The Finnish presidency of ACA-Europe focuses on the vertical dialogue between the national supreme administrative jurisdictions and the European Courts, i.e., the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This questionnaire addresses this vertical dialogue from the perspective of the pluralist framework of European fundamental rights protection on the one hand and the national constitutional framework of fundamental rights on the other hand.

The term “fundamental right” in the title of the questionnaire is used as an umbrella concept. It refers to rights recognized as fundamental by the respective legal orders. This implies that those rights are in some sense supreme norms, often judicially protected against violation by public authorities, including the legislature.

In national legal systems, these rights are usually laid down by the constitution, or they may be provided by domestically applicable international human rights conventions. Within the scope of application of European Union law, the Charter of Fundamental Rights (CFREU) provides the main source of fundamental rights. Quite often, these various sources of law are simultaneously applicable in concrete cases. Furthermore, each individual system usually provides for specific court(s) or other authorities regarded as supreme or authoritative. In this sense, the fundamental rights protection in Europe may be regarded as “pluralist”.

As legal norms, fundamental rights norms in Europe have several features that complicate their application in national courts. First, they are usually open to different interpretations, which in turn emphasises the role of precedents delivered by both national and European courts. Secondly, because of the pluralist nature of the European fundamental rights system, national courts sometimes need to decide which of the different sources of fundamental rights should be given primacy over the others and on what grounds. Third, it seems that there is not a single right answer to the second question. For instance, European Union law has primacy over national law, and this also applies to national constitutions. However, as provided by Article 52.4 of the CFREU, fundamental rights recognized by the Charter should be interpreted in harmony with the constitutional traditions of the Member States.

Building on the above-mentioned framework, the following questionnaire is prepared with a view to a comparative assessment of the functioning of the system of fundamental rights protection in the light of the legal practice of supreme administrative jurisdictions in Europe.

For this purpose, the questionnaire starts with questions concerning the basic institutional framework for the application of fundamental and human rights in the domestic legal order and then moves to questions about the modes in which the interpretation of national and European fundamental rights norms interact in the practice of national courts.

Acknowledging the differences between European legal cultures, please, feel free to complement any answer with additional and/or clarifying information.
I Background information

1. The formal title of your court? Please include the country.

Supreme Administrative Court of Austria

2. The number of decisions your court gives annually (average)?

Around 6,700 proceedings were concluded in 2022.

3. The number of published precedents your court gives annually (average)?

The Supreme Administrative Court does not give precedents, as these are unknown to administrative proceedings within the Austrian legal system.

II Constitutionality of legislation and the applicability of fundamental rights norms. Mark your answer with bold letters.

4. Does your country have a written Constitution?

- Yes
- No

Austria does not have a constitution per se: there is the Federal Constitutional Law (Bundes-Verfassungsgesetz 1920 - B-VG), and many additional constitutional provisions in simple laws. In addition, the ECHR has constitutional status.

5.a Is your court authorised to apply the (written or unwritten) Constitution directly in its decisions?

- Yes
- No

5. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often

5. c. If yes, what areas of constitutional law are typically involved in these cases?

- Fundamental rights
- Democratic principles
- Rule of law
- Federalism and local self-government
- Legislative process
- Finance
- Other. Please describe below.

5. d. If your court is not authorized to apply the Constitution directly, please explain briefly how your national system works.

n.a.
6. a Is your court authorised to repeal a piece of ordinary legislation if it is found unconstitutional?

- Yes
- No

6. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often
- Very often
- n.a.

6.c. If not, which institution, if any, has the power to decide on the constitutional validity of ordinary legislation (either in abstracto or in concreto)?

The constitutional judicial review regarding the unconstitutionality of laws as well as the unlawfulness of regulations lies exclusively with the Constitutional Court.

However, if a court (referring to all administrative courts - including the Supreme Administrative Court - as well as all ordinary courts) 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. 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). Furthermore, the Constitutional Court itself is obliged to initiate the review of a provision if concerns about the constitutionality or lawfulness of this provision have arisen during pending proceedings before the Constitutional Court.

Irrespective of a specific case, the following bodies are entitled to submit an application to the Constitutional Court for judicial review of a law (“abstract review of legal norms”):

- the Federal Government in respect of laws adopted at provincial level,
- provincial governments in respect of laws adopted at federal level,
- one third of the members of the National Council or one third of the members of the Federal Council in respect of federal laws,
- one third of the members of a provincial parliament in respect of provincial laws (if such measure is provided for in the constitution of the province).

The Constitutional Court 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).

7. During the last 10 years, has your court given precedents involving the following topics:

- Right to asylum
- Social rights
- Environmental rights
- Rights of future generations
- Rights of indigenous peoples
8. In the cases where your court has referred to the Constitution, what kind of role has the Constitution had in the reasoning? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision which is inherently based on ordinary legislation
- A source of interpretation which provides for the correct application of ordinary legislation in the concrete case at hand (i.e. fundamental rights friendly interpretation)
- 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
- An overriding role so that otherwise applicable ordinary legislation is set aside/declared invalid on constitutional grounds

Additional comment: If there are doubts about the conformity of a legal provision of the constitution (including the ECHR), the Supreme Administrative Court would be obliged to submit an application to the Constitutional Court for a review of the provision (see question 6c).

- Other. Please explain and/or provide an example.

III Interplay of national and European fundamental rights and international human rights norms

9.a. Is your court authorised to apply international human rights conventions and follow their international case law in its decisions?

- Yes
- No

9. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often
- Very often

10.a. Is your court authorised to apply the Charter of Fundamental Rights of the European Union (CFREU) in its decisions?

- Yes
- No

This applies only in the field of application of European Union law.

10. b. If yes, how often does this happen in practice?

- Rarely
- Sometimes
- Often
11. When applying fundamental rights provisions of the Constitution, is your court also simultaneously applying similar provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR)?

- Very rarely
- Sometimes
- Often
- Very often

As mentioned in question 4, the ECHR has constitutional status. If rights guaranteed by the ECHR are equal to those guaranteed in other constitutional provisions, the Supreme Administrative Court applies both.

12. When applying fundamental rights provisions of the Constitution in the field of application of European Union law, is your court also applying corresponding provisions of the CFREU?

- Very rarely
- Sometimes
- Often
- Very often
- My court does not apply the Constitution in the field of application of European Union Law.

13. In the cases where your court refers to the ECHR, what kind of role does the convention have in the reasoning? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision which is inherently based on ordinary legislation
- A source of interpretation providing for the correct application of ordinary legislation in the concrete case at hand (i.e. human rights friendly interpretation)
- A decisive role 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
- An overriding role so that otherwise applicable ordinary legislation is set aside /declared invalid based on the ECHR.

Additional comment: (see question 8)

- Other. Please explain and/or provide an example.

14. It follows from the case law of the CJEU (see, eg, C-14/83, von Colson) that national courts must interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of EU law. Within the scope of the application of EU law, how frequently does this kind of interpretation and application of law appear in the argumentation of your court?

- Never
- Rarely
- Sometimes
- Often
15. The obligation to interpret national legislation in line with EU law is extensive, but it is not without limits. According to the case law of the CJEU (eg, C-12/08, Mono Car Styling), that obligation is limited by the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem. Where there is any inconsistency between national law and Union law, which cannot be removed by means of such a construction, the national court is obliged to declare that the provision of national law which is inconsistent with (directly effective) Union law is inapplicable (eg 152/84, Marshall). How frequently does this kind of reasoning appear in the argumentation of your court?

- Never
- Rarely
- Sometimes
- Often

16. Has your court given any precedents regarding the application of Article 51 (Field of application) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

As mentioned before, the Supreme Administrative Court does not give precedents, as these are unknown to administrative proceedings within the Austrian legal system (see question 3).

However, the Supreme Administrative Court has addressed the application of Art. 51 CFREU in a number of decisions. It has clarified that the phrasing "only when they are implementing European Union law" in Art. 51 para. 1 CFREU implicates that Art. 51 is only applicable when the Member States act in the field of European Union law (see judgement of 23 January 2013, 2011/10/0195, mwN). It has also ruled that the implementation of directive law transposed into national law by the Member States is in any case and without any doubt a central part of the field of application of European Union law (see judgement of 23 June 2021, Ra 2019/13/0111).

In a number of decisions, the Supreme Administrative Court has stated, with reference to Art. 51 CFREU, that certain administrative proceedings fall within the field of application of European Union law, meaning that Art. 47 CFREU is also applicable in these proceedings (e.g. regarding VAT proceedings see judgement of 22 April 2022, Ra 2021/13/0087; regarding decisions of a first instance administrative court ruling on the legality of detention pending deportation see judgement of 24 February 2022, Ra 2020/21/0492).

17. Has your court given any precedents regarding the application of Article 52 (Scope and interpretation of rights and principles) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

As mentioned before, the Supreme Administrative Court does not give precedents, as these are unknown to administrative proceedings within the Austrian legal system (see question 3).

However, the Supreme Administrative Court has alluded to Art. 52 CFREU especially in order to stress the fact that the CJEU's case law has to be taken into account when interpreting the CFREU (see judgement of 12 October 2018, Ra 2018/14/0097). The Supreme Administrative Court also held that in administrative proceedings where claims based on European Union law are asserted, an exclusion of the reviewability of administrative action by courts has to be measured not only against Art. 6 para. 1 ECHR, but also against Art. 47 para. 2 CFREU, which - on the grounds of Art. 52 para. 3 CFREU - does not guarantee less protection than Art. 6 ECHR. In any case, in the "overlapping area" between Art. 6 para. 1 ECHR and Art. 47 para. 2
CFREU, an application of the limitation rule of Art. 52 para. 1 CFREU cannot be considered (see judgement of 9 September 2016, Ro 2015/12/0025).

18. In the cases where your court has referred to the CFREU, what kind of role has the Charter had in the argumentation? Choose all applicable options.

- Symbolic / Decorative
- An additional argument supporting a decision based on EU law and ordinary domestic legislation
- A source of interpretation which provides for a correct application of EU law and ordinary legislation in the concrete case at hand
- A decisive role so that the decision is based solely on the CFREU in a situation where EU law and national legislation is silent on the issue at hand
- An overriding role so that otherwise applicable ordinary legislation is set aside / declared invalid on grounds based on the CFREU

Additional comment: Within the field of application of European Union law the Supreme Administrative Court sets aside national provisions not in conformity with the CFREU.

- Other. Please provide an example.

19. Has your court given any precedents regarding the application of Article 53 (Safeguard for existing human rights) of the ECHR? If yes, please provide a brief description of the context and outcome of the decision(s).

No.

As mentioned before, the Supreme Administrative Court does not give precedents, as these are unknown to administrative proceedings within the Austrian legal system (see question 3). Moreover, there is also no case law of the Supreme Administrative Court on Art. 53 CFREU.

20. Has your court given any precedents regarding the application of Article 53 (Level of protection) of the CFREU? If yes, please provide a brief description of the context and outcome of the decision(s).

No.

As mentioned before, the Supreme Administrative Court does not give precedents, as these are unknown to administrative proceedings within the Austrian legal system (see question 3). Moreover, there is also no case law of the Supreme Administrative Court on Art. 53 CFREU.

21. Has your court applied 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? If yes, please explain and/or provide an example.

As mentioned before in Austria, there are a number of legal texts containing constitutional rights, most notably the B-VG, the ECHR, which was raised to the status of constitutional law in 1964, and the State Basic Act of 1867 (Staatsgrundgesetz - StGG). The StGG covers a number of individual rights that are also found in the ECHR or the B-VG, but also contains other individual rights, such as the accessibility to public offices regulated in Art. 3 StGG. This alone leads to a better standard of protection of individual rights in Austria that goes beyond the rights provided for in international human rights conventions.

22. Has your court 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 either international human rights conventions or to CFREU, and the case law relating to them? If yes, please explain and/or provide an example.
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.

There are various reasons why not only the Constitutional Court, but also the Supreme Administrative Court has to apply the ECHR from time to time, and why the Supreme Administrative Court therefore has extensive case law on the interpretation of the ECHR. For example, simple law regulations, restricting or implementing the fundamental rights of the ECHR must be interpreted in the light of these fundamental rights. The fundamental rights of the ECHR must therefore also be taken into account when assessing compliance with provisions of simple law.

This is the case also for sec. 24 of the Proceedings of Administrative Courts Act (Verwaltungsgerichtsverfahrensgesetz - VwGVG) which determines 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 was unlawful in regards to Art. 6 ECHR, often mentioned in relation to Art. 47 CFREU, and ECHR case law.

In a recent judgment from 19 October 2023, Ro 2020/04/0028, the Supreme Administrative Court referred to ECHR 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.