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JUDICIAL ACTIVISM AND INTERPRETATION OF LAW: SHOULD THE EUROPEAN COURT OF JUSTICE RESTRAIN ITSELF?

The article examines a phenomenon of judicial activism on the part of European Court of Justice particularly in connection with preliminary reference procedure, enshrined by Article 267 of the Treaty on the Functioning of the European Union. Mentioned Article provides for the Court to interpret provision of the European law and decide upon their validity. In this regard the Court may act creatively and perform a role of a legislator as national courts and tribunals resort to its authoritative opinion in cases they experience difficulties in properly construing and applying relevant European legal provisions. The author notes that in some cases the Court may introduce revolutionary solutions to legal problems, engaging into judicial activism and what raises criticism of its activity. However, it is suggested that the initial intentions of the ECJ are intentions *bona fide* and performance of the Court overall develops EU legal framework.
Key words: European Court of Justice, preliminary reference procedure, national judge, national court or tribunal, European law, interpretation, provision.

The European Court of Justice (hereinafter – ECJ or the Court) is entrusted to ensure observance and uniform interpretation of law by all Member States throughout the European legal order. In such a way the harmonious development of the European legal system and mechanism of its functioning are preserved.

In this regard, the ECJ is entitled to interpret EU law and decide on its validity (former Community law) by means of preliminary reference procedure enshrined by Article 267 of the Treaty on the Functioning of the European Union (hereinafter - TFEU)[1]. By holding preliminary rulings the ECJ guides all other national courts and tribunals on the matter of proper interpretation and application thereof thus shaping European Union law and ensuring its uniform application.

Therefore, the analyses of nature and essence of the preliminary ruling procedure is of particular interest as the ECJ performs its role as a legislator, modifying and developing European law, filling in the loopholes and raising its credibility and authority. It is notable that "more and more national courts have come to accept its guidance and leadership, and that the high-tide of revolt and obstruction appears to be long over. One may speak of an overall "habit of obedience" to EU law"[2].

Nevertheless, "the Court has on multiple occasions been attacked for its activism (commonly taken to mean: its zealously pro-integrationist stance")[3]. The Court has been claimed to exceed the limits of its judicial function, putting the blame on its exceptionally broad mandate to lay down rules of law in accordance with its own preferences, which to certain extent may rest upon its performance while issuing preliminary rulings. Thus, the Article examines the reasons for this stance paying particular attention to the preliminary reference procedure.

The preliminary reference procedure is initiated by the ECJ upon a request of a national court or tribunal in case a judge hearing a specific case experiences difficulties with a proper interpretation of relevant European law provisions. In order to submit a reference such a court or tribunal has to satisfy certain criteria elaborated by the Court in practice. These criteria are independent from national laws and regulations regarding establishing and functioning of judicial bodies. Moreover, a case should be indeed give rise to EU law issues and trigger preliminary ruling request, while a national judge should be positive to address the ECJ with such an issue or in other words, a judge should actually make a reference.

The EU law issue may vary from proper interpretation of founding treaties or validity of acts of EU

[1] Originally Article 177 of the Treaty on European Economic Community, subsequently Article 234 of the Treaty on European Communities.
[2] Waele de, H. (2009). The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. *European Law / Europarecht,* 24.
[3] Waele de, H. (2009). The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. *European Law / Europarecht,* 24.

bodies, agencies and institutions and it is up to the ECJ to decide how to act in a specific case and to hold a proper and well-founded decision at the national level[1]. The primary responsibility to apply and enforce European law lies on court of Member States, thus they are to be interested in cooperation with the ECJ in this matter. And the most prominent form of cooperation in this regard is the mentioned preliminary reference procedure.

As it has been mentioned the Court is called for to interpret various provisions of EU law. In doing so the ECJ resorts to different methods and techniques. One of the most preferred ones is the method of an expansive interpretation, by using which the Court does not only explain the features of a particular situation, but also adds to the development of the legal system in general. In such a way the Court fully enjoys its "legislative" powers as indeed the Court is expected to come up with solutions to legal issues relevant not only to the case concerned but also to legal controversies that the initial legislators failed to address.

It is true to say that "the wording of many provisions is indeed terse and laconic, and this naturally allows for an interpretation that judges consider best, trying to find the "best fit" in light of the existing rules and the legal system as a whole"[2]. In other words, the Court is naturally stimulated to present an interpretation which consequently may generate its activism.

It's worth mentioning that among the reasons why Court may be too flexible and creative are incorrectly formulated questions referred thereto by the national judge. Indeed there no specifically stipulated requirements as to how an inquiry should be formulated and presented. Existing requirements are subject to domestic provisions and national courts enjoy certain flexibility in this regard, which was supported by the Court in *De Geus* case[3].

The most essential requirement as to the reference is to convey the essence of the case, skipping irrelevant details and avoiding unnecessary information. In addition, the national judge needs to examine whether the question relates to the interpretation of EU law in certain cases[4]. In case it does, the court or tribunal should (not obliged to) check whether the issue at hand is equally obvious by resorting to comparing texts of authentic acts in different languages, interpreting relevant terminology of EU law in the light of the array of integration law, considering its objectives and development on the day of its application.

The ECJ applies this technique in dealing with a reference, though it would be much appreciated if a national judge does the same on a regular basis should arise doubts regarding a correct meaning of a certain provision or term. This would preserve the uniformity of law, minimize the Court's workload and make national judges more aware and responsible.

The more national courts are getting used to the role of the courts of former Community law (just to mention domestic courts and tribunals used to be *Community courts* before the adoption of TFEU) and the more they follow the given by the ECJ interpretation of the relevant provisions of EU law in their decisions, the easier it will be to prove that certain legal issues do not require additional preliminary requests. Besides, it should be clearly understood that the Court is not intended and most certainly not entitled to alter the existing provisions of national law of Member States. The ECJ formulates a position on the compatibility of certain provisions with EU law, leaving the right to certain actions with regard to the Court's position[5].

Lest the referred to above requirements are not observed, the Court may leave a reference unsatisfied. The *Telemaricabruzzo* doctrine suggests that the Court should not spend time and effort on incorrectly formulated questions, not containing necessary details and circumstances and dismiss such a reference for a preliminary ruling[6]. Thus, the national court or tribunal has to answer a range of questions before addressing the Court with a preliminary inquiry in order to make sure that the Court will not leave it without attention.

Nevertheless, the ECJ does not necessarily refuse to consider questions not quite correctly worded. On the contrary, it can reformulate or paraphrase the question so as to coin out the required issues to

[1] Hartley, T. (2010). *The Foundations of European Community Law*. Oxford: OUP.
[2] Waele de, H. (2009). The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. *European Law / Europarecht,* 24.
[3] Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, Case 13/61 (1962). *European Court Reports*, 45.
[4] Комарова, Т.В. (2010). *Юрисдикція Суду Європейського Союзу*: монографія. Харків: Право.
[5] Mancini, F.G. (1989). The Making of a Constitution for Europe. *Common Market Law Review,* vol. 26, 596-614.
[6] Joint cases 320/90, 321/90, 322/90, Telemaricabruzzo SpA v Circostel (1993). *European Court Reports*, I-393.

explain them. This fact explains why certain room "for detailed new rules that the ECJ may rightfully bring into being" is left[1]. At the same time, such courtesy of the ECJ may save a national judge a lot of time as in other case he would have to make another reference.

However, in some cases, where questions are adequately and clearly formulated, the ECJ may still expand the limits of such questions and go in for more details and consequences. In this regard the adherence to principles of some governments of Member States concerning limiting the scope of the preliminary ruling in respect of its binding effect should be considered. For instance, in France *Conseil d'Etat* at some point did not consider it is bound to follow preliminary rulings which went beyond the issue initially formulated and submitted to the ECJ by the referring court and it was lawful for the French courts not to observe the "irrelevant" provisions of preliminary rulings[2].

Naturally, this approach should fairly be considered harmful and incompatible with the principle of binding effect of ECJ's judgments for national courts which have not made preliminary references. Still, some theorists believe it is inappropriate to explain such a position of the Court by "the art of interpretation" and the absence of a single method or technique of interpretation that would ideally fit the Court and the European legal order in general[3]. Besides, it is implied that the Court may not modify or distort the ordinary meaning of the words or phrases in respectful provisions[4]. The more the ECJ's preliminary rulings contain far-reaching and unexpected interpretation of the law, the greater there is a need for such decisions to be clear and unambiguous. In fact, whenever the Court's decisions are consistent and unequivocal, there is more opportunity for the ECJ to reflect and evaluate possible ramifications of their further interpretation and application for the European legal framework[5]. In the alternative, most likely, vague and ambiguous decisions may bring up the issue of transparency in the formative process.

Additionally, the mentioned above position of the ECJ casts a shadow on the competence of the national court to decide independently on what issues require consideration, and which do not[6]. It should be noted that in some cases a reformulated question results into a less favorable guidance for a national judge on the part of the application of certain provisions[7]. Nevertheless, with appropriate and exhaustive amount of legal and factual circumstances provided by the national court, the European Court of Justice is more qualified to decide on the merits by applying the provisions of EU law and therefore it is able to analyze which of these provisions would be most apt to solve the case in the main proceedings. It is basically the objective of the preliminary reference procedure.

At the same time to support the above arguments, it should be mentioned that the French *Conceil d'Etat* has reversed its position regarding limiting the scope of binding effect of ECJ's preliminary rulings following the Court's judgment in *Societe De Groot*. By making additional analyses regarding the rules on free movement of goods which was not mentioned in a posed the Court arrived at a conclusion that the French rule in question violated Article 28 of the EC Treaty. Fortunately, the *Conseil d'Etat* held that although the offered by the ECJ interpretation "had not been the object of the preliminary reference it was indeed binding on the *Conseil d'Etat*"[8].

Among other possible critical aspects of judicial activism is that it to some extent "undermines" the credibility of the Court. Noting that the ECJ is entrusted to construe and develop legal provisions it does not mean that it is not bound by the relevant rules and regulations as well. Therefore, the more a judge distances from a drafter's initial idea and objective and represents his own approaches and preferences, the less authoritative such judgments may appear[9]. Thus, the Court should "doublethink" before adopting

[1] Waele de, H. (2009). The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. *European Law / Europarecht,* 24.
[2] Broberg M., Fenger N. (2010). *Preliminary References to the European Court of Justice*. Oxford: OUP.
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[9] Waele de, H. (2009). The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment. *European Law / Europarecht,* 24.

revolutionary solutions to legal questions when they are remotely connected to cases at hand.

Indeed, Article 267 of the TFEU also triggers the principle of cooperation between national courts and tribunals and the ECJ, which is realized by means of providing of the most coherent interpretation of EU law and best advice on the application thereof on the part of the ECJ. The ECJ is committed in every way to assist national court and tribunals in solving cases *bona fide*[1].

The European Union law is constantly evolving and vividly reacts to relevant and urgent changes, introducing respective amendments. And despite the fact that the ECJ is not bound by its previous decisions, it attempts not to depart from them arbitrary, thus doing its best to act coherently and soundly. Court's activism is not a widely-spread phenomenon and to certain extent serves Court's best intentions. It may be stated, that the preliminary ruling procedure exposes creative nature and potential of the ECJ while it interprets European legal laws and provisions in addressing preliminary references from national courts and tribunals. However, in this regard the Court indeed mostly restraints itself.

In addition, active cooperation and constant communication between the European Court of Justice and national courts and tribunals allows avoiding conflicts between European law and domestic law, making it an integral part of the latter.

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