Treaty on the functioning of the european union law european essay

Law

Part 2

Treaty establishing the European Community

TEU

Treaty on European Union

TFEU

Treaty on the functioning of the European Union

Introduction

Art. 267 Treaty on the Functioning of the European Union (ex Art. 234 TEC) [1]gives the European Court of Justice(ECJ) the right to provide preliminary rulings on an inquiry of national courts concerning the interpretation of the Treaties as well as on the validity and interpretation of acts of the institutions, bodies, offices and agencies of the EU. The ECJ has no rights under this procedure to decide on the merits of a legal dispute in which it sought to explain the interpretation of the EU law.

Short summary of the preliminary reference procedure

The mechanism of preliminary reference procedure consists in the following. The courts and tribunals of various levels of the Member States (MS), faced with the need to interpret the EU law can request the ECJ to interpret the EU law. However, it is not an obligation. Resolving this issue is left to the national courts. National courts or tribunal, against whose decisions there is no judicial remedy in a similar situation must make a request to the ECJ. The ECJ may not decide on the merits of the case, but only to give an interpretation on the application of the EU law. The requesting court is bound

by the received preliminary ruling and must apply it when considering the decision on the merits. In some cases, national courts are exempt from the obligation (where it exists) to apply under the discussed procedure to the ECJ (The doctrine of acte clair, based on CILFIT case (Case 283/81)[2]. This is in the following three cases: application of the European law is irrelevant to the particular case being considered by the national courtthis question of interpretation of European law has been considered in previous preliminary rulingsthe interpretation is so obvious, that it leaves no room for reasonable doubtIn this case, national courts are exempt from the obligation to comply with reference procedure, but do not lose the right to appeal with a request under this procedure.

Analysis of the role of preliminary reference procedure in the development of EU law

There is a strong opinion that the preliminary reference procedure is one of the most effective mechanisms for the implementation of the EU law at the national proceedings level in the EU Member States. At least, the « Report by the Working Party on the Future of the European Communities' Court System» gave the following assessment to the given procedure:" through the direct dialogue which has made possible between each national court and the Court of Justice, as the supreme judicial body in the Community, through the authority and certainty of the answers it thereby gives to the questions raised and through the simplicity of its operation, the current system of preliminary rulings has proved to be the most effective means of securing the uniform application of Community law throughout the Union, thereby forming the keystone of the Community‘ s legal order".[3]The named

procedure is designed to serve the unity of interpretation and application of the EU law in the MS. Putting in perspective the achievements of the Court, it should be noted that the ECJ in the named procedure developed a number of important legal principles that now serve as legal policy within the EU. These principles can be given as examples: Supremacy of EU law (Van Gend en Loos, Case 26/62[4], Flaminio Costa v ENEL, Case 6/64[5]), Direct effect of EU law (Van Gend en Loos v Nederlandse Administrative der Belastingen, Case 26/62[6])« Interpretive obligation» (Harz v Deutsche Tradax, Case 79/83[7]) and many others. It can be stated that this procedure played an important role in the process of the European integration, unified interpretation and application of the EU law, that is, in achieving the policy objectives of the EU. As the main mechanism of conformity of the unity of interpretation and application of the EU law in the courts of the MS as well as of resolving issues of conflict of the EU law and national legislation, the use of preliminary reference procedure has always been and remains the subject of heated debates. There are various suggestions on how to improve the mechanism of preliminary reference procedure and on a more radical reform of the EU's judicial procedures. For example, John Fairhurst indicates an alternative legal mechanism to ensure perfect unity of interpretation and application of the law of the Union:" The best way to insure the harmonious development of Union law would have been to have established the Court of Justice as a final Court of Appeal on matters of Union Law. That course seemed to constitute too direct a challenge to the supremacy of national legal systems, and was rejected by the founders of the Union. They opted, instead, for a system of references by national courts".[8]On one hand, the

MS are definitely interested in providing a united approach in the application of the EU law in all MS. On the other hand, they are not politically ready to give away the principle of sovereignty and the superiority of their own national judicial systems. In this situation a mechanism of preliminary reference procedure was the result of a compromise that has all the advantages and disadvantages of a compromise. In practice, the greatest criticism against the ECJ is long term of consideration of judicial inquiries. There is a strong belief that this is a serious, but still, a private legal issue related to the role and competence, which was provided to the ECJ by the EU legislation or that was adopted on his own. It is an accepted fact that the preliminary reference procedure in conjunction with the principles of supremacy of the EU law and its direct action, which were the result of the application of this procedure, in fact, produced a redistribution of power within the EU, including in national judicial systems. For example, it was noted that the ECJ has enabled the national judiciary to question government action on grounds and in areas not previously recognized by national law. The preliminary reference procedure has projected the ECJ as an alternative source of legal authority vis-a-vis the national courts of final instance thus emancipating lower courts from the obligation, or at least the pressure, to follow the rulings of higher courts."[9]Thus, since its creation the ECJ has consistently acted in the logic of constitutionalization of the Treaties and the federalization of the EU. The main instrument of such activities and, therefore, to increase its influence on the national judicial system for the ECJ was the use of preliminary reference procedure. A number of sources conducted a legal analysis that show that the logic of ECJ’s decisions is not

characteristic for horizontal relations between it and the national courts, as it follows directly from Art. 267 TFEU[10]. While talking about the relations of dialogue, the ECJ has been consistently building relationships of hierarchy with national courts, meaning that, he positioned himself as the Supreme Court of the European Union. Thus, analyzing a case examined by the ECJ in the manner of the discussed procedures, Takis Tridimas notes:" This uncompromising approach in extending jurisdiction by renvoi shows that the ECJ sees itself as the Supreme Court of the Union and views the national and the Community legal orders as a unitary system."[11]Came to similar conclusions and Hjalte Rasmussen, stating:" It is a fact that, in its case law, the Court of Justice has substituted a good deal of hierarchy for the« cooperation between coequal judicial partners » relationship allegedly governing the functioning of the preliminary references procedure."[12]This point of view can be demonstrated by the example of the declaration of the ECJ of the doctrine of acte clair, based on the CILFIT case (Case 283/81)[13]. In legal literature, it is given the following evaluation:" The doctrine promoted the process of federalization of the judicial system. By liberating national courts of last instance from the obligation to make reference where the case law already made the solution clear, the ECJ firmly established the normative value of its rulings."[14]

Analysis of preliminary reference procedure in establishing the basic principles of European law.

The subject of this assignment is to analyze the results of the application of the preliminary reference procedure. It seems logical in this situation, to try to analyze what it has fundamentally contributed to the development of the

EU legal system on the example of the most significant cases of its application. 1. The ECJ established the principle of the EU law supremacy (Van Gend en Loos, Case 26/62[15], Flaminio Costa v ENEL, Case 6/64[16]). In this case, as analyzed in the legal literature, the decision was made by the courts purposive approach of interpretation of legislation, based on the need to achieve the EU's objectives. In the case of Van Gend en Loos, Case 26/62[17], the ECJ explained his position " that Art 189 EEC (now Art 288 TFEU)[18], which provides for the direct applicability of regulations, would be meaningless if MS could negate their effect by enacting subsequent, conflicting legislation"[19]I note that the application of purposive approach to interpretation of legislation in a less politically sensitive and crucial court cases often means the complete inability to substantiate the case by applicable law. It is significant that the EEC Treaty, TEU and TFEU do not contain the principle of EU law supremacy. Consequently, it is still not formalized by the MS on a treaty level and continues to be the exclusive work of the Court of Justice. In the case of Flaminio Costa v ENEL, (Case 6/64) [20]the ECJ stated:" By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[21]On the basis of the text itself, it is possible to draw conclusions, opposite of the ECJ. Either due to the forgetfulness or the lack of proper legal technique, the MS did not

include the principle of supremacy of the EU law into the Treaty text. In this situation, the ECJ in its decision corrected such an unfortunate gap. Although the MS did not want to keep this principle in the Lisbon Treaty, replacing the contract binding fundamental principle of the EU law, by the Declaration. Even the supporter of the European integration law, Paul Craig, regrets it and has to acknowledge the possibility that " its removal might cause some national courts to doubt the continuing validity of the supremacy principle"[22]It was believed that this principle will be adopted by the MS in the Constitutional Treaty. The said agreement is not in force. In my opinion, this fact has not added to the legitimacy of the principle discussed. Based on the above, it is possible to make the most simple and, therefore, probably the correct conclusion. MS when signing the Treaties, in fact, were forced to go to a certain limitation of their sovereignty in order to achieve common goals. Another thing is that such a significant legal issue as a limitation of sovereignty they did not leave unattended and completely outlined in the Treaty the boundaries within which they agree to limit their sovereignty. Moreover, the failure to include the principle of the EU law supremacy in the following Treaties and the rejection of the Constitutional Treaty seems to me quite eloquent facts. 2. The ECJ under the preliminary reference procedure created another fundamental principle of EU law - direct effect of EU law (Van Gend en Loos v Nederlandse Administrative der Belastingen, Case 26/62)[23]. Traditionally, the ECJ based its decisions not on the missing Treaties but on the " spirit and aims" of the EU. As noted in legal sources, " The ECJ’s reasoning was also characterized by a vision of the kind of legal community that the Treaties seemed designed to create ... The ECJ’s vision

for the EEC was very different from the advanced by the Member States"[24]All that has been said previously about the justification and the legitimacy of creation of the principle of EU law supremacy may be referred to the principle of its direct action. It should be added that the adoption of a preliminary reference procedure under this principle, as stated, contradicted the original intent and the legal approach of the MS." Surprisingly, the founding Treaties did not address these questions directly and the original Member States assumed that EEC law would have the same domestic effects as other sources of international law, resulting in the status of the EEC Treaty being determined by each Member State, s own constitutional rules"[25]" Van Gend en Loos[26]was a ground-breaking judgment. The strong interventions made on behalf of three governments, half of existing Member States, indicated that the concept of direct effect, understood as the immediate enforceability by individual applicants of those provisions in national courts, probably did not accord with the understanding of those states of the obligations they assumed when they created the EEC". [27]Thus, it is recognized that by adopting this principle, the ECJ clearly went beyond those intentions than that of the MS when they were signing the Treaties. From this point of view, the repeating arguments of the ECJ on the " aims and spirit of the EU" logically means one of two things. Either the MS have established a formation, of which " the aims and spirit" are beyond of their own aims and intentions expressed by the Treaties. That is, in this variant, the EU is a structure living its own live, regardless of the original and later expressed will of its members. Or, it is the ECJ that is a structure with its own aims and interests, substituting in fundamental decisions the clearly

expressed will of the MS, with its own notion of the expediency of the abstract EU. The given evaluation of the role that has played the ECJ, above all, through the mechanism of preliminary reference procedure, is contained in a number of sources. For example, analyzing the methods of interpretation used by the ECJ, Hjalte Rasmussen concluded:" I argue that the traditional understanding is nothing but a smokescreen. It was, presumably, put up to camouflage the fact that the Court of Justice was deeply involved (if not in theory then in fact) in a continuous process of policymaking and of acting in hierarchical juridical capacity".[28]3. As part of the discussed legal framework the ECJ also took a number of decisions that actually significantly expanded the scope of the preliminary reference procedure. Thus automatically has been extended the courts own jurisdiction. An example is the creation of the vertical direct effect of EU Directives by the Court (Van Duyn v Home Office, Case 41/74)[29]. Another example of this approach can serve the broad interpretation of the concept of « a court or tribunal of a MS against whose decisions there is no judicial remedy», contained in Art. 267 TFEU (Broekmeulen v Huisarts Registratie Commissie, Case 246/80[30]).[31]Apparently, the policy of the ECJ on maximizing the expand of their own competence, the desire to preserve the exclusive role in the interpretation of the EU law, and to preserve the right of direct dialogue with the lower national courts largely created a crisis in the application of the preliminary reference procedure, that occurs. Meaning, in this case, long-term consideration of cases under this procedure. Under the crisis in a broader sense, I understand legal issues in the activities of the ECJ and its use of preliminary reference procedure, in particular. It has been

noted that the two problems are related to each other and one creates the other:" Furthermore, time consumption will continue to grow as long as the Court of Justice does not de-escalate its law-making and policy-making activities, for which it rightly earned a reputation".[32]

Conclusion

As I tried to show above, the role of the preliminary reference procedure in achieving the objectives of the EU policy is ambiguous. On the one hand, the use of preliminary reference procedure has made possible to create a functional design of understanding and application of the EU law. Objectively as part of this procedure, harmonization in the interpretation of the EU law is achieved. The created model allows using under the doctrine of vertical direct effect rights that are presented to the subjects directly by the EU law. Therefore, in this sense preliminary reference procedure contributes to achieving the EU objectives (at least in the understanding of the ECJ). The downside of this procedure is that at this point the fundamental principles of the EU law are based on a controversial interpretation of the law by the ECJ. The sources call the ECJ action " interpretation" of the EU law out of political correctness. In fact, under the discussed procedure the ECJ did not interpret; he created a number of fundamental principles of the EU law. It is not hidden that the ECJ’s conclusions often contradicted the intentions and the views of the MS. The last in their entirety are supposed to be the original sources of the EU law. In my opinion, this contradiction can be eliminated only if the MS fix the fundamental principles of EU law in the Treaties. At the same time, in the future the competence of the ECJ in the application of preliminary reference procedure should be strictly limited to the interpretation and not

the creation of legislation. Otherwise its decisions, based on its own understanding of the aims and objectives of the EU, different than that of the MS, will be nondurable. They will be recognized by the MS until the moment, when the costs of their implementation will exceed the benefits of the EU membership for the Members.

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