

CCJE-BU(2017)1

Ljubljana, 31 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”

ANSWERS - SLOVENIA

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?

Although the concept of the uniform application of the law is not formally established in the Constitution or national legislation in a sense of a principle or a formal definition, it may be concluded that the concept is inherent in our legal system, and it is recognizable through various constitutional principles (rule of law, principle of legality, conformity of legal acts, equality before the law, right to a fair trial). The aforementioned principles gained a crucial status through the decisions of the Constitutional Court, which had a significant impact on the actions of the legislative, executive and judicial power, directing them towards the concept of the uniform application of the law. Such concept is also incorporated into legislative practices and adjudication process (requirement of the legislative process to adopt consistent and coherent legislation, duty of the Supreme Court to ensure the uniform application of the law).

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.

The legislator, the executive power and the judiciary, all have a significant role in the development of law and ensuring its uniformity, coherence and overall integrity of the legal system. It is understood under the concept of the uniform application of the law that there is an interdependence between the legislation, executive power's practices and case law developed by courts. Formal legal sources have to be consistent and coherent as early as in the moment of their adoption into the legal system, and their main duty is to treat the legal addressees equally and in a predictable way. The duty of institutions of the executive power and finally the duty of courts is to strive for the equal and predictable application of formal legal sources in practice. Besides, the institutions that use formal legal sources in practice (including courts) should give feedback to the legislator once the law has come into force and practical experience has been obtained. Thus, constant interaction of all the three branches and other legal players is needed in order to establish the uniform application of the law.

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?

The rationale of the uniform application of the law is the consistency, predictability, uniformity and stability of law, and most of all, equality of all persons before the law. Every authority (legislative, executive and judicial branch) should strive for the aforementioned goals.

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?

There are safeguards aimed at ensuring the coherence of all legal acts adopted by the National Assembly. The ensuring of conformity of every draft law starts at the Government level (i.e. within the administration of the competent Ministry that is preparing the draft law, considering Ministries being the usual and the most important proposer of legislation). The Ministry responsible for preparing legislative proposals examines in advance the potential impacts of the proposals, also considering the compatibility and conformity of the draft legislation with the legal system as a whole.

According to Article 10 of the Rules of Procedure of the Government of the Republic of Slovenia proposed general acts must always first be coordinated with the Ministry of Finance and the Government Office for Legislation, which issues a written opinion regarding the draft law. One of the main tasks of the Government Office for Legislation is the examination of law proposals, submitted by the Government to the National Assembly, in terms of conformity with the Constitution, the national legal system and the EU law.

In the next step of the legislative procedure, the draft law is also reviewed by the Legislative and Legal Service of the National Assembly which issues opinions on the conformity of draft laws, other acts and amendments with the Constitution and the legal system.

2.2 Is there a hierarchy of laws?

The Constitution is the highest legal act in the hierarchy of legal acts in the Republic of Slovenia. All laws should be in conformity with the Constitution and with generally accepted principles of international law and valid treaties ratified by the National Assembly. There are no different types of laws, hierarchically no law is superior to other laws. In the event of a conflict between laws, the well established principles of legal interpretation should apply.

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?

The Constitution provides (Article 3 a, paragraph 3) that legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights must be applied in Slovenia in accordance with the legal regulation of these organisations.

Regarding the EU legislation, it is directly applicable in the Republic of Slovenia, therefore no ratification or publication in the Official Gazette is necessary. Even though EU regulations are directly applicable legal sources, in certain areas further implementation, (which is left to national legislation, is required. Unfortunately, national legislation often stays either fragmented or even absent in this respect. The EU civil procedure regulations, where the lack of national legislation is a major obstacle for their effective application in Slovenia, are a good example of such kind. Regarding EU directives, which need to be implemented into Slovenia's legal system, it has to be stressed that this is often done uncritically and without taking into consideration the specifics of national legislation.

In the cases where national law contradicts EU law, national courts must follow EU law, without having to wait for the annulment of national law by the Constitutional court.

International treaties, of which the Republic of Slovenia is a signatory, enter into force once they have been ratified in a specific procedure by the National Assembly.

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

The Constitutional Court decides on the conformity of laws with the Constitution. In cases of conflicts between national laws it is the task of the courts to determine (applying principles of interpretation that are generally accepted in legal theory and practice) which (national) law should be applied in a particular case. Nevertheless, the Constitutional Court has competence to assess conformity of conflicting laws if the constitutional principle of the rule of law is violated due to such laws.

The Constitutional Court also decides on the conformity of laws and other regulations with ratified treaties and general principles of international law.

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?

Laws are adopted in the legislative procedure which consists of multiple stages (from discussing a draft law to tabling amendments (modifications and supplements), voting on the law, promulgating the law, or otherwise concluding the legislative procedure). The legislative procedure is governed by the Constitution and the Rules of Procedure of the National Assembly. The adoption of law can be proposed to the National Assembly by the

government, individual deputies, by the National Council and by five thousand voters. The proposer of the law may propose that a preliminary reading be held within the competent working body. Following the preliminary reading, the working body adopts an opinion. The regular procedure in the National Assembly consists of three readings of the proposed law. The first reading is intended for the presentation of the draft law, the second reading of the draft law involves the debate and voting on individual articles or parts of the draft law within the working body or at a session of the National Assembly; it also includes modifications of and supplements to the draft law and the third reading involves the debate and voting on the draft law in its entirety. It is held at the session of the National Assembly. The discussion of draft laws by shortened or urgent procedure is only possible under clearly defined conditions. The National Council may veto an adopted law, and the National Assembly can override such a veto by a majority of all deputies.

The legislative power has a dominant role in this process, but in practice the executive power's role in the process is equally or even more important (since the government is the proposer of the law in the majority of cases)

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?

Yes, acts of the executive power are a source of (under-statutory) law in Slovenia. However if a judge considers an act of the executive power to be contrary to the Constitution or the law, he or she may refuse to apply such act and apply the law instead (*exceptio illegalis*).

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

As it can be seen from the number of amendments to laws and new laws adopted each year, the legislation in Slovenia are (too) frequently amended, sometimes (under the excuse of necessity) even unreasonably fast and reckless, which leads to non-transparency and induces a feeling of confusion among professional users and among general public.

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?

Slovenia is an example of a continental law system in which the case law has traditionally not been recognized as a formal legal source. According to Article 125 of the Constitution, judges are independent in the performance of the judicial function and are bound only by the Constitution and laws, which means that the case law is not a binding (formal) legal source. The same follows from Article 11 of the Courts Act, which expressly states that "in applying the law the judge shall also be independent in relation to the court of higher instance, which has already expressed its legal opinion on the specific case".

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?

In Slovenia case law does not have a binding legal effect, but in practice it functions as a source of law and it is of remarkable importance for judges (especially case law of courts of second instance and even more so the Supreme Court), on formal and informal level. It can be argued, that based on the constitutional requirement of equality before the law, the court case law is gaining a similar importance as pertains to formal legal sources.

The argumentative authority of courts of second instance and the Supreme Court is one of the reasons why judges of courts of first instance apply the settled case law in adjudicating cases, and usually follow the decisions of courts of second instance and the Supreme Court. The judges of the courts of first instance are motivated to closely monitor developments in

the case law as this means that fewer of their judgements will be annulled or changed at the courts of higher instance.

There are features and evolutions in the Slovenian legislation, which reinforce the importance of case law, since the amendments of Administrative Dispute Act in 2007 and the reform of the civil procedure in 2008 have somehow introduced a kind of precedent character of Supreme Court decisions (see 3.8.).

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?

The Supreme Court, as the highest court in Slovenia, is responsible for ensuring the uniform case law in the country. It administers records (databases) on the case law of Slovenian courts and monitors the case law of international courts. It takes care for uniform case law and gives a final interpretation of the law as a guidance to lower courts.

The Supreme Court has a special Documentation Department, with the judge of the Supreme Court at the head of the department, which deals with general questions concerning harmonisation of jurisprudence. Lower courts can address questions regarding new legislation to the Documentation Department and they can also express interest to prepare a special seminar on certain questions or to include such questions in regular training programmes. Additionally, the Documentation Department organizes regular meetings with the judges of lower courts, which focus on substantial issues of judicial work.

On the Supreme Court level, a special instrument that serves the purpose to unify the case law, are principled legal opinions (on issues important for the uniform application of the law), which are adopted by the Plenary Session of the Supreme Court. The principled legal opinions have the nature of a normative individual legal acts whose scope goes beyond a specific case. They are binding on all panels of the Supreme Court and, only by force of their reasoning, on lower courts. For lower courts it is constitutionally acceptable to deviate from the adopted principled legal opinion if such deviation is supported by reasoning.

On vertical level, the uniform application of law is achieved primarily through the case law of the Supreme Court. For example, the amendment of the Civil procedure Act in 2008 introduced a system of leave to file a revision, according to which a departure from a settled case law is one of the admissibility criteria for the extraordinary legal remedy (revision). In the event that a court of second instance departs from the case law of the Supreme Court, the last word concerning the disputable legal question is reserved to the Supreme Court.

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

There are four specialized courts of first instance, competent to deal with individual and collective labour and social cases. Appeals against their decisions are heard by the High Labour and Social Court, which is a court of second instance. There is also the Administrative court which also has the position of court of second instance and deals with litigation concerning administrative matters.

Having said that, there is a single Supreme Court in Slovenia. It is possible to challenge final judgements of specialized courts before the Supreme Court. In most cases the grounds of appeal to the Supreme Court (defined as extraordinary legal remedies in our procedural laws) are limited to issues of substantive and procedural law. In administrative dispute, the Supreme Court also hears cases as the second instance when deciding on a complaint against a decision of first instance (first instance being the Administrative court which is

competent for appellate procedure with regard to the administrative procedure before the administrative authority).

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?

The law, in particular the Courts Act, entrusts the Supreme Court (in Article 109) with the task of taking care of the uniform case law. The Courts Act (Article 108) also states that the Supreme Court manages records on the case law of courts in Republic of Slovenia and monitors the case law of international courts. Furthermore, it stipulates (Article 110) that the Plenary Session of the Supreme Court shall (among other matters) adopt principled legal opinions on issues important for a uniform application of law.

As already mentioned the uniform application of law is also achieved through the case law of the Supreme Court when deciding in a revision procedure, which is one of the extraordinary legal remedies defined in Slovenian procedural laws (Civil Procedure Act, Administrative Disputes Act).

As to the constitutional dimension, see 3.7.

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

- judges/panels of that court;
- all judges in the country;
- are there any consequences for judges if they do not follow case law of higher court?

According to Article 110 of the Courts Act principled legal opinions of the Plenary Session of the Supreme Court are binding on all panels of the Supreme Court and may only be changed at a new Plenary Session. Although the principled legal opinions are legally binding only on panels of the Supreme Court, they also have a significant impact on lower courts, by force of their reasoning.

As already explained, the Supreme Court's judgements are not a binding (formal) source of law, and it is not obligatory for judges to follow them as the judges are (according to Article 11 of the Courts Act) independent in relation to the court of higher instance, which has already expressed its legal opinion on the specific case. Although no specific direct consequences affect judges if they do not follow the case law of the Supreme Court or courts of second instance, it should be noted that a large number of annulled or changed judgements of an individual judge, which deviates significantly from the average, may be one of the circumstances which may affect the assessment of work of the relevant judge.

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

As explained in question 3.2, the judges of courts of first instance usually follow the decisions of courts of second instance and the Supreme Court, which means that their judgements in practice function as a source of law.

It is also important to note that the settled case law also has a constitutional dimension since, according to the case law of the Constitutional Court, an arbitrary departure from a settled case law can be remedied through a constitutional complaint. There is however no absolute binding character of the case law and even the importance of legal precedent does not resolve a judge from his or her duty to always critically reconsider the settled case law and to strive for a correct interpretation and application 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.)?

As already mentioned, the Plenary session of the Supreme Court adopts principled legal opinions on issues important for the uniform application of laws. This instrument is usually used to harmonize varying views of different departments of the Supreme Court or courts of second instance on different issues of law. These opinions are binding on all the panels of the Supreme Court and can only be changed at the new Plenary Session of the Supreme Court.

In the event of deviations from the settled case law the Supreme Court has a chance (and a duty) to unify the case law in the extraordinary legal remedies procedure.

According to the provisions of Civil Procedure Act, the Supreme Court grants permission to file a revision on points of law, if the case raises a question of law of fundamental significance, or if the development of law or the preservation or achievement of the uniformity of case law requires a decision by the Supreme Court, such as when it concerns a question of law in which the decision of the court of second instance departs from the case law of the Supreme Court or when it concerns a question of law where there is no case law of the Supreme Court and the case law of the courts of second instance is not uniform or when it concerns a question of law on which the case law of the Supreme Court is not uniform (Article 367 a of the Civil Procedure Act).

According to the Article 83 of the Administrative Dispute Act the revision is admissible, if the case raises a question of law of fundamental significance or when it concerns a question of law in which the decision of the court of first instance departs from the case law of the Supreme Court or when it concerns a question of law in which the case law of the court of first instance is not uniform and the Supreme Court has not yet decided on this point.

Preliminary rulings *in abstracto* are non existing in our legislation at the moment, but *de lege ferenda* a similar procedure is foreseen in draft amendments of the Civil Procedure Act in the form of advisory opinions of the Supreme Court to the courts of second instance.

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?

A departure from the settled case law is constitutionally acceptable only if it provides appropriate reasoning for such departure. Constitutional Court held that the court must not arbitrarily depart from an established case law, which can nevertheless be done if it provides appropriate legal reasons for such departure.

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)?

As explained in question 3. 3., the Supreme Court as the highest court in the country is responsible for ensuring the uniform case law. The Plenary Session of the Supreme Court decides on principled legal opinions, which have a unifying function, although they are binding only on the panels of the Supreme Court.

Regarding the access to the Supreme Court, as a rule, the Supreme Court hears cases against rulings that become final at second instance courts. The grounds of appeal to the Supreme Court (defined as extraordinary legal remedies in our procedural laws) are limited to issues of substantive and procedural law. The exception is an appeal against a judgement of the court of second instance in criminal cases and against a judgement of the Administrative court. In administrative disputes, the Supreme Court also hears cases as the

second instance when deciding on a complaint against a decision of first instance (first instance being the Administrative court which is competent for appellate procedure with regard to the administrative procedure before the administrative authority).

In general, the access is somehow limited in all types of cases, although in criminal cases a request for the protection of legality can be filed against every final judicial decision, but the applicant may only refer to grounds he was not able to state in his appeal against the first instance ruling or the court of second instance did not examine these complaints.

The extraordinary legal remedy in civil law (the revision) is now (after the 2008 reform) a remedy that depends mainly on the discretion of the Supreme Court. This is a “two step” procedure, since the question of whether a leave to file a revision should be granted is separated from the examination of the merits of the revision. Revision is admissible, if a leave has been granted by the Supreme Court. The Supreme Court is supposed to give such permission, if the case raises a question of law of fundamental significance or if the development of law or the preservation of uniformity of case law requires a decision by the Supreme Court. The law gives some examples when revision should be granted such as when it concerns a question of law in which the decision of the appellate court departs from the case law of the Supreme Court or when it concerns a question of law where there is no case law of the Supreme Court and the case law of the appellate courts is not uniform or when it concerns a question of law on which the case law of the Supreme Court is not uniform. (Article 367.a of Civil Procedure Act.).

It has to be noted here that the criterion of the disputed amount has been retained, but only partially. If the disputed amount does not exceed 2000 EUR or if it concerns a matter where revision is excluded by law then revision is inadmissible *per se* (Article 367, paragraph 3, of Civil Procedure Act.) On the other hand, if the amount in dispute exceeds 40.000 EUR (200.000 EUR in commercial disputes), then revision is admissible already by law and it is not necessary to obtain a leave from the Supreme Court. (Article 367, paragraph 2, of Civil Procedure Act.)

In the administrative dispute procedure the revision is admissible, if the case raises a question of law of fundamental significance or when it concerns a question of law in which the decision of the court of first instance departs from the case law of the Supreme Court or when it concerns a question of law in which the case law of the court of first instance is not uniform and the Supreme Court has not yet decided on this point. (Article 83 of the Administrative Dispute Act). In contrast to the revision in the civil procedure, a revision in the administrative dispute procedure is a “one step” procedure.

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?

The Slovenian Constitutional Court closely monitors the European Court of Human Rights case law. In the argumentation of its decisions it often refers directly to the case law of the European Court of Human Rights.

In addition, according to the Criminal Procedure Act (Article 421, paragraph 4) if the European Court of Human Rights delivers a judgement where it finds that the final judicial decision is in violation of a human right and basic freedom, this is a reason to file a request for the protection of legality against the final judicial decision and also a reason to file request for the reopening of criminal proceedings (Article 416 of Criminal Procedure Act), both being extraordinary legal remedies in Slovenian criminal procedure. On the contrary, in civil procedure, where the European Court of Human Rights found a violation of the Convention on the Human Rights, this is not a reason to file any of the provided extraordinary legal remedies.

Regarding the application of EU law, national courts are not entirely free in their interpretation of EU law. If there is consistent case law of the ECJ, they have to follow it, if there is none and they are in doubt about the correct application of EU law, they can refer the

question on the validity and interpretation of EU law to the ECJ. While courts of lower instances are not obliged to do so, courts adjudicating at last instance have a duty to seek a preliminary ruling. Referring preliminary questions to the ECJ has become a regular practice of Slovenian courts (currently, the number of preliminary questions referred by the Slovenian courts is 15).

The administrative department of the Supreme Court applies EU law the most frequently, as the provisions of EU law are mainly of vertical or administrative nature regulating the relations between the state and the individual, but also the civil, the commercial and the social and labour departments of the Supreme Court use EU law regularly. The criminal department is the least burdened with EU matters - the main legal source used remains the European arrest and surrender procedure warrant.

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.

All of the decisions of the Supreme Court, courts of second instance, the Higher Labour and Social Court and the Administrative Court along with the principled legal opinions of the Plenary Session of the Supreme Court are published on the judiciary website (<https://www.sodnapraksa.si/>) and are accessible by a free of charge search engine. The names of parties are not given, as the judgements are redacted before publication.

All published decisions of the Constitutional Court of the Republic of Slovenia are available on the Constitutional Court's website. The text of majority and separate (dissenting and concurring) opinions is given in full and free-of-charge.

3.13 Is the access to such database free of charge?

As explained in previous answer, such database is free of charge.

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?

There are several commercial and non-commercial providers of legal information in Slovenia, within the public and private sector, but they all get the information on case law from the Supreme Court's database through a right to access and re-use of the public information.

A few commercial providers have developed a quality payable portals, which are important tools for legal professionals and also general public. All judges are subscribed to one of such informational (payable - commercial) web portal offering inter-connected legal contents (legislation, jurisprudence, professional articles, collection of legal publication, news, etc.).

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?

One of the future challenges is to make a clear distinction of competences between the Supreme Court as the highest court in Slovenia and the Constitutional Court as the highest body of the judicial power as far the protection of constitutionality, legality, human rights, and fundamental freedoms is concerned. This distinction is clearly stipulated in legislation, yet not always consistent in practice where the Constitutional Court sometimes tends to function as the court of fourth instance.

Regarding uniform application of law in a view of the settled case law, one can notice a significant progress. The Supreme Court has been putting efforts into building a stable case law to ensure predictability of judicial decisions. This goal has been largely accomplished in the field of civil law - the Supreme Court's decisions in the field of civil law are predominantly orientated to the public interest of ensuring the uniformity of case law and as such they have high level of predictability for the addressees of judicial decisions. On the other hand, challenges remain in the field of criminal law, where the Supreme Court's decisions still focus on the private interest of just and correct resolution of every individual case.

In summary, the role of the Supreme Court in unifying case law needs further to be strengthened. There are still certain fields of law where the law lacks consistency, mainly due to shortcomings of procedural legislation. Moreover, frequent changes of the legislation do not contribute to the unification of the case law and legal certainty.

3.16 Any other point you wish to raise.