

Strasbourg, 12 January 2017

## CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)

**Questionnaire for the preparation of the CCJE Opinion No. 20 (2017):**

**“The role of courts with respect to uniform application of the law”**

Please in your answers do not send extracts of your legislation but describe the situation in brief and concise manner.

Comments on what is also happening in practice, and not only on point of law, will be much appreciated.

### **Introduction**

The first section deals with the concept of the uniform application of the law in the way, in which it possibly exists, is understood and is operated in different member states of the Council of Europe.

The second section proceeds to discuss the role of the legislative and executive powers in ensuring the uniform application of the law through adoption of consistent legislation and executive acts.

The third section highlights the role of courts in ensuring the uniform application of the law through consistent court case law. **This section, due to the mandate of the CCJE, is the key section of the Opinion.**

The Bureau and the Secretariat of the CCJE would like to strongly thank you for your cooperation and contributions.

## 1. Concept of the uniform application of the law

- 1.1 Is there in your country a concept of the uniform application of the law? Is it formal, established at the level of the Constitution and/or legislation, or rather informal, discussed and set at various level and applied in practice through common understanding? Is it a combination of both approaches, to various extents?

There is the concept of the uniform application of the law in Ukraine, it is part of the constitutional principle of equality before the law and court enshrined in articles 24 and 129 of the Constitution of Ukraine.

Ukrainian legislation contains an official notion of uniform application of the law and it has its specific features of implementation by the judiciary and law enforcement agencies and other government bodies. As an example, according to Art. 36 of the Law "On judicial system and status of judges" the Supreme Court of Ukraine as the highest court in the judicial system of Ukraine ensures the uniform application of law by courts of various specializations in order and manner established by the procedural law. The Article 9 of the Law "On Prosecutor's Office" specifies the competence of Prosecutor General of Ukraine to approve general guidelines for prosecutors to ensure uniform application of the legislation of Ukraine in the exercise of prosecutors' functions. And the Article 2 of the Law "On the Central Election Commission" states that the Commission in accordance with its responsibilities ensures adherence to fundamentals and principles of election and referendum processes established by the Constitution and laws of Ukraine. The Commission ensures the implementation of electoral rights of citizens of Ukraine and the right to participate in the referendum, the uniform application of the law of Ukraine on elections and referendum throughout Ukraine, and so on.

- 1.2 What is understood in your country under the concept of the uniform application of the law? Is it understood in the form of:

- consistent legislation to be adopted at legislative level;
- uniform practices by the executive institutions and law enforcement bodies;
- uniform case law developed by courts.

Please explain each point and indicate the relative importance of each point.

The definition of uniform application of the law is not formulated in Ukrainian legislation. However, in practice, by common understanding the concept appears as compliance of regulations issued by governmental bodies, enterprises, institutions, organizations and officials with the Constitution of Ukraine and existing laws.

On the issue of sequential adoption of laws, it should be noted that political component in the activity of the Verkhovna Rada of Ukraine (hereafter – The Parliament of Ukraine) has always had a dominant role. And weak framework of the legislation (lack of science-based technology of the legislative process, opposition of political and intellectual components in the activity of the Parliament of Ukraine, etc.) results in instability of legislation and therefore, the Parliament of Ukraine resolves its 'mistakes', if and when they detect them, which is not a systematic and consistent

process and mostly happens episodically.

For example, the process of adopting of any law includes a necessity to make legislative changes in those acts that does not conform to the new one. However, basically, current legislation shall be in force until it is brought in compliance with a new law, insofar as it does not compete with the new law.

In Ukraine, the unity of the practice of the executive and law enforcement is enshrined in legislation. In particular, the Article 9 of the Law "On Prosecutor's Office" states that the Prosecutor's General of Ukraine competence includes an approval of the general guidelines for prosecutors to ensure uniform application of the legislation of Ukraine in the prosecution. The Supreme Court of Ukraine as the highest court in the judicial system of Ukraine (according to the Article 36 of the Law "On judicial system and status of judges") ensures the uniform application of the law by courts of various specializations in order and manner established by procedural law.

Regarding the practice of uniform application of the law by courts, it should be noted that the fundamental principle of justice in Ukraine is equal rights for all participants of legal proceedings before the law and the court. It is stated by the Article 129 of the Constitution of Ukraine. Unequal application of the law by court in the decision-making process in the similar cases would imply breaching of constitutional principles. According to current procedural legislation and legislation on the judicial system the Supreme Court is responsible for ensuring uniform application of law by courts of general jurisdiction. It contributes to unity and uniformity of judicial practice. However, common judicial practice is not integrated and uniform. Its inconsistency does not contribute to the unity of legal consciousness in society. Therefore, distorts the legal awareness and legal culture of subjects of legal relations that definitely affects their legal behaviour. (Reasoning of this situation below)

1.3 What is the rationale of the uniform application of the law in your country and which kind of outcome for the population it is supposed to produce?

Unjustified complexity of legislation appears in unreasonable sophistication of regulations and artificial complication of social relations by legal means. Good example of solving this negative trend may serve the judgement of the Constitutional Court of Ukraine. (case № 4-pn/2016) of 8 June, 2016 upon application of the Supreme Court of Ukraine ruled that on the constitutionality of the provisions of the third paragraph; first, second, fourth, sixth sub-paragraph of the five paragraph of Article 141 of the Law of Ukraine "On judicial system and status of judges" and the paragraph 5 of section III of Final provisions of the Law of Ukraine "On amendments to certain legislative acts of Ukraine on pension protection". The Court adopted a decision on this issue, and deemed provisions, limiting the maximum size of life maintenance retired judges (judges' pensions) as failing the compliance with the Constitution of Ukraine. The Constitutional Court in its judgment quashed the legislation restricting these payments. In justifying its decision, the court stated that the limitation of judicial pensions are, in fact, reduced the guarantees of independence of judges and violates their constitutional status.

Moreover, the Decision of the Constitutional Court of Ukraine of 22 September 2005 (№ 5pn/2005) in the case of permanent use of land where the court indicated that constitutional principles of equality and justice generates the requirement of certainty,

clarity and ambiguous of legal standards as otherwise it may not ensure its uniform application, it preclude freedom of interpretation in legal practice and inevitably leads to arbitrariness.

In view of the above, the fundamental principle of equality before the law and justice can be achieved only by the uniform interpretation and application of law by all state authorities. The opposite can lead to unlimited discretion and violating the principle of equality.

## **2. Role of the legislative and executive powers in ensuring the uniform application of the law**

### **2.1 Are there in your country formal or informal requirements for ensuring the uniformity in the legislative process?**

Today, In Ukraine there is no single law, which regulates ensuring of uniformity in the legislative process.

Formal requirements to ensure uniformity in the legislative process are contained in the Law of Ukraine "On the Rules of Procedure of the Verkhovna Rada of Ukraine", as well as a number of other regulatory legal acts. However, there are certain problems associated with the regulation of certain internal legislative procedures.

In Ukraine, the Rules of Procedure of the Verkhovna Rada (art. 92) provides that a draft law introduced to parliament shall be registered by the Secretariat of Verkhovna Rada. There is only one day for the verification of its compliance with the requirements. Objectively, it is impossible to assess its compliance with all the requirements established by art. 90 and 91 of the Rules of Procedure for such a short time. So, usually all drafts that contain the necessary supporting documents are recorded without such verification.

Of particular importance in the rule-making process of executive and legislature bodies is its first formal stage – draft stage. This stage is characterized by relevant organizational and technological feature. With involvement of a range of relevant bodies established by the law which conduct its drafting activities in a way also prescribed by the law. This process consequently results in the creation of the draft of the legal act. Lack or low level of legislative drafting leads to inefficient, irrelevant and faulty governance in the specific field of public relations and actually undermines and nullifies legal requirements of the state.

In recent years, attempts to addressing the issues of creating a system of coherent regulatory legal acts were made, but until now, the Law of Ukraine "On normative legal acts" has not been accepted yet. Normative activities in different departments are carried out at the level of subordinate regulatory acts. Thus, under these conditions, the need for a comprehensive and systematic settlement of rule-making activity of executive authorities in Ukraine is urgent and actual.

Further work on regulation and normalization of public relations arising in the process of standard-setting executive and legislature logically has to be completed in a profile piece of legislation. This act would not only comprehensively govern and regulate the normative aspects of law-making, but would give a clear answer to procedural issues for this process, including urgent issues of law-making activity.

## 2.2 Is there a hierarchy of laws?

In terms of the place in the hierarchy of laws the following principles are consistently segregated:

1) **The rule of law**, which has the supreme juridical force compared to other legal acts established by the Constitution of Ukraine (Article 8 – In Ukraine, the principle of the rule of law is recognised and effective; Article 129 – In the administration of justice, judges are independent and shall be guided only by the law). Moreover, the rule of law prevails over the laws and legal acts.

2) Legal rules established by **the Constitution of Ukraine**. The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it (Article 8).

3) The legal provisions norms established by **international treaties** ratified by the Ukrainian Parliament. The international legal rules' place in the hierarchy of law states by the Article 19 of the Law "On International Agreements of Ukraine"

4) The legal standards set by **laws**. Part 2 of Article 8 of the Constitution of Ukraine determines their place in the hierarchy.

5) Legal norms and individual legal requirements established by **decrees and directives of the President of Ukraine**. Their place in the hierarchy defined by Article 106 of the Constitution of Ukraine

6) Legal rules stated by the **resolutions and orders of the Cabinet of Ministers of Ukraine**. The Article 113 of the Constitution of Ukraine determines their place in the hierarchy.

7) Legal rules established by **legal acts of central bodies of executive power** indirectly recognized as normative regulators of public relations. According to part 3 of Article 117 of the Constitution of Ukraine, normative legal acts of the Cabinet of Ministers of Ukraine, ministries and other central bodies of executive power, are subject to registration through the procedure established by law.

## 2.3 How the conformity of national laws to treaties and other international instruments is ensured? How the latter are applied in your country: directly or through national implementing legislation?

According to Article 9 of the Constitution of Ukraine international treaties agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. In Ukraine, international treaties apply according to the law "On International Agreements of Ukraine". If the international agreement of Ukraine, which has come into force under the set procedure, sets the rules other than those envisaged in the respective act of Ukrainian legislation, the rules of international agreement shall apply.

At the intra-state level conform of national legislation to international agreements and other international legal acts carried out by implementation (transformation) of international legal norms into national la legislation and regulations or changes to existing ones.

Methods of implementation (transformation) of individual rules and document as a whole, used in each particular case by authorized bodies of legislative, executive or judicial power. Public authorities act appropriately to implement the constitutional guarantees of implementation of international treaties and other international acts.

#### 2.4 What are the arrangements in cases of contradictions between national laws, or between national law and treaty?

Some lack of harmonization is inherent to the current legislation, as to any of other system. One type of such incoherence is formal or internal inconsistencies - contradictions within the legal system.

As an example, we can consider the conflict between the general provisions of the Commercial Code of Ukraine on contracts, obligations and responsibilities on the one hand, and the Civil Code of Ukraine on certain types of agreements - on the other.

The main ways of bridging differences between national laws are rule-making process, interpretation and application of the law. They create conflict mechanism that should include all of the above methods and enable the case to reduce the harmful effects of errors and negligence of the legislator.

In addition, there is a way to overcome conflicts by choosing to use one of several regulations that are in conflict. Hierarchical, temporal and substantive principles should be applied in doing so.

Another way of overcoming the contradictions between national laws are judicial proceedings carried out by the Constitutional Court of Ukraine. The Constitutional Court of Ukraine, in particular, decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine (Article 147, 150 of the Constitution of Ukraine). Also, it could be carried out by the courts of general jurisdiction, which, particularly, has jurisdiction over cases on invalidating acts of secondary legislation and individual normative acts.

Regarding the conflict between national law and international agreements it should be taken into account that If the international agreement of Ukraine, which has come into force under the set procedure, sets the rules other than those envisaged in the respective act of Ukrainian legislation, the rules of international agreement shall apply.

Also, it should be noted that respect of court to international treaties does not mean that the court may apply the provisions of such documents that were not agreed to be binding by the Parliament of Ukraine. The court may not apply the provisions of such documents.

#### 2.5 How usually law making process is carried out in your country? Which of the powers of the state has in practice dominant role in this process?

The legislative process in Ukraine as a regulatory approval process of adoption of the law, consists of certain stages - independent, logically completed stages of organizational and technical actions regarding the introduction, consideration, adoption (amending) laws and their publication.

In Ukraine, there are:

- the legislative process in respect of acts adopted by national referendum (regulated by the Constitution and the Law "On National Referendum");
- the legislative process concerning laws passed by Parliament. This legislative process is governed by the Constitution of Ukraine, the Budget Code, Sections IV-V of

the Rules of Procedure of the Verkhovna Rada of Ukraine, Regulations on the Procedure of the Verkhovna Rada of the draft laws, decrees and other acts of Parliament, approved by the Head of the Verkhovna Rada amended; Regulations on the order of the documents in the Parliament of Ukraine approved by the Head of Verkhovna Rada of Ukraine on May 25, 2006 №448 amended.

Below we consider legislative process concerning laws passed by Parliament.

The legislative process in Parliament has several stages:

**I. Pre phase (legislative initiative):**

The legislative process can begin with submission of a legislative initiative to Parliament for the adoption of a new law relating to certain sphere of public relations and developments in this regard, the draft law.

**II. The draft stage:**

If the legislative initiative has been submitted to the Parliament:

1. It is decided to prepare the draft law, an initiative is rejected or included in Legislative Drafting Plan;

2. for the Government or permanent parliamentary commissions are entrusted to develop a draft; for this purpose special commissions, working groups composed of deputies, representatives of concerned public organizations, legal scholars and others can be created.

3. A draft working out his preliminary examination involving stakeholders, revision and editing project.

**III. Phase of submission of a draft to the Parliament (legislative initiative):**

The legislative initiatives a submission of the draft officially to the legislative body by certain authorities and individuals. According to the Constitution of Ukraine (Article 93), the right of legislative initiative belongs to the President of Ukraine, the MP's of Ukraine and the Cabinet of Ministers of Ukraine.

Upon submission the Parliaments disposes it for consideration. After entering parliament approves the draft it into consideration.

**IV. Consideration stage:**

Discussion of the draft and its harmonization: expression of opinions of stakeholders about the project and obtaining their suggestions for improvement, completion of the project; adoption of a procedure of first, second, third reading; consideration of alternative projects. If necessary - making project: a) to discuss with wide range of qualified experts through parliamentary hearings, conferences and round tables, etc. .; b) for public discussion.

According to the Constitution of Ukraine draft laws defined by the President of Ukraine as not postponable, are considered by the Verkhovna Rada of Ukraine out of turn.

**V. Stage of adoption of the draft:**

This stage comprises of adoption of the draft through voting and of preparation of the relevant resolution of Parliament on the entering of the law into force. The texts of laws passed by Parliament, signed by the Chairperson of the Parliament of Ukraine should be forwarded without delay to the President of Ukraine for signature.

**VI. Certification stage.**

1. Within fifteen days of the receipt of a law, the President of Ukraine signs it (according to the Constitution).

2. President has the right to veto laws. President returns it to the Parliament of Ukraine with substantiated and formulated proposals for reconsideration.

3. In case the President of Ukraine has not returned a law for reconsideration within the established term, the law is deemed to be approved by the President of Ukraine and shall be signed and officially promulgated.

4. However, where a law, during its reconsideration, is again adopted by the Parliament of Ukraine by no less than two-thirds of its constitutional membership, the President of Ukraine is obliged to sign and to officially promulgate it within ten days. In case the President of Ukraine does not sign such a law, it shall be without delay promulgated officially by the Chairperson of the Parliament of Ukraine and published under his or her signature.

#### **VII. Publication stage.**

1. The law should be entered to the Uniform State Register of legal acts with assigning it a registration code.

2. Law publication is a process of printing the text of the law with all the details in official publications (edition "Gazette of Verkhovna Rada of Ukraine", the newspaper "Holos Ukrainy (The Voice of Ukraine)").

- 2.6 Are acts of the executive power source of law in your country and in that respect are they legally binding for the courts?

The President of Ukraine, on the basis and for the execution of the Constitution and the laws of Ukraine, issues decrees and directives which are mandatory for execution on the territory of Ukraine (Article 106 of the Constitution of Ukraine). Regarding Ukrainian courts, for example, the decree of President of Ukraine on appointment of judges on the basis of and within the proposal of the High Council of Justice is legally binding, without checking that established by this Law requirements for judicial candidates and procedure for the selection or evaluation of qualification candidates.

The Cabinet of Ministers of Ukraine as the highest body in the executive branch issues resolutions and orders which are binding. However, it should be noted, that within administration of justice, the courts are independent of any undue influence, and administer justice based on the Constitution and laws of Ukraine and on the basis of the rule of law. Neither the Constitution nor the laws of Ukraine provides rulings and orders of the Cabinet of Ministers of Ukraine which are legally binding for courts

- 2.7 In your opinion, are laws too often amended in your country and does it affect the legal certainty in the country?

Over the years of independence, Ukrainian domestic legislation has been drastically updated, in particular, amended to introduce regulations of Soviet legislation, and in our opinion there is no problem. However, due to intense law-making legislation in Ukraine (according to the Uniform State Register of legal acts, the total number of existing normative acts is 86,627 acts) developed by its lack of processing, unnecessary complexity, significantly lowering the formal clarity and sharp increases contradictions between the legal acts. It is clear that such legislation is much more difficult to apply and interpret than formally determined, free of contradictions, well



designed and clearly set out legislation that largely affects the legal certainty in the state.

### **3. Role of courts in ensuring the uniform application of the law**

- 3.1 Has the court case law in your country binding legal effect and is it a source of law? If yes, to what extent? To the same extent as the national legislation?

The definition of case law does not officially exist in Ukrainian legislation. However, judges making decisions on complex cases refer to previously adopted judgments of higher courts.

Despite the lack of official existence of case law, experts identify several modalities of precedent: so-called "quasi precedent", judgments of the European Court of Human Rights, which are a classic kind of international case law and judgments of the Constitutional Court of Ukraine, which are the interpretation of case law

Also, it is worth noting, that today, de facto, the case law as a source of law in Ukraine has been in use already. Indeed, based on the provisions of procedural codes, the ground for appellate review of decision is unequal application of the same provision of law by courts. This confirms the existence of case law in Ukraine and reference to that. In addition, lawyers often use judicial precedent as proof of their right positions during consideration of the case, such as: clarification and resolution of the Plenum of the higher courts and even print judgments that have become available since the introduction of uniform system of judicial decisions.

In current circumstances, the main source of law in Ukraine is the legal act. It does not settle promptly dynamic public relations. In connection with this, court must determine legal policy based on the rule-making. The basis for entitling acts of judiciary with features of normativity is a need to ensure uniformity of judicial practice, the principle of legality in the administration of justice, rights and freedoms of individuals and citizens, implementation of the Constitution of Ukraine as directly applicable, overcoming conflicts and gaps that arise in the legal regulation of social relations.

- 3.2 If the court case law in your country does not have binding legal effect, to which extent it is recognised as important for judges, at formal or informal level?

Judgments, which came into force, are binding for all state authorities, local government, their officials and officers, individuals and legal entities and their associations across Ukraine. Mandatory accounting (prejudicialness) of judgments to other courts is established by the legislation. Conclusions regarding the application of the law set out in the resolutions of the Supreme Court are binding for all power entities which apply the relevant provisions of the law. Conclusions of the Supreme Court of Ukraine on the application of the legal acts contained in its resolutions shall be taken into account during the application of the law by other courts (Article 13 of the Law "On judicial system and status of judges").

- 3.3 In either case, have the courts a role to unify in any way the case law, and if yes, which courts and in which way? Are there special arrangements within each court – or

between different courts at horizontal or vertical level within the hierarchy of courts – to ensure uniformity?

To address the problem of unequal application of the law courts in similar situations the legislation of Ukraine provides mechanisms which enable unified court practice. One of such mechanisms is to ensure uniform application of the law by the courts through performance of the Supreme Court. The Supreme Court formulates the legal positions in their decisions on the results of cassation against low-level court decisions.

The Supreme Court of Ukraine as the highest judicial body in the system of courts of general jurisdiction of Ukraine ensures the unity of court practice in order and manner established by procedural law (Paragraph 6 of article 36 of the Law “On judicial system and status of judges”).

The court shall be required to take account of the findings of the Supreme Court of Ukraine regarding the application of the law set down in its decisions. The court is entitled to waive legal opinion of the Supreme Court, only through the proving of its position.

It also provides the use of mechanisms to ensure the unity of court practice in Ukraine:

**revision of the judgements:**

- appeal and cassation review of judgments upon appeals of parties to proceedings (the Law "On judicial system and status of judges", procedural law);

**official interpretation:**

delivering the official interpretation of the Constitution of Ukraine and the laws of Ukraine by the Constitutional Court of Ukraine (the Constitution of Ukraine).

In the meantime, Ukraine is expected to adopt a new Law of Ukraine on the Constitutional Court which otherwise will give the definition of official interpretation of the Constitution and laws of Ukraine, and also introduce the institute of constitutional complaint.

A member of the CCJE from Ukraine will inform working group of appropriate changes immediately.

Also, there is a number of non-procedural ways of securing a unified court practice.

**methodological assistance and case law analysis:**

- the appeal court and the court of cassation are entrusted with issue of the case law analysis and reporting on its findings to the district courts and to the Supreme Court (Article 27 of the Law “On judicial system and status of judges”)

Furthermore, the Supreme Court examines court practice and makes case law analysis. Special mention should be made that the summarizing of court practice on the application of imperfect legislation by courts and adopting of the opinions and recommendations by the highest courts establishes the universal approach to considering cases on the basis of such rules, provides a methodology to overcome the law-making errors.

3.4 Are there specialised courts in your country? Is there a hierarchy of specialised courts if such system exists? Is it possible to challenge final judgments of specialised courts

before superior judicial body (Supreme Court or court with a similar role). If yes, please explain in short.

In June 2016 significant amendments were introduced to the Constitution of Ukraine.

Reform of the Constitution of Ukraine retained the building of the judicial system on the principle of specialization.

According to Article 18 of the Law of Ukraine "On judicial system and status of judges" Ukrainian courts of law are specializing in civil, criminal, commercial, administrative cases and cases of administrative offenses.

Courts of first instance are: district courts of general jurisdiction, district commercial courts and district administrative courts.

District courts of general jurisdiction consider civil, criminal, administrative cases and cases of administrative offenses in the circumstances and under the procedure established by law. District commercial courts consider cases arising from commercial relations as well as other cases ascribed to their jurisdiction. District administrative courts consider cases of administrative jurisdiction (administrative affairs).

There are courts of appeal with a view to reviewing judgements of district courts in Ukraine. Courts of appeal consider civil and criminal cases and cases on administrative offenses, commercial courts of appeal and administrative courts of appeal exist respectively.

District courts of general jurisdiction consider civil, criminal, administrative cases and cases of administrative offenses, in keeping with the principle of specialization of courts, could be reviewed only by courts of appeal solve civil, criminal cases and cases on administrative offenses. Decisions of district commercial courts are reviewed only by commercial courts of appeal. Decisions of district administrative courts can be viewed only administrative courts of appeal.

In Ukraine, according to the amendments to the Constitution of Ukraine and the Law of Ukraine "On judicial system and status of judges", the new Supreme Court is created. It consists of the Administrative Court of Cassation, Commercial Court of Cassation, Criminal Court of Cassation, Civil Court of Cassation and the Grand Chamber of the Supreme Court.

Decisions of district courts of general jurisdiction after its review at the court of appeal could be challenged in the Criminal Court of Cassation or Civil Court of Cassation.

Judgments of district commercial courts after its review at the court of appeal could be challenged in the Commercial Court of Cassation. And judgments of district administrative courts, as a consequence, can be appealed before Administrative Court of Cassation after its review in appeal proceedings.

The principle of specialization of courts in Ukraine has been implemented in such a way.

In addition, in accordance with Article 31 of the Law of Ukraine " On judicial system and status of judges" (but have not established yet) two high specialized courts shall be established: the High Court on Intellectual Property and the High Anti-Corruption Court, which act as courts of first instance on different categories of cases.

It is proposed that the High Anti-Corruption Court shall consider cases of corruption offenses which fall under jurisdiction of National Anti-Corruption Bureau of

Ukraine, in particular cases on corruption allegations against judges, prosecutors, MP's, senior officials of the executive authorities. The High Court on Intellectual property cases should consider violations of intellectual property.

By this time in Ukraine there is no adopted legislation which regulated through which court by what procedure the decisions of the High Court on Intellectual property and the High Anti-Corruption Court will be challenged.

Besides, the Grand Chamber of the Supreme Court is a permanent collegial body of the Supreme Court, which in the cases determined by law acts as an appeal court to ensure uniform application of the law courts of cassation.

Legislation regulating procedural grounds and order of the Grand Chamber of the Supreme Court is not adopted yet.

CCJE representative shall immediately report to the CCJE on this issue once the Parliament of Ukraine adopts legislation, which regulates this issue

3.5 Is the unification of case law (mentioned in the question 3.3) determined by the Constitution, laws, by-laws or by long lasting practice?

As noted in response to question 3.1 there is no officially existing case law in Ukraine.

Ukrainian legislation uses definitions "uniform application of the law", "ensure uniform application of courts of cassation," "ensure the uniform application of the law courts of different specializations." Article 36 of the Law of Ukraine "On the Judicial System and Status of Judges" provides that the Supreme Court is the highest court in the judicial system of Ukraine, which ensures consistency and unity of court practice in the order and manner established by procedural law. A Grand Chamber of the Supreme Court in the cases determined by law acts as an appeal court to ensure uniform application of the law courts of cassation.

President of the Supreme Court of Ukraine assessing the validity of decisions of the Supreme Court of Ukraine notes that they contain legal conclusions that specify the rules of law, specifying their content, It is an example of how the courts and other public authorities have to apply a particular provision of law. Therefore, only that court practices which contain mentioned features, in particular, legal conclusions and summary of court practice, should be in use. This is what can be called as unification of court practice of Ukraine. They should be obviously the rule and compared with other forms of practice.

The content of the legal conclusions of the Supreme Court based on the systematization of certain categories of cases and legal relations. Scope of court practice is the result of generalization and analysis of judicial statistics, identification of trends in its development, gaps in the legal regulation of the nature of miscarriage of justice and ways to avoid it .

The legislation of Ukraine does not provide hierarchical relationship (i.e. subordination) the legal conclusions of the Supreme Court and judicial practice.

3.6 Are judgments of such courts (mentioned in the question 3.3) obligatory to follow for:

- judges/panels of that court;
- all judges in the country;

The court shall be required to take account of the findings of the Supreme Court of Ukraine regarding the application of the law set down in its decisions. The court is entitled to waive legal opinion of the Supreme Court, only through the proving of its position. (Paragraph 6 of article 13 of the Law "On judicial system and status of judges").

- are there any consequences for judges if they do not follow case law of higher court?

Due to the fact that judgement which does not take into account a legal position of the Supreme Court on different issues, could be appealed. Regarding this fact, each judge, that knows such legal position can not to take it into account. However, it is possible that judge, for example, of the court of first instance, makes a judgement that is contradicting to the opinion of the Supreme Court, and risking this judgement to be cancelled. This situation does not contradict the current legislation.

The provisions of chapter 6 of article 13 of the Law of Ukraine "On the Judicial System and Status of Judges" can be interpreted only as a call for courts to consider the legal position of the Supreme Court and it is meant to motivate their rejection, and no more. This call is not supported by any measures of liability stated in the Article 106 of the Law. There is no specific kind of disciplinary offenses because of non-conformity the legal position of the Supreme Court. The Law provides for responsibility for unjustified judgment.

- 3.7 If judgments of such courts are not obligatory, what kind of practical effect they may have?

We believe that judgements of the Supreme Court can provide equivalent of cogent precedents.

According to the President of the Supreme Court of Ukraine, Yaroslav Romaniuk, judgements of higher courts provide the legal conclusions which specify the rules of law, clarifying their content, And set an example of how courts and other public authorities should apply specific provisions of law "

- 3.8 What are the procedures, if any, applied when there are contradictions or deviations in the case law between different courts or different levels within the same court including superior courts (appealing, rendering legal opinions of court departments, preliminary rulings in abstracto etc.)?

The case law analysis is applied for identifying contradictions and deviations in court practice in one court or the various courts in Ukrainian legislation.

The case law analysis means clarification of court practice of courts of general jurisdiction as a result of its study and analysis of court statistics, identifying trends in its development, gaps in the legal regulation of the nature of miscarriage of justice and ways to avoid it.

The cassation review of judgements by the Grand Chamber of the Supreme Court with the adoption of the position on the application of the law is the other

procedure that is used to overcome the unequal application of law by courts for similar public relations.

- 3.9 Either in the case when the case law has binding legal effect, or in the case when it is not binding but otherwise has some impact, in which, if any, situations would it be regarded as permissible or maybe even necessary to depart from the case law?

In some cases, judges are forced to deviate from the constant court practice, especially when it comes to protecting fundamental rights and freedoms in the political crisis (The Orange Revolution, Revolution of Dignity).

Moreover, in circumstances where the parliament, president, government attempt to abolish or restrict fundamental human rights or neglect fundamental constitutional principles in its activities, the Court must protect democracy, judicial activism in this sense on the extended (law-making) interpretation of constitutional provisions. Thus, goes beyond the literal understanding of the constitutional text is justified and necessary, because it can not be allowed to let democracy destroy itself.

- 3.10 What is the role of the Supreme Court or any other highest court in your country in establishing uniformity of application of law? Please explain how it is possible to access the Supreme Court and are there any discretionary powers in granting right to hear the case, and what would be the criteria for such possibility (filtering criteria)?

Today, the position of the Supreme Court of Ukraine, adopted as a result of considering applications for review of court decisions delivered by courts of cassation with ununiform application of same provisions, shall be binding for all power entities which apply the relevant provision of the law in their processes, as well as for all courts in Ukraine. Courts are required to bring their judicial practice into line with the Supreme Court of Ukraine (paragraph 1, Article 458 of the Criminal Code of Ukraine).

The opinion set out in the judgments of the Supreme Court of Ukraine belongs to qualify as the application of the law, which is binding, but not creating new law as binding rules of conduct.

Regarding access to the Supreme Court.

It provides the right of direct appeal to the Supreme Court the complainant, after its review in cassation, at the moment. Current judicial legislation determines the composition and structure of the Supreme Court. Thus, the Supreme Court will cease to be uniform and will not be divided into the chambers, how it was before and exists today, but into separate courts. It will be only one chamber – the Grand Chamber of the Supreme Court. But other divisions of the Supreme Court become the Administrative Court of Cassation, Commercial Court of Cassation, Criminal Court of Cassation and Civil Court of Cassation. According to the specialization of judges. Obviously, the Cassation Courts exercise the powers allocated today high specialized courts, and the Grand Chamber will carry out exclusive authority for all legal specializations.

However, before the adoption of appropriate amendments to the procedural legislation of Ukraine, the issue of discretionary powers of judges of the Supreme Court on the right to trial, and possible filter criteria of cases remain unresolved and not clear.

In addition, from 1 January 2017 legislator restricted the right to appeal in the interest of the person to the Supreme Court and courts of cassation, it will be access only for lawyers.

3.11 How is the case law of the European Court of Human Rights and other supranational courts or quasi-judicial bodies ensured and applied at national level, and how such case law affects the unification of national case law in your country?

European Convention on Human Rights (hereinafter - ECtHR or Convention) and its Protocols are part of the national legislation of Ukraine, according to Article 9 of the Constitution of Ukraine as an international treaty that is in force and agreed to be binding by the Parliament of Ukraine. Ratification of the Convention was held under the Law of Ukraine № 475/97-врР of July 17, 1997; The Convention came into force for Ukraine on September 11, 1997.

By ratifying the Convention and its Protocols, first of all the government committed to ensure to everyone within their jurisdiction the rights and freedoms defined in the Convention and these protocols. Paragraph 1 of the First part of the Law of Ukraine № 475/97-вр of July 17, 1997, which was the base of ratification of the Convention and separate Protocols, stated that "Ukraine fully recognizes on its territory [...] on the recognition of duty' compulsory and without special agreement the jurisdiction of the European court of human rights in all matters concerning the interpretation and application of the Convention".

Such legal recognition of the compulsory jurisdiction of the ECtHR in all matters concerning the interpretation and application of the Convention makes studying ECtHR case law and the application of national legislation based on the position of the ECtHR, because in the decisions of the ECtHR disclosed content of most provisions of the Convention.

In addition, Article 17 of the Law of Ukraine № 3477-IV «On enforcement and application of the European Court of Human Rights" (as subsequently amended) provides for the application of the Convention and the ECtHR as a source of law, and Article 18 of this Law determines the order of reference to the Convention and the practice of the Court. It should be noted that we are talking about the "case-law" within the meaning disclosed in Article 1 of this law, that practice ECtHR and the European Commission of Human Rights, not only of the decision on Ukraine. It is important to remember that the Law of Ukraine № 3477-IV no provisions that would prohibit the use ECHR decision or ruling rendered on other countries. So use this guide decisions regarding Ukraine caused solely by considerations of affordability and convenience is such decisions to readers, if necessary appeal to the full text (not just excerpts) cited decisions may experience difficulties because of insufficient knowledge of the official languages of the Council Europe. In the event that the Court finds a violation of the applicant's rights on the part of the respondent State, such a state must not only take individual measures (for example, pay just satisfaction or to review the case in court), but in many cases, take action general nature.

According to Article 13 of the Law of Ukraine "On enforcement and application of the European Court of Human Rights," general measures taken to address specified in the judgment systemic problem and its root causes - the underlying systemic problems that underlie found by the Court violation, and also eliminating the reasons for

submission to the Court applications against Ukraine caused a problem that has already been considered by the Court.

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General measures in particular are:

- Amendment of current legislation and practice;
- Amendment of administrative practices;
- legal review of draft and provide training on issues of the Convention and the Court practice for prosecutors, lawyers, police, immigration staff and other categories of staff whose professional activity is connected with law enforcement and restriction of person's liberty, and other events.

3.12 In which way the court case law, including above-mentioned international case law, is assembled, published and made otherwise accessible for:

- judges;
- other legal professionals;
- general public.

Texts of ECHR decisions are available in the database HUDOC, judgments concerning Ukraine also can be found on the official site of the Ministry of Justice of Ukraine. The decision in cases against Ukraine are published in the "Official Journal of Ukraine" and other official and unofficial publications.

The news about the decisions of the ECHR and educational materials can be found on the Ukrainian site of the European Programme for Human Rights Education for Legal Professionals.

In addition, on the web-site of the Supreme Court, in the section "Decisions of the European Court of Human Rights" and on the web-sites of most Ukrainian courts overview of recent decisions of the ECHR is accessible.

3.13 Is the access to such database free of charge?

Access to these databases is free.

3.14 Are courts the only source of information or there are more providers (on a commercial basis or through free access)? If the latter is the case, are such providers independent entities, and are they operating on commercial or not commercial basis?

According to the Law of Ukraine "On access to court decisions" on December 22, 2005 everyone has the opportunity to get acquainted with the decisions (non-profit basis) through the Unified state register of court decisions on the Internet. The Register is the official web portal of the judiciary at: <http://reyestr.court.gov.ua>



In addition, there are separate databases (commercial) of the document. For example: League: Law, NAU Judgments and NAU precedent, and so on. The database used in these software products is determined by the supply contract product.

- 3.15 What are the challenges for the unification of the case law in your country? Does the quality of national legislation pose a challenge – for example the need in modern society to use relatively broad definitions and legal concepts?

The peculiarity of the Ukrainian judicial system is that the Supreme Court is entrusted not only to avoid miscarriage of justice. According to the President of the Supreme Court Y. Romaniuk Ukraine has no mechanisms of preventive character that would jurisprudence directed forward, removing any possible errors in the application of the law to prevent their unequal application.

The legislator has empowered the Supreme Court to hear cases due to uniform application of the same substantive law in cases with similar legal relationship. However, in practice, it is common problem of unequal application of the same substantive law, and is application in the same relationship of different substantive law. Formally, it is can not be the ground of appeal to the Supreme Court.

The demarcation of jurisdiction is the painful issue.

The importance of the unity of judicial practice could not be underestimating.

Consideration of such cases should happen the same way that, watching jurisprudence, a person could predict the outcome of his case. We believe there are several reasons for the importance of the unity of judicial practice. This ensures the equality of people and contributes to the stability of the judiciary. Stability means legal certainty for individuals seeking protection of their rights in court. Inconsistent jurisprudence destroys the credibility of the judiciary and does not contribute to public confidence in it. In addition, due to the consistent jurisprudence can reduce the load on judges. Citizens will observe how to solve certain categories of cases, and guided judicial practice, can decide not to go to court. Also, if citizen could predict what decision will make the higher court in certain circumstances, consistency of jurisprudence reduces will reduce the number of appeals.

In addition, one of the actual mechanisms of unification of judicial practice, discussing by judges and legislators in Ukraine, is the introduction of reference for a preliminary ruling by analogy to the Law of the European Union.

Introducing of the procedure of applying to the Supreme Court with the reference for a preliminary ruling for adoption opinion on certain legal questions, according to the judges, will respond to the situation in time, while the regulation is relevant and the problems it has generated. It also will ensure stability and prevent a judgment different understanding of the interpretation, application of the law. The issue of application of the law can be addressed by with the Institute of reference for a preliminary ruling without the appeal to the Supreme Court on the local level of justice.

- 3.16 Any other point you wish to raise.

It is the issue of existing of the Institute of constitutional complaint as a means (mechanism) for ensuring the uniform application of the law.