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CONDITIONS AND CIRCUMSTANCES WHICH LEAD TO APPLICATION TO THE COURT OF JUSTICE OF THE EUROPEAN UNION AND ADOPTION OF A PRELIMINARY RULING

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ABSTRACT

This article deals with the issues concerning the communication between the national courts of the European Union Member States and the Court of Justice of the European Union via the preliminary ruling procedure. The doctrines of *acte clair* and *acte éclairé* are described briefly in the article. The authors explicitly investigate the national court's right to apply to the Court of Justice of the European Union and the obligation to apply to the Court of Justice of the European Union for a preliminary ruling. The recent tendencies in the

jurisprudence of the national courts of the Republic of Lithuania while applying for preliminary rulings are revealed.

KEYWORDS

Court of Justice of the European Union, CJEU, preliminary ruling, preliminary ruling procedure, *acte clair*, *acte éclairé*, right to apply to the CJEU, obligation to apply to the CJEU

INTRODUCTION

Article 19 of the Treaty on the European Union¹ (hereinafter – TEU) promulgates that the Court of Justice of the European Union (hereinafter – CJEU) shall ensure that in the interpretation and application of the Treaties (TEU and the Treaty on the Functioning of the European Union² (hereinafter – TFEU)) the law is observed. Also, the positive obligation for the Member States of the European Union (hereinafter – EU) is established in the same Article – Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by the EU law. It is obvious that the EU law itself has become an important tool of integration in the past fifty years.³ Consequently, it is evident that a close cooperation between the CJEU and the national courts of the Member States is inevitable and indispensable. The preliminary ruling procedure established in Article 267 of the TFEU is the most effective way for the national courts of the Member States of the EU to cooperate with the CJEU and to promote the contribution of the CJEU to the uniform interpretation and application of the EU law. Preliminary ruling is an adjudicatory process by which national courts make references over the questions of EU law to the CJEU.⁴

The Lisbon Treaty also provided that the jurisdiction for a preliminary ruling may be attributed to the General Court but this has not been put into effect.⁵ The preliminary ruling procedure can be figuratively described as a diamond of the CJEU jurisdiction because it not only helps to ensure the uniform interpretation and application of the EU law but also to develop and enrich it. If a rule is not explicitly written in the EU law, this does not mean that one cannot find it in the CJEU case law. Therefore, the CJEU can be confidently entitled as one of the creators and developers of the EU law.

The aim of the article is to describe the preliminary ruling procedure: to identify the conditions and circumstances which lead to a preliminary ruling procedure and to clarify the conception of the entity which can apply; to reveal the cases when the application for a preliminary ruling is obligatory and those when a national court has a discretion to decide for the application to the CJEU; and to disclose the tendencies in the jurisprudence of the national courts of the Republic of Lithuania while applying for preliminary rulings.

¹ *Treaty on the European Union*, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

² *Treaty on the Functioning of the European Union*, Official Journal C 326, 26/10/2012 P. 0001 – 0390.

³ Christiaan Timmermans, "What has made European Law so important?": 829; in: *Law in the Changing Europe* (Mykolas Romeris University, 2008).

⁴ Clifford J. Carubba and Murrah Lacey, "Legal Integration and Use of the Preliminary Ruling Process in the European Union," *International Organization* Vol. 59, No. 2 (Spring, 2005): 399.

⁵ Paul Craig and Gráinne de Búrca, *EU law: text, cases, and materials*, 5th ed. (Oxford: Oxford University Press, 2011), 482.

1. CONDITIONS AND CIRCUMSTANCES WHICH LEAD TO A PRELIMINARY RULING PROCEDURE

As the honourable academician, professor, and the first representative of the Republic of Lithuania in the CJEU, Pranas Kūris, once accurately described: "as there is no hierarchy (the instance or subordinate) between the Court of Justice and the national courts, the mechanism of the preliminary ruling is the only bilateral judicial relation form of organization, preserving the independence of all the courts".⁶ Nevertheless, some scholars also identify other forms and influences in the preliminary ruling procedure:

Preliminary ruling process is central to the legal, and thereby economic and political integration of Europe because it allows national courts to enforce EU law over the national law. However, while there is a strong consensus over the importance of the preliminary ruling system for European integration, there is significant disagreement over why it is used. For example, some scholars believe transnational business interests determine the use of the preliminary ruling process, while others believe national courts are primarily responsible for its use.⁷

The jurisprudence of the CJEU shows that throughout the existence and functioning of the CJEU, the cases in which the CJEU gave preliminary rulings often arose from national cases in which the issues affecting the rights and obligations of the influential business entities as well as the issues determining the States' responsibilities were being solved. Nonetheless, it is obvious, according to Article 267 of the TFEU, that only the national court of the Member State of the EU is a subject which has the right or obligation to decide upon the reference to the CJEU for a preliminary ruling. Neither the State itself, nor any business entity can by its own initiative refer to the CJEU for a preliminary ruling. It should be noted that the parties of a case can ask the national court to refer to the CJEU and motivate their request under the EU law and the jurisprudence of the CJEU; however, the national court is not bound by the parties' requests. It is for the court to decide about the need of reference.

Some authors also enshrine the ability to indirectly challenge the validity of the general legal acts during the preliminary ruling procedure. Therefore, natural or legal persons can encourage a national court, which is hearing a case, to apply to the CJEU and ask for a preliminary ruling.⁸ Besides, the CJEU itself encourages the

⁶ Pranas Kūris, "Prejudicinio sprendimo procedūra Europos Bendrijų Teisingumo Teisme," *Jurisprudencija, Mokslo darbai* Vol. 6 (84) (2006): 8.

⁷ Clifford J. Carubba and Murrah Lacey, *supra* note 4: 399.

⁸ Vitalija Tamavičiūtė, *Prejudicinis sprendimas dėl Europos Sąjungos teisės akto galiojimo*, Doctoral dissertation (Vilnius, Mykolas Romeris University, 2012): 8.

preliminary procedure by refusing to accept the direct actions initiated by the private subjects (natural or legal persons) against a regulatory act which is of direct concern to them and does not entail implementing measures (TFEU Art. 263) even though some authors argumentatively question such CJEU position.⁹ The main argument against the preliminary ruling procedure as the alternative of the review of the legality of the legal acts is the fact that the preliminary ruling does not always guarantee the right to the effective legal protection or cause the issues concerning the effectiveness of the defence.¹⁰ For better or worse the preliminary ruling procedure is mostly used for the reason it was created – namely, the proper interpretation and development of EU primary and secondary law.

A reference for a preliminary ruling can be made by a national court in a civil, administrative, criminal, or even constitutional case. As the majority of the preliminary references come to the CJEU from the national civil or administrative cases, the conclusion can be made that national courts do not hesitate a lot dealing with these categories of cases; they rather refer to the CJEU than not. However, sometimes the courts are not eager to apply for a preliminary ruling because of the fact that the hearing of a case in front of the CJEU takes a few years if the procedure is not recognised as urgent. The situation becomes more complicated when the “European issue” arises in a criminal or constitutional case.

The preliminary ruling procedure is the main mode of access to the EU courts for the individuals in criminal cases because as there is no European criminal court individuals can only be accused in the domestic courts and the issue concerning the EU criminal law and under the EU criminal law instruments can be claimed in a national criminal case. As a result, doubts regarding the interpretation or validity of the EU criminal law instruments will arise as incidental questions within a domestic case before a national court, sometimes ultimately before a constitutional court.¹¹

When an issue comes to the constitutional case, one should elucidate the relation of a national constitutional court and the CJEU. For instance, the Constitutional Court of the Republic of Lithuania has already clearly defined its approach towards the relation of the EU law and the Constitution of the Republic of Lithuania.¹² This relation is established in the Constitution of the Republic of Lithuania and flows directly from the 14th of March, 2006 ruling of the Constitutional

⁹ Agnė Limantė, “Prejudicinio sprendimo procedūros kaip alternatyvos privačių subjektų teikiams ieškiniams dėl ES teisės akto panaikinimo trūkumai,” *Mokslo darbai. Teisė*. Vol. 79 (2001): 48.

¹⁰ *Ibid.* *Unión de Pequeños Agricultores v. Council*, Opinion of advocate general of the Court of Justice of the European Union, ECLI:EU:C:2002:197 (2002, no. C-50/00 P).

¹¹ Juliane Kokott, “European criminal law before and after the Treaty of Lisbon”: 659; in: *Law in the Changing Europe* (Mykolas Romeris University, 2008).

¹² Egidijus Kūris, “Europos Sąjungos teisė Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje”: 681; in: *Law in the Changing Europe* (Mykolas Romeris University, 2008).

Court in case no. 17/02-24/02-06/03-22/04¹³, the 21st of December, 2006 ruling of the Constitutional Court in case no. 30/03¹⁴ and the 8th of May, 2007 decision of the Constitutional Court in case no.47/04¹⁵ "On the application to the Court of Justice of the European Communities for a preliminary ruling". Even though the Constitutional Court of the Republic of Lithuania referred to the CJEU only once, this does not mean that it somehow avoids the preliminary references. The constitutional courts of other Member States also do not have a lot of practice reflecting the dialogue with the CJEU.

Concerning the Constitutional Courts of the Member States of the EU and their right or obligation to apply for a preliminary ruling, CJEU still did not give the direct answer in its jurisprudence about the obligation for a constitutional court to apply to the CJEU. As previously mentioned, the Constitutional Court of the Republic of Lithuania has once applied to the CJEU for a preliminary ruling.¹⁶ A conclusion can follow that by doing so the Constitutional Court took the advantage of the duty to apply and appointed himself as the final arbiter whose decisions cannot be appealed or reviewed. Professor Ignas Vėgėlė highlighted that in the case of interpretation of the EU law guided Article 234 of the Treaty (*now – Article 267 of the TFEU*), thus presumably, in order to avoid the obligation to apply to the CJEU and be assigned as the court of last instance, the Constitutional Court could have recalled its powers under the Article 102 of the Constitution of the Republic of Lithuania which states that the Constitutional Court examines the laws compliance solely with the Constitution but not of the EU law.¹⁷ Theoretically, it is for the constitutional court to decide whether it has an obligation to apply or not. But as practice shows, the constitutional court's refusal to apply to the CJEU is criticised in the legal doctrine.¹⁸ In Case C-169/08 Advocate General Kokkot noticed that in the proceedings before the national constitutional courts, questions of EU law may arise and they can be decisive for the result of the constitutional dispute in question.¹⁹ However, the dialogue between the national constitutional court and the CJEU was very rare until recently. Therefore, the participation of the national constitutional courts in the

¹³ *Ruling of the Constitutional Court of March 14, 2006*, Case no. 17/02-24/02-06/03-22/04, Official Gazette (2006, no. 30-1050).

¹⁴ *Ruling of the Constitutional Court of December 21, 2006*, Case no. 30/03, Official Gazette (2006, no. 141-5430).

¹⁵ *Decision of the Constitutional Court of May 8, 2007*, Case no.47/04, Official Gazette (2008, no. 140-5569).

¹⁶ *Ibid.*

¹⁷ Ignas Vėgėlė, "Nacionalinių teismų teisė ir pareiga kreiptis į Europos Bendrijų Teisingumo Teismą," *Jurisprudencija, Mokslo darbai* Vol. 7 (97) (2007): 40.

¹⁸ A. Tizzano, "Ancora sui rapporti tra Corti europee: principi comunitari e c. d. controlimiti costituzionali," *Il Diritto dell'Unione Europea* 3/2007: 734; *Presidente del Consiglio dei Ministri v Regione autonoma della Sardegna*, Opinion of advocate general of the Court of Justice of the European Union, ECLI:EU:C:2009:420, para 21 (2009, no. C-169/08).

¹⁹ *Presidente del Consiglio dei Ministri v Regione autonoma della Sardegna*, Opinion of advocate general of the Court of Justice of the European Union, ECLI:EU:C:2009:420, para 22 (2009, no. C-169/08).

preliminary ruling procedure was rather limited. Lately, broad prospects have opened for the dialogue between the CJEU and national constitutional courts to be developed. Even the German Federal Constitutional Court (*Bundesverfassungsgericht*) which was one of the most restrained constitutional courts throughout the EU, can now accept congratulations from legal scholars for the much desired dialogue (for want of a better word).²⁰ The *Gauweiler* judgment was the first judgment delivered by the CJEU in response to the very first request for a preliminary ruling from the German Constitutional Court²¹ even though the Italian Government contested the examination of the case by the CJEU because “the referring court does not accept the binding and definitive interpretative value that the answer given by the Court in response to that request has. It argues that the referring court considers that it has ultimate responsibility for ruling on the validity of the decisions in question in the light of the conditions and limits imposed by the German Basic Law.”²² The Italian Government also recalled the CJEU judgment in *Kleinwort Benson*²³ where the CJEU declared that it did not have jurisdiction to give a ruling where the court making the reference is not bound by the interpretation of the CJEU and the CJEU does not have jurisdiction to provide, in preliminary ruling proceedings, answers which are purely advisory. Despite that, the CJEU noted that in *Gauweiler* “the request for a preliminary ruling concerns directly the interpretation and application of EU law, which means that the present judgment will have definitive consequences as regards the resolution of the main proceedings.”²⁴

Italian legal scholars have also welcomed the recent two references to the CJEU from the Italian Constitutional Court, recalling the complexity and sometimes even controversy of the conversation between Rome and the Luxembourg.²⁵ The Italian Constitutional Court itself stipulated that when the assumed violation of the EU law is a precondition of the alleged contrast with the Italian Constitution, in the absence of unequivocal jurisprudence of the CJEU, the ordinary national courts should raise the questions of constitutionality only after having raised the questions of interpretation of the EU law through the preliminary ruling procedure in front of the CJEU.²⁶ One might think that only in a case where a national court

²⁰ Monica Claes, “The Validity and Primacy of EU Law and the ‘Cooperative Relationship’ between National Constitutional Courts and the Court of Justice of the European Union,” *Maastricht Journal of European and Comparative Law*, Vol. 1 (2016): 151.

²¹ *Gauweiler*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2015:400 (2015, no. C-62/14).

²² *Ibid.*, para 11.

²³ *Kleinwort Benson*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:1995:85, (1995, no.C-346/93), para 23-24.

²⁴ *Gauweiler*, *supra* note 21, para 14.

²⁵ Silvana Sciarra and Giuseppe Nicastro, “Preliminary References from the Italian Constitutional Court,” *Maastricht Journal of European and Comparative Law* Vol. 1 (2016): 195.

²⁶ *Ibid.*: 201.

argumentatively rejects the necessity to refer to the CJEU (*i.e.* the interpretation of the EU law is *acte clair* or *acte éclairé*), the issue of the constitutionality can be raised. However, firstly, the constitutional court has to refer for a preliminary ruling, if needed, and only then to decide upon the constitutionality of the legal act.

Coming back to the criminal cases in which the “European issue” occurs, Lithuanian practice is scarce. Only once was there a reference to the CJEU in a criminal case and this was done by the Order of the Criminal Division of Panevėžys Regional Court²⁷ where the court precisely assessed and predicted the influence of the preliminary ruling and decided to refer to the CJEU. Even though in this case the CJEU replied that the answer to the preliminary questions can be clearly drawn from the previous case law of the CJEU²⁸, “no questions were raised about admissibility under the basis of this order and the Court of Justice specified the question referred by reformulating it.”²⁹ In other Member States the criminal issues raised before the CJEU include mostly the European Arrest Warrant³⁰ and the principle of *ne bis in idem*.³¹

In the first reference from the Spanish Constitutional Court to the CJEU, the *Melloni* case, the CJEU gave the preliminary clarifying the provisions of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 in line with the Charter of Fundamental Rights of the European Union. Afterwards, the *Tribunal Constitucional* of Spain modified its case law and decided to diminish the extent of protection which is supported by the Spanish Constitution according to the EU law.³²

In sum, the preliminary ruling procedure can be described as a diamond of the CJEU jurisdiction which allows for bringing a national case to the European arena and getting the relevant interpretation of the European law.

²⁷ *Edgar Babanov*, Order of the Criminal Division of Panevėžys Regional Court (2008, no. 1A-114-145/2008).

²⁸ *Edgar Babanov*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2008:407 (2008, no.C-207/08), para 24-25.

²⁹ Deimilė Prapiestytė, “Cooperation between the Lithuanian Courts and the Court of Justice of the European Union”: 655; in: *Lithuanian Legal System under the Influence of European Union Law* (Faculty of Law, Vilnius University, 2014).

³⁰ *Bob-Dogi*, Opinion of Advocate General of the Court of Justice of the European Union, ECLI:EU:C:2016:131 (2016, no. C-214/15); *Lanigan*, Opinion of Advocate General of the Court of Justice of the European Union, ECLI:EU:C:2015:509, (2015, no. C-237/15 PPU); *Stefano Melloni*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2013:107, (2013, no. C-399/11).

³¹ *Zoran Spasic*, View of Advocate General of the Court of Justice of the European Union, ECLI:EU:C:2014:739 (2014, no. C-129/14 PPU).

³² *Stefano Melloni*, Spanish Constitutional Court judgment of 13 February 2014, no. 26/2014.

2. THE CONCEPTION OF A NATIONAL COURT OR TRIBUNAL

Not only a national court but also a tribunal or even a legal entity dealing with a case can come face to face with a so called "European issue" by itself. Under the jurisprudence of the CJEU, not only the national courts of the Member States of the EU can apply for a preliminary ruling. The CJEU has already widely formulated the criteria under which the entity or body can be referred to the term "court or tribunal" under the Article 267 of the TFEU.³³ This term has an autonomous meaning and definition which can be found reading the jurisprudence of the CJEU.

Before accepting a case for a preliminary procedure, the CJEU has to decide on its admissibility – the CJEU verifies its jurisdiction.³⁴ In some Lithuanian cases the CJEU accepted the references from the Commission on Tax Disputes under the Government of the Republic of Lithuania and the preliminary rulings were given³⁵, and even though the Lithuanian Government contested the independence of the institution³⁶, the CJEU clearly considered the institution independent³⁷. However, in contrast to that, the CJEU moved away from the opinion of the Advocate General Jacobs in the *Syfait* case³⁸ and ruled that the Greek Competition Commission cannot be regarded as a court within the meaning of Article 267 of the TFEU, reasoning mainly upon the lack of independence of the Competition Commission.

In its early jurisprudence the CJEU ruled that:

It is incumbent upon Member States to take the necessary steps to ensure that within their own territory the provisions adopted by the Community institutions are implemented in their entirety. If under the legal system of a Member State the task of implementing such provisions is assigned to a professional body acting under a degree of governmental supervision, and if that body, in conjunction with the public authorities concerned, creates appeal procedures which may affect the exercise of rights granted by Community law, it is imperative, in order to ensure the proper functioning of Community law, that the

³³ E.g. *G. Vaassen-Göbbels v Bestuur van Beambtenfonds voor het Mijnbedrijf*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:1966:39 (1966, no. 61-65); *Dorsch Consult Ingenieurgesellschaft mbH v. Council and Commission*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2000:321 (2000, no. C-237/98 P).

³⁴ Rimvydas Norkus, Deimilė Prapiestytė, and Virgilijus Valančius, *Procesas Europos Bendrijų Teisingumo Teisme: preliminarus nutarimas* (Vilnius, Teisinės informacijos centras 2005), 123.

³⁵ *Nidera Handelscompagnie BV v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2010:627 (2010, no. C-385/09); *Lietuvos geležinkeliai AB v Vilniaus teritorinė muitinė and Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2012:496 (2012, no. C-250/11).

³⁶ *Nidera Handelscompagnie BV v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*, *supra* note 35, para 34.

³⁷ *Ibid.*, para 37.

³⁸ *Synetairismos Farmakopion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2005:333 (2005, no. C-53/03).

Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings.³⁹

The CJEU also emphasised that if, after an adversarial procedure, the institution or body delivers decisions which are recognised as final, it must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State⁴⁰ within the meaning of Article 267 of the TFEU. If an institution gives only an opinion but does not resolve a dispute, it cannot be held as court within the meaning of Article 267 of the TFEU and the request for a preliminary ruling is inadmissible⁴¹.

In sum, the CJEU is rather flexible while accepting preliminary references but the referring institution must not forget that the request is not admissible if the institution does not have the so-called dispute settlement power and its decisions are only of the recommendatory nature.

3. THE RIGHT TO APPLY TO THE CJEU AND THE OBLIGATION TO APPLY TO THE CJEU FOR A PRELIMINARY RULING

Article 267 of the TFEU establishes that:

Any court or tribunal of a Member State <...> *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court.

Even though the right to apply and the obligation to apply are not enshrined very strictly in the TFEU (especially in the official translation of the TFEU to the Lithuanian language⁴²), the CJEU in its jurisprudence and the European legal doctrine unanimously agree that there are two concepts: “the right to apply” and “the obligation to apply”. Additionally, the national law of the Republic of Lithuania

³⁹ *C. Broekmeulen v Huisarts Registratie Commissie*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:1981:218 (1981, no. 246/80).

⁴⁰ *Ibid.*

⁴¹ See *Regina Greis Unterweger*, Order of the Court of Justice of the European Union, ECLI:EU:C:1986:106 (1986, no. 318/85).

⁴² Article 267 (para 2) of the TFEU in Lithuanian: “Tokiam klausimui iškilus valstybės narės teisme, tas teismas, manydamas, kad sprendimui priimti reikia nutarimo šiuo klausimu, gali prašyti Teismą priimti dėl jo prejudicinį sprendimą.” The literal equivalent of this paragraph in English would be: “Where such a question is raised before any court of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon”. Article 267 (para 3) of the TFEU in Lithuanian: “Tokiam klausimui iškilus nagrinėjant bylą valstybės narės teisme, kurio sprendimas pagal nacionalinę teisę negali būti toliau apskundžiamas teismine tvarka, tas teismas dėl jo kreipiasi į Teismą.” The literal equivalent of this paragraph in English would be: “Where any such question is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court brings the matter before the Court”.

– Article 40¹ of the Law on Courts of the Republic of Lithuania⁴³ – clearly stipulates that the court applying the EU law comes to the issue of the interpretation or the validity of the EU legal acts which is necessary to consider that the dispute is taken, is entitled to apply to the competent judicial authority of the EU with a request for the preliminary ruling. The second part of the abovementioned Article 40¹ of the Law on Courts of the Republic of Lithuania establishes the obligation to the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania (when a ruling cannot be further appealed) to apply to the competent judicial authority of the EU with a request for the preliminary ruling.

As the national courts of the Member States apply EU law in their domestic case law, they have a strong duty to observe and follow the interpretations of the EU law given by the CJEU. Therefore, the courts of the last instance applying the EU law in the national cases have to request CJEU for the preliminary rulings if they come to an issue of the interpretation or the validity of the EU legal acts which must be considered in a national case.

4. THE DOCTRINE OF *ACTE CLAIR* AND THE DOCTRINE OF *ACTE ÉCLAIRÉ*

According to the established practice of the CJEU⁴⁴, the Court calls on the national supreme courts to deal cautiously with the interpretation and application of the EU law. The *acte clair* doctrine means that there is no need for the national courts of the Member States of the EU to refer to the CJEU for a preliminary ruling because the “European issues” arising in the national cases are obviously and reasonably clear – the national court understands the meaning of the EU law well and can easily interpret and apply the EU law by itself. In support of the above-mentioned circumstances the national court can motivate in rejection for the parties’ request to refer to the CJEU for a preliminary ruling. If the national court finds the matter *acte clair* it has to motivate reasonably that there is no need to refer to the CJEU and this should reflect in the procedural document which is adopted by the court.

The *acte clair* doctrine was explicitly established in the CJEU case *CILFIT v. Ministero della Sanità* where the CJEU emphasised that:

The correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular

⁴³ Law on Courts of the Republic of Lithuania, Official Gazette (1994, no. 46-851; 2003, no. 39-1765).

⁴⁴ *CILFIT v. Ministero della Sanità*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:1982:335 (1982, no. 283/81).

difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.⁴⁵

Even before the *CILFIT* case, the CJEU in *Da Costa en Schaake et. al.*⁴⁶ specified that when a question occurring in a national case in principal is the same as the CJEU had already interpreted in its jurisprudence, there is no need to apply for a preliminary ruling. In this way the CJEU in its early jurisprudence has developed the doctrine of *acte éclairé*, stating that a reference for a preliminary ruling is likely to be unnecessary if there is a previous decision of the CJEU concerning the same rule or law. If an EU law provision is perfectly clear, there is no need for interpretation, only for application.⁴⁷ However, as the Advocate General Lagrange expressed in his Opinion:

It is infinitely less serious to have several judgments of the Court reproducing previous judgments than to be faced with refusals to accept references from national courts, refusals based on a perhaps questionable interpretation of the scope of a previous judgment which would be the source of conflicts for which the Treaty provides no solution.⁴⁸

It is evident that by such statements the national courts of the Member States of the EU are encouraged not to avoid references to the CJEU.

In sum, if the CJEU has already decided upon the issue the situation can be declared *acte éclairé*; after the *CILFIT* judgment, the *acte éclairé* gained a wider interpretation and include not only identical questions but they concern the very same point of law. Presumably, a national court which decides not to refer to the CJEU for a preliminary ruling must substantiate its decision well and identify the *acte clair* or *acte éclairé* case. If any doubt occurs for a national court, it is better to communicate with the CJEU rather than to stay silent.

5. TENDENCIES IN THE JURISPRUDENCE OF THE NATIONAL COURTS OF THE REPUBLIC OF LITHUANIA WHILE APPLYING FOR PRELIMINARY RULINGS TO THE CJEU

The Republic of Lithuania became a Member State of the EU on 1 May 2004 and since then the country has had broad experiences in dealing with the European law issues, involving cross-border cases and the application of the EU law. The rapid development of international businesses and a high level of emigration have

⁴⁵ *Ibid.*, para 21.

⁴⁶ *Da Costa en Schaake et. al. v Nederlandse Belastingadministratie*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:1963:6 (1963, no. C-28/62).

⁴⁷ Mattias Derlén, *Multilingual Interpretation of European Union Law* (The Netherlands: Kluwer Law International, 2009), 67.

⁴⁸ *Da Costa en Schaake et. al. v Nederlandse Belastingadministratie*, Opinion of the Advocate General of the Court of Justice of the European Union, ECLI:EU:C:1963:2 (1963, no. C-28/62), part III, para 9.

resulted in an increase in the number of the intra-EU disputes. Therefore, EU law has been applied more and more frequently by the Lithuanian courts. Notwithstanding this increase, the Lithuanian courts are not the most active applicants for preliminary rulings, especially in comparison to the old Member States of the EU. However, it is absolutely understandable, as the Republic of Lithuania celebrated just its 12-year anniversary of the membership in the EU. Under the statistics given by the CJEU (1952–2014)⁴⁹, the Lithuanian courts by the preliminary references to the CJEU overtake only Cyprus, Croatia, Estonia, Malta, and Slovenia (these also are the newer Member States of the EU). For instance, in the year of 2013, Lithuanian national courts referred to the CJEU 10 times, and there were 6 referrals in 2014. As previously mentioned, the Constitutional Court of the Republic of Lithuania has also implemented the possibility to communicate with the CJEU⁵⁰. The Supreme Court of the Republic of Lithuania and the Supreme Administrative Court of the Republic of Lithuania also exercise their right and duty to apply to the CJEU when questions of the interpretation or application of the EU law arise. The Supreme Court has referred to the CJEU sixteen times (until 1 January 2017)⁵¹, as well as the Supreme Administrative Court did (also, sixteen times until 1 January 2017)⁵². Requests for preliminary rulings are rarely submitted to the CJEU from the first instance courts or the courts of the appeal instance – there were only a few cases when ordinary courts applied for preliminary rulings⁵³.

Notwithstanding the number of Lithuanian cases referred to the CJEU, the merits of the referred cases were of great importance to the Lithuanian and European legal practice. For instance, the Supreme Court of the Republic of Lithuania referred to the CJEU in the *Gazprom* case⁵⁴ to ask whether recognition and enforcement of that arbitral award classified as an anti-suit injunction may be refused on the ground that the exercise by a Lithuanian court of the power to rule on its jurisdiction would be restricted after such recognition and enforcement.⁵⁵ The CJEU proceeded to develop the notion of anti-suit injunctions which was already

⁴⁹ See Statistics of the Court of Justice of the European Union: 117-119 // http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_CJEU_annual_report_2014_pr1.pdf.

⁵⁰ *Decision of the Constitutional Court of May 8, 2007, supra* note 15.

⁵¹ See Information of the Supreme Court of the Republic of Lithuania // <http://www.lit.lt/lt/teismu-praktika/kreipimaisi-i-es-teismus.html>.

⁵² See Information of the Supreme Administrative Court of the Republic of Lithuania // <http://www.lvat.lt/lt/teismu-praktika/bendradarbiavimas-su-es-gbnb.html>.

⁵³ See, for example, *Edgar Babanov, supra* note 27; also, reference of the District court of Vilnius city, lodged in case *ERGO Insurance SE v If P&C Insurance AS* on 23 July 2014; also, *Baltlanta UAB v Lietuvos valstybė*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2014:2134 (2014, no. C-410/13).

⁵⁴ *Gazprom v Republic of Lithuania*, Supreme Court of the Republic of Lithuania, 23 October 2015, case no. 3K-7-458-701/2015.

⁵⁵ *Gazprom OAO v Republic of Lithuania*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2015:316 (2015, no. C-536/13), para 44-45.

previously analysed in the famous *West Tankers* case⁵⁶ and other cases.⁵⁷ In the cited jurisprudence the CJEU has already made clear that *anti-suit injunction* is a court imposed prohibition, ensured by a legal sanction, to commence or continue the litigation in a foreign country⁵⁸ and in cases where the addressee fails to comply with such obligation, he may be held liable for contempt of the court, for which it may be imposed an imprisonment or a lien.⁵⁹ Furthermore, in *Gazprom* case the CJEU stated that Brussels I does not preclude a Member State's court from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since it does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State. As a result, the Supreme Court of the Republic of Lithuania did not apply Brussels I and decided for the recognition and enforcement of an arbitral award under the national rules of civil procedure.⁶⁰ The Advocate General Wathelet emphasised in his opinion that:

As regards breach of an arbitration agreement, the response of the Brussels I Regulation (recast) is to exclude arbitration completely from its scope, with the consequence that the verification, as an incidental question, of the validity of that agreement does not fall within its scope, and to refer the parties to arbitration. <...> An anti-suit injunction is therefore the only effective remedy available to an arbitral tribunal in order to rule in favour of the party who considers that the arbitration agreement has been breached by the other contracting party.⁶¹

Even though the CJEU did not take the opportunity to accept such a broad interpretation, the outcome of the national case was in favour of arbitration.

Another problematic issue arose in disputes between insurance companies – one in the case of *ERGO Insurance, SE v If P&C Insurance*, and the other in the case of *Gjensidige Baltic v PZU*.⁶² These cases were referred to the CJEU and examined jointly.⁶³ The Supreme Court was in doubt about which regulation, Rome I or Rome II, was applicable to the case and requested a preliminary ruling. The

⁵⁶ *Allianz SpA, Generali Assicurazioni Generali SpA v West Tankers Inc.*, Judgment of the Court of Justice of the European Union, ECLI:EU:C:2009:69 (2009, no. C-185/07).

⁵⁷ See, for example, *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*, Judgment of the Court of Justice of the European Union, C-159/02, ECLI:EU:C:2004:228 (2004, C-159/02).

⁵⁸ *Ibid.*, para 27.

⁵⁹ *Allianz SpA, Generali Assicurazioni Generali SpA v West Tankers Inc.*, *supra* note 56, para 20.

⁶⁰ *Gazprom v Republic of Lithuania*, *supra* note 54.

⁶¹ *Gazprom OAO v Republic of Lithuania*, Opinion of Advocate General Wathelet, ECLI:EU:C:2014:2414 (2014, C-536/13).

⁶² *Gjensidige Baltic v PZU Lietuva*, Supreme Court of the Republic of Lithuania, 17 October 2014, case no. 3K-3-415/2014.

⁶³ *Ergo Insurance SE v If P&C Insurance AS and Gjensidige Baltic AAS v PZU Lietuva UAB DK*, ECLI:EU:C:2016:40 (2016, joined Cases C-359/14 and C-475/14).

CJEU clarified that the law applicable to an action for indemnity between the insurer of a tractor unit, which has compensated the victims of an accident caused by the driver of that vehicle, against the insurer of the trailer coupled to it at the time of that accident, is to be determined in accordance with Article 7 of Rome I if the rules of liability in tort, delict and quasi-delict applicable to that accident by virtue of Article 4 et seq of Rome II provide for an apportionment of the obligation to compensate for the damage.⁶⁴

A pro-consumer perspective was established in the *Šiba* case in which under the request for preliminary ruling of the Supreme Court of the Republic of Lithuania the CJEU has formulated a rule that:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as applying to standard form contracts for legal services, such as those at issue in the main proceedings, concluded by a lawyer with a natural person acting for purposes which are outside his trade, business or profession.⁶⁵

The Lithuanian Supreme Court also referred important issues of the protection of bank depositors in the well-known *Snoras* cases⁶⁶ and in case *Indėlių ir investicijų draudimas VĮ, Virgilijus Vidutis Nemaniūnas v. Vitoldas Guliavičius, SNORAS AB*, for which the CJEU already gave its judgment.⁶⁷

Therefore, one can see that if there is a need, Lithuanian courts are active in formulating the preliminary requests and promoting the positive evolution of the EU law.

According to the authors of this article, the initiative to request preliminary rulings is often raised by the parties or their attorneys. With this, the preliminary procedure can be made even more popular and the references from the national courts to the CJEU can become even more usual.

CONCLUSIONS

The preliminary ruling procedure can be described as a diamond of the CJEU jurisdiction which allows for bringing a national case to the European arena and getting the relevant interpretation of the European law. The great advantage of the preliminary ruling procedure is that it can be used in any national case – administrative, civil, criminal, or even constitutional.

⁶⁴ *Ibid.*, para 65.

⁶⁵ *Birutė Šiba v Arūnas Devėnas*, ECLI:EU:C:2015:14 (2015, C-537/13).

⁶⁶ *Request for a preliminary ruling from the Supreme Court of the Republic of Lithuania*, lodged on 18 December 2015 (Case no. C-688/15); *Request for a preliminary ruling from the Supreme Court of the Republic of Lithuania*, lodged on 25 February 2016 (Case no. C-109/16).

⁶⁷ *Indėlių ir investicijų draudimas VĮ, Virgilijus Vidutis Nemaniūnas v Vitoldas Guliavičius, SNORAS AB*, ECLI:EU:C:2015:418 (2015, C-671/13).

Any court of the Member States of the EU can raise preliminary questions and refer to the CJEU for the proper interpretation of the European legislation. Moreover, under article 267 of the TFEU, the CJEU can acknowledge that some other institutions can also refer for a preliminary ruling and can be comparable to the courts if they meet the criteria established in the jurisprudence of CJEU. However, the request is not admissible if the institution does not have the so-called dispute settlement power and its decisions are only of a recommendatory nature.

A national court which decides not to refer to the CJEU for a preliminary ruling must substantiate its decision well and identify the occasion of *acte clair* or *acte éclairé*. If any doubt occurs, it is better to communicate with the CJEU rather than avoiding the dialogue.

In the opinion of the authors, Lithuanian courts should refer to the CJEU for preliminary rulings more often. According to the statistics given by the CJEU, the old Member States of the EU are requesting preliminary rulings frequently. This can be encouraged by the parties in the national case and their attorneys; individuals or legal entities can ask national courts to request the preliminary rulings, pushing that an issue of the proper interpretation or application of the EU law is obviously requisite.

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