



**GHENT  
UNIVERSITY**

THE INFLUENCE OF EU LAW  
ON THE CASE LAW OF THE  
EURASIAN ECONOMIC UNION COURT

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# PRESENTATION OUTLINE

- I. The EAEU Court: a brief introduction
- II. Direct Influence of EU law on the substantive case law of the EAEU Court
- III. The CJEU as a role model for the EAEU Court
- IV. Presentation of the current research project

# THE EAEU COURT: A BRIEF INTRODUCTION

# HISTORY, COMPOSITION AND ROLE

- Founded in January 2015 with the entry into force of the EAEU Treaty;
- Not a legal successor of the EurAsEC Court that existed in 2012-2014;
- 10 judges (2 from each MS);
- Main function: ensure a uniform application of EAEU law.

# COMPETENCE: KEY DIFFERENCES WITH THE CJEU

- No preliminary reference procedure;
- Requests for clarifications by the Commission or Member-States;
- Action for failure to fulfil obligations only available to MSs;
- Possibility to challenge either Commission's decisions or its actions/failure to act.

# II ECJ'S INFLUENCE ON THE SUBSTANTIVE CASE LAW OF THE EAEU COURT

# GENERAL APPROACH

“The legal findings and the case-law of other courts may be taken into account when delivering judgments on similar matters, which is consistent with the principle of persuasive precedent [...]”

Judgment in *Tarasik*



# CHERRY-PICKING INSTEAD OF OPENLY DISAGREEING

- Broad definition of ‘failure to act’ in *Tarasik*:  
“In general ‘improper failure to act’ means a non-performance or improper performance by a supranational body (official) of the duties assigned to it by the Union law [...]”;
- Possibility to challenge a negative response of the Commission “if the performance of the action requested by the applicant constitutes its direct duty, which can not be delegated to other persons”;
- Reference to case 302/87 *Parliament v. Council* (Comitology) ignoring later developments.

# BINDING FORCE OF INTERNATIONAL TREATIES CONCLUDED BY MEMBER-STATES

## – *General Freight case:*

‘An international treaty, which is not an international treaty within the Union or an international treaty of the Union with a third party, shall be applicable within the Union if two cumulative conditions are met: 1) all EAEU Member States are parties to the international treaty; 2) the scope of the international treaty falls within the common policy in the framework of the EAEU’;

– Explicit reference to judgments in *International Fruit Company*, *Intertanko*, *Bogiatzi* and *Commune de Mesquer*.

## FREE MOVEMENT OF GOODS: BLURRING THE LINE BETWEEN EU AND EAEU LAW

- Article 29 (1) EAEU Treaty: MSs are allowed to impose restrictions on mutual trade for the protection of fundamental interests provided they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between MSs;
- The EAEU Court implicitly introduces two new features:
  - 1) the interests listed have to be interpreted narrowly as exceptions to the principle of free movement;
  - 2) the measures taken by MSs shall be proportionate.
- Applying ECJ case law to EAEU Law: no clear delimitation between the description of the ECJ case law and the Court's own position.

## BOSMAN'S SECOND LIFE? ADVISORY OPINION ON PROFESSIONAL SPORTSMEN

- Advisory opinion (AO) of December 7, 2018 on an application by the Commission;
- The EAEU Court defined restrictions as covering i.a. “measures, which hinder or deter the nationals of a Member State from exercising their right to work in any other Member State”;
- Classifying a restriction of a number of foreign sportsmen that can be fielded as affecting both working conditions and access to work;
- Introducing a two-components proportionality test.
- References to *Bosman*, *Simutenkov*, *Lehtonen* and *Olympique Lyonnais*.

# III THE ECJ AS A ROLE MODEL FOR THE EAEU COURT

## DIRECT EFFECT: AN *OBITER DICTA* ACTIVISM?

- First mention in the AO on Vertical agreements (2017):  
“General rules of competition have direct effect and shall be directly applicable by Member States as rules enshrined in an international treaty”;
- VGL criteria set in the AO on Professional sportsmen:  
“The fact that the wordings of paragraphs 1 and 2 of Article 97 of the Treaty grant the rights to employers, customers of works (services) and workers of the Member States, and are sufficiently clear and precise, and do not require implementation in the national legislation, allows us to conclude that the said wordings have the features of direct effect and applicability”.

## PRIMACY: A CAREFUL APPROACH

- First advocated by of Judge Chaika in his separate opinion to the *Kaliningrad transit case*;
  - *Downsizing case*: the wrong moment to develop primacy?
  - *Professional sportsmen*: directly addressing national courts
- “In case of conflict between the Law of the Union and the regulatory acts of the national legislation, including on the issues of application of restrictions of professional sportsmen’s labour activity, which are not complying with paragraph 2 of Article 97 of the Treaty, the provisions of the Union’s Law shall prevail.”;
- Primacy vs. supremacy: a deliberate choice?

# TOWARDS THE DEVELOPMENT OF GENERAL PRINCIPLE OF EAEU LAW?

- Proportionality for free movement of goods/persons restrictions;
- Proportionality test developed in the *Professional sportsmen case*;
- Proportionality of sanctions enacted for the violation of EAEU law (*Currency declaration case*);
- A case regarding the application of the *ne bis in idem* principle in competition law currently pending before the Court;
- A use of ‘generally recognised principles and norms of international law’ or the development of a distinct set of legal principles?



# FUNDAMENTAL RIGHTS

- Advisory opinion on pensions:

“Due to the commitment to the unconditional observance of the principle of the supremacy of constitutional rights and freedoms of a person and citizen as provided for by the preamble of the Treaty, the level of such rights and freedoms guaranteed by the Union shall not be lower than that ensured in the Member States”

- Towards a maximum protection standard?

# IV PRESENTATION OF THE RESEARCH PROJECT

# CURRENT RESEARCH AT GHENT EUROPEAN LAW INSTITUTE

- Integrating a constitutionalist perspective
- Key components:
  - Role of the supranational court in establishing an autonomous legal order and maintaining its integration in the system of international law;
  - Determination of the limits of EU/EAEU competence;
  - Creation of general principles of EU/EAEU law;
  - Ensuring protection of fundamental rights.
- A focus on the legal reasoning used by the Court;
- The issue of activism.

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