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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?

Yes, there is a concept of uniform application of law in Bulgaria. It is formal, established at the level of Constitution and legislation /Judicial System Act, Codes of Procedure, Normative Acts Law, Rules on Organisation and Procedure of the National Assembly/.

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 -yes;
- uniform practices by the executive institutions and law enforcement bodies-yes
- uniform case law developed by courts - yes.

Please explain each point and indicate the relative importance of each point (see answer 2.1., 3.2.)

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?

Supreme Court of Cassation as well as Supreme Administrative Court issue Interpretative Decisions by which the contradictory jurisprudence on certain issues is unified. They are obligatory for all courts/the organs of the executive, the self-government organs and all organs, issuing administrative acts - and the issues interpreted therein shall be solved according to that interpretation in all further cases. Besides addressing an issue in an appellate court judgement (in civil and commercial cases) - in contradiction with the obligatory practice of the Supreme Court of Cassation, addressed by the courts in a conflicting manner or relevant to the accurate application of the law, as well as to the progress of law - is a ground for admitting cassation, rehearing the case and delivering a judgement - containing, *inter alia*, an interpretative part – obligatory case law unifying the practice. The Interpretative Decisions and the obligatory case law are accessible to all. This makes the public aware of how certain matters shall be solved in court and, respectively, the court practice predictable and uniform. On the other hand the filtering criteria allow the Supreme Court of Cassation to focus on its main task – ensuring uniform application of law, and contributes to complying with the Article 6 ECHR reasonable time requirement – lessening the overall length of the proceedings.

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?

Yes. There are formal requirements for ensuring the uniformity in the legislative process. The hierarchy of normative acts and the law making process are subject to regulation in Constitution, Normative Acts Law, Rules on Organisation and Procedure of the National Assembly.

According to Article 5 of Bulgarian Constitution normative act shall match the Constitution and other normative acts of higher rank; if a normative act of a lower rank contradicts a normative act of a higher rank, the courts shall apply the higher rank act. State

organs are obliged to inform the organ competent to repeal a normative act for any discrepancies with higher rank acts /Art.15 Normative Acts Law/.

On the other hand, the enactment of a draft is preceded by a legal research about its impact assessment and conformity with European Union Law, respectively European Convention on Human Rights and European Court of Human Rights' practice and by a discussion of the draft in the National Assembly's Legal Commission. A normative act draft to which no motives, respectively no impact assessment or analysis on conformity with the abovementioned acts are applied, shall not be discussed by the competent authority.

2.2 Is there a hierarchy of laws?

Yes – Constitution, Laws, By-Laws

The Constitution shall be the supreme law, and no other law may be in conflict therewith (Art.5.1. Constitution); the normative act must comply with the Constitution and the other superior normative acts; should a Decree, Rules, Ordinance or Instruction contradict any superior normative act, the justice administering authorities shall apply the superior normative act (Art.15 Normative Acts 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?

There are special provisions in the Constitution and the Normative Acts Law on ensuring the conformity of national laws to treaties and other international instruments and the direct effect of the latter (Art.5.4. Constitution, Art.15 Normative Acts Law).

Any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for Republic of Bulgaria, shall be part of the domestic law. Any such treaty shall take priority over any conflicting standards of domestic legislation (Art.5.4.).

Should a normative act contradict an European Union Regulation, the Regulation shall be applied (Art.15.2.Normative Acts Law).

Each normative act draft shall be submitted for discussion and approval by the competent authority only if it is accompanied by, *inter alia*, an analysis regarding the compatibility with the European Union law. A draft of a law or a code, subject to consideration by the Council of Ministers, shall be accompanied by a check for compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights, carried out by the Ministry of Justice. A normative act draft which lacks the abovementioned analysis shall not be discussed by the competent authority (Art.28 Normative Acts Law).

Besides the Constitutional Court shall pronounce on the consistency of any international treaties concluded by Republic of Bulgaria with the Constitution prior to the ratification of any such treaties, as well as on the consistency of any domestic laws with the universally recognized standards of international law and with the international treaties whereto Bulgaria is a party (Art.149.4. Constitution). Any act which has been declared unconstitutional shall cease to apply as from the effective date of the decision.

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

See answer 2.3.

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?

Law making process is carried out by the legislative – through enactment of laws, and by the executive - through by-laws adopted in terms of statutory delegation.

The legislative has a dominant role in this process. The right to initiate legislation shall vest in every National Representative and in the Council of Ministers /the State Budget Bill shall be drafted and presented by the Council of Ministers/. The bill shall be submitted only if it is accompanied by motives, including impact assessment and analysis regarding the compatibility with the European Union law (see answer 2.3.). Following submission it shall be distributed among the Standing Committees and assigned Rapporteur Committee. Standing Committees shall consider the bill and submit a “motivated” report to the President of the National Assembly and the Chairperson of the main Rapporteur Committee. The report of the latter (as well as the bill and the motives thereto) shall be made available to the Members of Parliament not later than 24 hours before the beginning of the sitting at which the bill shall be considered. Members of Parliament may submit written motions for amending the bill that has been adopted at first reading. Bills shall be debated and passed by two votes /readings/ taken at separate sittings; by exception, the National Assembly may resolve that both votes be taken at a single sitting. The adopted act shall be sent to the President of the Republic who may return it for further consideration or sign a decree for promulgation. The act shall come into force three days after promulgation, unless another term is specified in it.

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?

By-laws adopted by executive power organs in terms of statutory delegation are source of law and legally binding for courts. However by-laws may be contested before administrative court without limits in the time (Art.185-Art.196 Code of Administrative Procedure). The court shall declare the invalidity of the contested by-law or a part of it, shall cancel it entirely or partially or shall reject the contestation. The court decision shall have an effect regarding everybody.

The pending contestation proceedings before administrative court do not prevent a civil court, finding inconsistency of a by-law with a higher rank law while solving a case, to apply the higher rank normative act – thus eliminating the inconsistency within its jurisdiction in the concrete case, regardless of the pending procedure before the administrative court.

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

Yes.

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?

Interpretative Decisions and judgments, containing interpretative part - forming the so called obligatory practice of the Supreme Courts – have binding effect to courts and state organs (see answer 3.3.). However, it is not a source of law as the national legislation.

3.1 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?

The practice of the Supreme Courts is important for judges both at formal and informal level. The so called obligatory practice is binding; the other case law, although not binding, is a landmark of how the Supreme Courts interpret and apply the law, respectively what might be the result upon appeal.

- 3.2 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?

Yes. The Supreme Court of Cassation and the Supreme Administrative Court have respective functions to unify civil, penal and administrative case law. According to Bulgarian Constitution (Art.124-125) the Supreme Court of Cassation and the Supreme Administrative Court shall exercise supreme judicial supervision as to the accurate and equal application of the laws by all courts/in administrative justice.

The uniform application of law is provided through the following mechanisms: issuing Interpretative Decisions, obligatory case law, admitting to cassation and rehearing cases.

Interpretive Decisions

The Interpretative Decision shall be adopted in presence of contradictory or erroneous jurisprudence or application of the law.

They are adopted /depending on the matter solved/ by the General Assembly of the Criminal, the Civil or the Commercial college of the Supreme Court of Cassation; the Civil and the Commercial colleges of the Supreme Court of Cassation; the Colleges of the Supreme Administrative Court; the colleges of the Supreme Court of Cassation and the Supreme Administrative Court.

The adoption of an Interpretative Decision may be requested by the Chairperson of the Supreme Court of Cassation, the Chairperson of the Supreme Administrative Court, the Prosecutor General, the Minister of Justice, the Ombudsman or the Chairperson of the Supreme Bar Council. A Supreme Court of Cassation panel may also propose rendering an Interpretative Decision - when issues have been addressed in a conflicting manner by Supreme Court of Cassation panels. The interpretative decisions contain interpretation of law which is binding - for all courts, the organs of the executive, the self-government organs, all organs, issuing administrative acts - and shall be followed *ex nunc*.

Obligatory practice, admitting to cassation and rehearing cases

While solving cases, the Supreme Court of Cassation and the Supreme Administrative Court shall also unify the jurisprudence and contribute to progress of law through interpretation of normative acts and updating their practice. These duties directly deriving from their Constitutional competence to carry out supreme court supervision for accurate and uniform appliance of law by all courts are entrusted with the aim of establishing consistent court practice, in conformity with the actual laws and the changing social and economic situation in the country.

Addressing an issue in an appellate court judgement (in civil and commercial cases) in contradiction with the obligatory practice of the Supreme Court of Cassation, addressed by the courts in a conflicting manner or relevant to the accurate application of the law, as well as to the progress of law. is a ground for admitting cassation. In these cases, if cassation is admitted, the Supreme Court of Cassation, following a hearing, delivers a judgment, which always contains two parts. The first part is the interpretative part – an answer to the issue abovementioned – which contains binding practice and shall be followed by the lower courts hereinafter. The second part is on the substance of the case - in which the court solves the dispute according to the circumstances of the case on the basis of the said answer/ respectively on the basis of the accurate application of law, which has been specified in the interpretive part (the Supreme Court of Cassation shall point out explicitly which case law is considered correct and which incorrect).

In administrative and penal cases cassation is not conditioned by such filtering criteria. Nevertheless rehearing the case and delivering a judgment in these cases has the same task - to establish consistent practice and ensure uniformity of law.

- 3.3 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.

Yes - there are specialized courts and hierarchy of specialized courts.

There are military courts (3) and a military court of appeal and a specialized penal court and a specialized penal court of appeal. The judgments of the military court of appeal and of the specialized penal court of appeal can be challenged before superior judicial body - Supreme Court of Cassation.

There are also administrative courts (28) and their judgments can be challenged before Supreme Administrative Court.

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

Yes. The unification of case law is determined by Constitution and laws (Judicial System Act, Codes of Procedure, Normative Acts Law).

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

- judges/panels of that court – The Interpretive Decisions of Supreme Court of Cassation/Supreme Administrative Court are obligatory for all judges – including for judges/panels of the respective Supreme Courts. Obligatory Supreme Court of Cassation case law, pronounced in case cassation is admitted (in civil and commercial cases), is not binding for other Supreme Court of Cassation panels - in case of contradicting Supreme Court of Cassation panels' judgements, the procedure for issuing Interpretative Decision shall be initiated and thus the practice shall be unified;
- all judges in the country - yes;
- are there any consequences for judges if they do not follow case law of higher court? – no, but the judgment shall be quashed upon appeal – and the number of judgments quashed shall be taken into consideration in the process of periodical evaluation of judges' performance

3.6 If judgments of such courts are not obligatory, what kind of practical effect they may have? (see answer 3.6.)

3.7 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.)? – appealing; admitting cassation upon appeal, rehearing cases and delivering obligatory Supreme Court of Cassation case law for unification of practice/rehearing cases by Supreme Administrative Court upon appeal; delivering Interpretative Decisions of Supreme Court of Cassation, Supreme Administrative Court, Supreme Court of Cassation and Supreme Administrative Court (see answer 3.3.)

3.8 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?

It would be regarded as permissible or even necessary to depart from the case law if it has to be updated with regard to changes in legislation, in social and economic situation in the country, ratification of international treaties, European Union legislation, practice of the European Court of Human Rights and European Court of Justice

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)?

According to Bulgarian Constitution (Art.124-125) the Supreme Court of Cassation and the Supreme Administrative Court shall exercise supreme judicial supervision as to the accurate and equal application of the laws by all courts/in administrative justice. The mechanisms for ensuring uniformity (Interpretative Decisions, obligatory case law, admitting to cassation and rehearing cases), as well as the filtering criteria regarding civil and commercial cases (details below), are described in answer 3.3.

Cassation appealability before Supreme Court of Cassation – in civil and commercial cases - shall not apply to all appellate court judgements. Some of them are excluded by law because of small material interest or the type of the dispute. The others can be admitted to cassation only if they match the filtering criteria established by law: The grounds for admitting cassation are three: addressing an issue by an appellate court in conflict with the obligatory practice of the Supreme Court of Cassation, addressing an issue which has been solved by the courts in a conflicting manner; addressing an issue which is relevant to the accurate application of the law as well as to the progress of law. Cassation proceedings have two phases. First phase – in which, by way of reasoned decision, cassation is admitted or not (depending on Supreme Court's understanding whether the filtering criteria are met); in case cassation is not admitted, the non-admittance decision is the final act and there is no rehearing of the case. Second phase – in case of admittance decision - there is rehearing of the case and delivering of final judgment – containing, *inter alia*, interpretation part (answer to the question, which had been addressed by the appellate court in conflict with the obligatory practice of the Supreme Court of Cassation, which had been solved by the courts in a conflicting manner, which had been relevant to the accurate application of the law/progress of law) – obligatory for lower courts. All parties seeking cassation pay equal tax for delivering an admitting to cassation decision (15 euro) and thereafter, depending on the result of it, those, who are admitted, pay additional tax for rehearing the case.

3.9 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?

The enactment of drafts is preceded by legal research about their conformity with European Union Law, respectively European Convention on Human Rights and European Court of Human Rights' practice. A normative act draft to which no analysis on conformity with the abovementioned acts is applied, shall not be discussed by the competent authority. In case of ECHR/ECJ judgments finding violations of protected rights, the State shall undertake measures to execute the final judgments, including, *inter alia*, amendments of the legislation (ex. following a pilot-judgment procedure compensation mechanism for excessive length of proceedings had been provided - through amendments of Judicial System Act and The State and Municipalities Liability for Damage Act).

On the other hand the courts shall apply directly European Convention on Human Rights in the light it is interpreted in the case law of the ECHR, thus ensuring the Court's case law appliance at national level - even if legislative changes had not been yet undertaken. The unification of nation case law to that respect /with regard to European Court of Human Rights and other supranational courts or quasi-judicial bodies case law/ is again through the case law of the Supreme Court of Cassation and the Supreme Administrative Court.

3.10 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.

All courts have on their internet sites the judgements delivered and the access to them is free of charge. The Supreme Court of Cassation/Supreme Administrative Court internet sites have searching machines with different criteria/classifications, both of case law and Interpretive Decisions. The judges dispose of information from an internal system and legal systems, providing updated legislation and practice; access to internet. There are also different case law periodicals. The Supreme Court of Cassation and the Supreme Administrative Court have very rich libraries; libraries are available in other courts too.

The Ministry of Justice has special sections on its official internet site where judgements against Bulgaria and other countries are available in Bulgarian free of charge; it also publishes there periodical with recent ECHR judgements. National Institute of Justice proposes such translations as well as Human Rights Internet Portal. It publishes digest of decisions of international tribunals and national courts. European Courts' case law is available free of charge on Supreme Judicial Council's internet site.

3.11 Is the access to such database free of charge?

The access to the database of all courts, Ministry of justice, National Institute of Justice, Supreme Judicial Council is free of charge.

3.12 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?

Yes, there are other providers, independent entities; some of them operate on commercial, others – on non-commercial database.

3.13 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 national legislation is changing frequently, the laws often contain ambiguous or imperfect wording/regulation; the usage of relatively broad definitions and legal concepts – which is sometimes needed and inevitable in order to cover various hypotheses - leaves room for different interpretations; the broad European Union legislation and European Courts' case law is also a challenge.

3.14 Any other point you wish to raise.