SEMINAR ORGANISED BY THE SUPREME ADMINISTRATIVE COURT OF FINLAND

IN COOPERATION WITH ACA-EUROPE

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GENERAL REPORT

"MAPPING THE MULTILEVEL PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPEAN ADMINISTRATIVE COURTS"

1. INTRODUCTION

The upcoming ACA-Europe seminar in Inari, scheduled for May 25–28, 2024, will continue exploring the vertical interactions between national supreme administrative jurisdictions and both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This seminar builds on previous insights from the ACA-Europe seminar in Stockholm (October 9–10, 2023), which examined the relationship between national courts and the CJEU's preliminary rulings procedure, and the seminar in Zagreb (February 19, 2024), which addressed conflicts between various domestic and European court rulings.

The seminar in Inari will aim to outline national and European legal frameworks of multilevel protection of fundamental rights from the perspective of European supreme administrative jurisdictions. Viewed through the lens of domestic adjudication, it is understood that individual rights recognized as fundamental by the respective legal orders derive from various sources that may apply concurrently. Individual rights enshrined in national constitutions may intersect with analogous rights established by the European Convention on Human Rights (ECHR), UN human rights conventions, and the Charter of Fundamental Rights of the European Union (CFREU).

This overlap among various legal systems is intensified by their distinct institutional structures: typically, the authority to interpret the national constitution is assigned to a specific national entity or a court, like the constitutional court, whereas the ECtHR and the CJEU occupy analogous roles within their own legal systems. Yet there exists no definitive constitutional hierarchy between European and national legal regimes. Moreover, national constitutional systems may provide different institutional solutions to the applicability of constitutional and human rights in domestic courts.

The ACA-Europe seminar in Inari aims to clarify how the vertical dialogue operates in the context of national administrative jurisdictions and multilevel protection of fundamental rights. For this purpose, the questionnaire distributed to participating institutions in preparation for the seminar was designed to help us understand both the constitutional boundaries within which national administrative jurisdictions

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function, as well as the specific legal mechanisms and principles that support the vertical dialogue between national and European courts.

This general report is based on a semi-structured questionnaire comprising 22 questions. In most cases, it did not call for statistically rigorous or comprehensive responses. Rather, a qualitative approach was employed. We believe that interpreting trends, patterns, and subjective estimates is especially valuable in this legal domain where expert experience and intuition are essential for comprehending complex phenomena such as the vertical dialogue between national and European courts.

The questionnaire was answered by 33 institutions. The report does not list all the responses. Instead, to enable fruitful discussions on a structured basis, the report seeks to provide a representative set of problems, solutions and case law detailed in the country and institution specific responses. To further facilitate the discussion, the report includes charts and tables to visualize similarities and differences between jurisdictions. In addition, further background information of the responding institutions can be found in Annex 1 to this report.

The outline of the report follows the questionnaire. Accordingly, it is divided into three sections, this introduction being the first.

The second section focuses on the outline of different systems for constitutional control as well as the legal framework addressing the general applicability of fundamental rights norms in the national legal systems.

The third and last section addresses more closely the mechanisms of interplay of national and European fundamental rights and international human rights norms.

2. NATIONAL LEGAL FRAMEWORKS: CONSTITUTIONAL CONTROL AND THE DOMESTIC APPLICABILITY OF FUNDAMENTAL RIGHTS NORMS

The increasing interconnectedness between national courts, the ECtHR, and the CJEU reflects the complexity of legal integration in Europe. Given the absence of an ultimate constitutional hierarchy among these jurisdictions, the protection of fundamental rights in Europe is often described as a system of multilevel constitutionalism.[1] However, from the perspective of national constitutions and administrative jurisdictions, there is significant national variation in how this multilevel system operates. A central part of this variation stems from constitutional differences especially with regard to the questions about constitutional control of parliamentary legislation and the doctrines involving the applicability of fundamental rights norms in national courts.

National constitutional systems may feature a specific body—such as a constitutional court—tasked with the specific duty of reviewing the constitutionality of national legislation, whether in abstract terms (*in abstracto*) or in specific cases (*in concreto*), or both. Following this, the authority of the supreme administrative courts to enforce fundamental rights is typically constrained by the powers of the constitutional court regarding the same issue. At the other polar opposite, the authority to review the

[1] See already Ingolf Pernice, Multilevel constitutionalism in the European Union. European Law Review Vol.27, No.5, October 2002, p 511-529.

constitutionality of national legislation might be vested solely outside the judiciary, such as in the parliament or a specific parliamentary body. Consequently, courts may either be prohibited from reviewing or applying fundamental rights norms in their rulings, or they may be permitted to do so but only within a restricted scope. Between these counterparts, there exist also mixed models.

This constitutional architecture does not necessarily imply that the protection of individual rights, as stipulated by the ECHR and the CFREU, would adhere to similar principles. In fact, and based on the results of the questionnaire forming the basis for this report, the role of supreme administrative jurisdictions in this area can significantly differ from their role in national constitutional adjudication.

The primary objective of the first part of this general report is to provide a groundwork for uncovering these national differences, therefore enabling a deeper understanding of the multifaceted relationship between national and European legal systems.

2.1 The Constitution and its applicability in Courts of Law (questions 4, 5a, 5b, 5c and 5d)

Out of 33 responding courts, 32 confirm that their jurisdiction has a written Constitution, the United Kingdom being the exception in this respect.

Austria clarifies that it does not have a constitution as such but the Federal Constitutional Law (*Bundes-Verfassungsgesetz 1920*) and many other constitutional provisions exist also in ordinary laws.

All responding courts explain that they are authorised to apply the Constitution at least to some extent, be it in a written or unwritten form. *The Netherlands* however explains that because the Dutch Constitution prohibits the courts from assessing Acts of Parliament on their compatibility with the Constitution, this power exists only with regard to lower-level statutes, such as legislation adopted by regional and local authorities or executing bodies. In these instances, Administrative Jurisdiction Division may also apply the Constitution.

Regarding the frequency of application of the Constitution in the decision-making practice, the answers are split between "sometimes" and "often". None of the courts reply "rarely".

18 responding courts[2] answer that they apply the Constitution "often" in their case law, whereas in 14 responses[3] the application of the Constitution is described to occur "sometimes".

[2] Austria, Belgium, France, Germany, Greece, Ireland, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia, Spain, Switzerland, Montenegro, Türkiye and the United Kingdom.
[3] Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Hungary, Lithuania, Poland, Slovakia, Sweden, Serbia, Norway and Albania.

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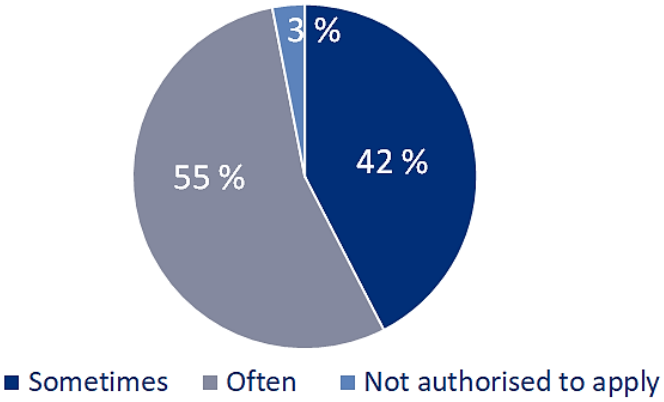
Chart 1 – The frequency of the application of the Constitution



On the basis of the national reports, the following areas of constitutional law are typically present in the responding courts' case law where the Constitution is applied in practice:

- fundamental rights (33 mentions)
- rule of law (23 mentions)
- democratic principles (17 mentions)
- legislative process (11 mentions)
- finance (10 mentions) and
- federalism and self-government (nine mentions).

Denmark also mentions the themes of parliamentary immunity, access to the public during trial and ratification of EU treaties as key areas where the Constitution is applied. *Hungary* refers to the topic of fair trial as another important aspect of constitutional law typically invoked in the case law.

Chart 2 – The areas of constitutional law typically involved in case law

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2.2 Power to repeal Parliamentary Acts (questions 6a and 6b)

Regarding the power to repeal a piece of ordinary legislation that is found to be unconstitutional, the vast majority of the responding courts (28 of 33) answer that they do not possess such powers. By contrast, the following courts respond in the affirmative: *Denmark, Ireland, Portugal, Spain*, and *Switzerland* to a certain extent.

Switzerland explains that a distinction needs to be made according to the normative nature of the legislation whose constitutionality is examined. First of all, the Federal Court is not empowered to assess the constitutionality of federal legislation as by virtue of Article 190 of the Federal Constitution it is obliged to apply federal laws, even when they are presumed to be unconstitutional. Conversely, the constitutional control exercised by the Federal Court is more extensive with regard to legislative acts adopted at the level of the cantons or municipalities. The Federal Court may be seized of both an appeal directed against the legislative act itself independently of a concrete case (giving rise to abstract control), and an appeal against a decision implementing this act (giving rise to concrete/incidental control). Most often constitutional control is in practice exercised in a concrete case related to the application of cantonal legislation. Should the Federal Court find a piece of legislation unconstitutional, its implementing act/decision is annulled but as the law itself is not subject to the proceedings, it cannot be subject to the annulment, either. Instead, the Federal Court overturns the decision under appeal, and, in doing so, refuses to apply the law that was found unconstitutional. Legally, the latter continues to exist, until the legislator decides to formally repeal it. However, as each of its future acts of application risks to be annulled in turn, the law can no longer have concrete legal effects, but it is in practice deprived of effectiveness.

Spain details that the repeal of legislation on the grounds of unconstitutionality is possible as long as certain conditions are met. First, it must be a piece of pre-constitutional legislation that has been left without effect as a consequence of the primary value of the Constitution and its derogatory effect on all those provisions that are in conflict with its content. Secondly, an interpretation according to the Constitution must be impossible. In other cases, only the Constitutional Court could declare legislation unconstitutional. Legislation equals statutes passed by the Congress, whereas all courts are prohibited from applying any executive decree or order if it contradicts the Constitution.

In terms of how often revocation of legislation that is found unconstitutional takes place in those jurisdictions where such powers are conferred to the responding courts, three courts (*Ireland, Portugal* and *Spain*) answer "sometimes" whereas in *Denmark* and *Switzerland* such decisions are explained to take place only rarely.

2.3 Decision-making power on constitutional validity of ordinary legislation (question 6c)

The responses reveal three main models for exercising decision-making power on the constitutionality of legislation. These approaches are judicial supremacy with a constitutional court, parliamentary sovereignty, and a mixed model where both parliament and courts are vested with this authority.

Judicial supremacy with a constitutional court

Most of the courts mention that a constitutional court has the authority to determine whether ordinary laws comply with the Constitution in their countries. Indeed, in 22 responses the constitutional court/council is named as the body authorised to review the constitutionality of the Acts of Parliament.

In *Estonia*, no separate constitutional court exists but the task of reviewing the constitutionality of the legislative act is conferred to the Constitutional Review Chamber of the Supreme Court. Cases where a chamber of the Supreme Court doubts the constitutionality of a legislative act or its provisions are decided by the Supreme Court *en banc*.

Austria details that the constitutional judicial review of laws as well as the unlawfulness of regulations lies exclusively with the Constitutional Court. However, if any court has doubts as to whether a legal provision to be applied in a case pending with that court is unconstitutional or as to whether a regulation to be applied is unlawful, it is obliged to apply to the Constitutional Court for the repeal of that provision. In addition, any party to a proceeding before an ordinary court of first instance claiming that his or her constitutionally guaranteed rights have been violated by the contested decision can initiate the review of a provision by the Constitutional Court in connection with an appeal against this decision (party application). The Constitutional Court of Austria also pronounces on the unconstitutionality of legal provisions upon application by an individual claiming that his/her rights have been directly violated, if the provision has taken effect for the individual concerned in the absence of a court decision or an administrative decision (individual application).

Belgium clarifies that the Constitutional Court is competent to decide on the constitutional validity of ordinary legislation, i.e., acts adopted by the Federal Parliament or the assemblies of the regions and communities. The administrative litigation section of the Council of State is authorised to annul generally binding executive decrees that have to be considered to be legislation in the substantive but not formal sense. In addition, the legislative section of the Council of State assesses the constitutional validity of all proposed legislation (both in a substantive and in a formal sense) without having the possibility to prevent its adoption. The Parliament or the government decides how to deal with the remarks about the constitutional validity of their piece of legislation.

In *Bulgaria*, the Constitutional Court decides on the constitutional validity of ordinary legislation *in concreto*. The Constitutional Court has the following powers: give binding interpretations on the Constitution; rule on motions for establishing the unconstitutionality of laws and other legislative acts of the National Assembly, as well as of Presidential acts, etc. The primacy of the provisions of the Constitution is a legal principle and the domestic courts apply its provisions directly if there is a conflict between the ordinary law and the Constitution. The courts do not have authority to decide on the validity of legislative acts.

Croatia explains that the Constitutional Court has the authority to review the constitutionality of legislative acts *in concreto*. The courts are authorized to give primacy to the provision in the Constitution in a concrete case if the application of a provision of an act would be in clear conflict with the Constitution. They do not, however, have the authority to decide on the validity of such an act.

The Czech Republic states that according to Article 95(1) of the Constitution, judges are bound by statutes and treaties which form a part of the Czech legal order; they are authorised to assess conformity of other

legislation with statutes or with such treaties. Therefore, if any court – including the Supreme Administrative Court – deems a provision of other legislation than statutes to be unlawful (contrary to statutes or binding treaties), thus unconstitutional (as follows from one of the core principles of rule of law), it simply shall not apply that provision in the case. In contrast, should a court deem that a statutory provision to be applied in resolving a case is contrary to the constitutional order, it shall stay the proceedings and refer the case to the Constitutional Court, which has the power to repeal the provision or declare its unconstitutionality.

In addition, pursuant to Article 87(3) of the Constitution, a law may provide that the Supreme Administrative Court – instead of the Constitutional Court – shall have the jurisdiction to repeal other (subordinate) legislation than statutes or individual provisions thereof if they are contrary to statutes. However, such power has not been conferred on the Supreme Administrative Court of the Czech Republic.

France explains that the Constitutional Council has the exclusive competence to rule on the conformity of an ordinary law with the Constitution within the framework of two procedures. On the one hand, it exercises *a priori* control of the conformity with the Constitution of laws not yet promulgated. This control is systematic for Institutional Acts (*lois organiques*) and, since the constitutional revision of 2008, for legislative proposals. The Constitutional Council may also be seized, for other laws, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate or sixty deputies or senators.

On the other hand, since the constitutional revision of 2008, the Constitutional Council has exercised *a posteriori* control of laws already promulgated, within the framework of the "priority question of constitutionality (*question prioritaire de constitutionnalité*, QPC)" procedure. Such a question can be asked during any proceedings before an administrative or judicial jurisdiction, at all stages of the procedure. This procedure allows any party involved in a trial to request, during this dispute, that a constitutionality review is carried out on a legislative provision which they consider infringing the rights and freedoms guaranteed by the Constitution. The QPC must always be the subject of a justified application. The judge to whom it is referred decides whether or not to transmit the priority question of constitutionality, depending on the order of jurisdiction competent to deal with the dispute, to the Court of Cassation or to the Council of State, which then has three months to examine it and, if necessary, refer this question to the Constitutional Council. The latter must also give a ruling within three months.

As to *Germany*, the Federal Constitutional Court has the competence to repeal a legislative act. If any national court finds a piece of legislation to be unconstitutional, it shall refer the case to the Federal Constitutional Court. However, legal norms below parliamentary legislation (government regulations etc.) may be repealed by any national court.

Hungary explains that if the Curia considers that the applicable law violates the "Fundamental Law of Hungary", which is the name of the Hungarian Constitution, it suspends its own proceedings and initiates proceedings before the Constitutional Court in order to establish that the applicable law is contrary to the Fundamental Law, on the one hand, and to exclude the applicability of the given law in litigation, on the other.

Within the framework of the so-called "*preliminary norm control procedure*", the Constitutional Court of Hungary may examine the conformity of the law to be enacted with the Fundamental Law. In doing so, the initiator of the law, the Government or the Ombudsman, may, before the final vote, propose that

Parliament send the act to the Constitutional Court for examination of its conformity with the Fundamental Law of Hungary.

Italy mentions that the Constitutional Court is competent to rule on disputes or litigation "*on the constitutional legitimacy of laws and acts having the force of law enacted by the State and the Regions*". If a court has doubts about the constitutionality of a rule which it must apply in order to decide the dispute brought before it, it may not disapply the rule deemed unconstitutional, but must refer the question of constitutionality to the Constitutional Court and suspend the trial until the Court's ruling.

Latvia explains that the Constitutional Court has the power to decide on the constitutional validity of ordinary legislation. The Constitutional Court is entitled to declare laws or other enactments or parts thereof invalid. However, upon examining the lawfulness of an administrative act or actual action, also administrative courts shall, in case of doubt, verify whether the legal provision applied by the institution or to be applied in the administrative court proceedings conforms to the legal provisions of higher legal force. If a court believes that a legal provision does not conform to the Constitution or a provision (act) of international law, it shall suspend court proceedings in the case and send a substantiated application to the Constitutional Court. After the coming into force of the decision or judgment of the Constitutional Court, the court proceedings in the case shall be renewed, and the following court proceedings shall be based upon the opinion of the Constitutional Court.

If a court finds that the binding regulations of local governments do not conform to Cabinet regulations or the law, or Cabinet regulations do not conform to the law, or an internal legal act does not conform to an external legal act or the directly applicable general principle of law, it shall not apply the relevant legal provision. The court shall substantiate its opinion on the non-conformity with the legal provisions of higher legal force in a decision or judgment. If the relevant legal act is not issued by a participant to the administrative proceedings, the court shall send the judgment or decision to the issuer of the legal act and the Ministry of Justice.

In *Lithuania*, the Constitutional Court decides on the legality of laws, government decrees and presidential decrees. The Supreme Administrative Court has jurisdiction over the legality of other normative administrative acts.

Luxembourg explains that by virtue of a specific provision in the Constitution, the question of the conformity of a law with the Constitution is within the competence of the Constitutional Court. If a question of conformity of a law with the Constitution arises in any court proceedings and this question is necessary for the resolution of the dispute, this court is required to refer, by way of a preliminary question, the Constitutional Court. However, with recent modifications to the Constitution, there is a debate as to what extent an ordinary court, other than the Constitutional Court, would be called upon to declare provisions of a law non-compliant under a new provision contained in one of the laws revising the Constitution, which specifies that "from the day of entry into force of this law, all legal or regulatory provisions contrary to the Constitution are no longer applicable."

Malta explains that the Constitutional Court has the power to declare an ordinary law invalid due to incompatibility with the Constitution. However, only the House of Representatives can formally repeal a law, so the law, even if declared invalid, will remain in force until repealed by the House of Representatives.

In *Poland,* the Constitutional Tribunal adjudicates on cases concerning 1) the conformity of statutes and international agreements to the Constitution; 2) the conformity of statutes to ratified international agreements whose ratification required prior consent granted by statute; 3) the conformity of legal

provisions issued by central state authorities to the Constitution, ratified international agreements, and statutes; 4) constitutional complaints; 5) disputes over powers between central constitutional state authorities; 6) the conformity to the Constitution of the purposes or activities of political parties. The Polish Constitutional Court also settles disputes over authority between central constitutional organs of the State.

Romania explains that the Constitutional Court is a political-jurisdictional public authority, the guarantor of the supremacy of the Constitution and the only authority of constitutional jurisdiction, independent from any other public authority, which is subject only to the Constitution and its own law of organization and functioning. The Constitutional Court reviews the constitutionality of laws, international treaties, Parliament regulations and Government ordinances. This review of constitutionality may be exercised either before the laws are promulgated or after their entry into force, following the admission by an ordinary court of a request for referral to the Constitutional Court by a party to the dispute before it.

The High Court of Cassation and Justice of Romania has the right to refer the matter to the Constitutional Court for a review of the constitutionality of laws prior to promulgation. According to the Fundamental Law, justice is carried out through the High Court of Cassation and Justice and the other courts established by law. The High Court of Cassation and Justice ensures the interpretation and the uniform application of the law by the other courts, according to its competence. Thus, the constitutional role of the courts is to interpret and apply the laws, while the High Court also has the role of unifying the jurisprudence of national courts.

In *Slovakia*, the Constitutional Court has the sole power to decide on the constitutional validity of ordinary legislation. If the Supreme Administrative Court has doubts about the constitutionality of the law, it may suspend the proceedings and refer the matter to the Constitutional Court.

Equally in *Slovenia,* the Constitutional Court has the power to decide on the constitutional validity of acts of the Parliament. With respect to cases of secondary legislation, the Supreme Court has the power to set them aside *in concreto* (with precedential effect).

Albania explains that the Constitutional Court has the authority to review the constitutionality of laws and normative acts *in abstracto* but also *in concreto* after they have been approved by the Parliament or other state organs. The courts are authorized to initiate a concrete control of norms before the Constitutional Court if they find a law in conflict with the Constitution. The Constitutional Court has the power to declare a piece of legislation unconstitutional.

In *Serbia,* the Constitutional Court has the power to decide on the constitutional validity of ordinary legislation, which encompasses: "compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties; compliance of ratified international treaties with the Constitution; compliance of other general acts with the Law; compliance of the Statute and general acts of autonomous provinces and local self-government units with the Constitution and the Law; compliance of general acts of organisations with delegated public powers, political parties, trade unions, civic associations and collective agreements with the Constitution and the Law".

Türkiye and *Montenegro* also confirm that the power to decide on the constitutional validity of ordinary legislation is conferred to the Constitutional Court in their respective jurisdictions.

Parliamentary sovereignty based solutions

The Parliament has been given the sovereign authority on purely constitutional matters in two jurisdictions: the Netherlands and the United Kingdom.

In *the Netherland*s, Article 120 of the Constitution stipulates that courts may not evaluate whether formal laws (acts of the legislature, consisting of government and parliament) and Treaties violate the Constitution. Similarly, *the United Kingdom* details that no judicial body in the United Kingdom is permitted to invalidate an act of the Parliament of the United Kingdom.

However, both countries emphasize that the prohibition of judicial review does not apply to international human rights obligations.

The Netherlands explains that under Article 120 of the Constitution, it is for the Parliament to decide whether a proposed law is constitutionally valid or not. Under Articles 93 and 94 of the Constitution, however, all courts in the Netherlands are obliged to look at rights and freedoms in treaties such as the ECHR. It follows from Article 93 of the Constitution that universally binding provisions of Treaties and decisions of international organizations can be directly relied upon by individuals and legal persons before the court. The courts, including the Administrative Jurisdiction Division, are then allowed to assess the compatibility of all national legislation with the obligations in these international treaties. The importance of this compatibility requirement is stipulated by Article 94 of the Constitution. This provision provides that statutory regulations applicable within the Kingdom shall not be applied if such application is not compatible with 'universally binding provisions' of treaties. In this way, Article 94 makes clear that it is possible to invoke a provision of international law in court, at least if it can function as an independent legal norm, with the argument that a national law is in violation therewith. 'Universally binding' treaty law prevails not only over legislation in the formal sense, but also over the Constitution and all other legislation.

Because of this many scholars have also argued that Article 120 of the Constitution does not pose a real problem in terms of fundamental rights protection as almost all rights and freedoms mentioned in the Constitution are also mentioned in the CFREU, ECHR and/or similar treaties. Other scholars have recently argued that Article 120 of the Constitution could or should be repealed. The political debate about this issue is on-going.

Quite similarly, *the United Kingdom* responds that the constitutional sovereignty of Parliament is subject to two qualifications. First, section 4 of the Human Rights Act 1998 (HRA) permits the higher courts (including the Supreme Court) to make a declaration that an act of the UK Parliament is incompatible with the ECHR. This declaration does not affect the validity, continuing operation, or enforcement of an act of the UK Parliament. If a declaration is made under section 4 of the HRA, the UK Government may, if it considers that there are compelling reasons to do so, by order make such amendments to the legislation as it considers necessary to remove the incompatibility.

Second, courts are permitted to invalidate acts of devolved legislatures i.e., the Scottish Parliament, the Welsh Parliament, and the Northern Ireland Assembly. Under the acts of the UK Parliament establishing these legislatures, each legislature is prohibited from legislating on matters reserved to the UK Parliament or in violation of the ECHR. If a court concludes that a statute passed by one of these devolved legislatures relates to reserved matters or violates the ECHR, then it may declare it to be invalid. This may be done either before the act has entered into force (*in concreto*) or prior to entry into force (*in abstracto*).

Mixed models of constitutional review

Based on the responses to the questionnaire, four countries have addressed the issue of the control of constitutionality of legislation through various forms of mixed models where both the legislature and courts may exercise distinct powers of controlling the constitutionality of legislation. In these countries, the supreme administrative jurisdictions may have a significant role.

Greece explains that there is no specific Constitutional Court before which applicants could directly challenge the constitutionality of the law, *in abstracto*, regardless of its application to a specific case. However, given its competence, the Council of State is required quite frequently to address questions related to the constitutionality of laws. Hence it plays the role of a "quasi-constitutional" Court in the legal system of Greece.

Greece also points out that all courts have the duty to control the constitutionality of the legislative provision to be applied in the context of a specific case. The review of constitutionality concerns the content of the law and not compliance with the procedure for its adoption. In addition, if two of the three supreme courts of the country (Council of State, Court of Cassation, Court of Auditors) render divergent judgments on the constitutionality of the same legislative provision, the question is referred to the Supreme Special Court. If this Court finds that the legislative provision in question is contrary to the Constitution, it is rendered void *erga omnes*.

In *Finland* and *Norway*, the Parliament (in the case of Finland specifically the Constitutional Law Committee of the Parliament) has the authority to review the constitutionality of legislative proposals *in abstracto* during the legislative process. Moreover, all courts are obliged to give primacy to the provisions of the Constitution in a concrete case if the application of a provision of an Act would be in conflict with the Constitution. In Finland, the disapplication of a parliamentary legislation necessitates the establishment of an *evident* conflict with the Constitution for this obligation to arise. However, the courts are not authorised to rule on the validity of such an act.

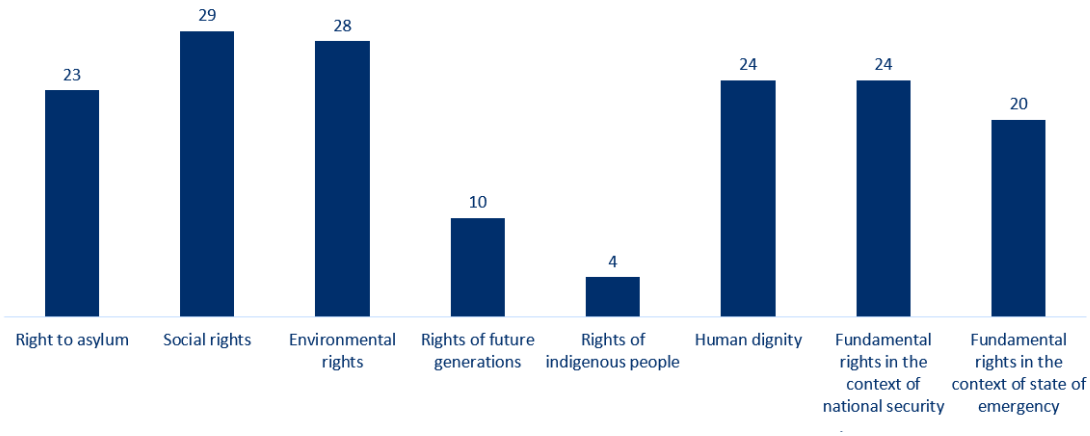
Similarly, in *Sweden*, all courts have the duty to check for the constitutionality of norms or decisions if such an issue arises with regard to a specific case in that court. If a conflict of norms materialises, the higher norm would be given primacy and the conflicting, lower norm would not be applied. As the Constitution naturally is the highest norm, any conflict with the constitutional provision would mean that the Constitution prevails. Such a decision does not formally affect the lower norm's validity, as it is still a legal norm until removed by the relevant institution (i.e., the Parliament). However, due to the role of precedent within the Swedish legal system, a decision by the Supreme Court not to apply a specific norm for constitutional reasons will almost certainly lead to all courts doing the same, in effect rendering the norm "void" even if still formally in effect.

2.4 The precedents and the role of the Constitution in the case law (questions 7 and 8)

First of all, it can be concluded from the responses to question 7 of the questionnaire that the responding courts have established precedents in a broad range of key legal areas over the past decade. Among the topics put forward in the questionnaire, social rights and environmental rights are mentioned most often by the responding courts (29 and 28 mentions, respectively). The topics of right to asylum, human dignity and fundamental rights in the context of national security are mentioned almost equally frequently by the responding courts (23 or 24 mentions each).

Furthermore, the issue of fundamental rights in the context of state of emergency has given rise to precedents in 20 responding courts, whereas rights of future generations feature in 10 responses[4]. By contrast, rights of indigenous people were mentioned only by four responding courts[5].

Chart 3 – Areas of law where precedents have been given during the past 10 years



With respect to the role of the Constitution, the national reports confirm that the Constitution often has a multifaceted role to play in the reasoning of those cases where reference to the Constitution is made. Virtually all responding courts refer to more than just one role described in the questionnaire.

On the basis of the responses, the Constitution is most often used as a source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (29 courts of 33). However, the Constitution is equally often relied upon as an additional argument supporting a decision which is inherently based on ordinary legislation (28 courts of 33).

A similar number of responding courts (28) also recognize a scenario where the Constitution plays a decisive role so that the decision is based solely on constitutional grounds in a situation where ordinary legislation is silent or unclear on the issue at hand. In 20 responses, the Constitution is also described as having had an overriding role so that otherwise applicable ordinary legislation is set aside or declared invalid on constitutional grounds. In this regard, the Supreme Court of the Republic of *Slovenia* clarifies that if the Constitution should have an overriding effect because of conflict with ordinary legislation, the case is referred to the Constitutional Court to declare the legislation unconstitutional, after which the case is decided by the Supreme Court.

By contrast, the Constitution is recognized to have had only a symbolic or decorative role in the decisions by 10 responding courts.

[4] The Czech Republic, Belgium, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Norway, Spain.
[5] Finland, Italy, Norway, Sweden.

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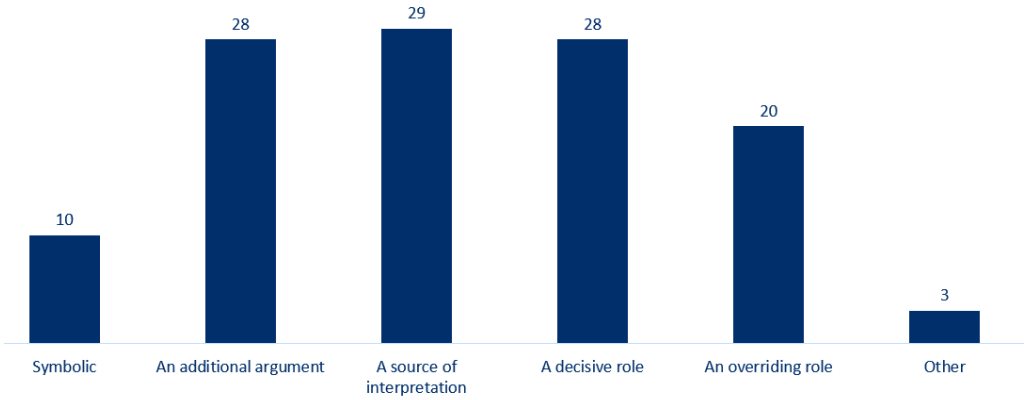
Chart 4 –The role of the Constitution in the reasoning



Regarding other roles of the Constitution in the courts' reasoning, *Sweden* draws attention to the fact that the right to access to public documents is to a high degree regulated on the constitutional level in Sweden and therefore court decisions in this field are often based solely on constitutional provisions.

Italy points out that the fundamental principles of the Constitution, as described in Articles 1 to 12 and in Part I "Rights and duties of citizens", characterise the legal system to such an extent that it would collapse or be transformed into another system if they were not respected or implemented. The values listed, which are translated into fundamental rights, inviolable rights, assume such an essential legal value that the very organisation of the public authorities is functional for their development and implementation.

The Netherlands explains that courts as such would not refer to the Constitution when dealing with formal legislation because Article 120 of the Constitution impedes them to do so, but they would refer to relevant international treaties which, by virtue of Article 94 of the Constitution, have an even higher ranking than the Constitution itself.

3. THE EUROPEAN FRAMEWORK: INTERPLAY OF NATIONAL AND EUROPEAN FUNDAMENTAL RIGHTS AND INTERNATIONAL HUMAN RIGHTS NORMS

National courts, the ECtHR and the CJEU play interconnected roles in the protection and application of fundamental and human rights. National administrative courts hold a critical position in this structure. Even though they may not always be the primary enforcers of national constitutions (especially if there is a Constitutional Court), their role may be much more significant in the European legal context. When national legal provisions conflict with European law, national courts often must not only apply but also

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prioritize European norms even if they would not be able to do so in a purely domestic constitutional context.

This section of the report focuses on the applicability, and actual application, of European fundamental rights and international human rights norms in the case-law of the national administrative courts as well as on the concrete provisions of the ECHR and the CFREU which facilitate the interplay between national, European and international legal standards.

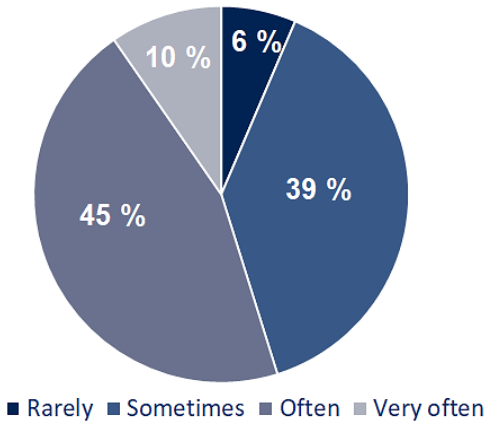
3.1 The applicability of international human rights conventions, in particular the ECHR (questions 9 and 11)

Virtually all responding courts confirm that they are authorised to apply international human rights conventions and follow their international case law in their decisions.

Regarding the frequency of the application of international human rights conventions, two responding courts (Hungary and Ireland) indicate that such application takes place only rarely in their respective case law. According to 12 responses[6] international human rights conventions are applied sometimes, whereas 14 responding courts[7] mention that international human rights conventions are relied upon often. Three courts[8] respond that international human rights conventions are applied very often in their respective case law.

Switzerland clarifies in this respect that according to the monist system prevailing in Switzerland, the rules of international law are an integral part of national law upon their entry into force. Individuals can thus invoke directly applicable provisions of international treaties before the courts and in this sense, the ECHR is part of national law.

Chart 5 –The frequency of the application of human rights conventions



[6] Bulgaria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Italy, Lithuania, Poland, Sweden, Serbia.
[7] Austria, Belgium, Denmark, Latvia, Luxembourg, the Netherlands, Romania, Slovakia, Slovenia, Spain, Türkiye, Norway, United Kingdom, Albania.
[8] France, Montenegro and Portugal.

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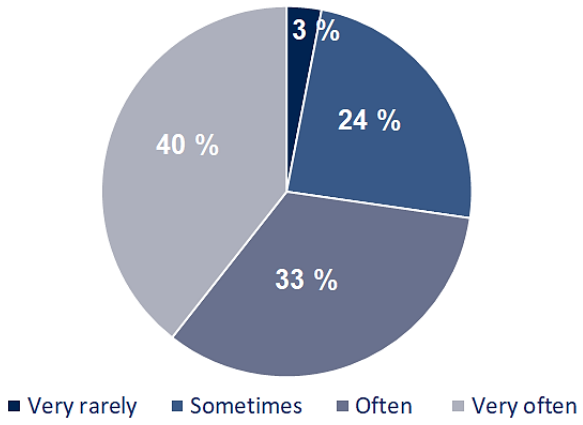
With respect to the simultaneous application of fundamental rights provisions of the Constitution and provisions of the ECHR, the responses are largely split between the options "sometimes" (8 of 33)[9], "often" (11 of 33)[10] and "very often" (13 of 33)[11]. Only one responding court[12] explains that it applies the fundamental rights provisions of the Constitution and respective provisions of the ECHR simultaneously only very rarely.

Chart 6 – The simultaneous application of the Constitution and the ECHR



3.2 The application of the CFREU and EU law in general (questions 10, 12, 14 and 15)

27 of 33 responding courts confirm that they are authorised to apply the CFREU in their decisions. Six responding courts not authorised to apply the CFREU are not members of the European Union (*Albania, Norway, Serbia, Switzerland, Türkiye* and the *UK*).

Switzerland clarifies, however, that even if the CFREU is not directly applicable, it is likely to have indirect effects in the Swiss legal order to the extent that legal texts binding Switzerland refer to it, such as a number of EU instruments in the field of international protection. In addition, it is also possible for federal judges to refer to Articles of the CFREU as part of a comparative approach. The CFREU is thus seen to exercise a certain influence on Swiss law although it is not an essential instrument for the realization of fundamental freedoms at the current stage of relations with the European Union.

[9] Estonia, France, Germany, Ireland, Latvia, Poland, Spain, Serbia.
[10] Austria, Belgium, Czech Republic, Croatia, Denmark, Lithuania, Slovakia, Slovenia, Sweden, Türkiye, Switzerland.
[11] Bulgaria, Finland, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, Norway, Albania, Montenegro, United Kingdom.
[12] Hungary.

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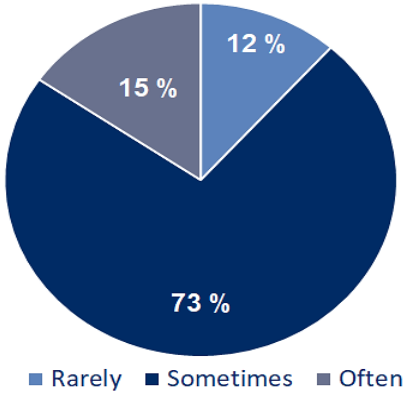
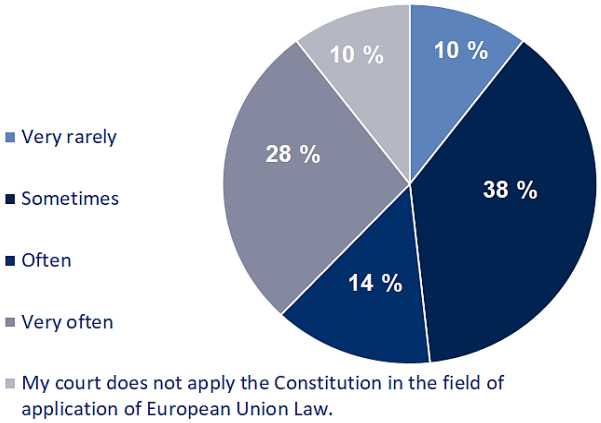
Regarding the frequency of the application of the CFREU, three responding courts[13] mention that such application occurs only rarely in their respective case law. In the majority of the responses[14] the CFREU is mentioned to be applied sometimes, whereas four responding courts[15] explain that the CFREU is relied upon often in their case-law. It shall be noted that no responding court opted for the alternative "very often".

Chart 7 – The frequency of the application of the CFREU



As for the simultaneous application of fundamental rights provisions of the Constitution and the corresponding provisions of the CFREU in the field of application of EU law, the responses are slightly more divided and the options of "sometimes" (11)[16] and "very often" (8)[17] are most frequently chosen by the responding courts. Four responding courts[18] mention that such application occurs often.

Chart 8 – The simultaneous application of the Constitution and the CFREU



[13] Croatia, Estonia and Hungary.
[14] Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Greece, Germany, Italy, Ireland, Latvia, Lithuania, Poland, Romania, Slovakia, Spain, Sweden.
[15] Luxembourg, Portugal, Slovenia and the Netherlands.
[16] Belgium, Czech Republic, Denmark, France, Ireland, Latvia, Lithuania, Poland, Slovakia, Spain, Sweden.
[17] Bulgaria, Estonia, Finland, Germany, Italy, Portugal, Slovenia, Montenegro.
[18] Austria, Greece, Luxembourg and Romania.

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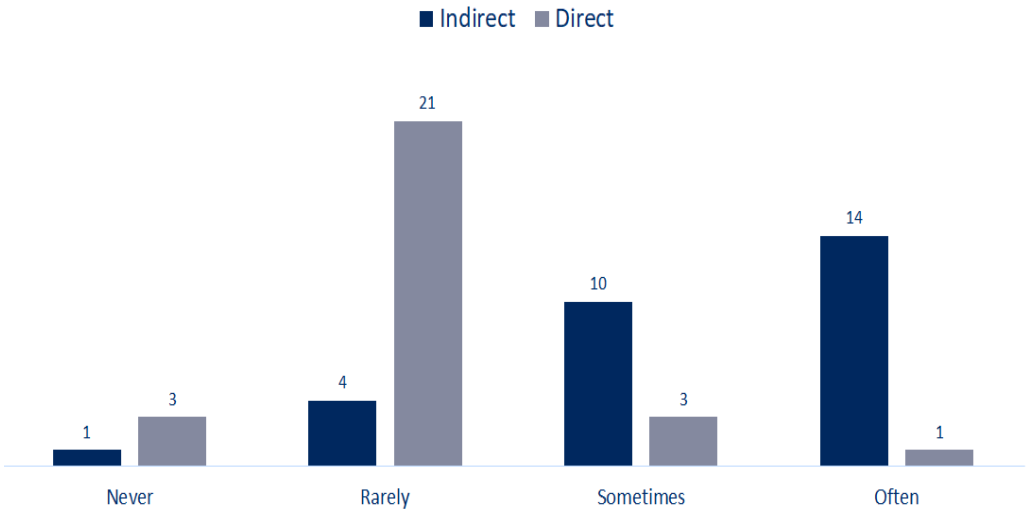
With respect to the role EU law in general plays in the decision-making practice of the responding courts, a distinction is made in the questionnaire between the frequency of indirect effect (interpretative effect) and direct effect, the latter referring here in particular to situations where a provision of national law is declared inapplicable in a concrete case when an inconsistency between national law and EU law cannot be removed by means of interpreting national law in conformity with EU law.

Around half of the members empowered to apply EU legislation (14)[19] confirm that the so-called interpretative effect of EU law features often in their argumentation when they apply legislation adopted for the implementation of directives. In addition, 10 courts[20] respond that EU law plays such a role sometimes, whereas four courts[21] indicate that the duty of conforming interpretation appears only rarely in their reasoning.

In contrast, a clear majority of the responding courts (21)[22] explain that a provision of national law is disapplied only rarely due to its inconsistency with EU law. Three courts respond[23] that EU law has such an impact sometimes whereas only one court[24] recognizes this to take place often. Three responding courts[25] explain that EU law has never had such a role in their respective case law.

Chart 9 –The frequency of indirect and direct effect of EU law in the argumentation



[19] Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Luxembourg, Poland, Portugal, Slovakia, Slovenia.
[20] Austria, Belgium, Croatia, Czech Republic, Lithuania, the Netherlands, Romania, Spain, Sweden, Switzerland.
[21] Hungary, Ireland, Malta, United Kingdom.
[22] Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Switzerland, United Kingdom.
[23] Austria, Italy, Spain.
[24] Luxembourg.
[25] Croatia, Latvia, Malta.

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3.3 The role of the ECHR and CFREU in the reasoning of the courts (questions 13 and 18)

Regarding the role the ECHR and the CFREU play in the reasoning, the responses reveal some differences in the practical function of these instruments in the case law of the responding courts. Both instruments seem to have varying roles depending on the particularities of the case at hand as most responding courts select more than one of the proposed options in the questionnaire.

As to the case law where referral is made to the ECHR, the Convention is first of all seen to have the role of an additional argument supporting a decision which is inherently based on ordinary legislation as all but three responding courts acknowledge the ECHR to have such a function in their respective reasoning.

The national reports reveal that the role of the ECHR as a source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand is almost equally significant as all but four responding courts recognize this role in their responses.

With respect to granting the Convention a decisive role in the reasoning so that the decision is based solely on the ECHR in a situation where national legislation is silent or unclear on the issue at hand, 26 responding courts[26] refer to this role in their responses. The Convention is stated to have had an overriding role so that otherwise applicable ordinary legislation is set aside or declared invalid based on the ECHR in the responses of 19 courts[27].

In addition, seven responding courts[28] recognize the ECHR to have at times a purely symbolic or decorative function in their respective case law.

As to the role of the CFREU, the responses are naturally limited to those courts who are authorised to apply this instrument in their decision-making practice (27 in total).

On the basis of the national reports, the CFREU is first and foremost – like the ECHR – seen to have the role of an additional argument supporting a decision which is inherently based on ordinary legislation, as all but one responding court acknowledge the Charter to have such a function in their respective reasoning. Moreover - and in equal terms with the role conferred to the ECHR – the CFREU also has an important role as a source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand as this function of the Charter is recognized by all but three responding courts.

The CFREU appears to have less often a decisive or overriding role in the case law of the responding courts than the ECHR. Eight courts[29] recognize that the CFREU has played a decisive role so that the decision is based solely on the Charter in a situation where EU law and national legislation are silent on the issue at hand. Equally only in eight responses[30] the CFREU is seen to have had an overriding role where the

[26] Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Albania, Norway, Türkiye, Switzerland, the United Kingdom.
[27] Albania, Belgium, Bulgaria, Czech Republic, Estonia, Finland, France, Greece, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovakia, Sweden, Switzerland, Türkiye.
[28] Belgium, Czech Republic, Lithuania, Poland, Romania, Slovenia and Switzerland.
[29] Austria, Germany, Ireland, Luxembourg, the Netherlands, Romania, Slovenia, Spain.
[30] Austria, Czech Republic, Finland, Greece, Luxembourg, Portugal, Slovenia and Sweden.

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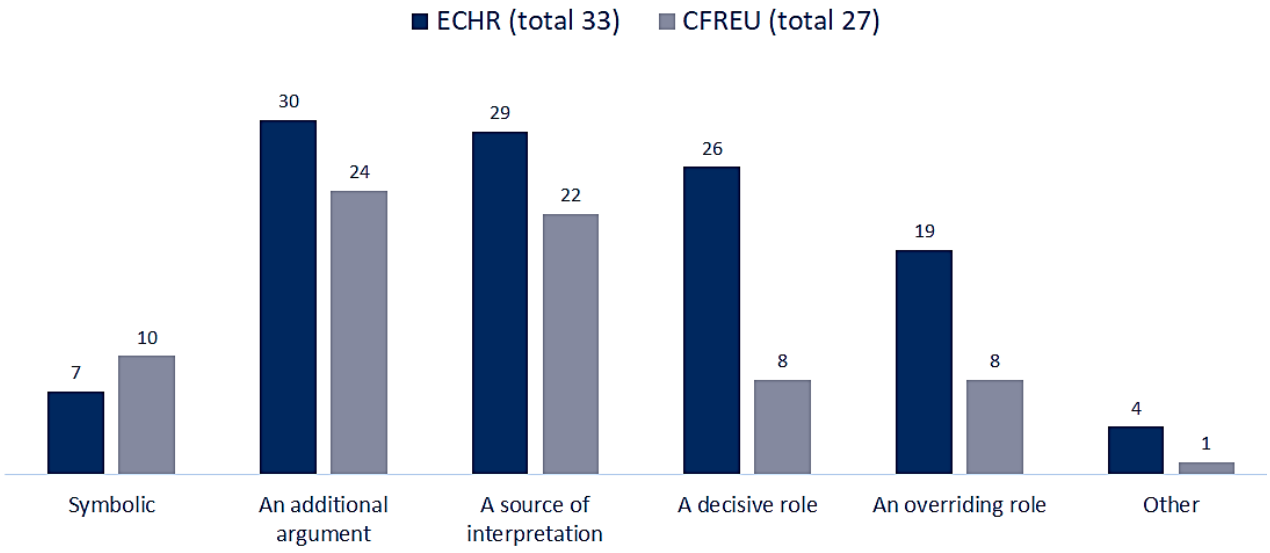
application of the Charter has led to setting aside or declaring invalid otherwise applicable ordinary legislation.

Nine responding courts[31] recognize the CFREU to have at times a purely symbolic or decorative function in their respective case law.

Chart 10 –The roles of the ECHR and the CFREU in the reasoning



3.4 Case law regarding specific Articles of the CFREU and ECHR

3.4.1 Case law regarding the application of Article 51 (Field of application) of the CFREU (question 16)

Article 51 of the CFREU deals, from the viewpoint of the Member States, essentially with the question when the Member States are obliged/authorised to apply the provisions of the Charter. According to paragraph 1 of Article 51, the provisions of the Charter are addressed to the Member States only when they are implementing Union law. In practice, however, this issue is rather focused on the contours of the scope of application of EU law. The responding courts were asked to provide a brief description of the context and outcome of their decisions related to this issue.

A number of courts explain that reference to Article 51 of the CFREU is often made to justify why the Charter is not applicable as the case falls outside the scope of application of EU law. On the other hand,

[31] Belgium, Czech Republic, Estonia, Finland, Lithuania, Poland, Romania, Slovenia, Sweden.

examples were also provided about cases where reference to Article 51 of the CFREU was made specifically to justify why the case did fall within the scope of EU law.

Bulgaria refers to two cases where the Supreme Administrative Court has dealt with the issue of the field of application of the CFREU. In the first case of 2016 the Court declared that, as the determination and proclamation of affiliations of a person to the security bodies of the state and the intelligence services of the National Army did not fall under the competence of the EU, the courts should not apply the provisions of the Charter. In a recent decision of 2023, the Court was faced with a case concerning recovery of previously paid social security benefits. The Court referred to Article 51 of the CFREU and stated that the object of the main proceedings must be connected with other provisions of EU law or implementing provisions of national law. As there was no such link, the Court did not apply Article 34 of the Charter.

The Czech Republic explains that typically the Supreme Administrative Court directly refers to Article 51 of the CFREU in response to a complainant's claim that there has been an infringement of the right guaranteed by the CFREU. In this respect, the Supreme Administrative Court usually reiterates that the CFREU is only applicable in cases in which EU law is applied. For example, in a judgment of 2015, the Court held that the complainant, an operator of gambling machines whose permits had been revoked due to their proximity to a school (based on national legislation on gambling, which empowers the municipalities to prohibit the operation of gambling machines e.g. near schools), could not invoke the CFREU as it was not, or at least did not claim to be, a person exercising the freedom of movement. On the other hand, the Court has in several cases concerning detention of foreigners for the purpose of expulsion observed that the national legislation on the issue implements – within the meaning of Article 51 of the CFREU - an EU directive. Thus, Article 6 and Article 47 of the Charter were applicable, and the Court concluded that the provision of national legislation which limited the right to judicial review of detention decisions was contrary to EU law. The Court has argued in a similar manner also in a case concerning application for a long-term visa for study purposes.

Ireland mentions a decision from 2015 where the Supreme Court considered an appeal as to the dismissal of a request for judicial review relating to a deportation order. In considering the issue of wasted costs, the Supreme Court held that there was no application to enlarge the grounds of appeal, and if such an application was to be made, this could only be permitted in the most extraordinary circumstances at such an advanced stage of the proceedings. The Supreme Court recognised that Article 51 of the CFREU does not establish any new power or task for the community or the Union, or modify powers and tasks defined by the Treaties. In finding for certain costs against the appellant, the Supreme Court found that an application for reference to the CJEU for a preliminary ruling (which was withdrawn by the appellant) was a completely unnecessary diversion.

Finland mentions a case of 2021 concerning a request by a private individual addressed to the Bank of Finland to exchange euro coins for new ones. In its decision, the Bank of Finland ordered the coins to be removed from circulation and refused to redeem and refund them. Under the national procedural rules, a decision by the Bank of Finland could only be appealed if there was a specific provision in this regard, which did not exist for the type of decision at hand, and no right of appeal was thus provided according to the national provisions. However, as the matter was considered to fall within the scope of EU law (Regulation concerning authentication of euro coins and handling of euro coins unfit for circulation), the Supreme Administrative Court stated that Article 51 of the Charter of Fundamental Rights required Finland as a Member State to guarantee an effective remedy in court in accordance with Article 47 of the CFREU. Therefore, the person was granted the right to appeal against the decision of the Bank of Finland.

Latvia mentions that Article 51 of the CFREU has been referred to in a case of 2022 where the national State Revenue Service had established a customs duty debt and determined its amount on the basis of EU Customs Code Regulations. The Supreme Court stated that the state authority was in those circumstances bound by Article 41 of the CFREU establishing the principle of good administration which also implies the obligation to state the reasons on which the decisions are made.

Luxembourg explains that most judgments of the Administrative Court where Article 51 of the CFREU is applied fall within the area of the exchange of information on request in tax matters. In these cases, for which the Administrative Court has introduced various preliminary rulings before the CJEU, it has been essential to make sure that a national law providing for a sanction for failure to comply with certain obligations imposed by a Directive relating to administrative cooperation was indeed an implementation of EU law. This was necessary to confirm the applicability of certain provisions of the CFREU, and in particular Article 47, in the context of various procedural discussions related to the existence of an effective remedy in the matter. The confirmation of the implementation of EU law by the CJEU, in this particular case, and the application of the CFREU, were subsequently reaffirmed on numerous occasions in subsequent cases of the Court. Article 51 CFREU has also been invoked by the Administrative Court in order to interpret a judgment of the CJEU in the context of immigration law, and with a view to confirming the implementation of EU law in the context of a national law providing for a financial penalty in the field of greenhouse gases, as well as to exclude the CFREU in a case where only national tax law applied.

Hungary points out a recent case of 2022 where the body responsible for monitoring the proper conduct of horse racing ordered a doping test which ended with a positive result. The Curia stated that the dispute had no legal relevance from EU law point of view and the plaintiffs could therefore not claim that Article 47 of the CFREU should be interpreted by the CJEU in the preliminary ruling procedure. Furthermore, since the issue was based on Hungarian legislation without a link to EU law, the provisions of the Charter could not be referred to before the national courts under Article 51 of the CFREU.

Denmark refers to a Supreme Court judgment of 2022 which concerned the obligation of the Court to refer a case concerning confiscation of a vehicle used for reckless driving for preliminary ruling about the application of Article 17 (right to property) of the CFREU. The Supreme Court ruled that, although Article 17 was applicable, the Court did not have the power to refer the case for a preliminary ruling due to Denmark's opt out from Justice and Home Affairs. Article 51 of the CFREU did not authorise the Court to refer for a preliminary ruling in this case.

Belgium explains that in a case of 2017 a discussion of the scope of Article 51 of the CFREU was combined with a discussion of the scope of Article 41 (Right to good administration) of the CFREU to determine whether the person applying for residence permit could rely on the right to be heard envisaged in Article 41. The argument was, however, dismissed on the ground that Article 41 only applies vis-à-vis EU institutions and bodies, rather than on the ground that the subject matter of the dispute fell outside the scope of Article 51. Belgium also raises attention to there being occasional discussion in advisory opinions of the Council of State on whether the Charter applies (alongside the ECHR and national Constitution) in the context of review of national legislation. For example, such issue has been raised concerning a draft law going in essence further than an EU regulation which allows Member States to adopt stricter rules on animal welfare.

Italy states that the Council of State does not have precedents in the field of Article 51 of the CFREU but the Constitutional Court has repeatedly referred to this Article in its rulings. For example, in a ruling of 2017 concerning equal pay for women and men, the Constitutional Court, after referring to Articles 21 and 23 of

the Charter, stated that both provisions may be invoked as they relate to a question of implementation of Union law by the State in accordance with their respective powers (Article 51(1) of the CFREU).

Austria explains that the Supreme Administrative Court has addressed the application of Article 51 CFREU in a number of decisions. For example, the Court has stated, with reference to Article 51, that certain administrative proceedings fall within the field of application of EU law, meaning that Article 47 of the CFREU is also applicable in these proceedings (e.g., VAT proceedings and decisions of a first instance administrative court ruling on the legality of detention pending deportation).

The Netherlands explains that even though no ground-breaking rulings on the scope of Article 51 of the CFREU have been issued, the CJEU case law on this subject recurs with some regularity and it is applied to assess whether an appellant's reliance on the CFREU can result in an evaluation of the compatibility of the contested rules with the CFREU due to the legal question falling within the scope of EU law.

3.4.2 Case law regarding the application of Article 52 (Scope and interpretation of rights and principles) of the CFREU (question 17)

The purpose of Article 52 of the CFREU is to set the scope of the rights and principles of the Charter and to lay down rules for their interpretation. It contains several paragraphs dealing with such issues as prerequisites for the limitation of rights (e.g., proportionality), consistency between the Charter and the ECHR, and the relevance of the constitutional traditions common to the Member States.

Several courts explain that they do not usually expressly mention Article 52 of the CFREU in their judgments but they do apply the principles stated in that Article. It seems that when a reference to the Article is made, it is most often related to the justifiability of limitations to fundamental rights and especially the principle of proportionality.

Austria explains that the Supreme Administrative Court has alluded to Article 52 of the CFREU especially in order to stress the fact that the CJEU's case law has to be taken into account when interpreting the CFREU. The Court has also held that in administrative proceedings where claims based on EU law are asserted, an exclusion of the reviewability of administrative action by courts has to be measured not only against Article 6(1) of the ECHR, but also against Article 47(2) of the CFREU, which - on the grounds of Art. 52(3) of the CFREU - does not guarantee less protection than Article 6 of the ECHR. In any case, in the "overlapping area" between Article 6(1) of the ECHR and Article 47(2) of the CFREU, an application of the limitation rule of Article 52(1) of the CFREU cannot be considered.

Greece refers to a recent judgment where it was held, in the context of an administrative dispute resulting from the imposition of administrative monetary sanctions in the customs field (for smuggling), that a final and irrevocable criminal judgment of acquittal for the same offence of smuggling binds the administrative judge as to the legality of the imposition of sanctions, which lead to their annulment by the administrative court in accordance with the requirements of the case law of the ECtHR and those of Articles 50 and 52(1) of the CFREU.

Belgium refers to a judgment of 2022 in which the validity of Regulation (EU) 2019/1157 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement was called into question. Article 52 of the Charter was included in preliminary reference to the CJEU, as the applicants challenged a Belgian Royal

decree that imposes the submission of biometric data to be stored on the ID cards issued to certain aliens pursuant to that Regulation. This question about the validity of the obligation to have digital fingerprints on an ID-card is still pending before the CJEU (case C-280/22 *Kinderrechten coalitie Vlaanderen and Liga voor Mensenrechten*). In a judgment of 2021 relating to an expulsion order targeting a suspected foreign fighter, it was held that the applicant did not prove a violation of Article 7 of the Charter, nor of Article 8 ECHR (right to family life). As the content of both provisions is similar, the Council of State ruled that Article 52 of the Charter was also not violated.

Ireland mentions that in a case of 2019 before the Supreme Court an *amicus curiae* to the case put forward that Article 52(3) of the CFREU allows for more "extensive protection" of human rights under EU law as opposed to the ECHR alone. This was rejected by O'Donnell J., who held that there was not enough evidence that the article permitted a more expansive interpretation and that, if this provision was intended to expand the protections of human rights further than the ECHR, this would have been explicitly stated within the Charter.

Romania clarifies that there are numerous cases where the High Court has applied the principle of proportionality in line with the case law of the CJEU. The High Court also frequently uses the reference that Article 52(3) of the CFREU makes to the ECHR and to the identity of the content and scope of the rights enshrined in the two instruments. Moreover, in accordance with Article 52(6) of the Charter, the High Court also takes account of the explanations drafted to guide the interpretation of the Charter.

Luxembourg explains that Article 52 of the CFREU has been invoked in the judgments of the Supreme Administrative Court essentially within the field of the exchange of information in tax matters. This article is regularly invoked by the parties in order to argue that the absence of certain legal remedies relating to the exchange of information would not satisfy the principle of proportionality as required by Article 52 CFREU. Following a preliminary reference to the CJEU, Article 52 of the CFREU has been extensively invoked in the field of exchange of information by the Court to hold that the absence of legal recourse for the taxpayer concerned by a request for exchange of information complies with the CFREU as a right to a direct effective remedy against an injunction decision addressed to a third party (the holder of the information) cannot be based on the provisions of the CFREU.

Hungary points out that the Curia has referred to Article 52 of the CFREU only in one case which concerned, among other things, the proportionality of a competition fine. In this judgment in the field of competition infringement, the Court stated that Article 52(3) of the CFREU incorporates the practice of the ECtHR into EU law in cases where a Member State is implementing EU law, as in the case at hand, and therefore the provisions of the ECHR must prevail such as EU law.

France mentions a decision by the Council of State in the context of a dispute relating to the storage of connection data, where it referred to the case law of the CJEU on justifiable limitations on the rights guaranteed in the Charter by virtue of its Article 52.

Slovakia refers to a case concerning tax fraud where the Supreme Administrative Court, albeit not directly applying Article 52 of the CFREU, made an indirect application through a quotation of the CJEU case law where this article played a central role.

Latvia responds that the Supreme Administrative Court has mentioned Article 52 of the CFREU in some cases when citing the case law of the CJEU.

The Czech Republic mentions that the majority of the cases in which Article 52 of the CFREU has been referred to concern the detention of foreigners or applicants for international protection.

Poland explains that the number of cases in which Article 52 of the CFREU is mentioned remains limited. It is mostly invoked by a claimant and the court needs to explain why the Charter has not been violated.

Estonia also points out that the application of Article 52 of the CFREU has been very rare. However, the Administrative Law Chamber of the Supreme Court did apply Art 52(1) in passing in a judgment of 2018, stating that fundamental rights could only be restricted by law.

3.4.3 Case law regarding the application of Article 53 (Safeguard for existing human rights) of the ECHR (question 19)

Article 53 of the ECHR essentially emphasises that the ECHR only lays down minimum protection and the states are allowed to offer additional fundamental rights guarantees in their national systems. Thus, the Article also obliges the ECtHR to respect such national guarantees if they go beyond the guarantees of the ECHR.

With respect to precedents relating to the application of Article 53 of the ECHR, a clear majority (27) of the respondents explain that they do not have case law where this Article would have been applied.

Switzerland mentions that in a judgment rendered in 2000, the Federal Court simply noted that the guarantees offered by the ECHR constituted a minimum standard, whereas more extensive protection can be provided by other provisions of international or domestic law. In another case dating from 2021, the Federal Court clarified that the "favourability principle" (*le principe de faveur*) enshrined in Article 53 of the ECHR was to be applied in the event of a conflict of human rights norms, but only when these norms are of a different rank to those of the ECHR.

Portugal explains that in a decision of 2023 this issue is briefly discussed, in the context of compensation for non-pecuniary damage caused by delays in the administration of justice, by stating that the subsidiarity system of conventional human rights protection in relation to national systems means that the violation of rights enshrined in the ECHR, such as the right to a judicial decision within a reasonable time, by the authorities of a State party to that Convention must, before being submitted to the ECtHR, be examined by the internal jurisdiction of that State. In the decision it is also mentioned, with a reference to Article 53 of the ECHR, that by virtue of the connatural subsidiarity of the rights recognised in the Convention in relation to the rights and freedoms enshrined in the constitutions of each of the States that are bound by it, the ECtHR has sought to transform the Convention into a constitutional instrument of the European public order.

The Czech Republic explains three cases where the Supreme Administrative Court has made a reference to Article 53 of the ECHR. In the case of 2008 the key issue was the extent of the application of the principle of retroactivity *in mitius* in the administrative court proceedings. The Court's reasoning was based on analogical application of the principle in criminal law. For the sake of completeness, the Court also referred to Article 53 of the ECHR and stated, inter alia, that the ECHR does not prohibit retroactivity *in mitius* for the states and, thus, the application of the principle is not a violation of the Convention. The Court reaffirmed the position taken in the previous case in its judgment of 2016. In that case the Court stated, inter alia, that even if the interpretation of the principle would go beyond the standard of protection of human rights as

defined by the Convention and the case law of the ECtHR, such a situation is in accordance with the requirements of the Convention. In this context, the Court expressly mentioned that within the meaning of Article 53 of the ECHR, the national authorities may grant a higher standard of protection than that provided by the ECHR. In a recent case of 2022, the Court referred to Article 53 in the context of balancing the right to information and right to privacy. The Court stated, inter alia, that the adoption of the criteria relating to the Convention must not lead to a lowering of the national standard of protection.

3.4.4 Case law regarding the application of Article 53 (Level of protection) of the CFREU (question 20)

According to the Explanations relating to the CFREU, Article 53 is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law.

A clear majority (20) of the respondent courts authorised to apply the CFREU explain that they do not have case law where Article 53 of the CFREU would have been applied.

Belgium points out that usually the legislative section of the Council of State invokes the rights in the CFREU – when likely applicable – alongside national constitutional provisions and the ECHR, often treating them as interchangeable. In a recent advisory opinion, the legislative section of the Council of State has for the first time recognized that the CFREU is the sole standard of review – to the exclusion of the national Constitution – for reviewing whether certain national measures relating to the energy markets envisaged by the King pursuant to EU law are compatible with the right to property and the right to pursue a business. In doing so, the Council of State has, for the first time, applied the doctrine of the *Melloni* judgment, according to which the national Constitution cannot be invoked to offer further-going protection in an area that has been harmonized. The impact, however, appears to be rather limited, as the right to property is not protected under the Belgian Constitution at a higher level.

The Czech Republic explains that the Supreme Administrative Court rarely makes explicit references to Article 53 of the CFREU in its decisions. One of the few examples is a judgment from 2012 in which the Court was faced with national legislation that was deemed to be inapplicable as a result of the direct effect of a directive. In this context the Court referred to the stand still clause contained in Article 53 of the CFREU when stating that the provision provides for the protection of the level of rights achieved, inter alia, within the framework of the ECHR, which is expressly mentioned in the Article and in this respect clearly has a privileged position. The Court further stated that the scope of the rights guaranteed – in the actual case the right to personal liberty – must therefore in no way be less than that conferred by the ECHR. It follows that even an interpretation adopted within the framework of EU law must, in the context of an interference with personal liberty, reflect the ECHR and cannot lead to a reduction of rights below the level laid down therein, as influenced by the relevant case-law of the ECtHR. There is therefore a clear and unquestionable link between EU law and the ECHR as the two main pillars of the protection of fundamental rights in the member states of the EU.

Slovakia refers to a case of 2017 which concerned the rejection of the applicant's application for tolerated stay on the territory of the Slovak Republic. The Supreme Court, with a reference to Article 53 of the CFREU, stated that the authorities of the Slovak Republic are obliged in the case of application of EU law or in the case of application of national law transposing legal acts of the authorities of the European Union to respect the right to protection of family life to the extent of the standard recognised by ECHR.

3.5 The standard of protection of fundamental rights and "fundamental rights pluralism in practice"

3.5.1 Application of fundamental rights laid down in the Constitution in a way that provides for a better standard of protection of individual rights than those provided for in international human rights conventions (question 21)

A number of responding courts (e.g., Albania, the Czech Republic, Croatia, Finland, Ireland, Norway, Türkiye) explain that they do not usually compare the differences of the standard of protection provided for by the Constitution, on the one hand, and the international human rights conventions, on the other hand.

Ireland points out, however, that in certain circumstances comparison is unavoidable. An example of this can be seen in a case of 2020 in which it was held that the Minister for Justice and Equality had misidentified the weight to be given to constitutional rights when deciding as to the revocation of a deportation order. The Minister had treated the constitutional protection of the family as to be of equal (or perhaps lesser) weight than the protections provided by the ECHR. The Supreme Court thereby determined that the protections of Article 41 of the Constitution are stronger than those contained in Article 8 ECHR.

Croatia also mentions that even if the High Administrative Court did not expressly indicate that international provisions only provide a minimum standard of individual rights, the Court has actually provided better protection than the minimum standard in international human rights conventions in the field of right to property.

Latvia explains that the Supreme Court has expressly stated that international human rights law sets minimum standards but this does not preclude the Constitution from providing greater protection. For example, with respect to the question whether the State had provided the applicant with social security in an adequate amount to enable the applicant to ensure a dignified existence for himself, it was concluded that the specific minimum standards recognised in the practice of application of the European Social Charter are directly applicable, and, thus, also clarifying the minimum scope of the fundamental rights on social security laid down in the Constitution.

Luxembourg refers to the judgment of the Constitutional Court of March 2021, where the Constitutional Court held that the provisions of the Constitution including the fundamental principle of the rule of law and its sub-principles, on the one hand, as well as the corresponding provisions of the ECHR and, where applicable, in the event of implementation of EU law, those of the CFREU, constitute "a common base (*socle commun*)" and had to be applied in a coordinated manner in order to ensure a consistent interpretation. The Administrative Court regularly refers to this method of application of the respective provisions of the Constitution, the ECHR, and, where applicable, the CFREU. However, it may happen in a particular case that the Administrative Court is required to apply the fundamental rights enshrined in the Constitution extensively, without specifically referring to either the ECHR or the CFREU. This is particularly true when the Administrative Court has applied the provision of the Constitution according to which the State guarantees the natural rights of the human person and the family.

Sweden elaborates that in certain areas of law a better standard of protection may result from the application of the Constitution even if the Supreme Administrative Court usually does not make any explicit

comparisons between systems when a case is decided on national constitutional basis. As an example, in 2021 the court found – against the background of the constitutional protection of the right to freedom of association – that the police may not deny an application for a license to keep a firearm only due to the applicant's membership in a political movement that is known in general to be associated with violence and crime. It is uncertain whether ECHR or CFREU would have demanded the same narrow scope for the police in such a case.

Lithuania explains that the Supreme Administrative Court does not generally emphasise the fact that it follows a higher standard than the one established in international law, but there are situations when the standard of protection of individual rights is better than the one provided for in international human rights conventions. As an example, Article 6 of the ECHR covers fair trial in civil and criminal proceedings but does not apply to the questions related to the legal status of foreigners. Therefore, the fair trial rights are supported by reference to the Constitution and accompanying constitutional jurisprudence.

Slovakia also mentions that compared to the protection guaranteed under the Constitution, the protection under Article 6(1) of the ECHR is lower in the administrative justice system, where the ECtHR has excluded from the scope of Article 6(1) such disputes before administrative courts which fall exclusively within the field of public law. Instead, the provision of the Constitution grants the right to judicial and other legal protection in all court proceedings.

France describes that the Council of State sometimes applies the fundamental rights enshrined in the Constitution in a manner which ensures a better level of protection of individual rights than that provided by international conventions relating to human rights. As an example, the Council of State qualified the right to asylum as a constitutional requirement on the basis of the Preamble to the Constitution, independently of the Geneva Convention, before this right was gradually "Europeanized". Moreover, the Council of State deduces from the general principle of the right of impartiality – which incorporates a constitutional principle – procedural requirements which apply to independent administrative authorities with the power to sanction, thus extending the material scope of Article 6(1) of the ECHR to authorities which do not constitute courts within the meaning of this article in the case law of the ECtHR. The Council of State also applies the principle of equality in a manner which is sometimes more demanding than that of the CJEU or the ECtHR.

Switzerland explains that the constitutional provision on the right to non-discrimination is more extensive than that of accessory prohibitions to discriminate contained in the ECHR and the UN Conventions. According to case law, Article 14 of the ECHR does not establish a general and autonomous right to equal treatment, but this provision has an accessory nature and can be invoked only when discrimination affects the enjoyment of other freedoms recognized in the ECHR, while the provision in the Federal Constitution guarantees an independent right that can be invoked and applied alone. For the rest, the fundamental rights guaranteed by the Federal Constitution ensure the same level of protection as those derived from the ECHR and the UN Conventions.

Belgium describes that the Belgian Constitution leaves hardly any margin for *ex ante* censorship, and thus offers stronger protection in that field than the balancing approach under other instruments. For example, in one judgment it was stated that the municipality cannot require public (dancing) events in a private room to obtain a municipal authorization. Sometimes the Council of State refers to international human rights treaties (Convention on the Rights of the Child, CRC) to explain that certain (procedural) obligations are required, while the ECtHR refers to a margin of appreciation in order not to impose such (procedural) obligations. Both the ECtHR and the Council of State had to deal with the right of access of a child to

information about her mother after an anonymous birth. In *Odièvre* the ECtHR held that the veto right of the mother, meaning that the mother could refuse that her identity was disclosed to the child, was not a violation of Article 8 of the ECHR given the wide margin of appreciation of the State. The Council of State ruled that the reasons to afford a wide margin of appreciation at supranational level were not present at domestic level. It held that a veto right for the mother was not compatible with the interests of the child as defined by the CRC and the Belgian Constitution. An independent court should on a case-by-case basis be able to balance the rights of the mother and the child to consider whether the refusal to disclose the identity of the mother is in the best interests of the child.

Romania explains that the High Court of Cassation and Justice has sometimes applied the fundamental rights enshrined in the Constitution, and as interpreted by the Constitutional Court, in a way that ensures a higher level of protection of individual rights than that provided for in international human rights conventions. Such analysis is common practice in the judgments of the Romanian Constitutional Court when it invokes, in addition to the provisions of the Constitution allegedly violated, articles of international conventions, in particular the ECHR. The Constitutional Court analyses and refers in the reasonings of its judgments to the level of protection of the fundamental rights guaranteed by the Constitution, expressly stating, where appropriate, that the standard of protection is superior to that of the international convention invoked by the party, since the convention ensures a minimum standard, lower than that of national law.

United Kingdom explains that its human rights law is based primarily upon the Human Rights Act (HRA) and common law principles, supplemented by various other acts of Parliament addressing specific topics, such as immigration law. The HRA incorporates certain rights under the ECHR into UK domestic law. The HRA requires that a court or tribunal determining a question of whether an individual's rights under the act have been breached must consider the judgments of the ECtHR. In a judgment of 2004, the House of Lords (the Supreme Court's predecessor) stated that this provision requires that, in the absence of some special circumstances, the UK courts should follow any clear and constant jurisprudence of the ECtHR, but that they should not exceed the scope of the ECHR as laid down by the ECtHR. The courts will inevitably be faced with situations which have not yet come before the ECtHR. In those situations, the UK courts will aim to anticipate, where possible, how the ECtHR might be expected to decide a given case on the basis of the principles established in the ECtHR's existing case law, even if some incremental development may be involved.

Austria details that the *Staatsgrundgesetz* contains also other individual rights than those found in the ECHR, e.g. the accessibility to public offices. This alone leads to a better standard of protection that goes beyond the rights provided for in international human rights conventions.

Greece explains that reference is usually made to texts protecting individual rights (the Constitution, the ECHR, the CFREU) while refraining from declaring that one text would offer more protection than the other. Often a combined interpretation is carried out to guarantee optimal protection of individual rights and freedoms. It cannot, however, be excluded that the interpretation of national texts would lead to reinforced protection of individual rights compared to those guaranteed by international conventions.

Portugal points out that it does not match the level of protection given by the Constitution with the level of protection conferred by international conventions but applies the existing constitutional provisions in the light of international conventions.

Bulgaria points out that the judgments of the Supreme Administrative Court do not only serve to decide those cases brought before it but, more generally, to safeguard and develop the rules instituted by the ECHR. Even though the Constitution contains a significant number of provisions on fundamental rights, the national administrative courts also protect human rights by directly applying international human rights conventions.

Spain details that the Supreme Court closely follows the jurisprudence of the international courts related to the conventions and treaties to which Spain is a party in the field of human rights and tries at all times to adapt its standards to those consolidated at the international level.

Germany mentions that typically human rights provided for in international instruments are only made reference to if they could possibly go further than national human rights.

Denmark explains that there are no judgments in which the Supreme Court has explicitly stated that the Constitution provides for a better standard of protection of individual rights than those provided for in international human rights conventions.

3.5.2 Application of fundamental rights laid down in the Constitution in a way in which the substance of a fundamental rights provision has been defined by reference to either international human rights conventions or to CFREU (question 22)

Most responding courts explain that they apply the fundamental rights provisions of the Constitution in the light of the ECHR and the case law of the ECtHR. Similarly, in those states where the CFREU is applicable, the provisions of the national Constitution are often interpreted in the light of the provisions of the CFREU and the related case law of the CJEU.

Italy clarifies in this regard that if a fundamental right is protected both in a constitutional norm and in a norm of the CFREU, there is an integration of guarantees that must lead to an extension of protection. The referring court may therefore rely on the convention rule as an intervening parameter, pointing out the protection it offers to the fundamental right allegedly infringed by the contested domestic rule, in the context of a comparison with the relevant conventional case law.

France describes that in the application and interpretation of fundamental constitutional rights, the Council of State may refer to the provisions of international conventions containing similar principles. This is particularly the case when the Council of State makes a joint assessment of the conformity of a regulatory system with the provisions of an international convention and a constitutional principle. In accordance with its editorial tradition, these considerations are not set out in the reasons for its decision, but, where appropriate, in the conclusions of the public rapporteurs.

Switzerland explains that the case law of the ECtHR is applied directly in the country and binds all authorities. The Federal Court takes into account the case law of the ECtHR when defining the content of a fundamental right. For the moment, the Court has not referred expressly to the case law that the CJEU has rendered in relation to the CFREU. However, in general, Switzerland closely follows the case law of CJEU and as a result, CJEU jurisprudence relating to human rights could be called to serve as a guide for the interpretation and application of fundamental rights by the Swiss judge.

The Netherlands details that if the Constitution, the ECHR and/or the CFREU are invoked simultaneously, the Administrative Jurisdiction Division normally assesses the compatibility of the national provision or the contested decision with the provisions in the ECHR and the CFREU. Whenever possible, it links to the protection provided by the Constitution, but the starting point is thus the protection in the treaties.

Albania points out that the reason for the Supreme Court often applying the fundamental rights provisions of the Constitution in the light of the ECHR and its case law is to be found in Article 17 of the Constitution where it is stated that the limitations of fundamental rights and freedoms in any case should not exceed the limitations set by the ECHR. Therefore, in case of limitations of rights and freedoms, the ECHR has been given the same effect as the Constitution.

Poland details in this regard that the Supreme Administrative Court often applies the fundamental rights provisions of the Constitution in the light of the ECHR, its case law and the CFREU. It is natural that if the Polish administrative court refers to the freedoms and rights of man and citizen regulated by the Constitution and these rights have their counterparts in international human rights conventions or the CFREU, the Polish administrative court will also refer to these international standards in its ruling.

Greece explains that according to their jurisdiction, the Constitution must be interpreted in a manner "favourable" to the ECHR, as it is interpreted and applied by the ECtHR. This means in particular that if several versions are reasonably tenable as to the meaning of a certain constitutional provision, the Greek judge must, at least in principle, prefer the one which can be reconciled with the ECHR and the jurisprudence of the ECtHR. The Council of State has even been required, in certain cases, to review its case law to adapt it to that of the European courts.

The Czech Republic clarifies that the interpretation of the substance of human rights by reference to international human rights conventions or the CFREU is part of the common decision-making practice of the Supreme Administrative Court. In some cases, it is the fundamental reason underlying the conclusions of the judgment (e.g., in cases related to foreigners and asylum seekers), in others, it is more of a supporting argument (e.g., in interpretation of the right to education). The references to international human rights conventions or the CFREU cover also procedural guarantees. For example, in a recent judgment of 2023 the Supreme Administrative Court concluded that the right to an adversarial procedure protected under Article 6(1) of the ECHR includes the right of the parties to be informed of all the submissions made and to comment on them with a view to influencing the court's decision. This requirement also applies to information and opinions obtained by the court on its own initiative for the purpose of taking a reasoned decision.

Belgium explains that unlike the Constitutional Court, the Council of State (administrative litigation section) can directly apply human rights treaties, which makes it often redundant to refer to similar constitutional provisions. The legislative section of the Council of State has in a recent opinion argued that the right to translation under a directive must be assumed to also encompass the right of translation into tactile or audio signals for the visually impaired, even though the directive is silent on that issue (in contrast to the rules on interpretation that do refer to people who have a speech or hearing impairment). Invoking the principle of equal treatment, the right to inclusion in the Constitution and Articles 21 and 26 of the CFREU, the Council of State thus interpreted the directive in such a way as to require Belgium to implement the right to translation in this inclusive manner.

Türkiye mentions as an example of the interplay between the Constitution and the international human rights convention a judgment of the Council of State where it was held that since the right to fair trial

includes not only the right to access to a court but also the right to have a judgment or decision enforced, the failure to implement the requirements of the judicial decision within a reasonable period of time and the attempt to render the judicial acts ineffective by taking action in the same direction as the administrative act to be annulled constituted a violation of a provision of the Constitution, the right to a fair trial guaranteed by Article 6 of the ECHR and the principle of the rule of law.

Sweden details that the protection of rights in the Constitution is inspired by the ECHR in particular, and in the case law of both supreme courts this has had some practical effects on the interpretation and application of constitutional rights. In a recent example the Supreme Administrative Court had to decide how the constitutional right to a fair trial would affect the existing order of no reimbursement of costs for litigation in the administrative courts unless legislation specifically provided for such a right. The court found that such costs could – in cases where it was constitutionally necessary – be reimbursed in other ways than by a direct order by an administrative court and that this was enough to fulfil the constitutional standard. The approach of the court could perhaps be seen as somewhat similar to how the ECHR affects national systems.

Slovenia explains that the Supreme Court very often applies the constitutional rights with regard to international human rights conventions. For example, in a case of 2020, the Supreme Court, based on the ECHR and decisions of the ECtHR (e.g., *Mirovni inštitut v. Slovenia*), has developed a judicial practice defining the right to a court hearing as an independent human right originating from the Constitution (as a part of the right to a fair judicial process). The complete assurance of this right is extended to judicial proceedings challenging administrative decisions. The Supreme Court concluded that, given the significance of the hearing in court proceedings, any deviation constitutes a substantive infringement of the human right enshrined in the Constitution. As such, it must be subject to a reasoning that is strictly compliant with the Constitution and, as an exception, be restrictively interpreted in judicial practice.

Germany also refers to an example concerning oral hearings. According to national law, the Higher Administrative Courts are competent to adjudicate on applications concerning the validity of urban planning decisions and some abstract norms. Oral proceedings are not obligatory according to these rules. The Federal Administrative Court found that in the application of Article 6 paragraph 1 of the ECHR, the Code of Administrative Court Procedure had to be applied in a way that oral proceedings were necessary and the owner of land property which was affected by urban planning had a right to such a hearing.

Austria explains that the ECHR has constitutional status in Austria. Many fundamental rights of the ECHR, in particular the fundamental procedural rights, are directly applicable and are therefore also applied by the Supreme Administrative Court. For example, regarding the Proceedings of Administrative Courts Act determining the circumstances allowing the omission of a hearing in first instance administrative court proceedings, the Supreme Administrative Court has often ruled that the omission of an oral hearing by a first instance administrative court is unlawful by virtue of Article 6 of the ECHR, often mentioned in relation to Article 47 of the CFREU, and the ECtHR case law. In a recent judgment of 2023, the Supreme Administrative Court referred to ECtHR case law and stated that an oral hearing is not necessary if the facts relevant to the decision have been clarified and the legal questions have been answered by previous case law and no questions of law or fact of such a nature were raised in the complaint that would have required an oral hearing. Since the existence of exceptional circumstances may also justify the omission of a public oral hearing, this also applies to cases in which only legal issues of a limited nature or of no particular complexity are raised. In the particular case, the omission of an oral hearing by the first instance administrative court was judged unlawful because the first instance administrative court did not explain that the facts relevant to the decision had been clarified.

Ireland confirms that the Supreme Court has applied fundamental rights laid down in the Constitution in a way in which the substance of a fundamental rights provision has been defined by reference to the ECHR. An example of this can be found in a judgment of 2022 in which the right to privacy was considered in both the context of the ECHR and the Constitution. In his judgment, the judge referred to the essence of the Article 8 right to private life as being the privacy and associated dimensions of that right, which in turn informed the reading of the constitutional right to privacy as being "essentially associational in nature, and therefore similar in language to Article 8". Acknowledging that Article 8 served as a "single, convenient, omnibus clause", the judge held that aspects of this wider right can be found in different parts of the Constitution. Article 8 of the ECHR thereby informed the reading of the provisions pertaining to the right to private life, contextualising the right as an associational one.

Bulgaria brings forward an example about the simultaneous application of a provision of the Bulgarian Constitution and Articles 3 and 5 of the ECHR in a case where the applicant sought for compensation of damage caused by the police. The Court referred to settled case law under Article 3 of the ECHR that such force by the police is not in breach of Article 3 if it was indispensable and not excessive. Based on the evidence of the case, and especially the fact that the state authorities had not referred to any evidence that the applicant would have put up resistance to the police, the Court found a breach of Articles 3 and 5 of the ECHR and decided that the applicant had an enforceable right to compensation of damage.

Serbia refers to a case of 2020 where the Administrative Court had to determine whether the amount of pension being paid to the claimant could be temporarily reduced by virtue of a temporary law. The Administrative Court assessed that the pension acquired in accordance with the law represented the property of a pensioner. However, in the assessment of whether the given case contained the elements of the violation of the right to property, the Administrative Court found that the measures related to the reduction of the pension amount were prescribed by the law, that they were of a temporary nature, and also that the stated law did not affect the right to the acquired pension. The Administrative Court specifically stated that the Constitution does not provide a guarantee of the precise amount of pension funds, while the limitation of property rights, under certain conditions, is allowed by both the Constitution and the ECHR. The Administrative Court therefore rejected the claim. The ECtHR has in its recent decision, discussing the violation of the right to property and application of the stated Law on Temporary Regulation of Pension Payment, stated that there was no violation of the right to property.

Spain clarifies that the Supreme Court applies and interprets the fundamental rights enshrined in the Constitution according to European law and jurisprudence and in accordance with the postulates established by those jurisdictions. Spain brings up as an example a recent judgment of 2023 in which the Administrative Chamber of the Supreme Court resolved a case on pay discrimination among public servants depending on whether they were temporary workers or workers with contracts of indefinite duration. The Court starts with reference to the Constitution's provision on the principle of equal treatment. In the judgment the Court also applies the corresponding provisions of the CFREU and the interpretation given to them by the CJEU.

Slovakia mentions a case of 2023 which concerned disciplinary proceedings against a judge of the Supreme Court who was accused of several disciplinary offences, in particular with regard to delays in judicial proceedings. The judge claimed that he was not actually being prosecuted for delays in the judicial proceedings but for his public criticism of the judicial reform. The Supreme Administrative Court found the case comparable to that of the ECtHR's judgment of *Todorova v. Bulgaria* to such an extent that the ECtHR's findings of a violation of Articles 10 and 18 of the ECHR in that judgment were fully applicable to the case. Thus, the Disciplinary Chamber concluded that the disciplinary proceedings against the judge and the

penalties and consequences that might be imposed, would constitute an interference with the exercise of his right to freedom of expression which would not be necessary in a democratic society in the light of the legitimate aims set out in Article 10 of the ECHR.

Norway clarifies that the Supreme Court regularly applies the fundamental rights provisions of the Constitution in the light of international human rights conventions. In the preparatory works relating to a 2014 revision of the constitutional provisions on fundamental rights, it is also clearly stated that the provisions must be interpreted in the light of international human rights conventions and case law relating to these conventions. For instance, in a recent case, the Supreme Court had to determine whether the issuing of a criminal sanction for not complying with the police's order to leave the reception area at a Ministry during a demonstration, was in accordance with the right to participate in peaceful assemblies and demonstrations. As the protection of those rights in the Constitution is presupposed to be of the same scope as the international conventions by which Norway is bound, such as the ECHR, the Supreme Court's assessment contains numerous references to ECtHR case law on Article 11 of the Convention.

Lithuania mentions a case where a dispute arose concerning the exercise of the applicant's right to freedom of assembly. The Court referred to the case law of the ECtHR where the ECtHR had noted that the right to freedom of assembly should not be interpreted narrowly and interpreted the corresponding right enshrined in the Constitution in a substantially broad manner in the light of the ECHR and the case law of the ECtHR.

Croatia refers to a case which concerned expulsion of a person from Croatia, in addition to which the person was banned from entering and staying in the country for a period of 10 years and the permanent residence permit was also terminated. The Constitutional Court annulled the verdicts of the First Instance Administrative Court and the High Administrative Court, which had rejected the claim against the expulsion decision. Even though the Constitutional Court accepted that the person, due to his criminal behaviour, represented a threat to public order, which is a sufficient and independent reason for his expulsion from Croatia, the Constitutional Court considered that the administrative courts did not carry out the test of necessity in a democratic society, and thus violated the guarantee of respect and legal protection of family life. In the renewed proceedings, the First Instance Administrative court carried out a proportionality test in terms of the relevant criteria for assessing whether the expulsion was necessary in a democratic society and proportionate to the goal being achieved. The First Instance Administrative court, after carefully considering all the facts, and bearing in mind the standards of human rights established in accordance with the ECHR and the practice of the ECtHR, assessed that there was no violation of the right to respect for family life.

Latvia explains that the Supreme Administrative Court generally applies the fundamental rights provisions of the Constitution in the light of the ECHR and its case law. For example, in a recent case, the Court had to determine whether it was justified to ban a citizen of Latvia from leaving the country. At the same time, the case dealt with a procedural aspect relating to the grounds on which the decision in question was based and the right of the parties to the proceedings to have access to it. In order to protect state secrets and the national security interests, a provision in the National Security Law provided for a limitation of the principle of reasoning concerning the facts established and the conclusions drawn in decisions on the prohibition of exit. According to this legal provision, information on facts and reasons for the decision shall be provided to the extent permitted by law and other normative acts regulating information protection. The Court, therefore, examined whether the restriction on the applicant and his representative to access information that constitutes a state secret violated the right to a fair trial. The Court concluded that it had been granted sufficient procedural tools to balance the restriction of the applicant's right to a fair trial in the court proceedings and to ensure the review of the appealed decision by an independent and impartial court, as required by the Constitution and Article 6 of the ECHR.

Finland refers to a recent case, where the legitimacy of disciplinary actions against a police officer based on her statements in the social media and in a tv programme was assessed under the criteria for limiting freedom of speech as provided for in the Constitution and the ECHR. In the assessment, the special duty of conduct applicable by law to all police officers had a central role. The aim of this special duty of conduct is to protect the public's trust in the appropriateness of police actions and in the impartiality, fairness and non-discrimination of the police organization. However, the special duty of conduct needed to be weighed against the fact that a police officer has the right to present critical opinions towards the police organization and its management and to participate in public debate on topics that are of a general interest, such as immigration and problems linked to it. In the assessment of the case, the fact that the police officer was also engaged in political activities was taken into account as well as the higher level of protection related to political speech. The reprehensibility of the statements made by the police officer was evaluated not only in the light of individual expressions but also taking into account the context and the overall picture conveyed by them. In the circumstances of the case, the Supreme Administrative Court considered that the police department had a legitimate reason to impose civil service sanctions on the police officer for her actions and public statements. Sanctions were considered to be proportionate in the light of the nature of the actions. In its judgment, the Court referred extensively to the case law of the ECtHR.

Hungary mentions that in administrative cases the Curia sometimes refers to the ECHR and the case law of the ECtHR in the reasoning of its decisions. From 2003 to the present, 129 decisions on administrative matters were found in the electronic database in which either a party or a court referred to a specific article or articles of the ECHR, generally to the case law of the ECtHR or to a specific decision. In 2022 and 2023, there were a total of 30 such completed cases. For example, in the recent order, the Curia explains in detail the content of the legal principle "*ne bis in idem*" contained in the Hungarian Fundamental Law, *inter alia*, on the basis of the International Covenant on Civil and Political Rights, the ECHR and the jurisprudence of the ECtHR.

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ANNEX I – List of member and guest institutions that submitted a national report in response to the questionnaire and some statistical information on the number of cases dealt with annually.

Country	Institution	Number of decisions given annually (average)	Number of published precedents given annually (average)
Austria	Supreme Administrative Court of Austria	6 700 (in 2022)	Precedents are unknown in administrative proceedings within the Austrian legal system.
Belgium	Council of State	3 344 judgments and cassation orders; 2 400 advisory opinions (in 2022–2023)	All judgments and opinions are published on the website.
Bulgaria	Supreme Administrative Court of the Republic of Bulgaria	12 000	-
Croatia	High Administrative Court of the Republic of Croatia	5 000	100 (published in the Official Gazette) and 1 500 (uploaded on shared case law website)
The Czech Republic	Supreme Administrative Court (SAC) of the Czech Republic	3 900 (average of the past ten years)	The SAC publishes a vast majority of its decisions (online). In addition, the SAC publishes its monthly collection consisting of the selected judgments of the SAC or regional courts relevant for practice (160 per year based on the average over the last 10 years).
Denmark	Supreme Court of Denmark	350	-
Estonia	Supreme Court of Estonia (Riigikohus), Administrative Law Chamber	683 (average of the past five years)	The average number of published reasoned judgments and rulings (although not precedents in the strictest sense, as the Estonian legal system does not recognise precedent law) in the last five years (2018–2022) has been 72.
Finland	Supreme Administrative Court of Finland	3 700 – 4 500	150 – 200
France	Conseil d'Etat (Council of State)	10 000	3 000
Germany	Bundesverwaltungsgericht (Federal Administrative Court)	1 000	200
Greece	Hellenic Council of State - Symvoulio tis Epikrateias (Συμβούλιο της Επικρατείας)	2 800 – 3 000	-

Hungary	Kúria (Közigazgatási Kollégium) - Curia of Hungary (Administrative Chamber)	2 000 – 2 500	As a result of reform effective from 1 April 2020, Hungarian law underwent a transformation to a limited system of precedents. All decisions in individual cases have to be published in the Collection of Court Decisions.
Ireland	Supreme Court of Ireland / Cúirt Uachtarach na hÉireann	85 – 120	85 – 120
Italy	Council of State	Average of the past five years: jurisdictional decisions 8 540, advisory decisions 1 500	All decisions (both jurisdictional and advisory) given annually are published on the website.
Latvia	Supreme Court of the Republic of Latvia	The Department of Administrative Cases gives annually about 800 decisions.	All judgments and decisions that conclude the proceedings at the Supreme Court are published on a special website. On average, around 600 published judgments and decisions are given annually. Also, if a court judgment or decision contains significant case law findings, such rulings may be published on the Supreme Court website. On average, there are around 150 such judgments yearly.
Lithuania	Supreme Administrative Court of Lithuania	4 200 – 4 700	30
Luxembourg	Administrative Court of the Grand Duchy of Luxembourg	250 – 300	All decisions are published.
Malta	Constitutional Court	101	The doctrine of precedent does not apply in Malta.
The Netherlands	Administrative Jurisdiction Division of the Council of State of the Kingdom of the Netherlands	9 000	5 000
Poland	Supreme Administrative Court (Naczelny Sąd Administracyjny)	13 000 – 19 000	90 – 120
Portugal	Supreme Administrative Court of Portugal	1 793 (average of the past three years)	Since 2007, the full texts of decisions are available in a database.
Romania	High Court of Cassation and Justice of Romania	Around 15 000	In recent years, around 30 RIL (appeals in the interest of law) and

			around 100 HP (preliminary ruling on question of law).
Slovakia	Supreme Administrative Court of the Slovak Republic	1500 – 2000	On average 32 decisions are published in the Collection of Decision, which constitutes established case law. An unjustified deviation from such case law may constitute a ground for filing a cassation complaint.
Slovenia	Supreme Court of the Republic of Slovenia	3000 – 3200 (Supreme Court in its entirety); 600 – 900 (Administrative Department of the Supreme Court)	All substantial decisions on the merits of the case (sixty percent of all decisions), are accessible to the public online. Moreover, a selection of 50 to 70 pivotal decisions from the entire Supreme Court and 5 to 10 key decisions from the Administrative Department of the Supreme Court are featured in a specialized written publication.
Spain	Supreme Court of Spain	35 000	35 000
Sweden	Supreme Administrative Court of Sweden	7 000	70 – 80
Montenegro	Supreme Court of Montenegro		
Serbia	Administrative Court of the Republic of Serbia	22 500 – 23 000	No precedents are set.
Türkiye	Council of State of Republic of Türkiye	95 298 (in 2022)	No data on published decisions.
Norway	Supreme Court of Norway	2 200	110
Switzerland	Federal Supreme Court of Switzerland	7 700	235
The United Kingdom	Supreme Court of the United Kingdom	55 – 65	55 – 65
Albania	Supreme Court of Albania	5 000 – 6 000	There is no such categorization as precedents. The Supreme Court issues unified decisions, which are obligatory to follow by the lower courts in similar cases, and other decisions which could be considered in some cases as precedents, but not in a formal way. In 2023, there were 17 unified decisions issued by administrative, civil and criminal chambers of the Court.