principles contained in the Charter, not only of the laws but also of the conduct of the institutions. Under Article 134 of the Constitution, the Court rules on the legality of laws and acts of the State and the Regions that have the force of law. It is also responsible for resolving conflicts of attribution between the powers of the State, between the State and the Regions or between the Regions. It also rules on cases in which the joint session of Parliament impeaches the President of the Republic (Article 90 of the Constitution).

To this list must be added the ruling on the admissibility of abrogating referendums (Constitutional Laws 1/1953 and 253/1970) and on the legitimacy of the statutes of ordinary regions (Article 123, paragraph 2, of the Constitution).

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 jurisdictions are different: only the Constitutional Court can judge the constitutional legitimacy of laws and acts having the force of law.

The administrative court deals with disputes concerning legitimate interests (and, in some cases, subjective rights) in relations involving the public administration, judging the legality of administrative acts. It can only annul regulatory acts, it can never decide on the constitutional legitimacy of a provision of law that it must apply to decide the case.

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, in the course of a trial, the parties or the judge ex officio draw attention to the possible constitutional illegality of a provision, the judge shall, if he considers that the question is relevant to the decision of the case and is not manifestly unfounded, suspend the case and refer it to the Constitutional Court by means of a reasoned act.

The final decisions of the Constitutional Court are made by judgments and can be of 3 types:

- a) inadmissibility;
- b) upholding;
- c) dismissal.



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In the first case, the Court declares that, for various reasons, it is impossible to deal with the merit of the question raised. In the second case, the application is granted and the contested provision is declared unlawful. The effect of such a decision is similar to the annulment of the contested provision. In the case of a dismissal, the Court declares that the questions submitted are unfounded.

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?

The retroactive effect of the judgment declaring the constitutional illegality of a rule of law does not extend to exhausted relationships, that is to say, to relationships which, having arisen prior to the the judgment of the Constitutional Court, have given rise to established and intangible legal situations by virtue of the *res judicata* of judicial decisions, the finality of administrative measures which can no longer be contested, the complete exhaustion of the effects of acts of negotiation, the expiry of the statute of limitations or the period of limitation, or the completion of other acts or facts which are relevant at the substantive or procedural level.

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?

*As mentioned above the law does not provide for the possibility of changing a legally binding individual final ruling due to the position of the Constitutional Court expressed in the case regarding the constitutional lawsuit of another person.*

#### **IV RELATIONSHIP OF THE DOMESTIC SUPREME ADMINISTRATIVE JURISDICTION WITH ANOTHER DOMESTIC SUPREME COURT**

1. Is there another supreme jurisdiction in your system?

*Yes, in Italy exists the Supreme Court of Cassation.*

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

*The Italian justice system is dualistic, i.e. based on a dual track of protection (ordinary judge and administrative judge).*

*According to Article 103 of the Constitution, the division between ordinary and administrative jurisdiction is based primarily on the nature of the subjective rights claimed by private individuals against the public administration. The ordinary courts have jurisdiction over disputes concerning subjective rights, while the administrative courts have jurisdiction over disputes concerning legitimate interests. In addition, the*



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*protection of subjective rights is also entrusted to administrative jurisdiction in certain cases expressly provided for by law.*

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?

*A judgment of the Council of State may be appealed in cassation, provided that the decision:*

*- has infringed the jurisdiction in general - by exercising jurisdiction in a field reserved to the the legislation or to the discretionary power of the administration or, conversely, by refusing jurisdiction on the basis of erroneous assumption that the claim cannot be the subject a judicial function;*

*- whether has overstepped the so-called outer limits of its jurisdiction by deciding a matter which falls within the ordinary jurisdiction or another special jurisdiction, or by denying its own jurisdiction in the mistaken belief that it belongs to another court (Court of Cassation No 15476 of 23 July 2015).*

4. In your opinion, is conflict prevention possible?

*A continuous and informal dialogue between the supreme courts could prevent mutual conflicts.*

