

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?

In the UK there is a variety of different legal systems. For most purposes England and Wales and Northern Ireland have the same legal system; but Scotland has its own. Within the different internal jurisdictions the concept of the uniform application of the law applies within each jurisdiction. The concept of the uniform application of the law is in part derived from legislation and is in part derived from the common law (i.e. customary law). At the same time (until Brexit) the United Kingdom as a whole is a single member state of the EU and also a single member of the Council of Europe. The application of the law of the EU and the principles developed by the ECtHR are uniformly applied across the UK. The uniform application across the UK of the law of the EU and the principles developed by the ECtHR are required by legislation.

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.

There is no general principle that legislation must be consistent, except in cases involving EU law. There is a principle enshrined in legislation that laws should be interpreted, so far as possible, to be in conformity with the ECHR and, in the case of Scotland, a legal requirement in legislation to that effect.

There is no general principle that executive institutions should adopt uniform practices but executive institutions can only adopt practices that are authorised by whatever law sets up those institutions.

The UK has a strong tradition of the uniform application of case law. There is a hierarchy of courts and a decision on a question of law by a court at one level of the hierarchy binds a court at a lower level in the hierarchy.

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 for the uniform application of the law is twofold. First, similar cases should be treated similarly. Second, everyone is equal before the law.

The outcomes that the uniform application is intended to produce is the public perception of fairness, the ability to predict the legal effect of acts or omissions (the principle of legal certainty), and confidence in the administration of justice.

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 legislative process is governed by constitutional convention and the internal regulations of each of the two Houses of Parliament. However, the Scottish Parliament and the Welsh Assembly also have powers delegated to them by Act of Parliament and the Acts of Parliament which delegate those powers also set limits to them (but not to the process). If it is alleged that either the Scottish Parliament or the Welsh Assembly

have exceeded their powers, the Supreme Court of the United Kingdom will give a ruling. Apart from that the UK does not have a constitutional court.

2.2 Is there a hierarchy of laws?

Yes. At the top of the hierarchy (until Brexit) is the law of the EU. Below that are laws made by Parliament in Westminster. Parliament in Westminster can also delegate law making powers to ministers, but any laws made by ministers are submitted to Parliament before they come into operation. In some cases laws made by ministers must be expressly approved by Parliament. In other cases the laws are valid unless Parliament objects. In addition in relation to laws made by ministers (whether or not Parliament has approved them) the courts may rule on whether the laws are within the limits of the delegated powers.

In addition Parliament sometimes delegated law making powers to local government. Local government may make laws within the limits of the delegated powers. But the court can rule on whether a local government has exceeded its delegated authority.

Finally, as explained the Scottish Parliament and the Welsh Assembly have limited legislative competence within the limits of the powers conferred on them.

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?

A treaty is not directly applicable in the UK unless it is incorporated into domestic law by Act of Parliament. In the case of the EU treaties and certain articles of the ECHR this has been done generally. In other cases (e.g. conventions on jurisdiction or child abduction) this is done on an ad hoc basis. But even if a treaty has not been formally incorporated there is a general principle that, if possible, domestic law should be interpreted so as to conform with the UK's obligations in international law (including treaties).

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

If a treaty has not been incorporated into national law, and a discrepancy between national law and a treaty cannot be cured by interpretation, national law prevails.

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?

In the UK the common law and legislation run side by side. Where there is legislation affecting a particular area of behaviour the legislation prevails; and in such a case it is Parliament which has the dominant role. The role of the courts in such cases is to interpret the law rather than to make it. Where an area of activity or behaviour is not regulated by legislation the law is, in practice, made by the judges.

In cases where powers to legislate have been delegated to ministers, devolved administrations (i.e. Scotland and Wales), or local government, it is those institutions who make the law. However, as explained, the courts will rule on whether the law making powers have been exceeded and, in addition, the court will rule on disputed interpretations of the laws thus made.

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?

Acts of the executive power per se are not a source of law, with limited exceptions. The Immigration Rules are treated as being almost equivalent to law although technically they are no more than a statement of the policy of the Home Office. Extra-statutory concessions made publicly by the tax authorities can also give rise to binding legal effects. But in all these cases, the courts are the final judges of whether legally enforceable rights or obligations have been created.

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

In some areas of the law, laws are far too frequently amended. The Immigration Rules are a notorious example in the UK, as are the laws relating to the sentencing of convicted criminals. Although the content of laws are publicly available, the piecemeal nature of amendment and the complexity of the laws (as amended) compromise the principle of legal certainty.

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?

As explained there is a hierarchy of courts in the UK. In order of seniority they are (1) the Supreme Court (2) the Court of Appeal (in England and Wales) and the Inner House (in Scotland) (3) the High Court (in England and Wales) and the Outer House (in Scotland) (4) the county court (in England and Wales) and the sheriff court (in Scotland).

In parallel there is a series of independent tribunals staffed by specialist judges (and in some cases specialised lay people e.g. medical practitioners or real estate professionals). They are subordinate to the courts but have their own hierarchy (1) the Upper Tribunal and (2) the First Tier Tribunal.

A decision on a question of law by a senior court binds a junior court. Unless and until Parliament changes the law (or there is a contrary decision by an even more senior court) the decision of the court is a source of law with equal effect to legislation. Unlike the legal system in many countries, senior courts may lay down principles of law of general application.

- 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?

See my answer to question 3.1

- 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?

As explained in the hierarchy of courts in the UK a decision of a senior court binds a junior court. Where a court has decided a legal question another court of the same seniority faced with the same point will normally apply the decision of the first court. There are exceptions to this rule; but they are rare in practice. A more senior court is free to reach its own decision.

- 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.

There is a whole series of specialist tribunals, dealing with a large variety of different subject matter: intellectual property, social security benefits, taxation, immigration, landlord and tenant disputes and so on. These tribunals are all under the supervision of the courts in so far as they decide points of law.

Within the court system itself there are also some specialist courts. They deal with: commercial cases, insolvency (both personal and corporate), intellectual property and company matters.

It is always possible to challenge a decision of a specialist court or tribunal on a point of law. In some cases (but not many) it is also possible to challenge a decision on a point of fact.

- 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?

Long-standing practice amounting to a fundamental principle of the common law (i.e. customary law).

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

See my answer to question 3.1

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

See my answer to question 3.1

- 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.)?

If there are contradictions in the case law between different courts, the usual procedure is to appeal to a higher court. There are rare cases where, if decision of the same level of the same court conflict, another court is entitled to choose between the conflicting cases. In addition the Supreme Court may decide not to follow one of its previous decisions, although this is rare. If there are contradictions between different levels in the same court, the senior court prevails.

- 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?

Where a case has binding legal effect, only a senior court may depart from it. The exception to this rule is that the Supreme Court may depart from one of its own earlier decisions. If the case law is not binding, then any court may depart from it if good reasons are shown.

- 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)?

The Supreme Court is the highest court in the UK. It will only hear a case if it considers that it raises an arguable point of general public importance. Even then permission to appeal is necessary. Once the Supreme Court has decided a case its decision binds all other courts in the UK.

- 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 courts of the UK must "have regard to" the case law of the ECtHR. This means that they must apply the principles laid down by consistent case law of the ECtHR. There have been cases in which the UK courts have taken the view that the ECtHR has misunderstood UK law or practice and in such cases the UK courts resolve the problem by dialogue with the ECtHR.

In the case of the CJEU (until Brexit) the jurisprudence of that court is directly applicable in the UK.

Decisions of other supra-national courts are generally of persuasive value only.

- 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.

Judges have access to a large on-line data base as well as to published series of law reports. In addition there are legal textbooks for professionals. Access to these databases is available, on a subscription basis, to anyone who chooses to pay the subscription. In the case of judges, the subscription is paid by the Court Service. Members of the public have access to a number of databases on the internet. For the case law of UK courts the most popular database is the British and Irish Legal Information Institute (bailii.org). The ECtHR and the CJEU also maintain their own databases.

- 3.13 Is the access to such database free of charge?

Databases operated on a commercial basis are not free of charge. The British and Irish Legal Information Institute, HuDoc and Eurolex are 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 many providers of case law, both in hard copy published form and on line. These operate on a commercial basis, although they are not always profit making. They are independent entities.

- 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 UK tradition of legislative drafting aims at precise language which is nevertheless comprehensible by lay people. On the whole it achieves its objectives. There are of course areas where broad definitions are used in order to give flexibility in changing circumstances; and in those cases it is for the courts to interpret the legislation. The degree of precision also depends on the subject matter of the legislation. Tax legislation, for instance, is usually far more technical and detailed than consumer legislation.

There are some cases in which legislation tries to codify the effects of case law, but they are unusual. Where this happens, the courts will apply the code.

- 3.16 Any other point you wish to raise.