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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?

There is no general formal concept of the uniform application of the law. The uniform application of the law takes place in the courts that apply the law to the individual cases. However there are rules that guarantee and promote a uniform application of the law. Especially the following:

The competence for the final interpretation of the law and the control about the application of the law in the individual case belongs to the courts. Therefore mainly the courts are responsible for guaranteeing a uniform application of the law. Such a uniform application of the law can only work out if the courts themselves decide in a uniform way. This is what we call the principle of a uniform jurisdiction.

The principle of a uniform jurisdiction is part of the guarantee of equal treatment in legal affairs in Germany. The idea of legal treatment itself belongs to the principle of equal treatment codified in Art. 3 German Constitution/Grundgesetz - GG). This principle is part of the rule of law.

Since the judges are not formally bound in any way to the decisions of other courts (principle of an independent justice, Art. 97 GG) there is the possibility of deviating decisions. Germany does not recognize a legally binding effect of earlier jurisprudence. The core of an independent justice has to be upheld and enforced.

Therefore there is no binding effect for the inferior courts to the jurisprudence of the superior (high) courts. In one situation a binding effect of a decision of superior courts is however accepted. The decision of a higher court has to be followed if the higher court remits the case back to the lower instance for the final ruling. Anyhow, a uniform application of the law is reached by the factual binding effect cases and decisions of the higher instances have.

In Federal Courts (courts of last instance) a chamber has the obligation to effect a submission to the joint chamber if it wants to deviate from the current known jurisprudence in one topic of law (see 3.3).

In conclusion, Germany knows only few mechanisms to guarantee a uniform jurisprudence. A uniform application of the law is mainly achieved by the Federal Courts, the procedure of passing through different instances and the certain legal obligations to submit a case if it is of relevance for a uniform jurisprudence.

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.

The uniformity of law in the German legal system mostly concerns the uniform practice by the executive institutions and the uniform case law developed by courts.

In case of the executive branch, the most elaborate system of regulations exists in tax law. There, the tax authorities have developed a very extensive system of guidelines which ensure the uniform application of the tax law in the multitude of tax cases (which concern practically every citizen). They even issue so called guidelines of the non-application of court cases (“Nichtanwendungserlasse”) if an individual court has ruled against their view. By these guidelines – which are controversially debated among constitutional lawyers – the tax authorities limit the application of a certain decision to the case decided and restrict thereby the influence of court cases on the uniformity of application of law (see 3.1 and 3.2).

To uniform case law which is developed by courts see 1.1, 3.1.

- 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 target of a uniform application of the law is to enforce the principle of equal treatment and to guarantee a certainty of law for the citizens, see 1.1

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 is no formal requirement for ensuring the uniformity in the legislative process. The German legislative process has, however, informal checks and balances to ensure uniform results of the legislative process. The ministries concerned in the drafting of new laws normally have to coordinate new draft laws insofar. The ministry of justice has a leading role in reviewing new draft laws to secure no contradictions between new laws and the existing laws.

- 2.2 Is there a hierarchy of laws?

There is a hierarchy of laws. The Constitution has the highest legal importance, followed by the formal laws made in parliament. On a third level, executive authorities produce application guidelines which are binding for them and the citizens concerned. They need to be based on a regulative authority in the respective law, but have not the same legal quality as laws enacted through parliament.

- 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 order to implement an international treaty into German binding law, a law of acceptance by the parliament (on the federal level) is needed (Art. 59 (2) GG). By passing this law through parliament the treaty becomes part of the Germany body of law. In the hierarchy of norms these treaties stand on the same level as a normal law made by parliament. Also, to guarantee the conformity of national law with treaties there are

several rules of interpretation that influence the application of the law (e.g. the principle to interpret the law in favour of international law – Art. 24 GG).

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

The later law supersedes the older law (*lex posterior derogat legi priori*). Treaties have the same legislative rank as “normal” laws. So later laws could overrule treaties. This so-called treaty override is legally accepted. This has been confirmed by a recent decision of the Federal Constitutional Court in relation to a law which conflicted with a tax treaty with Turkey.

- 2.5 How usually law making process is carried out in your country? Which of the powers of the state has in practice dominant role in this process?

Law is made in the parliaments (on a federal and a state level). The legislation process normally starts through draft proposals initiated by either the government or the parliament or parts thereof. The proposed law is normally developed within the ministries of justice and the ministries competent for the subject matter. The majority of legislation has to pass two chambers (one representing the interests of the states – Bundesrat - and the parliament – Bundestag). If no consensus can be found during this process there exists the possibility for a special procedure to find a solution (conciliation committee). The dominant role in this process has the parliament.

- 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 can be source of law and binding for the citizens (especially in public law). However, as those executive regulations/laws were not approved by the parliament (representation of the people) there is always a possibility for citizens to challenge these executive regulations/laws in front of courts. The courts are then generally not bound to the executives’ decisions if they conflict with existing laws, see 2.2.

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

In general this is not the case. Frequent changes result from the necessity to convert European guidelines in to national law. In certain matters, however, law changes quite often, e.g. in family law, social law, tax law, and in other areas of public law. This concerns mainly areas in which legal provisions have to reflect frequent changes in the economic circumstances. As far as law changes within one or two years, e.g. in tax law, such a legal uncertainty exists, especially if new laws are applied retroactively.

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?

Germany belongs to one of the classical countries of the “civil law system” compared to the common law system. Primary source of law is the national legislation. As courts only deal with individual cases, such a binding effect remains only *inter partes*.

However, there is a factual binding legal effect of the decisions of the highest courts (e.g. the Federal Courts or the Federal Constitutional Court).

The task of the Federal Courts (Federal Court of Justice (Bundesgerichtshof, BGH), the Federal Administrative Court (Bundesverwaltungsgericht, BVerwG), the Federal Finance Court (Bundesfinanzhof, BFH), the Federal Labour Court (Bundesarbeitsgericht, BAG) and the Federal Social Court (Bundessozialgericht, BSG) are primarily to ensure uniform application of law, clarify fundamental points of law and develop the law. In general, they review rulings of the lower courts with regard to errors of law. Even if the binding effect of the judgments and rulings of the Federal Courts are technically confined to the respective case decided, in practice the lower courts follow their interpretation of the law virtually without exception.

The Federal Constitutional Court's duty is to ensure that the Constitution of the Federal Republic of Germany (GG) is obeyed. Since its founding in 1951, the Court has helped to secure respect for and effectiveness of Germany's free and democratic basic order. This applies particularly to enforcement of the fundamental rights. All government bodies are obliged to respect the Basic Law. Should any conflict arise in this respect, the jurisdiction of the Federal Constitutional Court may be invoked. Its decisions are final.

For the Federal Constitutional Court there is such a binding effect in cases in which the court has asserted the incomparability of a certain law with the constitution. Under these circumstances court decision has the same binding legal effect as national legislation (paragraph 31 organisational law of the Federal Constitutional Court/Bundesverfassungsgerichtsgesetz – BVerfGG).

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 mentioned above there is a factual binding effect (informal level) of the decisions of the Federal Courts, see 3.1, 3.4. It is recognised as an important rule of law and is mostly followed by the judges of the inferior instances.

The far-reaching effect of rulings of the Federal Court of Justice is also due to the fact that, particularly in the field of civil law, legal practice is often guided by these rulings. Banks and insurance companies as well as landlords and divorce lawyers respond to a “ruling from Karlsruhe”.

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 principle, there is no legal mechanism for the courts to unify the case law.

The task of the Federal Courts (BGH, BAG, BFH, BVerwG, BSG) are primarily to ensure uniform application of law, clarify fundamental points of law and develop the law, see 3.1.

There are however special arrangements which aim to secure a uniform application of the laws.

Vertical level within the hierarchy of courts:

In the framework of the hierarchy of courts remedies of the parties could be admitted if they are necessary to secure a uniform application of laws in case the lower court decision deviates from the case law of the higher courts (e.g. "Berufungszulassung" paragraph 511 (4) Civil procedure code/Zivilprozessordnung - ZPO; "Revisionszulassung" paragraph 543 (2) ZPO).

Horizontal level within each court:

Each Federal Court (see 3.2.) consists of various chambers. The chambers of each Federal Court have to ensure to rule in a uniform way.

For the Bundesgerichtshof (Federal Civil and Criminal Court of Justice) the relevant rules are contained in paragraph 132 organisational law of the courts - Gerichtsverfassungsgesetz – GVG.

According to that law, one chamber which would like to deviate from a decision of a different chamber has to ask whether the latter still upholds the (older) decision/view.

In that case, the case would have to proceed to a joint chamber of judges in order to solve the discrepancies of views and to ensure a jointly respected position. The joint chamber of judges ("Großer Senat") consist of the president and one judge of each chamber of the court. This procedure is called "Divergenzvorlage" (diverging submission). There is one joint chamber for criminal cases and one for civil cases.

In addition, a chamber could apply for a decision of the joint chamber of judges if a uniform decision is needed in a question of fundamental importance for the development of legal principles or for securing a uniform jurisprudence. This procedure is called "Rechtsfortbildungsvorlage".

There is no legal duty to submit the cases to the joint chamber of judges. This chamber deals with the legal question of the submission issue. The submission is only permitted if the answering of the posed questions is of general importance for the development of the law. The answer to the legal question has either a prejudicial effect or will be shaping the material or procedural law.

The joint chamber of judges is not bound to the submission of the deciding chamber. However, the deciding chamber is bound by the rulings of the joint chamber. This binding effect only exists in the special procedure of submission to the joint chamber. In all the other cases there will be a binding effect only to that extent that the chamber will have to submit the case to the joint chamber if it plans to deviate from the joint chamber of judges' opinion. The Federal Constitutional Court has no jurisdiction on the submission process. Only the final decision in the original case is controlled by the Federal Constitutional Court.

This exact process described above takes place in the Federal Court of Justice (for civil and criminal matters), but the other Federal Courts do have similar rulings to guarantee a uniform application of the law.

Also, there is another provision on the horizontal level. German legal system provides for a common chamber in between the Federal Courts that is meant to guarantee a uniform application of the law within the different Federal Courts (article 95 (3) GG). This is the joint chamber of the Federal Courts (“Gemeinsamer Senat der Obersten Gerichtshöfe des Bundes”). If a chamber of one of the Federal Courts plans to deviate from the current jurisprudence of one chamber of a different Federal Court it has to submit the case to the joint chamber of the Federal Courts. This chamber consists of the five presidents of the Federal Courts, the two presiding judges of the chambers that deal with question (originally) and one judge each of the involved chambers.

In family law there is another mechanism for a uniform application of the law on the horizontal level created through the practice of the courts. Specialized chambers for family law of the Higher Regional Courts have developed guidelines for the application of support law in their respective jurisdiction. There are even guidelines which apply across the jurisdictions of Higher Regional Courts. This practice is accepted by the courts and by legislator.

- 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.

The German court system is divided into five specialized branches or jurisdictions: ordinary (civil and criminal), labour, general administrative, fiscal and social. In addition, there is the constitutional jurisdiction, i.e. the Federal Constitutional Court and the Constitutional Courts of the states (“Bundesländer”).

The highest ordinary court is the Federal Court of Justice. At regional level there are Local Courts (“Amtsgerichte”) and Regional Courts (“Landgerichte”), which are the first or the second instance courts depending on the character of the case, and Higher Regional Courts (“Oberlandesgerichte”). The administrative, labour and social jurisdictions have three tiers and the fiscal jurisdiction has two. Each Federal Court rules the final decision in a law suit.

However after such a final decision there is the possibility to challenge the judgement in front of the Federal Constitutional Court if the plaintiff asserts that his/her fundamental constitutional rights are violated.

- 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?

A uniform application of the law is part of the principle of legal certainty, determined in the Constitution (article 20 (1), (3) GG, 95 GG, see 1.1, 3.3). In addition there are procedural rules (paragraph 132 GVG, article 45 law on the organisation of labour law courts, ArbGG; paragraph 11 administration procedural code, VwGO; paragraph 11 fiscal law procedural code, FGO; paragraph 41 law on the organisation of the social law courts, SGG). Further there are legal practice guidelines, see 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?

In the German law system there is no principle like “stare decisis”, which exists in the Common Law countries to guarantee a uniform application of the case law in the different courts. In general the only obligation judges have is to apply the law and to observe the fundamental rights of the constitution. Factually judges in the lower courts tend to follow the opinions of the higher courts. They do not have a legal obligation to follow that case law. If they do not so, their decision might get overruled by the court of next instance, and eventually by the Federal Constitutional Court.

If the Federal Court of Justice reassigns a matter to a lower instance court for additional review that court is legally bound to the decisions and their reasoning (article 563 (2) ZPO).

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

In the German law system it is agreed that the judgements in general courts only have an “inter partes” effect in between the parties of a legal conflict, see 3.1., 3.2.

- 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.)?

There is no procedure to avoid deviating decisions in the courts or chambers below the level of the Federal Courts. For the rules applicable on the level of the Federal Courts, see 3.3.

- 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 there is no binding case law in Germany deviations from superior courts are permissible. This is a consequence of the legal independence of judges (article 97 GG). Even if the legal question at hand has already been decided in a certain way courts may decide differently and thereby cause the higher court to review (again) its position. If the higher court confirms its position the decision of the lower court may be repealed. This is the factual binding effect of the legal hierarchy of the German Court system, see 3.6.

- 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 Federal Court of Justice (in civil matters) decides on cases in which the Higher Regional Courts have permitted the appeal. If the appeal is not granted that decision can be reviewed by the Federal Court of Justice in cases the amount in dispute exceeds

20.000 Euro. There are no discretionary powers in granting right to hear other cases. The Federal Court of Justice decides only legal questions on the facts established by the lower courts. This practice then secures the uniform application of law and contributes to legal certainty in other cases, see 3.1.

- 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?

According to the Constitution (Art. 59 (2) GG) the treaties like the European Court of Human Rights are on the same level in the norm hierarchy as a usual formal law of our legislative body, see 2.2. In German cases there is a duty to implement a judicial decision by the European Court of Human Rights or another supranational court.

Furthermore in other cases the decisions of the European Court of Human Rights will be respected because Germany has accepted the competence of the European Court of Human Rights. The Federal Constitutional Court has ruled that all courts in Germany have to take into account the decisions of the European Court of Human Rights if interpreting a law, even if the decisions were about/against other countries than Germany.

The judgements of the European Court of Justice have a binding effect in questions of European law which are relevant for the case to be decided.

The uniform application of the European law is guaranteed by Art. 236/256, 267 AEUV that allows a special submission procedure to the European Court of Justice if a national court has difficulties in reading and interpreting the European law (e.g. directives, regulations, recommendations etc.). In that case the European Court of Justice then decides on the question regarding the European law and remits the case to the national court, which then decides the case. German courts obey diligently the obligations under which they have to submit cases to the European Court of Justice.

- 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 Federal Courts provide their decisions on their own websites. These could be used free of charge by everybody. Various other public websites exist which cover the jurisprudence of lower tier courts.

As a federal state, the Federal Republic of Germany is characterised by decentralised structures. Therefore the federal states decide by themselves whether they provide judgements of first instance online. Most federal states provide a selection of judgements free of charge for non-commercial purposes (<http://www.justiz.de/onlinedienste/rechtsprechung/index.php>).

In North Rhine-Westphalia there is a database covering all decisions of courts in North Rhine-Westphalia which are of special public interest accessible via the internet free of charge (www.nrwe.de).

In addition, selected judgements of the courts of highest instance since 2010 are available to the general public free of charge on the website www.rechtsprechung-im-internet.de. The website is provided by the Federal Ministry of Justice and Consumer Protection in collaboration with the juris GmbH.

A broad range of judgements of first instance courts is available via the Federal Legal Information System. Registered users can get access via the commercial website www.juris.de (subject to costs). There are also other commercial providers. Those databases cover mostly national case law.

In addition courts or lawyers may send court decisions for publication to legal magazines. There are some commercial scientific literature for jurists, in which new (international) case law is presented and discussed on a regular basis (mostly every month).

3.13 Is the access to such database free of charge?

Public websites of courts are free of charge and accessible without restriction. Commercial databases which are most frequently used are not free of charge. There are no free licenses for judges, but special conditions might apply to courts, see 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?

There are more providers, but mostly on a commercial basis. They are independent of the courts, see 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?

There are no particular challenges. The uniform application of law is efficiently guaranteed by the court system as described above, see 3.3. The legislator rarely interferes to secure the uniform application of law.

3.16 Any other point you wish to raise.

No.