



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?

*The Supreme Administrative Court of Sweden does not have a special department devoted to the study of the development of European law. Every law clerk and justice is supposed to follow relevant developments in regard of the cases being decided by the court and are assisted in this by the courts' access to legal sources of various kinds and our librarian. There is no specific regulation on this matter for the Supreme Administrative court or any other courts in Sweden. However, the National Agency for Administration of the courts is publishing a newsletter 10 times a year that highlights important developments concerning the application of EU-law both in national courts and in the CJEU. It is generally around 20-25 pages and consists of short summaries and relevant links for further information.*

*Under the Courts Act, the High Administrative Court of the Republic of Croatia has established a department for monitoring European regulations and judicial practice of the Court of the European Union and the European Court of Human Rights. The existence of such a department is prescribed for all high courts in the Republic of Croatia.*

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

*Not relevant.*

*The department is headed by a judge. A judge and three legal secretaries were assigned to the Department. The legal secretaries have graduated from the Faculty of Law and passed the bar exam.*

*The Department regularly monitors the judicial practice of European courts and singles out decisions relevant to administrative disputes. The selected decisions are studied in the department and sorted into an internal (court) database available to all judges.*

*The department has an advisory role, and responds to judges' inquiries about specific judicial practice, that is, about the positions of the CJEU on certain issues.*

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

*In Swedish law there is a general possibility to reopen a decided case if later developments shows that this was based on an obvious misinterpretation of the law or the facts or if new evidence clearly shows that the case was wrongly decided. The issue of whether a new decision by the CJEU that puts into question the legal*



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*reasoning of an already decided case has been dealt with by the Supreme Administrative Court in RÅ 2010 ref. 61 and HFD 2018 not 28), where the court found that the mistake done by the lower court was not of the kind that qualified for reopening. But this does not mean that in other cases the criteria for reopening may be fulfilled. It is important to point out that reopening is thus not an automatic consequence of the later discovery of a mistaken interpretation of EU-law by a national court.*

*It may be mentioned that many administrative issues are of the nature that an individual can start new procedures again and again concerning the same issue. Examples may be permits to sell alcohol or a social benefit due to illness. In such cases, new case-law from international courts on the interpretation of relevant legal material is easier to handle by a new application to the authorities with reference to that case-law, instead of trying to reopen an old decision that now seems wrongly decided.*

*Croatian legislation does not provide for a procedure for changing a final ruling due to a different later decision or position of the CJEU. Even otherwise, incorrect application of substantive law is not prescribed as a reason for the renewal of a dispute concluded by a final ruling.*

*However, if a party were to propose renewing the dispute for a legally prescribed reason (for example, knowledge of new facts or evidence), it would be possible to apply the newer position of the CJEU in the renewed dispute. The High Administrative Court decides on the renewal of the dispute in a regular formation – a panel of three judges, and the administrative court of first instance as a single judge.*

*According to Croatian legislation, a renewal of the dispute cannot be requested even if the plaintiff considers that the court in the case in which he raised the previous question neglected the interpretation of Union law (see in this sense judgment C-261/21 of 7 July 2022, ECLI:EU:C:2022:534).*

*Individuals who have been harmed by a violation of the rights granted to them on the basis of Union law could invoke the responsibility of the Member State and submit a claim for damages if the conditions regarding sufficient seriousness of the violation and the existence of its direct causal connection with the damage suffered are met (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, item 80).*

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?

*It is only the parties that can request a reopening of a decided case and there is no time-limit to such a request*

*As stated 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?

No, see above.

*There is no possibility for the Croatian administrative court to ex officio repeal a final ruling because it is contrary to a later decision of the CJEU. The Croatian Administrative Case Litigation Act does not foresee the possibility for the court to renew an administrative dispute ex officio.*

*Union law does not require a national court to exclude from application the national procedural rules on the basis of which a court ruling becomes final, even though this would correct a national situation that is not in accordance with Union law (see *Târșia* judgment C-69/14 of 6 October 2015, ECLI:EU:C:2015:662, p.29). Therefore, the principle of *res judicata* is one of the most serious limitations for national courts regarding the obligation to apply Union law ex officio.*

*In cases C-453/00 *Kühne & Heitz NV* (judgment of 13 January 2004, ECLI:EU:C:2004:17) and C-234/04 *Kapferer* (judgment of 16 March 2006, ECLI:EU:C:2006:178) the CJEU considered whether the principle of *res judicata* justifies the limitation of the court to ex officio review and modify already final rulings in which Union law was incorrectly applied. The CJEU, as a rule, gave priority to the principle of *res judicata*, considering that it is of particular importance for preserving legal certainty and the stability of the legal system. However, he still opened the possibility that if national procedural rules allow courts to review final judgments, they should do so, under certain assumptions, by invoking the principle of equivalence, even when final judgments violate Union law. The assumptions are defined in the aforementioned case C-453/00, starting from the principle of loyal cooperation from Article 4, paragraph 3 of the TEU.*

*In case C-234/04, the CJEU concluded that it was not possible to adequately apply the rules from case C-453/00 because the national procedural rules did not allow the national court to modify an already final court judgment.*

*In case C-40/08 *Asturcom* (judgment of 6 October 2009, ECLI:EU:C:2009:615), the CJEU gave priority to the principle of *res judicata* over requirements for the effective protection of subjective rights derived from Union law, but it follows that the CJEU neither does not give absolute priority to the principle of *res judicata* nor the principle of effective protection. The CJEU assessed the application of the principle of *res judicata* with regard to the party's ability to submit legal remedies that would prevent the ruling from becoming final, specifically in relation to the passivity of the party that failed to submit a legal remedy.*

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?



*The only realistic procedure open to a private party in such a case is to either request a reopening as described above or sue the State (as responsible for its courts) for damages due to the wrongful interpretation of EU-law.*

*In the first case, the reopening of a case is just that – it starts all over again and any outcome of the new case is theoretically possible (as further new evidence may appear etc.) even if it in practice often is decided in favour of the complainant, for example revoking the original judgement. A request for reopening a case is done at a higher court than the one who decided the challenged decision. If it concerns a decision by a supreme court, the court deals with the request itself, of course paying attention to issues of the composition of the panel involved.*

*In the latter case the parties involved in the original dispute or persons (physical or legal) affected by that dispute may sue. Such a case would be dealt with within the general courts (not the administrative courts) and would involve tort law and relevant civil law procedures. This procedure will not affect the validity of the original judgement whatever the outcome. There is however the extra-ordinary possibility of „grace“, stipulated in the constitution 12 Ch 9 §, where the Government may abolish the legal consequences of any legal decision under certain circumstances. This can be applied for by the individual and are in rare and special cases granted.*

*If the court accepts the party's proposal to renew the dispute (for some other reason, as the reason for non-conformity with the later decision of the CJEU is not provided as a reason for renewing the dispute), the previous ruling will be repealed in whole or in part.*

*Before making a decision, the court will give each party the opportunity to express their views on the requests and statements of other parties and on all factual and legal issues that are the subject of the dispute. This enables the parties to present more recent views to the CJEU.*

2.4 Is a legal remedy permitted against such a ruling?

*A decision not to allow for a reopening may be appealed. The decision of the court deciding a reopened case may be appealed as a „normal“ case would.*

*If the ruling of the administrative court of first instance was made in the renewed dispute, the parties have the option of filing an appeal with the High Administrative Court of the Republic of Croatia.*

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 does not have any statistics on this topic, but it have dealt with one such case as mentioned above (HFD 2018 not 28), in which the request for reopening was not granted. The number of cases dealt with by the court of*





*appeals (kammarrätterna) is unknown, but a qualified guess would be no more than a dozen and probably fewer than that.*

*The aforementioned procedure is not prescribed, and there is no information about the number of renewed disputes (for some other reason) in which the court applied a later decision by the CJEU.*

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 have no information on specific legislative changes that are due to national case law in conflict with case from the CJEU over a longer period of time – that is, that the national courts have not adopted to the new situation even it has been clearly stated by CJEU. However, there are several occasions in which legislations has been changed after it was realized that it was not in conformity with newly developed case-law from CJEU. In the case HFD 2018 ref. 38, the Supreme Administrative Court requested a preliminary ruling on certain issues concerning pensions and the system for calculating different pensions from different member-states. The CJEU however found that the issue in the case did not concern a “pension” in the sense of EU-law, but rather a social minimum benefit. This led to some legislative changes in the Swedish pension-system (prop. 2021/22:237) which was adopted by parliament in April 2022.*

*We have no information that the legislation would change for the reasons mentioned.*

## II ECtHR

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

*The Supreme Administrative Court of Sweden does not have a special department devoted to the study of the development of European law. Every law clerk and justice are supposed to follow relevant developments in regard of the cases being decided by the court and are assisted in this by the courts’ access to legal sources of various kinds and our librarian. There is no specific regulation on this matter for the Supreme Administrative court or any other courts in Sweden.*

*The High Administrative Court of the Republic of Croatia has established a department for monitoring European regulations and judicial practice of the Court of Justice of the European Union and the European Court of Human Rights. The existence of such a department is prescribed for all high courts in the Republic of Croatia.*



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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 above.*

*The department is headed by a judge. Another judge and three legal secretaries were assigned to the department. The legal secretaries have graduated from the Faculty of Law and passed the bar exam.*

*The department regularly monitors the judicial practice of European courts and singles out rulings relevant to administrative disputes. The selected rulings are studied in the department and sorted into an internal (court) database available to all judges.*

*The department has an advisory role, and it responds to judges' inquiries about concrete judicial practice, that is, about ECtHR positions on certain issues.*

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

*The Convention has a semi-constitutional status as well as being adopted as law. The constitution provides that legislation may not be passed that is contrary to the Convention, thus making it unconstitutional to breach the convention even if the convention itself does not formally have constitutional status. The law adopting the Convention is just an ordinary law, turning the text of the convention into Swedish law. Otherwise, Sweden is a "dualist" country when it comes to the internal effects of international law in the national legal system, i.e. a national regulation or similar measure is necessary in order for international law to have full effect (but it can affect interpretation etc even without such measures).*

*According to the Constitution of the Republic of Croatia, international treaties (and thus the Convention) that have been concluded and confirmed in accordance with the Constitution and published and are in force form part of the internal legal order of the Republic of Croatia, and are legally binding above the Law.*

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

*The Convention has often been applied directly but also as a tool for interpreting other laws concerning the rights of individuals.*

*Courts apply the Convention directly.*

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



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No. However, the case-law of the Supreme Administrative Court will, due to its role as giving precedence, have special impact on how administrative agencies and lower courts apply the Convention.

*Acting on an appeal, the High Administrative Court of the Republic of Croatia controls whether the administrative courts applied the Convention and whether the Convention was applied correctly.*

*Furthermore, the Constitutional Court of the Republic of Croatia, acting on constitutional complaints, controls the application of the Convention.*

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, if a higher court find that the decision of an administrative agency or the ruling of a lower court is contrary to the Convention the appeal will be successful and the decision or ruling repealed. If the conflict with the convention solely pertains to the issue of reasonable time in Article 6, repeal will not be the usual consequence, but rather it will turn into a case of damages.*

*According to the practice of the High Administrative Court of the Republic of Croatia, if that court decides on an appeal against the ruling of the administrative court and determines that there has been a violation of the Convention, it will accept the appeal and repeal the ruling of the administrative court.*

*The ruling of the High Administrative Court of the Republic of Croatia is final on the date of its adoption.*

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?

*In Swedish law there is a general possibility to reopen a decided case if later developments shows that this was based on an obvious misinterpretation of the law or the facts or if new evidence clearly shows that the case was wrongly decided. This is also possible in cases where ECtHR finds that Swedish authorities are acting contrary to the Convention. Otherwise, staying national procedures based on the faulty acts are an option as well as bringing claims for damages against the State. After a development in case-law from the Supreme Court during almost a decade, special legislation was introduced in 2018 to cover these situations in the Act of damages Ch 3 § 4.*

*As mentioned above section 1 2, in many administrative law cases, a more expedient way to reach a new and more favourable decision would however be to apply again for the administrative permit or benefit that was previously denied, instead of requesting a reopening of an old and closed case.*





*Based on the Administrative Case Litigation Act, the concluded dispute will be renewed at the request of the party if the final judgment of the ECtHR decided on the violation of fundamental human rights or freedoms in a different way than the final judgment.*

4.1. Must the party react within a prescribed deadline?

*Claims for damages follow ordinary rules of prescription in civil procedural law. There is no formal deadline for a request of reopening a case.*

*The proposal for renewal of the dispute shall be submitted no later than within 30 days from the day when the party became aware of the reason for renewal.*

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.

*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?

*In a reopened case, the administrative court decides in a regular formation, as the case is brought forward as if it was new.*

*In the renewed dispute, the High Administrative Court decides in a regular formation – three judges, and the administrative court of first instance as a single judge.*

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?

*These issues are also dealt with by the reopening procedure in Swedish law, see above under section 1 2 and 1 4.*

*In the event that the parties were to request the renewal of a dispute concluded by a final court ruling, due to the fact that the ECtHR had taken a different position in another case, the court would have to bear in mind the positions of the Constitutional Court of*



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*the Republic of Croatia expressed in ruling number: U-III-3304/2011 of 23 January 2013, point 32 (Official Gazette, number 13/13), according to which "in matters of enforcement of judgments of the European Court, domestic judicial practice must be constructed in such a way that it respects the international legal obligations arising for the Republic of Croatia from the Convention. It must be in accordance with the aforementioned relevant legal positions and practice of the European Court, because they are binding international legal standards for the Republic of Croatia".*

*The deadline for submitting a proposal for the renewal of the dispute is the same as in the case that it is submitted by the party in whose case the ECtHR found a violation of the Convention: no later than 30 days from the day on which it learned about the reason for the renewal.*

*In a renewed dispute, each party must be given the opportunity to comment on the requests and statements of the other parties and on all factual and legal issues that are the subject of the dispute.*

*If the ruling in the renewed dispute was made by an administrative court, an appeal against such ruling would be allowed under the conditions of the Administrative Case Litigation Act, and if the ruling was made by the High Administrative Court of the Republic of Croatia, the ruling becomes final on the day it is made.*

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?

*We do not have statistics on these issues at hand for the Supreme Administrative Court or for administrative courts nationally. Most likely it has happened in some cases, but as explained above (section I 2 och I 4) cornering substantial matters of law, a new application from the individual would usually a more rational way of proceeding.*

*In the somewhat frequent cases which concern the right to a fair trial within reasonable time, Swedish legislation gives an individual who is complaining against a court's decision on that ground a possibility to sue the State for damages (see above section II 4). A higher administrative court may on appeal adjust its judgement in order to give an individual that has been subject to a violation of reasonable time in the lower instances, but this is not always possible. For example, if a person applying for the right to sell alcohol is deemed (perhaps due to earlier criminal activities) not suitable for such a licence and the appeal of that decision is handled very slowly, the higher court cannot award the licence as compensation for the delay – in such cases damages is often the only way to address the violation.*

*There is a simplified procedure for individuals claiming damages from the State, in that they can apply to the Chancellor of Justice, who can grant such applications. A recent example would be the decision to grant damages to the religious organisation Jehovah's Witnesses (decision 21 October 2021, dnr 2020/4305) due to slow handling of that organisation's application for state subsidies according to national legislation. The relevant time of the proceedings was ten years of which at least six years was due*



to the decisionmakers' inactivity and the awarded damages amounted to more than eight million SEK (700 000 EURO). If CoJ does not grant the application, the only way forward is to sue the State in a general court.

*The most common reason for requesting the renewal of a dispute in the sense of the above was due to a violation of the right to a fair trial (which is the most common cause of established violations of the Convention in relation to the Republic of Croatia).*

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

*The type of administrative cases that most frequently involves substantial Convention rights are such that concerns Article 8 (private and family life) and protocol 1 Article 1 (property). Otherwise, cases concerning Article 6 and the reasonable time of court proceedings are not uncommon. However, as explained above (4) these cases are most often resolved in the general courts as cases of damages.*

*In 2022, the largest number of established violations of the Convention in all courts in the Republic of Croatia (therefore also outside the administrative dispute) refer to Article 6 of the Convention (12 violations), related to the length of the procedure, violations of the ne bis in idem principle, and the bias of the courts. Next in number are violations of Article 1 of Protocol 1 to the Convention (9 violations).*

*No special statistics are kept on violations determined in administrative disputes.*

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, there is no such special body. The special powers of the Chancellor of Justice to award damages due to violations of the Convention (above 4) is however of importance here.*

*In the Republic of Croatia, the Expert Council for the Execution of Judgments and Decisions of the European Court of Human Rights was established as a multi-institutional body responsible for the identification of measures for the execution of concrete judgments of the ECtHR and for the supervision of their implementation.*

*The Expert Council is composed of representatives of all ministries, the Constitutional Court of the Republic of Croatia, the Supreme Court of the Republic of Croatia, the State Attorney's Office of the Republic of Croatia, high courts and certain other state authorities.*

*The members of the Expert Council are obliged to consider every judgment of the ECtHR against the Republic of Croatia from the point of view of the jurisdiction of the bodies they represent and, in the event that there is a need for this, to propose concrete measures that should be implemented within the framework of these jurisdictions in*



*order to avoid the repetition of the same violation of the Convention in future similar cases. It follows that a mechanism has been established for the prevention of future violations of the Convention, that is, for the avoidance of inconsistencies between the practice of national courts and the ECtHR.*

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 administrative procedural law has changed in many ways due to the influence of case-law from ECtHR on Article 6 and the right to an access to court included in that article. Until 1990's many administrative decisions in Sweden was appealed from a regional agency to a national authority and then to the Government. Appeal to administrative courts was only possible in explicitly regulated cases. As case-law showed that many such disputes fell within the "civil" limb of Article 6, legislative change was necessary to shift these cases to the administrative courts. In 2017 a comprehensive reform of the Administrative Act (2017:900) in which a new general rule was introduced in that all administrative decisions are appealed to an administrative court (40 §), unless otherwise regulated in law.*

*In the judgment Kutić v. Croatia (application no. 48778/99) of 1 March 2002, the ECtHR "reiterates that Article 6, paragraph 1 of the Convention guarantees the right of access to court for the resolution of civil disputes." The court considers that this right of access to the court includes not only the right to initiate proceedings, but also the right to "resolve" the dispute by the court...". Since the decisions of the Croatian courts interrupted the decision-making procedures on specific damages, the said decisions were in conflict with the ECtHR position cited. Therefore, the legislation was amended so that the Law on Liability for Damage Caused by Terrorist Acts and Public Demonstrations, which entered into force on 31 July 2003, stipulates that the interrupted procedures for compensation of damages will continue.*

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

*Not yet, but it is just now under consideration by the Government (Ds 2023:7) and will probably be put before parliament before too long.*

*The Republic of Croatia 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.

*As the purpose of the mechanism of an advisory opinion is to secure the correct interpretation of the Convention, it seems rather obvious that it could have such a positive effect. However, as only the supreme courts are eligible to ask for advisory opinions other domestic courts will not benefit as much from this procedure. And a lower court can of course be somewhat bewildered by the legal significance of an advisory opinion if for some reason the supreme court involved would not follow it.*



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*The Institute of Advisory Opinions could prevent national courts from making decisions contrary to the practices of the ECtHR, because it is possible for the court before which the proceedings are conducted to receive a relevant answer related to the interpretation or application of the Convention before the proceedings end.*

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.

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



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### III CONSTITUTIONAL COURT

1. Is there a Constitutional Court in your country?

*No, there is no Constitutional Court in Sweden.*

*Yes, there is a Constitutional Court of the Republic of Croatia in the Republic of Croatia.*

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

*The Constitutional Court of the Republic of Croatia:*

- decides on the compatibility of laws with the Constitution,*
- decides on the conformity of other regulations with the Constitution and the law,*
- decides on constitutional lawsuits against individual decisions of state bodies, bodies of units of local and regional self-government, and legal entities with public powers when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution Republic of Croatia,*
- monitors the implementation of constitutionality and legality and reports to the Croatian Parliament on observed instances of unconstitutionality and illegality*
- ,- solves the conflict of jurisdiction between the bodies of the legislative, executive and judicial authorities,*
- decides, in accordance with the Constitution, on the responsibility of the President of the Republic,*
- supervises the constitutionality of the programmes and activities of political parties and may, in accordance with the Constitution, prohibit their work,*
- supervises the constitutionality and legality of elections and state referendums and resolves electoral disputes that are not within the jurisdiction of the courts,*
- performs other tasks determined by 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!

*Yes, all the courts in Sweden have the power of judicial review – i.e. finding a law or decision contrary to higher law (the constitution) and therefore not applicable. The administrative courts' also have an important task in checking the legality of administrative decisions generally (even if not in conflict with higher law). These powers are only used in concrete cases brought before the courts by affected individuals or administrative agencies (ex post).*

*Abstract review (ex ante) is done by a special judicial body, the Legislative Council (Lagrådet) which writes advisory opinions on draft bills before they are presented to*



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*parliament, checking among other things the constitutionality of the proposed legislation. The council's opinions are not legally binding, and the Government is free to regard or disregard them. However, as the council consists of justices from the two supreme courts, who serve for two years in the council instead of in the court, disregarding the opinion of the council in a constitutional matter may result in legal proceedings on judicial review after a law has passed parliament. In such proceedings the opinion of the council have no formal weight but may still influence the court's interpretation of the constitution and the relevant legislation.*

*Yes, the High Administrative Court of the Republic of Croatia has jurisdiction similar to that of the Constitutional Court in administrative disputes, the subject of which is the assessment of the legality of a general act (regulation) of a unit of local and regional self-government, a legal entity that has public authority and a legal entity that performs public service.*

*In this dispute, namely, it is assessed whether the general act as an abstract and general regulation is consistent with the law and the statute of a body governed by public law.*

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?

As we do not have a constitutional court, SAC is authorized to handle the case itself (see 2 above).

*Different treatment is foreseen depending on whether the law or subordinate regulation is unconstitutional.*

*If the court determines in the proceedings that the law it should apply, that is, some of its provisions are not in accordance with the Constitution, it will stop the proceedings and submit to the Constitutional Court of the Republic of Croatia a request for an assessment of the conformity of the law, that is, some of its provisions with the Constitution.*

*However, if the court determines in the proceedings that another regulation that should be applied, that is, some of its provisions are not in accordance with the Constitution and the law, it will apply the law directly to the specific case, and it will submit a request to the Constitutional Court of the Republic of Croatia for an assessment of the conformity of the contested regulation, that is, some of its provisions with the Constitution and the law.*

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?



*In the Swedish system, it is here again a question of using the general rules for reopening decided cases (see section 1 2 and 4 above). There is a theoretical discussion in Swedish public law on a mistake of law being so obvious that it would be “null and void” (nullitet) but that reasoning has not been used in case-law as far as known. Again, the generous possibility in Swedish law to make the same (or almost the same) claim or application over and over again in practice not so attractive to request a reopening instead of just starting a new case, now with the ruling on constitutionality in mind.*

*According to Constitutional Court case law, every natural and legal person can, in a renewed procedure, obtain an amendment of a valid individual act that violates his right, which was adopted on the basis of a provision of a law or other regulation that was abolished by the Constitutional Court of the Republic of Croatia.*

*A request to amend a valid individual act can be submitted within six months from the date of publication of the ruling of the Constitutional Court in the Official Gazette of the Republic of Croatia.*

*If the High Administrative Court of the Republic of Croatia repeals an illegal general act, the person who submitted a request for legality assessment to that court can amend the individual decision in the renewed procedure.*

*The request is submitted within three months from the publication of the judgment of the High Administrative Court of the Republic of Croatia in the Official Gazette of the Republic of Croatia.*

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?

*Not applicable to the Swedish legal situation.*

*The law does not provide for the possibility of changing a legally binding individual ruling due to the position of the Constitutional Court of the Republic of Croatia 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, the Supreme Court of Sweden.

*Yes, the Supreme Court of the Republic of Croatia exists in the Republic of Croatia.*

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



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*The Supreme Court is the highest court of the general courts in Sweden. The general courts deal with criminal law and civil law cases. The Supreme administrative Court of Sweden is the highest court of the administrative courts. Administrative courts deal with appealed decisions from the public administration, local, region and national.*

*The two supreme courts are courts of precedence, i.e. appeal is subject to a leave to appeal system (filtering) and the courts do not make a substantial decision in the absolute majority of cases- More than 90% of appeals are not given leave to appeal and are thus not tried in substance. The courts function is almost solely to give guidance on the interpretation of law in cases where such guidance has shown itself necessary (as if two or more courts below make different interpretations of the same law).*

*The Supreme Administrative Court also has the function of legality review (rättsprövning), which is a special procedure for controlling the legality of decisions by the Government (in the narrow sense of the cabinet) in issues that concern the civil limb of Article 6 of the Convention. If the government's decision is found to be illegal, it is repealed and the case is sent back for new handling. Individuals wishing to apply for legality review has to do so within 3 months of the decision they are complaining about.*

*The Supreme Court of the Republic of Croatia ensures the uniform application of law and the equality of all in its application.*

*Due to the above, the State Attorney's Office of the Republic of Croatia is authorised to submit a request to the Supreme Court of the Republic of Croatia for an extraordinary review of the legality of the final ruling of the High Administrative Court of the Republic of Croatia, on the basis of breaches of the law.*

*The request is submitted within six months from the date of delivery of the final ruling to the parties.*

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?

*There is no formal mechanism for counteracting such a situation. Of course one supreme court that is deciding a case involving an issue already dealt with by other court will inform itself of that decision and it will probably be a factor in the reasoning of the court when it decides.*

*The conflict of opinions of different courts can be eliminated in the procedure for a constitutional complaint, because the Constitutional Court of the Republic of Croatia observes the stability of judicial practice in the light of the realisation of the principle of legal certainty.*

4. In your opinion, is conflict prevention possible?

The Swedish experience is that conflict is very unusual, we have in modern times (after the second world war) only one clear example concerning the division of competences between the different court-systems. Both of the supreme courts came in the middle of



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2000:s to the conclusion that the other court-system was competent to judge on a specific issue, thus leaving the individual with no access to court. This was however quickly amended by new case-law and then legislation. The individual in question was granted damages.

Informal dialogue and more formal contacts between the courts and justices can also migrate the risks of getting in a situation of conflict.

*A proposal on reform is as we write this under way (SOU 2023:12), opening the possibility for the two supreme courts to cooperate more closely if necessary. In essence it concerns the use of a judge from one court in cases dealt with by the other court. We already do this in certain cases where it is deemed appropriate, but what is discussed now is a new special formation of 5 judges from the supreme court having the case and 4 invited judges from the other supreme court, making up a special panel of 9. Such a composition could be used in constitutional cases or cases concerning the Convention which have impact on both court-systems. It would also be a further mechanism to avoid conflicts between the courts.*

*It would be possible to prevent mutual conflict by consistently applying the views of the CJEU, ECtHR and the Constitutional Court in court proceedings and by informal dialogue between the courts.*

