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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?

*The only formal provision in the Swedish Constitution which is relevant in this context states that courts and public authorities shall observe that everyone is equal before the law. This is further emphasized in the same provision when it is stated that courts and public authorities shall also act objectively and impartially.*

*Nevertheless, the uniform application of the law is commonly understood as a fundamental value to be respected by the legislator, public authorities and courts.*

- 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 a strive for consistency at the legislative level through, inter alia, the work of the Council on Legislation, which is an institution composed of three members, or former members, of respectively the Supreme Administrative Court and the Supreme Court. Most, if not all, Government bills are sent to the Council on Legislation for scrutiny before being presented to Parliament. In a public statement the Law Council will evaluate the proposed legislation from various aspects, such as constitutionality and consistency with the legal order in general.*

*Uniform practices by public authorities are intended to be secured by the possibility to appeal against administrative decisions before the administrative courts. This is also true with regard to some decisions by the law enforcement bodies. In cases when an appeal is not possible or useful – for example house searches and other immediate actions by the police – a complaint may be made to the Parliamentary Ombudsmen.*

*The uniformity of case law is ultimately secured by the supreme courts.*

- 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 uniform application of the law is intended to secure the equality before the law and the principle of legal certainty.*

## **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?

*Before the Government takes position on the recommendations of a commission of inquiry, its report is referred for consideration to the relevant bodies. When the referral bodies have submitted their comments, the ministry responsible drafts the bill that will be submitted to the parliament (Riksdag). If the proposed law has important implications, the Government should first refer the proposal to the Council on Legislation. The examination of the Council on Legislation aims to examine the draft laws from a legal viewpoint. See also answer to question 1.2.*

- 2.2 Is there a hierarchy of laws?

*Yes, there is a hierarchy of laws. In Sweden, a constitutional act is higher ranked than ordinary acts, which are counted before Governments regulations and statutory instruments. Special law has in interpreting legislation precedence over a law which only governs general matters (the principle *lex specialis derogate legi generali*). A more recent law has precedence over an older regulating the same matter.*

- 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?

*In Sweden, transformation, i.e. convention rules revised to Swedish law, is the method that has so far dominated. Even incorporation of conventions, both in its entirety or in some special parts occurs. The European Convention for the Protection of Human Rights and Fundamental Freedoms is an example of a convention as a whole has been incorporated into Swedish law. EU law has a special status in Swedish law. Some EU law will, despite the fact that Sweden is a dualist state, be directly applicable in Sweden as soon as adopted in the EU.*

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

*Contradictions between national laws need to be addressed by the courts, in the final analysis by the supreme courts. The same is true with regard to contradictions between "ordinary" national law and treaty provisions having been incorporated into national law. Concerning non incorporated treaty provisions, Swedish courts are under an obligation*

*to as far as possible interpret national law to bring it into conformity with our international obligations.*

*However, in the case of conflict between EU law and Swedish law, EU law should apply.*

- 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?

*Most legislative proposals are initiated by the Government but bills can also be based on suggestion put forward by the Riksdag or by private citizens, interest groups or public authorities.*

*The matter is first analyzed and evaluated by a commission of inquiry or a one-man committee or by officials from the ministry. The reports and conclusions are published in the Swedish Government Official Reports series (SOU).*

*The report is then referred for consideration to relevant bodies (e. g. government agencies, special interest groups and local government authorities). After the referral process the responsible ministry drafts the bill. If the bill has important implications it is submitted to the Council on Legislation to ensure that it does not conflict with existing legislation, before it is submitted to the Riksdag who is responsible for approving all new or amended legislation. Before a bill is put forward to the plenary it is discussed in one of the standing parliamentary committees.*

*When a law has been passed by the Riksdag it is formally promulgated by the Government and published in the Swedish Code of Statutes (SFS).*

*Consequently, the executive normally possesses the power of initiative and of formulating the problem whereas the legislative power naturally has the final say. The power of each institution within the process of course also depends on whether it is a minority government or not.*

- 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, the Government's regulations are legally binding for the courts. See also answer to question 2.2 for the hierarchy of laws. However, except for a very limited field of law, the Government must base its regulatory powers on provisions of law enacted by Parliament.*

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

*The law making process is well established and well-functioning. It is difficult to say that laws are too often amended, since Government and Parliament in modern society are frequently faced with new developments and challenges.*

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

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

*The court case law in Sweden doesn't have binding legal effect in the literal sense. It is an important source of law but not to the same extent as the national legislation. Decisions of the Supreme Court and the Supreme Administrative Court are viewed as precedents. Court of appeal judgements are not regarded as precedents, but are seen as important means to provide guidance for the inferior courts and to achieve uniform and consistent implementation of the law in the lower courts.*

*Thus you may say that the predominant legal position in Sweden is that precedents are not formally binding in the same sense as national legislation. Nevertheless, precedents handed down by the supreme courts are de facto treated as a source of law.*

- 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?

*As follows by the answer to 3.1, precedents are not formally binding, but judges in the lower courts should and do accept guidance to develop a coherent body of judicial practice which can be observed by all courts and which can make it possible for parties to court proceedings to foresee the outcome.*

- 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?

*In a more general sense, every court has a role to unify case law. Courts of first instances are of course expected to treat equal cases equally and courts of appeal are expected to correct mistakes of this nature. Furthermore, the duty of the two supreme courts is fundamentally to adjudicate only those cases where the judgment may serve as a precedent. Therefore, there is a filtering system allowing the supreme courts to refuse to adjudicate cases that do not have this quality. Consequently, in most cases the courts of appeal are effectively courts of last instance and thus play an important role to ensure the uniform application of the law.*

*Within courts of appeal, there normally is a senior judge at each division who has a responsibility to discuss general legal issues with his or her colleagues from the other divisions in order to arrive at a common understanding within the court.*

Once a year the Supreme Administrative Court brings together the presidents and senior judges from the administrative courts of appeal to hear their view on which legal issues need to be addressed by way of a precedent. This helps the Supreme Administrative Court to identify areas where there is a non-uniform application of the law by the lower courts.

Along the same line, the Supreme Court organizes meetings, at irregular intervals, with for example the Bar Association and the Prosecutor General's Office.

The decisions of the Supreme Court are reported in part I of *Nytt juridiskt arkiv (NJA)* since 1874. Some decisions are reported in full, while less important ones are reported in an abbreviated form. Every full report starts with a headline describing the main point of the case. The method to report cases adjudged in the Supreme Administrative Court is basically the same. The Supreme Court's precedents are also published on their websites. A small selection of the Court of appeal decisions is reported in *Rättsfall från hovrätterna (RH)* since 1980. It is each individual judge's responsibility to keep updated on current case law.

Furthermore, it is common for the individual courts to have so called case law-meetings where the judges discuss how precedents and Court of appeal decisions should be interpreted and applied.

- 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.

*Formally there are two specialized courts in Sweden.*

1) **The Labour Court** is a special court with the function of considering law disputes. Certain types of labour dispute may be brought directly before the Labour Court. In such cases the Labour Court has exclusive jurisdiction. In other types of dispute claims must be brought before the ordinary District Court. If any party is dissatisfied with the district court's judgment they can lodge an appeal with the Labour Court. In either case the judgment of the Labour Court is the final judgment in the dispute since Labour Court judgments cannot be appealed.

2) **The Defense Intelligence Court** is a special court with the task of examining applications from SIGINT Agency (FRA) authorizing signals. The decisions of the court cannot be appealed.

*In addition, there are specialized divisions, acting in their own name, within the general court system and within the administrative court system.*

3) **The Patent and Market Court** (which is a division of Stockholm District Court) and the **Patent and Market Court of appeal** (which is a division of Svea Court of Appeal) are specialized divisions of the

*general courts that deal with cases matters relating to intellectual property law, competition law and marketing law. Patent and Market Court judgments and decisions can be appealed to the Patent and Market Court of Appeal. Generally, decisions reached in the Patent and Market Court of Appeal cannot be appealed except for judgments and decisions reached in criminal cases. In certain instances, the court can grant leave for a judgment or decision to be appealed to the Supreme Court. If that were to happen, the Supreme Court would also need to grant leave to appeal before the case could be heard.*

- 4) **The Land and Environment courts and the Land and Environment Court of appeal** are equally specialized divisions within the general court system.
- 5) **Migration Courts** are specialized divisions within the administrative court system for aliens and citizenship cases. These cases can be appealed to the **Migration Court of Appeal** who examines the Migration Court decisions. The Migration Court of Appeal is the final instance.
- 6) **Regional rent and tenancies tribunals.** The regional rent tribunal mediates in disputes relating to domestic premises and business premises. The regional rent tribunal also makes decisions on certain issues, for example, the right to sublet an apartment. Tenancy disputes that are not dealt with by the regional rent tribunal are considered by a general court. The decision of the Regional Rent Tribunal can be appealed against in writing to Svea Court of Appeal. A decision by Svea Court of Appeal in a case that has been appealed against from the Regional Rent Tribunal cannot be appealed against and thus represents a final determination of the dispute. Some of the decisions of the Regional Rent Tribunal cannot be appealed against. For instance, this applies to permissions for exchange of apartment and subletting of an apartment.

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?

*See answer to question 3.3.*

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?

*The answer is no on all counts.*

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

*See answer to question 3.1-2.*

- 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.)?

*Contradictions or deviations in case law are usually resolved by the Supreme Court or the Administrative Supreme Court giving leave to appeal to one or more cases to clarify the matter by precedence.*

*In civil cases, there is a possibility for a court of first instance to directly ask the Supreme Court for a preliminary judgment on a specific question of law.*

- 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?

*As mentioned above case law is not binding for the Swedish judges, but has great impact as guiding precedents.*

*A precedent can become obsolete by new legislation (on national or European level) or by the development of society and under such circumstances the courts can or should depart from existing case law.*

- 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 and the Administrative Supreme Court are the main courts establishing precedents.*

*Leave to appeal to the Supreme Court is regulated in Chapter 54 Section 10 of the Swedish Code of Judicial Procedure and, to the Administrative Supreme Court in Section 33 of the Administrative Court Procedure Act. Leave to appeal may be granted if two cases:*

- 1. If it is of importance for the guidance of the application of law or*
- 2. If there are extraordinary reason for such a determination, such as that grounds exist for relief for substantive defects or that a grave procedural error has occurred or that the result in the court of appeal is obviously due to gross oversight or to gross mistake.*

*See also answer to question 3.3.*



- 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 European Convention on Human Rights is since 1995 Swedish law and the case law of the European Court of Human Rights is, like case law from the Swedish supreme courts, guiding precedents. In the same manner the case law from the ECJ also form case law to be observed by Swedish courts. As mentioned in question 3.3 it is the task of each judge to be updated on relevant case law, national as well as international, and it is available in the databases used by the courts (se answer to question 3.12).*

*The Parliamentary Ombudsmen (JO) has a significant role in ensuring compliance with the fundamental rights outlined both in the Instrument of Government but also in the European Convention.*

*In short, it is the task of JO to ensure that public authorities and courts abide by the constitutional provisions of impartiality and objectivity and that public authorities and courts does not infringe on the basic freedoms and rights of the citizens. Thus, JO has a significant role in the unification of case law.*

*Case law of quasi-judicial bodies does not have precedent in Swedish courts and the influence of such case law is therefore limited. Of course it can serve as guidance in relevant matters.*

- 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 two supreme courts and the appellate courts publish their cases in printed form as described in question 3.3.*

*Case law is also available online on the courts websites.*

*The website [www.lagrummet.se](http://www.lagrummet.se) is a portal for Swedish public administration legal information. On this website landmark cases from the supreme courts are published. It also links to various international sources of legal information (e.g. the ECHR, the ECJ, EUR-lex).*

*The government's official website, [www.regeringen.se](http://www.regeringen.se), also contains legal information and links to the above mentioned lagrummet.se for information on case-law.*

*There is also a private, non-profit, website, [www.lagen.nu](http://www.lagen.nu), which provides access to legal information containing all statutes published in SFS as well as case law from the supreme courts and other courts.*

*All the above mentioned is available free of charge.*

*Judges and other legal professionals also use legal databases provided at a fee by independent publishing/information companies. These providers operate on commercial bases. These databases contain legal information such as case law but also doctrine and comments/analysis on law, government bills and other legislative history as well as case law.*

3.13 Is the access to such database free of charge?

*See answer to question 3.12.*

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?

*See answer to question 3.12.*

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 need to use relatively broad concepts or standards – such as “reasonable”, “necessary” or “sufficient” – in modern legislation naturally leaves a considerable room for interpretation by the courts. Swedish courts normally takes what has been stated in the travaux préparatoires into consideration when interpreting the law and especially such more broad concepts. Nevertheless, it may lead to deviating interpretations and a need for unification, ultimately by the supreme courts.*

3.16 Any other point you wish to raise.

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