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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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**COMMITTEE OF EXPERTS ON THE SYSTEM OF
THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)**

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Compilation of written contributions concerning mechanisms for ensuring the compatibility of laws with the Convention (arrangements, advantages, obstacles) / Compilation de contributions écrites relatives aux mécanismes pour garantir la compatibilité des lois avec la Convention (modalités, avantages, obstacles)

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AUSTRIA/AUTRICHE

The following procedures have proven their effectiveness in Austria for decades:

- The European Convention on Human Rights (Convention) and the Protocols thereto have the rank of constitutional law in Austria. From this it follows that all ordinary laws and regulations (and all implementing acts) must be in compliance with the Convention.

  In case of any concerns regarding the compliance of ordinary law (a regulation or an individual implementing act) with the Convention, this issue can be submitted to the instances of appeal. Finally the Austrian Constitutional Court might be asked for an examination. The Constitutional Court is entitled to review laws and regulations. It goes without saying that the Constitutional Court includes the Convention and the ECHR's specific case-law in its reasoning. It did so for example most recently in a judgment concerning inheritance law (judgment of 9 December 2015, G 165/2015).

- In Austria, the great majority of federal laws - including the pertinent explanations – are prepared by the federal ministries responsible for the respective legal issue. According to established State practice, the federal ministry concerned carries out a general consultation procedure inviting interested parties and those concerned as well as the Constitutional Service at the Austrian Federal Chancellery (*Bundeskanzleramt – Verfassungsdienst*), the offices of the regional governments, the Association of Municipalities and Association of Towns (*Gemeinde- und Städtebund)*, and frequently also universities, professional associations, NGOs, etc. to submit their comments. Based on the comments and opinions received, the federal ministry prepares the final draft bill and submits it to the Ministerial Council for adoption. After the Ministerial Council has taken its decision, the draft bill (including the explanations and a comparison [juxtaposition] of the text currently in force and the proposed text) is transmitted to Parliament as a "government bill" for further consideration.

  The legislative material (draft, explanations and comparison of texts) contain *inter alia* comments regarding the draft's conformity with the Austrian Constitution and accordingly also the Convention. All draft bills for federal laws and the comments received thereon are accessible to everyone free of charge on the homepage of the Austrian Parliament. The Austrian Parliament can thus generally base its deliberations and take its decisions on a comprehensive documentation of all comments and opinions and any concerns voiced therein. For an in-depth discussion of sensitive socio-political issues, the Parliament also organises enquetes to give, for example, scientific experts and representatives of the civil society the opportunity to discuss issues relating to the Convention.

- The Constitutional Service at the Federal Chancellery is specialised in providing the federal ministries and the federal government with general advice on questions of constitutional law, having regard to the Convention and the ECtHR's pertinent case-law (and also for example, to the EU Charter of Fundamental Rights and the pertinent decisions of the CJEU). It is regularly consulted by the federal ministries for the preparation of a draft bill and for questions of interpretation.

BELGIUM/BELGIQUE

Le Gouvernement belge renvoie aux observations qu'il avait formulées dans ses précédentes contributions sur le contrôle de compatibilité des normes nationales avec les principes fixés par la Convention européenne des droits de l'homme, ces observations demeurant d'actualité. Le Gouvernement souhaite toutefois apporter les compléments suivants.

La référence directe à la Convention européenne des droits de l'homme et à la jurisprudence de la Cour dans les circulaires et instructions que l'administration adresse à ses agents

Le Gouvernement s'efforce d'assurer la compatibilité de ses pratiques administratives avec les dispositions de la Convention européenne des droits de l'homme et la jurisprudence de la Cour EDH.

Ainsi, l'important arrêt *Trabelsi c. Belgique* rendu le 4 septembre 2014 par la Cour a conduit le ministère de la Justice à préparer la diffusion d'une note générale sur les mesures provisoires visant à informer les agents des services susceptibles d'y être confrontés sur les obligations qui en découlent en vertu de la Convention.

Depuis l'arrêt *Yoh Ekale Mwanje c. Belgique* du 20 décembre 2011, des instructions ont été données par l'administration aux différents services médicaux des centres fermés en vue de l'éloignement du territoire afin de garantir un meilleur suivi dans la prise en charge médicale des résidents. Ainsi, lorsque le résident signale qu'il était en traitement à l'extérieur, un contact est pris avec son médecin traitant afin d'assurer la continuité des soins.

Dans la majorité des cas où des arrêts nécessitent d'adopter ou de modifier une loi, les Ministres concernés vont déposer des « projets de loi ».

En outre, ils peuvent lors de la discussion de « propositions de loi » déposées par des parlementaires, proposer des amendements visant à se conformer aux exigences d'arrêts de la Cour. Par ailleurs, des propositions législatives ont parfois été initiées directement par l'Agent du Gouvernement belge (par exemple, la loi sur la réouverture des procédures pénales suite à un arrêt de la Cour) et sa modification par la loi du 5/2/2016 élargissant les possibilités de réouverture aux règlements amiables et déclarations unilatérales reconnaissant une violation de la Convention de nature à créer un doute sérieux quant au résultat de la procédure attaquée.

Il est aussi arrivé qu'une législation soit modifiée en Belgique suite à un arrêt de la Cour rendu à l'égard d'un autre Etat : ainsi, c'est suite à l'arrêt *Salduz c. Turquie* qu'a été adoptée une loi du 13 août 2011 qui permet désormais l'accès à un avocat dès la garde à vue.

De manière générale, on peut souligner que la proximité au sein d'une même Direction générale de l'Agent du Gouvernement avec des services spécialisés dans les procédures législatives pénales et civiles constitue une aide précieuse en vue d'identifier les mesures individuelles et/ou générales nécessaires pour exécuter des arrêts et, le cas échéant, pour initier des modifications législatives.

BULGARIA/BULGARIE

1) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

Following the conclusions of a report "A mechanism for preliminary examination of draft legislative acts and for their compatibility with the Convention, as well as practices of the executive and judicial authorities", a system of preventive control was proposed by the Government though the adoption of proposal of amendments of the Legal Acts Act. This proposal was sent to the Parliament for adoption. This new procedure envisages **mandatory review of all draft laws for compatibility with the Convention.** According to the proposal the review will be performed at the Ministry of Justice.

The Ombudsman acting also as the NPM contributes further to the assessment of the compatibility of the legislative amendments with the ECHR provisions through his ongoing work on complaints and signals; opinions and recommendations to public bodies; approaching the Constitutional Court; visits to places of detention or deprivation of liberty, social institutions, etc.; preparation of annual reports and periodical bulletins.

With regard to the role of the Parliament it is important to note that the Minister of Justice presents an Annual report on the execution of the ECtHR's judgments, which includes a catalogue of proposals for further measures to be taken. The Strategy for the continuation of the judicial reform also envisages amendments of the legal framework of the judicial system with direct relation to the compliance mechanisms with the Convention.
A significant step was made by the adoption of amendments of the Constitution in 2015 by broadening the competent institutions to draw the attention of the Constitutional Court to legal provisions violating the human rights. Thus, Article 150 of the Constitution was amended to allow to the Supreme Attorney Council to send applications to the Constitutional Court.

2) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

With regard to the above amendments of the Legal Acts Act and awaiting their adoption by the Parliament the Ministry of Justice has started the establishment of focal points network of human rights experts of the Bulgarian authorities in compliance with the measures of the Brighton declaration. The appointed responsible persons at all ministries and the Administration of the Council of Ministers were trained (in cooperation with the Norwegian Human Rights Institute under the Norwegian Financial Mechanism) in order to enhance the knowledge of the European human rights standards.

3) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What

obstacles have been encountered in setting up or carrying out such an assessment?

The above mentioned Annual report of the Minister of Justice was adopted by the Parliament last week stating the improvements of the measures taken to prevent human rights violations in Bulgaria.

A number of Projects in the field of judicial capacity-building and cooperation were completed under the Norwegian Financial Mechanism. Those Projects have direct effect on the enhancement of the human rights protection in Bulgaria.

CROATIA/CROATIE

What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

The Convention in the Republic of Croatia is an integral part of the legal system and all domestic bodies vested with right of legislative initiative are responsible to ensure compliance of their proposals of laws with the Convention and jurisprudence of the Court.

At the outset, it should be noted that there are several ways in which the ministries are regularly informed of Court's case-law and of issues raised in the pending proceedings against Croatia before the Court.

First, most ministries have designated a focal point, a person responsible for ensuring that complete and accurate information and documents are timely delivered to the Government Agent for the purposes of pending proceedings before the Court.

Second, the Council of Experts for the Execution of the Judgments of the European Court of Human Rights (hereinafter: the Council of Experts), an inter-institutional body responsible for defining and implementing the measures for execution of Court's judgments, has its members in each ministry, several agencies, Constitutional Court and Supreme Court.

Third, national bodies are informed of Court's case-law against other member states in the form of Review of ECHR case-law published periodically by the Office of the Agent.

In all these ways national bodies are informed of relevant issues dealt by the Court, with the view of taking Court's case law into account while drafting a law proposal.

Drafting new laws (in general)

Before submitting a proposal of the law to the Government, the national bodies must:

1) Submit their draft proposal for public consultation
   For that purpose, draft proposal must be published on web pages of the competent body, with the possibility to submit comments.
   Recently, the Government has set up new application (https://savjetovanja.gov.hr) to facilitate public consultations. It enables the user to see all open consultations in one place, and the subsequent reports on results of the public consultation. It also enables registered users to comment directly on specific provision, or to make comments on the draft proposal in general.

2) Submit their draft proposals to the Governmental Office for Legislation, Ministry of Finance and Ministry of Foreign and European Affairs, as well as to other bodies in whose field of competence fall the issues regulated by the proposal in question.

The proposal should also be submitted to professional and other associations dealing with issues regulated by the said proposal. The proposal should be accompanied with the Assessment of Impact of the Law/Regulation.

In order to accomplish an efficient procedure which ensures compliance of Croatian legislation with the Convention, a special Department has been set up in the Office of the Agent, in whose scope of work falls, among other things, giving opinions on compatibility of laws with the Convention (Department for case-law research and harmonisation of the legislation with the European Convention of Human Rights and Fundamental Freedoms and case-law of European Court of Human Rights, hereinafter: Department for case-law research and harmonisation).

When giving opinion on compliance of specific regulation with the Convention, the Office of the Agent is guided by recent jurisprudence of the Court. In doing so, the Office of the Agent points out the non-compliance of certain provisions with standards arising from the Convention, indicates uncertainties in the application of regulations and, if necessary, gives suggestions for improvement, especially when it comes to a legal matter in which the Court has already found a violation of the Convention. It is not mandatory to request the opinion from the Office of the Agent.

Upon receiving opinions from the bodies which have been requested to provide one, the body in charge of the proposal must assess all the comments and opinions and give reasons for accepting them or not accepting them. If the disagreements on opinion between national bodies cannot be resolved, they are further discussed within coordinating governmental bodies.

When the proposal of law dealing with human rights is subsequently sent to the parliamentary procedure, it is reviewed by the Human Rights and National Minorities' Rights Committee. The Government Agent (along with, e.g. Ombudsman) is usually invited to the sessions of the Committee.

Legislative measures following the judgment of the European Court

When the European Court in its judgment finds that laws or administrative practices are incompatible with the Convention, the Republic of Croatia will be called upon to rectify such legal situation. In order to perform this task, the Council of Experts, established within the Office of the Agent, will determine the measures of execution of judgments and decisions of the Court and monitor their implementation.

After the judgment becomes final, the Office of the Agent (Department for coordination of execution of judgments and decisions of the European Court) will disseminate the judgment to all members of the Council of Experts. The dissemination of ECHR judgments translated into Croatian language is accompanied by extensive analysis of the judgment.

All the bodies, via their representatives in the Council of Experts are required to assess their responsibilities in the process of execution of a particular judgment. If a legislative change is needed, the body in whose competence the relevant issue pertains will provide information on measures to be undertaken to the Office of the Agent. Based on this information, the Office of the Agent will draft an Action plan for the execution of a

particular judgment. After the Council of Experts approves the Action plan, it gives instructions to responsible bodies to undertake agreed measures within time limit that have been set. If legislative measures are required, the draft proposal undergoes the same procedure as explained above.

Laws in force

There are no systematic mechanisms for the verification of the compatibility of existing laws with the Convention.

However, various bodies have the possibility to raise the issue of the incompatibility of the laws and administrative practices with the Convention.

The Ombudsman, a commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms enshrined in the Constitution, laws and international legal instruments on human rights and freedoms ratified by the Republic of Croatia may issue warnings, notices, requests and recommendations. The Ombudsman monitors the state of human rights and indicates the need for their protection. Within his or her responsibilities he or she monitors the constitutionality of laws and other regulations and instigates the harmonisation of legislation with international and European standards. The Ombudsman is empowered to initiate changes in the laws regarding the protection of the rights proclaimed by Constitution and laws. The Ombudsman submits the annual report to Croatian Parliament, containing recommendations (including those to undertake legislative measures) to national bodies.

The Government Agent is empowered to give the initiative to the Government for changes of laws, bylaws, strategies, programs and other acts for the purpose of their harmonisation with the Convention and Court's case-law.

The assessment of the incompatibility of domestic law with the Convention can also be made by domestic courts and the Constitutional Court in the proceedings before them, as the Convention is directly applicable in domestic legal system and has higher legal power than domestic laws.

What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

The Department for case-law research and harmonisation within the Office of the Agent and Council of Experts are relatively new mechanisms whose tasks are, among other things, ensuring the compatibility of domestic laws with the Convention.

Although it is not mandatory to seek opinion on the compatibility of the draft law with the Convention and Court's case-law from the Office of the Agent, many bodies have made their practice to seek such opinion. However, this mechanism is still not used sufficiently.

The lack of human and financial resources is preventing the idea to prescribe mandatory request for opinion on compatibility of laws with the Convention. Instead, the focus will be on the activities aimed to improve the capacities within the bodies responsible for drafting the legislation to better understand and implement the Convention (education,

training, providing relevant case-law and case-law analysis to working groups etc.) and to encourage bodies to make use of the possibility to seek opinion from the Office of the Agent.

Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

No systematic assessment is planned at this moment.

CYPRUS/CHYPRE

1. What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

Domestic mechanisms for checking the compatibility of draft legislation, laws in force or administrative practice operate in the Law Office of the Republic of Cyprus under the Government Agent, that is, the Attorney General of the Republic of Cyprus. Within the Law Office's internal structure, a Human Rights Sector was set up in 2004 for carrying out the functions and tasks necessary for implementing *inter alia*, the 2004 Recommendation of the Committee of Ministers, on compatibility of administrative practice and legislation with the Convention/Court's case-law (Rec(2004)5). The Human Rights Sector consists of lawyers from the Attorney-General's Office familiar with Strasbourg case-law and human rights issues.

In exercise of the Attorney General´s function as the Republic´s legal adviser, the Human Rights Sector operates as follows concerning the verification of compatibility of laws in force or administrative practice with the Convention:

(a) It gives legal advice/opinions, whenever the issue raised for advice by a Ministry/Governmental Department has a human rights dimension/aspect requiring examination and study in the light of the Convention.

(b) It communicates to Ministries/Governmental Departments concerned judgments of the Court or relevant press releases and inquires as to applicable administrative practice/legislation in the matter, so as to ascertain whether this is in conformity with the judgment communicated, and to advise the Ministry/Governmental Department accordingly.

(c) It examines whether there is a need in the light of the Court´s case law to introduce new or amend/abolish existing legislation and advices accordingly. The necessary legislation is drafted by the Sector. In the process of drafting the necessary legislation, relevant authorities are consulted.

(d) It advises the administration on legislative/administrative measures needed to be adopted in execution of judgments of the Court finding violations against Cyprus and drafts necessary legislation.

(e) It studies administrative practice/legislation also brought to its attention from other sources so as to determine whether they need to be reviewed in the light of the Convention and advises the administration accordingly.

Concerning compatibility of draft legislation, it is noted that in Cyprus all legislation to be tabled in Parliament by the Government is either drafted or vetted by counsel of the Law Office. The compatibility therefore of all draft legislation with the Constitution and the Convention rests with the Attorney General as the Republic´s legal adviser and the Law Office. Legislation drafted/vetted as above, is always accompanied by a short

explanatory memorandum signed by the Attorney General, setting out its aim and giving a brief summary of its basic provisions. Signature of the memorandum by the Attorney General means in effect that the Republic´s legal adviser has ascertained the draft law´s compatibility with the Constitution and the Convention.

The above mechanism/practice is systematic as it flows from the constitutional function of the Attorney-General as legal adviser of the Republic, of the Council of Ministers, the President and the Ministers. The Attorney General´s office's mode of operation in the Government machinery in conjunction with his other constitutional functions respecting court proceedings, enable the Law Office and in particular its Human Rights Sector to operate effectively and act promptly respecting compatibility of legislation and administrative practice with the Convention.

The advantages and appropriateness of the mechanism chosen are obvious regard being had to the fact that the Constitution itself sets out the Attorney-General's functions and powers as the Republic´s legal adviser, rendering him/her completely independent of the executive and the legislature. Moreover, the Office of the Attorney General and in particular its Human Rights Sector, has acquired expertise on Strasbourg case law and human rights issues, as counsels at the Human Rights Sector deal also with individual applications under the Government Agent/Attorney-General and are responsible to see to it on his behalf that the Court's judgments and case-law are disseminated and executed.

2. *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

No obstacles have been encountered in establishing or applying these mechanisms, save from the occasional shortage of staff.

3. *Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? Is so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?*

No assessment of the above mechanisms has been made or is planned.

CZECH REPUBLIC/RÉPUBLIQUE TCHÈQUE

1) Quels mécanismes ont été mis en place au niveau national pour garantir la compatibilité des lois (qu'il s'agisse de projets de lois, de lois en vigueur, voire de la pratique administrative) avec la Convention ? Quels en sont les modalités (caractère systématique ou non, autorités compétentes et consultations éventuelles (à titre facultatif ou obligatoire)) ? Quels sont les avantages du mécanisme choisi ?

Il convient de distinguer deux types de contrôle de compatibilité : en amont et en aval de l'adoption de textes normatifs.

Afin d'expliquer la situation, il faut partir du dernier type de contrôle, exercé par la Cour constitutionnelle, soit par voie d'action (saisine par les groupes de parlementaires, le Président de la République, etc., et dans le cas de textes infra-législatifs, également par le défenseur public des droits), soit par voie d'exception (saisine par un tribunal ordinaire d'une disposition indispensable pour qu'il puisse trancher l'affaire). La Cour constitutionnelle a établi que la Convention fait partie de l'ordre constitutionnel et de ce fait jouit de la même protection que les lois constitutionnelles en vigueur, assuré par le pouvoir judiciaire et en dernier ressort par la Cour constitutionnelle.

Celui qui propose un projet de loi ou d'autre texte est censé, en vertu des « Règles législatives du Gouvernement », vérifier la compatibilité du projet avec toutes sortes de critères de référence, y compris l'ordre constitutionnel et les traités internationaux. Sont expressément visées la Convention et la jurisprudence de la Cour. Une section du rapport explicatif du projet doit y être consacrée.

Tout projet de loi ou de règlement proposé pour adoption au niveau central (c'est-à-dire par le Gouvernement ou par les ministères) passe également par une consultation interministérielle préalable et normalement, l'office de l'Agent du Gouvernement, qui fait partie du ministère de la Justice, a la possibilité de soumettre des objections. L'office de l'Agent procède généralement à un contrôle sommaire de la manière dont celui qui propose le texte normatif s'est acquitté de son obligation de vérifier la compatibilité. Il arrive souvent que l'office de l'Agent attire l'attention sur la jurisprudence pertinente de la Cour. Une fois les objections réglées, celui qui propose le texte normatif le soumet à l'Office du Gouvernement (l'équivalent du secrétariat général du Gouvernement) dont le département législatif procède à un contrôle de la qualité du projet et le soumet à son tour à un organe consultatif – le Conseil législatif du Gouvernement et/ou ses commissions de travail.

Les parlementaires, en cas de doutes, peuvent saisir l'Institut parlementaire qui est une unité de recherche propre au Parlement et qui peut renseigner les intéressés entre autres sur les obligations découlant de la Convention. Tout projet ou proposition de loi est discuté en commissions parlementaires.

En ce qui est des avantages de ce système, il convient de relever qu'il repose sur deux éléments complémentaires – mécanismes de contrôle en amont et en aval – qui est en mesure d'éliminer la plupart des dispositions problématiques de l'ordre juridique même s'il est parfois loin de fonctionner d'une manière parfaite.

2) Quels obstacles ont été rencontrés lors de la mise en place des mécanismes ou dans leur mise en œuvre ? Comment ont-ils été surmontés ?

Parmi les problèmes de fonctionnement du mécanisme de contrôle en amont, qui sont néanmoins dans une large mesure contrebalancés par l'existence du contrôle en aval, on peut compter la survenance d'une vérification formelle, et non pas substantielle, du projet de texte normatif, souvent matérialisée en une phrase disant qu'aucun traité international n'est applicable en la matière ou que le projet est compatible avec tous les engagements internationaux de l'État. Une telle approche, le plus souvent basée sur la méconnaissance de la Convention et de l'étendue de son champ d'application, peut être couplée d'une vérification moins stricte de la qualité du projet de texte, normalement censée découvrir les manquements aux exigences prévues par les « Règles législatives du Gouvernement ».

L'office de l'Agent du Gouvernement s'est alors proposé d'élaborer un manuel méthodologique sur les manières de procéder à la vérification de la compatibilité des projets de textes avec la Convention. Ce manuel est sur le point d'être finalisé et sera publié sur Internet. Cette initiative est accompagnée de la mise en place récente d'une base de données accessible sur Internet qui contient les traductions ou les résumés de la jurisprudence de la Cour, ainsi que de la publication, depuis plus de trois ans, d'un bulletin trimestriel contenant une sélection de résumés qui reflète les actualités jurisprudentielles de la Cour de Strasbourg. Il est envisagé de proposer une formation aux fonctionnaires des services législatifs des ministères pour les familiariser avec le manuel méthodologique.

L'engagement de membres de l'office de l'Agent du Gouvernement dans les travaux du Conseil législatif du Gouvernement ou de ses commissions de travail peut également constituer un moyen visant à renforcer l'impact de l'obligation de contrôler la compatibilité en amont.

3) L'évaluation des caractères adéquat et effectif des mécanismes est-elle prévue ou a-t-elle été envisagée ? Si oui, selon quelles modalités ? Quels sont les obstacles rencontrés dans la mise en place ou pour la mise en œuvre d'une telle évaluation ?

Il n'a pas été procédé à une telle évaluation et celle-ci n'est pas envisagée pour le moment.

ESTONIA/ESTONIE

1. What mechanisms have been put in place at national level to ensure compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

According to the Estonian Constitution, the Convention is an integral part of the Estonian legal order and all domestic bodies vested with right of legislative initiative are warranted to ensure compliance of all national legislation with the Convention (§ 123). Additionally, by interpreting and applying national law, all public bodies must give due regard to the Convention provisions.

Mechanisms to ensure the compatibility of draft laws.
The Regulation no. 180 of the Government on the Rules for Good Legislative Practice and Legislative Drafting (effective as of 1 January 2012) prescribes that international conventions and treaties, including that of human rights that Estonia is a party to, must be considered during the preparation of legislation (§ 3 of the Rules). Hence, a body that initiates draft legislation is required to examine the compatibility of their draft with the Convention and to ensure that the draft law complies with it. In certain cases, if the draft law is likely to affect the Convention rights directly or entails essential considerations of the Convention rights, the legal department of the Ministry of Foreign Affairs or the Government Agent before the ECtHR (whose office is in the legal department of the MFA) could be consulted.

When a draft law is forwarded to the Parliament, it is accompanied by an explanatory memorandum which analyses the compatibility of the draft law with the fundamental rights of the Estonian Constitution and/or of the human rights set out in the Convention (§ 43 of the Rules). The questions on the compliance with the Convention are subsequently undertaken by the relevant parliamentary committee in charge of the preparation of the bill in the Parliament. Lastly, if relevant, the draft law's compliance with the Convention is addressed during the parliamentary debates.

After the legislation is adopted by the Parliament, the President of the Republic of Estonia needs to promulgate it for it to become valid. According to § 107 of the Constitution of Estonia the President may refuse to do so and return it to the Parliament for a new debate and for a new decision if the President assesses the law to be incompatible with the Constitution. If the Parliament, for the second time and without amending it, passes a law which has been returned to it by the President, the President either promulgates the law or applies to the Supreme Court for a declaration of unconstitutionality in respect of that law.

Mechanisms to ensure the compatibility with respect to laws in force.
As to the laws already in force, their verification in light of the Convention requirements is prompted normally by a case that concerns Estonia directly or following a judgment by the Court against another member state with relevance to Estonian legislator.

The Government Agent before the Court (MFA) communicates to all relevant authorities all judgments and decisions adopted by the Court in individual applications brought against Estonia. The ministry responsible for the subject area under question is also responsible for scrutinising the compliance of existing regulations and practices with the Convention requirements, and for initiating legislative amendments if necessary.

The Government Agent and the officials dealing with human rights' issues in the Ministry of Foreign Affairs also systematically monitor the developments of the Court's case law and accordingly publish and disseminate the Court's judgments to draw attention of other ministries or the courts to certain developments in the Court's case law, especially concerning laws relating to areas in which there is a potentially higher risk of a violation of human rights.

Additionally, each year the Government Agent before the Court prepares an overview of the previous calendar year for the Government, outlining the judgments and decisions made in respect of Estonia and the various aspects relating to their execution, including the need to amend legislation. Drawing from the judgments made against other member states, the overview also identifies certain problematic areas in the Estonian legislation that require scrutiny in light of the developments of the Court's case law. The respective overview is also forwarded to the Constitutional Committee of the Parliament and to the Legal Affairs Committee of the Parliament.

The compliance of the laws to the Convention is also verified within the framework of the constitutional review procedure at the Supreme Court. A case to challenge a law's compatibility with fundamental rights and freedoms may be referred to the Supreme Court by any court processing a case raising such issue, and by the Chancellor of Justice.

Mechanisms to ensure the compatibility of administrative practice.
The compatibility of administrative practice to the Convention requirements is ensured by appropriate publication and dissemination of the relevant case-law of the Court to all the authorities concerned. When relevant and necessary, appropriate training is provided to the decision makers.

Additionally, courts are required to assess the conformity of administrative practice to the Convention standards if such compatibility issue rises.

The Chancellor of Justice contributes further to the assessment of the compatibility of the draft laws, existing laws and administrative practice to the Convention provisions. Under the Chancellor of Justice Act, it is the duty of the Chancellor to monitor that the authorities' actions are in conformity with the Constitution of Estonia and with its international agreements and that the fundamental rights and freedoms of people living in Estonia are protected. Within this competence the Chancellor analyses the petitions and proposals made to him or her concerning the amendment of acts, passage of new acts and activities of state agencies and, when necessary and appropriate, issues opinions, recommendations, requests and reports to the relevant body of authority.

2. What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

The factors that contribute to the obstacles in establishing and applying the mechanisms to ensure compatibility of legislation with the Convention include limited human and financial resources to analyse the fast-evolving case law of the Court at different levels of governance and to address all the possible Convention issues in a timely manner - there is always room for improvement in this regard. Nevertheless, Estonia considers the present mechanisms to be adequate.

3. Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

There has been no separate assessment taken place regarding the appropriateness and effectiveness of the mechanisms in question.

FRANCE

1. Lors de la 9ème réunion du DH-GDR (17-20 novembre 2015), il a été décidé que le premier échange d'informations du DH-SYSC concernant la mise en œuvre de la Convention et l'exécution des arrêts de la Cour porterait sur les mécanismes nationaux mis en place pour garantir la compatibilité des lois avec la Convention (modalités, avantages, obstacles). Cette décision a été endossée par le CDDH lors de sa 84e réunion (voir CDDH(2015)R84, § 8).

2. Pour compléter utilement ces éléments et afin que cet échange de vues soit aussi concret et constructif que possible, les Etats parties ont été invités à adresser au Secrétariat d'ici le lundi 18 avril 2016, leurs éléments en réponse aux trois questions suivantes :

- Quels mécanismes ont été mis en place au niveau national pour garantir la compatibilité des lois (qu'il s'agisse de projets de lois, de lois en vigueur, voire de la pratique administrative) avec la Convention? Quelles en sont les modalités (caractère systématique ou non, autorités compétentes et consultations éventuelles (à titre facultatif ou obligatoire)) ? Quels sont les avantages du mécanisme choisi ?

- Quels obstacles ont été rencontrés lors de la mise en place des mécanismes ou dans leur mise en œuvre ? Comment ont-ils été surmontés ?

- L'évaluation des caractères adéquat et effectif des mécanismes est-elle prévue ou a-t-elle été envisagée ? Si oui, selon quelles modalités ? Quels sont les obstacles rencontrés dans la mise en place ou pour la mise en œuvre d'une telle évaluation ?

3. Le Gouvernement souhaite apporter les réponses qui suivent à ces trois questions.

I. Sur les mécanismes existants pour garantir la compatibilité des projets de lois, lois en vigueur et pratique administrative

4. Le contrôle de compatibilité des textes avec les principes fixés par la Convention européenne des droits de l'homme s'effectue à deux stades, en amont (a) et en aval (b) de leur adoption.

a) Le contrôle a priori de la compatibilité des textes nationaux avec la Convention et la jurisprudence de la Cour EDH

i) Sur le contrôle de compatibilité a priori des projets de loi

5. Le contrôle de compatibilité des textes avec la Convention et la jurisprudence de la Cour est exercé en amont à plusieurs stades de leur élaboration par différentes autorités.

5. En premier lieu, un contrôle de compatibilité a priori est effectué par les **ministères responsables de la rédaction des projets de loi**.

6. Chaque ministère dispose d'une ou plusieurs directions en charge de la rédaction des textes nationaux (par exemple, au sein du ministère de l'intérieur, la direction

générale des étrangers en France au ministère de l'Intérieur, au sein du ministère de la Justice la Direction des affaires civiles et du Sceau …).

7. Chacune de ces directions chargées de l'activité normative au sein de chaque ministère s'appuie sur ses propres juristes et/ou sur la direction des affaires juridiques du ministère pour s'assurer de la compatibilité des projets de texte qu'elle(s) élabore(nt) avec les engagements internationaux de la France, et notamment la Convention européenne des droits de l'homme et la jurisprudence de la Cour européenne des droits de l'homme (ci-après la « Cour EDH »). A titre d'illustration, la direction de la protection judiciaire de la jeunesse « *conçoit les normes et les cadres d'organisation de la justice des mineurs en liaison avec les directions compétentes* », et les autres directions en charge de l'activité normatives et le Secrétariat général du ministère de la Justice qui comprend des juristes spécialisés en droit de la Convention européenne des droits de l'homme (article 7 du décret du 9 juillet 2008).

8. En outre, la rédaction de l'exposé des motifs et du projet de loi par les ministères compétents s'accompagne de la rédaction d'une étude d'impact, prévue par l'article 39 alinéa 2 de la Constitution dans sa rédaction issue de la loi constitutionnelle du 23 juillet 2008 et les dispositions des articles 8 à 12 de la loi organique n° 2009-403 du 15 avril 2009 (pièce n° 1 en annexe).

9. Cette étude d'impact doit contenir des développements sur « *l'articulation du projet de loi avec le droit européen en vigueur ou en cours d'élaboration et son impact sur l'ordre juridique interne* ».

10. L'étude d'impact n'est pas assimilable à un exposé des motifs enrichi, mais constitue un outil d'évaluation et d'aide à la décision.

11. L'élaboration de l'étude d'impact doit être engagée dès le stade des réflexions préalables sur le projet de loi. Le ministère doit prendre l'attache du Secrétariat général du Gouvernement (ci-après le « SGG ») dès la mise en chantier du projet de réforme, pour que soit organisée une réunion de cadrage qui doit permettre de déterminer le coordonateur de l'étude d'impact, rappeler la méthodologie applicable, fixer la liste des contributions ministérielles attendues, ainsi que le calendrier attendu (voir, circulaire du 15 avril 2009 relative à la mise en œuvre de la révision constitutionnelle, pièce n° 2 en annexe).

12. Il convient de préciser que la rubrique « impact juridique » des études d'impact sur les projets de loi a pour objet principal d'expliquer la manière dont les textes nouveaux vont s'insérer dans le droit en vigueur.

13. En pratique, force est de constater que les études d'impact comportant des analyses sur la compatibilité du projet de loi avec la Convention, ne sont pas encore systématiques. Néanmoins, c'est l'avis du Conseil d'Etat (cf. point 18 et suivants) qui est le principal temps de l'examen du respect de la Convention et de la jurisprudence de la Cour EDH par les projets de loi.

14. En deuxième lieu, lorsque l'exposé des motifs, le texte du projet de loi et l'étude d'impact sont finalisés par le ministère concerné, ces trois documents sont soumis à l'analyse du SGG, organe administratif placé sous l'autorité du Premier ministre.

15. Chargé notamment de veiller à la qualité de la loi et de l'évaluation préalable, le SGG procède à une nouvelle analyse de la compatibilité des projets de loi avec les engagements internationaux et les dispositions constitutionnelles.

16. Dans ce cadre, le SGG vérifie à nouveau le respect par les textes qui lui sont soumis des exigences conventionnelles et de la jurisprudence de la Cour. Le SGG échange avec les ministères pour s'assurer de la compatibilité du projet de loi et, à défaut, pour modifier le texte en conséquence.

17. Le Conseil d'Etat ne sera saisi du projet de loi que si l'étude d'impact est jugée suffisante par le cabinet du Premier ministre et par le SGG. Dans l'affirmative, elle est transmise au Conseil d'Etat pour recueillir son avis en application de l'article 39 de la Constitution.

18. En troisième lieu, le Conseil d'Etat, qui intervient dans ce cadre en qualité de conseiller du Gouvernement et non en tant qu'autorité juridictionnelle, émet un avis sur le projet de loi qui lui est soumis.

19. Dans ce cadre, le Conseil d'Etat effectue un contrôle de la compatibilité des projets de loi avec l'ensemble des normes juridiques, au nombre desquelles figure bien évidemment la Convention européenne des droits de l'homme et la jurisprudence de la Cour EDH.

20. Cette fonction consultative est assurée par les cinq sections consultatives du Conseil d'Etat (section de l'Intérieur, section sociale, section des travaux publics, section de l'administration et section des finances).

21. A la différence de la section du contentieux du Conseil d'Etat qui ne peut se prononcer que sur les moyens dont il est saisi, les sections consultatives exercent leur contrôle en prenant en considération toutes les normes constitutionnelles et conventionnelles.

22. Lorsque les sections consultatives ont un doute sur la conventionnalité du projet de loi, elles saisissent la délégation du droit européen de la section du rapport et des études, dont l'une des missions est de répondre aux consultations adressées par les sections administratives en droit de l'Union européenne et sur le droit de la Convention européenne des droits de l'homme.

23. Les questions liées notamment à la compatibilité des projets de loi avec la Convention peuvent être examinées devant l'Assemblée générale de sections consultatives. L'Assemblée générale est présidée par le vice-président du Conseil d'Etat, entouré des présidents des six sections consultatives et d'une trentaine de conseillers d'Etat.

24. Depuis le 1er mars 2015, les avis adoptés par le Conseil d'Etat sur les projets de loi ordinaires sont publiés sur Légifrance, à l'issue du Conseil des Ministres qui les a adoptés. Cette publication inclut le texte du projet de loi et de l'étude d'impact qui l'accompagne.

25. Depuis la réforme constitutionnelle du 23 juillet 2008, le Conseil d'Etat a étendu sa compétence consultative aux propositions de loi élaborées par les parlementaires dont il peut également être saisi par le président de l'Assemblée nationale ou du Sénat. Il convient de noter que les propositions de lois ne font pas l'objet d'études d'impact. Le Conseil d'Etat garantit ainsi un contrôle sur la compatibilité des propositions de lois avec la Convention et la jurisprudence de la Cour.

26. Les avis du Conseil d'Etat sur les projets de loi ne sont pas contraignants. Pour autant, compte tenu de leur caractère public, ils sont la plupart du temps pris en compte par le Gouvernement lors de la finalisation du texte.

27. A titre d'illustration, dans un avis rendu le 28 janvier 2016, le Conseil d'Etat a apprécié la compatibilité du projet de loi renforçant la lutte contre le crime organisé et son financement, l'efficacité et les garanties de la procédure pénale au regard notamment de l'article 8 de la Convention (pièce n° 3 en annexe).

28. Dans cet avis, le Conseil d'Etat a veillé à ce que le projet concilie les impératifs de lutte contre le crime organisé et le terrorisme avec le respect des droits et libertés susceptibles d'être affectés, et notamment la liberté individuelle, le respect de la vie privée tel qu'il est protégé notamment par l'article 8 de la Convention, ainsi que la liberté d'aller et venir.

29. De même, le Conseil d'Etat a relevé, dans son avis du 31 mars 2016 sur le projet de loi « égalité et citoyenneté », que l'exclusion par la loi du fait justificatif d'exception veritatis, fait justificatif ancien dont le champ d'application a été accru par les jurisprudences du Conseil constitutionnel et de la Cour européenne des droits de l'homme, soulevait une difficulté notamment par rapport à la Convention (pièce n° 4 en annexe).

30. A l'inverse, le Conseil d'Etat a estimé, dans son avis du 12 mars 2015 sur le projet de loi relatif au renseignement, que les mesures prévues pour assurer la surveillance et le contrôle des transmissions émises ou reçues à l'étranger remplissent les exigences de prévisibilité de la loi découlant de l'article 8 de la Convention (pièce n° 5 en annexe).

31. En 2015, 118 projets de loi et 4 propositions de lois ont fait l'objet d'un avis du Conseil d'Etat.

32. Une fois l'avis rendu et transmis, le SGG peut en concertation avec le ou les ministère(s) concerné(s) modifier le projet de loi en fonction des recommandations formulées par le Conseil d'Etat dans son avis.

33. Une fois le texte retouché, le projet de loi est transmis pour délibération au Conseil des Ministres, puis au bureau de l'assemblée saisie.

34. Ainsi, dans les faits, un contrôle de compatibilité de l'ensemble des projets et propositions de lois avec la Convention et la jurisprudence de la Cour est assurée avant leur adoption par le Parlement par trois autorités différentes (ministère concerné/SGG/Conseil d'Etat).

ii) Sur le contrôle de compatibilité a priori des autres textes

33. En second lieu, ce contrôle de compatibilité n'est pas réservé aux seuls actes de valeur législative, mais aussi à l'égard de certains actes de nature réglementaire.

35. Ainsi, les projets d'ordonnances et certains décrets sont soumis aux mêmes autorités que les projets et propositions de loi, à savoir le ministère compétent, le SGG, puis le Conseil d'Etat.

36. En vertu de l'article 38 de la Constitution, le Conseil d'Etat doit obligatoirement être saisi de tous les projets d'**ordonnance** avant leur adoption par le Conseil des ministres.

37. De même, certains **décrets** ne peuvent être pris ou modifiés qu'après la saisine du Conseil d'État.

38. Le Conseil d'Etat est obligatoirement saisi des projets de décrets dans trois hypothèses, à savoir lorsque :

- des dispositions législatives ou réglementaires ont prévu que des décrets ne pourraient être pris qu'après avis du Conseil d'Etat ;
- un projet de décret tend à modifier un décret qui a été pris après du Conseil d'Etat (CE Ass. 3 juillet 1998, *Syndicat national de l'environnement*, n° 177.248),
- un projet de décret modifie un texte de forme législative antérieure à l'entrée en vigueur de la Constitution de 1958.

39. Il appartient au Gouvernement d'apprécier s'il convient de soumettre les autres projets de décision à l'avis du Conseil d'Etat.

40. Le Gouvernement n'est pas tenu de suivre l'avis du Conseil d'État sur les projets d'ordonnance. En revanche, s'agissant des décrets en Conseil d'Etat, il ne peut édicter que le texte adopté par le Conseil d'État ou le projet qu'il lui a soumis.

41. Là encore, le contrôle exercé par le Conseil d'Etat est très important : en 2015, il a contrôlé 68 projets d'ordonnance et 999 projets de décrets (dont 800 décrets réglementaires).

b) Le contrôle a posteriori de la compatibilité des normes avec la Convention et la jurisprudence de la Cour EDH

42. L'analyse de la compatibilité des textes en vigueur avec la Convention européenne des droits de l'homme et la jurisprudence de la Cour EDH n'est pas prévue par la Constitution.

43. Pour autant, un contrôle peut être effectué, bien qu'il soit moins systématique.

44. En premier lieu, un contrôle de compatibilité est exercé dans le cadre de l'exécution des arrêts de la Cour.

45. A ce titre, le ministère des Affaires étrangères et du Développement international s'assure, lors de la parution de chaque arrêt concernant la France, de la compatibilité des textes en vigueur avec la Convention et la jurisprudence de la Cour EDH.

46. En tant que de besoin, le ministère des Affaires étrangères et du Développement international organise des réunions interservices avec les ministères concernés en concertation avec le SGG pour réfléchir aux modifications législatives envisageables et au calendrier dans lequel elles pourraient être adoptées.

47. En second lieu, le ministère des Affaires étrangères et du Développement international, qui est l'Agent du Gouvernement, envisage, dans le cadre de la mise en œuvre de la Déclaration de Bruxelles, de publier une lettre annuelle de jurisprudence sur les arrêts de la Cour concernant d'autres Etats parties, qui seraient susceptibles d'avoir une influence sur le droit national.

48. A ce titre, le ministère des Affaires étrangères et du Développement international appelle l'attention des ministères concernés sur les conséquences des arrêts rendus concernant d'autres Etats membres sur la législation nationale.

49. En troisième lieu, le Conseil d'Etat peut être amené à traiter de demandes d'avis que sollicite le Gouvernement.

50. A titre d'illustration, le Conseil d'Etat a été saisi par le Premier ministre sur la conformité à la Constitution du projet de créer un registre national des crédits aux particuliers.

51. Si le Conseil d'Etat était saisi exclusivement de la conformité à la Constitution, il s'est également prononcé dans cet avis sur le nécessaire respect de l'article 8 de la Convention lors de la constitution de fichiers (pièce n° 6 en annexe).

52. Ensuite, la Cour de cassation, dans son rapport annuel publié à la Documentation française, mentionne les suggestions de modifications législatives, notamment afin de permettre une meilleure compatibilité avec la Convention. A titre d'illustration, le rapport 2014 de la Cour de cassation invite à modifier l'article 500-1 du code de procédure pénale pour renforcer sa compatibilité avec l'article 6 § 1 et l'article 6 § 3 en ce qui concerne un prévenu qui n'aurait connu que tardivement les motifs du jugement et qui se serait désisté après le délai d'un mois, tout en restant exposé à un risque d'aggravation de sa peine au cas où le ministère public ne se serait pas désisté de son appel incident.

53. De même, dans le cadre des questions prioritaires de constitutionnalité[1] qui lui sont posées, le Conseil constitutionnel procède a posteriori à un contrôle de constitutionnalité

[1] L'article 61-1 de la Constitution reconnaît le droit reconnu à toute personne qui est partie à un procès ou une instance de soutenir qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit. Si les conditions de recevabilité de la question sont réunies, il appartient au Conseil constitutionnel, saisi sur renvoi par le Conseil d'État et la Cour de cassation de se prononcer et, le cas échéant, d'abroger la disposition législative.

des dispositions législatives en vigueur, qui s'accompagne d'une analyse de la compatibilité de ces dispositions avec la Convention et la jurisprudence de la Cour.

54. Enfin, deux structures indépendantes, à savoir la Commission nationale consultative des droits de l'homme, institution nationale des droits de l'homme et le Défenseur des droits, autorité constitutionnelle indépendante, examinent, dans le cadre de leurs missions respectives de conseil au Gouvernement, la compatibilité des textes en vigueur avec la Convention européenne des droits de l'homme. Ces deux structures exercent un contrôle de la mise en œuvre par la France de ses engagements internationaux, comme la Convention européenne des droits de l'homme, respectivement dans le rapport sur les droits de l'homme en France publié tous les deux ans et leurs rapports d'activité. Ces documents compilent et analysent la jurisprudence de la Cour EDH ainsi que les observations formulées par les organes de surveillance.

55. L'avantage de ces contrôles tient dans la multiplicité des acteurs impliqués à différents stades de la procédure.

56. En effet, ce contrôle à visages multiples garantit une analyse de la compatibilité des textes nationaux en amont de leur adoption.

II. Sur les obstacles rencontrés lors de la mise en place ou la mise en œuvre de ces mécanismes

57. Plusieurs difficultés dans la mise en œuvre de ces mécanismes peuvent être relevées.

58. Dans la phase amont de l'adoption des textes, deux difficultés peuvent être constatées.

59. En premier lieu, les délais pour examiner la compatibilité des textes avec la Convention et la jurisprudence de la Cour sont courts.

60. A titre d'illustration, le Conseil d'Etat dispose d'un délai de deux mois pour se prononcer sur les projets de lois.

61. Si le Conseil d'Etat respecte largement les délais qui lui sont impartis, les délais sont très courts pour examiner dans de bonnes conditions un nombre aussi important de textes que celui dont il dispose pour examiner l'ensemble des textes qui lui sont soumis[2] (pièce n° 7 en annexe).

62. Lors de la phase aval de l'adoption des textes, il convient de constater que la principale difficulté tient dans l'absence de revue systématique des textes au regard de la Convention et de la jurisprudence de la Cour EDH.

63. Notamment, les textes de valeur réglementaire et infra réglementaire ne font pas l'objet d'un contrôle systématique de légalité. Ce n'est que lorsque ces textes sont

[2] En 2014, le Conseil d'Etat a examiné 1160 textes en section et 65 textes en Assemblée générale. 97 projets de loi, 1 proposition de loi, 54 ordonnances, 756 décrets réglementaires, 209 décrets individuels et arrêtés lui ont été soumis pour avis (rapport d'activité 2015 du Conseil d'Etat).

contestés devant les juridictions administratives que leur compatibilité avec la Convention et la jurisprudence de la Cour EDH peut, le cas échéant si les requérants ont soulevé des moyens en ce sens, être vérifiée.

64. En effet, les juridictions administratives, comme les juridictions judiciaires, ne peuvent pas soulever d'office le moyen d'inconventionnalité, ce moyen n'étant pas d'ordre public (voir, par exemple pour le contrôle effectué au regard des engagements internationaux, CE Assemblée, 6 décembre 2002, *Maciolak*, n° 239.540 ; pour le contrôle effectué au regard de la Convention, CE
13 décembre 2002, *Mme Benahmed*, n° 237.275).

65. Les deux difficultés évoquées ci-dessus ne sont à ce jour pas surmontées.

66. Une réflexion interministérielle est actuellement en cours pour réfléchir à la prise en compte plus systématique dans les études d'impact des conséquences des projets de textes envisagés par rapport à la Convention et à la jurisprudence de la Cour EDH.

III. Sur l'existence d'une évaluation de ces mécanismes

67. A ce jour, aucun mécanisme d'évaluation des mécanismes de contrôle de la compatibilité des projets de loi n'a été mis en place.

68. Cela trouve son origine dans la variété des acteurs impliqués dans ce mécanisme de contrôle.

GERMANY/ALLEMAGNE

What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

1. Draft laws and statutory instruments (executive orders based upon enabling legislation)

First, the Ministry with overall responsibility for the particular draft is responsible for examining draft legislation for its conformity with the Convention – before that Ministry submits it to the other Ministries for approval.

Second, ever since the Federal Republic of Germany was founded in 1949, the Federal Ministry of Justice has served as the central body within the Federal Government with responsibility both for examining whether draft laws and statutory instruments proposed by the federal ministries meet legal and formal requirements, and for advising the Ministries on preparing their legislative proposals.

Since that time, the Federal Ministry of Justice has been rising to these obligations on a daily basis. When it is involved at an early stage, the scrutiny of legislation can make a key contribution to improving the quality of legal provisions. The main task is to examine whether new provisions are consistent with the current legal system: Are they compatible with the Constitution? Do they conform to European and international law? Do they fit coherently into the existing system of legal provisions of the same rank?

To this end, the Joint Rules of Procedure of the Federal Ministries contain the following provision:
"§ 46:
"Before a bill is submitted to the Federal Government for adoption, it must be sent to the Federal Ministry of Justice to be examined in accordance with systematic and legal scrutiny. …"
Furthermore, the Rules of Procedure of the Federal Government say in § 26:
"According to these rules the Minister of Justice can protest against the adoption of a bill if it is inconsistent with the current law."

In the case of executive orders based on enabling legislation, there will be an examination for conformity by the Ministry with overall responsibility for the order as well as, in the course of the scrutiny procedure, by the Federal Ministry of Justice.

Once the draft bill has been adopted by the federal cabinet, the Legal Affairs Committee of the Federal Parliament (*Bundestag*) and the Legal Affairs Committee of the Federal Council (*Bundesrat*) are responsible for further examining it for conformity with the Convention until the legislative process has been concluded.

Similar control mechanisms are in place on the level of the constituent states (Länder).

2. Laws in force or administrative practice

All courts and administrative organs in Germany are bound by the Basic Law, the German Constitution, and must take into account developments in European and public international law. They must especially take into account the decisions of the ECtHR, as clearly established by the Federal Constitutional Court (BVerfG). The BVerfG has explicitly stated that the Convention, as interpreted by the ECtHR, must be considered when interpreting the provisions of the Basic Law.

When facing a problem of compliance with ECtHR judgments which require the adoption of general measures, the Courts will still have to apply the current law, since the ECtHR cannot declare national laws invalid. However, the courts would have to interpret any legal provision as far as possible in light of the ECtHR's decision. It would also be possible to refer such a question to the Federal Constitutional Court for a ruling on the constitutionality (which generally includes compatibility with the Convention) of the relevant provision, if no helpful interpretation is possible.

If somebody takes the view that existing laws or administrative practice violate the Convention, he or she can bring forward this argument in court proceedings. It is also possible to argue likewise in an individual complaint before the Federal Constitutional Court after having exhausted the recourse to the lower courts.

Responsibility for execution process lies with the Agent's Office. The Agents must present the Action Plan to the Committee of Ministers, and in the process of drafting the Action Plan the necessary measures must be identified in cooperation with the responsible authorities within the German system. Since the national authorities are in a far better position than the Court to judge what is the most appropriate way to prevent further violations, specific instructions run the risk of excluding possible viable alternatives and should be used only in extraordinary cases.
There is no written procedure for the adoption of general measures. Once the judgment becomes final, the Agent's Office within the Federal Ministry of Justice will analyze the judgment and determine whether general measures are called for. If so, the Ministry will initiate the necessary steps – depending on the nature of the measures (federal legislation, Länder legislation, practice directions, etc.).

If the general measures in question involve federal legislation, the executive branch will be obliged to come up with a draft of the necessary legislative measures, which will then be examined by the legislative bodies. The federal Parliament (Bundestag) will usually leave the first draft to the executive branch, but it also has the right to initiate legislation.

As described, the Ministry of Justice will be the starting point for the identification of any need for legislation, but the coordination of such measures will fall to whichever Ministry is responsible for the respective field of legislation.

What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

As far as the procedure of review as described above (see 1.) is concerned, it is well established and works well.

As far as jurisprudence and administrative practise are concerned, we have the following comments:

For a long time, nobody seriously thought that any major judgments would be issued which established a human rights violation in Germany. It was assumed that Germany had already done its homework with the creation of the Federal Constitutional Court. Therefore, many were surprised and even outraged when, in the year 2004, a chamber of the European Court of Human Rights established a violation of human rights in Germany for the first time – although the case had been thoroughly scrutinised by a panel of the Federal Constitutional Court and no violation of fundamental rights had been found. Since then, things have changed profoundly.

The Federal Constitutional Court has generally followed the ECtHR in its interpretation of Convention rights. The best-known recent judicial dialogue in this respect was concerned with preventive detention, where the Federal Constitutional Court specified the conditions for continued detention as required by the ECtHR in its M v. Germany judgment.

Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

To date, the Court has found only very few cases where national law had to be changed to implement a judgment. Thus, the mechanisms in place work well. As such, no assessment is planned for the time being.

GREECE/GRÈCE

Contrôle avant l'adoption et l'entrée en vigueur des projets de lois ou des règlementations.

En Grèce on a pas créé de mécanisme spécial pour vérifier la compatibilité des projets de lois avec la Convention Européenne des Droits de l'Homme, or ce contrôle a lieu dans un cadre plus général où des problèmes de compatibilité ou de conformité à la Constitution, aux autres lois en vigueur de l'ordre national et aux instruments internationaux auxquels la Grèce fait partie, tels que la Convention Européenne des Droits de l'Homme, sont relevés au sein du processus législatif. Ce contrôle qui ne concerne que les projets de lois – par conséquent les propositions de lois soumis par des députés ainsi que les décrets et l'autre activité gouvernementale lui échappe – est effectué par un service d'experts spécial du Parlement, appelé « *Service Scientifique»* (Επιστημονική Υπηρεσία) qui est chargé de rédiger un rapport sut tous les projets de lois proposés par le gouvernement avant de les transmettre aux Chambres (comités) ou la formation Plénière du Parlement.

Le rapport et les commentaires du « *Service Scientifique»* ne sont pas contraignants pour les Chambres ni pour la formation Plénière, toutefois ils en sont presque toujours sérieusement pris en compte.

S'agissant des décrets présidentiels le contrôle ci-dessus est effectué par le Conseil d'Etat (5^{e} Chambre) dont le rapport est de caractère consultatif pour le ministre qui a rédigé le projet de décret. Or, presque dans tous les cas le ministre se conforme aux commentaires du 5e Chambre du Conseil d' Etat où il motive toute éventuelle différenciation. Le Président de la République peut renvoyer au ministre un projet de décret au cas où ce dernier n'a pas été conformé aux indications du Conseil d'Etat sans motiver suffisamment sa différenciation.

Contrôle postérieur (après l'adoption et l'entrée en vigueur des lois).

Ce contrôle concerne non seulement les lois adoptées par le Parlement ou les décrets présidentiels (qui se sont soumis au contrôle préalable ci-dessus) mais également toutes les règlementations et la pratique administrative.

Le contrôle postérieur est un contrôle judiciaire qui relève de la juridiction de tous les tribunaux et cours du pays qui sont en effet compétents d'examiner d'office la compatibilité des lois et des règlementations, notamment des décrets et de la pratique administrative avec la Constitution, les traités européennes et bien évidemment la CEDH. Au cas où une disposition ou une pratique administrative est révélée non conforme à la Constitution ou la CEDH, la juridiction la déclare non applicable et même – dans le cas du contrôle des règlementations exercé par les tribunaux administratifs et le Conseil d'Eta – non avenu.

Or, dans la plupart des cas[3] cette déclaration ne produit pas d'effets que dans le cadre du litige en question et ne suffit pas en soi pour abroger la loi. Ce qui plus est, un jugement provenant des juridictions inférieures peut toujours être renversé par un tribunal ou une cour supérieure. Il n'y a que le Conseil d'Etat qui a le pouvoir à abroger irrévocablement

[3] Notamment pour les juridictions civiles.

et contre tous les règlementations révélées non conformes à la Constitution ou la Convention.

Au cas d'une éventuelle contradiction (arrêts divergents) de deux juridictions suprêmes à l'égard d'une disposition de loi, il est à la Cour suprême spéciale (Ανώτατο Ειδικό Δικαστήριο) de la lever (la contradiction), se prononçant irrévocablement et contre tous.[4] Une fois l'arrêt de la Cour suprême spéciale rendue les juridictions nationales sont désormais obligées de ne plus appliquer la ou les disposition(s) qui ont été jugées non conformes à la Constitution ou la Convention; il en va de même pour le gouvernement et les individus. Pour des raisons de sécurité de droit, la ou les disposition(s) jugées non conformes à la Constitution ou la Convention sont d'habitude amendées ou révoquées par le gouvernement.

[4] Voir, par exemple, l'arrêt *25/2012* de la Cour suprême spéciale à l'égard de taux d'intérêt moratoire appliqué aux dettes des particuliers dont la CrEDH a fait référence dans ses arrêts *Viaropoulou et autres c. Grèce (no 570/11 et 737/11)* et *Grigoriou-Kanari c. Grèce (no 39631/13).* Pareil c'est le cas de l'arrêt *1/2012* de la Cour suprême spéciale à l'égard de temps de la prescription des prétentions des fonctionnaires contre l'Etat dont la CrEDH a fait référence dans son arrêt *Giavi c.Grèce (no 25816/09).*

IRELAND/IRLANDE

1) *What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?*

Government Departments

The implications of legislative proposals for human rights and the rights protected under the European Convention, are taken into account at an early stage by Government Departments when developing policy and proposals. Where Government Departments have Legal Divisions and units, lawyers working in those Divisions and Units can provide advice to their Department in this regard.

In the course of preparing draft legislation Government Departments should use the mechanism of a Regulatory Impact Assessment which (depending on the context of the legislation) may include a human rights focus. A Regulatory Impact Assessment is a tool used when a new regulation or regulatory change is being considered to address particular policy issues, in order to explore alternative options to the use of regulation. The Regulatory Impact Assessment identifies the objectives to be achieved and examines the possible impacts of the various options available. In relation to the latter, the relevant Government Department assesses whether the proposals impinge disproportionately on the rights of citizens. Where significant human rights impacts are identified, a high level of analysis of the proposed regulation is required. In examining such impacts, consideration is given to the European Convention on Human Rights.

Attorney General's Office

When the Attorney General and his/her Office are advising on proposals for draft legislation or responding to formal memoranda for Government in relation to such proposals, the State's obligations under the European Convention on Human Rights, as incorporated into Irish law at a sub-constitutional level by the European Convention on Human Rights Act 2003 (as amended), are taken into account. The Office also advises on the human rights and ECHR aspects of public law litigation against the State and those advices and the judgements of the courts on compatibility with the ECHR are taken into account when advising on legislation.

The Houses of the Oireachtas (the National Parliament)

Furthermore, the Houses of the Oireachtas (the National Parliament) establish Parliamentary Committees to discuss laws and draft laws which will include a human rights perspective. In the past public hearings have been held by such committees with a focus on the human rights compliance of proposed legislation. Further, the Oireachtas maintains a research capacity to inform Oireachtas members of human rights developments in the process of pre-legislative scrutiny.

Pre-legislative scrutiny is where Parliament, through its committees, scrutinises General Schemes of draft legislation. Ministers are required to forward the General Scheme of a Bill to the relevant Committee for scrutiny. In the exceptional circumstance where a Minister does not do so, he/she must explain to the House (of Parliament) why this was not done. The Committees are empowered (but not obliged) to consider the General Scheme. Pre-legislative scrutiny allows extensive engagement of the public in law-making as it enables parliamentary committees to consult civil society and advocacy

groups, stakeholders and experts. This process takes place regularly. For instance, of the approximately 45 General Schemes published between March 2011 and October 2014, there were 36 cases of pre-legislative scrutiny by the Joint Committees of the Houses of the Oireachtas.

Irish Human Rights and Equality Commission

The Irish Human Rights and Equality Commission (IHREC), established by the Irish Human Rights and Equality Commission Act 2014 in accordance with the Paris Principles, keeps draft and enacted legislation under review to make sure it meets with human rights and equality standards. IHREC may:

A) examine any legislative proposal, either of its own volition or on being so requested by a Minister of the Government, and report its views on any implications for human rights;

(A list of recent observations is available at the following link: http://www.ihrec.ie/policy/legislativeobse.html)

B) review the effectiveness of any enactments relating to the protection and promotion of human rights;

C) review the working or effect of equality legislation and make such recommendations as it sees fit following such review;

D) receive complaints in relation to human rights compliance including legislation and administrative practices;

E) contribute to consultation initiatives undertaken by Government Departments, Oireachtas (Parliamentary) Committees, statutory bodies and agencies in order to promote human rights in law, policy and practice, such as through producing submissions on policy and legislative reform;

F) conduct an inquiry, either of its own volition or on being so requested by the Minister for Justice and Equality, if it considers that there is evidence in respect of any body (whether public or otherwise) institution, sector of society, or geographical area, of a serious violation of human rights or a systemic failure to comply with human rights and the matter is of grave public concern;

G) serve a human rights compliance notice on a person, in circumstances where the Commission is satisfied that he/she has violated or is violating human rights, specifying the act or omission constituting the violation and requiring the person on whom it is served not to commit or to cease committing, as the case may be, the act or omission concerned;

H) hear representations from a person on whom a human rights compliance notice is served;

I) record human rights compliance notices on a register available for inspection by members of the public;

J) grant assistance to a person who has instituted or wishes to institute legal proceedings involving law or practice relating to the protection of human rights;

K) institute proceedings in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons;

L) assist public bodies to perform their functions in a manner consistent with the protection of the human rights of their members, staff and the persons to whom they provide services, by giving guidance to and encouraging the public bodies in relation to developing policies of, and exercising, good practice and operational standards in relation to, human rights;

M) review the performance by public bodies of their functions, having regard to the need to protect the human rights of their members, staff and the persons to whom they provide services, and make a report of the review to the Minister for Justice and Equality, making such recommendations as the Commission thinks appropriate. In addition, the Commission must cause a copy of the report to be laid before each House of the Oireachtas (the National Parliament).

Since the introduction of the Irish Human Rights and Equality Commission Act 2014, it is incumbent on public bodies, having regard to the need to eliminate discrimination, promote equality of opportunity, and protect the human rights of their members, staff and the persons to whom they provides services, to set out in a manner that is accessible to the public in their strategic plans (howsoever described) an assessment of the human rights issues they believe to be relevant to the functions and purpose of the body and the policies, plans and actions in place or proposed to be put in place to address those issues. Moreover, they must report in a manner that is accessible to the public on developments and achievements in that regard in their annual reports (howsoever described).

The Commission has a specific role (section 42(3) and (4) of the Act) of advising and assisting public bodies in performing their functions in a manner that is consistent with these obligations, including by issuing guidelines or preparing draft statutory codes of practice.

Conclusion

The involvement of numerous stakeholders means that legislative proposals and existing laws and administrative practices can be examined from different points of view and this increases the chances of identifying elements that may be incompatible with the European Convention on Human Rights.

2) *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

No obstacles have been encountered in the operation of the above mechanisms.

3) *Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?*

There are no assessments or planned assessments of the appropriateness and effectiveness of the mechanisms at present.

LATVIA/LETTONIE

1) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

In the process of drafting legislative acts the compatibility test (with Latvia's international obligations, including the Convention and the Court's case-law relevant to both Latvia and other states), first of all, is entrusted with the state authority responsible for the particular draft legal act. The results of analysis and assessment of international obligations, including the Court's case-law, are presented in detail in a report of ex-ante assessment of the draft legislative act or an explanatory note; it refers to the Court's case-law and the Court's conclusions which might be or are of relevance in the particular case. Prior to the adoption of the draft legislative act by the Cabinet of Ministers, the Government Agent Office, the Ombudsman and NGOs are entitled to submit their observations regarding thereof.
As a general rule, if the draft legislation concerns HR issues, the competent authority seeks the Government Agent Office's opinion.

Once adopted by the Cabinet of Ministers and forwarded to the Parliament, the draft legislative act's compatibility with Latvia's international human rights obligations is thoroughly analysed during the sessions of the parliamentary commissions, for example, during the sessions of the Commission on Human Rights and Public Affairs and Legal Commission. If deemed necessary, the Government Agent Office is invited to provide its opinion and participate in those sessions. Also, at this stage of proceedings the compatibility test is likewise performed by the Parliament's Legal Bureau.

In case the Court finds a violation in the case lodged against Latvia, as a rule, prompt actions are taken to expedite the adoption of necessary legislative amendments.
For example, in the light of the Court's judgments in the cases brought against other states in which Latvia had intervened as a third party, numerous amendments to the *Civil Procedure Law* and other relevant legislative acts were introduced for improving regulation on child abduction, which is closely connected with the Hague Convention of 25 October 1980 on the *Civil Aspects of International Child Abduction*. The mentioned amendments introduced a procedure providing for forced execution of order on child's return to the country of his or her domicile. The newly drafted legal framework was based on the Court's case-law; it introduced a clear mechanism on the child's return, on the one hand, and ensures the protection of child's rights, on the other hand.
The amendments described above were introduced prior to the development of the Court's case-law against Latvia concerning similar issues.

2) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

Lack of sufficient training and education might preclude the competent authorities from identifying that the particular draft legislation might involve HR issues. Also, insufficient

knowledge of the English and French languages hinders the opportunity to conduct a full and all-embracing analysis of the available Court's case-law.

Very often the time constraints prevents performing in-depth analyses of all possible aspects.

However, the responsible state authorities seek to manage the aforementioned issues by using the allocated budgetary funds; the awareness raising is promoted by further training and educational activities.

Another problem faced – lack of proper procedure for compatibility test when certain amendments or new proposals are introduced to the draft legislation already pending before the Parliament or are introduced after their adoption following the Parliament's first reading. Such proposals, in majority cases, are not accompanied by a report of ex-ante assessment of the draft legislative act or an explanatory note.

3) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

Currently the discussion on the assessment of procedure for performing compatibility test of draft legal proposals to the draft legislation already pending before the Parliament, which as a rule are submitted directly to the Parliament (Parliament's commissions), has been commenced.

LIECHTENSTEIN

1) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

- Liechtenstein has a monist legal system. A ratified international agreement becomes part of domestic law upon entry into force without a special law having to be created, and it can be applied directly if its provisions are specific enough to serve as a basis for decision-making.

- As adequately stated in the compilation of replies, in Liechtenstein, every report of the Government to the Parliament regarding new draft legislation contains a section devoted to the compatibility with the Constitution, national law and with international obligations. Particular attention is therefore also paid to the compatibility with the Convention.

- Before a report of the Government regarding new draft legislation is finalised (and thereafter submitted to the Parliament), a wide consultation process is launched. Within this process, associations, NGOs, individuals, etc. may comment on the planned draft legislation.

- Liechtenstein citizens have far-reaching direct-democratic rights, such as the right of initiative. Voters may submit a legislative initiative in the form of a precisely formulated draft or a general suggestion. The Liechtenstein Parliament must then consider the initiative in its next session. Before this consideration, compatibility with the Constitution and international treaties must be assured. Therefore, for instance, an initiative must be in line with the Convention.

2) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

So far, no obstacles have been encountered in applying the above mentioned mechanisms.

3) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

For the time being, no assessment of the above mentioned mechanisms is planned.

THE NETHERLANDS/PAYS-BAS

a) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

b) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

1. In accordance with Article 81 of the Constitution, legislation is enacted jointly by the Government and the States General, consisting of the House of Representatives and the Senate.

Draft legislation

2. When drafting legislation, the ministries concerned check the quality of draft legislation and their conformity with the Constitution and relevant provisions of international law. The Convention is of great significance in this process. Drafters assess the legislation in the light of the Convention in the manner laid down in policy on legislative quality and the Instructions on legislation, in particular Instructions 18, 212g and 254.[5] Instruction 18 reads: 'During the drafting of legislation, it must be ascertained which rules of higher law have limited the freedom to regulate in relation to the issue concerned.' Instruction 212g states that the Explanatory Memorandum should contain a justification of the legislation in question. This will include, in any event, the relationship of the Act being drafted to other legislation and to existing and forthcoming international and EU legislation.

3. One of the checks consists of an examination by the Legislation Department at the Ministry of Justice in consultation with the Ministry of Foreign Affairs and the Ministry of the Interior and Kingdom Relations of the compatibility of the draft legislation with obligations arising from international and European law (see Instruction 254). Although the Ministry of Justice bears primary responsibility for monitoring legislation for compliance with the principles of good governance and the rule of law, this does not detract from the responsibility resting on the other ministries to ensure that the legislation they draft is of the highest quality. To this end the officials involved have at their disposal an integral assessment framework for legislation that includes several models for testing draft legislation against the fundamental rights laid down in the Convention and its Protocols.

4. In the drafting phase, new statutory measures are submitted to external parties for consultation, including representatives from the legal profession, the judiciary, the independent supervisory body in the area of data protection and the national human rights institute. In addition, the Dutch section of the International Commission of Jurists (NJCM) frequently renders an opinion on the human rights compatibility of draft

[5] These Instructions are laid down in a circular letter which is published in the Government Gazette.

legislation. The advice of these individuals and agencies is always dealt with in a substantiated manner in Explanatory Memorandums with legislative proposals.

5. After the Dutch Council of Ministers has given its approval, the proposed regulations are submitted to the Council of State (*Raad van State*) which has the constitutional task to advise the Government on legislation and administration. The Council of State applies a policy analysis evaluation, a legal evaluation and a statutory evaluation, and assesses whether a proposed regulation complies with internationally recognised human rights standards. If there is any lack of clarity on this issue, the Council will make a recommendation.

6. Finally, during their debate on the draft legislation the Parliament addresses the issue of compatibility with the Convention. Although there is no specific parliamentary procedure for verifying this, the permanent Justice Committee of both the House of Representatives and the Senate place considerable emphasis on compliance with human rights instruments. The relevant, obligatory, paragraph in the explanatory memorandum why the draft legislation is deemed compatible with international human rights standards, serves as an essential tool to promote parliamentary debate on the issue.

Administrative practice

7. As for policy instruments that are not laid down in formal legislation, they are subjected to a similar check. The aliens policy is a good example in this regard. This policy seldom is incorporated in legislation, but it does have significant human rights implications. The legal experts of the responsible department assess whether the freedom to develop the new policy is limited by rules of higher (international) law. If necessary, they can call on the Legislation and Legal Affairs Department at the Ministry of Justice for advice. This department annually renders around 250 advices on compatibility with the Convention to colleagues in other government departments, to the Constitutional Affairs and Legislation Department of the Ministry of the Interior and Kingdom Relations and to the Legal Department of the Ministry of Foreign Affairs. It goes without saying that the Parliament can raise the compatibility with the Convention of a (proposed) policy for discussion.

Laws in force

8. A substantial number of laws contain an evaluation clause, by means of which the legislation must be evaluated after a number of years. The potential effects in the area of fundamental rights often form a significant part of this evaluation.

9. Furthermore, it occurs on a regular basis that existing legislation needs to be reviewed following a judgment of the Court, whether or not the judgment is against the Netherlands. In its Salduz judgment[6] the Court held that Article 6 ECHR required that a suspect be assisted by a lawyer during police interrogation. Since such assistance during the police interrogation is not common practice in the Netherlands, the Minister of Justice announced that Dutch law would be amended accordingly. While draft legislation was being prepared, the Supreme Court already had to rule on the subject matter.[7] Following

[6] *Salduz v. Turkey*, ECtHR (GC) 27 November 2008, appl. no. 36391/02.
[7] Supreme Court 30 June 2009, LJN BH3079.

the judgments of the Court and of the Dutch Supreme Court, the Public Prosecutor's Office issued new policy guidelines in April 2010 in anticipation of the new legislation to be adopted by parliament. More recently the Supreme Court ruled that, in anticipation of the entry into force of the new legislation, suspects are entitled to the presence of a lawyer during police questioning as from 1 March 2016.[8]

10. It is up to the directly responsible ministry to consider whether the Court's jurisprudence in a particular field necessitates adjustment of legislation in that field. In addition, the International Law Division of the Ministry of Foreign Affairs (which also comprises the office of the Government Agent), the Legislation and Legal Affairs Department of the Ministry of Security and Justice and the Constitutional Affairs and Legislation Department of the Ministry of the Interior and Kingdom Relations have a more general role in informing, advising and facilitating.

11. The above system is based on two principles: (a) the primary responsibility as to policy content always lies with the relevant ministry; (b) overall expertise on the Convention is concentrated in three contact points with a more general responsibility of informing the other ministries. The system works efficiently and does not give rise to problems. Usually the contact points have no difficulty in drawing the attention of their colleagues in other ministries to an issue of compatibility with the Court's jurisprudence. Follow-up remains, however, the responsibility of the relevant ministry.

12. To adequately perform this overall task of signaling it is important that the contact points have the necessary capacity. A good example of a structural mechanism that functions well can be found in the field of alien law where awareness of relevant jurisprudence is guaranteed partly through the distribution of analyses to all relevant departments and partly through regular consultation mechanisms.

13. As for the role of parliament in this context, it is of the utmost importance that members of parliament (and their staff) have their own access to expertise in the field of human rights, independent from the Government. The Dutch parliament mostly calls on the expertise of academics and the Netherlands Institute for Human Rights.

c) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

14. No such assessment is planned.

[8] Supreme Court 22 December 2015, ECLI:NL:HR:2015:3608

POLAND/POLOGNE

A. Mechanisms to ensure the compatibility of draft legislation (draft statutes or executive acts)[9]

1. Verification of draft legislation by the Government Agent

Since October 2012 the Government Agent has been regularly analysing draft legislation of the Government (draft statutes or ordinances) from the point of view of their compatibility with the Convention and the Court's case-law.

On the same basis, the Government Agent analyses draft Government opinions on draft legislation proposed by other bodies (e.g. parliamentarians).

- *How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)?*

If potential problems in the draft legislation are identified by the Government Agent, upon his/her initiative, the Minister of Foreign Affairs submits comments and proposals within the framework of legislative consultations held by the Government.

The mechanism is systematic as it concerns – in principle – all draft legislation received by the Government Agent.
It is optional as it has been introduced upon the initiative of the Minister of Foreign Affairs[10] and is implemented as part of the competences of the Minister of Foreign Affairs (as a member of the Government) and within the framework of inter-ministerial consultations. It is optional also in the sense that the opinions submitted by the Minister for Foreign Affairs on the compatibility of draft legislation with the Convention are not formally binding upon other ministers, including the author of the draft.

- *What are the advantages of the mechanism chosen?*

As the Government Agent has the most up-to-date information on the Court's case-law concerning both Poland and other countries and also information on communicated cases (including repetitive ones), it is possible for him/her to signal those issues that may be most problematic in practice.

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[9] In Poland the term "administrative practice" does not apply to normative acts but would rather apply to *e.g.* administrative decisions issued in individual cases on the basis of statutes, or more broadly to the overall functioning of administrative authorities. The term "executive acts" proposed here would concern in particular ordinances issued by the relevant executive authorities on the basis of the authorisation included in a statute, within the limits of that authorisation and in order to execute the statute. The same rules and governmental procedures apply equally in respect of executive acts as in cases of statutes, with an additional requirement that executive acts, which have lower rank, should comply not only with the Constitution and the relevant international acts, but also with statutes. The term "statutes" is used here in accordance with the official translation of the Polish Constitution. It may be referred to "laws."

[10] To this end, in 2012 the competences of the Government Agent's Office (formally called "Department of Proceedings before International Human Rights Protection Bodies") at the Ministry of Foreign Affairs of Poland, were extended to include the following task: The Department issues opinions on proposed statute guidelines, draft statutes as well as other legal acts as to their compatibility with international human rights protection standards, including the Convention for the protection of human rights and fundamental freedoms, and prepares the necessary analyses in this respect.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

The following obstacles have been encountered by the Government Agent in establishing or applying this mechanism:

- **significant number of draft legal acts** prepared by the Government in relation to staff capacities of the Government Agent Office. Obviously, some draft legal acts do not concern the Convention rights and freedoms at all as they relate to areas not covered by the Convention. The Government Agent elaborated a thematic list of areas where regulation could potentially affect human rights and fundamental freedoms – this could serve as a basis for other departments of the Ministry, signalling to them those areas where the Government Agent should be consulted. Nevertheless, in practice the workload is significant.
- **short time-limits** – the Government Agent is bound by usually rather short time-limits that apply to the procedure of inter-ministerial consultations. This may affect the ability of the Government Agent to search the relevant case-law of the ECtHR.
- **highly technical or specialist nature of some areas covered by the draft legislation** requiring specialist knowledge. Even good knowledge of the Convention and the ECtHR case-law by the staff of the Government Agent Office may be insufficient to identify possible future problems that could arise in connection with the operation in practice of some detailed legal regulations concerning such specialist areas.
- in many cases – **lack of a relevant Court ruling** concerning an issue sufficiently similar to the one addressed in the draft legislation that could serve as a point of reference. Obviously, the authority of the opinions of the Government Agent is lower if they are based only on his/her own interpretation of the Convention (even if this interpretation is made on the basis of general principles found in the Court's case-law).
- **the constantly developing case-law of the Court** sometimes makes it impossible to prejudge with sufficient certainty the outcome of possible proceedings before the Court if an application is lodged in connection with the draft legislation in question.
- **difficulties linked with the so-called balancing exercise** – the assessment by the Court of whether the legislation in question strikes a fair balance between the public and individual interests may differ from the assessment of the national authorities, including of the Government Agent.

2. Verification of draft legislation by other bodies

Any authority is obliged to examine, and ensure, at every stage of the legislative process, conformity to the Constitution (thus also to constitutional rights and freedoms) of any legal act it drafts. As the Convention is an integral part of the generally binding law in Poland[11] and by operation of the Constitution takes precedence over statutes, if they

[11] By operation of Article 87(1) of the Polish Constitution ratified international agreements constitute universally binding law of the Republic of Poland. In accordance with Article 91(1) of the Constitution, a ratified international agreement (after its promulgation in the Journal of Laws of the Republic of Poland)

cannot be reconciled with the Convention (Article 91(2) of the Constitution in connection with Article 241(1)), the authorities should examine draft legal acts and ensure their compatibility with the Convention as well.

- *How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)?*

1) On 1 March 2016, on the initiative of the Minister of Foreign Affairs, an amendment was introduced to the Rules of Legislative Technique specifying that an analysis of the legal order (required before drafting any new statute) should also take into account international human rights agreements ratified by Poland[12].

The Rules of the Legislative Technique were adopted by an ordinance of the Prime Minister and are binding upon the government administration (but not on *e.g.* parliamentary legislative initiatives). At this stage there is no data available on how this new provision will be enforced by the relevant ministers. In principle, it constitutes a basis for regular and systematic analysis by the competent ministers (at the early stage of the legislative process) of international human rights obligations binding upon Poland pursuant to ratified human rights agreements, notably the Convention.

2) Once a draft legal act is prepared and submitted by a relevant minister, its compliance with the Convention may be examined (and challenged, if necessary) in the general process of inter-ministerial consultations and in the framework of the process of adopting opinions on draft legal acts involving a wide range of bodies, including those outside the government administration.

In particular, both the Legislative Council attached to the Prime Minister and the Government Legislative Centre pay attention to the compatibility of draft legal acts of the Government with the Constitution and the Convention. Standards stemming from the well-established case-law of the Court are referred to by them whenever they are relevant to their analyses and proposals. In its annual reports submitted to the Council of Ministers, the Legislative Council also draws attention to the issues related *inter alia* to the application of the Convention. Also the Supreme Court is tasked with preparing opinions on draft statutes and other normative acts which form the basis for proceedings and the functioning of courts (it may also issue opinions on other acts, if appropriate). When preparing such opinions the compatibility with the Convention and the standards stemming from the Court's case-law are analysed by the Supreme Court and its expert staff. This concerns, in particular, acts governing court procedures and Article 6 guarantees. Likewise, analyses of the compliance with the Constitution and ratified international agreements, among them the Convention, are often prepared by the Prosecutor General and the National Prosecutor who participate in the process of submitting opinions on draft legal acts. /The above information is provided as an example, as there are many other authorities that may submit opinions on draft legal acts. /

3) The compatibility of draft statutes (and those that are in force) with the Convention (among others) may also be examined by Parliament, specifically by the relevant Sejm

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constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute.

[12] § 1. 1 of the Rules of the Legislative Technique states as follows: A decision on preparing a draft statute should be preceded in particular by: […] 2) an analysis of the current legal order, taking into account the law of the European Union, international agreements binding upon Poland, including agreements concerning protection of human rights, as well as the law of international organisations and bodies of which Poland is a member.

and Senate committees. The Sejm's Legislative Committee may be asked by the Speaker for an opinion in the case of doubts as to the possible incompatibility of a draft statute with the law. The relevant organs of both chambers of the Parliament or even individual parliamentarians may raise issues as to the compatibility with e.g. the Convention. Expert opinions may be commissioned from the chancelleries of the Sejm and Senate. Independent advice may also be sought. Again, other authorities and civil society organisations may also (and often do) contribute with their opinions and the Convention is often referred to in the legislative work of the Parliament.

- *What are the advantages of the mechanism chosen?*

A broad range of authorities and representatives of the civil society may contribute to the legislative process, submitting comments and proposals on the compliance with the Convention and other matters.

- *What obstacles have been encountered in establishing or applying these mechanisms?*

There have been no obstacles encountered in establishing the above mechanisms. As regards their application in the context of ensuring the compliance with the Convention, the following obstacles or challenges have been identified by the authorities consulted by the Government Agent before this exchange:

- **few Court judgments or decisions** in the areas of competence of some authorities that could serve as a point of reference for them;
- difficulties stemming from the need to take into account **differences in the legal systems** of other member states to which the Court's judgments or decisions apply;
- sometimes **insufficient knowledge** about the Convention and the Court's case-law on the part of persons dealing with the legislative process and **problems with finding the relevant case-law** of the Court on the part of persons who do not deal with the Court's case-law on a daily basis – due to the vast number of judgments adopted by the Court, the fact that only a small part has been translated into Polish and because information on the case-law may be fragmented or dispersed (it is published on websites of various authorities, NGOs, courts, etc.).

- *How have these been overcome?*

Training of legislators

In 2015 a new ordinance of the Prime Minister was adopted governing the professional training of legislators (the so-called legislative apprenticeship organised by the Government Legislative Centre). Upon the initiative of the Minister of Foreign Affairs, the scope of training was extended to formally include the impact of international obligations of Poland in the area of human rights on the law-making process.

Even earlier though, within the framework of legislative apprenticeship courses organised by the Government Legislative Centre in the 2013/14 and 2014/15 academic years, the topic of human rights protection in the legislative context was introduced and more than 60 legislative apprentices participated in those courses.

In addition, in 2012-15 the Government Legislative Centre carried out a project "Improving legislative techniques in offices supporting public authority organs," in which the Helsinki Foundation of Human Rights participated. In the framework of this

project, training and workshops were organised for the management staff and other staff of the Government Legislative Centre, directors of legal and legislative departments of ministries and other central offices, as well as legislative apprentices. The purpose of the training was to increase awareness of the necessity to take the Convention standards and the role of the Court's case-law into account in the legislative process. In sum, 23 legislative workshops have been organised for 237 persons.

Awareness-raising of the need to take the Convention into account

In March 2013, the Undersecretary of State at the Ministry of Foreign Affairs and the President of the Government Legislation Centre took a joint initiative by sending a letter to undersecretaries of state of all the other ministries, drawing their attention to the need to take the provisions of the Convention and its Protocols into account when drafting new legislation.

Various authorities consulted by the Government Agent have presented their initiatives to raise their staff's awareness of the Convention and the Court's case-law standards (training, publishing information on the Convention and the relevant ECtHR judgments on their websites). In some ministries the relevant departments and their staff have been asked to follow the Court's case-law on a regular basis. For instance, the tasks of the Department of International Cooperation and Human Rights of the Ministry of Justice include the monitoring and analysing the Court's case-law and its impact on the legal acts falling within the competence of the Ministry of Justice. The Department is consulted in the process of preparing draft legal acts by the Ministry of Justice and the Minister's opinions on draft legislation.

Increasing access to the Court's case-law and information thereon

In 2014 an agreement was signed between the Ministry of Justice, the Ministry of Foreign Affairs, the Constitutional Tribunal and the Supreme Administrative Court in order to increase the availability of judgments of the Court in respect of other countries. The signatories jointly select the Court's judgments to be translated on the basis of overviews prepared by the Government Agent and mutually share the translations prepared by them. In 2015 the Prosecutor General acceded to the agreement. Over 70 ECtHR judgments or decisions concerning other States Parties have been translated and published by the parties to the agreement so far. One should add that obligation of the competent ministers to translate "violation" judgments in Polish cases is explicitly envisaged by the Order of Prime Minister on the establishment of the Committee for Matters of the European Court of Human Rights. All translations (about 500 texts) are collected in an on-line database run by the Ministry of Justice which also prepares and disseminates many publications with analyses and comments concerning various aspects of the Convention (more information on the awareness-raising activities – see the report by Poland on the implementation of the Brighton Declaration).

The Government Agent has prepared two overviews of the leading 2014 and 2015 ECtHR judgments and decisions concerning other countries (*i.e.* leading cases selected by the Court's Bureau). Those overviews have been annexed to the 2014 and 2015 annual reports by the Government on the state of execution of the Court's judgments by Poland.

In 2015, the Government Agent started preparing monthly newsletters on the Court's case-law concerning other countries, while the Ministry of Justice has been preparing such newsletters concerning the Court's case-law in respect of Poland for many years

now. Both newsletters are distributed to a wide range of contact persons from other ministries and institutions.

Dialogue between the Government Agent and other ministries

On some occasions meetings are organised between representatives of the competent ministry and the Government Agent to clarify obligations stemming from the Convention. For instance, in October 2015 a meeting was organised between the experts of the Government Agent's Office and the ministry responsible for spatial planning (at its request) in order to discuss legislative plans of the ministry from the point of view of the standards stemming from the Court's case-law concerning the protection of property.

B. Mechanisms to ensure the compatibility of laws (statutes and executive acts) in force

1. Competences of the Constitutional Tribunal

a) *in abstracto* verification of compatibility of legislation with the Convention:

Ex post verification of compatibility of Polish law with the Convention is performed by the Constitutional Tribunal upon an application of the competent authorities, including the courts[13]. According to Article 188 of the Polish Constitution, the Constitutional Tribunal's competences encompass adjudicating *inter alia* regarding:

2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;

Consequently, the Constitutional Tribunal may adjudicate on the conformity of both statutes and other legal acts not only to the Polish Constitution but also the Convention, and may declare a given legal act to be incompatible with the latter, as a result of which the relevant provisions would lose their binding force.

b) *in concreto* verification of compatibility of legislation with human rights (individual constitutional complaints):

In accordance with Article 79(1) of the Constitution, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute

[13] The President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights may make applications to the Constitutional Tribunal to adjudicate the conformity of all legal acts. An application may also be submitted by the National Council of the Judiciary regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges. Also some other bodies (the constitutive organs of units of local government, the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations as well as churches and religious organisations) may submit such applications if the normative act relates to matters relevant to the scope of their activity (Article 191 of the Polish Constitution). Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court (Article 193 of the Polish Constitution).

or another normative act upon which basis a court or organ of public administration has made a final decision with respect to his freedoms or rights or his obligations specified in the Constitution.

Formally, the verification by the Constitutional Tribunal in such cases is performed according to the Constitution only. Nevertheless, in view of the convergence between constitutional and conventional rights and freedoms and also the fact that the Constitutional Tribunal often relies on the Convention and the Court's case-law in the reasoning of its judgments, constitutional complaints in practice often serve to eliminate provisions which are also incompatible with the Convention from the legal order.

- *What are the advantages of the mechanism chosen?*

The main advantage of the above mechanisms is that they result in legal provisions found by the Constitutional Tribunal to be incompatible with *e.g.* the Convention being removed from the legal system (together with their legal effects). A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, is a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to such proceedings (Article 190(4) of the Constitution).

One could also mention here that upon the initiative of the Minister of Foreign Affairs in 2015 a special consultation procedure was added to the Rules of Procedure of the Council of Ministers. The Government Legislative Centre prepares the observations of the Government in proceedings before the Constitutional Tribunal. According to the new rules, it consults the Minister of Foreign Affairs if the subject of the case pending before the Constitutional Tribunal relates to the compatibility of a normative act with international regulations concerning human rights, in particular the Convention (the latter is specifically mentioned in the Rules). This procedure made it possible for the Government Agent to signal to the Government Legislative Centre for instance the problem of incompatibility of some legislation which has been found problematic by the ECtHR in the case of *Kędzior v. Poland*. The observations prepared by the Government Legislative Centre in the proceedings before the Constitutional Tribunal concerning this legislation reflected the position of the Government Agent in this respect.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

No particular obstacles have been encountered in establishing or applying the above mechanisms of verification of conformity of legislation to the Convention.

2. Competences of the courts

If a statute contains provisions that cannot be reconciled with the Convention, in accordance with the Polish Constitution, the Convention takes precedence (on the basis of Article 91(2) in conjunction with Article 241(1)). In consequence, if the courts encounter such a situation in the context of court cases examined by them, and the incompatibility of the statute with the Conventions is of such nature that it may not be removed e.g. by interpretation, they may not rely on such provisions when delivering

their decisions. In such event the courts may address a legal question to the Constitutional Tribunal (see footnote no. 5 above).

Considering the purpose of the current exchange, this complex matter, including the courts' competences to review executive acts, will not be discussed here in detail for it would require a long presentation, but additional information can be submitted upon request.

It would be useful to highlight the following practical mechanism aimed at helping the law-maker to adjust the legislation. In accordance with Article 5 of the Act on the Supreme Court, the First President of the Supreme Court submits to the competent authorities his/her comments concerning shortcomings or lacunae in the binding law that should be removed with a view to ensuring coherence of the Polish legal system. As an example, in the information submitted in 2015, the First President of the Supreme Court pointed to a lacuna in the Act on Proceedings in Cases Concerning Minors. This lacuna had resulted in inappropriate application of the law by the authorities (the same problem has been identified by the ECtHR in the case of *Grabowski v. Poland*).

- *What are the advantages of the mechanism chosen?*

The courts are particularly well-placed to identify, remedy and signal any possible shortcomings of the legislation that arise in the application of the law.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

No particular obstacles have been encountered in establishing the above mechanisms. As regards their application, the same issues may be mentioned as in case of other authorities assessing the (draft) legislation, such as:

- **few Court judgments or decisions** in some of the areas of the courts' competence that could serve as a point of reference for them;
- difficulties stemming from the need to take into account **differences in the legal systems** of other member states to which the Court judgments or decisions apply;
- sometimes **insufficient knowledge** of the Convention and the Court's case-law by judges and **problems in finding the relevant case-law** of the Court – due to the vast number of judgments adopted by the Court, the fact that only a small part has been translated into Polish and because information on the case-law may be fragmented or dispersed (it is published on websites of various authorities, NGOs, courts, etc.).

- *How have these been overcome?*

By means of awareness-raising and educational activities, notably conducted by the Ministry of Justice and the National School for Judges and Prosecutors. See the above information on p. 5 and the report on the measures taken by Poland as a follow-up to the Brighton Declaration.

3. Competences of the inter-ministerial Committee for matters of the European Court on Human Rights

In the annual reports on the execution of ECtHR judgments by Poland, adopted by the Government, there is a separate annex with information on the outstanding legislative work that is needed in order to ensure the execution of pending ECtHR judgments in respect of Poland.

On 23 April 2015, a comprehensive amendment to the *Order of the Prime Minister on the establishment of the Inter-ministerial Committee for matters of the European Court of Human Rights* entered into force with a view to streamlining the process of execution of the Court's judgments, including where relevant by adopting the necessary legislative reforms.

The 2015 amendment sets out obligations and introduces a detailed schedule for the submission of action plans and action reports by the relevant ministers. It also provides for deadlines for the translation of judgments and the dissemination of judgments and decisions among the relevant stakeholders. The amendment is based on the Committee of Ministers' regulations regarding the deadlines and definitions of general and individual measures and requirements concerning action plan/reports.

- *What are the advantages of the mechanism chosen?*

The 2015 amendment increases the transparency of tasks in the process of the execution of judgments incumbent on the respective ministers. Hence, it also increases their accountability for the timely introduction of the necessary legislative and other reforms and for the timely drafting of documents for the Committee of Ministers. It is expected that the amendment will accelerate the execution process, including the adoption of amendments to the law necessary to conform to the Convention.

- *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*

Among others, there were no time-limits in the Polish law governing the execution of judgments, including the preparation of action plans and actions reports by the competent ministers. The adoption of the above-mentioned amendment was intended to remedy this problem.

C. Mechanisms to ensure the compatibility of administrative practice

The same mechanisms apply both to statutes and executive acts – see above.

D. Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

The process of execution of the ECtHR judgments in respect of Poland by the relevant ministers is monitored by the inter-ministerial Committee chaired by the Government Agent. The necessary legislative work is regularly discussed at plenary meetings of the Committee and within the framework of bilateral contacts between the Government Agent (the Committee's Chair) and the relevant ministries.

Moreover, in the annual reports on the execution of ECtHR judgments by Poland there is an annex with detailed information on changes to the law (or to the practice of its application) which are required in order to execute the respective judgments of the Court. This may serve as a basis for possible evaluation of the progress made.

No other special mechanisms have been put in place so far to assess other mechanisms described here from the point of view of their appropriateness and effectiveness in ensuring the compliance of law and practice with the Convention.

Nevertheless, the Government Agent regularly analyses the case-law of the Court in order to identify the main reasons behind the Court's judgments finding a violation by Poland. It may be concluded therefrom that the vast majority of violations found in respect of Poland stemmed from the inappropriate application of the law by courts or administrative authorities rather than from the law as such. In those cases where the violation did stem from the law in force, most often it was due to its insufficient character rather than its direct incompatibility with the Convention (compare *e.g.* the case of *Rutkowski and Others v. Poland* – the legislation provided for an effective domestic remedy capable of ensuring appropriate redress for the applicants in the case of excessive length of domestic proceedings, but the manner in which it was applied by the courts did not always fully comply with the ECHR criteria).

PORTUGAL

1) Quels mécanismes ont été mis en place au niveau national pour garantir la compatibilité des lois (qu'il s'agisse de projets de lois, de lois en vigueur, voire de la pratique administrative) avec la Convention? Quels en sont les modalités (caractère systématique ou non, autorités compétentes et consultations éventuelles (à titre facultatif ou obligatoire)) ? Quels sont les avantages du mécanisme choisi ?

Il n'y a pas un mécanisme spécifique visant à garantir la compatibilité des lois avec la Convention. Le contrôle qu'on exerce sur les projets de loi concerne, en général, leur compatibilité avec la Constitution et la législation existante, et d'autres instruments internationaux auxquels le Portugal est partie, y compris la Convention Européenne des Droits de l'Homme.

Il faut souligner que la Constitution de la République Portugaise consacre une vaste protection aux droits fondamentaux, et va même bien au-delà de ce qui est prévu à la Convention. Nonobstant, la Convention, ayant été reçue et adoptée dans l'ordre juridique national (conformément aux articles 8 et 16 de la Constitution), permet une protection approfondie des droits fondamentaux, notamment en raison de la jurisprudence de la Cour.

Alors, la Constitution portugaise garantit d'ores et déjà les principes et les droits fondamentaux inscrits dans la Convention et toute activité publique doit se conformer à ces droits et à ces principes.

Les droits fondamentaux relèvent de la compétence réservée (exclusive) du Parlement (*Assembleia da República*), sauf délégation législative (au Gouvernement).

En ce qui concerne la compétence législative du parlement et le contrôle qui doit être exercé *a priori* sur la compatibilité des textes avec la Constitution (et la Convention) on signale le rôle de la première commission permanente du Parlement – la *Commission des Affaires Constitutionnelles, Droits, Libertés et Garanties* – qui a des compétences législatives, de fiscalisation et de contrôle politiques dans le domaine des droits de l'homme (et aussi, de l'égalité, de la justice et des affaires pénitentiaires, des enfants et des jeunes en péril, etc.) et qui assure cette conformité.

Il appartient à cette Commission des Affaires Constitutionnelles, Droits, Libertés et Garanties la préparation des rapports sur les projets de lois qui lui sont soumis, eu égard à leur compatibilité avec la Constitution.

Pour ce qui est de la compétence législative du Gouvernement, le contrôle de compatibilité avec la Constitution et les engagements internationaux du Portugal, doit être effectué par les ministères responsables pour l'initiative législative en cause et par la Présidence du Conseil de Ministres.

Relativement aux pratiques administratives elles doivent se conformer aux principes fondamentaux inscrits dans la Constitution, tels que l'égalité, l'équité, l'intérêt public ou la transparence, qui sont, d'ailleurs, consignés dans les codes de procédure (notamment le Code de procédure administrative) que les fonctionnaires doivent respecter.

Lorsque l'exécution d'un arrêt de la Cour rendu contre le Portugal exige l'adoption d'une mesure d'ordre législative, une proposition dans ce sens est présentée au Ministère de la Justice et est, par la suite, analysée et envoyée aux organes ayant une compétence législative (soit le Conseil des Ministres ou le Parlement).

Finalement, il faut aussi souligner le rôle de l'*Ombudsman* qui peut adresser des recommandations au Gouvernement et suggérer des modifications législatives ou autres pour améliorer les pratiques administratives, mais aussi saisir le Tribunal Constitutionnel de demandes de contrôle de la constitutionalité d'un diplôme législatif quelconque.

2) **Quels obstacles ont été rencontrés lors de la mise en place des mécanismes ou dans leur mise en œuvre ? Comment ont-ils été surmontés?**

   Néant

3) **L'évaluation des caractères adéquat et effectif des mécanismes est-elle prévue ou a-t-elle été envisagée? Si oui, selon quelles modalités? Quels sont les obstacles rencontrés dans la mise en place ou pour la mise en œuvre d'une telle évaluation ?**

   Néant

ROMANIA/ROUMANIE

1) Quels mécanismes ont été mis en place au niveau national pour garantir la compatibilité des lois (qu'il s'agisse de projets de lois, de lois en vigueur, voire de la pratique administrative) avec la Convention? Quels en sont les modalités (caractère systématique ou non, autorités compétentes et consultations éventuelles (à titre facultatif ou obligatoire)) ? Quels sont les avantages du mécanisme choisi ?

En Roumanie, la compatibilité des projets de lois[14] et des lois en vigueur avec les dispositions conventionnelles est assurée de manière *systématique* par plusieurs mécanismes. Ces mécanismes sont complémentaires, ce qui constitue un avantage par rapport à la diversité des autorités impliquées et détermine la diminution du risque de législation non-compatible avec la Convention.

1. La règlementation en matière de technique législative exige la justification des solutions proposées par un projet d'acte normatif par rapport aux dispositions de la Convention et de ses Protocoles et de la jurisprudence de la Cour européenne des Droits de l'Homme.

Ainsi, *les rédacteurs d'un projet d'acte normatif*, qu'il soit le Gouvernement ou les membres du Parlement, doivent se rapporter, s'il y a le cas, aux dispositions conventionnelles et à la jurisprudence de la Cour, afin d'évaluer l'impact de l'acte normatif sur les droits et les libertés fondamentales. Pour réaliser cette évaluation, les membres du Parlement peuvent solliciter au Gouvernement l'accès aux informations pertinentes.

2. Les projets d'actes normatifs sont, avant leur adoption, avisés par *le Conseil législatif*, organe consultatif de spécialité du Parlement, qui suit la conformité desdits projets avec les dispositions constitutionnelles et avec les traités internationaux ratifiés par l'Etat roumain, donc la Convention.

A cet égard, il est à noter que, en ce qui concerne les dispositions relatives aux droits et libertés des citoyens, la Constitution roumaine prévoit la primauté des pactes et des traités portant sur les droits fondamentaux auxquels la Roumanie est partie par rapport aux lois internes, sauf dans le cas des dispositions plus favorables prévues par la Constitution ou les lois internes.

3. Compte tenu de cette disposition prévue dans la Constitution, dans le cadre du contrôle de constitutionnalité (*ex ante* et *a posteriori*), la Cour Constitutionnelle réalise implicitement un contrôle de conventionalité.

4. Dans le cadre du processus de l'exécution des arrêts de la Cour, la règlementation en matière de technique législative prévoit que, si un arrêt de la Cour européenne conclut sur la contradiction entre un certain acte normatif interne (ou des parties de celui-ci) et les dispositions de la Convention, *le Gouvernement* doit présenter au Parlement un projet de loi portant sur la modification ou l'abrogation de l'acte normatif en cause, dans un délai de 3 mois à partir de la date de la communication de l'arrêt.

[14] Y compris les autres actes normatifs.

5. Même en absence d'un arrêt de la Cour contre la Roumanie, s'il y a contradiction entre un certain acte normatif et les dispositions de la Convention/la jurisprudence de la Cour, la règlementation en matière de technique législative prévoit l'obligation de proposer la modification de celui-ci, afin d'assurer son compatibilité avec la Convention.

2) Quels obstacles ont été rencontrés lors de la mise en place des mécanismes ou dans leur mise en œuvre ? Comment ont-ils été surmontés?

Dans le cadre du processus de l'exécution des arrêts de la Cour, surtout dans le cas des questions complexes et/ou structurales, le temps nécessaire pour l'identification adéquate de la solution législative peut déterminer le dépassement du délai de 3 mois à partir de la date de la communication de l'arrêt, pour présenter au Parlement un projet de loi.

3) L'évaluation des caractères adéquat et effectif des mécanismes est-elle prévue ou a-t-elle été envisagée? Si oui, selon quelles modalités? Quels sont les obstacles rencontrés dans la mise en place ou pour la mise en œuvre d'une telle évaluation ?

La législation en la matière n'a pas prévu la réalisation, après l'écoulement d'un certain délai, d'une évaluation des caractères adéquat et effectif de ces mécanismes.

SERBIA/SERBIE

The Republic of Serbia has been a member of the Council of Europe (CoE) since 3 April 2003. The Serbian authorities have since been formally and legally obligated to apply the CoE conventions, including, notably, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).

Article 16 paragraph 2 and Article 194 paragraph 3 of the Constitution of the Republic of Serbia (hereinafter: the Constitution), which was adopted in 2006, lay down that generally accepted rules of international law and ratified international agreements shall be an integral part of the legal order in the Republic of Serbia and be enforced directly. This practically means that the decisions of all state authorities may be based on generally accepted rules of international law and ratified international treaties, including ECHR.

Under Article 18 paragraph 2 of the Constitution "[H]uman and minority rights enshrined in the generally accepted rules of international law, ratified international treaties and laws shall be guaranteed by the Constitution and, as such, be exercised directly." Paragraph 3 of this Article stipulates that "[P]rovisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society, pursuant to the valid international human and minority rights standards and the practices of international institutions supervising their implementation."

The Constitutional Court of Serbia, within its duty to protect the unity of the legal order within the abstract constitutionality review procedure, has been reviewing the compliance of laws and other general legal enactments with generally accepted rules of international law and ratified international treaties, including ECHR (Article 167 paragraph 1 of the Constitution).

In other words, the Constitutional Court has a jurisdiction to review the compatibility of laws and other general legal enactments with the ECHR. Procedure in which the Constitutional Court performs this duty is an abstract procedure.

a) Assessment of constitutionality of law and compatibility of legislation with ratified international treaties, including ECHR (Article 168 of the Constitution)

Assessment of constitutionality of law and compatibility of legislation with ratified international treaties, including ECHR may be instituted by state bodies, bodies of territorial autonomy or local self-government, as well as by at least 25 deputies of National Assembly. The procedure may also be instituted by the Constitutional Court. Also, any legal or natural person shall have the right to an initiative to institute assessment proceedings of constitutionality and legality.

The law or other general acts, which are not in compliance with the Constitution and/or ratified international treaties, including ECHR, shall cease to be effective on the day of publication of the Constitutional Court decision in the Official Gazette.

b) Assessment of constitutionality of law and compatibility of legislation with ratified international treaties, including ECHR prior to its coming into force

At the request of at least one third of deputies of the National Assembly, the Constitutional Court shall be obliged within seven days to assess constitutionality and compatibility with ratified international treaties, including ECHR, of the law which has been passed, but has still not been promulgated by a decree of the President.

If a law is promulgated prior to adoption of the decision on constitutionality and compatibility with ratified international treaties, including ECHR, the Constitutional Court shall proceed with the proceedings as requested, according to the regular assessment proceedings of the constitutionality of a law and compatibility with ratified international treaties, including ECHR.

If the Constitutional Court passes a decision on non-constitutionality of a law prior to its promulgation, that decision shall come into force on the day of promulgation of the law.

The assessment proceedings of constitutionality may not be instituted against the law whose compliance with the Constitution was established prior to its coming into force.

Therefore, the Serbian national mechanism for the assessment of compatibility of legislation, both draft legislation and a law in force, with the ECHR, is an abstract review procedure before the Constitutional Court.

The advantages of this mechanism are that, according to Article 166 of the Constitution, decisions of the Constitutional Court delivered in this procedure are final, enforceable and generally binding.

As regards questions nos. 2 and 3, there are no obstacles in the implementation of this mechanism.

SLOVAK REPUBLIC / RÉPUBLIQUE SLOVAQUE

1) A compliance of the draft laws with the international treaties is one of the aims of the legislative work. The liability for compatibility of the draft laws with the international treaties is born by submitters of the draft acts who are obliged to declare in the preference clause, as well as explanatory report to the draft acts their compliance with international treaties.

Pursuant to Article 4 § 4 of the Legislative Rules for Law Making (No. 19/1997 Coll.), a law must comply with the obligations, which result for the Slovak Republic from the international treaties and international documents thereof.

Verification of draft law material compliance with Convention runs throughout the whole legislative process in the National Council of the Slovak Republic. The contents of deputy mandate give rise to this duty of the deputies (Article 75 of the Constitution of the Slovak Republic). Pursuant to Article 68 of the Rules of the National Council of the Slovak Republic (Act No. 350/1996 Coll.), a draft law shall contain its wording in sections and an explanatory report. The explanatory report must include a statement on the draft law's compliance with the Constitution, its relation to other laws and international treaties and on the draft law's compliance with the EU law elaborated by means of a clause on compatibility of the respective draft law with the EU law (compatibility clause).

The Legislation and Law Approximation Department of the Office of the National Council performs a legal analysis of law drafts. Its role is to point out, inter alia, to an eventual contradiction with the international treaties which bound the Slovak Republic, thus it has an opportunity to initiate an alternation of the draft law also in the case when such a draft law is not in compliance with the Convention.

In scope of the second reading the draft law shall be deliberated by those committees of the National Council, which it was allotted to in the first reading. Each committee or any member thereof may point out to any incompatibility of the draft law with the international obligations, and to propose a rectification that shall reflect, after being adopted by the committee, in a joint report of the committees which shall be voted on in the plenum of the National Council. Any deliberation within the committees of the National Council is open to public so that chairman of a committee may also let speak representatives of various institutions dealing with, for instance, the issue of human rights. The National Council may invite specialists or other individuals to its meetings and ask them to give their position relating to the draft law, or to set up an expertise and, subsequently, an oral explanation (Article 54 of the Rules of the National Council). The most important role from the aspect of verification of draft law compatibility with the Convention in the National Council is played by the Constitutional Law Committee that deliberates all the draft laws, also from the aspect of their compatibility with international agreements, and the Committee of Human Rights and Minorities that deliberates on the draft laws in view of their compatibility with human rights anchored in the Constitution of the Slovak Republic, and which result from the international obligations of the Slovak Republic.

Within the scope of the second reading by the general assembly of the National Council the deputies may make any suggestions for an amendment thereto whereby they

may equally propose a specific rectification of any eventual incompatibility with the Convention.

If, in the third reading by the general assembly of the National Council, a need to make the deliberated bill compatible with the Convention occurs then there is an opportunity to decide, based on a proposal presented by 30 deputies, to repeat the second reading where the necessary modification in form of an amendment proposal can be voted through.

Pursuant to Article 102 § 1(o) of the Constitution of the Slovak Republic the President of the Slovak Republic may remand any law of the National Council, together with its commentary. Under Article 87 § 2 of the Constitution of the Slovak Republic, should the President remands a law with a commentary then the National Council has to deliberate it repeatedly. It follows from the above that if the President finds out, for instance, any incompatibility with the Convention then he can deny signing the law adopted by the Slovak National Council, and remand it to be repeatedly deliberated by the National Council.

In the case of government draft laws, before filing a draft law of the National Council, the Legislative Rules of the Government of the Slovak Republic must be adhered to. Those stipulate the rules for making the generally binding legal regulations. In accordance with Article 17 § of the Legislative Rules of the Government the so-called Compatibility Clause aiming to ensure and transparently verify and justify compatibility of the draft legislation with Law of the EU is an integral part of the General Part of the Explanatory Report to the submitted draft regulation/act.

Before draft law submission to be deliberated by the Government, a comment procedure runs during which the bill is discussed with relevant authorities and institutions. The draft law is published on internet and a notification of the publication is forwarded to the Deputy Prime Ministers of the Government, ministries and other central bodies of government administration, to the Institute of Law Approximation, National Bank of the Slovak Republic, The Supreme Audit Office of the Slovak Republic, The Supreme Court of the Slovak Republic, the General Prosecution of the Slovak Republic, and other bodies and institutions concerned with the issue, or if this duty results from a special regulation, or if so determined by the Government or Prime Minister. The draft law may also be forwarded for comments to other public bodies, or bodies of regional self-government, professional organisations or other institutions. This means that an entity providing comments may also be, for instance, the Ombudsman or non-governmental organisations. The public can use the so-called “massive comment”, i.e. a comment of a larger number of physical or legal entities. It follows from the above that any of the aforesaid entities or the public can raise an objection of the incompatibility of a proposed legal regulation with the Convention.

The Legislative Council of the Slovak Republic, as an advisory body of the Government of the Slovak Republic, gives its opinions on the draft laws from the view of their compatibility with conventions of the Council of Europe, in the same manner as it gives its opinions on compliance with other international treaties binding for the Slovak Republic, while the Institute for Approximation of Law under the Office of the Government of the Slovak Republic elaborates written opinion on the draft laws also from the viewpoint of’ their compliance with the EU law and conventions of the Council

of Europe. Should the draft law is not in compliance with the Legislative Rules of the Government, the chairman of the Legislative Council can remand the draft law to its presenter for completing it.

2) A compliance of the laws in force with the Convention is ensured by means of constitutional conformity review. Article 125 of the Constitution provides that the Constitutional Court shall decide on the conformity of laws with the Constitution, constitutional laws and international treaties to which the National Council has expressed its assent and which have been ratified and promulgated in the manner laid down by law. The Constitutional Court shall open such proceedings on an application by no less than one fifth of the deputies of the National Council, the President, the Government, a court of law and the Prosecutor General. If the Constitutional Court finds a lack of conformity between legal instruments, the relevant instruments, parts of them or certain of their provisions shall lose their effect. The bodies that issued these legal regulations shall be obliged to harmonise them with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and also, in the case of Instruments, with other laws, and in the case of instruments, with government regulations and with generally binding legal regulations issued by ministries and other central State administrative bodies within six months from the promulgation of the decision of the Constitutional Court. If they fail to do so, these instruments, parts of them or their provisions shall lose their effect six months after the promulgation of the decision.

3) A compliance of the administrative practice with the Convention is ensured by means of the individual constitutional complaint under Article 127 § 1 of the Constitution. If the Constitutional Court finds a complaint justified, it shall deliver a decision stating that a person's rights or freedoms have been violated by a final decision, specific measure or other act and shall quash such decision, measure or act. If the violation that has been found is the result of a failure to act, the Constitutional Court may order the authority which has violated the rights or freedoms to take the necessary action. At the same time it may remit the case to the authority concerned for further proceedings, order such authority to refrain from violating the fundamental rights and freedoms or, where appropriate, order those who have violated the rights or freedoms set out in paragraph 1 to restore the situation to that existing prior to the violation. In its decision on a complaint the Constitutional Court may grant appropriate financial compensation to the person whose rights have been violated.

4) As to the obstacles that have been encountered in establishing or applying these mechanisms, the statutory framework for the examination of individual constitutional complaints did not allow to examine the compliance of laws with the Constitution and international instruments as such. It follows that if the basis for the violation of the Convention is a statutory there is no available domestic remedy and the applicants have a direct access to the European Court of Human Rights (see e.g. *Bittó and Others v. Slovakia* concerning the application of rent-control scheme under the relevant legislation to the applicants, application no. 30255/09, judgment of 28 January 2014, §§ 75 and 76). It would be useful to empower the Chamber of the Constitutional Court, while deciding on the individual complaint pursuant Article 127 of the Constitution, to introduce *ex officio* or at the applicant´s request the review of the constitutionality of legislation before Constitutional Court´s plenary session pursuant Article 125 of the Constitution. The proceeding pursuant Article 127 of the Constitution

will be postponed until the decision of the plenary session pursuant Article 125 of the Constitution.

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Modification of an existing law

Examples

PL. ÚS 23/2006 (on the devolution of costs of phone-tapping on telephone providers) – Incompatibility of the provision of Article 13 § 2 j "costs of the company" in conjunction with Article 56 § 2 of the Act on the Electronic Communication No. 610/2003 Coll., as amended, with Article 1 of the Protocol No. 1 to the Convention

PL. ÚS 19/09 (on the protection of property rights to real estate /land) – Incompatibility of the provisions of Article 2 § 1a the words "or was an act done to obtain it," Article 2 § 2 point a) the words "or evidence" and Article 2 § 2 a the first point and the second point of the Act on Extraordinary Measures in Preparation of Certain Motorways and Roadways No. 669/2007 Coll., as amended, and on amendments to Act on the Land Registry (Land Act) No. 162/1995 Coll., as amended, with Article 1 of Protocol No. 1 to the Convention.

PL. ÚS 3/09 (on changes in the system of public health insurance and their constitutional acceptability) - Incompatibility of the provision of Article 15 § 6 of the Act on Health Insurance Companies and Healthcare Supervision No. 581/2004 Coll., on as amended, with Article 1 of Protocol No. 1 to the Convention.

PL. ÚS 1/2010 (on starting point of the period for contesting paternity) – Incompatibility of the provision of Article 86 §1 of the Family Act No. 36/2005 Coll., as amended, with Article 6 § 1 and

PL. ÚS 11/2011 (on the immunity of state assets from execution) – Incompatibility of the provision of Article 18 § words "enforcement" of Act on State Property Administration No. 278/1993 Coll., as amended, and supplementing Act on Modification of the Ownership of Land and Other Agricultural Property No. 229/1991 Coll., as amended with Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 to the Convention.

PL. ÚS 109/2011 (on the obligation to determine the payer of the court (judicial) fee by the Act) – Incompatibility of the provision of item 13 b) in the Annex Fees in Civil Proceedings (Tariff of the Court Fees) Act on Court (Judicial) Fees and Fee for Criminal Record No. 71/1992 Coll., as amended, with Article 6 §1 of the Convention

PL. ÚS 115/2011 (on the enforcement of so-called unauthorized state aid) – Incompatibility of the provision Article 26 § 5 of the Act No. 231/1999 Coll. on the State Aid with Article 6 §1 of the Convention and Article 1 of the Protocol No. 1 to the Convention

PL. ÚS 11/2013 (on the statutory average marks as a criterion for access to the full secondary education) – Incompatibility of the provision of Article 62 § 1 point a) and c), Section 62 § 3 of Act No. 245/2008 Coll. Education Act with Art. 2 of the Protocol No. 1 to the Convention

SLOVENIA/SLOVÉNIE

1) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

According to the Constitution of the Republic of Slovenia (Article 8) statutes (Acts of the National Assembly – the Parliament) and other regulations must comply with generally accepted principles of international law and with international treaties that are binding on Slovenia. Ratified and published international treaties shall be applied directly. Therefore, it should be inherent to our system that draft primary legislation proposed by the Government should be consistent with the Convention.

Different mechanisms for ensuring the compatibility of draft legislation also with the ratified and published treaties (including the Convention and its Protocols), are set up:

- Verification of conformity of every draft law (draft statute) starts within the **competent Ministry**, which initiated the draft law.[15] Ministries responsible for preparing the texts of legislative proposals examine in advance (*ex ante*) the potential economic, social, environmental or other impacts of the different policy options in a regular and formal manner. Other impacts may include also the verification of conformity of a draft law with the Convention and its Protocols, which are binding for Slovenia. Information on the compatibility of draft primary legislation with international treaties (thus also with the Convention) can be a part of the detailed explanation of the proposed draft legislation.
- Ministries responsible for preparing the texts of legislative proposals in their area of responsibility are obliged to send proposals of draft laws prior to being submitted for debate by the government to the **Government Office for Legislation** and to the relevant Ministries (Article 10 of the Rules of Procedure of the Government of the Republic of Slovenia) and to obtain their opinion. Only when it is not possible to reach an agreement or when coordination in advance is impossible due to the urgent nature of the procedure, can materials that have not been harmonised be submitted for government debate. One of the basic responsibilities of the Government Office for Legislation is to consider draft laws and other acts that the government submits to the National Assembly are compatible with the Constitution, However the Office mostly reviews the alignment with the Constitution, only exceptionally (e. g. police legislation and asylum (migration) the legislation) is also assessed with the Convention and its Protocols, including the case law of the European Court of Human Rights.
- The draft laws should be prepared in accordance with the Resolution on Legislative Regulation (the rules for "good legislation") adopted by the National Assembly, which also foresees consultations with the **civil society**, consequently *this* may cover also fundamental rights compatibility reviews.

[15] Besides the Government, draft statutes (draft laws) may be proposed also by any Deputy of the National Assembly, the National Council and at least five thousand voters.

- In addition to verification by the executive, examination is before tabling a draft law also undertaken by the **Legislative and Legal Service of the National Assembly**. Laws are adopted in the legislative procedure, which consists pursuant to Rules of Procedure of the National Assembly of multiple stages - from discussing a draft law to tabling amendments (modifications and supplements), voting on the law, promulgating the law, or otherwise concluding the legislative procedure. Legislative and Legal Service of the National Assembly delivers opinions on the conformity of draft laws, other acts, and amendments with the Constitution and the legal system (the ratified and published international treaties are part of the legal system), and on legislative and technical aspects of drafts.

The main control mechanisms for ensuring the compatibility of laws in force or administrative practice include the *ex-post* constitutional review of the Slovenian Constitutional Court. The conformity of domestic legal provisions with the provisions of the Convention must be ensured by the whole system of regular and specialised courts and the **Slovenian Constitutional Court**. The latter verification take place within the framework of judicial proceedings brought by individuals with legal standing to act or even by state bodies, persons or bodies not directly affected.

In recent years constitutional complainants have more and more often referred not only to constitutional provisions but also to the provisions of the European Convention on Human Rights and also significantly more to the decisions of the European Court of Human Rights in cases similar to theirs. The Constitutional Court reviews constitutional complaints differently in relation to the European Convention on Human Rights as compared to the case law of the European Court of Human Rights, and thus regarding the relation of the contents of the European Convention on Human Rights to the Constitutional provisions regulating individual constitutional rights[16].
The European Convention on Human Rights has been directly cited in more than some hundred decisions of the Constitutional Court, and in more than hundred cases, the Constitutional Court has directly referred to the case law of the European Court of Human Rights in the reasoning of its decisions. Thus, the Constitutional Court has referred to the European Convention of Human Rights and the case law of the European Court of Human Rights in cases in which the complainants have not mentioned them in their applications.

Particular attention is paid to the judgments of the European Court of Human Rights against Slovenia. In this regard a consideration of Strasbourg case-law is explicitly determined by the Courts Act: The decisions of the European Court of Human Rights are

[16] In cases in which the provisions of the Constitution and the European Convention on Human Rights regarding an individual right are the same or very similar, the Constitutional Court foremost applies the Constitution and only exceptionally are violations of both the Constitution and the European Convention on Human Rights reviewed in parallel. In a few cases, the Constitutional Court explicitly stated that in such cases the European Convention on Human Rights could not have been violated if the Court had established that there had been no violation of the Constitution. Moreover, the Constitutional Court refers to the Constitution in cases in which the Constitution guarantees a higher level of the protection of an individual right compared to the European Convention on Human Rights. In cases in which the European Convention on Human Rights is more demanding than the Constitution or the case law of the European Court of Human Rights guarantees a higher level of protection of rights, the Constitutional Court refers to the European Convention on Human Rights and the decisions of the European Court of Human Rights. Only such manner of deciding by the Constitutional Court is in compliance with paragraph 6 of Article 15 of the Constitution, which explicitly determines that no rights regulated by legal acts in force in Slovenia (the European Convention on Human Rights is undoubtedly such an act) may be restricted on the grounds that this Constitution does not recognize that right or recognizes it to a lesser extent.

to be directly executed by the competent courts of the Republic of Slovenia (Article 113 of the Courts Act) – if so provided in sectorial legislation (in fact – only for criminal cases – in the Criminal Procedure Act).

Compatibility of the executive regulation is ensured within regular and specialised courts through the so-called *exceptio illegalis* (exception of illegality). If these courts takes the view that an executive regulation does not comply with the Constitution (or Convention which is part of national law) or the law (statute), it will not or must not apply it, however, this jurisdiction is very rarely applied in practice. However, these courts cannot exercise constitutional review of laws while deciding in concrete (incidenter) proceedings. That court must interrupt the proceedings and refer the law to the Constitutional Court for a review of its constitutionality and may continue the proceedings only after the Constitutional Court has reviewed the constitutionality of the respective law (Slovenian system is a system of concentrated constitutional review; a law can only be eliminated from the legal system by the Constitutional Court).

An important role in the verification of how laws are applied and, notably, the Convention, plays **Human Rights Ombudsperson of the Republic of Slovenia**. According to Article 23.a of the Constitutional Court Act the Ombudsperson can initiate the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority, if he/she deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms In the requests for constitutional review the Ombudsperson often referred to the Convention. Besides that, the Ombudsperson in his recommendations which are part of several annual reports, regular invites all state institutions and local authorities to unconditionally respect the human rights and fundamental freedoms set out in the Constitution of the Republic of Slovenia, the Convention, and other treaties binding on the State in their work and when making decisions. The National Assembly when considering the Annual Reports of the Human Rights Ombudsperson recommends that all institutions and officials at all level observe these recommendations.

2) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

We believe that aforementioned mechanisms are suitable at the current situation, however there is a room for further improvements. In the process of ensuring the implementation of individual measures for the implementation of the Court's judgments, also a review of needed general measures has regularly been made, including regarding the possible (needed) legislative changes. In this regard, it has been detected that there is no systematic or mandatory system of verification of the compatibility of laws with the Convention, therefore same proposals were made within the Ministry of Justice on how to improve the existing verification system (see below).

3) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

At the level of the Government, the impact assessment to ensure the compatibility of draft laws with the Convention and its Protocols binding for Slovenia could be made systematic and mandatory. A draft law on State Administration proposes that a new task of the Ministry of Justice would also be "the verification of the suitability of draft laws from the perspective of human rights and fundamental freedoms". The aim is to give more emphasis to preliminary verifications of the Ministries, when proposing a text of a draft law, and to ensure additional verification system in the intergovernmental procedure. In addition, every draft law prepared by the government would need to have a written statement about the compatibility of its provisions with the rights and freedoms enshrined in the Convention and its Protocols ('statement of compatibility').

Also, in the legislative procedures the regular legislative procedure instead of the shortened or urgent procedure - could be used more often, as in the shortened and urgent procedure for the adoption of a law no general debate is held, and the second and third reading are held at the same session of the Parliament. In addition, involvement of the independent bodies during the consultations on the draft laws could be more respected.

Further, at the national level, the Government aims to propose the amendments to the Human Rights Ombudsperson Act with the aim of meeting the "A" status standards of this National Human Rights Institution, in accordance with the United Nations endorsed "Paris Principles".

SPAIN/ESPAGNE

1) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

If the legislative initiative comes from the Government, before reaching the Parliament a compulsory consultative opinion from the Council of State is needed. If the Draft Law will affect procedural laws, then a compulsory request of a consultative opinion from the General Council of the Judiciary is needed.

It is not unusual in administrative practice that compatibility of Draft legislation with the Convention is assessed by the Office of the State Attorney, especially through consultation with the agent before the Court.

The Spanish Ombudsman has in its statute the power to suggest either to the legislative of to the executive modifications of the States that might be necessary to prevent violations of human rights.

If the legislative initiative comes from within the Parliament the Legal services of the Parliament provide advice as to the compatibility with national and international law.

2) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

There have been no obstacles to this functioning.

Once the legislation is in force, there're checks through the procedures that can be brought before the Constitutional Tribunal, that can be triggered even by the Spanish Ombudsman in subjects referring to the protection of fundamental rights.

3) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

No assessment is envisaged.

SWEDEN/SUÈDE

1) What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?

The Swedish Instrument of Government, states that no act of law or other provision may be adopted which contravenes Sweden's undertakings under the Convention. Accordingly, Swedish legislators are bound by constitutional law to ensure that Swedish legislation is in conformity with the Convention. It is thus an obligation incumbent upon all relevant actors within the legislative process to have due regard to the Convention in their work. Such actors are:
- the inquiry committees, which have the task of studying a certain issue or set of issues and putting forward proposals for new and amended legislation; - the Government Offices (Regeringskansliet), which has the task of preparing government decisions inter alia regarding proposals for new and amended legislation; - the parliamentary committees, which have the task of preparing parliamentary decisions; - the Council on Legislation (Lagrådet); - the Government; and - the Riksdag (parliament) (Chaper 2, Section 19 of the Instrument of Government).

With certain exceptions, the Government or a parliamentary committee is required to refer draft legislation to the Council on Legislation. This is a body whose members are former or current justices of the Supreme Court and the Supreme Administrative Court. One of their tasks is to ensure the constitutionality of draft bills, which, as set out above, includes their compatibility with the Convention. Although the Council's pronouncements are not binding, they are usually adhered to.
The government bill submitted to parliament will, if relevant, include a discussion of the proposed new legislation's compatibility with the Convention, thereby ensuring that the parliament is informed in this respect.

Moreover, if a national court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made. In the case of review of an act of law, particular attention shall be paid to the fact that the Riksdag (parliament) is the foremost representative of the people and that fundamental law takes precedence over other law (Chapter 11, Section 14 of the Instrument of Government).

2) What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?

In the process of ensuring the compatibility of legislation with the Convention, it is difficult to foresee all situations which could entail a potential violation of the Convention. In the legislative process, one way to prevent a potential violation of the Convention has been to emphasise in the preparatory works that no legislative provision is meant to contravene the obligations contained in the Convention. In this manner, new

jurisprudence settled by the Court is also taken into account when the new domestic legislation is applied.

3) Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?

The government has recently announced that it will deliver to the Riksdag (parliament) a strategy for the systematic work for human rights in Sweden. One important aspect of this coming strategy is to suggest the establishment of an independent national institution to promote and protect human rights in accordance with the Paris principles. The next step in this process is to deliver to the parliament such a strategy. It is then up to the Parliament to decide on the establishment of an independent national institution to promote and protect human rights.

TURKEY/TURQUIE

Selon l'article 90 de la Constitution, les conventions internationales régulièrement mises en vigueur ont force de loi, aucune exception d'inconstitutionnalité ne peut être opposée à leur égard. Cet article prévoit qu'en cas d'incompatibilité entre les lois et les conventions internationales relatives aux droits et libertés fondamentales mises régulièrement en vigueur contenant des dispositions divergentes concernant une même matière, la convention prévaut sur la loi. Les conventions internationales concernant les droits et libertés fondamentales ont valeur de disposition constitutionnelle. Cette disposition est le mécanisme fondamental mis en place au niveau national pour garantir la compatibilité des lois avec la Convention.

Par ailleurs, selon le paragraphe d de l'article 6 du Règlement concernant la procédure et des principes de la préparation des lois, l'avis du Ministère de la Justice est obligatoire pour les projets de lois et décrets, l'avis du Secrétariat Général de l'Union Européenne est obligatoire en ce qui concerne la compatibilité des projets des lois et des décrets avec les acquis de l'Union européenne conformément au paragraphe f du même article. L'application de la Convention européenne des droits de l'homme et la compatibilité des projets avec la jurisprudence de la Cour sont prises en compte dans le cadre desdits avis. L'article 25 dudit Règlement stipule que le Premier ministère peut d'office faire les modifications de forme adéquates dans les projets. Les projets dont l'incompatibilité avec la Constitution, les lois et les autres législations concernées ou les projets qui n'ont pas été préparés conformément au Règlement sont renvoyés devant le Ministère qui a fait la proposition dans le but de remédier aux défauts ou afin d'assurer leur compatibilité.

Le Règlement concernant la procédure et des principes de la préparation des lois a également mis en place dans notre système juridique une analyse d'impact juridique réglementaire qui est un processus d'évaluation préliminaire montrant les effets éventuels d'un projet de loi sur le budget, la législation, la vie sociale, économique et commerciale, l'environnement et les secteurs concernés.

L'article 24 du Règlement prévoit une analyse d'impact pour la préparation des lois et décret et autres mesures réglementaires jugées nécessaires par le Premier Ministère à partir du 17 février 2008, à l'exception des lois et décrets sur les questions liées à la sécurité nationale, le budget et les comptes définitives.

Par ailleurs, l'article 148 de la Constitution stipule que la Cour constitutionnelle contrôle la constitutionalité des lois, des décrets et du Règlement de l'Assemblée parlementaire nationale de Turquie du point de vue de la forme et du fond et se prononce sur les requêtes individuelles. Selon cette disposition, le contrôle juridique réalisé par la Cour constitutionnelle dans notre système juridique est de deux types à savoir « le recours en annulation » et « la voie de l'opposition ». Le recours en annulation permet « un contrôle abstrait » de la norme, la voie de l'opposition est «un contrôle concret » de la norme. Le droit de recours d'inconstitutionnalité d'une loi ou d'un décret du point de vue de la forme et du fond appartient au Président de la République, au groupe parlementaire du parti constituant le gouvernement, ou groupe parlementaire du parti de l'opposition ou des parlementaires constituant le 1/5ème de l'Assemblée parlementaire. Seules les lois et les décrets peuvent faire l'objet de la voie de l'opposition. Si les tribunaux dans le cadre d'une affaire déterminée dont ils sont saisis, estiment que la norme applicable est inconstitutionnelle ou estiment sérieux la revendication d'une des parties au litige dans le

sens de l'inconstitutionnalité de la norme applicable, peuvent porter la question de l'inconstitutionnalité devant la Cour constitutionnelle.
Consécutivement à l'amendement de la Constitution réalisé le 7 mai 2010 (Loi no. 5982), la Cour constitutionnelle peut connaître des requêtes individuelles. La voie de recours individuelle est dorénavant ouverte depuis le 23 septembre 2012 contre les individus ou organisations exerçant la force publique en raison des allégations de violation des droits et libertés fondamentales. Dorénavant toute personne alléguant une violation des droits et liberté garanties par la Constitution et la Convention européenne des droits de l'homme par des individus ou organisations qui exercent la force publique peut saisir la Cour constitutionnelle. Tout comme les actes et agissements des individus ou organisations qui exercent la force publique, l'existence ou non d'un problème structurel découlant de la législation sont également pris en compte dans le cadre de l'examen de la requête par la Cour constitutionnelle.