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GENERAL REPORT

DIALOGUE WITH THE EUROPEAN COURT OF HUMAN RIGHTS – THE IMPACT OF THE COURT'S JUDGMENTS AND ADVISORY OPINIONS AT THE NATIONAL LEVEL

The Colloquium in Helsinki in May 2025 marks the end of the Finnish presidency of ACA-Europe, arranged in close co-operation with Sweden during the term of 2023−2025. The overarching theme of the presidency has been the 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).

During the Finnish presidency, seminars have been organised on a variety of issues: the duty of the national courts to make a reference for a preliminary ruling to the CJEU (Stockholm, October 2023), mechanisms of counteracting conflicting rulings from the domestic courts and the CJEU and the ECtHR (Zagreb, February 2024), the multilevel protection of fundamental and human rights in European administrative courts (Inari, May 2024), ethics and the recruitment of members of the Supreme Administrative Courts and Councils of State (Versailles, November 2024) and how the Supreme Administrative Courts can contribute to the quality of legislation (The Hague, March 2025).

In this Colloquium, the dialogue between national supreme administrative courts and the ECtHR is in the limelight.

The first part of the report examines the mechanism of advisory opinions under Protocol No. 16 to the European Convention on Human Rights and Fundamental Freedoms (ECHR). This mechanism is assessed from a practical point of view, with a focus on how the national supreme administrative courts perceive this instrument and what effects it has had at the national level thus far. Experiences are shared both by those courts that have already made use of this relatively novel instrument as well as by those courts in states that have not ratified Protocol No. 16 to date.

In the second part, the impact of the judgments of the ECtHR at the national level is explored from the viewpoint of two topical themes: climate change litigation and the so-called "push-backs" in the field of immigration law. Both themes, albeit very different by nature, touch upon core human rights provisions but call for an interpretation that is able to adapt to legal, social and scientific

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developments of today's society. Questions related to both climate change and summary returns of aliens are also prime examples of legal issues that may require scrutiny by national administrative justices but the impact of which is not limited to the domestic sphere.

The questionnaire was answered by 34 institutions. This report does not aspire to list all these 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.

The outline of the report is as follows: In the first part, the advisory opinion mechanism under Protocol No. 16 is assessed. This part is divided into two sub-sections, the first (A) focusing on responses from the courts of the states that have ratified Protocol No. 16, and the second (B) examining the views of the courts of those states that have not.

In the second part, the impact of the case law of the ECtHR in the field of climate change litigation and summary returns of aliens is explored in more detail. The first sub-section (A) is devoted to issues linked to climate change whilst considerations related to "push-backs" are assessed in sub-section B.

I. ADVISORY OPINIONS UNDER PROTOCOL NO. 16 TO THE CONVENTION

The Protocol's purpose of enabling a dialogue between the highest national courts and the ECtHR is well described in the third paragraph of the Preamble to the Protocol, which refers to enhanced interaction between the Court and national authorities, and to reinforced implementation of the Convention in accordance with the principle of subsidiarity.

The highest national courts or tribunals may request the ECtHR to give an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. It must give reasons for its request and must provide the Court with the relevant legal and factual background to the pending case.

Protocol No. 16 to the Convention entered into force on 1 August 2018 with ten High Contracting Parties to the Convention having expressed their consent to be bound by the Protocol.

To date, 24 out of 46 Council of Europe member states have deposited their instruments of ratification, acceptance or approval with the Secretary General and by means of a declaration indicated the courts or tribunals that may request the ECtHR to give advisory opinions.

The corresponding figure for the participants in ACA-Europe is to date 14 out of 34, including member (12), observer (2) and guest (0) states.

For the purposes of the overarching theme of this Colloquium – dialogue between the ECtHR and national courts – it is interesting to note that the following courts are able to avail themselves of the advisory opinion mechanism. These courts thus have a crucial role to play in enhancing the interaction between the ECtHR and national authorities:

ALBANIA Supreme Court – Constitutional Court
BELGIUM Constitutional Court – Court of Cassation – Council of State
ESTONIA Supreme Court
FINLAND Supreme Court – Supreme Administrative Court – Labour Court – Insurance Court
FRANCE Constitutional Council – Council of State – Court of Cassation
GREECE Supreme Special Court – Supreme Civil and Criminal Court – Council of State – Court of Audit
LITHUANIA Constitutional Court – Supreme Court – Supreme Administrative Court
LUXEMBOURG Constitutional Court – Administrative Court – Court of Cassation – Court of Appeal
MONTENEGRO Supreme Court – Constitutional Court
THE NETHERLANDS Supreme Court – Administrative Jurisdiction Division of the Council of State – Central Appeals Tribunal* – Administrative High Court for Trade and Industry* – Joint Court of Justice of Aruba, Curaçao, Sint Maarten and of Bonaire, Sint Eustatius and Saba*[1]
ROMANIA Constitutional Court – High Court of Cassation and Justice
SLOVAKIA Supreme Court[2] – Supreme Administrative Court – Constitutional Court
SLOVENIA Supreme Court – Constitutional Court
SWEDEN Supreme Court – Supreme Administrative Court – Labour Court – Land and Environment Court of Appeal – Migration Court of Appeal – Svea Court of Appeal, in rent cases
UKRAINE (request for observer status pending) Supreme Court

In this report, sub-section A addresses the responses provided by the courts in states bound by Protocol No. 16. The answers by the courts in those states that have not ratified the protocol are examined in further detail in sub-section B of this report.

A. POINTS OF VIEW PRESENTED BY COURTS THAT MAY USE THE MECHANISM UNDER PROTOCOL NO. 16

1. ACA-Europe jurisdictions in which a request for an advisory opinion has been submitted

Six courts report that a request for an advisory opinion has been submitted to the ECtHR, either by them or another court in their country. Requests have been submitted by Belgium (Council of State), Estonia (Criminal Chamber of the Supreme Court), Finland (the Supreme Court), France (Council of State and Court of Cassation), Lithuania (the Supreme Administrative Court) and Romania (High Court of Cassation and Justice).

> In *France*, Court of Cassation submitted a request for an advisory opinion already in 2018 with respect to surrogacy. The Council of State made use of Protocol No. 16 for the first time in 2021 by asking the ECtHR on the relevant criteria for assessing the compatibility with the ECHR of a

[1] * Possesses the powers arising from the protocol only when acting as domestic courts of last resort.
[2] Possesses the powers arising from the protocol only when acting as a court of cassation or as a court of appeal on points of law.

legislative provision relating to hunting, which limits the possibility for associations of owners to withdraw their land from the territory of an approved municipal hunting association.

Lithuania explains that the Supreme Administrative Court submitted a request for an advisory opinion regarding impeachment legislation in 2020. The request arose in the context of a case involving a former member of the Lithuanian Parliament who had been impeached but sought to run for re-election and contested the authority's refusal to register her as a candidate.

In *Finland*, a request for an advisory opinion was submitted by the Supreme Court in 2022 in a case concerning procedural rights related to the adoption of an adult.

Belgium details that the Council of State submitted a request for an advisory opinion in 2023. The request concerned Article 9 of the Convention and whether a competent administrative authority could consider the mere association or membership of a religious movement as presenting a threat to the country so that it could constitute a sufficient reason to take an unfavourable measure against someone, such as a ban on exercising the profession of security guard.

In addition, in a few instances a request was made but ultimately rejected by the ECtHR. Regarding *Estonia*, the panel of the Criminal Chamber of the Supreme Court requested an advisory opinion in 2023 in a matter related to the principle of *ne bis in idem*. Although the request was rejected, the reasoning by the Panel of the Grand Chamber provided in practice useful guidance.

2. Considerations related to submitting a request – ex officio or party arguments?

Questions 3 and 4 of the Questionnaire aim at examining the considerations related to submitting a request for an advisory opinion. In particular, it is explored if courts have considered of their own motion the usefulness of obtaining an advisory opinion of the ECtHR in a pending case, and whether such requests have been made by the parties as part of their argumentation in a particular case.

With respect to considering having recourse to the mechanism under Protocol No. 16 of their own motion, answers are split: six courts (*Belgium, France, Lithuania, the Netherlands, Romania, the Slovak Republic*) respond that they have considered such an option *ex officio* whereas six courts (*Albania, Estonia, Finland, Greece, Luxembourg, Slovenia*) explain that the advisory opinion procedure has not been reflected upon in the context of deliberations of a particular case.

However, only in three courts such considerations have resulted in the actual submittal of a request for an advisory opinion, whereas equally in three courts no request was made after considering the option provided for by Protocol No. 16.

The Netherlands explains that in general, a decision not to request an advisory opinion is based on the following considerations: the lack of need for further explanation from the ECtHR; the major role that the EU law (and the preliminary ruling procedure at the CJEU) plays in fundamental rights cases; and practical considerations, such as an undesirable delay.

The Slovak Republic mentions that the Supreme Administrative Court of the Slovak Republic has considered requesting an advisory opinion, for example, in a case concerning a restitution claim under a special law for the restoration of ownership of land during the period of non-freedom. Ultimately, after careful consideration, the Court decided not to make such a request due to the advisory opinion only having a recommendatory character, which would not be able to break the statutory binding nature of the decision of the Constitutional Court of the Slovak Republic, as the Constitutional Court had already ruled on the constitutional conformity of the provisions of the restitution act.

The majority of the responding courts answer that they have been asked to make a request for an advisory opinion by the parties in a pending case. This can be interpreted to indicate that the advisory opinion mechanism has been recognised at least to some extent by the legal audience.

Most courts submit very similar considerations with respect to the parties' request to submit an advisory opinion. First of all, in most cases, these requests have been rejected. *Romania* mentions that only one such demand has resulted in submitting the request to the ECtHR. The main reasons for rejecting the parties' request appear to relate to the absence of clear and specific legal questions in need of interpretation, the existence of clear case law by the ECtHR on the issues at hand and the lack of a question of principle in need of clarification. Most courts submit that they do give reasons for rejecting the parties' request. *Greece* and *Belgium* also explain that they have pointed out in their reasoning that the advisory procedure is optional by nature, and thus making the request is at the discretion of the requesting court. Furthermore, *Estonia* and *Finland* clarify that if leave to appeal is not granted and the case is not considered on its merits, no reasons are given for rejecting the request.

3. Practical experiences related to requests for an advisory opinion

Questions 5–8 of the Questionnaire were addressed to those courts that have submitted a request for an advisory opinion, aiming at grasping the different practical insights of the procedure and its usefulness for adjudicating the case at hand. As most responding courts have not obtained first-hand experience of the advisory opinion mechanism, the answers to these questions are more limited in number.

Regarding the requesting court's decision to give (or not) its view on the question posed to the ECtHR, different considerations are put forward by the responding courts.

Belgium considers that taking an attitude on the question raised would be likely to prejudge it and it has therefore refrained from formulating an opinion.

In the same vein, *Lithuania* observes that the decision not to provide a view could reflect the requesting court's focus on seeking clarification of the Convention's requirements, rather than advocating for a particular interpretation.

Romania, however, refers to its recent decision to request an advisory opinion from the ECtHR, in which the court expressed its doubts as to whether the national procedure complies with the standards of the ECHR.

France explains that the wording of its decision to request an advisory opinion is intended to be as clear as possible in order to set out the legal question raised, the legal difficulty encountered in light of the provisions of the ECHR, to recall the case law of the ECtHR on this issue and to explain why the case law does not allow the specific issue to be resolved. The Council of State's referral decision therefore remains "neutral". However, the *rapporteur public* expresses his opinion on the matter more clearly in his conclusions.

With respect to the usefulness of the advisory opinion received, all three courts (*Belgium, France, Lithuania*) who received an opinion from the ECtHR confirm that the opinion proved useful for resolving the pending case.

Belgium submits that the opinion given by the ECtHR was useful since the ECtHR clarified the criteria to be taken into consideration in determining whether a violation of Article 9.2 of the ECHR had occurred. The ECtHR held that the established fact that an individual belongs to a religious movement that, in view of its characteristics, is considered by the competent administrative authority to represent a threat to the State, may justify a refusal to authorise that individual to work as a security guard or officer, provided that the measure in question: (1) has an accessible and foreseeable legal basis; (2) is adopted in the light of the conduct or acts of the individual concerned; (3) is taken, having regard to the individual's occupational activity, for the purpose of averting a real and serious risk for democratic society, and pursues one or more of the legitimate aims under Article 9.2 of the ECHR; (4) is proportionate to the risk that it seeks to avert and to the legitimate aim or aims that it pursues; and (5) may be referred to a judicial authority for a review that is independent, effective and surrounded by appropriate procedural safeguards, such as to ensure compliance with the requirements listed above.

France details that the opinion delivered by the ECtHR proved to be extremely valuable in resolving the dispute. In its final ruling the Council of State referred to the opinion, recalled its content (the ECtHR had suggested a three-stage methodology) and applied this methodology to the case at hand.

Lithuania also explains that the advisory opinion of the ECtHR was useful for resolving the case at hand. The Supreme Administrative Court summarised the criteria for evaluation outlined in the advisory opinion related to the assessment of the proportionality of the restriction of the applicant's voting rights, and emphasised that these criteria must primarily be objective and allow for a transparent assessment of important circumstances related to (1) the events that led to the individual's impeachment; (2) the duties the individual intends to undertake in the future. These criteria should be determined primarily by considering the functional requirements of the institution the individual seeks to join, as well as the constitutional and democratic requirements of the entire state; this includes evaluating factors such as the individual's loyalty to the state, including their respect for the Constitution, laws, institutions, and independence of the country. Guided by these clarifications, the Supreme Administrative Court assessed whether the disqualification imposed on the applicant at the time of the disputed decision by the Central Electoral Commission was proportional. The individually evaluated circumstances and legal framework confirmed that, had the applicant's constitutional disqualification from holding a parliamentary seat not been taken into account when the disputed decision was made, the constitutional and democratic requirements of the

state, as well as the specific requirements for the position of Member of Parliament, would have been violated. Therefore, it was concluded that the restriction on the applicant's voting rights, imposed by the disputed decision of the Central Electoral Commission, was consistent with the purpose of this institution and was proportional.

Equally, all three courts that have received an advisory opinion from the ECtHR confirm that the opinion was cited in their final decision.

> *Belgium* explains that the opinion given by the ECtHR was analysed in the final judgment of the Council of State. In addition, the parties to the dispute were able to put forward their arguments in relation to the opinion. It is clear from this judgment that the Council of State implemented the principles that the Court's opinion had recommended in order to determine whether, in the case at hand, there had been a violation of Article 9.2 of the ECHR.
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> *Lithuania* details that the criteria for evaluation outlined in the advisory opinion were summarised in the final decision of the national court when assessing the proportionality of the restriction of the applicant's voting rights.

Question 8 addresses the potential wider impact the advisory opinion received from the ECtHR may have had on the national legal order, outside of adjudicating the case at hand to which the opinion directly related. Also on this point, three courts have similar experiences, and they all answer in the affirmative.

> *Lithuania* explains that in 2022, the legal regulation was amended in light of the ECtHR Grand Chamber judgment in the case of *Paksas v. Lithuania* (2011) and the Advisory Opinion issued in 2022. As a result, the constitutional doctrine was adjusted. Based on these changes, the previously established permanent and irreversible ban on the applicant being elected to parliament was lifted, and a time limit for such a ban was set. Overall, the advisory opinion reinforced the visibility of human rights protection, encouraging national authorities, courts, and lawmakers to prioritise compliance with the ECHR. This resulted in a stronger emphasis on human rights in national legal discourse, ensuring that the ECHR's influence was more directly felt in the interpretation and application of domestic law.
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> *Belgium* states that the advisory opinion provided a fairly precise reading of Article 9.2 of the ECHR in a specific context of the internal security of the State, and it also describes how judicial review should be exercised, in particular when information is classified. This opinion may have an impact on other cases submitted to the Council of State in this area and should also encourage the State to prepare files that meet the requirements put forward by this opinion.
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> *France* submits that beyond the rather circumstantial question of approved municipal hunting associations (ACCA), the advisory opinion given by the ECtHR sheds light on how to apply Article 14 in combination with Article 1 of the Protocol and to define the relevant criteria for assessing the existence or not of discrimination prohibited by the ECHR.

4. The impact of the requests made by other courts and the ECtHR's rejection decisions

Questions 9 and 10 aim at exploring the impact at the national level of the advisory opinions requested by other courts, on one hand, and the reasoning by the ECtHR when it rejects a request for an advisory opinion, on the other hand.

None of the responding courts recognises that advisory opinions requested by courts in other countries would have had a particular impact on their national legal order. This can, at least partly, be explained by a relatively small number of advisory opinions requested and delivered thus far. Interestingly, the views submitted by the non-ratified jurisdictions were slightly different on this and especially one opinion delivered by the ECtHR was recognised to have had implications also in other jurisdictions (see further below in sub-section B).

With respect to the usefulness of the reasoning of the ECtHR in the context of rejecting a request for an advisory opinion, most responding courts answer in the negative. However, *Belgium* explains that before the Council of State referred its request to the ECtHR, it took note of the various opinions that had already been requested from the ECtHR and the responses provided. It also took into account the "Guidelines concerning the implementation of the advisory opinion procedure provided for in Protocol No. 16". Similarly, *France* mentions that before referring – or not referring – a request for an advisory opinion, the Council of State systematically examines whether the conditions set out in Article 1 of Protocol No. 16 are met. In particular, it considers at length whether or not the question raised is a "question of principle".

B. POINTS OF VIEW PRESENTED BY COURTS THAT MAY NOT USE THE MECHANISM UNDER PROTOCOL NO. 16

Questions 11–15 of the Questionnaire were addressed to those ACA-jurisdictions that have not ratified Protocol No. 16, namely: ***Austria, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Germany, Hungary, Ireland, Italy, Latvia, Malta, Poland, Portugal, Spain, Sweden[3], Serbia, Türkiye, Norway, Switzerland*** and ***United Kingdom*****.** A clear majority of the responding courts report that they are unaware of whether ratification is forthcoming or not.

> *Italy,* however, submits that a bill for the ratification of Protocol No. 16 had been prepared for consideration by the Parliament. During the parliamentary debate, it was highlighted that the ratification of Protocol No. 16 had been postponed to the future "due to criticism linked to the risk of erosion of the role of the Italian High Courts and of the fundamental principles of our legal system". In Italy, the debate on whether or not to ratify Protocol No. 16 is still open. Among the elements taken into consideration, there is one concerning the impact of the advisory opinion of the ECtHR on the duration of the judgment. In particular, given that the

[3] At the time of answering the Questionnaire Sweden had not yet ratified the protocol, which is reflected in the answers of our Swedish colleagues. The instrument of ratification was deposited on 19 December 2024 (entry into force 1 April 2025).

reference under Protocol No. 16 is preliminary to the case but that, unlike the preliminary reference to the CJEU under Article 267 TFEU, the opinion issued by the ECtHR does not affect the final decision since it is always possible that the national court which requested it will not take it into account, this could lead the parties to make dilatory use of the advisory reference. This would be contrary to the principle of the reasonable duration of the proceedings.

Denmark explains that there is no current public debate regarding whether Denmark should ratify Protocol No. 16 or not, nor any political action to that effect from the government. In addition, Denmark details that the decision not to ratify at the time was based on a lack of experienced need for such an instrument combined with a reluctance to accept the delayed justice that would result from this procedure.

Switzerland points out that the Swiss government initially wished to assess the impacts of Protocol No. 16 on the workload of the ECtHR and the implementation of the ECHR in the States Parties. It subsequently recognised the usefulness of the Protocol in clarifying important questions that may arise at the international level concerning the interpretation and application of the ECHR. The increase in the workload for the ECtHR was deemed reasonable. On the occasion of the 50th anniversary of Switzerland's accession to the ECHR in 2024, the Parliament adopted a postulate asking the Federal Council to draw up a report including, in particular, an assessment of the scope of the judgments handed down by the ECtHR against Switzerland over the last ten years, as well as an analysis of Protocols Nos. 12 and 16 and an examination of the advisability of ratifying them. The Federal Council declared itself willing to follow up on the postulate and present a report. Therefore, although ratification is considered, it is not imminent.

Spain mentions that while the ratification of Protocol No. 16 remains unconfirmed, Spain has formally expressed several reservations against adopting it. These reservations have been conveyed both through an official declaration at the time of signing and in responses to various parliamentary inquiries. In particular, Spain considers that its judicial framework already provides robust human rights safeguards, with cases eligible for review up to the Constitutional Court, incorporating the ECtHR jurisprudence. It is also argued that due to Spain's judicial structure, current national systems adequately support the principle of subsidiarity. In favour of ratification, on the other hand, a more strengthened dialogue between Spain's highest courts and the ECtHR is advocated. The proponents also argue that ratification would enhance consistency in human rights standards across Europe and reinforce the European commitment to protecting fundamental rights.

The majority of the responding courts consider that they have not, to date, encountered a situation in which it might have been useful to be able to request an advisory opinion from the ECtHR. However, three courts recognise that such a mechanism could have been of use.

The Czech Republic states that there have been cases where the option of requesting an advisory opinion might have been useful, for example in environmental matters.

Sweden refers to a recent case in which the court dealt with the issue of whether national legislation of compulsory care of the young was in compliance with Article 5 of the ECHR, as Swedish law makes it possible to forcibly care for a young person up to the age of 20, while the ECHR states that only "minors" can be subject to the care in question.

Portugal details that there have been some unclarities in the jurisprudence of the Supreme Administrative Court on the issue of compensation for delays in justice. Therefore, an advisory opinion might have been useful on this matter, especially to clarify certain aspects, such as how to count the time exceeding the reasonable time, how should the delay caused by the conduct of the other party be taken into account, how should the compensation be calculated and can the court order the State to pay compensation ex officio or must it be expressly requested by the party.

Question 14 aims at examining whether advisory opinions requested by other courts abroad are seen useful and used as sources of case law. Six courts respond in the affirmative whereas the majority of the respondents have not yet recognised the value of these opinions in their daily work.

Sweden refers to a case concerning discrimination of a same-sex couple, in which the Supreme Administrative Court made use of the advisory opinion requested by France and delivered by the ECtHR in 2019 as it concerned a similar issue.

The same advisory opinion is also mentioned by *Poland.* The Supreme Administrative Court referred to this opinion in its resolution concerning the obligation to transcribe foreign birth certificates of children, whose parent is in a same-sex partnership.

Similarly, *Switzerland* refers to this advisory opinion given by the ECtHR in 2019 and submits that it had a significant impact on the Contracting Parties regardless of whether they had ratified Protocol No. 16 or not. In the judgment in *D.B. and others v. Switzerland* in 2022, the ECtHR took this opinion into account and condemned on that basis Switzerland for invasion of the privacy of a child born through surrogacy. However, already a few months before, the Federal Court had taken this opinion into account in two cases.

Ireland details that since the enactment of the European Convention of Human Rights Act in 2003, the Irish courts are obliged, so far as possible, to interpret statutory provisions and rules of law in a manner compatible with the ECHR, and they are also obliged to take judicial notice of the ECHR and of declarations, decisions, advisory opinions and judgments of the ECtHR. However, in practice, the Supreme Court has not cited any advisory opinion of the ECtHR to date.

Norway adds that in the same way as judgments and decisions by the ECtHR are used as sources of law, advisory opinions are also used when relevant for the case at hand.

Spain refers to the non-binding nature of the advisory opinions but explains that even though advisory opinions requested by other courts are not used as binding sources of case law, they are often consulted as a valuable interpretative tool, as they contribute to a broader understanding of international standards and aid national judges in aligning national rulings with established international interpretations.

With respect to Question 15 as to whether advisory opinions requested by courts abroad have had an impact on the national legal order, the majority of the responding courts have not identified such an impact, whereas four courts answer in the affirmative.

Switzerland mentions that the advisory opinion of the ECtHR in 2019 relating to the right to respect for private life of the child has been taken note of also at the level of legislative

initiative. The Parliament has instructed the Federal Government to prepare a draft revision of adoption law, aimed at facilitating adoption and regulating the situation of children conceived using private sperm donation, sperm donation (possibly anonymous) or other medically assisted procreation methods authorised abroad, including surrogacy, and living from birth with their legal parent and the intended parent.

Spain explains that advisory opinions issued by the ECtHR have an indirect but meaningful impact on the national legal order. These opinions are frequently cited as persuasive authority. Beyond case law, advisory opinions from the ECtHR have also influenced legislative development in Spain. Spanish lawmakers consider these opinions and broader ECHR jurisprudence when drafting and amending legislation, and this indirect influence ensures that Spanish law evolves in harmony with international norms, promoting compliance with European standards and reducing potential conflicts between domestic law and human rights obligations.

Bulgaria recognises the value of the advisory opinion mechanism as an institutional dialogue between domestic courts and the ECtHR. This may reinforce both the role of the ECtHR and its case law and that of the domestic courts in protecting human rights. Advisory opinions provide an opportunity to develop the underlying principles of law in a manner that will speak to the legal systems of all the Contracting Parties.

II. THE IMPACT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AT THE NATIONAL LEVEL

A. CLIMATE CHANGE LITIGATION

Questions 16–24 of the Questionnaire deal with climate change litigation. The aim of this section is to explore the intersection between climate change and human rights law. In particular, the questions focus on admissibility criteria, interpretation of locus standi and national courts' competence to scrutinise political decision-makers' decisions and inaction. A special refence in the questionnaire is made to the recent judgment from the ECtHR in *Verein KlimaSeniorinnen Schweiz* and Others v. *Switzerland*.

The answers contain important and topical information from the climate change litigation point of view. Overall, answers appear to reflect the rhyme "Something old, something new, something borrowed." Indeed, it seems that many old general rules apply also in the climate context. And yet, new specific rules based on climate change considerations have emerged. Nevertheless, some of these new rules do not appear to be completely new but rather inspired by the environmental law and human rights law context.

1. Rules on standing in the context of climate change litigation

Questions 16 and 17 seek to explore whether the domestic legal frameworks contain specific rules on standing for bringing legal actions based on climate change considerations.

Out of 34 responding courts, nine confirm that there are specific rules concerning standing of individuals in the context of climate change litigation. In contrast, 24 answer that no such specific legal provisions exist in their national jurisdiction. Most of them clarify that general rules of standing are applied also in the context of climate change disputes.

> *Albania* explains that a new Act on Climate Change was adopted recently, and its main objective is to create a comprehensive legal and institutional framework to contribute to the reduction of greenhouse gas emissions and the acceleration of adaptation to climate change. The act provides that when violations of this law do not constitute a criminal offence, they constitute administrative violations and are therefore punishable by fines. Regarding the standing of parties in these proceedings, according to the Code of Administrative Procedure, the parties in administrative proceedings may be holders of public interests authorised by law, as well as holders of collective interests or broad public interests, if these interests can be affected by the result of the administrative procedure. In addition, administrative courts have jurisdiction to adjudicate disputes arising from illegal intervention or inaction of a public authority. "Administrative inaction" is defined as any lack of action by the public administrative authority in the exercise of its administrative activity, according to the public function, which

creates legal consequences on subjective rights or legitimate interests. Therefore, access to justice is in principle guaranteed, both in cases of activity or inactivity of the administrative authorities, given that they affect the rights and interests of individuals and legal persons/entities.

Bulgaria explains that no explicit legal provision concerning the protection of climate exists. However, the Constitutional Court has ruled that the decision on the environmental impact assessment may be challenged by any person, group of persons or organisation that proves their legal interest, which derives from the need to ensure a healthy environment for human well-being and the implementation of fundamental human rights, including the right to life itself. Thus, any person has the right to appeal against an administrative decision based on the Climate Change Mitigation Act if his right, obligation or interest may be affected in a particular way by the effects of climate change or its mitigation or adaptation to it.

Croatia clarifies that a new Act on Climate Change and Ozone Layer Protection entered into force in 2020. However, there is no general provision for access to justice in cases of governmental inaction, as in accordance with Croatian administrative procedure law, appeals must be based on an administrative decision.

Cyprus details that under relevant provisions, any legal or physical person who is affected by administrative acts or omissions produced by the Environmental Authority and/or with regard to the participation of the public, and which adversely affect, directly and personally, the legitimate interest of the applicant, may make a recourse, according to Article 146 of the Constitution.

Greece submits that the National Climate Law entered into force recently establishing measures and policies for the country's adjustment to climate change and for ensuring the decarbonisation pathway up to the year 2050. Nevertheless, the law does not provide for access to justice in cases of climate change litigation.

Finland explains that the Climate Act was recently amended by adding special provisions on the appeals process with respect to a government decision on a climate policy plan. The right of appeal against such decisions is granted to any person whose right, obligation or interest may be affected in a particular way by the effects of climate change or its mitigation or adaptation to it. However, this does not generally provide for access to court in cases of governmental inaction. According to the Finnish administrative procedure law, appeals are only applicable for administrative decisions. In the Finnish climate cases this obligation has, however, been interpreted in a broad manner. In the first case in 2023, it was stated that the need to safeguard basic rights and the realisation of international obligation in the mitigation of climate change may require access to court even in a situation where no actual administrative decision has been made. In that case, however, the appeal was in the end considered inadmissible. In contrast, in the second case in early 2025, the appeal was considered admissible, largely relying upon the ECtHR's recent jurisprudence. However, the Supreme Administrative Court dismissed the second climate case against the Finnish government on the merits.

Italy submits that an important step in the fight against climate change was taken with Constitutional Law No. 1 of 2022, which amended Article 9 of the Constitution of the Italian

Republic, specifying that it "protects the environment, biodiversity and ecosystems, also in the interest of future generations". The Constitutional Court, in its recent ruling in 2024, clarified the real meaning of this amendment, stating that it is a new constitutional parameter that "therefore explicitly obliges all public authorities to act with a view to its effective defence". This means that national public authorities are called upon to translate European environmental directives into conscientious and effective measures, and that in the absence of this, individuals can act so that measures are imposed by (national) courts in order to annul illegal actions (because they are insufficient), or to compensate for inaction. That said, it should also be stressed that the standing of individuals to refer to the administrative judge to challenge an administrative act, or the silence kept by a public administration, in environmental matters does not escape the principle according to which the individual must be able to justify a concrete and current interest in acting. Finally, it should be noted that parliamentary work is currently underway to revise the Environmental Code, and it seems that a proposal to create a special agency with special competence to challenge administrative acts that are detrimental to environmental rules is under consideration.

Latvia points out that even if there are no specific rules concerning standing of an individual in climate change litigation, the Environmental Protection Law provides that the public is entitled to contest and appeal the administrative act or actual action of a State institution or local government on the basis of it not meeting the legal requirements regarding the environment or because of a risk of damage. In addition, a person may bring an action before the courts if his/her subjective rights have been infringed or the administrative act or the actual conduct constitutes a risk of harm or damage to the environment (*actio popularis*). These provisions would be applicable also in a climate change case.

Switzerland clarifies that there are no specific rules. In order to appeal to the Federal Court, the association KlimaSeniorinnen Schweiz and several individual applicants relied on Article 25a of the Federal Act on Administrative Procedure to assert their claims. The Federal Court considered whether the individual applicants had standing to appeal but did not rule whether the association also had standing. In limiting its considerations to the individual applicants, the Federal Court recalled that citizens may, under certain conditions, demand that the authorities refrain from unlawful acts. Omissions by the authorities can also be challenged and, in particular, the execution of specific acts can be demanded. The procedure does not constitute a legal basis for popular action but only guarantees the protection of individual rights. The applicants complained about numerous omissions in the field of climate protection and called on the authorities to remedy these and to take all necessary measures by 2030 so that Switzerland could make its contribution to the objective of the Paris Climate Agreement. The Federal Tribunal considered that according to scientific knowledge, global warming can be slowed down by appropriate measures. Under these conditions, the applicants – like the rest of the population – are not affected with the required intensity in the fundamental rights invoked by the omissions complained of. The Federal Court classified their application as a popular action and declared it inadmissible. In the Grand Chamber judgment *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, the ECtHR concluded that the individual applicants did not meet the criteria for victim status for the purposes of Article 34 ECHR and declared their complaints inadmissible.

With respect to *locus standi* of associations, 14 courts confirm that specific rules concerning standing of associations exist in the context of climate change litigation in their country. In contrast, 19 courts explain that no such specific legal provisions exist in their respective jurisdictions.

Austria explains that following the CJEU judgment in C-664/15 *Protect,* a number of Austrian statutory laws were adapted, and many federal and provincial laws now grant environmental organisations a status as a party and right of appeal. Similarly, in accordance with the case law of CJEU, the Supreme Administrative Court has gradually extended the party status of environmental organisations.

Bulgaria details that the procedural standing of the affected public, including environmental organisations, is recognised in environmental matters, regardless of the existence of an affected legal interest of the legal subject.

Germany clarifies that the Environmental Litigation Act basically transforms the obligations resulting from the Aarhus Convention into national law.

Sweden submits that concerning the special procedure when a governmental decision is challenged before the Supreme Administrative Court (legality review), the rules on standing are modeled on the Aarhus Convention in order to make it possible for environmental associations to appear before the court.

Hungary explains that the Climate Protection Act was adopted in 2020 and the law treats climate change litigation similarly as any litigation concerning the environment. According to applicable provisions, aligned with the requirements of the Aarhus Convention, those environmental associations which have been operating for at least one year in the area covered by the case may be plaintiffs in proceedings in courts.

The Czech Republic clarifies that special rules on standing of associations are general in nature and not exclusive to climate change litigation. These rules result from the interpretation of *infringement of rights* by the Constitutional Court. The association must prove its relationship to the location or project in question, either by statutes or by its previous activities.

Finland details that an explicit provision was recently added to the Finnish Climate Act, providing access to justice to certain national, regional or local NGOs and indigenous people (Sámi peope).

Ireland explains that the current position in Irish law is that environmental NGOs or associations do not have standing to advance claims alleging that particular government climate policies are infringing personal rights that are enjoyed by a natural person, such as the right to life or bodily integrity, due to established constitutional standing principles and concerns about floodgate litigation. However, the Court anticipated in *the Friends of the Irish Environment* case that individual persons could initiate rights-based claims in future environmental proceedings, provided that the "real and imminent danger" test was met.

Portugal explains that there are no specific standing rules related to the environment. However, the *actio popularis* as a sort of class action is specifically designed to protect the environment. The Constitution recognises *actio popularis* as a form of citizen's legal standing (individually or through associations), which may be exercised before any court, for the defense

of environmental interests, without the need to invoke a personal and direct interest or to demonstrate any link with the relationship in dispute.

Spain also submits that there are specific rules governing standing in environmental matters that can apply to climate change cases, particularly through what is known as "environmental public action". Spain's legislative framework ensures access to justice for organisations committed to environmental protection, and the Supreme Court has interpreted standing requirements broadly in line with the Aarhus Convention and the pro actione principle, ensuring that legitimate environmental interests are represented and safeguarded.

Greece points out that the Fifth Section of the Court has long been elaborating the general procedural provisions on standing before the Council of State in order to allow an application for annulment in environmental disputes, recognising the legitimate interest of associations whose purpose is to protect the environment, insofar as their application for annulment does not turn into an "actio popularis". It cannot be ruled out that the same requirements will apply for standing of associations in climate change litigation.

Romania points out that in environmental matters in general, national law recognises the right of access to justice of non-governmental organisations promoting environmental protection, regardless of whether or not damage has been caused.

Türkiye details that in environmental matters, associations can file a case if the condition of a violation of interest is fulfilled. Associations may bring legal actions in matters related to their fields of activity and in accordance with the purposes of their establishment.

Serbia explains that the Law on Climate Change prescribes the concept of the interested public and defines this as the public who is affected or may be affected by the decision-making of the competent authority, or the public who has an interest in it, including citizens' associations and organisations that deal with the environmental protection and are registered with the competent authority.

Switzerland clarifies that in the case of *Verein KlimaSeniorinnen Schweiz and Others*, the Federal Court left open the question of whether the applicant association had a right of appeal. Furthermore, the Federal Office of Justice noted in its legal analysis of the judgment of the Grand Chamber of the ECtHR that: "In Switzerland, current law and case law have not, until now, allowed such associations to pass the filter of standing to bring proceedings to assert, on the merits, a violation of the fundamental rights of their members in connection with climate change […]. In the future, the authorities and courts that will be seized of new requests from associations in the field of climate change will therefore have to examine, in the light of the new case law of the ECtHR and the criteria that it has developed, whether the associations have the right to act."

2. Existence of climate-related national case law involving human right provisions

The aim of Questions 18–20 is to explore the national case law where different human right provisions have been invoked and/or applied in matters related to climate. In particular, Articles 6 and 8 of the ECHR and the rights of future generations are in focus.

Regarding the interplay between Article 8 and climate, ten courts answer that they have recently had climate-related cases where Article 8 of the ECHR has played a role. Eight of them detail that Article 8 has been only a part of the argumentation whereas two courts explain that Article 8 has formed an essential part of their reasoning.

> *The Czech Republic* details that the first Czech strategic climate litigation case (*Klimatická žaloba*) relies on the positive obligations of the State stemming from the Paris Agreement and the ECHR. The case has reached the Supreme Administrative Court twice. The first time (judgment in 2023) the Court acknowledged the greening of human rights. However, it refused to construct the obligations of the individual ministries based on Article 8 of the ECHR as the ECtHR had not yet addressed the climate issues specifically. In the second judgment, this time after the *KlimaSeniorinnen* ruling, the Court assessed whether the Czech Republic meets the requirements of the ECtHR's test and found in the affirmative, stating that not only Czech law, but also EU law, must be taken into account, even though the mere fulfilment of EU obligations does not exempt the Czech Republic from its obligations under Article 8 of the ECHR.
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> *Ireland* explains that in the case of *Friends of the Irish Environment*, the leading Irish climate change case, both a statutory claim and rights-based claim were raised. Regarding the rights-based argument, the Supreme Court was asked to consider whether constitutional and Convention rights had been violated. This included Article 8 of the ECHR alongside Article 2 of the ECHR. However, the Supreme Court held that the applicant NGO did not have standing to maintain these arguments under the Constitution or Convention, and therefore, was not appropriate to address the rights-based arguments put forward.
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> *United Kingdom* refers to the case of *R (on the application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant)* from 2020, where the Appellant argued that a failure for the UK's Airports National Policy Statement to take into account the Paris Agreement under the United Nations Framework Convention on Climate Change would allow major national projects to be developed without consideration of climate change, and that those projects would create an intolerable risk to life and to people's homes contrary to Article 8 of the ECHR. This argument was dismissed, however, partly on the grounds that an individual's Article 8 rights would not be directly affected by the National Policy Statement itself, but only by an individual decision to grant a consent order to an airport's development.

Similarly, 11 courts explain that Article 6 of the ECHR has played a role in their recent jurisprudence in the field of climate-related matters.

> *Spain* details that in recent years, several environmental organisations have brought claims against national climate policies, challenging governmental decisions on the grounds of insufficient climate action. They have invoked Article 6.1 of the ECHR to argue for their right to judicial review of government actions that impact fundamental rights, including the right to an adequate environment. Article 6.1 serves as a critical foundation for these plaintiffs to assert their standing and ensure that claims related to climate action are heard in court, thus reinforcing procedural fairness in environmental litigation. The Supreme Court's jurisprudence has established that the concept of "right or legitimate interest" should be interpreted broadly, in line with the *pro actione* principle, which is integral to the effective judicial protection guaranteed by the Spanish Constitution. Additionally, it acknowledges the duty of judicial

bodies, under Article 9 of the Aarhus Convention, to interpret the standing requirements for NGOs in a non-restrictive manner, to ensure effective protection of environmental interests. Essential to this recognition is the requirement that a link be demonstrated between the NGO initiating the action and the object of the case, "such that a favorable ruling results in a collective and specific benefit or the cessation of concrete and specific harms."

Romania refers to a pending climate appeal at the Administrative and Tax Litigation Chamber of the High Court of Cassation and Justice in which Article 6.1 of the ECHR is relevant. The subject-matter of the application is to order the defendant authorities to take all necessary measures to reduce greenhouse gases by 55 % by 2030, to achieve climate neutrality by 2050, to take all necessary measures to increase the share of renewables in final energy consumption to 45 % and to increase energy efficiency by 13 % by 2030, as well as to order them to adopt concrete and coherent climate change mitigation and adaptation plans, including annual carbon budgets, as well as annual reporting and monitoring mechanisms to track progress towards these targets. In the recitals of the judgment of the Court of First Instance it is considered, having regard to the manner in which the pleas in the action are formulated (ordering the defendants to take all necessary measures, i.e. to adopt concrete and coherent plans), that to uphold the action would entail a delivery of a judgment that cannot be enforced, given that the operative part of the judgment could not identify which measures are necessary. This would therefore constitute a breach of Article 6 of the ECHR, with reference to the case-law of the ECtHR in which it has been held that the right to apply to a court would be illusory if the domestic legal order of a contracting state allowed a final and binding judgment to be ineffective to the detriment of a party.

France mentions that the judgment of the Grand Chamber of the ECtHR in *Carême v. France* concerned the finding by the Council of State that this individual applicant did not demonstrate a standing giving him an interest in bringing proceedings in the *Grande Synthe* dispute. The ECtHR confirmed the analysis of the Council of State which had held that Mr. Carême "who merely claims, on the one hand, that his current residence is in an area likely to be subject to flooding by 2040, and on the other hand, to rely on his status as a citizen" did not demonstrate an interest giving him standing to bring proceedings.

Austria explains that Art. 6.1. of the ECHR has only played a role in a climate related case before the Supreme Administrative Court when the Supreme Administrative Court dismissed the complaint of a citizens' initiative against the approval of the extraction of mineral raw materials in open-cast mining and ruled that the requested oral hearing could be refrained from in accordance with art. 6.1. of the ECHR because the Supreme Administrative Court was called upon after proceedings had taken place before the Environmental Senate, a tribunal within the meaning of the ECHR, and the complainant did not request that an oral hearing be held before the Environmental Senate.

Finland mentions that in the first climate change case, the Supreme Administrative Court stated that the decision of the Government to submit an Annual Climate Report to the Parliament was not an administrative decision that could be appealed. Even so, the need to protect fundamental rights and fulfil international obligations for the sake of climate mitigation and adaptation, which is essential for the future of humanity, should be especially considered when reviewing the obligation of public authorities to guarantee the observance of basic rights

and liberties and human rights. This may also require the right to appeal in a situation where an actual administrative decision has not been made.

Reference to the rights of future generations is reported to have taken place in the recent jurisprudence only in eight answers.

Spain refers, as the most prominent example, to the case of *Greenpeace and others v. Spain* case, which involved two separate lawsuits filed by environmental organisations against the Spanish government. The organisations argued that the government's National Energy and Climate Plan (PNIEC) for 2021–2030 was insufficient to meet the goals of the Paris Agreement and protect the rights of future generations. They argued that the PNIEC did not adequately address the urgency of the climate crisis and failed to ensure a sustainable future for future generations. While the Supreme Court ultimately dismissed the case, it did acknowledge the importance of considering the rights of future generations in climate change litigation. The court's decision highlighted the complex legal and political challenges involved in climate change cases, but also opened the door for future litigation that may more explicitly address the rights of future generations.

Finland draws attention to Article 20 of the Constitution of Finland which provides that ”Responsibility for the nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.”

Hungary explains that Curia has stated in two cases that the courts, as state organisations, have a duty to facilitate the protection of the interests of future generations under the Fundamental Law, for example by informing, *ex officio*, the Commissioner for Fundamental Rights of the possibility of joining the action in proceedings that directly affect the interests of future generations in lawsuits over the state of the environment. According to the Fundamental Law of Hungary, natural resources as well as biological diversity, in particular native plant and animal species and cultural values, shall comprise the nation’s common heritage and the responsibility to protect and preserve them for future generations lies with the State and every individual.

Italy mentions that concern for change and future generations is implicit in a decision of the Council of State in 2022, in which it is stated that "the public interest in protecting cultural heritage does not, in the specific case, have the necessary weight and urgency to completely sacrifice the irreplaceable environmental interest of the ecological transition, which involves the transformation of the production system into a more sustainable model that makes energy production, industrial production and, in general, people's lifestyles less harmful to the environment".

France refers to the case of *Grande Synthe* from 2020 in which the Council of State agreed to exercise anticipatory control of the greenhouse gas reduction trajectory by 2030, in light that current government actions have consequences for future generations. The *rapporteur public* in this case indicated that “the idea that there is indeed a climate emergency today, so that the actions or inactions decided today and in the near future are likely to determine the future of the planet and its habitability for humans in the second half of the 21st century and beyond”.

Norway draws attention to Article 112 of the Constitution, which, *inter alia*, provides that "Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well." This provision has been applied, for example, in a case concerning the validity of an administrative decision awarding ten petroleum production licenses on the Norwegian continental shelf in the south and southeast parts of the Barents Sea. The Supreme Court, sitting in a plenary, unanimously found that the decision was not incompatible with the Constitution or the European Convention on Human Rights.

Türkiye mentions that the rights of future generations have been invoked in a few cases in the field of environment, such as a project linked to building a nuclear power plant in Sinop province.

In addition, *Greece* points out that even if there has not been a direct reference to the rights of future generations as such, it is well established in the case law of the Council of State that Article 24 of the Greek Constitution, which guarantees the so-called "right to the environment", and the sustainability principle, have been established also in order to preserve natural resources for the benefit of future generations.

3. Scrutiny of political decision makers' action and inaction

Question 21 of the Questionnaire seeks to explore whether national courts have recently been faced with matters relating to their competence to scrutinise political decision-makers' action or inaction, in particular in the field of climate or environmental cases. The answers of the responding courts are quite split on this question, with a slight majority reporting that they have not dealt with such issues. Nevertheless, 16 courts answer in the affirmative.

France explains the *Grande Synthe* cases deal precisely with these issues, with the Council of State seeking both to highlight the State's obligation to act to combat climate change and to verify whether it was complying with this obligation, without replacing its power of assessment as to the means to be implemented to achieve this. This is why, in the *Grande Synthe III* decision issued on 10 May 2023, it ordered the government to "take all useful additional measures to ensure that the rate of reduction of greenhouse gas emissions is consistent with the trajectory for reducing these emissions". In the area of air pollution, the *Amis de la Terre* cases also led the Council of State to note the inadequacy of the Government's action to comply with air pollution limits and to order it, with penalty payments (liquidated for a total amount of €50 million), to take additional measures.

The Czech Republic details that in the first *Klimatická žaloba* case the Supreme Administrative Court elaborated on its competence to scrutinise political decision-makers' decisions. It ruled that it is not the role of the judiciary to estimate the positive obligations of the state in climate protection that corresponds to the impact of the climate change to the rights of the plaintiffs if there is no precise obligation enacted in legislation. According to the Supreme Administrative Court, it is not for the administrative courts themselves to set the standards by which to assess

the unlawfulness of the alleged interference. At the same time, however, they must be prepared to provide effective protection to individuals affected by the consequences of the lack of action by the Czech State authorities in the area of combating climate change and its consequences; this need may increase over time as the consequences of climate change increase. The Supreme Administrative Court suggested that in further proceedings before the first instance court, the plaintiffs should specify in which specific areas the defendants' alleged passivity breached their obligations, which particularly interfere with the individual rights.

Greece submits that as a rule, the Council of State reviews the constitutionality of every measure of a legislative nature in an ancillary manner and reviews directly every regulatory administrative act. The same applies in environmental litigation. In fact, the Fifth Section of the Court has held that Article 24 of the Constitution directly enables it to declare the failure/omission of the administrative authorities to adopt regulatory acts relating to the protection of the environment, i.e. to adopt or expand a normative regime favourable to the environmental protection, even though that kind of judicial review is not in principle permissible under the constitutional principle of the separation of powers. More specifically, in a number of judgments the Court has ruled that "[a]ccording to Article 24 of the Constitution, it is mandatory for the legislature and the administrative authorities to take the necessary normative, general or individual measures of a preventive or remedial nature, and for the courts to provide effective protection of the environment. Consequently, the authorities' omission to take such measures, which may even include the adoption or amendment of normative administrative acts, constitutes a failure to take a lawful action which is subject to annulment by the Council of State, because otherwise that constitutional requirement would be reduced to a mere theoretical declaration of principle, with the result that the environment would remain without effective protection, despite the clear intention of the constitutional legislature to the contrary".

Slovenia explains that in a recent case, the claimants requested the annulment of the Resolution on the Long-Term Climate Strategy of Slovenia until 2050, adopted by the National Assembly of the Republic of Slovenia, specifically the part where it stipulates that Slovenia plans the long-term use of nuclear energy and for this purpose implements measures for investment decision-making. The Supreme Court upheld the decision of the Administrative Court to dismiss the action, stating that the Resolution was not an administrative act and therefore could not be challenged in an administrative dispute. The Supreme Court clarified that the Resolution of the National Assembly is not a regulation under the constitutional order of the Republic of Slovenia which could have binding effects but is by its legal nature merely a strategic document which defines the policy of the National Assembly in a particular area.

Finland points out that in the first climate change litigation case (2023:62), the Supreme Administrative Court found that assessing the legality of the Government's decision-making procedure as referred to by the appellants could be examined by the court if neglecting to make a decision at that stage would lead to a result in violation of the Climate Act, or that the actions of the Government in reality would demonstrate that it had no intention of making the appropriate decisions in order to reach the goals and fulfil the obligations required by law with a sufficiently rapid schedule.

Norway refers to the 2020 plenary judgment (mentioned above in the section 2) and explains that the court's competence vis-à-vis the political decisions was one of the main questions

raised in that case. The Supreme Court concluded that Article 112 of the Constitution entailed individual rights relevant in combating climate change. But the Court also highlighted that given how decisions involving basic environmental issues often require a political balancing of interests and broader priorities, considerations related to democracy suggest that these decisions should be made by democratically elected bodies and not by courts. For the courts to be able to set aside, as a violation of Article 112 of the Constitution, a legislative decision or an administrative act to which the Parliament has otherwise consented, would require that the Parliament has grossly neglected its duties.

Italy details that the acts of a political nature are considered as incontestable by the administrative judge; there is therefore no room in the Italian legal system for litigation concerning the decisions of political decision-makers. However, the Council of State in a recent decision in 2022 provided important clarifications on the nature of the control that the administrative judge exercises in matters of landscape and environmental constraints. The Council of State specified that these are choices that are the expression of a power of technical assessment and that unlike political-administrative choices (known as "administrative discretion") - where the judicial control relates to the "reasonable" weighting of interests, public and private, not previously selected and classified by the rules - assessments of complex facts requiring particular expertise (known as "technical discretion") must be examined in light of the different and stricter parameter of technical-scientific "reliability" (specific case concerning the appeal against a refusal of landscape authorisation). This leads to a broadening of the notion of legitimacy as a precondition for a "complete" examination of administrative acts in environmental matters, already provided for by the doctrine.

Romania refers to the principle of separation and balance of powers within the framework of constitutional democracy. The judiciary does not exercise any control over legislature and the courts have specific limits as regards the review of decision or inaction of political decision-makers. As a general rule, the administrative litigation is litigation for annulment and of full jurisdiction, the court being able to annul the unlawful act, to oblige the administrative body to certain administrative measures and to award damages. Thus, although courts can review and sanction decisions or inaction by public authorities in cases where there is a clear violation of law, they cannot impose new public policies or strategic directions on the government or parliament regarding climate change or other environmental policies.

Switzerland submits that in the case of *KlimaSeniorinnen Schweiz*, the Federal Court stressed that the applicants' claims could not be dealt with through judicial channels, but rather through political means. The Swiss system, with its democratic instruments, offers sufficient possibilities for this.

4. Scrutiny on whether national authorities have met the relevant climate requirements

Question 22 focuses on those cases where national courts have examined whether the competent national authorities – be it at legislative, executive or judicial level – have met relevant requirements resulting from the domestic climate framework. Equally on this question, answers are relatively split, with a majority of the responding courts stating that they have not encountered such issues during

recent years. Ten courts, however, explain that they have been asked to scrutinise the actions of national authorities in this regard.

Greece refers to a set of cases regarding the legality of the master plan of the urban development plan of the former international airport in Athens, in which the Court affirmed that the competent administrative authorities had taken into account the so-called "climate change parameter" before issuing the administrative act approving the project's environmental conditions.

The Czech Republic explains that in the second *Klimatická žaloba* case, the Supreme Administrative Court examined whether the Ministries had met relevant requirements pursuant to the domestic and EU climate framework in several areas such as transport and LULUCF. The Court found, *inter alia*, that while the State was not on track to meet the EU requirements, the deadline had not yet expired. Therefore, the inactivity did not present illegal interference and the cassation complaint was dismissed.

Estonia refers to a case (no 3-20-771/113) in which an environmental organisation contested a building permit for the construction of a shale oil production plant. The organisation mainly relied on the argument that the construction of the plant did not fulfill the objective of climate neutrality. The Administrative Law Chamber of the Supreme Court stated that the obligation to preserve the environment and natural resources as provided by the Constitution serves as the basis for the obligation of the State to limit and reduce greenhouse gas emissions to mitigate global warming. The Court found that the climate impact of operating the plant must be assessed as a preliminary question in issuing the building permit of the plant, if the building permit is granted before the integrated environmental permit. If the planned activities brought along consequences due to which it is not possible to achieve the objectives of reducing greenhouse gas emission, such activities would certainly have a significant environmental impact. The more intensively and likely the planned activities aggravate the achievement of climate objectives, the more substantial the interests justifying the activities must be. The Supreme Court also emphasised that essential issues of the obligation to limit greenhouse gas emissions must be decided by the legislator based on the best available scientific information and the international obligations of Estonia. The Constitution obligates the Estonian State to make a proportional contribution to the achievement of the objective of the Paris Climate Agreement. To this end, it is necessary to establish a realistic and legally binding stage- and sector-based emissions allocation plan for achieving climate neutrality. The Supreme Court ordered the municipality to assess the environmental impacts that had not been properly assessed and make a new decision on the construction permit application.

France refers to a case in which the public utility of a road bypass project was challenged because of the surplus CO2 emissions it would generate. But as the surplus was extremely low compared to France's national emissions, it could not in itself lead to the illegality of the project.

Ireland mentions that the case of *Friends of the Irish Environment* resulted in the statutory plan for tackling climate change pursuant to the provisions of the Climate Act and Low Carbon Development Act 2015 being quashed on the basis that it did not sufficiently specify the policy measures which are required in order to transition to a low-carbon, climate-resilient and environmentally sustainable economy by 2050. The *Friends of the Irish Environment* case

demonstrates the critical role superior courts can play in reviewing government climate policies that have been codified in the legislation. By way of statutory interpretation, courts can ascertain whether the State has met its self-prescribed carbon budgets or emissions reductions targets. Statutory claims remind the government that the target which it chooses to set for itself in the Climate Act (inspired by the Paris Agreement) are binding. The judiciary's expertise in statutory interpretation makes it particularly well-suited to assess whether government actions align with legislative purposes against objective standards such as "the reasonable and interested member of the public".

United Kingdom mentions, *inter alia*, a judgment where it was found that although the United Kingdom had ratified the Paris Agreement, this had not been incorporated into UK law, and therefore it did not form part of the domestic climate framework.

5. The impact of the case *KlimaSeniorinnen Schweiz* v. *Switzerland* at the national level

Regarding the question of whether the recent judgment from the ECtHR in *KlimaSeniorinnen Schweiz* v. *Switzerland* has already had an impact at the national level, and in particular whether it has led to new cases being brought to the national courts, most courts respond that such an impact has not yet been recognised at the national level, particularly at the level of the Supreme Administrative Courts.

However, in some courts the *KlimaSeniorinnen* case has already been invoked in pending matters or applied in judgments delivered after the ECtHR's judgment. Moreover, a number of courts acknowledge the potential importance of this judgment in climate-related legal actions in the future.

The Czech Republic explains that in its second judgment in the *Klimatická žaloba* case, the Supreme Administrative Court looked at the requirements of the ECtHR and assessed the sufficiency of mitigation procedures. At the same time, however, the Court found that the climate action at hand differed from the situation in *KlimaSeniorinnen* in that it was necessary to assess also the EU legislation and EU control mechanisms. The current EU's collective commitment to reduce greenhouse gas emissions by 55 % by 2030 compared to 1990 levels has been reflected both in EU secondary legislation and in the obligations of individual Member States. Even though the conclusions of the ECtHR were taken into account, the Supreme Administrative Court did not identify an obligation for the State to reduce its greenhouse gas emissions by more than 80 %, as requested by the applicants.

Norway mentions that *KlimaSeniorinnen* has been invoked at least in one case that is currently pending before the Supreme Court's Appeals Committee. The case concerns the use of temporary injunctions as a measure to prevent or suspend planned petroleum related activities.

United Kingdom explains that although there have not been cases before the UK Supreme Court in which *KlimaSeniorinnen* would have been cited or relied on, there has been one first instance decision in which it has been considered. In that case, it was held that the Secretary of State's proposal and timescales in relation to adaptation to climate change was not unlawful and fell within the wide margin of appreciation offered by the case.

Finland details that a coalition of six Finnish environmental and human rights organisations filed a new lawsuit against the Finnish Government at the Supreme Administrative Court. In the pleadings, reference is made to the *KlimaSeniorinnen* case. The Court examined the appeals leaning on *KlimaSeniorinnen* but dismissed the second climate case against the Finnish government. The Court stated that it was too early to say whether the government's policies can be considered insufficient in meeting the climate targets — and therefore the government's actions cannot at this point be considered unlawful, although actions could be subject to change if the measures do not prove successful.

Portugal mentions that the Supreme Court of Justice has referred to the *KlimaSeniorinnen* case in its recent judgment concerning an *actio popularis* brought by three environmental associations against the Portuguese State.

Germany explains that there are currently new cases pending which are directed against a decision of the Berlin-Brandenburg Administrative Court of Appeal and in which the jurisprudence of the ECtHR need to be taken into account.

The Netherlands explains that the *KlimaSeniorinnen* case has not yet resulted in an influx of new cases being brought to the Administrative Jurisdiction Division. Under the new Environmental and Planning Act, climate change mitigation is included as one of the interests to be considered, which may result in more cases in which *KlimaSeniorinnen* could be relevant. Regarding the impact of that judgment in the Netherlands, it can be argued that so far in practice the impact has not been very significant, since the Supreme Court had ruled already that the state is legally responsible to mitigate climate change in the so-called *Urgenda* judgment. Nevertheless, the fact that the ruling of the ECtHR supports the *Urgenda* judgment does carry weight with regard to new cases concerning climate change litigation.

Spain clarifies that even though the *KlimaSeniorinnen* case has not yet had a direct impact on specific new cases being brought before the Spanish Supreme Court, it certainly has influenced the broader legal landscape surrounding climate change and human rights. This case has set a precedent for individuals to hold governments accountable for their climate policies through human rights law, and it has demonstrated that climate change can have significant impact on individuals´ rights, including their right to life.

6. Differences between legal questions raised by climate change v. environmental matters

Question 24 aims at grasping national courts' experiences in relation to climate change cases, on the one hand, and environmental cases, on the other hand, in particular by examining whether there are differences in legal questions raised in these two closely related yet separate fields of law. Due to the limited or non-existent experience in climate change cases thus far, a clear majority of the responding courts (20) answer in the negative. There are, however, a number of courts that recognise certain differences.

France submits that climate change differs from other environmental issues in that it is a systemic issue, which challenges the State's ability to organise all public policy tools to meet

its climate commitments. The usual environmental litigation involves targeted pollution or a risk of environmental damage to a specific site or species, which narrows down the questions presented to the judge.

Spain points out that while climate change and environmental matters are closely intertwined, distinct legal questions have been raised in the case law of the Spanish Supreme Court in these fields. Climate change cases relate to long-term, systemic issues requiring consideration of future generations and the global impact of national policies. These cases frequently involve complex scientific evidence, and they also intersect with international law, particularly climate treaties and human rights law. Environmental matters, on the other hand, are often specific, localised issues, related to a particular project. These cases primarily rely on domestic environmental laws and regulations, although EU law and international treaties may also be involved. Environmental cases frequently involve balancing competing interests, such as economic development and environmental protection.

Lithuania puts forward similar considerations, noting also that climate change litigation may involve broader public interest challenges, whereas environmental cases more often stem from disputes brought by directly affected individuals or entities.

Romania explains that there are differences between the legal issues raised by climate change and the environmental issues addressed so far in the Romanian courts, both in terms of the specifics of these issues and the approach of the courts. Climate change involves legal issues related to greenhouse gas emissions, global warming, and the need to implement long-term and large-scale measures to reduce the impact of human activities on the climate. Legal actions in this area tend to address issues such as the ineffectiveness of public policies in reducing emissions, compliance with international commitments (e.g. the Paris Agreement), and the protection of fundamental rights threatened by climate change. Environmental problems addressed so far in Romanian courts usually focus on local and immediate impacts on health and quality of life, such as air and water pollution, illegal deforestation, and waste management. These cases aim to correct or prevent direct negative impacts on the environment and human health and tend to be smaller scale actions targeting concrete projects (e.g. a polluting factory, illegal logging in a specific region).

The Czech Republic considers that the major difference is the question of shared responsibility of the Member States in climate change litigation. In the first Czech climate change judgment, the Supreme Administrative Court ruled that the 55 % reduction in greenhouse gas emissions is a commitment for the EU as a whole, not broken down between individual Member States. Another important aspect of climate change litigation is the admissibility of the action against the Government and individual ministries.

Croatia explains that the permit consideration in accordance with the Environmental Protection Act only concerns the risk of environmental pollution caused by the emissions of the activity subject to the permit. The Croatian Climate Act sets out only a specific planning system for climate change policy and currently, there is no legislative link between the Climate Act and the Environmental Protection Act. In environmental permit matters, the rights of future generations are usually not brought up.

Similar considerations are submitted by *Finland*, although noting that the argumentation concerning climate related issues has increased during the last five years also in the context of environmental cases. In addition, climate considerations have been indirectly involved in some major environmental permit issuance cases (such as a pulp mill factory or a mining project), for example in relation to the decrease of forest carbon sinks. In many of such cases, it has not been possible for the court to address such considerations in view of the applicable law.

Italy points out that the problems posed by climate change induce a "hierarchy of interests", in which the environmental interest takes a hierarchical priority position over other potentially antagonistic interests. In the past, especially relating to the installation of energy production facilities from renewable sources, the requirements of environmental protection were considered recessive compared to those of the simple preservation of the shape of the territory, while currently we are witnessing an overcoming of this approach, especially following the amendment of the Constitution. In addition, the notion of legitimacy of the administrative act has been broadened, in order to allow the administrative judge to exercise a more penetrating control.

Greece mentions that the main difference relates to legal questions raised by climate change being opaque by nature, as they are not linked with specific legislative or administrative measures. Furthermore, climate change litigation touches upon the delicate issue of the relations between the legislative and judicial branch and the constitutional principle of separation of powers in a more intense manner compared to environmental matters.

B. SUMMARY RETURNS OF ALIENS AT THE BORDER OR SHORTLY AFTER ENTRY INTO THE TERRITORY ("PUSH-BACKS")

Questions 25–28 explore the national legal landscape in the field of summary returns of aliens at the border or shortly after entry into the territory, so-called push-backs. This section aims at taking a closer look at the legislative and jurisprudential developments that have taken place at the national level related to issues such as instrumentalised migration. The focus is also on the impact of the ECtHR case law in the field of collective expulsion as defined in Article 4 of Protocol No. 4 at the national level.

The answers to the Questionnaire indicate that even though the main burden of irregular, and in some instances also instrumentalised, migration flows is limited to only a number of jurisdictions, mainly due to their geographic location, the concerns linked to this phenomenon are shared by many others. Balance needs to be struck between the legitimate security considerations of sovereign states faced with hostile activities orchestrated by other state actors, on the one hand, and the obligations stemming from universal human rights as defined in the jurisprudence of the ECtHR, on the other hand.

1. Existence of specific national legislation related to "instrumentalised" migration and/or entry *en masse*

Question 25 of the Questionnaire examines whether any special legislation has been enacted at the national level, the aim of which has been specifically to tackle issues related to so-called instrumentalised migration or to apply to situations where entry is attempted by aliens *en masse.*

Out of 34 responding courts, the majority explain that no such specific legislation exists in their jurisdiction. In a number of responses, it is however detailed that other legislative measures have been taken recently with the aim of restricting or better controlling migratory flows, even though they have not been related specifically to the questions in focus. Moreover, the complex legal issues linked to the instrumentalisation of migration is recognised by many respondents. Nevertheless, a number of responding courts also refer to the absolute nature of the *non-refoulement* principle and to the binding legal requirement to assess every application individually.

In a number of jurisdictions, specific measures have also been adopted.

> *Spain* clarifies that specific national legislation addresses the summary return of aliens at the border, particularly through the Tenth Additional Provision of Organic Law 4/2000, which governs the rights and freedoms of foreigners in Spain and their social integration. This provision, added in 2015, specifically applies to the borders of Ceuta and Melilla, Spain's enclaves in North Africa, where significant migratory pressure often arises. This law allows for what are commonly referred to as "hot returns" or *devoluciones en caliente* (summary returns), enabling the immediate return of individuals attempting unauthorised entry by

breaching border security. The Tenth Additional Provision outlines that returns should occur while respecting international human rights obligations and include special protection for vulnerable individuals, such as minors and those needing international protection. However, this process does not include individual assessments at the border, raising concerns under Article 4 of Protocol No. 4 of the ECHR, which prohibits the collective expulsion of aliens. In the *N.D. and N.T. v. Spain* case, the ECtHR assessed these returns and found that in cases where individuals avoid regular entry points, the state may lawfully apply immediate returns, provided they have access to legal entry channels and sufficient remedies within the receiving state. Moreover, the Constitutional Court stated that this provision is consistent with the Constitution. Spain's legislation does not currently include explicit provisions addressing "instrumentalised migration" or migration flows that might be used by third countries to destabilise Spain or the EU. However, the legislation is framed in a way that, provided fundamental rights are respected, it allows for security responses to mass entry attempts at the border, permitting a more streamlined approach when confronted with large groups. In this vein, Spain has bilateral agreements with neighbouring countries, such as Morocco and Algeria, for the return of their nationals who are apprehended in Spanish territory. These agreements facilitate the swift return of migrants, particularly in cases of mass arrivals. Nonetheless, these agreements and the procedures they establish are also subject to judicial scrutiny and must respect fundamental rights and safeguards.

Estonia explains that the summary returns of aliens at the border is regulated in the State Border Act with the purpose of preventing and managing mass immigration, including instrumentalised migration. According to the national provisions, in an emergency caused by mass immigration and in the event of a threat to public order or national security, the Police and Border Guard Board may return an alien, who has illegally crossed the external border, to the foreign state from which they arrived to Estonia without the issue of a precept to leave or without making a decision on prohibition on entry, if it was possible for the alien to enter Estonia through an open border crossing point. In an emergency caused by mass immigration, the Police and Border Guard Board may refuse the receipt of an application for international protection if it was not filed at the location determined by the Police and the Boarder Guard Board. However, upon the return of an alien, the principle of *non-refoulement* must be considered, and an alien may be also admitted for humanitarian reasons. Aliens may contest their return in accordance with the rules applicable in administrative court proceedings, but this does not have a suspensive effect unless the court orders otherwise.

In *Finland,* the Act on Temporary Measures to Combat Instrumentalised Migration entered into force in July 2024. The Act is foreseen to be of a limited duration and to remain in force for one year. It was passed as a limited derogation to the Constitution in accordance with a specific enactment procedure which required a higher parliamentary quorum (5/6) than normally for approval. The Act lays down the conditions under which a government plenary session can decide to restrict the reception of applications for international protection in a limited area on Finland's national border and in its immediate vicinity for a maximum of one month at a time. The objective of the Act, as expressly stated in its Article 1, is to combat efforts by a foreign state to exert influence on Finland by exploiting migrants. If such a decision to restrict the reception of applications has been made, Article 4 of the Act provides that "a migrant who is being exploited in efforts to exert influence" shall be prevented from entering the country, and if such a person has already entered the country, he/she shall be removed

from the country without delay and guided to move to a place where applications for international protection are received.

However, the Act contains certain derogations related to children, persons with disabilities and other persons in a particularly vulnerable position. In addition, if the person has presented, or there have arisen, circumstances which make it evident that the person faces a real risk of being subjected to the death penalty, torture or other treatment violating human dignity primarily in the state from which the person has arrived in Finland, an asylum application may be lodged. The Act does not provide for the possibility of judicial review if entry is refused or a person is removed; a right to request reconsideration by the Border Guard Authority is however provided but that decision cannot be appealed. So far, no government decision has been made to apply the above-mentioned provisions.

Latvia explains that in 2021, the Cabinet of Ministers issued an Order declaring an emergency situation based on the huge increase in illegal crossing of state border from Belarus, and the state of emergency was subsequently extended several times. The Order stipulated, *inter alia*, that applications for international protection shall not be accepted by the State Border Guard and other institutions in the territory where the emergency situation has been declared. In addition, the State Border Guard, the National Armed Forces and the State Police were granted the right to, for example, prevent persons from illegal border crossings and order them to return to the country from which they were attempting to cross the border, and if needed in a state of extreme necessity, to apply physical force and special means to ensure the execution of orders given. The legality of the Order was challenged at the district administrative court, in particular regarding the ban on accepting and registering asylum applications. The district administrative court, with reference to the judgment of *N.D. and N.T. v. Spain,* concluded that the Order was disproportionate by restricting the applicants' right to apply for asylum, and it also violated the principle of non-refoulement and collective expulsion. Taking into account this judgment, the Order was amended stating that the disputed paragraph does not apply to border crossing points located in certain territories, as well as to the State Border Guard Accommodation Centre for Detained Aliens. After the expiry of the Order, in 2023 State Border Guard Law was supplemented, and a border guard is given the right to prevent a person from entering the country at a place and time which is not intended for such purpose, and to use physical force in this connection.

Slovenia details that specific provisions exist referred to as a complex migration crisis. This type of crisis occurs when a very large number of aliens enter one or more areas of the Republic of Slovenia and express their intention to apply for international protection. In accordance with Article 10a of the Aliens Act, the Government of Slovenia, based on the Ministry of the Interior's assessment and considering the principle of proportionality and the level of threat to constitutionally protected values, has the authority to propose the implementation of measures under Article 10b. The National Assembly then decides on these measures, requiring a majority vote of all its members. These measures can be in place for a maximum of six months, with the possibility of extension. Additionally, the Government is required to inform various international bodies, such as the Council of Europe and the United Nations, about the introduction and termination of these measures. If the application of measures from Article 10b is approved by the National Assembly, the police have the power to deny entry of the alien at the national border and, in the case the alien has already illegally entered the country, to

bring the alien to the national border and send him to a neighbouring safe country from which the alien entered, in a simplified procedure. In relation to this, the Act gives the power to the police for a summary examination of the alien's intention to apply for international protection and issue a rejection decision. This decision can be appealed, but it does not suspend execution. However, the measure cannot be applied, and the alien must be allowed to lodge an application for international protection, if the neighbouring country from which the alien entered has such systemic deficiencies with its international protection procedures and reception conditions that could result in a risk of torture, inhuman or degrading treatment. The measure is also prohibited if the alien can give individual, well founded reasons that demonstrate with a level of probability that the alien faces a real risk of such treatment in the neighbouring country and had valid reasons for not seeking protection there. Additionally, the measure cannot be applied if the alien or their family members have a health condition that makes it clearly impossible to send them to the neighbouring country. The same shall apply if the alien is considered to be an unaccompanied minor. It should also be noted that the provisions on the complex migration crisis in Slovenia have not been activated so far.

Austria explains that in 2016 special provisions for the preservation of public order and the protection of domestic security during the operation of border controls entered into force, but these provisions have not been applied to date. These special provisions amend the possibilities of applying for international protection as well as the granting of de facto protection against deportation. Under the special provisions, applications for international protection by aliens who are not entitled to enter and reside in the federal territory shall generally be filed in person at the time of the border crossing. Following the filing of an application for international protection, firstly the admissibility of refusal of entry, rejection at the border or removal shall be determined prior to interrogation concerning the admissibility of an application for international protection, and, if applicable, the refusal of entry, rejection at the border or removal measures shall be executed. Aliens are thus not granted de facto protection against deportation in this case.

Poland details that there is no specific legislation applicable to returns of foreigners in situations where entry is attempted *en masse* or in the case of instrumentalised migration. However, in connection with the situation at the Polish-Belarusian border, certain amendments have been made allowing the return of foreigners at the border. In particular, a new legal instrument is provided allowing for expulsion: an order to leave Poland after the foreigner has crossed the border in an illegal manner. The "order to leave" is accompanied by a re-entry ban covering the Schengen area. In addition, the Office for Foreigners has the power to reject without consideration an application for international protection submitted by foreigners who crossed the border illegally. There is however one exception to this rule: the application is not rejected without consideration if the applicant came directly from the territory where his/her life or freedom was threatened, the applicant presented reliable reasons for illegal entry and the applicant applied for international protection directly after crossing the border. Moreover, the Regulation of the Minister for Internal Affairs and Administration from 2020 on temporary suspension or restriction of border traffic at certain border crossing points allows for immediate push-backs without taking any formal decision. The administrative court in Bialystok has however refused to apply the provisions of this regulation, as the court found

that the expulsion of foreigners based on the regulation is not in compliance with the Polish Constitution and the 1951 Refugee Convention.

Greece points out that even though *en masse* migratory flows are given a specific definition in the national law ("the arrival of a significant number of displaced persons, coming from a designated country or geographical area, regardless, whether their arrival was spontaneous or assisted, such as through an evacuation programme"), there are no national provisions allowing authorities to take measures in order to prevent or reverse these flows. In 2020, however, the Greek Government, considering that Greece was confronted with the phenomenon of instrumentalised migration, issued an act of legislative content provided for in the Constitution, in the face of an "asymmetric threat to the security of the country that exceeds the justification basis of international and EU law for the asylum procedure, combined with the absolute objective impossibility of examining in a reasonable time the asylum applications that would arise due to the illegal mass entry into the country". The act provided that the submission of applications for asylum by persons who entered the country illegally is suspended for a month. Such persons shall be returned, without registration, to their country of origin or nationality. Neither the act nor any individual administrative act based on it was challenged before the Council of State.

Italy refers to the topical issue of the concept of a "safe country" and its relation to the agreement concluded between Italy and Albania. Currently, the legislation provides that "a country designated as a safe country of origin in accordance with this Article may only be considered a safe country of origin for the applicant if he or she has the nationality of that country or is a stateless person who previously had his or her habitual residence in that country and has not invoked serious grounds for considering that this country is not a safe country of origin due to the particular circumstances in which he or she finds himself or herself". The recent agreement concluded with Albania provides that migrants rescued in the Mediterranean Sea will be transported to centres in Albania if they are deemed not vulnerable. The agreement concerns persons intercepted during unauthorised border crossings and rescued at sea by the Italian Coast Guard, Border Police and Navy, and provides that these persons will be taken to reception platforms located on Albanian territory for identification procedures. It also provides for the transfer to these centres of asylum seekers, to whom border procedures apply, and of all those who do not apply for asylum or whose application is deemed inadmissible. For the latter, their stay in the centre is planned until their expulsion from the territory. The agreement also provides for the construction and management, under the responsibility of the Italian authorities, of two reception centres located on Albanian territory, in which migrants arrested at the Italian border are transferred and accommodated only for the time necessary to carry out the border or repatriation procedures provided for by Italian and European legislation. After the transfer to Albania, the competent Italian police authorities issue a decree ordering the detention of the migrant in one of the Albanian reception centres, which decree is subject to validation by the competent civil court. On several occasions, in recent times, the civil courts have not validated these decrees, for reasons related to the concept of "safe country", and in particular due to doubts as to whether Albania or one of the countries listed in the relevant provision can be considered a "safe country": in support of these orders, the civil courts have invoked the criteria defined by the CJEU for the identification of "safe countries", in particular the judgment of the CJEU of 4 October 2024, in

case C-406/22, thus calling into question the fact that "safe countries" can be predetermined by law and independently of a concrete assessment of the circumstances of the case. In more than one case, the civil courts have therefore referred the question of the conformity of the "list of safe countries" with European law to the CJEU by means of preliminary rulings under Article 267 of the TFEU.

2. National case law relating to alleged summary return of aliens

Question 26 explores the practical experiences the responding courts have had in the field of alleged summary return of aliens by looking at those national cases where the notion of collective expulsion as defined in Article 4 of Protocol No. 4 has been invoked and/or applied.

It shall be noted, first of all, that not all responding courts have jurisdiction in the field of immigration law, or they have competence only in certain areas in this field[4]. The focus is therefore only on those courts that explain having jurisdiction on questions in focus.

> *Spain* refers to a recent judgment as being the leading case in the field (STS 114/2024 - ECLI:ES:TS:2024:114*).* In this judgment, the Administrative Chamber of the Supreme Court confirmed that the return of Moroccan minors from Ceuta to Morocco carried out by Spanish authorities in August 2021 was illegal due to the "complete disregard" of the requirements of the Immigration Law. Furthermore, the Chamber confirmed that the minors' rights to physical and moral integrity were violated in their return to Morocco. The administration made no assessment of the minors' best interests or consideration of their individual circumstances. The Supreme Court acknowledged the gravity of the events in Ceuta on May 17 and 18, 2021, when around 12,000 people entered *en masse* and illegally, including approximately 1,500 minors. The Court noted that this presented an extraordinary challenge for both the State and the autonomous community. However, it clarified that the dispute concerns whether the Spain-Morocco Agreement of March 6, 2007, was sufficient on its own to justify the return of the minors to Morocco, or whether it was additionally necessary to follow the procedures established in national laws, which require individualised administrative procedures, information about each affected person, a hearing if the individual is mature, and intervention by the Public Prosecutor. The Supreme Court concluded that the 2007 Agreement does not, by itself, constitute sufficient legal grounds to decide on the return of the minors, primarily

[4] In *Sweden*, the Supreme Administrative Court does not have jurisdiction in the field of immigration law. *Italy* explains that the jurisdiction of the administrative courts is limited to measures relating to residence permits. Jurisdiction for expulsion measures was previously reserved to general courts but from 2023, jurisdiction for acts of immediate rejection at the border is devolved to the administrative judge. The general courts remain however competent in matters of international protection and asylum, and, therefore, on summary expulsion procedures. *Hungary* details that the Hungarian law distinguishes between cases relating to immigration and cases relating to asylum and the Curia does not have jurisdiction to review decisions on asylum matters. *Romania* submits that the High Court has no jurisdiction to settle disputes concerning the appeal against return decisions concerning aliens, as the judgment of the Court of Appeal analysing the legality of these administrative acts is definitive. *Latvia* submits that in most cases, the Department of Administrative Cases of the Supreme Court does not have a jurisdiction in the field of immigration law. Questions regarding the immigration are brought before the District Administrative Court.

because it does not outline any procedural requirements. Therefore, as in any other administrative action—especially one that may affect fundamental rights—Spanish authorities are required to act through the corresponding administrative procedure, as a guarantee of the legality and accuracy of their decision and as a safeguard of the affected parties' interests. In this case, the applicable procedures are those regulated by the Immigration Law and its Regulations. The ruling further states that the invocation of exceptional circumstances by the appellants is "abstract," as it does not justify the administration's complete inaction; what might initially seem understandable becomes less so as the situation persists. Thus, a lenient interpretation of legality, or even a waiver of compliance with legal requirements, cannot be justified by citing exceptional circumstances.

Poland mentions that the Polish Supreme Administrative Court applies Article 4 of Protocol No. 4 (as connected with the *non-refoulement* principle) in its judgments. For example, in a recent judgment, the Supreme Administrative Court stated that simplified expulsion procedure is permitted under EU legislation, in particular Article 2(1)(a) of the Return Directive. This case concerned the decision of the Polish Border Guard on ordering an immigrant to leave Polish territory due to the fact that he was stopped immediately after crossing the border illegally. The Court emphasised that the conduct of a simplified procedure cannot lead to a violation of the principle of *non-refoulement*. The Court also indicated that the principle of *non-refoulement* protects not only persons who have applied for refugee status, but also foreigners who have not.

Hungary explains that the Curia has proceeded in several cases regarding the escort-across-the-border measure, stating that the escort-across-the-border is classified as an individual decision, and as such, may become the subject of an administrative legal dispute. The Curia also stated that the Aliens Policing Authority does not have the power to order the escort-across-the-border and therefore, the Aliens Policing Authority's decision that orders the escort-across-the-border and does not take the form of a formal decision, shall be null and void.

The Czech Republic points out that even though there have not, to date, been any cases dealing with alleged summary returns of aliens as a main legal issue, in some cases this argument was brought up by the complainant. The Supreme Administrative Court has reminded that summary returns of aliens are prohibited under the Czech law. For example, in the judgment from 2017, the Supreme Administrative Court overruled the decision of the Regional Court and remanded it for further proceedings because of doubts whether a waiver of the right to appeal was valid. In addition, the need to individualise the assessment of the alien's obligation to leave the territory was emphasized by the Court in the judgment from 2020.

Switzerland refers to a landmark judgment from 2023 concerning Dublin transfers to Croatia, in which the Federal Administrative Court considered that despite the known problem of forced returns at the border (push-backs), asylum seekers transferred to Croatia under the Dublin III Regulation have access to the asylum procedure in that country. The Court indicated that the problem of push backs often also raises the question of collective expulsions of foreigners, prohibited by Article 4 of Protocol No. 4. While recalling that Switzerland had not signed or ratified this instrument, the Court specified that this did not, however, exempt the Swiss authorities from respecting the principle of *non-refoulement*.

Austria details that the Supreme Administrative Court has briefly referred to the notion of collective expulsion as defined in Article 4 of Protocol No. 4 in a few cases. In addition, in a recent decision, the Regional Administrative Court of Styria declared the rejection of an alien unlawful because he had used the word "asylum" and therefore should have been granted *de facto* protection against deportation. The Supreme Administrative Court dismissed an appeal by the Regional Police Directorate of Styria against this decision. Among others, the Supreme Administrative Court relied on its case law that a border control officer must ensure whether an application for international protection has been made prior to carrying out a rejection.

France mentions that while the argument based on the violation of Article 4 of Protocol No. 4 is sometimes raised before the administrative tribunals and administrative courts of appeal, and has also been raised three or four times, about twenty years ago, before the Council of State, such an argument has never succeeded.

United Kingdom refers to a recent case which involved the legality of the UK government's plan to send asylum seekers to Rwanda. While this case didn't explicitly address "summary returns", it raised concerns about expedited removals without proper individual assessment.

3. The impact of the case law of the ECtHR related to Article 4 of Protocol No. 4 at the national level

Question 27 seeks to explore the impact the case law of the ECtHR in relation to Article 4 of Protocol No. 4 has had, if any, at the national level, either in the legislative or judicial sphere. Whilst the majority of the responding courts answer that no such impact can be detected, 13 courts respond that the principles established in this case law have been applied in their national practice and/or the interpretation of the ECtHR has been taken note of in the preparation of national legislation.

Lithuania explains that the case law of the ECtHR in the field of summary returns of aliens has had an impact on the national legal framework. Specifically, in its recent ruling, the Constitutional Court, when addressing measures applied to asylum seekers temporarily accommodated in border transit zones while their asylum applications were pending, referred to the ECtHR's case law. It noted that the distinction between deprivation of liberty and restriction of freedom of movement depends on the intensity and degree of the restrictions, rather than their nature. The key evaluation criteria are the specific situation of each individual, the type of measures applied, their duration, impact, and the manner in which they are implemented.

Equally in *Poland* the ECtHR case law and its interpretation of the scope of Article 4 of Protocol No. 4 has been taken into account in the interpretation of national law by the administrative courts. For example, the Voivodship Administrative Court in Białystok, in case concerning pushbacks at the Polish-Belarusian border, took into consideration the notion of collective expulsion within the meaning of Article 4 of Protocol No. 4. The Court underlined that Article 4 of Protocol No. 4, as well as Article 19 paragraph 1 of the Charter of Fundamental Rights of the European Union (CFREU), imposes an obligation to individually examine the case of each of the foreigners seeking protection (including in the event of their mass migratory flows), with particular consideration of the situation in the country to which they were to be returned.

Therefore, the Court stated that the failure to conduct a thorough investigation to determine whether the removal of foreigners would expose them to the dangers described in Article 33 paragraph 1 of the Geneva Convention and Article 19 paragraph 2 of the CFREU, in particular inhuman or degrading treatment, violates Article 19, paragraph 1 of the CFREU and Article 4 of Protocol No. 4.

Serbia mentions the decision of the Constitutional Court from 2021 in which a violation of the prohibition on collective expulsion was established. The applicants (citizens of the Islamic Republic of Afghanistan) who had entered the country illegally had not been given an opportunity to present arguments against their expulsion to the competent authorities on an individual basis. The Constitutional Court applied the national legislation, including the Constitution, and referred to the case law of the ECtHR, including, *inter alia, Hirsi Jamaa v. Italy*.

Malta refers to, in particular, the ECtHR's decision in *Hirsi Jamaa and Others v. Italy* and explains that this ruling led to heightened scrutiny and adjustments in national policies to ensure compliance with the ECHR standards. Maltese courts have increasingly referenced the ECtHR case law in their decisions on immigration matters. For instance, in cases involving the detention and deportation of migrants, Maltese courts have considered the principles established by the ECtHR to ensure that expulsion procedures do not constitute collective expulsions and that individuals have access to effective remedies.

The Netherlands points out that the case law of the ECtHR in the field of Article 4 of Protocol No. 4 can be relevant in particular with regards to cases concerning Dublin claimants.

Slovenia mentions that the case law of the ECtHR in the field of summary returns of aliens has been referenced in the reasons presented by the government relating to proposal to amend the Aliens Act (which subsequently was adopted). Equally in *Austria, Estonia* and *Finland* the case law of the ECtHR under Article 4 of Protocol No. 4 has been referenced in the legislative materials relating to amendments and/or adoptions of national laws in this field. In *Finland*, however, it was expressly acknowledged in the government proposal that the bill on temporary measures to combat instrumentalised migration "would be in tension with human rights obligations that bind Finland".

4. Applications to the ECtHR alleging a violation of Article 4 of Protocol No. 4

Regarding Question 28 inquiring whether any cases have been brought against the state in question in the ECtHR alleging that there has been a violation of Article 4 of Protocol No. 4 (alone or in conjunction with Article 13 of the ECHR), most of the courts respond in the negative. However, ten courts report being aware of such cases, although a few of these cases were deemed inadmissible in the end.

Poland details that a number of cases have been decided against Poland, and some are currently pending. In particular, judgments finding Poland in violation of Article 3 of the ECHR, Article 4 of Protocol No. 4, and Article 13 of the ECHR were issued in cases: 1) *M.K. and Others v. Poland* in 2020; 2) *D.A. and Others v. Poland* in 2021; 3) *A.I. and Others v. Poland* in 2022; 4)

A. B. and Others v. Poland in 2022; 5) *T.Z. and Others v. Poland* in 2022; 6) *Sherov and Others v. Poland* in 2024. These cases concerned, respectively, the situations at the Polish-Belarusian border or the Polish-Ukrainian border, where in 2016 and 2017 the complaining foreigners (Russian, Syrian and Tajikistani nationals) repeatedly tried to submit an application for international protection. The cases pending before the ECtHR concern a situation of foreigners who have crossed the Polish-Belarusian border in 2021 or 2022. These cases are different from those already decided by the ECtHR as they relate to the hybrid war on the Polish-Belarusian border, often referred to as the "instrumentalisation" of migrants. One of these cases – *R.A. and Others v. Poland* (no. 42120/21) – is pending before the Grand Chamber (the date of hearing: 12 February 2025). This case concerns a group of 32 Afghan nationals who crossed the Belarusian-Polish border in August 2021 before being forcibly pushed back to Belarus by Polish Border Guards. Relying on Article 3 of the ECHR, Article 4 of Protocol No. 4 and Article 13 of the ECHR taken together with Article 3 and Article 4 of Protocol No. 4, the applicants further complain that they have been subjected to collective expulsion and that no effective remedy has been available to them. There are also a number of similar cases communicated to Poland by the ECtHR. Some of these cases have not previously been reviewed by Polish administrative courts.

Latvia explains that in 2022, the ECtHR delivered its decision in the case of *M.A. and Others v Latvia*, declaring the complaints inadmissible on the merits and terminating the proceedings. The case concerned a complaint by Russian citizens alleging violations of Article 3 and Article 4 of Protocol No. 4 of the ECHR, both individually and in conjunction with Article 13. The applicants submitted that they and 22 other persons arrived at the border checkpoint on the border between Latvia and Belarus in order to seek asylum in Latvia. However, their asylum applications, expressing concerns about persecution in their country of origin and the poor living conditions in Belarus, from where they had come, were rejected without consideration, with decisions to refuse them entry to Latvia being taken because they did not have documents valid for entry. The applicants alleged that the State Border Guard officials, by taking decisions to refuse entry to Latvia and without assessing their individual situation, subjected the first applicant to a chain of refoulement from Latvia to Belarus and on to Russia, where he was subsequently subjected to torture, while the other members of his family were left in a situation of uncertainty, stress and fear. The applicants also alleged that they had been subjected to collective expulsion and had no effective remedy available to them in this respect. The ECtHR concluded that the applicants had not submitted sufficient evidence to indicate that they had indeed sought asylum in Latvia and declared the applicants' complaints concerning alleged violations of Articles 3 and 13 of the ECHR inadmissible on the merits. In assessing the applicants' complaints alleging violation of Article 4 of Protocol No 4, the ECtHR, referring to its case-law, stated that similar decisions taken in respect of several foreign nationals could not in themselves lead to the conclusion that there had been collective expulsion where each person had had the opportunity to present his or her case against expulsion to the competent authorities. The ECtHR concluded that the applicants had had such opportunity. In addition, the case of *H.M.M. and Others v. Latvia* is currently pending at the ECtHR and a Grand Chamber hearing is scheduled for 12 February 2025.

Lithuania refers to the pending case *C.O.C.G. and Others v. Lithuania,* relinquished to the Grand Chamber, in which violations of Article 4 of Protocol No. 4 in conjunction with Article 13 of the

ECHR are alleged. The applicants, four Cuban nationals, claim they were subjected to summary returns (push-backs) from Lithuania to Belarus, where they were deprived of their liberty while attempting to seek asylum. They allege that Lithuanian border guards forcibly expelled them from Lithuanian territory without providing them the opportunity to submit asylum applications. Additionally, the applicants assert they faced degrading treatment and were denied access to legal remedies, violating their rights under the Convention.

Hungary explains that in recent years, several cases have been launched against Hungary before the ECtHR in which the applicant alleged a violation of Article 4 of Protocol No. 4. In the case of *Shahzad v. Hungary,* the applicant crossed the border illegally with a group of people, and a few hours later, he and the other members of the group were apprehended by the Hungarian police and were escorted to the other side of the border fence between Hungary and Serbia. The ECtHR found that the "apprehension and escort" measure constituted an expulsion according of Article 4 of Protocol No. 4, and that the applicant's expulsion was "collective" and lacked individual criteria, which led to a violation of his rights under Article 4 of Protocol No. 4. Furthermore, the ECtHR established that the applicant had not had an adequate remedy at his disposal and Article 13 was violated, too. In the case of *M.D. and others v. Hungary*, the applicants, an Afghan family, alleged a violation of their rights enshrined in the ECHR due to being escorted from the transit zone to Serbia overnight without a formal decision after their asylum application was rejected. The ECtHR found a breach of Article 4 of Protocol No. 4 on the basis of the same test as in the *Shahzad* case, since it could not be established that the applicants' case had been examined individually by the authorities. In the case of *S.S. and others v. Hungary*, the applicants entered Hungary via an international airport and used, during border checks, fake diplomatic travel documents that were discovered by the police, which led to their arrest. The applicants applied for asylum and the group was escorted across the border toward Serbia at night. The ECtHR found that the applicants had been escorted to Serbia without having been given a real opportunity to present arguments against their expulsion and that their expulsion was therefore collective.

Croatia explains that there has been one case brought against Croatia in the ECtHR alleging a violation of Article 4 of Protocol No. 4 – *M.H. and Others v. Croatia* from 2021. The applicants were a family of 14 Afghan nationals and the case related to their attempt to cross the Croatian border illegally. Whilst being ordered to return to Serbia on foot along the train tracks, a train accident happened where one of the applicants, a little girl, died. The other applicants filed a criminal complaint against unknown Croatian border police officers for the criminal offence of negligent death, abuse of office and authority, torture and other cruel, inhuman and degrading treatment and violation of the child's rights. The criminal complaint was rejected on the basis, *inter alia*, that the evidence gathered during the investigation did not show that the applicants had crossed the border, entered Croatia, talked to Croatian police officers or applied for asylum. Before the ECtHR, the applicants claimed an infringement of Articles 2, 3, 5 and 34 of the Convention and of Article 4 of Protocol No. 4 to the Convention. In relation to Article 4 of Protocol No. 4 to the Convention, the applicants complained that they had been subject to collective expulsion because an individual assessment of their circumstances had not been carried out. The ECtHR held that there was *prima facie* evidence in support of a version of the events as presented by the applicants. Namely, their description of this event was specific and consistent throughout the period and a large number of reports of civil society organisations

and international organisations pointed to the problem of return by the short procedure of persons who secretly entered Croatia at the borders with Serbia and Bosnia and Herzegovina. It was therefore for the Government of the Republic of Croatia to prove that the applicants had not entered Croatia and that they had not been returned on short notice to Serbia before the train hit the girl. However, the Government failed to refute the abovementioned *prima facie* evidence of the applicant. The ECtHR was also unable to determine whether the applicants had real and effective access to procedures for legal entry into Croatia. Consequently, the removal of the applicants was considered of a collective nature and therefore infringed Article 4 of Protocol No. 4 to the Convention.

Greece mentions that although Greece was involved in the case *Sharifi and Others v. Italy and Greece*, the violation of Article 4 of Protocol No. 4 was found only against Italy. In pending case *K.K. and 17 others v. Greece*, concerning the alleged return of the applicants from Greece to Turkey without any prior procedure, the applicants complain about a violation of Articles 2, 3 (alone and in conjunction with Article 13) and 5, paragraph 1, of the ECHR. Nevertheless, the ECtHR has indexed this case as relevant to potential violation of Article 4 of Protocol No. 4 to the ECHR, despite the fact that Greece has not ratified it. The same applies for case *F.C. and 4 others v. Greece*.

The Slovak Republic refers to the case of *Asady and Others v. Slovakia* which concerned the expulsion of 19 Afghan nationals to Ukraine after illegally entering Slovakia. In their application to the ECtHR, the applicants claimed that their expulsion to Ukraine was collective in nature because the state authorities had failed to carry out an individual examination and assessment of their cases, and that they had been denied access to the asylum procedure. The ECtHR held, however, that there had been no violation of Article 4 of Protocol No. 4 as the ECtHR did not find that the applicants had been deprived of the opportunity to present to the national authorities all the circumstances which might have justified their remaining in the Slovak Republic, or that their return to Ukraine had been carried out without an examination of their individual situation.