

## THE COURT OF THE EURASIAN ECONOMIC UNION: CHALLENGES AND PERSPECTIVES

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*The Court of the Eurasian Economic Union (EAEU Court) is a new structure operating since 2015, and whose mission is to ensure the uniform interpretation and application of EAEU law. The article focuses on the main challenges the Court is presently facing: limited competence; a lack of procedural mechanisms to ensure the dissemination of its case-law among national courts; and a low number of applications. Consequently, it is divided into three sections.*

*The first section is devoted to an analysis of the Court's competence and focuses on the loss of the preliminary reference procedure that existed under the EurAsEC law. The authors analyze its role and the possibility of compensating for its lost powers.*

*The second section explores the other tools available to the Court in order to influence the case-law of national courts indirectly. It explores the practical difficulties which economic entities face when bringing parallel proceedings before the EAEU Court and a national court, or when trying to obtain a review of a national court judgment following a positive outcome in the EAEU Court.*

*The third section tackles the issue of the low number of applications, linked to a lack of trust from the business and legal communities. Thus, it is vital for the Court to earn a reputation based on accessibility, professionalism and efficiency. To this end, the authors analyze such issues as the duration of proceedings, the locus standi of economic entities and the way in which judgments should be drafted to ensure the protection of rights and legitimate interests of economic entities.*

*Keywords: Court of the Eurasian Economic Union; Eurasian integration; EAEU' Russian civil procedural law; Court of Justice of the European Union.*

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## Introduction

The Court of the Eurasian Economic Union (EAEU Court) is a relatively new structure operating since 2015. After the termination of the Eurasian Economic Community (EurAsEC) in connection with the launch of a more advanced integration association – the Eurasian Economic Union, the Member States decided not to reform the EurAsEC Court but to create an entirely new institution.

Such a decision might have been prompted not only by the intent to substantially review the competence and operation of the Court through drafting a new Statute and Rules of Procedure<sup>1</sup> but also by the desire of some of the Member States to appoint new judges and to get more control over their appointment and dismissal.

The lack of a legal succession between the two institutions has two major consequences. First, it limits the jurisdiction *ratione temporis* of the new Court to the disputes arisen after January 2015. Secondly, it allows the new Court to distance itself from the case-law of the EurAsEC Court. While in the judgment of the Chamber in the *General Freight* case<sup>2</sup> the Court stated that legal positions formulated in the judgments of the Court of the Eurasian Economic Community may be used as *stare*

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<sup>1</sup> The Rules of Procedure of the EurAsEC Court have been drafted by the Court itself.

<sup>2</sup> Case No. CE-1-2/2-16 *General Freight CJSC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-15563>.

*decisis*,<sup>3</sup> it should be noted that this judgment remains the only instance where the EurAsEC Court's case-law was quoted even though the EAEU Court is often reproducing the same legal positions.

The mission of the new Court is to ensure the uniform interpretation and application of the EAEU law. In fulfilling this objective, the Court is facing three main challenges: a limited competence, the lack of procedural mechanisms to ensure the dissemination of its case-law among national courts and a relatively small number of applications from economic entities.

### 1. A Limited Competence: Myths and Realities

Among the challenges the EAEU Court is facing, one of the most important is still its limited competence set in Chapter IV of the Statute of the EAEU Court (hereinafter – Statute).<sup>4</sup> The jurisdiction of the Court can be divided into two blocks. First of all, the Court has the competence to resolve disputes brought by Member States or economic entities. Secondly, the Court has competence to consider applications for clarification of EAEU law provisions brought by Member States, bodies of the Union or EAEU civil servants. The fundamental difference between these two categories is that applications concerning disputes lead to judgments that are binding.

According to the judgment of the Grand Chamber of the EurAsEC Court in the *Yuzhny Kuzbass* case,<sup>5</sup> the judgments of the EurAsEC Court were binding not only on the parties to the disputes, but *erga omnes*.

Although pursuant to paras. 99 and 100, after consideration of the disputes, the Court shall deliver a judgment that shall be obligatory for execution by the parties to the dispute (in cases submitted by Member States) or by the Commission (in cases submitted by economic entities), the wording of this provisions (the absence of the word “only”) does not prevent the legal positions established by the Court in the analytical part of the judgment from being binding *erga omnes*. Thus, there are no reasons why the EAEU Court should depart from the position of the EurAsEC Court in the *Yuzhny Kuzbass* case. This conclusion is confirmed by the position of the Supreme Court of the Russian Federation expressed in Plenary Ruling of May 12, 2016 No. 18 “On Certain Questions of the Application of Customs Legislation.”<sup>6</sup>

In para. 39 of the Statute, the types of disputes the Court is competent to consider are classified according to the persons who can bring them. For the sake of clarity,

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<sup>3</sup> Subpara. 10 of “Legal Context” section of the judgment of the Chamber of the Court in the case *General Freight CJSC v. Commission*.

<sup>4</sup> Annex 2 to the EAEU Treaty.

<sup>5</sup> Case No 1-7/1-2012 *Yuzhny Kuzbass OJSC v. Commission* (May 1, 2017), available at <http://courteurasian.org/page-20811>.

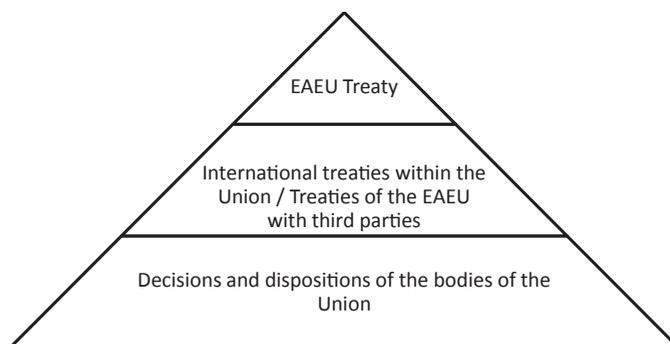
<sup>6</sup> Para. 3, subpara. 2.

we would like to suggest a different classification based on the type of action. Before doing so, however, it is necessary to give some preliminary remarks.

First of all, one has to keep in mind the specific structure of EAEU law as determined by Art. 6(1) of the EAEU Treaty.

The primary law is formed by three types of international treaties: the Treaty on the Eurasian Economic Union, which is the founding treaty establishing the main principles and setting up the bodies of the EAEU; international treaties within the EAEU (some of them dating back to the Customs Union<sup>7</sup>), and, finally, treaties between the EAEU and third parties.<sup>8</sup> According to Art. 6(2) of the EAEU Treaty, International treaties of the Union with a third party shall not contradict the basic objectives, principles and rules of the Union operation. The fact that these objectives, principles and rules are mainly established by the Treaty and that the compliance of treaties concluded within the EAEU may only be assessed *vis-à-vis* the Treaty<sup>9</sup> and not *vis-à-vis* international treaties with third parties suggest that there is no predetermined hierarchy between the EAEU treaties with third parties and international treaties within the Union. At the same time, there are no mechanisms like the one existing in the EU<sup>10</sup> which could ensure a judicial control over the compliance of international treaties with third parties with the EAEU Treaty.

The secondary law is composed by the decisions and orders of the EAEU bodies – the Supreme Eurasian Economic Council (hereinafter – Supreme Council), the Eurasian Intergovernmental Council and the Eurasian Economic Commission (hereinafter – Commission).



<sup>7</sup> For instance, the Customs Code of the Customs Union which is to be replaced by the EAEU Customs Code.

<sup>8</sup> For instance, the Free Trade Agreement with Vietnam.

<sup>9</sup> Para. 39(1) of the Statute.

<sup>10</sup> Art. 218(11) of the Treaty on the Functioning of the European Union (TFEU) provides that “a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”

Secondly, it must be born in mind that the Court does not have the competence to declare a Commission's decision or an international treaty within the Union invalid. This follows directly from para. 102 of the Treaty according to which "a judgment of the Court cannot amend and (or) abrogate the existing rules of the law of the Union, of the legislation of the Member States, and cannot create new ones". Thus, the Court may only declare a Commission's decision "not in line with the Treaty or international treaties within the Union." According to para. 111, a decision of the Commission or its particular provisions declared by the Court not in line with the Treaty and (or) international treaties within the Union shall continue to be valid after the entry into force of the corresponding judgment of the Court until the execution of the said judgment by the Commission within the time-limit prescribed by the Court.<sup>11</sup> Therefore, challenges directed against Commission decisions take the form of actions "concerning the compliance" of the said acts with the EAEU Treaty or international treaties within the EAEU. Likewise, the Court has the competence to assess the compliance of international treaties within the EAEU with the Treaty.

### ***1.1. The Current Judicial Remedies in the EAEU Court***

Actions (applications to resolve disputes and requests for clarification) can be classified into five categories:

**a. Actions "concerning the compliance of an international treaty within the Union or its particular provisions with the Treaty."** They may be brought by Member-States only. This type of action has not been submitted to the Court yet and raises some questions. First of all, a direct action supposes that there is at least one plaintiff and one defendant. One could suppose that the defendant could be the Supreme Council as international treaties within the Union are signed during its meetings. However, we have to rule this hypothesis out – international treaties may not be regarded as acts of the Council as they are signed by Member States. Thus, the Supreme Council in this instance serves as a mere platform for heads of states to meet. Besides, according to para. 43 of the Statute, "any dispute may be accepted for consideration by the Court only following a prior recourse of an applicant to a Member State or the Commission to settle the matter within the pre-trial procedure." Thus, only Member States may be the defendants in this type of action. Secondly, it is not entirely clear what will be the consequences of a judgment of the Court declaring a certain provision of an international treaty within the EAEU not in line with the EAEU Treaty. We can suppose that due to the principle of primacy, the Commission or national bodies (including the courts) will be no longer able to apply the international treaty, while Member States, under the principle of loyal cooperation, will have the duty of renegotiating the international treaty within the EAEU unless they choose to amend the EAEU Treaty instead.

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<sup>11</sup> In case of absence of such a prescription a default time-limit of 60 days shall apply.

**b. Actions “concerning the compliance of a decision of the Commission or its particular provisions with the Treaty, international treaties within the Union.”** This type of action may be submitted by Member States<sup>12</sup> but also, subject to certain requirements, by economic entities.<sup>13</sup> The difference between the type of applications appears not only in a stricter *locus standi* for economic entities, but also in the fact that Member States may also ask the Court to assess the compliance of the Commission decisions vis-à-vis decisions of the bodies of the Union. This could be explained by the fact that decisions of the Supreme Council or the intergovernmental council are not directly applicable and capable of having direct effect. On the other hand, strict wording used in the Statute does not prevent the applicants from invoking other rules of law relating to the application of the Treaty or treaties within the EAEU provided they have a direct effect such as international treaties between the EAEU and third countries or even, under certain conditions, treaties concluded by EAEU Member States with third parties. Indeed, in the *General Freight* case<sup>14</sup> the Court concluded that the Convention on Harmonized System “shall be applied along with the Union law to regulate the customs and tariff relations within the EAEU.”<sup>15</sup> Likewise, nothing prevents the applicants from invoking other grounds to challenge the Commission’s decision such as lack of competence, infringement of substantive procedural requirements or misuse of powers. Indeed, according to Art. 45(a) of the Rules of procedure, in this type of action the Court “shall verify the competence of the Commission to adopt the contested decision.” The Court gave a broad interpretation of this requirement in the *Sevlad* case<sup>16</sup> by stipulating that it also needs to check whether the Commission has respected essential procedural requirements.<sup>17</sup>

**c. Challenges of actions or inaction of the Commission.** This type of action is very similar to the challenges directed against Commission’s decisions and may be submitted by either Member States or economic entities. It should be noted that unlike the EU where the action for failure to act constitutes a separate type of action<sup>18</sup>, the Statute of the Court does not make a distinction between the challenge of actions, and the challenge – for failure to act in the EAEU Court do not constitute a separate kind of action.

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<sup>12</sup> Para. 39(1), alinea 3 of the Statute.

<sup>13</sup> Para. 39(2), alinea 1 of the Statute.

<sup>14</sup> *General Freight CJSC v. Commission*, *supra* note 2.

<sup>15</sup> See subparas. 5, 7–9 of “Legal Context” section of the judgment of the Chamber of the Court; para. 5.1.1, subparas. 13–15 of the judgment of the Appeals Chamber of the Court.

<sup>16</sup> Case No. CE-1-2/1-16-KC *Sevlad LLC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-15463>, <http://courteurasian.org/doc-15893>.

<sup>17</sup> See para. 7.1.2, subpara. 1 of the Judgment of the Chamber in the case *Sevlad LLC v. Commission*.

<sup>18</sup> Governed by Art. 265 of the TFEU.

Thus, it was logical that the Court of the EAEU chose a broad interpretation of inaction in the *Tarasik* case.<sup>19</sup> It should be 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).”

The Court went even further by stating that a negative response of the Commission may also be contested as part of a claim regarding a failure to act “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’).” In doing so, it clearly preferred to follow the approach of national courts<sup>20</sup> over the one of the CJEU. It should be reminded that in the CJEU once the institution comes with a clear position (even when it is a negative reply), the action has to be discontinued even if the institution gave the reply in the course of judicial proceedings. This makes the action for failure to act a mostly ineffective judicial remedy – just a necessary preliminary step before submitting an action for annulment. Contrary to the affirmations of some scholars, the Court did not wrongly interpret the case-law of the CJEU but made a deliberate choice to depart from this narrow reading of “inaction.” The reference to an early judgment of the CJEU<sup>21</sup> was illustrative of the broad approach chosen by the Court even if it does no longer reflect the case-law of the CJEU.

**d. Actions for failure to fulfil obligations.** This type of action<sup>22</sup>, which could have only been submitted by the Commission in the EurAsEC Court, may now be submitted by Member States alone. This change significantly reduced the capacity of the Commission responsible for monitoring and controlling the application of EAEU law, and capable to apply pressure on reluctant Member States. This is symptomatic of an overall lack of trust in the supranational institutions. We still consider that for Member States sending a complaint to the Commission might have been a more preferable option rather than having to institute proceedings themselves. Accordingly, the low number of such actions does not come as a surprise. The first action for failure to fulfil obligations currently pending has been introduced by the

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<sup>19</sup> Case No. CE-1-2/2-15-KC *Tarasik K.P. v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-14443>.

<sup>20</sup> Постановление Арбитражного суда Северо-Кавказского округа от 27 июля 2015 г. по делу № А32-31511/2012 [Resolution of the Federal Court of Arbitration of the North Caucasian District No. А32-31511/2012 of July 27, 2015].

<sup>21</sup> Case C-302/87 *European Parliament v. Council of the European Communities*, 1988, ECR 05615.

<sup>22</sup> In the Statute, they are referred to as actions “concerning the observance by another Member State (other Member States) of the Treaty, international treaties within the Union and (or) decisions of the bodies of the Union, as well as particular provisions of the said international treaties and (or) decisions.”

Russian Federation against the Republic of Belarus and relates to the transit of goods from Kaliningrad to the rest of the Russian territory via Belarus.

**e. Requests for clarification.** Requests for clarification of provisions of the Treaty, international treaties within the Union and decisions of the bodies of the Union may be submitted either by Member States, bodies of the Union or employees and officials of the bodies of the Union and the Court.<sup>23</sup> In the last case, they may only concern labour relations. We have to note that among the bodies of the Union, only the Commission is likely to address such requests, as neither the Supreme Council nor the Intergovernmental Council are permanent institutions and the function of their secretariat is currently performed by the Commission.

While the advisory opinions of the Court are not legally binding and do not deprive the Member States from the right of jointly interpreting the Treaty or international treaties within the Union, this instrument can still be an effective instrument as will be discussed in the next chapter.

### **1.2. References for Preliminary Rulings in the EurAsEC Court**

Unlike its predecessor – the EurAsEC Court – the EAEU Court has no jurisdiction to give preliminary rulings concerning the application of the Treaty, international treaties within the Union, or Commission decisions following references made by national courts. All researchers are unanimous in their negative assessment of this change in the Court's powers,<sup>24</sup> pointing out that "it may prove a serious obstacle on the path of establishing the EAEU's legal order; it narrows the Court's field of action, while undermining confidence in its authority and legitimacy from both the perspective of national courts and potential applicants," and further that "it will impair upholding of a uniform interpretation of the EAEU law and subsequent integration efforts."<sup>25</sup>

The actual situation, however, seems to be less dramatic. Firstly, the role played by preliminary rulings in the interaction between the EurAsEC Court and the national courts should not be overestimated. Secondly, we believe there are mechanisms to at least partially recover the powers lost by the Court.

Any supreme judicial authority could request the EurAsEC Court to render an opinion regarding the application of international treaties of the Customs Union and acts of the Commission of the Customs Union, provided that the two following requirements were met:

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<sup>23</sup> Para. 46 of the Statute.

<sup>24</sup> See, for instance, Кембаев Ж.М. Сравнительно-правовой анализ функционирования Суда Евразийского экономического союза, 2 *Международное правосудие* 30 (2016) [Zhenis M. Kembraev, *Comparative Analysis of the Functioning of the Court of the Eurasian Economic Union*, 2 *International Justice* 30 (2016)].

<sup>25</sup> Карлюк М.В. Система обеспечения права Евразийского экономического союза, 10 *Право в современном белорусском обществе* 181 (2015) [Maxim V. Karlyuk, *The System for Ensuring the Law of the Eurasian Economic Union*, 10 *Law in Modern Belorussian Society* 181 (2015)].

a. the specific act affected the rights and legitimate interests of economic entities;  
b. the issues raised could have a substantial influence on the decision on the merits.<sup>26</sup>

A supreme judicial authority could exercise this right, either on its own motion or upon a request by an economic entity.<sup>27</sup> Public authorities were deprived of their right to submit such requests, which therefore resulted in violating the principles of equality and competition in national proceedings.

One of the major differences between EU and EurAsEC law regarding preliminary ruling procedure is that lower courts in the EurAsEC did not have the power to make these references. This seems even more striking if we take into account the fact only 45% of the total number of references for preliminary rulings submitted to the CJEU were made by supreme courts.<sup>28</sup>

The right of a supreme court from a Member State of the EurAsEC to make a reference for a preliminary ruling did not convert into an obligation unless the court's judgment in specific proceedings could not be subject to appeal.<sup>29</sup>

This fact, combined with the unwillingness of national courts to be bound by an interpretation given by the EurAsEC Court, has resulted in a systematic refusal of Russian courts to make preliminary rulings – something which is evidenced by relevant court rulings.

Supreme courts of the Russian Federation have denied 12 motions to make reference to the EurAsEC Court. Ten of these were declined because they were submitted by a party that did not have such a right – the customs<sup>30</sup>; in one case the court ruled that the issue addressed by a party to the case did not fall within the law of the Customs Union<sup>31</sup>. Finally, in a further case, the Supreme Court of the Russian Federation refused to make a reference, pointing out that reference to the EurAsEC

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<sup>26</sup> Art. 3, para. 1 of the Agreement on appeals to EurAsEC court by economic entities with disputes arising within Customs Union (December 9, 2010) [Договор об обращении в Суд ЕвразЭС хозяйствующих субъектов по спорам в рамках Таможенного союза (9 декабря 2010 г.)].

<sup>27</sup> *Id.* Art. 3, paras. 1, 2.

<sup>28</sup> 4100 from 9146. See Court of Justice of the European Union Annual Report 2015: Judicial Activity: Synopsis of the Judicial Activity of the Court of Justice, the General Court and the Civil Service Tribunal, at 97–99 (May 1, 2017), available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport\\_annuel\\_2015\\_activite\\_judiciaire\\_en\\_web.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf).

<sup>29</sup> Art. 3, para. 1 of the Agreement on appeals to EurAsEC court by economic entities with disputes arising within Customs Union (December 9, 2010).

<sup>30</sup> Определения Высшего Арбитражного Суда РФ от 14 февраля 2014 г. № ВАС-713/14, ВАС-638/14, ВАС-311/14, ВАС-485/14, ВАС-494/14, ВАС-534/14, ВАС-335/14, ВАС-499/14, ВАС-531/14, от 24 февраля 2014 г. № ВАС-1659/14 [Decisions of the Supreme Arbitration Court of the Russian Federation No. VAS-713/14, VAS-638/14, VAS-311/14, VAS-485/14, VAS-494/14, VAS-534/14, VAS-335/14, VAS-499/14, VAS-531/14 of February 14, 2014, No VAS-1659/14 of February 24, 2014].

<sup>31</sup> Определение Высшего Арбитражного Суда РФ от 8 сентября 2013 года № ВАС-8698/13 [Decision of the Supreme Arbitration Court of the Russian Federation No. VAS-8698/13 of September 8, 2013].

Court is a right, and not an obligation for the Supreme Court, and such a refusal thus could not constitute a flagrant procedural fault.<sup>32</sup>

All in all, during the three years of its existence the EurAsEC Court has only received one reference for a preliminary ruling – made by the Supreme Economic Court of the Republic of Belarus.<sup>33</sup> Thus, preliminary rulings have been extremely rare in the EurAsEC Court and did not become an effective instrument for influencing the case-law of national courts.

The powers of the EAEU Court to give opinions on references for preliminary rulings cannot be considered to be lost irrevocably. Para. 49 of the Statute of the Court allows each Member State to draft a list of competent authorities and organizations who will have the right to submit applications to the Court on its behalf. We believe that a list of national authorities which hold the right to submit requests for clarification could potentially include national courts.

The desire of national courts to acquire such a tool will greatly depend on the Court itself – on how well argued its advisory opinions are. The Court should strive to assert that its opinion is correct, and to provide a general guidance that could be followed by national courts in domestic proceedings.

At the same time, it is necessary to acknowledge that the procedure of giving advisory opinion is not truly equivalent to the preliminary ruling procedure as established in EU law.<sup>34</sup> An act adopted pursuant to a reference for a preliminary ruling is binding, while an advisory opinion on an application for interpretation as stipulated in para. 98 of the Statute is merely recommendatory. Another difference is the discretion of national courts as to whether to submit a request for clarification while a reference for a preliminary ruling is compulsory for the national courts whose decision on the specific case is not be subject to appeal.

For now, all Member States, except for the Republic of Kazakhstan, have indicated only their Ministries of Justice as bodies authorized to exercise the right of judicial recourse to the EAEU Court. The Republic of Kazakhstan delegated these powers to the General Prosecutor Office, Ministry of Foreign Affairs, Investments and Development, National Economy, and Justice. The first application for interpretation from a Member State (clarification of the issue of application of preferential rates provided for the importation of goods in respect of which tariff quotas are established) was submitted to the Court by the Ministry of National Economy of the Republic of Kazakhstan.<sup>35</sup> It should be noted that the application was submitted on

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<sup>32</sup> Определение Верховного Суда РФ от 29 мая 2015 г. № 87-ПЭК15 [Decision of the Supreme Court of the Russian Federation No. 87-PEK15 of May 29, 2015].

<sup>33</sup> Case No. 1-6/1-2013 *Reference for a preliminary ruling submitted by the Supreme Economic Court of the Republic of Belarus* (May 1, 2017), available at <http://courteurasian.org/page-20991>.

<sup>34</sup> Art. 267 of the TFEU.

<sup>35</sup> Case No. CE-2-1/2-16-BK *Advisory opinion upon the request of the Ministry of National Economy of the Republic of Kazakhstan* (May 1, 2017), available at <http://courteurasian.org/doc-16833>.

the initiative of immediate stakeholders – the association of legal entities “Eurasian Union of Participants of Foreign Trade Activities.” Subsequently, the representatives of this association managed to communicate their position directly to the Court by filing written pleadings *amicus curiae* supported by an intervention during the hearing. An economic entity can also use an alternative route by requesting the Commission to submit an application for interpretation to the Court.<sup>36</sup> In this regard, it should be noted that the Commission is entitled, rather than obliged, to submit an application for interpretation to the Court. Therefore, a refusal by the Commission to fulfill such a request could not be challenged before the Court.

## 2. Other Possibilities of the EAEU Court to Influence National Judicial Practices

The fact that the EAEU Court does not have the jurisdiction to give preliminary rulings does not exclude its possibility to influence the case-law of national courts. This may happen in two situations:

a. an act of a public authority is challenged before a national court, if this act was based on a Commission decision recognized by the EAEU Court as being “not in line” with the Treaty, or an international treaty within the Union;

b. when a national court refers to the legal positions contained in the statement of reasons of an EAEU Court’s judgment.

With regard to the first case, it is evident that the existence of a Court judgment recognizing a Commission decision as “not in line” with the Union law is likely to determine the outcome of domestic proceedings.<sup>37</sup> Positive examples include court rulings recognizing decisions to impose administrative penalties on Yuzhny Kuzbass OJSC as illegal or unenforceable.<sup>38</sup> The liability arose with the company in connection with its failure to meet the requirements of the decision of the Commission of the Customs Union No. 335 of August 17, 2010, which the EurAsEC Court recognized as being in breach of international treaties upon an application submitted by the company itself.<sup>39</sup> As could be concluded from the analysis of proceedings initiated by

<sup>36</sup> Ковалев А.В. Толкование права Евразийского экономического союза: правовые основы подготовки разъяснений и эволюция интерпретационного процесса, 1 Актуальные проблемы российского права 194 (2016) [Alexander V. Kovalev, *Interpretation of the Eurasian Economic Union Law: Legal Basis for the Preparation of Clarifications and the Evolution of the Interpretation Process*, 1 Actual Problems of Russian Law 194 (2016)].

<sup>37</sup> If the Court recognizes Commission’s decision as not in line with Union law purely on procedural ground this will have no effect on a national implementation measure.

<sup>38</sup> Постановления Федерального арбитражного суда Западно-Сибирского округа от 18 апреля 2013 г. по делу № А27-13542/2012, от 24 апреля 2013 г. по делу № А27-13543/2012 [Resolutions of the Federal Court of Arbitration of the Western-Siberian District No. A27-13542/2012 of April 18, 2013, No. A27-13543/2012 of April 24, 2013].

<sup>39</sup> *Yuzhny Kuzbass OJSC v. Commission*, *supra* note 5.

Yuzhny Kuzbass OJSC in domestic courts, “under such circumstances, national courts are bound by the interpretation offered by supranational judicial authorities.”<sup>40</sup>

Things seem to be more complicated if, by the time of the hearing at a national court, the EAEU Court has not yet delivered its judgment on the compatibility of the Commission’s decision with Union law. In such situations, the applicant would be well advised to request the national court to suspend the proceedings until the EAEU Court delivers its judgment. As simple and evident as this mechanism might seem, its practical implementation proves to be far less evident. The Civil Procedure Code of the Russian Federation does not contain any provisions allowing a court to suspend the proceedings until the EAEU Court delivers a judgment.<sup>41</sup> For arbitration proceedings, however, this is technically possible. Pursuant to Art. 144(5) of the Arbitration Procedure Code of the Russian Federation, an arbitration court shall have the right to suspend the proceedings on a case if an international court or a court of a foreign state is examining another case, whose outcome may be of importance for the consideration of the given case. It should be noted that proceedings are suspended at the court’s exclusive discretion: though, according to Art. 143, part 1, clause 1 of the Arbitration Procedure Code, it is compulsory for a court to suspend proceedings on a case if it is impossible to consider the given case until the resolution of another case, examined by the Constitutional Court of the Russian Federation; by a constitutional (statutory) court of a subject of the Russian Federation; by a court of general jurisdiction; or by an arbitration court.

The discretion enjoyed by the courts leads to highly improbable outcomes: an arbitration court may rule against suspending the proceedings even though the same applicant brought a case to the EurAsEC Court<sup>42</sup> and decide to suspend them in a situation where proceedings before the EurAsEC Court were initiated by another person.<sup>43</sup>

Another major concern is that Russian procedural law does not allow revision of an enforceable court ruling in the light of new facts pursuant to a judgment of the EAEU court; while permitting it with respect to the acts of the European Court of

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<sup>40</sup> Павлова Н.В. Наднациональное регулирование таможенных правоотношений и национальное правосудие, 1 Судья 16 (2016) [Nataliya V. Pavlova, *Supranational Regulation of Customs Matters and National Justice*, 1 Judge 16 (2016)].

<sup>41</sup> Arts. 215, 216 of the Civil Procedure Code of the Russian Federation contain exhaustive lists of situations where a court is, respectively, obliged or entitled to suspend the proceedings. They do not contain any mention of consideration of a case by the EAEU Court or an international court.

<sup>42</sup> Постановление Федерального арбитражного суда Московского округа от 7 августа 2013 г. по делу № А40-104443/2012 [Resolution of the Federal Court of Arbitration of the Moscow District No. A40-104443/2012 of August 7, 2013]

<sup>43</sup> Определение Седьмого арбитражного апелляционного суда от 24 января 2014 г. по делу № А27-5548/2013 [Decision of the Seventh Arbitration Court of Appeal No. A27-5548/2013 of January 24, 2014].

Human Rights, the Constitutional Court and the Supreme Court.<sup>44</sup> This is confirmed by the case-law of the Russian arbitration courts which declined the application to revise an enforceable court ruling on the grounds that the EurAsEC Court took an opposite view on the matter.<sup>45</sup>

This clearly shows that procedural law of the Russian Federation has not been adopted yet to the realities of the Eurasian integration, and this undermines the importance of the Court's case-law in domestic proceedings. It is evident that lodging an appeal to the EAEU Court against a decision, or an action (inaction) of the Commission is not always the ultimate goal for the economic entity. A judgement of the EAEU Court, when in favor of an economic entity, should be applied to restore the violated rights in the national legal system, most usually – in legal proceedings. The uncertainty surrounding the suspension of proceedings by a national court pending judgment of the EAEU Court and the impossibility to revise a court's ruling following the EAEU Court's judgement deprives the economic entity of the possibility to restore its violated rights, even pursuant to a favorable judgment of the EAEU Court.

Another issue is that Russian courts should not only follow the operative part of the Court's judgment, establishing that a Commission decision is not in line with the EAEU law, but should also follow the Court's interpretation of EAEU law provisions, i.e. consider the Court's judgments as sources of precedent law.

In that regard the analysis of the Russian judicial practice, illustrated by the EurAsEC Court's judgments, reveals an interesting picture.

Legal positions contained in certain judgments have been assimilated to the widest possible extent, while some other court rulings have not affected judicial practice at all. We believe it depends on whether the judgment contained universal rules applicable to a broad range of similar cases, or whether the EurAsEC Court merely sought to solve a particular dispute, without establishing a rule of precedent law.

Among the rulings of the EurAsEC Court assimilated by the Russian judicial practice, one should mention the judgment of the Chamber in the case of *ONP LLC* of November 15, 2012, upheld by a decision of the Appeals Chamber of February 21, 2013<sup>46</sup> which defined both a universal and a special rule. The universal rule concerned

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<sup>44</sup> Art. 392, part 4, points 3–5 of the Civil Procedure Code, Art. 311, part 3, points 3–5 of the Arbitration Procedure Code, Art. 350, part 1, points 3–6 of the Administrative Procedure Code.

<sup>45</sup> Определение Арбитражного суда Челябинской области от 4 апреля 2013 г. по делу № А76-3828/2009 [Decision of the Chelyabinsk Region Arbitration Court No. A76-3828/2009 of April 4, 2013], постановления Восемнадцатого арбитражного апелляционного суда от 30 июля 2013 г., Федерального арбитражного суда Уральского округа от 9 сентября 2013 г. по делу № А76-3828/2009 [Resolutions of the Eighteenth Arbitration Court of Appeal No. A76-3828/2009 of July 30, 2013, of the Federal Court of Arbitration of the Ural District No. A76-3828/2009 of September 9, 2013], Определение Высшего Арбитражного Суда РФ от 27 февраля 2014 г. № ВАС-1249/14 [Decision of the Supreme Arbitration Court of the Russian Federation No. VAS-1249/14 of February 27, 2014].

<sup>46</sup> Case No. 1-7/2-2012 *ONP LLC v. Commission* (May 1, 2017), available at <http://courteurasian.org/page-20801>.

inadmissibility of restricting the right of an economic entity to define, at its sole discretion, the principal applicable rule of interpreting the Nomenclature of Goods. The special one concerned the classification of specific goods under a selected heading of the Nomenclature. Russian law enforcement practice assimilated both of these positions.<sup>47</sup>

A universal rule for interpreting the advisory nature of the Comments to the Nomenclature of Goods was defined in the case of *Nika LLC and Zabaikalresurs LLC*.<sup>48</sup> The EurAsEC Court made it clear that the advisory nature of the Comments does not mean that unreasoned derogations therefrom are admissible. The said legal determination was assimilated in rulings of several appeal courts.<sup>49</sup>

Finally, one of the position of the EurAsEC Court in the *SeverAvtoProkat LLC* case<sup>50</sup> regarding a possible retroactive application of a provision of a Commission's decision caused such a major switch in the case-law of the Russian courts that the Constitutional Court had to intervene.<sup>51</sup> It pointed out that the legal positions of the EurAsEC Court may not constitute grounds for derogating human and civil rights and freedoms as established in international treaties and the Constitution.

All of the above testifies to the significance of determinations by the Court of the Union (earlier the EurAsEC Court), in national law enforcement practices. A supranational court cannot function in an ivory tower; its concerns embrace not only matters of the law of the integration association, but also how these

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<sup>47</sup> Постановления Пятнадцатого арбитражного апелляционного суда от 24 апреля 2014 г. по делу № А32-30717/2013, Двадцатого арбитражного апелляционного суда от 6 июня 2014 г. по делу № А06-7112/2013, от 29 июля 2014 г. по делу № А09-818/2014, Девятого арбитражного апелляционного суда от 22 октября 2015 г. по делу № А40-78259/2015 [Resolutions of the Fifteenth Arbitration Court of Appeal No. А32-30717/2013 of April 24, 2014, of the Twentieth Arbitration Court of Appeal No. А06-7112/2013 of June 6, 2014, No. А09-818/2014 of July 29, 2014, of the Ninth Arbitration Court of Appeal No. А40-78259/2015 of October 22, 2015].

<sup>48</sup> Case No. 2-4/7-2014 *Nika LLC and Zabaikalresurs LLC v. Commission*, judgment of the Chamber of May 20, 2014 upheld by the decision of the Appeals Chamber of October 14, 2014 (May 1, 2017), available at <http://courteurasian.org/page-21661>.

<sup>49</sup> Постановления Четвертого арбитражного апелляционного суда от 26 сентября 2014 г. по делу № А78-5492/2013, Пятого арбитражного апелляционного суда от 14 апреля 2016 г. по делу № А51-23838/2015, от 6 апреля 2016 г. по делу № А51-22124/2015, от 26 мая 2016 г. по делу № А51-26736/2015, от 25 августа 2016 г. по делу № А51-26735/2015, Восьмого арбитражного апелляционного суда от 11 февраля 2015 г. по делу № А46-11894/2014, от 30 мая 2016 г. по делу № А46-11452/2014 [Resolutions of the Fourth Arbitration Court of Appeal No. А78-5492/2013 of September 26, 2014, of the Fifth Arbitration Court of Appeal No. А51-23838/2015 of April 14, 2016, No. А51-22124/2015 of April 6, 2016, No. А51-26736/2015 of May 26, 2016, No. А51-26735/2015 of August 25, 2016, of the Eighth Arbitration Court of Appeal No. А46-11894/2014 of February 11, 2015, No. А46-11452/2014 of May 30, 2016].

<sup>50</sup> Case No. 2-4/1-2014 (1-7/5-2013) *SeverAvtoProkat LLC v. Commission* (May 1, 2017), available at <http://courteurasian.org/page-21151>.

<sup>51</sup> Определение Конституционного Суда РФ от 3 марта 2015 г. № 417-О [Decision of the Constitutional Court of the Russian Federation No. 417-О of March 3, 2015].

determinations can be propagated at national level. This is the only way to achieve the supremacy and efficiency of Union law. Taken that a supranational court aspires not only to settle specific disputes, but also to fill gaps in the legislation of the integration organization, the EAEU Court needs to strive for establishing universal rules in each of its rulings.

### 3. Limited Number of Applications: An Issue of Trust?

According to the statistics in 2015 the Court received six applications from economic entities. The application in *Kapri* case<sup>52</sup> was rejected due to the plaintiff's lack of *locus standi*; the one in *Gamma* case<sup>53</sup> – as manifestly unfounded. A third application (*Unitrade* case<sup>54</sup>) was found admissible by the Court but was later revoked by the plaintiff. Finally, three applications (*Tarasik*,<sup>55</sup> *Sevlad*<sup>56</sup> and *General Freight*<sup>57</sup> cases) led to judgments adopted by the Court's Chamber.

Contrary to what could have been expected the year 2016 did not bring any notable increase in the number of applications from economic entities. In fact three of the seven applications concerned appeals against the judgments of the Court and led to judgments of the Appeal Chamber.

Three applications were rejected by the Court – in the *Remdizel* case<sup>58</sup> the application was rejected as manifestly unfounded as the applicant tried to challenge a Commission's recommendation. *Remdizel*'s appeal against the Court's order was rejected by the Appeal Chamber of the Court as the Rules of Procedure expressly provide that only judgments of the Court may be challenged.<sup>59</sup> In the *Rusta-Broker* case<sup>60</sup> the application was rejected by the Court as manifestly unfounded.

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<sup>52</sup> Case No. CE-3/2-15-KC *KAPRI CJSC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-14373>.

<sup>53</sup> Case No. CE-3/1-15-KC *Gamma LLP v. Commission* (May 1, 2017), available at <http://courteurasian.org/page-24101>.

<sup>54</sup> Case No. CE-1-2/1-15-KC *Unitrade JSC v. Commission* (May 1, 2017), available at <http://courteurasian.org/page-24121>.

<sup>55</sup> *Tarasik K.P. v. Commission*, *supra* note 19.

<sup>56</sup> *Sevlad LLC v. Commission*, *supra* note 16.

<sup>57</sup> *General Freight CJSC v. Commission*, *supra* note 2.

<sup>58</sup> Chamber order in case No. CE-1-2/3-16-KC/1 *Remdizel LLC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-15763>.

<sup>59</sup> Appeals Chamber order in case No. CE-1-2/3-16-KC/1 *Remdizel LLC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-15763>.

<sup>60</sup> Case No. CE-3/2-16-KC *Rusta-Broker LLC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-17113>.

Finally, in the *ArcelorMittal Krivoj Rog* case<sup>61</sup> an application challenging anti-dumping measures imposed by the Commission was accepted and is currently under consideration.

Thus, if we only count new applicants their number has dropped from six in 2015 to just three in 2016. The small number of applications may be partially explained by the limited competence of the Court (particularly, the impossibility to award compensation for damages) or the lack of activity of the Commission in certain fields.<sup>62</sup> We believe, however, that the main reason lies in a certain caution, not to say lack of trust, of the legal and business community in this new institution. It is thus vital for the Court to establish itself a reputation based on professionalism, efficiency and accessibility.

### **3.1. Professionalism**

Professionalism is highlighted in the quality of judicial acts. Thus, it is important that the judgments of the Court of the Union be not only well-grounded, but, moreover, clear and easily understood. In this situation, the task of the Court is to make its legal positions well-argued and sufficiently precise as to preclude differing interpretations by the Member States or their bodies, and particularly their courts. The ideal legal position of a supranational court is one that could be incorporated by a national court in its judicial acts without any adjustments or additions. This is especially important for advisory opinions since these are not legally binding.

The EAEU Court, intent upon its mission of conveying the key elements of its judicial acts to the states and their authorities, has made a practice of preparing summaries of these acts<sup>63</sup> – which contain not only a description, but also the legal positions, i.e., the conclusions that, according to the Court, are universal and establish precedent.

### **3.2. Efficiency**

We believe that the efficiency of a supranational court should not be estimated solely by the number of cases examined, or by the rate of judgments rendered in favour of economic entities.

Conclusions on the Court's efficiency must be drawn from the legal positions which are contained in the findings of the Court, and according to its intentions in the provision of protection for the rights and freedoms of entrepreneurs. Even when a ruling is made not in favor of the applicant (the Commission decision is considered to be in line with the Treaty), the EAEU Court has the option to insert legal positions into its findings that could contribute to the protection of rights and

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<sup>61</sup> Case No. CE-1-2/4-16-KC/1 *ArcelorMittal Krivoy Rog JSC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-16813>.

<sup>62</sup> For instance, in the field of competition law no decisions have been adopted yet.

<sup>63</sup> Available at <http://courteurasian.org/page-24221>, <http://courteurasian.org/page-24451>.

legal interests of plaintiffs or other persons in national courts. This could be done, i.a., by indicating that the situation of the plaintiff does not fall within the application of a contested decision. This is particularly important, given that appeal against the Commission decision does not always constitute the end goal, but is often merely a step towards the restoration of the applicant's rights in domestic legal proceedings. In such situations, the conclusions made by the Court in its findings could prove to be more significant than the wording of the operative part of the judgment, since they will form the basis of the plaintiff's arguments in a national court.

This approach confers special responsibility on the Court. Judicial rulings must be drafted with the understanding that any of the Court's findings could affect the legal position of legal entities in domestic proceedings.

In discussing the notion of efficiency, it could be also worthwhile to assess the efficiency of different legal remedies available to the applicants. It is revealing that in the absence of a large number of legal remedies, the EAEU Court strives to render those which are available as effectively as possible. This can be exemplified by the broad definition of inaction in the *Tarasik* case<sup>64</sup>; and by the Court's willingness to automatically verify, in such cases where the validity of a Commission's decision is challenged, whether the Commission possessed the necessary competence to adopt contested decisions – and whether in doing so it followed essential procedural requirements.<sup>65</sup>

Finally, a special aspect of efficiency for a judicial body is the time taken for its judicial proceeding. Para. 96 of the Statute establishes a mandatory period of 90 days from the date of receipt of application (except in case of disputes of which the subject-matter is the granting of industrial subsidies, agricultural state support measures, the application of safeguard, anti-dumping and countervailing measures – where this term shall not exceed 135 calendar days<sup>66</sup>). By comparison, the average duration of proceedings in the CJEU is 16.1 months.<sup>67</sup>

The total 90-day period for the consideration of cases guarantees economic entities prompt consideration of their applications – which should also contribute to the protection of the rights and legal interests of entrepreneurs in proceedings before domestic courts.

### **3.3. Accessibility**

This element consists of several aspects:

**a.** First of all, it includes the *locus standi* of economic entities before the EAEU Court. The EAEU Court Statute allows economic entities, whose rights and legitimate interests in the area of business and other economic activities is directly affected by

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<sup>64</sup> *Tarasik K.P. v. Commission*, *supra* note 19.

<sup>65</sup> *Sevlad LLC v. Commission*, *supra* note 16.

<sup>66</sup> Art. 37(2) of the Rules of Procedure.

<sup>67</sup> See Annual Report 2015, *supra* note 28.

Commission decisions, action or inaction, to challenge them in the event that this entailed a violation of any rights and legitimate interests of the entity granted by the Treaty, or an international treaty within the Union.<sup>68</sup>

This provision contains two conditions: (1) direct concern; (2) violation of the rights or legal interests provided by the Treaty or an international treaty within the Union.

It is important to note, as established by the Court in the *Sevlad* case, that the violation of the rights and legal interests of the plaintiff may only be assessed during a consideration of the merits. As the Court noted, “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.”<sup>69</sup> Thus, the Court must determine 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.”<sup>70</sup>

Therefore, the *locus standi* of an economic entity includes only the first requirement – that his rights and legal interests are affected.

As determined by the Court in the decision of the Chamber in the *Sevlad* case, “In accordance with the principle of legal certainty, the decision of the Commission or its particular provisions may be recognized 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.”<sup>71</sup>

Doing so, the Court has clearly called for the widest possible interpretation of this criterion, thus making legal protection more accessible. Economic entities do not need to prove that the Commission’s decision has been applied to them – it is sufficient to show that it could be.

This situation should be distinguished from the one that occurred in the *Capri*<sup>72</sup> case, where the applicant sought to challenge a Commission that imposed less stringent requirements on its competitors operating in an adjacent field. In this case the applicant could not claim direct concern, since the goods he was importing did not fall within the application of the Commission’s decision. The EAEU Court, when dismissing the application, pointed out that “the applicant has failed to substantiate

<sup>68</sup> Para. 39(2) of the Statute of the Court.

<sup>69</sup> Para. 7.2.1, subpara. 1 of the judgment of the Chamber of the Court in the case *Sevlad LLC v. Commission*, *supra* note 16.

<sup>70</sup> *Id.* Para. 7.2.1, subpara. 3.

<sup>71</sup> *Id.* Para. 6.2, subpara. 1.

<sup>72</sup> Order of the Court of April 1, 2016 in the case *KAPRI CJSC v. Commission*.

how the contested Commission's decision directly affects the applicant's rights and legitimate interests in the area of business and other economic activities."<sup>73</sup>

**b.** A further important element in defining the accessibility of judicial protection in the EAEU Court is the absence of a preclusive time-limit for initiating actions against decisions, actions or inaction of the Commission. By comparison Art. 263 of the TFEU establishes a compulsory two month period for bringing an action for annulment. This strict time-limit could be justified by the need to ensure legal certainty. In practice, however, because of the very strict *locus standi* of non-privileged applicants under Art. 263, TFEU actions for annulment are practically never directed against legislative acts, and are instead challenged via the preliminary reference procedure<sup>74</sup> for which no time-limits are prescribed.<sup>75</sup>

Given the fact that in the EAEU, economic entities may only challenge Commission decisions directly, setting a preclusive deadline (even an extensive one) would constitute an unreasonable limitation of the right for judicial protection.

**c.** A prerequisite for the acceptance of an application is the payment of a fee.<sup>76</sup> Given the fact that in cases in which the Court shall grant the claims of the economic entity stated in the application, the fee shall be refunded,<sup>77</sup> this requirement does not appear to limit the access to the Court in any substantial way – provided that the amount of the fee does not become excessive for economic entities, including individual entrepreneurs.<sup>78</sup>

**d.** The other important element to take into consideration is that the Court may not order the unsuccessful party to pay the costs even if they have been applied for in the successful party's pleadings. On the one hand, the provision that each party bears its own costs<sup>79</sup> reduces the economic risks for the plaintiffs, as they may determine in advance the amount of their own expenses.

On the other hand, in cases where protection measures for the protection of the internal market are challenged, the rule on inability to assign the expenses to the losing party should be assessed critically – since the plaintiffs similarly bear the expenses linked to the functioning of specialized groups<sup>80</sup> formed in accordance with

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<sup>73</sup> Order of the Court of April 1, 2016 in the case *KAPRI CJSC v. Commission*, para. 6.

<sup>74</sup> Art. 267 of the TFEU.

<sup>75</sup> See, for instance, case C-370/12 *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756, at 39.

<sup>76</sup> Paras. 62 and 63 of the Statute; Art. 9, para. 3(d) of the Rules of Procedure.

<sup>77</sup> Para. 64 of the Statute.

<sup>78</sup> According to the decision of the Supreme Eurasian Economic Council No. 40 of December 21, 2015 since January 1, 2016 the amount of the duty is 39 368 Russian rubles.

<sup>79</sup> Para. 66 of the Statute.

<sup>80</sup> Para. 6 of the decision of the Supreme Eurasian Economic Council No. 102 of December 23, 2014.

Chapter VI of the Statute. Thus, in the case of *ArcelorMittal* the plaintiff was ordered to pay 2 250 000 Russian rubles to this end.<sup>81</sup> We believe that the impossibility for the plaintiff to obtain reimbursement of these costs constitutes a restriction of access to justice. In fact, economic entities are placed in a worse position in proceedings before the Court than in domestic proceedings, where there is a presumption that the unsuccessful party shall bear the costs in the form of the payment of experts' fees.<sup>82</sup> We believe that when measures for the protection of the internal market are found to be contrary to the EAEU law, the Court should be able to recover the expenses from the losing party.

e. Finally, the fifth element that characterizes the Court's accessibility is the requirement of prior recourse for the applicant to a pre-trial procedure.<sup>83</sup> For the Court it is extremely important, at the stage of determining the admissibility of an application, to establish the very fact that an application on the matter has been submitted to the Commission in accordance with the existing procedure. At the same time, we believe that the economic entity should not be obliged, when applying to the Commission, to indicate its intention to appeal to the Court in case of refusal. A similar position can be found in the CJEU case-law regarding actions for failure to act where a pretrial procedure is compulsory.<sup>84</sup> A further important point is the option for an economic entity, when applying to the Court, to supplement its position and to present new arguments in support of it. This is explained by the fact that the purpose of the pre-trial procedure is to convince the Commission to undertake a certain action, i.e. to modify or annul its decision, or to undertake a monitoring, or similar. In this context, the entity may choose to present not only legal but also economic or political arguments. At the stage of application to the Commission there are no disputing parties as yet, hence, the very structure of the argumentation may be different.

The argument that the Commission must be aware of the content of the claim prior to its submission is untenable, since one of the requirements for the acceptance of an application to the Court is the confirmation that copies of the application and of the attached documents have been sent to the defendant.<sup>85</sup> If the arguments submitted by the applicant seem convincing to the Commission, nothing prevents it

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<sup>81</sup> Order of the Chamber of the Court in the case *ArcelorMittal Krivoy Rog JSC v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-17143>.

<sup>82</sup> See Arts. 106, 110 of the Arbitration Procedure Code of the Russian Federation, Art. 88, para. 1, Art. 94, para. 1, Art. 98 of the Civil Procedure Code of the Russian Federation, Arts. 125, 126, 133 of the Commercial Procedure Code of the Republic of Belarus, Arts. 114, 116, 135 of the Civil Procedure Code of the Republic of Belarus, Arts. 100, 107, 110 of the Civil Procedure Code of the Republic of Kazakhstan.

<sup>83</sup> Para. 43 of the Statute.

<sup>84</sup> See case T-12/12 *Laboratoires CTRS v. Commission*, ECLI:EU:T:2012:343, at 40.

<sup>85</sup> Art. 9, para. 3(e) of the Rules of Procedure.

from settling the dispute through an agreement before the delivery of a judgment.<sup>86</sup> As Judge T.N. Neshataeva put it in her dissenting opinion in the *Volkswagen* case as considered by the EurAsEC Court, “the alteration and improvement of the reasoning in preparation for the consideration of a case forms an integral part of the legal practice. [...] a dismissal of an application by the Court on the sole grounds that the same arguments must have been presented before the Commission and before the Court leads to the substitution of the notions of ‘legal proceedings’ and ‘pre-trial procedure.’”<sup>87</sup>

### Conclusion

As has been demonstrated in the first years of its existence the Court has come across three major challenges, all interrelated. They can only be overcome by the Court by building a reputation for itself.

This should firstly take place among Member States and bodies of the Union, which would help the Court to ensure compliance with its judgments and allow to envisage an enlargement of its competence.

Secondly it must occur among national courts – which is essential for the dissemination of the Court’s case-law. National courts themselves could have an interest in their inclusion in the list of national authorities which hold the right to submit requests for clarification (although they will likely remain opposed to the reappearance of a preliminary reference procedure). Thus, it is for the EAEU Court to prove to national courts how useful these instruments might be. This could be done by a form of dialogue between institutions, via participation in conferences, or through organizing meetings. However, the first step could be taken by starting to include references to the case-law of national courts.

Finally, the reputation must be reinforced among the business and legal community – since one of the most important functions of the Court is to protect the rights and legitimate interests of economic entities. Both are likely to judge the Court on its professionalism, accessibility and efficiency.

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<sup>86</sup> Art. 54 of the Rules of Procedure.

<sup>87</sup> Separate opinion of Judge T.N. Neshataeva in the case No. 2-4/10-2014 *Volkswagen AG v. Commission* (May 1, 2017), available at <http://courteurasian.org/doc-12073>.

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