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JURISDICTION OF THE COURT OF THE EURASIAN ECONOMIC UNION AND ITS ROLE IN THE DEVELOPMENT OF THE EURASIAN LEGAL ORDER: ONE STEP BACK AND TWO STEPS FORWARD

Abstract: *The Court of the Eurasian Economic Union was created in 2015 as a judicial organ with jurisdiction over a range of subject matters within the Eurasian Economic Union. It replaced the Court of the Eurasian Economic Community, which operated within the Eurasian Economic Community and its Customs Union (2012-2014). Though the Union become the next step in the integration process of the post-Soviet area, the newly created Court has not been given de jure a successor status. The Court of the Union was set up anew as one of the four institutional bodies in the structure of the Union. It was empowered to settle disputes between the Member States, as well as to consider different types of actions brought by private actors (economic entities only). The interpretative function of the Court was enshrined as "competence on clarification." Moreover, the Commission, the main executive and regulative organ, was not given locus standi in actions against the Member States to enhance their compliance with the obligations of EAEU law. Preliminary jurisdiction was also cut down as compared to the Court of the Community or other regional integration courts. However, some new functions were given to the Court, and its five years long practice shows a clear tendency to substitute missing powers with those given but in a broader context, as well as its aspirations to play a consolidating role for the legal order of the Union.*

Keywords: advisory opinion, dispute resolution, EAEU law, Eurasian Economic Union, Eurasian integration, jurisdiction, judgment, protection of rights

INTRODUCTION

The launch of the Court of the Eurasian Economic Union (the EAEU Court or simply the Court) was awaited with interest by both practitioners and the academic

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community. Its establishment in 2015 was a result of a general reform of the Eurasian integration process that involved the creation of new institutional structures. The Treaty on the Eurasian Economic Union (the EAEU Treaty or the Treaty on the Union) was signed in Astana on 29 May 2014 and took effect as of 1 January 2015 for three founding Member States (i.e. Belarus, Kazakhstan, and the Russian Federation). Armenia and Kyrgyzstan joined the Union in February and September 2015, respectively. The EAEU replaced the previously existing Customs Union and the Eurasian Economic Community.

The difference between judicial organs operating within those two structures is not only formal. There are also significant differences in terms of jurisdiction between the Court of the Eurasian Economic Community (the EurAsEC Court), which functioned in 2012-2014, and the new EAEU Court.

The Statute of the EAEU Court, being an integral part of the Treaty on the EAEU (Annex 2), uncontroversially prohibits the Court from establishing new legal rules, changing the existing norms,[1] as well as from extending the powers of other EAEU bodies.[2] At the same time, the Eurasian Economic Commission has been excluded from the entities possessing *locus standi* before the Court as regards actions for failure to fulfil obligations. The most regrettable change, however, concerns elimination of the preliminary ruling procedure. This development has made the academia particularly sceptical about the real powers and the role of the EAEU Court in the integration process.[3] Indeed, while according to Art. 2 of the Statute of the EAEU Court the "objective of the Court's activities shall be to ensure, in accordance with the provisions of this Statute, uniform application by the Member States and bodies of the Union of the Treaty, international treaties within the Union, international treaties of the Union with a third party and decisions of the bodies of the Union", the actual functions of the Court seem to be quite limited.

To be fair, one also must admit that some fields of the Court's jurisdiction are, in contrast, widely formulated. *Locus standi* of economic entities is only limited by the criteria of "direct effect on the rights and legitimate interests" which can be caused by the actions taken or decisions challenged. This means that there is no obligation for them to prove an "individual" interest, and that the contested action or decision may be of general application. In this context, it should be noted that in the EU judicial system, private (so-called non-privileged) applicants can also seek judicial review of acts of the EU institutions. However, Art. 263(4) of the Treaty on the Functioning of the

[1] Art. 102 of the Statute: "No decision of the Court may alter and/or override the effective rules of the Union law and the legislation of the Member States, nor may it create new ones", available at: http://courteurasian.org/doc-17063 (accessed 30 June 2020).

[2] Art. 42 of the Statute: "The jurisdiction of the Court shall not include extension of the competence of Bodies of the Union in excess of that expressly provided for by the Treaty and/or international treaties within the Union."

[3] Z. Kembayev, *The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration?*, 41 Review of Central and East European Law 342 (2016).

European Union (TFEU) only provides that any natural or legal person may institute proceedings against an act which is either addressed to them or of direct and individual concern. Another example of a quite wide approach to judicial access concerns the *ratione temporis* of actions. There are no preclusive time-limits for initiating actions against decisions or acts/failures to act on the part of the Commission.

When discussing the role and progress of the Court in the EAEU legal system it is useful to start with the jurisdictional issues. While the Union, its history and its evolution are quite widely explored in the doctrine,[4] the analysis of its judicial system, including the case law of the Court, still remains underdeveloped, despite its obvious influence on the integration processes. Although, the early jurisprudence is well analysed in the existing scholarship,[5] the practice of the Court shows some diversity and changes in its approaches, which requires looking at the more recent case law as well.

The objective of this article is twofold. First, the article aims at exploring the jurisdiction of the Court by analysing its jurisprudence and comparing it to its predecessor. Second, the article discusses how the judicial organ of the EAEU influences the development of the regional legal order. To this end, the basic rules and dynamics of applications to the Court are reviewed (the first section). Then in the second section the different aspects of the jurisdiction of the Court are analysed. The last section offers some general observations on the tendencies in the evolution of the Eurasian integration project as seen through the prism of the Court's activities.

1. GENERAL RULES AND THE DYNAMICS OF APPLICATIONS TO THE COURT

The Court is a permanent judicial body of the EAEU (Art. 19(1) of the Treaty on the Union), that acts within the powers granted by the Treaty on the Union and treaties within the Union (Art. 8(2) of the Treaty). Its status, jurisdiction, order of formation and functioning are set forth in the Statute of the Court (Annex 2 to the Treaty).

The Court consists of two judges from each Member State. The term of office of a judge is nine years. The judges are appointed by the Supreme Eurasian Economic Council on proposals from the Member States of persons of high moral character, highly qualified in the field of international and domestic law, and as a rule, meeting the requirements applicable to judges of the highest judicial authorities of the Member States. Judges may be dismissed by the Supreme Eurasian Economic Council, but only in some specific situations. These particularly include inability to exercise the powers of a judge for health reasons or other valid reasons; participation in activities incompatible

[4] G. Mostafa, M. Mahmood, *Eurasian Economic Union: Evolution, Challenges and Possible Future Directions*, 9(2) Journal of Eurasian Studies 163 (2018); S. Verdijeva, *The Eurasian Economic Union: Problems and Prospects*, 4 Journal of World Investment and Trade 722 (2018).

[5] K. Entin, B. Pirker, *The Early Case Law of the Eurasian Economic Union Court: On the Road to Luxembourg?* 25(3) Maastricht Journal of European and Comparative Law 266 (2018).

with the office of a judge; termination of membership in the Union of the State that nominated the judge; loss by the judge of the citizenship of the Member State that nominated him or her; entry into force of a judgment of conviction against the judge or a court decision on the application of compulsory measures of a medical nature to the judge.[6] The initiative to terminate the term of office of a judge belongs to the Member State that nominated the judge, the Court itself, or to the judge concerned.

All activities of the Court are managed by the President of the Court. The President of the Court has a deputy – the Vice-President. Both of them are elected from among the judges of the Court and by the judges of the Court, subject to approval by the Supreme Eurasian Economic Council, for a term of three years.

The jurisdiction of the Court is set forth in Arts. 39 and 46 of the Statute and includes dispute resolution and the so-called "clarification procedure." The main difference between these two procedures lies in the legal effect of the Court's decision. A dispute resolution procedure leads to a binding judgment, while a clarification procedure involves interpretation of Union's law provisions and takes the form of an advisory opinion, which is non-binding in nature. There are some differences in terms of administration of justice as well (e.g. a clarification procedure has no oral proceedings, and the principle of equal arms is not applicable there). An advisory opinion is always delivered by the Grand Chamber which consists of all 10 judges, while in the case of dispute resolution the formation of the Court depends on whether the case is a public or private litigation. The Grand Chamber hears the case on the application of a Member State, and the Chamber, consisting of five judges, deals with the cases brought by economic entities.

Both procedures (dispute settlement and clarification) are similarly in demand by applicants. The statistics at the end of 2019 is provided below. Moreover, by March 2020 four new cases have been initiated before the Court: two new applications, one application for clarification, and one complaint.

Table 1. Applications brought to the Court in 2015-2019

	2015	2016	2017	2018	2019	Total
Total in the relevant period	6	13	9	8	11	47
Applications (dispute settlement)	6	4	4	3	5	22
Applications (requests) for clarification	-	4	5	5	4	18
Applications for appeal (complaints)	-	5	-	-	2	7

The quality and legal grounding of applications brought before the Court are getting better each year, which is reflected in the number of applications found to be admissible. This positive dynamic is visible for all types of applications.

[6] Statute of the Court of the Eurasian Economic Union, Chapter II "Composition of the Court." An English unofficial translation can be found at: http://courteurasian.org/en/page-24501 (accessed 30 June 2020).

Table 2. Applications found admissible (2015-2019)

	2015	2016	2017	2018	2019	Total
Admissible	2	11	7	7	10	37
Applications (dispute settlement)	2	5	1	2	4	14
Applications (requests) for clarification	-	2	6	5	4	17
Applications for appeal (complaints)	-	4	-	-	2	6

Art. 39 of the Statute governs different types of disputes in accordance to *ratione personae* and type of action. Art. 39(1) concerns actions brought by Member States (public applicants), while Art. 39(2) concerns those brought by "economic entities" (private applicants). Note that there are types of actions which may be brought by both private and public applicants, and those which may only be brought by Member States.

2. SCOPE OF JURISDICTION OF THE COURT IN THE STATUTE AND ITS CASE LAW

2.1. Actions by private and public applicants

There are two types of actions available for both private and public entities: (i) challenges against actions of the Commission or its failure to act; and (ii) actions concerning the compliance of a decision of the Commission or its particular provisions with the Treaty or international treaties within the Union.

2.1.1. Applications challenging actions of the Commission or its failure to act

In theory the former type of action should form a separate ground for jurisdiction, but the Statute of the EAEU Court – unlike the European Union (EU) system – does not make any distinction between the challenge of an action and of a failure to act (inaction).

The first case considered by the Court on the merits (the *Tarasik* case, 2015) concerned this issue, and the Court had to draw the line between action and inaction, based on a broad approach to the latter. In this context, the Court noted that:

> In general 'improper failure to act' means a non-performance or improper performance by a supranational body (official) of the duties assigned to it by the Union law, in particular leaving a request from an economic entity without consideration in whole or in part, a response to the applicant not on the merits of his request, if the consideration of this request falls within the competence of a supranational body (official).[7]

[7] *Tarasik v. Commission*, Judgment of 28 December 2015, case no. CE-1-2/2-15-KC and Judgment of the Appeals Chamber of 3 March 2016, case no. CE-1-2/2-15-AP, sec. VII, para. 2, available at: http://courteurasian.org/doc-14443, http://courteurasian.org/doc-14893 respectively. A summary in English can be found at: http://courteurasian.org/page-25001 (all accessed 30 June 2020).

The Court widened the concept even further (again differently than the Court of Justice of the EU) by noting that a negative answer from the Commission can be also a failure to act:

> As part of a claim regarding a failure to act, a negative response of the Commission can be contested, if the performance of the action requested by the applicant constitutes its direct duty, which cannot be delegated to other persons (the so-called 'special duty'). The duty to perform the action requested by the applicant should follow from the general principles and rules of international law, decisions of the bodies of the integration association.[8]

The efficiency of an action for failure to act in the EAEU may be illustrated by the *Oil Marine Group* case (2018).[9] The applicant was a Russian company which had to pay customs duties with regard to the vessels it imported, despite a Commission decision granting an exemption with regard to those goods. The company complained to the Commission, asking it to conduct a monitoring of the application of its decision by the Russian customs authorities. Following a refusal from the Commission to do so, it brought an action before the EAEU Court. The EAEU Court considered that the company had legitimate interests in assuring that the Member States properly apply the provision of Union law and, consequently, the Commission monitor and control thereon.[10] On one hand, the exercise of such a monitoring does not usually depend on individual requests, while on the other hand the Eurasian Economic Commission has a duty to conduct monitoring when there is objective evidence that the state bodies of the Member State do not apply the rules of the Union law or where the practice in its application throughout the Member States is contradictory.[11] In this instance, the EAEU Court considered that while the Commission performed an analysis of the Russian legislation and found it to be consistent with Union law, the Commission failed to analyse the relevant law enforcement practice, thus failing to conduct a proper/full monitoring and to perform its duties under the Treaty. Consequently, when national administrative authorities violate their obligations under EAEU law, economic entities may not only bring an action before the national courts, but also file a complaint to the Eurasian Economic Commission and, eventually, challenge its inaction before the EAEU Court.

This broad approach to inaction has allowed the Court to rule more actively on the mode of action of the Commission, paying a great deal attention to due procedure in the Commission as regards communications with private persons, monitoring of compliance of states' actions with the EAEU law, taking decisions, etc.

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[8] Paras. 2(11) and (13) of section VII of the Judgment of the Chamber of the Court; paras. 8.3(8) and 8.5(18) of section IV of the Judgment of the Appeals Chamber of the Court.

[9] *Oil Marin Group LLC v. Commission*, Judgment of 18 October 2018, case no. CE-1-2/4-18-KC, available at: http://courteurasian.org/doc-21993. A summary in English can be found at: http://courteurasian.org/page-26461 (both accessed 30 June 2020).

[10] *Ibidem*, part VI, para. 8.

[11] *Ibidem*, part IV, para. 23.

2.1.2. Actions concerning the compliance of a decision of the Commission or its particular provisions with the Treaty and international treaties within the Union

Actions concerning the compliance of Commission's decisions with the Treaty and international treaties within the Union may be submitted by both public and private entities. However, access of the Member States to this category of cases is wider. Firstly, the Member States may plead for an assessment of the compliance of Commission's decisions not only with the Treaty on the EAEU and treaties within the Union, but also with decisions of other organs (i.e. the High Economic Council and the Intergovernmental Council). Secondly private actors, which are "economic entities" in the EAEU terminology, have strict *locus standi* rules.

The term "economic entity" refers to any legal entity which is "directly concerned." This category of applicants can be residents of any country; not only Member States but third states as well. For example, in *Arcelor Mittal* (2016), the applicant was from outside of the EAEU (i.e. a Ukrainian company which aimed at the review of antidumping measures imposed by the Commission).[12] On the other hand, the notion "economic entity" refers only to legal entities and individual entrepreneurs. Individuals in their personal capacity have no access to the Court notwithstanding that their interests be directly concerned.

The concept of "direct concern" has no definition in the Treaty. The case law of the Court is helpful in this context. As has been indicated by the Court in the *Sevlad* case (2016), "the decision of the Commission or its particular provisions may be recognised as directly affecting the rights and legitimate interests of an economic entity in the area of business and other economic activities, *inter alia* in cases where the corresponding decision is applied to the specific economic entity in connection with its business activities."[13] The same approach was taken in the *General Freight* case (2016) by another Chamber, which stressed that a decision of the Commission is of direct concern for an economic entity if it has legal consequences for it.[14] This very broad approach was aimed at allowing a wider circle of economic entities to have *locus standi*: according to the EAEU Court an economic entity has the right to challenge not only a decision which has been applied, but one which could be applied hypothetically.

This situation was different from what happened in the *Kapri*[15] case, where the EAEU Court found that the Commission's decision did not *directly concern* the appli-

[12] *ArcelorMittal Krivoy Rog JSC v. Commission*, Judgment of 27 April 2017, case no. CE-1-2/4-16-KC, available at: http://courteurasian.org/doc-19913, with no summary in English (accessed 30 June 2020).

[13] *Sevlad LLC v. Commission,* Judgment of 7 April 2016, case no. CE-1-2/1-16-KC and no. CE-1-2/1-16-AP, available at: http://courteurasian.org/doc-15463. A summary in English can be found at: http://courteurasian.org/en/page-25061 (both accessed 30 June 2020), para. 6.2.

[14] *General Freight CJSC v. Commission*, Judgment of 4 April 2016, case no. CE-1-2/2-16, available at: http://courteurasian.org/doc-15423, para. 3. A summary in English can be found at: http://courteurasian.org/en/page-25041 (both accessed 30 June 2020).

[15] Order of 1 April 2016, case no. CE-3/2-15-KC (*"Kompanija avtopritsepov" CJSC* or *Kapri* case), available at: http://courteurasian.org/doc-14373. A summary in English can be found at http://courteurasian.org/page-24991 (both accessed 30 June 2020).

cant. The economic entity, the company Kapri, sought to challenge the action of the Commission which imposed less strict requirements on its competitors operating in a similar business field. In this case the applicant could not prove direct concern, since the goods it imported were not subject to the Commission's Decision. The Decision of the Commission was aimed at the goods which had been imported by the competitor of the applicant. The EAEU Court found the application inadmissible and pointed out that: "the applicant has failed to substantiate how the contested Commission's decision *directly* affects the applicant's rights and legitimate interests in the area of business and other economic activities."[16] This case is a classic example of an applicant's lack of direct involvement in the activities regulated by a contested decision, and therefore of the inadmissibility of such an application.

Overall, the concept of direct concern was quite widely conceptualized in the early years of the functioning of the Court, allowing it to accept a lot of applications from economic entities whose interests were interfered with, in way or another, by a decision of the Commission. However, the practice of the Court in 2020 has changed and it appears that it has decided to narrow the concept of "direct concern." In the *Electronnaya tamozhnia* case (2020), the Chamber ruled that the Court lacked competence because, *inter alia*, the relevant decision of the Commission was of no "direct concern" to the applicant.[17] The latter was a customs agent bearing a subsidiary liability along with the declarant ("SUEK-KUZBASS" JSC), though it was not a payer of the customs duty. The challenged decision of the Commission classified the goods that "SUEK-KUZBASS" JSC imported to the Union. The goods were imported within another classification position which corresponded, according to the applicant, with the Harmonized System of Codification of Goods. As a result, the customs agent, "Elektronnaya tamozhnia" (the applicant) was fined. Therefore the latter believed that its interests were of direct concern, which gave grounds for its application to the Court. However, the Chamber decided otherwise and found the applicant as ineligible because of a lack of direct concern. Consequently, its application was found to be inadmissible. In this context it is necessary to note that previously the Court considered applications from the customs agents as from eligible applicants (the *"Unitrade" CJSC*[18] and *"ONP" LLC*[19] cases). Only time will tell whether the Court is using a new concept of *stare decisis*, or whether it was a one-time fluctuation in its position.

To be precise, Art. 39(2) of the Statute refers not only to rights and legal interests of direct concern, but also stipulates that economic entities may challenge those decisions (actions/failure to act) which entail a violation of the Treaty or an international treaty

[16] *Ibidem*, para. 6.

[17] Order of 10 March 2020, available at: http://courteurasian.org/doc-27483, with no summary in English (accessed 30 June 2020).

[18] *Unitrade JSC v. Commission*, Order of 25 March 2015, case no. CE-1-2/1-15-KC, available at: http://courteurasian.org/page-24121, with no English version available (accessed 30 June 2020).

[19] *ONP LLC v. Commission*, Judgment of 15 November 2012, case no. 1-7/2-2012, available at: http://courteurasian.org/page-20801, with no English version available (accessed 30 June 2020).

within the Union. However, this issue is not considered at the stage of admissibility of a case. As the Court held in the *Sevlad* case, the alleged violation of the rights and legal interests of the plaintiff is assessed while considering the merits ("the verification of a violation of the rights and legitimate interests of the plaintiff in the area of business or other economic activities, granted by the Treaty and (or) international treaties within the Union, should be preceded by an assessment of the legality of the challenged decision of the Commission").[20] Thus the Court determines the legality of the Commission's decision first, since "the violation of the rights and legitimate interests of the applicant in the area of business and other economic activities can be caused only by the execution (application) of a decision of the Commission which is not in line with the Union law."[21]

2.2. Applications by Member States only

2.2.1. Actions for failure to fulfil obligations

This form of action has been significantly transformed, as within the Eurasian Economic Community it used to be within the Commission's domain. Now such actions may be submitted by the Member States only. This change has considerably altered the balance of powers within the integration structure, decreasing the competence of the Commission as a supranational institution in monitoring and controlling implementation of the Union law.

The Member States inform the Court via diplomatic channels which organs can represent the Member State in its communications with the Court. All Member States have adopted special legal acts in this regard. Generally, the respective Ministries of Justice are indicated as the relevant organ. However, the Republic of Kazakhstan decided on a very wide list of organs representing the state in relations with the Court, and this group currently includes the Ministries of Justice, of Foreign Affairs, of Economic Development and Investments, the General Prosecutor Office, as well as a non-state Chamber of Entrepreneurs Atameken.

During last five years there was only one case, initiated by the Russian Federation against the Republic of Belarus (i.e. the *Kaliningrad transit* case (2017)). The Russian Federation complained that the Republic of Belarus did not recognize the decisions taken by customs authorities of the Claimant on the release of goods in accordance with the customs procedures of reimport and customs transit, reviewed the validity of such decisions and adopted decisions establishing the foreign origin of goods.[22] Five separate opinions were issued by the judges of the Grand Chamber (consisting of 10 judges).

Obviously, a state-to-state dispute is not the best compliance mechanism in an integration community, therefore it is not surprising to see so far there has been only one

[20] *Sevlad v. Commission*, para. 7.2.1(1).

[21] *Ibidem*.

[22] *Russian Federation v. the Republic of Belarus*, Judgment of 21 February 2017, case No CE-1-1/1-16/, available at: http://courteurasian1.org/doc-17943. A summary in English can be found at: http://courteurasian.org/page-25431 (both accessed 30 June 2020).

action. The relevant judgment also remains quite vague. The Grand Chamber of the Court delivered on 21 February 2017 its final judgment establishing that the Republic of Belarus had "*not fully complied* with the provisions of Articles 1, 3, 4, 25 of the Treaty on the Eurasian Economic Union of May 29, 2014 on the free movement of goods, the functioning of the Customs Union without exceptions and limitations upon completion of the transitional periods, commitment to the creation of a common market for goods, services, capital and labour resources within the Union, the application of a common customs regulation, Article 125 of the Customs Code of the Customs Union, Articles 11 and 17 of the Agreement of May 21, 2010."[23] The Court's Statute prescribes only two forms of a decision – establishing compliance or non-compliance. The formula of "non-full compliance" is unclear and not strictly prescribed by Union law; however it was politically sensitive and constituted a compromise of the mutual interests involved.

2.2.2. Actions on the compliance of a treaty within the Union or its particular provisions with the EAEU Treaty

This type of jurisdiction is novel, as it was unknown under the EurAsEC. So far this option has not been used. According to Art. 2 of the EAEU Treaty "treaties within the Union" are "international agreements concluded between member-states on the issues related to the functioning and evolving of the Union." Taking into account the procedure for drafting and signing treaties within the Union based on consensus and the internal standard procedures within the states on approving international agreements, it is hardly possible that any treaty within the Union can be elaborated, signed, and enter into force with any inconsistency to the EAEU Treaty. The situation is hypothetically possible if an agreement is concluded to which not all the Member States are the parties, and those states consider this agreement to be incompatible with the Treaty of the Union. However, if such a situation were to occur then according to the hierarchy of the Eurasian sources of law prescribed in Art. 6 of the Treaty of the Union, the Treaty prevails, and the Member States should amend the treaty within the Union based on the principle set forth in Art. 3(2) ("Member-states create favourable conditions for fulfilment of the functions of the Union by the Union and refrain from those measures which menace the objectives of the Union"). This principle is very similar to the principle of the loyal cooperation within the EU, although not so named.

2.3. Advisory procedure (clarification)

Unlike the EurAsEC Court, the Court of Justice of the EU, or the Andean Court of Justice and some other regional integration courts, the EAEU Court has no jurisdiction to give preliminary rulings based on references made by national courts concerning the application of the Treaty, treaties within the Union, or Commission decisions. In truth this function within the EurAsEC was not much in demand.

Nonetheless, the absence of a preliminary ruling procedure has caused many observers to doubt whether the Court can become a significant legal actor. During the

[23] *Ibidem*, para. 1 of the operative part of the judgment (emphasis added).

five years of its operation, the EAEU Court has managed to dispel some of the doubts concerning its role by showing that it has other tools at its disposal. Thus advisory opinions of the Court have become a kind of substitute for this missing function.

2.3.1. Clarification upon requests on general matters

The clarification function of the Court, as is set forth in its Statute, largely resembles the interpretation competence of international courts. Art. 46 of the Statute of the EAEU Court provides for the possibility for the Commission and the Member States to request the Court to issue a clarification of the provisions of the Treaty, treaties within the Union, and decisions of the Union bodies.

The main objective of the clarification process is the uniform application of the Union's law by the Member States, its legal persons and individuals, organs of the Union, as well as its staff. In the absence of a preliminary ruling procedure this clarification function performs the general role of consolidating the practices of national courts and other institutions applying the Union's law. Therefore, not surprisingly the Court tries to interpret such a request *in abstracto,* aiming its clarification at a non-limited range of analogous situations. In its advisory opinions, delivered upon the requests by Member State bodies and/or the Eurasian Economic Commission, the Court has managed not only to clarify several key provisions of EAEU law regarding the functioning of the customs union, the free movement of goods and workers, or even transport policy, but also to establish the main characteristics of the EAEU legal order: primacy, direct effect and direct applicability. In case No СЕ-2-2/518/БК (clarification of the freedom of movement of sportsmen), the Court identified the criteria of the norms of direct effect and applicability (i.e. if a norm grants rights and is sufficiently clear and precise, it does not require implementation in national legislation). Similarly, the Court took a clear stance on the issue of primacy by stating that in case of a conflict between the law of the Union and the regulatory acts of national legislation, the provisions of the Union's law shall prevail (para. 7(10) of the part III "Court's Findings" in the Advisory Opinion).[24]

The above developments resemble the approach taken by the European Court of Justice (ECJ) in *van Gend en Loos*. However, the position of the EAEU Court is formulated very concisely, without any in-depth explanation (again in contrast to the ECJ). The probable reason behind this is the fact that there seems to be no disagreement among the Member States and in the doctrine on the primacy and direct application of the Union's law. Most states have already confirmed the existence of both principles in their national practice and legal acts.[25]

[24] *Eurasian Economic Commission (Sportsmen case)*, Advisory Opinion of 7 December 2018, case CE-2-2/5-18-BK, available at: http://courteurasian.org/doc-22543. A summary in English can be found at: http://courteurasian.org/page-26501 (both accessed 30 June 2020).

[25] *See* Judgment of the Court of the Republic of Belarus of 28 December 2017, the Order of the Constitutional Court of the Russian Federation of 13 February 2018, the Order of the Plenum of the Supreme Court of the Russian Federation of 12 May 2016, and the Decree of the Constitutional Council of the Republic of Kazakhstan of 5 November 2009 (No. 6).

The Commission and the Member States have often made recourse to this instrument as an alternative to an action for failure to fulfil obligations,[26] or as a possible test of the conformity of a Member State's actual or draft legislation with EAEU law.[27] Thus, in the case *On the application of the Ministry of Justice of the Republic of Belarus*, the Court was asked about issues relating to certain competition rules. Art. 74(3) allows Member States to determine in their legislation further prohibitions, as well as additional requirements and restrictions with regard to the prohibitions set out in Arts. 75 and 76 of the Treaty. In its application the Ministry of Justice of the Republic of Belarus asked whether a Member State was allowed to establish different criteria of admissibility of vertical agreements in its national legislation. This request was derivative to the process of amendment of national legislation, and the Ministry of Justice asked for a kind of preliminary ruling of the Court on the possibilities to change the national law as regards these competition rules. In its advisory opinion of 4 April 2017, the Grand Chamber of the Court indicated that Art. 4 and Arts. 74-76 of the Treaty and the provisions of Section II of the Protocol on General Principles and Rules of Competition (Annex 19 to the Treaty), when read jointly, do not allow the Member States to modify the prescribed admissibility criteria of vertical agreements. The national legislator (the Belarusian parliament) later followed the position of the Court.

However, the clarification function of the Court does not deprive the Member States of the right to joint interpretation of the Treaty or treaties within the Union (Art. 47 of the Treaty on the Union).

As was indicated above, the Member States designate their competent authorities which may refer to, apply to, and communicate with the Court. No Member State has indicated in a relevant national act any national courts at any level or specialization. However, taking into consideration the growing role of advisory opinions of the Court it is currently discussed in the doctrine and between practitioners whether it would be advisable for the Member States to empower their Supreme Courts with the right to request advisory opinions from the Court.

2.3.2. Clarification on Eurasian civil service matters

Both EAEU civil servants and the Commission also have the possibility to ask the Court for a clarification of EAEU law connected to labour relations, and this competence has allowed the Court to interpret several provisions of the EAEU Treaty and the Regulation on Social Guarantees, Privileges and Immunities within the Eurasian Economic Union (Annex No. 32 to the Treaty on the Union). Altogether the Court

[26] *See e.g. Ministry of Transport and Roads of the Kyrgyz Republic (Railroad tariffs case)*, Advisory Opinion of 20 November 2017, case CE-2-1/2-17-BK, available at: http://courteurasian.org/doc-18093, http://courteurasian.org/doc-18093, http://courteurasian.org/doc-18093. A summary in English can be found at http://courteurasian.org/page-25441 (all accessed 30 June 2020).

[27] *See e.g. Ministry of Justice of Belarus (Vertical Agreements case)*, Advisory Opinion of 4 April 2017, case CE-2-1/1-17-BK, available at: http://courteurasian.org/doc-18803. A summary in English can be found at http://courteurasian.org/page-25081 (both accessed 30 June 2020).

has considered three cases within this jurisdictional power. This remedy cannot be considered as an alternative to direct judicial protection of the rights and interests of the Eurasian civil service. This sphere thus lacks access to justice within the EAEU because these advisory opinions are of a non-obligatory character.

The other important issue which has not been resolved within the Union is the fragmented internal regulation of the status, rights and duties, and privileges and immunities of the Union's staff. Annex No. 32 refers to the national law of the Member State where the relevant organ resides (for the Commission this is Moscow, Russian Federation, and for the Court it is Minsk, the Republic of Belarus). As the Court pointed out in all three cases considered in this sphere, the only way to effectively address all the issues connected with the Union's staff is to develop internal Union regulations on social security, pension and other issues in order to preserve the independent character of the Eurasian civil service. As the Court stated in the case *Employees of the Eurasian Economic Commission*, "the internal law of an international organisation shall establish norms that cover the maximum range of relations connected to civil service (including issues of appraisal). Nonetheless national law regulates relations concerning solely the material sphere (e.g., pensions)."[28]

In the *Adilov case,* the Court went further and stated: "[t]aking into account the established international practice, as well as accumulated experience of regulation of employment relations in integration governing bodies, a comprehensive solution could be found to the problems of legal regulation of employment relations in the bodies of the Union via the development and adoption, within the framework of the process of improvement of the Union law, of a legal act regulating different aspects of employment and social security of international civil servants in the bodies of the Union in a more comprehensive way, subject to the need to guarantee their independence, as well as proper social and legal protection."[29]

The issues covered in these advisory opinions are diverse: appraisal, assessment, audio and video recording, contracts, reform of organizational structure, equal representation of Member States, termination of employment contracts, etc. While the three cases referred to herein constitute only 8% of all cases decided by the Court, nonetheless these advisory opinions are very important insofar as they form the only possible mechanism for any judicial protection for the Union's staff. Due to the immunities of the Union as an international organization, national institutions are without competence to rule on these issues. The Court, being aware of the problem of a lack of direct protection of the rights of civil servants in the Union, has decided to adopt a special approach to these types of cases, i.e. while issuing clarifications in other cases as a rule *in abstracto*,

[28] *Employees of the Eurasian Economic Commission case,* Advisory opinion of 3 June 2016, case no. CE-2-3/1-16-CE available at: http://courteurasian.org/doc-15913, a summary in English can be found at: http://courteurasian.org/page-25031 (both accessed 30 June 2020).

[29] *Adilov case,* Advisory Opinion of 11 December 2017, case no. CE-2-3/1-17-BK, available at: http://courteurasian.org/doc-19843, para. 15(2), a summary in English can be found at: http://courteurasian.org/page-25481 (both accessed 30 June 2020).

in labour related acts the interpretation is *in concreto*, with due attention given to the details of each particular situation and their legal consequences. Thus in the *Adilov* case the Court declared that it was the responsibility of the Commission to institute a proper competition process for the replacement of vacant positions, and technically expressed the position that an official could not be dismissed from the position of deputy head of the department for the reason of further concluding a contract with a person of the same nationality as the head of the given department. However, this type of the Court's jurisdiction is not an effective alternative to full judicial protection inasmuch as it relies upon the authoritative power of the Court and not on effective legal remedies and guarantees.

CONCLUSIONS

Today, of the Court's five years of practice has proven that this judicial organ, being an element of the integration structure in the Eurasia, plays an important role and can form authoritative legal positions. Its two main types of jurisdiction (dispute resolution and clarification) give rise to referrals from both public and private actors possessing *locus standi*. However, some important features of supranational judicial body are missing. In particular, the Court lacks sufficient powers to ensure that the tasks will be fulfilled and the objective(s) envisaged in the Treaty of the Union will be achieved. The most regrettable change in competence, as compared to the EurAsEC Court, was the elimination of a preliminary ruling procedure.

At the same time however, there are some developments in the functioning of the Court which elevates its role in the legal order of the Union. Firstly, there is a kind of substitution in functions and procedures that fill in the normative gaps in the Court`s jurisdiction prescribed in its Statute. In some cases the clarification procedure substitutes for a normative control function and preliminary jurisdiction. So, while the founding treaty, including the Court's Statute, can be seen as a step back in terms of the development of the judicial organ of integration, the Court's practice has shown slow but visible and reasonable progress in the judicialization of the Eurasian integration. Secondly, there is public understanding and attention paid to the Court's decisions among the actors in the EAEU: its legal positions tend to become *stare decisis* and they are implemented by the Commission and the Member States. The Court can play an important role in conceptualizing the structure, the principles, and the sources of the law in the EAEU. However, following the period of its establishment the time has now come for stating and affirming its authority. Diversity in a court's practice is not exactly what is necessary for strengthening and reinforcing integration processes and establishing the credibility of a judicial organ. Therefore the tasks for the Court in the nearest future are the establishment of unification of its practice and standards, enhancement of its argumentation, and consistency in its legal positions.