



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?

Yes. At the Supreme Administrative Court (STA) there is a department (Legal Documentation and Information Division) which provides legal advice to STA' judges and public prosecutors. This department does not limit itself to studying the CJEU case law.

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)?

Currently, the Legal Information and Documentation Division contains 11 legal supporters, whose function is assisting the judges and public prosecutors of the Supreme Administrative Court. The assistance provided by the legal supporters may include, amongst other activities deemed relevant for the settlement and judgment of a case, the following tasks:

- Case analysis;
- Legislation research applicable to the cases;
- Research and entry in the available databases of the case-law regarding the same subject and the community case-law when the issues raised involve the application of the rules of the European law;
- Research of the legal theory regarding the points to be settled;
- Report preparation which includes, identity of the parties, subject of the dispute, pleadings of the parties, opinion of the public prosecution, facts considered to be proven and the points raised in the case;
- Comparative law analysis, where the case raises points that imply the application of community law.
- Brief presentation and exchange of information, between the lawyer and the judge, on certain aspects of a case that require a more extensive analysis, generally on the initiative of the judge.

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?

No. In Portugal, a final ruling is *res judicata* within the precise limits and terms in which it considers an expression of the principle of the legal security inherent to the rule of law (principle of inalterability of *res judicata*), under the terms of article 621 of the Code of Civil Procedure.

However, this principle is not absolute, there are exceptions enshrined in the law itself, one of which is the appeal on a point of law. The civil procedural law applicable alternatively to administrative proceedings, by virtue of Article 154 of the Procedure Code of the Administrative Courts, establishes that a final judgement may be appealed

when it is irreconcilable with a definitive decision of an international body that is binding on the Portuguese State, such as the CJEU and the ECHR (cf. item f) Article 696).

In these cases, the competent court to assess the appeal is the one that issued the decision to be reviewed: courts of first instance (single judge) and higher courts (in a regular formation of three judges).

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?

Yes. Under the terms of article 155, of the Procedure Code of the Administrative Courts, the Public Prosecutor's Office and the parties to the proceedings can ask for a review.

In administrative litigation cases, the appeal on a point of law must be presented within 60 days of the date on which the decision of the international body became final (but no later than 5 years after the decision of the Portuguese court became final (unless it concerns personality rights).

In tax litigation proceedings, an appeal is subject to expiration dates which are laid down in Article 293 of the Code of Tax Procedure and Proceedings<sup>1</sup>: 4 years from the final decision, being the request submitted within 30 days of the facts referred to in paragraph 1 of that article. However, if the review is requested by the Public Prosecutor's Office, the deadline for submitting it is three months.

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

No.

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 the event of a conflict between a decision by national court and a new decision by the CJEU, the appropriate procedural means is an appeal on a point of law, which only occurs when "the national decision is opposed by reason of non-compliance with something stated, as a necessary logical prerequisite, in the international decision"<sup>2</sup> and provided that the injured party, following the national decision, continues to suffer particularly serious negative consequences, which cannot be compensated with the reasonable reparation arbitrated by the International Court (cf. Supreme Administrative Court Decision of 7th May 2020, Case no. 01054/05.9BESNT-S1-S1)<sup>3</sup>.

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<sup>1</sup> Approved by Decree-law no. 433/99, October 26, amended by Decree-law no. 74-B/2023, August 28.

<sup>2</sup> Cf. Decision by the Supreme Administrative Court of 22nd of May 2013.

<sup>3</sup> Available at <http://www.dgsi.pt/jsta.nsf?OpenDatabase>

If the grounds for the appeal on a point of law are upheld, the decision appealed against is revoked and a new decision is made, being given to with each party 20 days to argue their case in writing (cf. item a), no. 1, Article 701 of the Code for Civil Procedure).

#### 2.4 Is a legal remedy permitted against such a ruling?

Under the terms of no. 6, article 697 of the Code for Civil Procedure, the final ruling handed down in the context of this appeal on point of law is subject to ordinary appeal (cf. no. 6, Article 697).

#### 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 Supreme Administrative Court assessed 31 appeals on a point of law. However, we do not have statistical information regarding the number of cases in which a national court decision has changed a decision for being opposite to posterior CJEU decision.

#### 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!

We don't have information that Portuguese legislation has been changed due to conflicts between national courts case law and the CJEU case law. It should be noted, however, that Decree-Law no. 303/2007, of 24 August, introduced a new ground for reviewing court judgements into the Code of Civil Procedure, in an attempt to address the lack of internal means of enforcing CJEU decisions that had existed until then.

## 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?

Yes. At the Supreme Administrative Court (STA) there is a department (Legal Documentation and Information Division) which provides legal support to STA' judges and judges from the Public Prosecutor office. This department does not limit itself to studying the CJEU case law.

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)?

Please, see answer to question 1.1., dedicated to CJEU.

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

Once the Convention was ratified by Portugal, it became binding in the Portuguese state. Meaning that the rules of international law form an integral part of Portuguese law and are lower than constitutional rules - being unconstitutional if they are in breach with the constitution (Article 277) - but higher than ordinary laws.

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

According to the Constitution's article 8, the courts apply the Convention directly.

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

No.

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?

Yes, this is a possible reason for overturning the decision of a lower court. In general terms, there will be an appeal against the lower court's decision.

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?

There is the possibility of an appeal on a point of law on the final ruling, since the national decision is being incompatible with the final decision made by the ECtHR and provided that the nature of the violation of the ECHR allows for *restitutio in integrum*.

Although, natural restitution is not always possible, under article 41 of the ECHR, if the Court finds that there has been a violation of the Convention or its protocols, but domestic law does not allow the consequences of that violation to be remedied other than imperfectly, the Court will award the injured party reparatory damages. In these situations, the ECtHR's decision acts as substitute justice.

4.1. Must the party react within a prescribed deadline?

Yes (please see answer to question CJEU/2.1.).

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*?

No.

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

One judge if the case is in a court of first instance, three judges if the case is in a court of appeal (2nd 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?

See answer to question CJEU/2.3.

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?

Within the timeframe (2012-2022), the Supreme Administrative Court analysed 31 appeals on a point of law. We do not have statistical data regarding the number of cases in which the court decision was changed that was contrary to the CJEU's subsequent position was changed.

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

The violation of the right to a decision within a reasonable time (enshrined in article 6 of the ECHR and in no. 4, article 20 of the Constitution) has been at the root of administrative litigation. The main reason for these delays is the lack of judges and technical advisors to provide technical advice and counselling to judges.

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.

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!

We don't have any information that Portuguese legislation has been changed due to conflicts between the national and the ECtHR case law. It should be noted, however, that the Decree-Law no. 303/2007, of 24 August, introduced a new ground for reviewing court judgements into the Code of Civil Procedure, in an attempt to address the lack of internal means of enforcing ECtHR decisions that had existed until then.

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

Portugal has not yet ratified Protocol 16, which allows member states to request an advisory opinion from the Court.

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.

Yes. Protocol No. 16 allows the member states Superior Courts to seek an advisory opinion to the Court, encouraging national courts case law harmonisation within the

European area, consequently guaranteeing an increased protection of human rights.

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

As previously stated, Portugal has not yet ratified Protocol No.16 of the Convention.



### III CONSTITUTIONAL COURT

1. Is there a Constitutional Court in your country?

Yes, the Constitutional Court, created by the 1982 constitutional revision, fulfils its jurisdiction at a national level and has its headquarters in Lisbon.

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

The first and most important competence attributed to the Constitutional Court refers to normative control, *i.e.* monitoring of the constitutionality and legality of rules, under the terms of articles 223, no.1 and 277 of the Constitution.

Besides these, the Constitutional Court exercises others in various procedural areas that are fundamental to regulate the institutional life of the State:

- Competences concerning the President of the Republic;
- Competences concerning parliamentary litigation;
- Competences concerning elections;
- Competences concerning political parties and coalitions;
- Competences concerning organisations that display fascist ideology;
- Competences concerning the verification of the constitutionality and legality of national, regional and local referenda;
- Competences concerning political office holders' declarations of assets and income;
- Competences regarding political office holder' declarations of incompatibilities and inabilities to comply.

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

According to Constitution' article 204, all Portuguese courts can assess and decide constitutionality questions that arises in the submitted cases to their judgement, by setting aside the rules which they consider to be unconstitutional. However, when admissible, their decisions can be appealed to the Constitutional Court, which acts as the final court of appeal in matters of constitutionality.

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?

In the light of the Constitution, it is authorised to interpret the contested provision.

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 situation described above can lead to an appeal to the Constitutional Court.

The deadline to present the appeal is 10 days from the notification of the decision you wish to present it (to appeal).

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?

If the final decision has not the force of *res judicata*, the parties can appeal under the general terms. However, the Portuguese legal system, in an administrative dispute, does not give the parties the possibility to ask to repeal final decisions which do not agree with the Constitutional Court's decision in someone else's constitutional action, since this Superior Court decision regarding an unconstitutional norm only has effect in that particular case ("inter partes" effectiveness), *i.e.* it only applies to the case that gave rise to the appeal.

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

1. Is there another supreme jurisdiction in your system?

Yes. The Constitution of the Portuguese Republic enshrines two distinct jurisdictions: the common and the administrative. It also provides for the existence of the Constitutional Court and the Court of Auditors.

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

According to the judicial organisation outlined in the Constitution and the Judicial Organisation Act<sup>4</sup>:

- The administrative and tax courts are responsible for judging disputes arising from administrative and tax relations, which are, as a rule, relations between private individuals (citizens and companies) and the Public Administration. The administrative and tax jurisdiction comprises the Supreme Administrative Court, the central administrative courts (2<sup>nd</sup> instance, courts of appeal) and the administrative courts and tax courts (1<sup>st</sup> instance courts).

- The judicial courts (common courts) are responsible for judging all matters that are not assigned to other judicial orders. The common jurisdiction includes the Supreme Court of Justice, the Courts of Appeal (2<sup>nd</sup> instance, courts of appeal) and the district courts (1<sup>st</sup> instance courts).

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?

The resolution of jurisdictional conflicts between judicial courts and administrative and tax courts is carried out by the Court of Conflicts according with Law no. 91/2019, September 4. It should be noted that there is no conflict of jurisdiction, so long as, the decisions handed down on that matter are open to an ordinary appeal.

4. In your opinion, is conflict prevention possible?

Yes, Law no. 91/2019, September 4, provides “preliminary ruling consultation”. Under that law, where, during proceedings or appeal proceedings, doubts are founded on the question of the competent court, any court may, of its own motion or at the request of one of the parties, bring an action before the Court of Conflicts. (Except in urgent cases).

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<sup>4</sup> Approved by Law no. 62/2013, August 26.