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APPLICATION OF THE EAEU LAW BY NATIONAL COURTS AND DEVELOPMENT OF JUDICIAL DIALOGUE

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The subject. This article examines the dialogue between the EAEU Court and national courts, on the one hand, as the application by national courts of the court of the integration organization, on the other hand, – as a recourse by the supranational court to the legal constructions that have been developed in the case law of the Member States' courts.

The purpose of the article is to confirm or disprove hypothesis that judicial dialogue between the court of the integration association and the courts of its Member States is the key to the effective application of supranational law.

The methodological basis of the research is the doctrine of EU law, as well as the practice of Court of Justice of the European Union. The formal legal interpretation of the EAEU Court decisions and decisions of national Supreme Courts is also used.

The main results, scope of application. One of the characteristics that differentiates the law of an integration organization from universal international law is its active application not only by the judicial body of such an organization, but also by the national courts. The plurality of actors in charge of the application of the law raises the question which of them have the authority of interpreting the integration law and the modalities of such an interpretation. One of the instruments that could help overcome the lack of uniformity of approaches regarding the interpretation and application of supranational law by the courts of several member states is the preliminary reference procedure. In the absence of such a procedure the burden of interpretation of supranational law rests on the national courts. Such a situation has arisen in the Eurasian Economic Union where the EAEU Court is empowered to interpret the law of the Union while settling disputes regarding the respect of EAEU law by its Member States, the challenge of the Eurasian Economic Commission's actions (failure to act) and decisions as well as delivering advisory opinions. The courts of the Member States, in turn, interpret the law of the EAEU in various fields of relations, including the ones where regulatory powers have been transferred to the supranational level. The analysis of national case law shows that in their application of EAEU law they premise their judgments on the principle of its primacy over national legislation.

Conclusions. Judicial dialogue allows to prevent the non-uniform interpretation of the Union law by the court of the 5 Member States. It is a form of exchange of legal positions and concepts between the judicial bodies which, as a result, leads to a mutual enrichment of the legal orders by borrowing legal constructions and approaches.

1. Introduction

A distinctive feature of the integration organizations law is the fact that it is actively applied by national authorities and courts. The reason for this phenomenon is the transfer of the member states' sovereign powers, which were previously exercised by domestic authorities, to the supranational level. From the moment of the delegation of the abovementioned powers to the integration organization, the competence to adopt all the relevant norms passes to its bodies, while their application remains at the national level. Such a process entails the emergence of a situation in which acts and actions, adopted on the basis of the integration organization, may be the subject to appeal in domestic courts on behalf of national authorities.

In turn, empowering the courts of the integration organizations with the competence to verify the validity of secondary law acts of these organizations naturally leads to a situation in which the supranational law application is carried out at two different levels: the court of the integration organization and the courts of its member states.

These processes demonstrate the relevance of studying the peculiarities of the application of integration organization law by the courts of its member states, on the example of the Eurasian Economic Union (hereinafter referred to as the EAEU, the Union).

Using the provisions of the integration legal order by national courts raises the question of whether they have the right to interpret relevant norms or whether such authority is exclusive to the supranational body of justice.

The appeal of the integration organization and its member states' courts to the law provisions of the corresponding association necessitates building bilateral relations which can acquire the form of a judicial dialogue.

The designated range of legal issues in the aspect of the EAEU emphasizes the expediency of establishing a circle of actors entitled to interpret the law of the Union, assessing the features of such an interpretation, as well as the mechanism of judicial dialogue emerging between the Court of the Eurasian Economic Union (hereinafter referred to as the Court of the EAEU, the Court of the Union) and the judicial authorities of its member states. Considering that the European Union (hereinafter referred to as EU) has the greatest experience in interpreting and applying the law of integration organizations by domestic courts, as well as in interacting with supranational and national bodies of justice, the doctrine of the EU law, as well as its Court's practice is used as a methodological basis for the current study.

The issue of interpretation and application of integration organizations law, as well as the judicial dialogue between the bodies of integration and domestic justice have been profoundly studied in the aspect of the EU law and is represented by the works of such scholars as Fr. Jacobs [1, pp. 547 – 556], A. Rossas [2, pp. 1 – 16], L. Boisson de Chazournet [3, pp. 13 – 72], Kr. Ekes [4, pp. 123 – 210] and others. In domestic literature, the role of interaction between supranational and national courts is indicated by M.L. Entin, who pointed out that "close and fruitful cooperation between national and supranational judges on our European continent has become a good tradition. It has become an integral part of our inherent legal and political culture" [5, p. 61]. S.A. Grachiova analyzes the legal dialogue between the EU Court and the Supreme Courts of its member states as part of the study of the subsidiary approach to the integration processes [6, pp. 59 – 60]. In the doctrine of the EAEU member states, its law's application by national courts and the institute of judicial dialogue receive extremely little attention. Some separate studies are dedicated to the relationship between the Court of the Union and the Constitutional Court of the Russian Federation [7, pp. 14 – 20; 8, pp. 17 – 21; 9, pp. 98 – 101; 10, pp. 88 – 110], as well as to the perception of the EAEU law in the Republic of Armenia [11, pp. 11 – 19].

In view of the above, it seems relevant to answer the question about the actors authorized to interpret the EAEU law, to analyze the specifics of the Union law by the judicial authorities of its member states, and to explore the mechanism of the judicial dialogue, both from theoretical and practical points of view.

2. Doctrinal approaches to the problem of the interpretation of law of an integration organization by its member states' courts and the concept of judicial dialogue

Despite the fact that in legal science there are two main concepts concerning the possibility of applying the law without interpreting it, in our opinion, the approach according to which the content of a legal norm is interpreted in the form of clarification before each case of its application [12, pp. 78 – 79] seems more justified.

The interpreting activity is immanent to a judicial body, since its competence and, consequently, the achievement of its main functional purpose depend on its implementation. With regard to the Court of the EAEU, an extremely important question is whether it has exclusive authority to interpret the Union law or it is shared between a judicial body of an integration association and its member states' courts.

The EU experience shows that in order to resolve the issue of the possibility for national courts to interpret the law of the integration organization, it has formulated the so-called doctrine of the "clear act" (fr. "aste clair"). It lies in the fact that, in addition to the existing legal positions which have already been developed by the EU Court on the relevant issue, a national court may carry out the interpretation of the law of an integration otganization if the correct interpretation is obvious. In other circumstances the question of the EU law interpretation must be addressed to its Court as a preliminary ruling procedure.

In the *CILFIT* judgment the EU Court stated: in order to ascertain the correctness of the interpretation, first of all the national judge must compare different linguistic versions of the EU law and proceed from its specific terminology and the context in which the norm in question is contained[1]. Failure to comply with these conditions entails the necessity for the domestic court to make a request for a preliminary ruling.

In the *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi* judgement, based on a vast array of earlier practice, consisting in the following: (1) the national law interpretation and application represents the exclusive jurisdiction of a domestic court; (2) the existence of the EU Court practice on a certain issue does not exclude the right of a national court to make a request for a preliminary ruling; (3) in view of the existence of many linguistic versions of the acts of the EU law their interpretation must be identical; (4) no linguistic version has priority in the interpretation, the EU Court summarized that every provision of the EU law must be seen in the context and interpreted in the light of other provisions of the EU law as a whole, taking into account its objectives and state of development on the date of application of the legal norm to be interpreted[2].

The multidimensionality of the requirements that the jurisprudence of the Court of the EU imposes on the conditions for the application of the clear act doctrine fully explains the statement of Advocate General N. Wahl in his report on the joined cases of *X v Inspecteur van Rijksbelastingdienst and T.A. van Dijk v Staatssecretaris van Financiën*: if one follows a strict interpretation of the clear act doctrine, finding a situation that meets its criteria is just as likely as to encounter a unicorn[3].

Although the criticism of the clear act doctrine in the juridical science does not subside [12, pp. 1386 – 1390; 13, pp. 188 – 190, 211 – 212; 14, pp. 1318 – 1322], the consistent adherence of the EU Court to this approach is conditioned, in our opinion, by the conviction that the best way to ensure the uniform interpretation and the application of the integration organization law remains the reference for a preliminary ruling, which, as pointed out in the aforementioned judgement on the case of *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*, observed above, is a cornerstone of the EU legal system and constitutes the basis of the dialogue between its court and the

[1] Court of Justice of the European Union (hereinafter referred to as CJEU). Case no 283/81 *CILFIT*. Judgment of October 6, 1982. EU:C:1982:335. Para 20.

[2] CJEU. Case no C-561/19. *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*. Judgment of October 6, 2021. EU:C:2021:799. Para 35, 37, 42, 43, 46.

[3] CJEU. Joined cases C-72/14 and C-197/14. *X v Inspecteur van Rijksbelastingdienst and T.A. van Dijk v Staatssecretaris van Financiën.* Opinion of Advocate-General N. Wahl of 13 May 2015. EU:C:2015:319. Para 62.

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courts of its member states[4]. The cause of the EU delegating the function of its law interpretation to its juridical body instead of domestic courts is the necessity to ensure an autonomous interpretation of legal concepts, especially in a situation where similar categories are present in the national legislation and there is a risk of their transferring to the interpretation of the EU law.

The lack of competence on behalf of the Court of the EAEU to deliver prejudicial rulings and, consequently, its placing the main burden of the Union law interpretation on the national courts, indicates that, on the one hand, it grants them the power to interpret the EAEU law, and on the other hand, the need for the judicial body of the integration organization to elaborate some universal legal positions capable of influencing the national courts' practice [16, p. 80]. This situation increases the relevance of the development of the dialogue between the Court of the EAEU and the domestic courts.

One of the first to voice the idea of a "judicial dialogue" was the British scientist and former Advocate General of the EU Court Fr. Jacobs, who argued that the peculiarities of the European Union legal system, its Court's structure and competence predetermined the search for mechanisms of interaction with other bodies authorized to resolve legal conflicts. At the same time, the EU Court, unlike classical international courts, had to solve the problem of coexistence not only with other international courts, but also with the national judicial authorities of all its member states [1, pp. 547 – 549]. Such views seem to be very close to the approach of L. Boisson de Chazournet, who spoke about the "internal communication" that takes place between various actors involved in the process of resolving international disputes and is formalized into a "judicial dialogue", the most relevant in the light of the trend towards regionalization and specialization [3, pp. 15, 30].

Turning to the perception of the idea of the judicial dialogue in domestic science, we will quote M.L. Entin, who noted that "close and fruitful cooperation between national and supranational judges on our European continent has become a good tradition. It has become an integral part of our inherent legal and political culture". The scientist sees the key task of such interaction in the identical interpretation of the legislation of the integration organization and its member states, in the absence of which the development of any supranational project is impossible [5, pp. 61, 64 – 65].

Fr. Jacobs considers the judicial dialogue and legal systems' mutual enrichment in two aspects: within the European Union with regard to the relations between the courts of its member states, outlining the "internal" contour of all the relevant processes, as well as denoting its "external" contour, within which he analyzes the links between the EU Court and the European Court of Human Rights (hereinafter referred to as ECHR), the Court of the European Free Trade Association, as well as the International Court of Justice and the WTO Appellate Body [1, pp. 548 – 552].

In the categories of "external and internal judicial discourse", the relationship of the EU Court with the courts of its member states and the international courts is considered by the Dutch researcher Kr. Ekes [4, p. 3].

The academician and former judge of the EU Court A. Rossas, presuming the existence of the EU legal system not in isolation, but in a broad European and international context, proposes to consider, in addition to the external and internal contours highlighted by Fr. Jacobs and Kr. Ekes, the judical dialogue within the framework of the internal structure of the EU Court, which includes the EU Court itself and the Court of First Instance [2, pp. 3 – 5].

Recognizing the validity of the concept of the judicial dialogue both with other international courts and with the EU member states' courts, it is impossible to agree with A. Rossas regarding the dialogue between the EU Court and the Court of First Instance. Paragraph 1 of Article 256 of the Treaty on the Functioning of the EU[5] provides that the decisions of the Court of First Instance can be appealed to the EU Court, which indicates the existence of a hierarchical subordination between

[4] CJEU. Case no C-561/19. *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*. Judgment of October 6, 2021. EU:C:2021:799. Para 27.

[5] Consolidated version of the Treaty on the Functioning of the European Union, December 13, 2007. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (accessed on January 17, 2022).

them in which the decisions of a Supreme Court are binding on the Court of First Instance. What is more, a distinctive feature of the judicial dialogue, in our opinion, is the initiative coming from one of the judicial bodies. With regard to the relationship between the EU Court and the domestic courts, such an initiative is the reference for a preliminary ruling. By contrast, the Court of First Instance is not able to activate such a dialogue, since the appeal of its decisions depends solely on the will of the actors involved in the consideration of each particular case.

In view of the above, we believe that judicial dialogue is a form of exchange of positions and concepts between various judicial bodies, the result of which is legal systems' mutual enrichment by their borrowing legal structures and approaches.

Judicial dialogue within its "internal contour", that is, in relations between the national courts, is considered, on the one hand, as the domestic courts' use of the integration organization court's rulings, and on the other hand, as an appeal of the supranational court to legal frameworks, which were developed throughout the practice of the member states' judicial authorities.

It should be emphasized that while in such integration organizations as the EU and the Andean Community[6] the dialogue with the national courts has an institutionalized form of a preliminary ruling, in the EAEU its implementation depends solely on the "good will" of its member states' judicial bodies. At the same time, reviewing the practice of the member states' courts shows the successful implementation of this mechanism.

3. Interpretation and application of the EAEU law by the courts of its member states

An analysis of the acts adopted by the Constitutional and Supreme Courts of the Russian Federation, the Supreme Court of the Kyrgyz Republic, as well as the Administrative Court of the Republic of Armenia allows us to conclude that there is an emerging practice of interpreting the right of an integration organization by domestic judicial authorities.

To illustrate the conclusion regarding the interpretation of the EAEU law by the national courts, first of all, let us turn to the acts of the Constitutional Court of the Russian Federation.

Decree No. 8-P[7] of February 13, 2018 on applying the principle of exhaustion of the exclusive right to a trademark in Russia, regardless of its absence in the Civil Code of the Russian Federation, remains one of the most significant examples of the understanding and application of the provisions of the Union law by the body of constitutional proceedings of a member state.

When adopting the abovementioned Decree, the Consitutional Court interpreted paragraph 16 of the Protocol on intellectual property protection[8], according to which it is no violation of the exclusive right to a trademark if it's used in relation to goods which were lawfully introduced into civil circulation on any member state's territory by the trademark owner directly or by other persons with his consent, and taking into account the EAEU law supremacy over national legislation, stated that the regional principle of exhaustion of the exclusive right ot a trademark applies to the member states, regardless of its absence in the domestic law [9, p. 99].

Another example of the interpretation of the Union law by the Constitutional Court of the Russian Federation is the Ruling of March 26, 2020 No. 588-O[9]. In this case, the question raised before the Constitutional Court was about the conformity of the classification decision of the Eurasian Economic Commission[10] (hereinafter referred to as EEC) to the Consitution in terms of the possibility of its retroactive application.

[6] According to the Treaty on the Establishment of the Andean Community Court (as amended on May 28, 1996), the application of a national court with a preliminary ruling request to the court of an integration organization is a right in the application of the Union law, which is transformed into an obligation if the decision of the national court is not a subject to appeal.

[7] The Constitutional Court of the Russian Federation (hereinafter referred to as CCRF). Decree No. 8-P of February 13, 2018 // http://www.pravo.gov.ru (accessed on January 17, 2022).

[8] Appendix No. 26 to the Treaty on the EAEU.

[9] CCRF. Decision No. 588-O of March 26, 2020 // http://doc.ksrf.ru/decision/KSRFDecision464887.pdf (accessed on January 17, 2022).

[10] In this case, the constitutionality of the EEC Judgement of May 11, 2017 No. 51 "On the classification of a household garment steamer in accordance with the unified Commodity Nomenclature for Foreign Economic Activity of the Eurasian Economic Union" was disputed // The Eurasian Economic Union official website // http://www.eaeunion.org/, 12.05.2017.

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Refusing to accept the applicant's appeal for consideration, the Constitutional Court analyzed the procedure established by the Union law for the EEC[11] decision to enter into force, and also referred to the approach it had previously formed on the effect of acts of interstate bodies in time.

Such logic of legal reasoning corresponds to the abovementioned "clear act" doctrine, showing the appeal of the national court to an unquestionable norm of the integration law and its application to the applicant's question.

In the context of the EAEU law interpretation by the body of constitutional justice of a member state what deserves attention is the Ruling of the Constitutional Court of the Russian Federation dated April 2, 2015 No. 583-O[12], which raised the question about the compliance of the Judgement of Customs Union Comission dated July 15, 2011 No. 728[13] with the Constitution of the Russian Federation.

The Constitutional Court, referring to the approach developed in the Ruling dated March 3, 2015 No. 417-O[14], and based on the distinction between its own jurisdiction as a body of constitutional control and that of the Court of the EAEU, authorized to verify its member states' compliance to the law of an integration organization, failed to interpret the regulations of the Judgement of the Customs Union. The constitutional body of justice pointed to the inadmissibility of the retroactive enforcement of the regulations which worsen the legal sitiuation of the citizens, emphasizing that this approach extends to the normative legal regulation of customs affairs, including those judgments of the Customs Union's Commission that enter into the customs legislation of the Customs Union [more about the Ruling No. 417-O: 9, pp. 98 – 99; 16, pp. 91 – 92]. A similar approach was formulated by the Constitutional Court in its Ruling dated January 28, 2021 No.168-O[15], which questioned the constitutionality of certain provisions of the Customs Code[16], as well as the Rules of application of the customs valuation method, approved by the Decision of the EEC[17].

After analyzing the abovementioned legal acts, we should agree with the opinion of E.V. Taribo, who proceeds on the basis of the distribution of competence between the Court of the EAEU and the Constitutional Court of the Russian Federation: "if the international court provides adequate and uniform application of the sectoral rules of customs legislation attributed to the competence of the EAEU, then the constitutional court aims at ensuring the constituitonal rights due to the application of sectoral (including customs) legislation" [8, p. 18].

With regard to the practice of the EAEU law interpretation by the Supreme Court of the Russian Federation, the Judgements dated August 13, 2020 No. APL20-220[18] and October 7, 2021 No. AKPI21-612[19] are its vivid manifestations which raised the following issue before the highest judicial authority: whether certain regulations of the Clarifications of classification, according to the

[11] Paragraph 2 of the contested judgement stipulated that it would enter into force upon the expiry of 30 calendar days from its official publication date.

[12] CCRF. The Ruling of April 2, 2015 No. 583-O // http://doc.ksrf.ru/decision/KSRFDecision193025.pdf (accessed on January 17, 2022).

[13] The Judgement of the Customs Union Commission of July 15, 2011 No. 728 "On the procedure for applying exemption from taxation when importing certain categories of goods into the common customs territory of the Customs Union" // The Customs Union official website // http://www.tsouz.ru/, 18.08.2011.

[14] CCRF. The Ruling of March 3, 2015 No. 417-O // http://doc.ksrf.ru/decision/KSRFDecision190708.pdf (accessed on January 17, 2022).

[15] CCRF. The Ruling of January 28, 2021 No. 168-O // http://doc.ksrf.ru/decision/KSRFDecision515227.pdf (accessed on January 17, 2022).

[16] The Customs Code of the Customs Union (Appendix to the Treaty on the Customs Code of the Customs Union, adopted by the Decision of the Interstate Council of the EAEU at the level of heads of state on November 27, 2009, No. 17) // The legislation collection of the Russian Federation, 13.12.2010, No. 50, art. 6615.

[17] The Decision of the Board of the Eurasian Economic Commission of October 30, 2012 No. 202 "On the application of methods for determining the customs value of goods at the cost of a transaction with identical goods (method 2) and at the cost of a transaction with similar goods (method 3)" // The Eurasian Economic Commission official website http://www.tsouz.ru/, 31.10.2012.

[18] The Supreme Court of the Russian Federation (hereinafter referred to as SCRF). Judgement of August 13, 2020 No. APL20-220 // http://vsrf.ru/stor_pdf.php?id=1907088 (accessed on January 17, 2022).

[19] SCRF. Judgement of October 17, 2021 No. AKPI20-220 // http://vsrf.ru/stor_pdf.php?id=2049810 (accessed on January 17, 2022).

EAEU Commodity Nomenclature of Foreign Economic Activity of certain goods approved by the Order No. 28[20] issued by the Federal Customs Service on January 14, 2019, comply both with the Union and the Russian Federation law.

Within the framework of the abovementioned Judgments the Supreme Court realized consequent clarification of the provisions of the EAEU Customs Code[21] in order to establish the competence of the Federal Customs Service to adopt the clarification, after which turned to the unified Commodity Nomenclature of Foreign Economic Activity[22] provisions to confirm the extent to which the regulations formulated by the member state's competent authority comply with the supranational regulation of the issue. The result of the Union law interpretation and application by the Supreme Court is the conclusion that "the contested act does not contradict the law of the EAEU".

The Supreme Court Judgements No.No. APL20-220, AKPI21-612 are a subject of interest because they are the first case when recognising as invalid those normative acts that do not comply with the integration organization law was brought to a member state court.

Other examples of the application of the EAEU law regulations by the Supreme Court of the Russian Federation in order to settle certain disputes are the Judgements dated August 17, 2017 No.-AD17-40[23] and July 2, 2018 No. 18-AD18-35[24], which have been used to estimate the legitimacy of the lower courts acts regarding the imposition of administrative sanctions upon a legal person in view of employment without the authorization provided by the citizenship of the Republic of Armenia. Having stated the presence in the Treaty on the EAEU, whose member state is the Republic of Armenia, the norm which establishes the right of Armenian citizens to get employed in other member states without a work permit, the Supreme Court interpreted this normative regulation as excluding administrative liability of the Russian legal persons who hire the abovementioned citizens with no work permit [see 17, p. 86; 18, p. 130].

The analyzed judgments of the Supreme Court of the Russian Federation demonstrate its commitment to the rule-of-law principle of the Union, as well as to the national law interpretation and application on the basis of this principle.

In contrast to the Russian Federation, the Union law application practice in other member states is much less common. Its analysis is also being complicated by the circumstance that in some particular member states, including the Republic of Armenia, court orders are published only in the state language.

An example of the appeal to the EAEU law in the activities of the Administrative court of the Republic of Armenia is a case No. ՎՎ/10460/05/19. In this case, the legitimacy of subjecting a person to administrative liability due to the sale of goods which, on the one hand, complied with the food safety standards according to the law of the Union, and on the other hand, didn't comply with the standards according to the national law system, was estimated. In the absence of an administrative offense the Administrative court of the Republic of Armenia proceeded from these goods' conformity to the "food safety indicators defined by the technical regulation of the Customs Union [on food safety[25]], which indicates that there is no ban on

[20] The Order of the Federal Customs Service of the Russian Federation of January 14, 2019 No. 28 "On classification in accordance with the unified Commodity Nomenclature of Foreign Economic Activity of the Eurasian Economic Union certain goods" // Official state law database http://pravo.gov.ru, 10.01.2022.

[21] Customs Code of the Eurasian Economic Union (Appendix No. 1 to the Treaty on the Customs Code of the Eurasian Economic Union) // Eurasian Economic Union official website http://www.eaeunion.org/, 12.04.2017.

[22] Decision of the Council of the Eurasian Economic Commission of July 16, 2012 No. 54 "On approval of the unified Commodity Nomenclature for Foreign Economic Activity of the Eurasian Economic Union and the Unified Customs Tariff of the Eurasian Economic Union" // Eurasian Economic Commission official website http://www.tsouz.ru/, 23.07.2012.

[23] SCRF. Judgement of August 17, 2017 No. 5-AD17-40 // http://vsrf.ru/stor_pdf.php?id=1573026 (accessed on January 17, 2022).

[24] SCRF. Judgement of July 2, 2018 No. 18-AD18-35 // http://vsrf.ru/stor_pdf.php?id=1669624 (accessed on January 17, 2022).

[25] Decision of the Commission of the Customs Union of December 9, 2011 No. 880 "On the adoption of the

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their import and (or) sale on the territory of the Republic of Armenia". The foregoing allowed the Administrative court to state that "according to the abovementioned norms of the international treaty, ratified by the Republic of Armenia, the State commited to ensuring product turnover corresponding to the technical regulations of the Customs Union without imposing any additional requirements except for those to the mentioned products", which means that realizing that kind of goods couldn't entail any administrative liability [11, pp. 15 – 16].

Analyzing the judgement of the Administrative Court of the Republic of Armenia shows that it interpreted the EAEU law, after which, taking into account the supremacy of the integration organization law over national regulation, one of the provisions of the Union law was applied to resolve the dispute. Such an approach corresponds to the legal position of the Court of the EAEU, set out in the advisory opinion on *the professional athletes case*, according to which "in case of contradiction between the law of the Union and acts of national legislation … one should be guided by the provisions of the Union law"[26].

In this context, it seems impossible to agree with A.S. Gambaryan, who ponted out, while commenting on the judgement of the Administrative Court of the Republic of Armenia on the mentioned cased, that "this judgement has no rational legal justification" [11, p. 16].

An example of the application of the Union law by the judicial authorities of the Kyrgyz Republic is the Supreme Court Judgement dated November 9, 2017. In this judicial act, assessing the legality of the imposition of anti-dumping duties, the Supreme Court began its reasoning by clarifying Article 48 of the Treaty on the Union on the legality of their application, and then turned to the interpretation of the EEC[27] decision which introduced the relevant duty to determine its applicability to the circumstances of the case at hand.

The above-described analysis allows us to conclude that the member states' supreme courts consistently apply the law of the Union based on the principle of its supremacy over national legislation. In this case, the logic of clarification and application of the EAEU law consists of several stages: the first is to establish the applicable rule of the integration legal order, thereupon the supranational law supremacy is stated whenever there is a contradictory provision of national law, after which the application to resolve the disputed issue is carried out.

4. Interjudicial dialogue and its impact on the application of the law of the Union

The study of the judicial dialogue within the EAEU allows us to assert the mutual use of the integration organization court's positions by its member states' judicial authorities and vice versa, i.e. the appeal of the Union Court to the approaches of the national law enforcement practice in order to develop its own legal positions.

Firstly, regarding the domestic courts' application of the approaches used by the Court of the EAEU, we should refer to the practice of the Supreme Court of the Russian Federation, which, in addition to the examples of independent interpretation of the Union law, contains cases of combining such interpretation with the mechanism of judicial dialogue.

In particular, in the Ruling dated June 17, 2020 № 303-ES20-816[28], establishing the scope of validity of the EEC classification decision[29], the

technical regulation of the Customs Union «On food safety»" // Customs Union Commission official website http://www.tsouz.ru/, 15.12.2011.

[26] The Court of the Eurasian Economic Union (hereinafter referred to as the EAEU Court). Advisory opinion of December 7, 2018 on case No. CE-2-2-2/5-18-VK on the EEC application // https://courteurasian.org/court_cases/eaeu/P-3.18/ (accessed on January 17, 2021). Sub-paragraph 10 of paragraph 7 in part III "Court's findings".

[27] EEC Decision No. 49 of May 24, 2012 "On measures to protect the economic interests of manufacturers of polymer-coated metal products in the Customs Union" // Customs Union Commission official website http://www.tsouz.ru/, 26.05.2012.

[28] SCRF. Ruling of June 17, 2020 No. 303-ES20-816 // http://vsrf.ru/stor_pdf_ec.php?id=1895052 (accessed on January 17, 2022).

[29] Decision of the EEC Board of September 16, 2014 No. 156 "On the classification of disposable baby diapers according to the unified Commodity Nomenclature for Foreign Economic Activity of the Eurasian Economic Union" // Eurasian Economic Commission official website http://www.eurasiancommission.org/, 17.09.2014.

Supreme Court, first of all, referred to the EEC Court heading which regards the Union's guarantee of protecting all rights and freedoms at a level not lower than in national constitutions, formulated in the advisory opinion on *the pensions case*[30]. The next stage was the interpretation of Paragraph 17 of the EEC Regulation[31], which establishes a general prohibition on the retroactive application of the Commission's decisions which worsen the situation of persons. Next, the Supreme Court referred to the approaches of the Constitutional Court of the Russian Federation on the issue of retroactive actions of public authorities' acts and only then proceeded to the clarification of the EEC law, necessary to resolve a particular issue [19, pp. 11 – 12].

The analysis of law interpretation carried out by the Supreme Court of the Russian Federation shows that it has built a kind of hierarchy of approaches to interpretation which is based on the legal position of a supranational court that establishes a universal rule on the observance of human rights within the Union. The next step consists in the clarification of the clear rule of the Union law and only afterwards the approaches of the national constitutional court are applied. We should also agree with the opinion expressed in the doctrine which points out that "Russian courts understand the EAEU law as a single integral system, which allows to apply the legal positions developed by the Union Court in one area to another area of legal relations". [19, p. 12].

In this context, the Ruling of the Supreme Court of the Russian Federation dated May 21, 2020 №306-ES20-387[32] is also noteworthy. In this case, while assessing the legitimacy of the actions taken by a customs authority, the national judicial body began to provide a basis for its position by referring to Paragraph 1 of Article 53 of the Treaty on the Union on the safety of products put into circulation in the territory of the EAEU. Thereupon the Supreme Court referred to the position of the EAEU Court formulated in the advisory opinion on *the wheeled vehicles case*[33], according to which the abovementioned paragraph of the Treaty on the Union is imperative and the requirement contained in it is of a general nature. Only after having stated its commitment to the supranational court approach, the Supreme Court carried out its own interpretation of the provisions of the EAEU Treaty and the Customs Code of the Union, necessary for the resolution of the specific issue of the plaintiff.

The analysis allows us to note that the reference to the positions of the EAEU Court represents an element of legal argumentation for a national court which precedes the interpretation of the Union law by the domestic court itself. Given the doctrinal classification of argumentation into the following types: (1) based on a legal regulation; (2) based on analogy; (3) based on a precedent, in this case it is reasonable to affirm the similarity of reference to the approaches of the integration organization court with case law argumentation [20, p. 48].

The study of the dialogue between the EAEU Court and the courts of its member states would be incomplete without pointing out the approaches that the supranational court perceives from the practice of domestic courts.

First of all, it's worth mentioning that the enshrining of such principles as *non bis in idem*[34] and proportionality[35] as the general principles of the Union law in the acts of the EAEC Court was accompanied not only by referring to the practice of ECHR and the European Union Court, which is noted in the doctrine [21, pp. 75 — 76; 22, pp. 197 — 201], but also to the positions of the Russian Federation Constitutional Court.

[30] The Court of the EAEU. Advisory opinion of December 22, 2018 on case No. SE-2-2/7-18-BK // https://courteurasian.org/court_cases/eaeu/P-5.18/ (accessed on January 17, 2022).

[31] Appendix No. 1 to the Treaty on the EAEU.

[32] SCRF. Ruling of May 21, 2020 No.306-ES20-387 // http://vsrf.ru/stor_pdf_ec.php?id=1887350 (accessed on January 17, 2022).

[33] The Court of the EAEU. Advisory opinion of October 31, 2019 on case No. SE-2-2/4-19-BK on the EEC application // https://courteurasian.org/court_cases/eaeu/P-3.19/ (accessed on January 17, 2022).

[34] The Court of the EAEU. Advisory opinion of June 18, 2019 on case No. SE-2-1/2-19-BK on the RPE "Atameken" application // https://courteurasian.org/court_cases/eaeu/P-1.19/ (accessed on January 17, 2022).

[35] The Court of the EAEU. Advisory opinion of October 15, 2018 on case No. SE-2-1/3-18-BK on the application of the Ministry for the National Economy of the Republic of Kazakhstan // https://courteurasian.org/court_cases/eaeu/P-2.18/ (accessed on October 17, 2022).

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One of the key positions of the Constitutional Court of the Russian Federation in terms of application of the principle *non bis in idem* is the rationale for its extension both to the sphere of criminal legislation as well as to the liability in cases of administrative offences. In the Decision dated February 4, 2019 No. 8-P[36] the following approach is formulated: "the rule *non bis in idem* enshrined in the constitutional text only in relation to criminal liability characterizes an inherent feature of the principle of justice and, thus, being a specification of this principle, has a general meaning, and therefore applies not only to the criminal law, but also to the legislation on administrative offenses". A similar conclusion is stated in the Rulings of the Constitutional Court dated March 26, 2019 No. 824-O[37], and October 24, 2019 No. 2922-O[38].

The significance of this legal position for the Court of the EAEU is that, using member states' law systems as one of the sources for formulating the principle of *non bis in idem*, the Union Court found out that both at the constitutional and legal levels this principle is enshrined only in relation to criminal liability and not in all states, as it is not in the Constitution of the Republic of Belarus and is contained only in the criminal legislation of this state [23, p. 183]. In such circumstances, the approach of the constitutional justice body of the Russian Federation served as the starting point, which allowed the integration organization Court to proceed from a broad interpretation of the *non bis in idem* principle.

As for the principle of proportionality in the aspect of administrative liability, in the practice of the Union Court it is reflected in the Advisory Opinion on *the declaration of funds case*[39].

The principle of proportionality, especially in the aspect of punishment for failing to declare money is reflected in the practice of the ECHR, in particular in its judgments on the cases of *Ismailov v. Russia, Girlyan v. Russia, Moon v. France, Grifhorst v. France, Boljević v. Croatia*[40]. The Constitutional Court of the Russian Federation has also repeatedly noted the need to respect the proportionality of sanctions imposed for the offense of failing to declare the money moved across the customs border, which entails administrative or criminal liability[41]. In this case, the approaches of the Constitutional Court of the Russian Federation are based on the relevant position of the ECHR, which is especially interesting in the aspect of judicial dialogue. Given that, according to the preamble to the Treaty on the EAEU, the Union was established, among other things, with a view to ensuring the supremacy of constitutional rights and freedoms of man and citizen, the integration union presumes the protection of rights and freedoms at a level no lower than it is guaranteed by the national constitutional courts. In such circumstances, the commitment of the member state's constitutional justice body to one of the principles that contribute to the protection of human rights makes this principle binding on the Court of the Union. As a result, there is a situation when the legal principle that came to the national constitutional practice from the approaches inherent in the ECHR is transferred to the acts of a supranational court, creating a kind of indirect dialogue between the ECHR and itself [24, pp. 8 — 9].

The need to comply with the principle of proportionality has been repeatedly pointed out by

[36] CCRF. Order of February 4, 2019 No. 8-P // Official Internet Portal of Legal Information http://www.pravo.gov.ru, 07.02.2019.

[37] CCRF. Ruling of March 26, 2019 No. 824-O // http://doc.ksrf.ru/decision/KSRFDecision396235.pdf (accessed on January 17, 2022).

[38] CCRF. Ruling of October 24, 2019 No. 2922-O // http://doc.ksrf.ru/decision/KSRFDecision436905.pdf (accessed on January 17, 2022).

[39] The Court of the EAEU. Advisory opinion on October 15, 2018 on case No. SE-2-1/3-18 on the application of the Ministry for the National Economy of the Republic of Kazakhstan. URL: http://courteurasian.org/court_cases/P-2.18/ (accessed on January 17, 2022).

[40] European Court of Human Rights (hereinafter referred to as ECHR). *Ismailov v. Russian Federation*. Application No. 30352/03. Judgement of November 6, 2008; *Grifhorst v. France*. Application No. 28336/02. Judgement of February 26, 2009; *Moon v. France*. Application No. 39973/03. Judgement of July 9, 2009; *Boljević v. Croatia*. Application No. 43492/11. Judgement of January 31, 2017; *Girlyan v. Russian Federation*. Application No. 35943/15. Judgement of October 9, 2018.

[41] CCRF. Order of May 27, 2008 No. 8-P // http://doc.ksrf.ru/decision/KSRFDecision19724.pdf; Ruling of November 6, 2014 No. 2477-O // http://doc.ksrf.ru/decision/KSRFDecision179299.pdf; Ruling of November 19, 2015 No. 2591-O // http://doc.ksrf.ru/decision/KSRFDecision215499.pdf (accessed on January 17, 2022).

the constitutional justice bodies of other EAEU member states. Thus, in the Decision dated July 6, 2018 No. R-1129/2018 the Constitutional Court of the Republic of Belarus emphasized that in order to implement the principle of the supremacy of law, to ensure justice, reasonableness and proportionality, one should take into account the nature of the act committed, motives and pursued goals of illegal actions, used methods and means, the consequences occurred and their impact on safety and public order while subjecting persons to administrative liability[42]. The Constitutional Council of the Republic of Kazakhstan in its message dated June 22, 2020 stated the need to develop clear criteria to ensure *the principle of proportionality*[43] of law restrictions.

The principle of legal certainty, compliance with which the EAEU Court verifies when assessing the validity of EEC classification decisions[44], is also inspired by the approaches of the Constitutional Court of the Russian Federation.

The Constitutional Court of the Russian Federation in its Ruling dated November 11, 2003 № 16-P-P indicated that the principle of legal certainty primarily implies the need to ensure the stability of the legal regulation, its compliance with the criteria of certainty, clarity and unambiguity of a legal regulation achieved through a uniform understanding and interpretation of the regulation by all law enforcement agencies[45].

It is noteworthy that even in the EU the principles of proportionality and legal certainty, formulated in the practice of its member states' courts, served as a source of inspiration for their consolidation by the Court of Justice of the EU as the general principles of its own law system [1, pp. 548; 25; 26].

In the light of the dialogue with the highest courts of the member states, the decision of the EAEU Court Chamber on the application of *IE Tarasik K.P.*[46], in the consideration of which one of the key issues was the formulation of the concept of "inaction", is particularly noteworthy. As the Court's subsequent practice has shown, clarification of this legal category is important regarding protection of the rights and legitimate interests of business entities, especially in situations when they seek to encourage the Commission to monitor member states' compliance with the Union law[47].

When considering the case on the application of IE Tarasik K.P., the Court of the Union defined the concept of "inaction" as non-performance or improper performance by a supranational body (official) of the duties imposed on it by the Union law, in particular, leaving an appeal of a business entity without consideration in whole or in part, or giving a response to the applicant not on the merits of the appeal, if the consideration of this appeal falls within the competence of a supranational body (official). It is noteworthy that in formulating this legal position the Court of the Union did not follow the stable practice of the EU Court on this issue, which is that any position of the EU institution, even a negative one, terminates the inaction[48]. The EAEU Court carried out an analysis of the legislation of its member

[42] The Constitutional Court of the Republic of Belarus. Judgment of July 6, 2018 No. R-1129/2018 // National Internet Portal of Legal Information of the Republic of Belarus, 14.07.2018, 6/1646.

[43] The Constitutional Council of the Republic of Kazakhstan. Forwarding of June 22, 2020 // https://online.zakon.kz/Document/?doc_id=31686961&pos=3;-88#pos=3;-88 (accessed on January 17, 2022).

[44] The Constitutional Court of the EAEU. Judgment of the Chamber of the Court dated June 18, 2019 on case No. SE-1-2/1-21 on the OOO "Shiptrade" application // https://courteurasian.org/court_cases/eaeu/C-1.19/; Judgment of the Chamber of the Court dated May 19, 2021 on case No. SE-1-2/1-21 по заявлению CDO «DOMINANTAPHARM» application // https://courteurasian.org/court_cases/eaeu/C-2.21/ (accessed on January 17, 2022).

[45] CCRF. Order of November 11, 2003 No. 16-P // http://doc.ksrf.ru/decision/KSRFDecision30382.pdf (accessed on January 17, 2022).

[46] The Court of the EAEU. Judgment of the Chamber of the Court dated December 28, 2015 on case No. SE-1-2/2-15-KS on the application of IE Tarasik K.P. // https://courteurasian.org/court_cases/eaeu/C-4.15/ (accessed on January 17, 2022).

[47] As at January of 2022 the Court considered five cases on challenging the EEC inaction, four of which raised the issue of EEC's failing to monitor the EAEU law enforcement by its member states.

[48] See CJEU. *Echebastar v. European Commission*. Case No. C-25/91. Judgment of April 1, 1993. EU:C:1993:131; *European Commission v. Council of the European Union*. Case C-196/12. Judgment of November 19, 2013. EU:C:2013:753; *Fernando Marcelino Victoria Sánchez v European Parliament and European Commission*. Case No. T-61/10. Order of November 17, 2010. EU:T:2010:473.

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states[49] and their law enforcement practice[50], which showed that "inaction" is interpreted not only as non-performance of the duties imposed on a state body (official) by regulatory legal acts, but also as fully or partially leaving an appeal of a citizen or a legal entity without consideration, responding to the applicant not on the merits of the appeal. The approach of the EAEU Court, which has been undeservedly criticized in domestic science [27, pp. 87 – 88], on the one hand, is based on the understanding that the practice of the EU Court has turned claim for inaction into an ineffective remedy, which has been repeatedly noted in the legal doctrine [28, pp. 303 – 304; 28, pp. 341 – 358; 30, pp. 209 – 226], and on the other hand, the inability of the EAEC Court to "narrow" the concept of inaction in its judgment, because that would entail the protection of human rights and freedoms in the Union to a lesser extent than the relevant rights and freedoms are guaranteed at the national level [16, p. 80].

This example shows that the Court of the Union deliberately rejected the current practice of the EU Court, which proposed a restrictive interpretation of inaction, as failing the test of compliance with the basic principles of the Union law [31, p. 282; 32, pp. 143 – 146].

To conclude this study we should turn to the analysis of the judgment made by the Union Court on terminating the proceedings on the application of the *Remdizel* Production Enterprise Ltd.[51] which challenged certain provisions of the EEC recommendations[52].

In accordance with paragraphs 13 and 14 of the Regulations of the Commission, a recommendation is a non-binding act, which is adopted by the Council or the Commission Board within the authority defined by the Treaty and internaional agreements of the Union.

The recommendation challenged by the *Remdizel* Production Enterprise Ltd. represented an act which, in effect, introduced the Clarifications to the Commodity Nomenclature of Foreign Economic Activity of the Eurasian Economic Union. Certain provisions of the said Clarifications are applied by customs authorities while classifying goods imported by an economic entity on the customs territory of the Union, and afterwards by judicial bodies on appeal against the noted decisions.

Despite the abovementioned circumstances, the Chamber of the Court, when considering the application of the *Remdizel* Production Enterprise Ltd., proceeded from a restrictive interpretation of Subparagraph 2 of Paragraph 39 of the Statute, determining the Court's competence to verify the conformity of the Commision's decisions with the EAEU Treaty, and concluded that "the Commission's decisions and recommendations by their legal nature, objectives and validity represent different types of legal acts of the Union's body, whereas the Commission's recommendations ... do not have any regulatory nature, are not included in the Union law in accordance with Article 6 of the Union Treaty and are not a subject to challenge in the Court as they are beyond its jurisdiction". In view of the foregoing, the Court's Chamber dismissed the proceedings on the application of the Enterprise, on the basis of "an excessively formalized interpretation of a positive norm". [33, p. 39].

It seems that this order is an example of judicial interpretation which did not take into account the law enforcement approaches, for

[49] Civil Procedure Code of the Republic of Belarus, Economic Procedure Code of the Republic of Belarus, Civil Procedure Code of the Republic of Kazakhstan, Arbitration Procedure Code of the Russian Federation and Civil Procedure Code of the Russian Federation.

[50] The Supreme Court of the Republic of Kazakhstan. Resolution of December 24, 2010 No. 20 "On some issues of application by courts of Chapter 29 of the Civil Procedure Code of the Republic of Kazakhstan" // // https://sud.gov.kz/rus/legislation/CAT01/79693/2010 (accessed on January 17, 2022); the Supreme Court of the Russian Federation. Plenum Decree of February 10, 1999 No. 2 "On the court practice in considering cases on challenging jugments, acts (inaction) of state authorities, local governments, officials, state and municipal employess // Bulletin of the Supreme Court of the Russian Federation, No. 4, April 2009.

[51] The Court of the EAEU. Order of the Chamber of the Court dated April 8, 2016 on the termination of proceedings on the application of *Remdizel* Production Enterprise Ltd. // https://courteurasian.org/court_cases/eaeu/C-1.16/ (accessed on January 17, 2022).

[52] Recommendation of the EEC Board dated March 12, 2013 No. 4 "On the clarifications to the unified Commodity Nomenclature for Foreign Economic Activity of the Eurasian Economic Union // http://www.eurasiancommission.org/ (accessed on January 17, 2022).

instance, those of the Constitutional Court of the Russian Federation. The latter, in its Decision No. 6-P[53] of March 31, 2015 considered the issue of whether it complies with the Constitution to deny the private entities' right to appeal against the letters of the Federal Tax Service containing explanations of tax legislation. The Constitutional Court stated that such letters, although being addressed directly to taxing authorities and officials, are indirectly, through the law enforcement activities of the taxing authorities, essentially become binding on an indefinite range of taxpayers. In view of the above, the Constitutional Court deemed that in a situation where the contested act of the Federal Tax Service posseses characteristics which allow it to be applied as a general binding prescription, its investment in the form of an explanation in itself could not serve as sufficient grounds for declaring it inadmissible for checking its compliance with the federal law.

Given that the right of access to the Court is a fundamental human right, we believe that, with a view to its protection within the Union at a level no lower than that of the member states, it is justified to perceive a national law enforcement approach in the light of a deviation from a formal interpretation of the notion of a regulatory act. Transposing the position of the Constitutional Court of the Russian Federation on the possibility to challenge the Commission's recommendation in the Court of the Union would require establishing the presence of binding features that affect the legal position of an economic entity.

5. Conclusion

The analysis leads us to a conclusion about the consistent application of the Union law by the judicial authorities of its member states.

Unlike other integration organizations that have a preliminary ruling procedure, in the EAEU its absence is compensated by a very active interpretation of the integration organization law by national courts, based on the recognition of the supremacy of the Union law and using previously formulated positions of the EAEU Court on other cases, which can be seen as an element of the emerging judicial dialogue.

It is fundamentally important that the dialogue between the court of an integration organization and the courts of its member states is the key to the effective application of supranational law. The legal constructions elaborated by the Court of the Union are capable of obtaining wide distribution through the practice of domestic courts. It seems that more intensive use of the EEC Court's positions in resolving specific cases by the national courts may be facilitated by the position formulated in the Decision of the Appellate Chamber on the application of *IE Felbusch D.Y.* on the need to apply the contested EEC decision in this case only in the interpretation of the Court of the Union. On the one hand, the proposed wording of the Court of the Union can be applied by analogy to the previously considered cases, and, on the other hand, we can expect similar clarifications to appear in other decisions of the EEC Court.

A positive signal of the EAEU Court's coexistence with constitutional and supreme courts of the member states is the refusal of the latter to intrude into the authority of a supranational judicial body. Nevertheless, it is obvious that such an approach of the member states' courts is subject to the condition that the EAEU Court complies with its obligations to ensure guarantees of human rights and fundamental freedoms in the Union at a level no lower than in the member states. The achievement of this goal is facilitated by the second element of the judicial dialogue, which consists in the perception of the positions formulated by the member states' courts with regard to the implementation of certain rights and freedoms.

[53] CCRF. Order of March 31, 2015 No. 6-P // http://doc.ksrf.ru/decision/KSRFDecision191663.pdf (accessed on January 17, 2022).

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