14 ECtHR Advisory Opinion and Response to Formal Requests Given by the Jurisconsult

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Abstract
The aim of this article is to present the role of the Superior Courts Network (SCN) launched by the ECtHR in preparation of national request for an advisory opinion issued by the ECtHR. The actuality of the topic is given by Protocol No. 16 of the ECHR that entered into force on 1 August 2018 and the issuance of the first advisory opinion published on 10 April 2019. Hungary has not acceded to Protocol No. 16, so this option is currently not available for the Hungarian courts. Actually, there is another way to assist the domestic courts in understanding the principles of the ECtHR's case-law that are relevant to the case pending before them. This option is the so-called formal request for case-law information that could be submitted by a national court to the Directorate of Jurisconsult of the Registry of ECtHR with the help of SCN. Later, after acceding to Protocol No. 16, this channel of information could be helpful in preparation of request for advisory opinion.

14.1 Introduction

Advisory opinions are well-known legal instruments not only in domestic jurisprudence but also in international legal practice. Such opinions usually serve as guidance for natural or legal persons on a point of law. They are legally binding on the requester only if the relevant legal provision provides for this. Advisory opinions were issued by several international courts, such as the ICJ, the Permanent Court of International Justice, the Inter-American Court of Human Rights, the International Tribunal for the Law of the Sea, the

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CJEU and the ECtHR too.[1] This article focuses on the practice of the ECtHR, where a certain type of advisory opinion was also known earlier.

14.2 The ECtHR's Advisory Opinions

14.2.1 Advisory Opinions under Article 47

Article 47 of the ECHR states that "the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto" (advisory opinion under Article 47). This type of advisory opinion – as to the conditions of submission and the procedure – significantly differs from the advisory opinion introduced by Protocol No. 16.

The Committee of Ministers is entitled to initiate advisory opinion under Article 47, while in case of Protocol No. 16 the requester is a domestic high court. The scope of the advisory opinion under Article 47 is limited, since essential parts of the Convention – *i.e.* the rights and freedoms – are excluded. It is not surprising that there have been only three requests for advisory opinion under Article 47, but one of them was not admissible.[2] The first request was rejected by an ECtHR decision (A47-2004-001) in 2004. The ECtHR gave its first advisory opinion under Article 47 (A47-2008-001) on the merits on 12 February 2008, and the second opinion (A47-2010-001) was issued on 22 January 2010.

14.2.1.1 First Request for an Advisory Opinion under Article 47 (A47-2004-001)

The first request for an advisory opinion under Article 47 was inadmissible. The Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (the CIS Convention) was opened for signature on 26 May 1995 and came into force on 11 August 1998. In May 2001, the Parliamentary Assembly of the Council of Europe adopted Resolution 1249(2001) on the coexistence of the ECHR and the CIS Convention. It considered that the CIS Convention offers less protection than the ECHR, both with regard to the scope of its contents and the body enforcing it. According to Recommendation 1519(2001) adopted by the Parliamentary Assembly on the same date, the Chairman of the Committee of Ministers requested the ECtHR in a letter sent on 9 January 2002 and addressed to the President of the ECtHR to give an advisory opinion on the matter raised in Recommendation 1519(2001) of the Parliamentary Assembly concerning "the coexistence

1 Anthony Aust, 'Advisory Opinions', *Journal of International Dispute Settlement*, Vol. 1, Issue 1, 2010, pp. 123-151.

2 David Harris *et al., Law of the European Convention on Human Rights*, Oxford University Press, 2014, p. 135.

of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights." The ECtHR found that the request for an advisory opinion was related to a question which the Court might have to consider in consequence of proceedings instituted in accordance with the Convention, and, therefore, it did not have competence to give an advisory opinion on the matter referred to it.

14.2.1.2 First Advisory Opinion on Merits (A47-2008-001)

The request for an opinion arose out of the correspondence between the Maltese authorities and the Parliamentary Assembly concerning the composition of the Maltese list of candidates for the position of judge at the ECtHR. Article 21 of the ECHR regulates the criteria for the office of judges. According to Article 22, the judges shall be elected by the Parliamentary Assembly from a list of three candidates nominated by the state parties. As it is laid down by its Resolution 1366(2004) and Resolution 1426(2005), the Parliamentary Assembly expects that at least one of the domestic nominees should be from the opposite sex. In 2009, the candidature list put forward by the Maltese government was rejected on three separate occasions because none of the candidates was a woman. By letter of 17 July 2007 to the President of the ECtHR, the Chairperson of the Committee of Ministers requested the ECtHR, in accordance with Article 47 ECHR, to give an advisory opinion on the questions set out below: *(i)* Can a list of candidates for the position of judge at the ECtHR, which satisfies the criteria listed in Article 21 of the ECHR, be refused solely on the basis of gender-related issues? *(ii)* Are Resolution 1366(2004) and Resolution 1426(2005) in breach of the Assembly's responsibilities under Article 22 of the Convention to consider a list, or a name on such list, on the basis of the criteria listed in Article 21 of the Convention?

The ECtHR decided that it had jurisdiction to answer the first question, and that it was not necessary to answer the second. According to the reasoning of the ECtHR, where a state party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the recommendations of the Parliamentary Assembly advocating an open and transparent procedure involving a call for candidatures, the Parliamentary Assembly may not reject the list in question on the sole ground that no such candidate is featured on it.

14.2.1.3 Second Advisory Opinion on Merits (A47-2010-001)

The request for an opinion arose out of an exchange of letters between the Ukrainian authorities and the Parliamentary Assembly on the composition of the list of candidates for election as a judge of the ECtHR in respect of Ukraine. By letter of 15 July 2009 to the President of the ECtHR, the Chairperson of the Committee of Ministers requested the

ECtHR, under Article 47 of the ECHR, to give an advisory opinion. The core issue of the questions was whether a state party is entitled to withdraw a previously submitted list of candidates for the position of judge in order to replace with a new list of three candidates and whether there was any time limit for it. The other aspect of the questions was whether the Parliamentary Assembly was obliged to consider the new list.

According to the ECtHR, the state parties may withdraw and replace a list of candidates for the position of judge at the ECtHR, but only on condition that they do so before the deadline set for submission of the list to the Parliamentary Assembly. After that date, the state parties are no longer entitled to withdraw their lists. If the withdrawal occurs before the time limit, the state party concerned may either replace any absent candidates or submit a new list of three candidates. If, however, the withdrawal occurs after that date, the state party concerned must be restricted to replacing any absent candidates.

14.2.2 Advisory Opinions under Protocol No. 16.

The idea of reforming the jurisdiction of advisory opinions has been discussed nearly from the very moment of its introduction. At the beginning of the reform of the ECtHR, the Group of Wise Persons was set up by the Third Council of Europe Summit in Warsaw in May 2005. The Committee of Ministers agreed on the members of the Group of Wise Persons and set the goal for them to draw up a comprehensive strategy to secure the long-term effectiveness of the Convention and its control mechanism. The Group of Wise Persons concluded that

> "it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's 'constitutional' role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding."[3]

This aim has, however, not materialized into legislative proposals until the Brighton Conference on the future of the ECtHR organized by the UK government in April 2012. The Brighton Declaration invited the Committee of Ministers to draft a new protocol

3 *Explanatory Report to Protocol No. 16*, at www.echr.coe.int/Documents/Protocol_16_explanatory_report_ENG.pdf, p. 1.

widening the ECtHR's power to render advisory opinions on request from state parties on the interpretation of the ECHR in the context of a specific case at domestic level.[4]

The new type of advisory opinion is regulated by Article 1 of Protocol No. 16 that summarizes the main features of this legal instrument.[5] According to this rule, the

> "[h]ighest courts and tribunals of a High Contracting Party may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto."

The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

Comparing the two instruments, we could find several important differences between the advisory opinion under Protocol No. 16 and the advisory opinion under Article 47. The main differences and similarities are summarized in Table 14.1.

	Advisory Opinion under Protocol No. 16	**Advisory Opinion under Article 47**
Requester	Designated domestic highest court	Committee of Ministers
Conditions of request	Concerning the interpretation and application of the ECHR and the Protocols	
	Question of principle relating to human rights and freedoms	Any question *except* for those relating to – human rights and freedoms – any such proceedings as instituted by the Committee of Ministers in accordance with the ECHR
	Pending domestic proceedings	
Competent forum	Grand Chamber	Grand Chamber

Protocol No. 16 has a dual purpose: the reinforcement of dialogue between ECtHR and the national judicial systems, and, on the other hand, the reduction of workload of ECtHR. Relating to the first aim – enhancing the dialogue between ECtHR and national courts –,

4 Kanstantsin Dzehtsiarou, 'Advisory Opinions: More Cases for the Already Overburdened Strasbourg Court', *Verfassungsblog*, No. 5, 2013, p. 31. at https://verfassungsblog.de/advisory-opinions-more-cases-for-the-already-overburdened-strasbourg-court/.

5 Protocol No. 16 was opened for signature on 2 October 2013. On 10 April 2019 – on day of issuance of the first Protocol No. 16 advisory opinion – there were 13 signatures followed by ratifications (Albania, Andorra, Armenia, Estonia, Finland, France, Georgia, Greece, Lithuania, the Netherlands, San Marino, Slovenia, Ukraine) and 9 signatures without ratifications (Belgium, Bosnia and Herzegovina, Italy, Luxembourg, Norway, Republic of Moldova, Romania, Slovak Republic, Turkey). The majority of the Council of Europe and those big countries that represent the majority of EU citizens have not acceded to Protocol No. 16, yet.

some sceptic views emerged at a relatively early stage of the debate. There are several questions to be answered, such as the guidelines of defining highest courts and tribunals, the relationship between individual application and advisory opinion requested in the same case, the appropriate stage at which to make a request for this opinion and procedural issues (anonymity, priority, costs, follow-up and publication of advisory opinion).[6] The most important problem could be that the ECtHR can only pronounce itself on a certain matter if all national remedies have been exhausted. During the often lengthy procedures, the ECtHR is not in a position to provide any guidance or to correct any faulty interpretation of the ECHR. Potentially, an advisory opinions procedure could enable the ECtHR to have a more direct impact on national judgments and could offer national courts a more concrete guidance at an earlier stage of the proceedings.[7]

The other main goal is the reduction of workload of the ECtHR. It is supposed to help hold domestic judicial decisions in accordance with the provisions of the Convention, so these cases will be remedied at national level. This aim is also doubtful according to some authors, because Protocol No. 16 will add even more cases to the already overburdened ECtHR. The Grand Chamber procedure is complex and long, and it does not normally deliver more than 20 judgments per year. The drafters of Protocol No. 16 argued that this procedure would not be adversarial, and it would take much less time that the procedure in any contentious cases. One can recall that, in the early days of the Court, its procedure in contentious cases was also not really adversarial, but it gradually became such. Moreover, the legitimacy of a procedure where one or both parties would not have an opportunity to present their arguments is questionable. So, one can suggest that even if the length of the advisory opinion procedure will not be as lengthy as a contentious case, it will be considerably burdensome, which can be detrimental taking into account the backlog of the Court.[8]

Later, some concerns and questions were answered by the Rules and the Guidelines issued by the ECtHR in connection with this type of advisory opinion. The procedure relating to advisory opinion according to Protocol No 16 is regulated in Chapter X of Rules of Court (Rules 91-95). Some important details are explained also in the Guidelines approved by the Plenary Court on 18 September 2017, *e.g.* such question was the schedule and timing for submitting the application (at an early stage of the procedure or not). The Guidelines says that "it is recommended that a request be lodged with the Court only after,

6 Open Society Justice Initiative, *Implementing ECtHR Protocol No 16 on Advisory Opinions*, at www.opensocietyfoundations.org/sites/default/files/briefing-echr-protocol-16-20160322.pdf, March 2016, pp. 16-18.

7 Janneke Gerards, 'Advisory Opinions, Preliminary Rulings and the New Protocol No. 16 to the European Convention of Human Rights. A Comparative and Critical Appraisal', *Maastricht Journal of European and Comparative Law*, Vol. 21, Issue 4, 2014, p. 638.

8 Dzehtsiarou 2013, p. 31.

in so far as relevant, the facts and legal issues, including issues Convention law, have been identified."[9]

However, the real answers will be given by the practice, but it seems that this procedure works despite of these concerns.

The ECtHR has delivered its first advisory opinion nine months after the Protocol entered into force (No. P16-2018-001). On 16 October 2018, the Court received a request for an advisory opinion from the French Court of Cassation. The Court of Cassation adjourned the proceedings until the Court would give its opinion. On 3 December 2018, the panel of the Grand Chamber accepted the request for an advisory opinion under Protocol No. 16, and on 4 December a Grand Chamber was constituted in accordance with Rule 24 § 2 (h) of the Rules of Court in order to consider it. The President of the Grand Chamber invited the parties to the domestic proceedings to submit written observations by 16 January 2019. The Grand Chamber delivered its opinion in writing on 10 April 2019.

During the procedure, the French Government submitted written observations under Article 3 of Protocol No. 16. The Commissioner for Human Rights of the Council of Europe did not avail herself of that right. Written observations were also received from the Governments of the United Kingdom, the Czech Republic and Ireland, the French Ombudsman's Office and the Centre of Interdisciplinary Gender Studies at the Department of Sociology and Social Research of the University of Trento, and from non-governmental organizations such as the AIRE Centre, the Helsinki Foundation for Human Rights, the ADF International, the International Coalition for the Abolition of Surrogate Motherhood, and the Association of Catholic Doctors of Bucharest, all of which had been given leave by the President to intervene (Article 3 of Protocol No. 16). The NGO Child Rights International Network, which had also been given leave to intervene, did not submit any observations. Then the copies of the observations received were transmitted to the Court of Cassation, which did not make any comments (Rule 94 § 5). After the close of the written procedure, the President of the Grand Chamber decided that no oral hearing should be held (Rule 94 § 6).[10]

As we can see, there were several interveners, so the issuance of such advisory opinion could be a result of a complicated process depending on the topic and it could be also time-consuming. The length of the proceedings before the Grand Chamber obviously varies depending on the case, the diligence of the parties in providing the Court with information and many other factors, such as the holding of a hearing or referral to the Grand Chamber

9 *Guidelines on the Implementation of the Advisory Opinion Procedure Introduced by Protocol No. 16 to the Convention*, para. 10. at www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

10 *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother requested by the French Court of Cassation*, No. P16-2018-001, 10 April 2019, paras. 5-8.

or not. So, this half-year duration of the Grand Chamber procedure in the case of the first advisory opinion under Protocol No. 16 was relatively short.

As to the merits of the advisory opinion we could find that the case concerned was very special. The main issue of the case was the possibility of recognition in domestic law of a legal parent-child relationship between a child born abroad through a gestational surrogacy arrangement and the intended mother, designated in the birth certificate legally established abroad as the 'legal mother', in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognized in domestic law.

According to the opinion of the Grand Chamber in this situation the child's right to respect for private life within the meaning of Article 8 of the ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the legal mother. The child's right to respect for private life does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used.[11] The first advisory opinion under Protocol No. 16 emphasizes that

> "[t]he aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it […]. The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it. It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case."[12]

In order to make the advisory opinion under Protocol No. 16 useful and applicable for the domestic court, the requester has to prepare the request thoroughly. According to the Guidelines the request for this advisory opinion must contain not only the questions on which the domestic court concerned seeks the guidance of the ECtHR, but several additional elements, among them the relevant ECHR issues, in particular the rights or freedoms at stake. The case on which the first advisory opinion under Protocol No. 16 was based was

11 Id. paras. 1-2.
12 Id. para. 25.

the *Mennesson v. France* case,[13] so the relevant case-law could be determined relatively easily. However, there may be issues in which respect it is not easy to determine the relevant case-law. In this preparation work, the Superior Courts Network and the national request to the Directorate of Jurisconsult of the Registry of ECtHR (Jurisconsult) could help the domestic courts.

14.3 Preliminary Ruling Procedure and Advisory Opinion under Protocol No. 16

Preliminary ruling procedure provided for in Article 19(3)(b) TEU and Article 267 TFEU is designed to ensure the uniform interpretation and application of law within the EU. It offers the courts and tribunals of the EU Member States a means of bringing questions concerning the interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the EU before the CJEU for a preliminary ruling.

The two types of interpretation procedure for EU Member States might cause a potential problem when a domestic highest court finds itself dealing with a matter of an EU law that could violate some provisions of the ECHR.[14] Article 52(3) of the EU Charter of Fundamental Rights and Article 6(3) of the TEU ensure the same level of protection of human rights provided by the ECHR, and the CJEU has frequently based its judgments on principles coming from the ECHR and used the ECtHR's case-law. On the other hand,

13 *Mennesson v. France*, No. 65192/11, 26 June 2014. The case concerned the refusal by the French authorities to grant legal recognition in France to parent-child relationships that had been legally established in the US between children born through a surrogacy agreement and their intended parents. While the Court did not find a violation of the right to respect for family life of children and intended parents, it did find a violation of the right to respect for private life of the children because their right to identity was affected as a result of the non-recognition, in particular as one of the intended parents was also the biological parent. The case-law of the Court of Cassation evolved in the wake of the *Mennesson* judgment. Registration of the details of the birth certificate of a child born through surrogacy abroad is now possible in so far as the certificate designates the intended father as the child's father where he is the biological father. It continues to be impossible with regard to the intended mother. Where the intended mother is married to the father, however, she now has the option of adopting the child if the statutory conditions are met and the adoption is in the child's interests; this results in the creation of a legal mother-child relationship. French law also facilitates adoption by one spouse of the other spouse's child. In a decision of 16 February 2018 the French Civil Judgments Review Court granted a request for re-examination of the appeal on points of law submitted on 15 May 2017 by Mr. and Mrs. Mennesson, acting as the legal representatives of their two minor children, against the Paris Court of Appeal judgment of 18 March 2010 annulling the entry in the French register of births, marriages and deaths of the details of the children's US birth certificates. The Court of Cassation's request for an advisory opinion from the Court was made in the context of re-examination of that appeal.

14 Giovanni Zampetti, 'The Recent Challenges for the European System of Fundamental Rights: Protocol No. 16 to the ECHR and its Role Facing Constitutional and European Union Level of Protection', *Discussion Paper No 2/18*, Europa-Kolleg Hamburg, Institute for European Integration, at http://www.europa-kolleg-hamburg.de, pp. 14-17.

the ECtHR shaped the presumption of equivalent protection or Bosphorus-presumption. This presumption means that the state party concerned could not infringe the provisions of the ECHR by fulfilling the EU obligation itself, because the EU ensures the same level of human rights' protection. However, this presumption has two preconditions: *(i)* the national authorities have no margin of maneuver during the application of EU law, and *(ii)* they deploy the full potential of the supervisory mechanism provided by the EU law. In that case the ECtHR does not exercise its power of review, except the protection of fundamental rights is manifestly deficient.[15] The main features of these legal means are compared in Table 14.2.

	Request for Advisory Opinion under Protocol No. 16	**Request for Preliminary Ruling Proceedings**
Requester	Designated highest court	Any domestic court
Issues	Question of principle of ECHR	Interpretation or validity of EU law
Domestic case	Pending before the requesting court	Pending before the requesting court
Binding force	Not binding opinion	Binding decision
Competent forum	ECtHR Grand Chamber	CJEU

At first glance, it seems that these principles could solve the problem of different interpretations. However, there are some uncertainty factors. The most important of them is that these types of interpretation could be applicable when the domestic procedure is still in progress. So, the central question for the highest court could be the appropriate order of these procedures.

If EU law must be applicable in the case, the right order must be to request for preliminary ruling first, but, in that case, there is also an important uncertainty factor. According to the *CILFIT* case and the *Da Costa* judgment, the domestic court may take into consideration the necessity of request for preliminary ruling. If the court considers that the EU provision is clear, it does not need to be interpreted in the meaning of doctrine of *acte éclairé* (*clara non sunt interpretanda*).[16] This margin of appreciation or circumvention of the obligatory submission of request could result some differences in domestic interpretation of the same EU provision and this situation could cause uncertainty in the interpretation of ECHR provision connecting to it.

If there is no questionable EU provision or there is no EU provision that needs to be interpreted at all, only the necessity of request for advisory opinion under Protocol 16 could be emerged. However, it could be also problematic. This advisory opinion is not binding either for domestic courts or the ECtHR. Applying the jurisprudence originated

15 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, [GC], No. 45036/98, 30 June 2005.
16 Blutman László, *Az Európai Unió joga a gyakorlatban*, HVG-ORAC, Budapest, 2013, pp. 439-440.

from the *Bosphorus* case, it means that, after the final domestic decision, the ECtHR could supervise the deliberation or assessment of the domestic court including its interpretation of EU provision and regarding to the advisory opinion under Protocol No. 16, too. There is a possibility that the ECtHR could supervise its former opinion with a view to the specific circumstances of the case. It is not surprising that the domestic court could call into question the usefulness of advisory opinion under Protocol No. 16. This could be a reason of reluctance of accession to it.

14.4 The Role of the Superior Courts Network

In his address at the Solemn Hearing during the opening of the Court's Judicial Year in January 2015, President Spielmann underlined the importance he attached to Protocol No. 16, the protocol of dialogue with the highest courts of the Contracting States. Even before its entry into force, reinforcing this dialogue was one of his priorities which explained why the President wished to set up an information exchange network which would enable superior courts to have a point of contact within the Court through which case-law information could be provided to them, under the supervision of the Jurisconsult.[17] The SCN is a new form of mutual exchange of respective research resources between courts. According to the Charter of SCN,

> "[t]he Network shall be set up with a view to ensuring the effective exchange of information, between the European Court and the national courts belonging to the Network, on the case-law of the European Court, Convention law and practice and the domestic law of States whose superior courts are members of the Network."[18]

On 10 April 2019 – at the time of issuance of the first advisory opinion –, the Network had 74 courts from 36 state parties. The number of SCN members is increasing continuously. Each member court must designate a person who will contact the SCN as a focal point. The so-called Focal Points are, both in the Registry of ECtHR and in the national superior courts, through whom SCN day-to-day exchanges are conducted. Hungary has two high court members at the SCN, such as the Curia of Hungary and the Constitutional Court of Hungary, so there are two national focal points. Every year, the Registry of ECtHR

17 *Introduction to the Superior Court Network*, at www.echr.coe.int/Documents/SCN_Introduction_Network_June2018_ENG.pdf.

18 *Cooperation Charter of the Superior Courts Network*, para. 1. at www.echr.coe.int/Documents/SCN_Charter_ENG.pdf.

organizes an annual forum for the national contact points in order to discuss together the functioning and future of the SCN.

The ECtHR has developed a dedicated website to facilitate the exchanges with member courts, access to which is restricted to the ECtHR and superior court members (the SCN Intranet). Within this space, the member superior courts have privileged access to material not in the public domain such as the Jurisconsult's analytical notes on new decisions and judgments, a weekly selection of notable decisions and judgments by the Jurisconsult as well as research reports on a range of ECHR subjects drafted under the supervision of the Jurisconsult. Beyond such regular exchanges, the member courts can also ask specific questions on ECHR case-law, responses to which are provided by the Jurisconsult (*e.g.* in the form of short research items). These replies are the Jurisconsult's sole responsibility and are not binding on the ECtHR in its judicial activity.[19]

	Request under Protocol No. 16	**Formal request in SCN**
Requester	Designated highest courts	Any domestic court assisted by focal points
Issues	Question of principle	Question relating to existing case-law
Responder	Grand Chamber	Jurisconsult
Domestic case	The case is pending before the domestic court; request must refer to it.	It should not refer to the pending domestic case to which it relates.
Output	Advisory opinion (judicial interpretation)	Short research item (a list of cases with short comments)

The second annual forum discussed the question of formal requests addressed to the Jurisconsult. The report on Second Annual Focal Point Forum contains that any questions on the ECtHR's case-law might require some preliminary work on the wording to ensure that the most specific response would be obtained. Courts which had already made formal requests expressed their satisfaction with the added value of the answers received, which at least allowed them to verify whether their own research was complete. In addition, the selective and structured nature of the case-law lists prepared by way of reply often helped to identify the ECHR issues better. Expectations as to a more analytical type of answer could not be satisfied since such an approach would render the answer tantamount to an interpretation or opinion, thus falling outside the Network's objective of information exchange. Nevertheless, the process of dialogue between the requesting court and the ECtHR, in the formulation of the questions, helped to fine-tune and adjust the result of that exchange.[20] The Third Annual Focal Point Forum was held on 6-7 June 2019, and the

19 Id.

20 *Report – Focal Points Forum of the Superior Courts Network, 8 June 2018*, at www.echr.coe.int/Documents/SCN_Forum_Report_2018_ENG.PDF, para. II/C.

SCN launched a new platform of the so called Knowledge Sharing. This new platform makes it possible to access to more different databases (guidebooks, short research items, reports *etc.*) managed by the SCN.

14.5 Conclusions

As we can see, the response for the formal request provided by Jurisconsult in the framework of SCN has its limitations compared to the advisory opinion. The formal request should not refer to the pending domestic case to which it relates, it is not a judicial interpretation of case-law, only a list with some explanations but it is not an analysis. So, it is desirable that the requesting court prepares and attaches its own research made by the help of HUDOC and the Jurisconsult could update and complete this research.

The conclusion of this article is that the new type of advisory opinion is an adequate solution to solve a well-defined, new issue of ECtHR case-law emerged in connection with a domestic, pending case and an opportunity for the domestic courts without any legal risk, so the accession to Protocol No. 16 and its ratification would be useful and fruitful for Hungary. Hoping that, after the entry into force of Protocol No. 16 in Hungary, the highest domestic courts will use this opportunity properly. In the professional preparation work of the request for advisory opinion under Protocol No. 16, the courts could be helped by the SCN and its knowledge sharing methods, such as the cooperation with Jurisconsult from the aspect of determination of the relevant ECtHR case-law.