

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?

The Constitution does not provide for the regulation of the uniform application of the law. Article 109 of the Constitution deals with the provision stating that when considering the cases judges shall only obey the law. According to the doctrine of the Constitutional Court precedents are considered to be sources of law – auctoritate rationis; reliance on precedents is a uniform (coherent, consistent) case law implementation condition together with the principle of justice provided in the Constitution. A uniform case law is formed by the courts of general competence as well as specialised courts. The Law on Courts establishes that the courts, while reaching decisions in different cases, are bound by their own rules regarding interpretation of the law, which were formulated in analogous or basically similar cases. In compliance with the provisions of the above mentioned law the Supreme Court of Lithuania forms a uniform case law of courts of general competence while interpreting and applying laws and other legal acts. The law also provides for the fact that the Supreme Administrative Court of Lithuania forms a uniform case law of administrative courts while interpreting and applying laws and other legal acts. Taking such regulation into consideration, we can state that the requirement regarding the uniform application of the law is provided by 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;

The legislative process is aimed at regulatory consistency. However, in Lithuania it is common to make a distinction between the legislative process and the application of the law. Therefore, the concept of the uniform application of the law is not usually related to regulatory consistency, its protection.

- uniform practices by the executive institutions and law enforcement bodies;

In some cases the uniform practices are formed by the executive institutions and law enforcement bodies. For example, the practice of labour law is formed by the State Labour Inspectorate, the practice of application of the law regarding taxes is formed by the State Tax Inspectorate, etc.

- uniform case law developed by courts.

The courts can be distinguished as the most significant institution which forms the practice of the uniform application of the law. The practice of the application of the law formed by the courts is not disputed by other institutions – states, other institutions and persons take into account the interpretations of the laws provided by the courts of general competence as well as specialised courts.

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

- 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 formation of the practice of the uniform application of the law is understood as a trial to reveal the true objectives of the law, explain the possible contradictions of the regulation, avoid the mistakes while applying them, adapt to the requirements of the times. Reliance on precedents is a uniform (coherent, consistent) case law implementation condition together with the principle of justice provided in the Constitution. In addition, the Constitutional Court stated that disregard to the maxim that the same (analogous) cases have to be decided in the same way, which arises out of the Constitution, means disregarding the provisions of the Constitution on administration of justice, that of the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles.

## **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?

The formal requirements do exist. The legislative framework law requires that the legal regulation established in the legal acts shall be logical, coherent, concise, comprehensible, precise, clear and unequivocal, the legal norms should be consistent with each other, the legal acts of lower legal power cannot contradict the legal acts of higher legal power, the legal acts regarding law enforcement shall be prepared and adopted together with the laws and their provisions, which are implemented by the above mentioned laws.

2.2 Is there a hierarchy of laws?

Yes. The classical hierarchy of laws is applied – the Constitution, international treaties, the law, subordinate legislations.

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 international treaties, which were ratified by the Parliament of the Republic of Lithuania, comprise the legal system of the Republic of Lithuania. This provision claims that the ratified international treaties shall be applied as well as the laws of the Republic of Lithuania. The provisions of international legal acts are usually included into the national laws, although in some cases international acts are directly applied. The Constitutional Court can provide a conclusion whether the international treaties of the Republic of Lithuania do not contradict the Constitution. The Constitutional Court has also established that according to the Constitution the law (the Constitution) corrections cannot be made which could deny the international obligations of the Republic of Lithuania as well as – the constitutional principle *pacta sunt servanda*, if these international obligations are not rejected while following the international legal norms.

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

In the case of non-compliance between the international treaties and national laws the international treaties have priority over the application of national laws. The Constitution provides for the principle that the Republic of Lithuania obeys voluntarily undertaken international obligations, respects widely recognized principles of international law, which implies that in such cases when in the national legal acts (*inter alia* laws or constitutional laws) there is such legal regulation established which competes with the one established in the international treaty, the international treaty shall be applied. The Constitutional Act of the Republic of Lithuania on “Membership of the Republic of Lithuania in the European Union” provides for the fact that the legal norms of the European Union comprise the legal system of the Republic of Lithuania. If it is related to the treaties, which are based on the European Union, the legal norms of the European Union are directly applied, and in the case of conflict, they have priority over the laws and other legal acts of the Republic of Lithuania. While hearing the cases the issue is always solved depending on its particular case. The contradictions are managed while directly applying the hierarchy principles of the laws. If it is necessary, it is possible to apply to the European Court of Justice or the Constitutional Court.

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 legal acts are adopted by a competent authority. The laws are only adopted by Seimas (the Parliament). The resolutions are reached by the Government. Seimas dominates in this process. The law drafts are often provided to Seimas by the Government.

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. While examining a particular case the courts follow the regulation provided by the executive power as much as this does not contradict the Constitution or the laws. If the court doubts whether the act of the executive power needs to be applied in a particular case, it avails itself of a right according to the law to apply to the Constitutional Court or the Supreme Administrative Court of Lithuania with the request for such legality of the act to be examined.

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

No.

### **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?

According to the doctrine of the Constitutional Court precedents are considered to be sources of law. The Law on Courts provide for the case that while hearing the cases the courts follow the decisions reached by the Constitutional Court of the Republic of Lithuania which were officially announced.

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?

The precedents formed by the courts in practice are taken into consideration by the courts and other institutions of the country. As it has already been mentioned, the Supreme Court of Lithuania as well as the Supreme Administrative Court of Lithuania form a uniform case law of courts of general competence while interpreting and applying laws and other legal acts.

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 Law on Courts provides for the fact that the Supreme Court of Lithuania forms a uniform case law of courts of general competence while interpreting and applying laws and other legal acts. The law also provides for the fact that the Supreme Administrative Court of Lithuania forms a uniform case law of administrative courts while interpreting and applying laws and other legal acts. In its decision the Constitutional Court has established that while examining the cases the courts can refer to such earlier decisions which were reached in analogous cases, i. e. the precedent can only be applied in the cases, whose factual circumstances are identical to the case, which dealt with the precedent.

In the competition case of the precedents (when there are some different decisions reached by the courts in analogous cases) the precedents created by the higher instance court shall be taken into consideration. The time of the precedent and other significant factors should also be taken into account, for instance: whether a particular precedent reflects the formed case law, or it is just a single case; persuasiveness of the decision argumentation; the composition of the court which reached a decision (whether the decision was reached by one judge, the chamber of the judges or an extended chamber of the judges, or all the composition (division) of the court); whether there were any different opinions expressed by the judges; possible significant changes (social, economic, etc.), which had some impact on the decision which was reached, etc.

According to the Constitutional Court, the court precedent is understood as a legal source in the vertical as well as horizontal aspect: the precedents present in the decisions reached by the higher instance courts are related to the lower instance courts, which have to reach decisions in the analogous cases.

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.

Yes, there are specialised administrative courts. As the first instance courts there are regional administrative courts and as a higher (final) instance – the Supreme Administrative Court. The significance of the above mentioned court in the administrative cases – is the same as of the Supreme Court of Lithuania. The decisions reached by the Supreme Court of Lithuania as well as the Supreme Administrative Court do not compete with each other.

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?

In the Constitution and laws the necessity of the unification of the case law of the courts of general competence and administrative courts is not directly stated. In practice, the Supreme Administrative Court of Lithuania forms the case law in the administrative cases. In such cases, when in the administrative cases there are norms applied, whose practice was formed by the Supreme Court of Lithuania, the Supreme Administrative Court of Lithuania sticks to the practice formulated by the Supreme Court of Lithuania. And on the contrary, if in the courts of general competence there are norms applied, whose practice was formed by the Supreme Administrative Court of Lithuania, the courts of general competence are also related to. The decisions reached by the Supreme Administrative Court of Lithuania are final and not subject by appeal to the Supreme Court of Lithuania.

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

Yes • judges/panels of that court;

Yes • all judges in the country;

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

Generally, the non-compliance of the binding court precedent comprises the ground for the vacation of the court decision which has been reached, and the renewal of the proceedings in the cases provided by the law. The non-compliance of the formed law case only in exceptional cases can be evaluated as negligent performance of the duties fulfilled by the judge and the judge then may be brought to disciplinary responsibility.

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

The case law in particular cases needs to be adjusted and new court precedents in such cases can be created only when it is inevitable, objectively necessary, based and justified constitutionally. Such adjustment of the case law (deviation from the earlier precedents and creation of the new ones) in all the cases shall be clearly argumentative in the particular decisions reached by the courts.

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 court of the higher instance reaches a decision and corrects the deviations regarding the case law made by the court of the lower instance. In the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania the chambers of the judges comprising three judges hear the cases. If the deviations of the law case are noticed, the case can be transferred to be heard by the extended chamber of the judges, who specify the practice which is being

formed. Moreover, consistency of the case law is observed by some divisions in the courts of the higher instance. They are responsible for the analysis of the case law which is being formed. They provide the judges and employees of the court with the reports, conclusions and other information, which is related to formation of the case law, if necessary – make offers for the case law to be unified.

- 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?

The case law in particular cases needs to be adjusted and new court precedents in such cases can be created only when it is inevitable, objectively necessary, based and justified constitutionally. As it has already been mentioned, such adjustment of the case law (deviation from the earlier precedents and creation of the new ones) in all the cases shall be clearly argumentative in the particular decisions reached by the courts. The case law is also to be amended when the European Court of Human Rights states that the decision reached by the court of the Republic of Lithuania contradicts to the Convention for the Protection of Human Rights and Fundamental Freedoms, its additional protocols, or when the European Court of Justice makes a different decision rather than the interpretation of the national court.

- 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 it has already been mentioned, the Law on Courts establishes that the Supreme Court of Lithuania forms a uniform case law of courts while interpreting and applying laws and other legal acts. The precedents are exclusively formed by the Supreme Court of Lithuania only in the procedural documents while hearing the cases by cassation. All the participants of the case can apply to the Supreme Court of Lithuania with the petition for cassation if they are not satisfied with the decision reached by the appellate court. The system for the petitions for cassation is established in Lithuania, i. e. the chamber of the judges is composed of three judges of the Supreme Court of Lithuania. The selection panel decides if the petition for cassation can be examined by cassation. These are the following grounds for the case to be heard by cassation:

The Supreme Court of Lithuania can verify the appealed judgment and/or ruling only from the aspect of the application of the law. The court does not deal with questions of fact.

The Code of Criminal Procedure states that cassation appeal is heard by the Supreme Court only if one of these grounds exist: violation of substantive criminal law or serious breach of the Code of Criminal Procedure. The court is entitled to refuse to admit cassation appeal when it is evident that no violation of substantive criminal law or serious breach of the Code of Criminal Procedure has been done.

In civil cases cassation appeal is admissible only if one of these grounds for reviewing a case in a cassation procedure exist:

1) a violation of the rules of substantive or procedural law, which is essentially important for the uniform interpretation and application of the law, if this violation could lead to adoption of an unlawful judgment (ruling);

2) if in the appealed judgment (ruling) the court deviates from the practice of application and interpretation of the law formulated by the Supreme Court of Lithuania;

3) if on the question at issue the case law of the Supreme Court of Lithuania is not uniform.

The law also provides for the fact that the Supreme Administrative Court of Lithuania forms a uniform case law of administrative courts while interpreting and applying laws and other legal acts. The uniform case law of administrative courts is formed while dealing with particular disputes, which occur because of legal administrative relations. All the participants of the administrative proceedings avail themselves of a right to apply to the Supreme Administrative Court of Lithuania with the petition for appeal if they do not agree with the decision reached by the court of first instance.

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?

In their procedural decisions while forming the case law the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania take into consideration the decisions reached by the European Court of Human Rights and the European Court of Justice. Respectively, the courts of the lower instance also take into consideration the decisions reached by the European Court of Human Rights and the European Court of Justice. While developing and protecting the uniform interpretation and application of the law these courts analyse the case law of the European Court of Human Rights and the European Court of Justice, other sources of law. The material, which deals with the decisions reached by the European Court of Human Rights and the European Court of Justice and which is significant for Lithuania, is announced in the judicial bulletins and reports. If necessary, particular measures regarding the formation of the case law corresponding to the position of the above mentioned international courts are taken (for example, the institute of the renewal of the proceedings is applied according to the law).

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.

The material, which is significant for the uniform interpretation and application of the law, is announced in the judicial bulletins published by the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania. Moreover, the divisions of the above mentioned courts are responsible for the observation of the tendencies in the decisions reached by the Constitutional Court of Lithuania, the European Court of Human Rights. While implementing this task the case law of the above mentioned courts is analysed and summaries as well as reviews of the case law are prepared. The judges of the courts as well as the employees of the courts are regularly distributed with the above mentioned documents, they are also provided in the websites of the courts and are available to all the interested persons. The exception is only made in exceptional cases when the information cannot be announced due to the protection for the interests of the injured parties, underage persons, business subjects.

3.13 Is the access to such database free of charge?



Yes

- 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?

Such information is also announced by the providers operating on commercial basis. In such a case, the search for the information itself is easier, it is more comfortable to use, etc. However, the same information is provided.

- 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 hearing of the cases conducted by the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania is directed towards the formation of the case law. This is done purposefully and effectively. There are some cases, when contradictory, inconsistent laws with the loops of the legal regulation are adopted, but these are only exceptions to the rule.

- 3.16 Any other point you wish to raise.

In our opinion, it would really be useful to more analyse the relationship between binding court precedents and judicial independence. As it has already been mentioned, Article 109 of the Constitution deals with the provision stating that when considering the cases judges shall only obey the law. Therefore, the direct regulation provides for the priority of the law but not the precedent. The judge of the lower instance court, disagreeing with the precedent which is being formed, shall apply the precedent but not the law.

It is under the dispute whether one decision reached by the court which dealt with the particular precedent is enough, so that the other courts could follow it while hearing the cases with the same factual circumstances. The question is what should be understood by "the cases with the same factual circumstances".

Regarding the form of the precedents. In Lithuania the court precedents are formed in the court procedural documents, which were adopted while hearing a particular case. In such a case all the decision reached by the court is considered to be "precedential", although it only dealt with the specific problem peculiar for that particular situation.

It is difficult to establish the fact about the significance of the formed precedent if the legal regulation is partly changed.

The important question is, whether the court itself in all the cases shall find out all the important case law in the particular case and apply the precedents in compliance with the principle of *iura novit curia*, or the application of the precedents could be the business of the parties themselves and they should indicate the precedents. This is especially important, when the amount of the case law is abundant, and the judge finds it difficult for all the case law to be found and analysed.