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THE PRINCIPLE OF DIRECT EFFECT BY THE COURT OF THE EURASIAN ECONOMIC UNION

A Eurasian restatement of Van Gend en Loos in order to achieve further integration?

Felix Toggi Sames

The Court of the Eurasian Economic Union (EAEU Court), in the Vertical Agreements case, introduced the principle of direct effect to the Eurasian legal regime. As a result, the question was asked if the EAEU Court was following the footsteps of the Court of Justice of the EU (ECJ), in pushing for further integration. However, upon examination, the principle of direct effect in the two regimes might share similarities in the spirit of strengthening supranational legal regimes, but their contents are very different. Subsequently, the EAEU Court's capacity for pushing for further integration is also questioned. Due to the curtailing of the competence enjoyed by its predecessor, the Court faces some serious obstacles in pushing for further integration. Namely, the lack of preliminary ruling procedure, the attitude of Russian national courts, and the judicial independence of the judges of the Court. Nevertheless, when examining the possible scenarios of further integration in the EAEU, there is not a clear path to which the EAEU Court can effectively push for further integration. In light of the principle of direct effect, a possible hybrid approach between a state-centric and judicial activist approach to Eurasian integration can be seen. However, only with time and practice can it be determined if the EAEU Court will adopt such an approach and if it is effective. Therefore, it remains to be seen if the principle of direct effect in the EAEU context, become a prime instigator for the push for further Eurasian integration.

KEYWORDS

Eurasian Economic Union, Principle of Direct Effect, Eurasian integration

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1 Introduction

1.1 Background

The Eurasian Economic Union (EAEU) is a relatively new regional integration organization. Originally a customs union from 2011, and now an economic union since 2015, it is seen as a major achievement by its members after two “false starts” of integrations in the 1990s-2000s.¹ Some of the progress of the EAEU include a common market for goods and services, a common external tariff, a common labour market and a free trade area with Vietnam.² With such progress, one might ask if the EAEU is following the same path as its neighbour, the European Union (EU), especially in terms of regional integration. This idea can be supported by a statement by the President of the Russian Federation, Vladimir Putin, in an article in 2011. In it, he stated that the “Eurasian Union, like the European Union, should be based on four pillars: free movement of goods, services, and capital and also coordination in economic and currency policies”.³ In addition, it can also be seen that the EAEU bodies are modelled after the EU.⁴ On the other hand, there are those who will argue that the EAEU is not a case of further regional integration, but rather a tool to solidify Russia’s regional hegemony. This is highlighted by the fact Russia accounts for over 80% of the EAEU’s economic output, trade, territory and population.⁵ This can also explain why some of the member states, are not eagerly pushing for further integration, in order to keep their options open in regards to regional foreign policy, as they have done in the Commonwealth of Independent States (CIS).⁶ Therefore, the future

¹ Evgeny Vinokurov, ‘Eurasian Economic Union: Current State and Preliminary Results’ (2017) 3 *Russian Journal of Economics* 54, 54–55.

² Evgeny Vinokurov and others, ‘Customs Unions, Currency Crises, and Monetary Policy Coordination: The Case of the Eurasian Economic Union’ (2017) 3 *Russian Journal of Economics* 280, 280–281.

³ Agnieszka Konopelko, ‘Eurasian Economic Union: A Challenge for EU Policy towards Kazakhstan’ (2018) 16 *Asia Europe Journal* 1, 2.

⁴ Ksenia Kirkham, ‘The Formation of the Eurasian Economic Union: How Successful Is the Russian Regional Hegemony?’ (2016) 7 *Journal of Eurasian Studies* 111, 124.

⁵ Martin Russell, ‘Eurasian Economic Union: The Rocky Road to Integration’ (European Parliamentary Research Service 2017) Briefing PE 599.432 8
<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599432/EPRS_BRI\(2017\)599432_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599432/EPRS_BRI(2017)599432_EN.pdf)> accessed 22 May 2019.

⁶ Anastassia Obydenkova, ‘Comparative Regionalism: Eurasian Cooperation and European Integration. The Case for Neofunctionalism?’ (2011) 2 *Journal of Eurasian Studies* 87, 95.

of the direction of integration in the EAEU is still up for debate. There are many possibilities including following the in steps of the EU, allowing Russia to take the lead, or even developing a new style of integration altogether based on regional Eurasian principles.

This brings us to the Court of the Eurasian Economic Union (EAEU Court). The Court was founded in 2015, and surprisingly is not the legal successor to the now terminated Eurasian Economic Community (EurAsEC) Court.⁷ The role of the EAEU Court is to ensure uniform application of EAEU law by member states and the bodies of the EAEU.⁸ However, it faces many issues in achieving this role. Including the status of national laws of its member states which are prioritized over EAEU law if there is a conflict of laws.⁹ Therefore, it can be argued that because of such issues, the role of the EAEU Court in the future of further Eurasian integration is limited. However, in its judgment on April 4, 2017, it effectively challenged this perspective. In Case No. CE-2-1/1-17-BK (*Vertical Agreements*), regarding questions on competition law, the Court in its first decision on the subject matter, formulated a “direct effect” principle.¹⁰ Leading to some calling this case as a Eurasian *Van Gend en Loos* and a serious breakthrough, especially since EAEU law does to contain such a principle.¹¹ Consequently, this raises the question, does this Eurasian “direct effect” principle allow the EAEU Court to now achieve further integration, in spite of the challenges facing it?

1.2 Research Question & Methodology

Therefore, this thesis aims to contribute to the discourse of the role of the EAEU court in the future of Eurasian integration, by focusing on the direct effect principle developed by it, resulting in asking the question:

⁷ Ekaterina Diyachenko and Kirill Entin, ‘The Court of the Eurasian Economic Union: Challenges and Perspectives’ (2017) 5 Russian Law Journal 53, 54.

⁸ Evgeny Vinokurov, *Introduction to the Eurasian Economic Union* (Palgrave Macmillan 2018) 52.

⁹ *ibid* 55.

¹⁰ Paul Kalinichenki, ‘A Principle of Direct Effect: The Eurasian Economic Union’s Court pushes for more Integration’ (*Verfassungsblog*, 16 May 2017) <<https://verfassungsblog.de/the-principle-of-direct-effect-the-urasian-economic-unions-court-pushes-for-more-integration/>> accessed 22 May 2019.

¹¹ *ibid*.

To what extent does the principle of direct effect by the Court of the Eurasian Economic Union allow the Court to achieve further integration in the EAEU?

In the course of answering this question, sub-questions will include:

- 1.) What is the reasoning behind the creation of the direct effect principle by the EAEU Court?
- 2.) What are some of the integration capabilities possessed by the EAEU Court?
- 3.) To what extent does the direct effect principle developed by the EAEU Court, show a different approach towards Eurasian integration?

In order to answer the research questions, the thesis will employ a desk-based study. Primary sources that will be consulted include the Treaty on the Eurasian Economic Union (EAEU Treaty), specifically on the annex regarding the Statute of the Court of the EAEU. In addition to this, the EAEU Court's decision in the *Vertical Agreement case* will also be consulted, since it is in this case where the Eurasian direct effect principle stems from. However, since the principle of direct effect is relatively new in the Eurasian context, the work of legal scholars will be consulted. In this context, the thesis will aim to explain why the Court found it necessary to create such a principle. Subsequently, by analyzing different scholars work on the EAEU court, it is possible to map out its current role in the integration process.

As a result, this thesis will also explain why the Court faces some challenges in taking a more assertive role in the process. Furthermore, once the role of the court can be mapped out, the thesis will also analyze what possible suitable models for the direction of the Eurasian integration process can take with this new direct effect principle. This analysis will be carried out mainly by looking at the different types of integration possible. For this reason, the models that will be compared, include the path of integration taken by the Court of Justice of the European Union (ECJ), a state-centric integration process, and a possible middle ground between the two. By using the works of different scholars and scrutinizing them at the same time, the thesis aims to demonstrate the advantage and disadvantage of the different models. As a result, the thesis aims to highlight if the principle of direct effect by the EAEU court allows it to achieve possible further integration in the EAEU.

1.3 Literature Review

On a first glance, there is a perceived lack of scholarly articles regarding the EAEU by the tradition of western academia. This can be explained due to the relatively young age of the EAEU and also a widespread scepticism regarding Eurasian integration.¹² However, in recent years, the number of articles written in English have also increased, signalling an intention to explain Eurasian integration towards a more global audience. With this said, the works of different legal scholars who have written on the subject of the EAEU, have also focused on the future integration capabilities of the Union. As such, such works will serve as a solid contribution towards the discourse on the EAEU Court and its direct effect principle.

One such scholar is Dr Evgeny Vinokurov, the Director of the Centre for Integration Studies at the Eurasian Development Bank. His book on an introduction to the EAEU and different articles, provide a valuable starting point to research on the state of the Union and its institution. However, what is interesting, is that he argues that the EAEU should not be compared to the EU, in regard to its success in regional integration.¹³ Nevertheless, he interestingly mentions that the EAEU has been following in the footsteps of the EU, for matters such as monetary policy coordination.¹⁴ In regards to the EAEU Court, Dr Vinokurov has also mentioned that it is facing the same situations that the ECJ has faced, specifically in regards to the conflict between national law and supranational regulations.¹⁵ The relevance of all of this when it comes to the current research question is highlighted by the comparisons between the EAEU and EU, in regards to further regional integrations. As such, one can argue that the EAEU should follow the example of the EU or take a whole new path altogether.

The aforementioned scepticism regarding Eurasian integration is evident in the few publications by western scholars. One example is a publication by Martin Russell on the EAEU for the European Parliamentary Research service. It mentioned that the performance of

¹² Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) xxii.

¹³ Vinokurov, 'Eurasian Economic Union' (n 1) 55.

¹⁴ Vinokurov and others (n 2) 288.

¹⁵ Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) 56.

the EAEU is poor due to the economic status of its member states, and states that Russian dominance of the EAEU is an obstacle to closer integration.¹⁶ It must be highlighted that the criticism of Russian dominance in the EAEU is a recurring theme amongst western scholars, in some articles it is even called Vladimir Putin's personal project.¹⁷

Finally, on publications that focus on the EAEU court, different authors have also noted different approaches towards its role in Eurasian integration. There are those who state that the Court has a reputation problem and that it needs to improve this specifically towards national courts and the different business and legal communities.¹⁸ Others call for an EAEU *acquis*, however not entirely similar to that of the EU, in order for further integration to be achieved through the EAEU legal systems.¹⁹ Lastly, there are also those who criticize that the weakens in the judicial authority of the EAEU court, actually, reflect the lack of political will to make an effective judicial body similar to the ECJ.²⁰ Therefore, this shows that there are different models for the role of the EAEU Court in Eurasian integration.

1.4 Thesis Structure

The thesis will consist of 5 chapters, Chapter 1 is the introduction and Chapter 5 is the conclusion. Thus, Chapter 2 will be the first substantive chapter. It will focus on the discussion regarding the principle of direct effect formulated by the EAEU Court. The chapter will begin with a discussion regarding the development of the principle. Explaining why it

¹⁶ Russell (n 5) 1,7.

¹⁷ Nicu Popescu, *Eurasian Union: The Real, the Imaginary and the Likely*. (EU Institute for Security Studies, 2014) 13.

¹⁸ Diyachenko and Entin (n 7) 73.

¹⁹ Roman Petrov and Paul Kalinichenko, 'On Similarities and Differences of the European Union and Eurasian Economic Union Legal Orders: Is There the "Eurasian Economic Union *Acquis*"?' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2836060 306 <<https://papers.ssrn.com/abstract=2836060>> accessed 22 May 2019.

²⁰ Zhenis Kembayev, 'The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration?' (2016) 41 *Review of Central and East European Law* 342, 366.

was deemed necessary by the Court to develop it and what is the legal basis that the court used to justify it. Also, a comparison with the principle developed by the ECJ will also be done, in order to show the similarity and differences of the two.

Chapter 3 will focus on the integration capability of the EAEU Court. Firstly, the treaties will be examined to show what are the powers that are given for the Court in the context related to integration. Then the possible effects towards such capabilities by the formulation of the direct effect principle will be examined. Finally, also the major obstacles towards the possibility of the Court's exercise of further integration powers will be addressed. One of such obstacles is the priority of national laws over EAEU law in the conflict of law situations.²¹

Chapter 4 will discuss some of the possible scenarios for further integrations by the EAEU Court. For example, if it is suitable that with its new formulated principle of direct effect, the EAEU court follows an integration path similar to the one that was adopted by the ECJ. Or if it is better to allow Eurasian integration to follow a more state-centric model. As a result, it will give an overview of the possibilities that the Court can take with its new principle in the context of the future of the EAEU.

²¹ Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) 55.

2 The Principle of Direct Effect by the EAEU Court

The EAEU Court on April 4, 2017, gave its decision in the *Vertical Agreements case* (Case No SE-2-1/1-17-BK). Considered by some to be a landmark case, it concerned a request by the Belarusian Ministry of Justice regarding the interpretations on the EAEU Treaty in the field of competition law.²² The question before the court was if Belarus could unilaterally modify its legislation regarding the admissibility criterion for vertical agreements to 15% when EAEU law provides for a minimum level of 20%.²³ In turn, the Court was also requested to clarify Articles 74, 75, 76 of the EAEU treaty.²⁴ In short, the Court decided that while Article 74 allows for the Member States to introduce additional prohibition or restrictions in regards to prohibition stated under the treaty, it, however, does not allow member states to “modify the prescribed admissibility criteria of vertical agreements”.²⁵ Furthermore, the Court also decided that “General rules of competition have direct effect and shall be directly applicable by the Member States as rules enshrined in an international treaty.”²⁶ Therefore this decision is important, as EAEU law does not contain a “direct effect” principle in the likes of that of EU law.²⁷ Nevertheless, while the case is seen by some as a landmark case, comparable to that of *Van Gend en Loos* of the ECJ, there are some issues with it.²⁸ One of them being that the Court did not further elaborate on the establishment of the principle of direct effect or even cite ECJ cases, as it has done in other cases.²⁹ Nonetheless, it is still important to discuss the development of this principle by the EAEU Court, especially in regards to the future of the Eurasian integration process.

²² Kalinichenki (n 10).

²³ Kirill Entin and Benedikt Pirker, ‘The Early Case Law of the Eurasian Economic Union Court: On the Road to Luxembourg?’ (2018) 25 Maastricht Journal of European and Comparative Law 266, 20.

²⁴ ‘Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)’ (Court of the Eurasian Economic Union / Суд Евразийского экономического союза) <<http://courteurasian.org/page-25081>> accessed 8 July 2019.

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Kalinichenki (n 10).

²⁸ *ibid.*

²⁹ Entin and Pirker (n 23) 9.

2.1 The Development of the Principle in the EAEU

2.1.1 The Reasoning

The first question in the discussion regarding the development of the principle of direct effect in the EAEU, is why did the principle have to be developed? Firstly, it must be noted that in the *Vertical Agreements case* the EAEU court did not provide thorough arguments to support its conclusion regarding the principle of direct effect.³⁰ As a result, in order to fully understand the court's motives is complicated and obscure, especially in light of the monumental nature that the case has on the development of the EAEU legal order.³¹

Nevertheless, since it has been established by some scholars that the EAEU court has been regularly citing the case-law of the ECJ, one can look at the EU context for insight to the reasoning behind the EAEU court.³² The principle of direct effect was made explicit in the *Van Gen en Loos case*, where it ruled that the Treaties are international agreements however they are “capable of generating legal effects in the member states without the need for any implementing measures.”³³ As a result, it can be claimed that EU law is intruding into the domain of national sovereignty in order to support the enforcement of EU law.³⁴ Since such principles maintain the supremacy of EU law and oblige national courts to ensure the rights that are contained within it.³⁵ Therefore, it can be deduced that the reasoning behind the ECJ in its decision regarding the direct effect principle, is for the enforcement and strengthening of EU law and integration. Especially in light of the fact that the ECJ is heavily engaged in judicial activism and has been very proactive towards European integration.³⁶

³⁰ *ibid.*

³¹ *ibid* 10.

³² Maksim Karliuk, ‘Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship’ (2017) 5 *Russian Law Journal* 36.

³³ Anthony Teasdale and Timothy Bainbridge, *The Penguin Companion to European Union* (Penguin 2012) 219.

³⁴ Michelle Cini and Nieves Pérez-Solórzano Borragán, *European Union Politics* (6th Edition, Oxford University Press 2019) 195.

³⁵ Erika M Szyszczak and Adam Jan Cygan, *Understanding EU Law* (Second Edition, Sweet & Maxwell 2008) 104.

³⁶ Nigel Foster, *EU Law Directions* (6th Edition, Oxford University Press 2018) 64.

How is this then possibly relevant to the Eurasian context, specifically to the reasoning of the EAEU Court. There are a few reasons, firstly, since the EAEU Court is a relatively new institution, it can analyze the decisions of the ECJ especially in regard to integration and see how it can be applied in the EAEU. In a statement by Vladimir Putin, he stated that the EAEU pursues the objective to align its legislation with the “best international and European practices”.³⁷ Therefore, the EAEU court might develop the principle of direct effect because it might view it as one of the best practices for strengthening the supranational legal orders, as was the case in the EU. This is highly important due to the evolutionary character of the EAEU legal order that might show the existence of an “EAEU *acquis*”.³⁸ However, this reason can also be viewed in the light that the development of the principle of direct effect was merely functional in nature. In the *Vertical Agreements case*, the issue was mainly if a member state is allowed to set different criteria of admissibility of vertical agreements different to that stated out in the EAEU treaty.³⁹ Consequently, if the Court would allow the member states to deviate from, it will undoubtedly weaken the EAEU legal order. One can also argue that this order is already weakened by the fact that the different Constitutions of some member states does not give absolute priority to the provisions of EAEU law.⁴⁰ Thus, the Court might view the direct effect principle as the best practice not necessarily for its integration potential but rather from a functional viewpoint in regard to supranational legal orders.

Secondly, the EAEU court might take into the account of the ECJ reasoning, in order to strengthen itself and fight against a so-called “Russian led EAEU legal order”.⁴¹ Some scholars point out that the Eurasian integration process has been heavily a Russian-led one.⁴² This is understandable considering the fact that 86% of the GDP of the EAEU is

³⁷ Petrov and Kalinichenko (n 19) 302.

³⁸ *ibid* 303.

³⁹ ‘Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)’ (n 24).

⁴⁰ Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) 55.

⁴¹ Karliuk, ‘Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship’ (n 32) 51.

⁴² Golam Mostafa and Monowar Mahmood, ‘Eurasian Economic Union: Evolution, Challenges and Possible Future Directions’ (2018) 9 *Journal of Eurasian Studies* 163, 169.

Russian.⁴³ Therefore, leading to some claiming that such Russian-led Eurasian integration is not for its hegemonic ambitions but rather to minimize uncertainty, transaction cost and market failures in the region.⁴⁴ However, on the other side, it is claimed that Russia with its dominance, has allowed it to have a more assertive control over the other member states, and thus does not allow objections by such members.⁴⁵ Subsequently, this has also slowed down the Eurasian integration process, since it has made other members reluctant to integrate further.⁴⁶ In regards to the EAEU Court, one can argue that this Russian led regime has weakened the court from fulfilling its integrative potential. The EurAsEC Court, the functional yet not legal predecessor of the EAEU Court, engaged heavily in judicial activism resulting in establishing itself as a law-making body and particularly required national courts of the Member States to bring their judicial practice into compliance with its decisions.⁴⁷ However, during its existence, the Supreme courts of the Russian Federations has refused to make preliminary rulings to the EurAsEC Court and citing in one case that reference to the court is a right and not an obligation.⁴⁸ This ultimately weakens the role and effectiveness of the court. As a result, when the statute of the EAEU Court was made, preliminary rulings and the law-making capabilities of the court were removed further weakening it.⁴⁹ Therefore, this shows also the lack of political will by the member states to make the EAEU court into an effective judicial body.⁵⁰ As a response, the Court might develop the principle of direct effect specifically in the same lines as that of the ECJ in order to strengthen EAEU law and its enforcement, especially in the light of the curtailing of its own powers by the member states. In line with this, due to Russia's dominance in the EAEU, the Court might reason that the necessity to strengthen EAEU law is to bring a balance to the playing field and developing the principle of direct effect is one of the ways to do so.

⁴³ Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) 11.

⁴⁴ Kirkham (n 4) 113.

⁴⁵ Russell (n 5) 8.

⁴⁶ *ibid.*

⁴⁷ Kembayev (n 20) 351.

⁴⁸ Diyachenko and Entin (n 7) 61.

⁴⁹ Kembayev (n 20) 352,360.

⁵⁰ *ibid* 342.

2.1.2 The Legal Basis

After discussing the possible reasoning behind the development of the principle of direct effect by the EAEU Court, it is also necessary to examine the legal basis for such development. This is important in the sense that it may serve as the blueprint for other principles that might push for further integration in the EAEU.

Firstly, under paragraph 2 of the Statute of the Court of the Eurasian Economic Union (EAEU Court Statute), the objective of the Court is to ensure uniform application of EAEU law by the member states and its institutions.⁵¹ Consequently, under paragraph 46 of the same Statute, member states or EAEU institutions can ask the Court for clarifications towards provisions of EAEU law.⁵² This results in the Court producing an advisory opinion, that is recommendatory in nature and does not deprive the member states of the right to join interpretations, as per paragraph 47 and 98 of the Statute.⁵³ In the *Vertical Agreements case*, Belarus requested an advisory opinion on if a member state is allowed to make its own criteria of admissibility of vertical agreements different from that stipulated in the EAEU treaty.⁵⁴

In order to answer the request of Belarus, the EAEU Court first started by determining if the regulation of competition, of which vertical agreements is part of, falls within the competence of the EAEU or its member states.⁵⁵ Under Article 1 and 2 of the EAEU Treaty, the Union ensures either coordinated, agreed, or common policies in the economic sectors stipulated in the Treaty or international treaties concluded within the Union.⁵⁶ Specifically for common policy, the Court gave that the criteria that must be fulfilled are: 1) the presence of unified legal regulations; 2) the transfer by the Member States of competence in this

⁵¹ Annex 2 to the Treaty on the Eurasian Economic Union

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ 'Summary of Case No. CE-2-1/1-17-БК (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)' (n 24).

⁵⁵ Yury Rovnov and Nadezhda Sporysheva, "The Court of the Eurasian Economic Union: Some Initial Jurisprudence" (2018) 4 Trade Policy/Торговая политика 72.

⁵⁶ Alessandro Rosano, "Wrong Way to Direct Effect?: Case Note on the Advisory Opinion of the Court of the Eurasian Economic Union Delivered on 4 April 2017 at the Request of the Republic of Belarus" (2018) 45 Legal Issues of Economic Integration 211, 215.

sphere to the bodies of the Union in the framework of their supranational powers.⁵⁷ In connecting this criterion to the issue at hand, the Court first stated that since Article 74 of the EAEU Treaty and Annex XIX set common rules governing competition in transnational markets, they qualify as the presence of unified legal regulations.⁵⁸ In regards to the second criteria of the transfer of competence, the Court pointed out that the Eurasian Economic Commission (EEC) has full powers to review compliance by using the general rules that governing competition in transnational markets.⁵⁹ Under paragraph 9 and 10 of Annex XIX of the EAEU Treaty, it clearly gives the EEC important powers in regards to compliance with the EAEU general rules of competition. This includes power such as the initiation and review of cases regarding competition rules violations and issue rulings and adopt decisions that are binding for economic entities of the different member states.⁶⁰ Therefore, by this, the Court argued that this clearly shows the transfer of competences in the sphere of competition to the EAEU institutions, and thus fulfilling the second criteria for a common policy. The effect of qualifying competition rules in transnational markets as common policy is, therefore, according to the Court, grants a direct effect to the general rules of competitions enshrined in the EAEU treaty.⁶¹ Resulting in the introduction of the principle of direct effect whereas previously EAEU law had not contained it.⁶² In turn with the principle of direct effect, the Court answered Belarus's questions, by saying that while member states are allowed to set new forms of prohibitions regarding the admissibility criteria, they are not allowed to introduce any new ones or modify it.⁶³ The Court provides two reasons for it, in which the principle of direct effect became prevalent. Firstly, the rules regulating the admissibility criteria are binding in their nature as common policy, especially now due to the principle of direct effect and therefore has a significant value in the EAEU competition-law system.⁶⁴

⁵⁷ 'Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)' (n 24).

⁵⁸ Rosano (n 56) 215.

⁵⁹ *ibid.*

⁶⁰ Annex 19 to the Treaty on the Eurasian Economic Union

⁶¹ 'Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)' (n 24).

⁶² Kalinichenki (n 10).

⁶³ Rosano (n 56) 216.

⁶⁴ *ibid.*

Secondly, the Court reviewed the definition of terms in the EAEU Treaty and ruled that the Treaty allows under Article 74(3) for member states to interduce additional prohibition but this does not entitle them to add or modify the admissibility criteria in the EAEU treaty.⁶⁵

In conclusion, the *Vertical Agreements case* showed how the Court used the EAEU treaty to justify the development of the principle of direct effect. Specifically, by stating that since the competition rules regulating transnational markets in the EAEU treaty fulfils the criteria of common policy, it, therefore, gives direct effect to the general rules of competition. Therefore, from this, it can be argued that it establishes a sort of quasi-link between common policy and direct effect. Resulting in the forming of the blueprint that for a provision in the EAEU Treaty to have direct effect it must first be considered a common policy. However, it remains to be seen if in future cases the EAEU Court continues this line of arguments or rather withdraws from it. Especially considering some of the possible criticism related to the weakness of the EAEU principle of direct effect.

2.2 Problems Related to the EAEU's Principle of Direct Effect

After discussing how and possibly why the principle of direct effect was developed by the EAEU Court, it now important also to discuss some of the possible problems or issues related to it, especially in regard to its effectiveness.

2.2.1 The Form

One of the possible problems regarding the EAEU's principle of direct effect is the form of the Court's act in which it was formulated. In the *Vertical Agreements case* Belarus asked the Court for an advisory opinion. Under the EAEU Court Statute, paragraph 46 and 47, state that an advisory opinion is for providing clarification by the Court on provisions of the EAEU Treaty, international treaties within the Union, and decisions of the Union's institutions.⁶⁶ However, in addition with paragraph 98 of the Statute, advisory opinions are only recommendatory in nature and they do not deprive the member states the right for joint interpretation of

⁶⁵ Rovnov and Sporysheva (n 55) 74.

⁶⁶ Annex 2 to the Treaty on the Eurasian Economic Union

international treaties.⁶⁷ Furthermore, unlike in the EurAsEC Court, which allowed the highest judicial bodies of each member state to ask for clarification of EurAsEC law.⁶⁸ In the EAEU Court, however, only authorized bodies and organization defined by member states area are allowed to ask for clarification.⁶⁹ This results in the weakening of the role of judicial organs in both the national and the EAEU level.⁷⁰

Thus, this all in all weakens the effectiveness of the EAEU's direct effect principle. Firstly, because as it currently stands the principle is only recommendatory in nature and not binding. Therefore, enforcing the principle is already problematic, because member states have no obligation to follow an advisory opinion. This then brings us to the second point, where the member states under the EAEU Court Statute are allowed to jointly interpret international treaties.⁷¹ Leaving the judicial interpretation in the hands for the member states is clearly not reassuring especially in light of the EAEU Court's shortcomings.⁷² Since the principle of direct effect is a product of the EAEU Court, which itself is based on the EAEU Treaty, therefore allowing member states to give their own interpretation of the principles. This then, of course, opens the gates to allow a member state to interpret the EAEU's direct effect principles as not in the same sense as that of the EU, but rather one that requires the approval of the different Constitutional Courts or still needs an implantation procedure. An example of this would be the Russian Constitution, where it stated the Constitution will apply if they prove a higher level of protection of a citizen's rights and freedoms that the provisions of international law or in this case EAEU law.⁷³ Lastly, the fact that local courts or even the different supreme courts are not allowed to ask for an advisory opinion on the principle of direct effect is problematic. However, it must be noted that national courts can be determined as an authorized body to ask for an advisory opinion, however, no member state has done so.⁷⁴ This important in the enforcement and strengthening of the

⁶⁷ *ibid.*

⁶⁸ Kembayev (n 20) 357.

⁶⁹ *ibid.*

⁷⁰ *ibid* 356.

⁷¹ Annex 2 to the Treaty on the Eurasian Economic Union

⁷² Maksim Karliuk, 'The Eurasian Economic Union: An Eu-Inspired Legal Order and Its Limits' (2017) 42 *Review of Central and East European Law* 50, 67.

⁷³ Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) 56.

⁷⁴ Karliuk, 'The Eurasian Economic Union' (n 72) 67.

direct effect principle in the EAEU, because through national courts judgement can the direct effect principle gain a sort of obligatory effect, and thus the enforcement of this principle is then also carried out by the national court.⁷⁵ Nevertheless, due to the nature of advisory opinion in the EAEU context, it makes national courts completely disintegrated from the EAEU judicial system, and will lead to inconsistent application and differing practices regarding the principle of direct effect, therefore highlighting a major issue embodied in it.⁷⁶

2.2.2 Unclarity surrounding the definition of “Common Rules”

Another possible problem regarding the direct effect principle formulated by the EAEU Court is the lack of clarity surrounding crucial aspects regarding it. In the *Vertical Agreements case*, the Court Stated that “General rules” (Also translated as “Common Rules” by other legal scholars) of competitions have direct effect.⁷⁷ However, the Court did not use this case to explain what qualifies as or what are “Common Rules”.⁷⁸ Only that it says that if a policy is a common policy, then the direct effect principle can be implied for the relevant provisions.⁷⁹ Now at first glance, it might seem that the two criteria for the definition of common policy used by the Court in this case, seem to shed additional light. However particular attention must be drawn to the first criterion. To recall, this criterion is the presence of unified legal regulations.⁸⁰ Consequently, when the Court applied it to the *Vertical Agreements case*, they stated that since Article 74 of the EAEU Treaty and Annex XIX set the “common rules” governing competition in transnational markets, this criterion is fulfilled.⁸¹ Yet as mentioned before the Court did not define or stipulate clearly what such “common rules” are.

⁷⁵ *ibid.*

⁷⁶ Maksim Karliuk, ‘The Limits of the Judiciary within the Eurasian Integration Process’ (National Research University Higher School of Economics 2016) Higher School of Economics Research Paper WP BRP 69/LAW/2016 7 <<https://publications.hse.ru/en/preprints/198482054>> accessed 22 May 2019.

⁷⁷ ‘Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)’ (n 24).

⁷⁸ Kalinichenki (n 10).

⁷⁹ Rosano (n 56) 219.

⁸⁰ ‘Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)’ (n 24).

⁸¹ Rosano (n 56) 215.

The issue regarding the unclarity surrounding “common rules” is tied to the effectiveness regarding the principle of direct effect in the EAEU. Firstly, since “common rules” are not defined is it still unclear specifically which types of provisions can rely on the principle of direct effect principle. It must be noted that as it currently stands, due to the Roman continental and Soviet socialist legal systems of its founding members, the notions of an EAEU *acquis*, founding principles, or common values, is not explicitly mentioned in the EAEU treaty.⁸² As a result of previous case laws by the EAEU Court also do not mention any reference to such founding principles of EAEU Law, which if they did could at least give a foundation level on what “common rules” can be.⁸³ This lack regarding founding principles of EAEU law can possibly be explained through the actions of the drafter of the EAEU Treaty. In it, the drafters intentionally defined the EAEU as an “international organization of regional economic integration”, so to avoid any reference to supranationality and supremacy of EAEU Law.⁸⁴ This then brings up to another point regarding the issue of unclarity. Namely, the role of the member states has in interpreting what “common rules” are in the absence of clarity. Recalling what has been mentioned previous sections, member states have the right to a joint interpretation of international agreements in the EAEU framework. Therefore, this results in dominance for member states over the EAEU Court in matters of joint interpretation.⁸⁵ Resulting in the member states guiding the interpretation of what “common rules” can be. Since it can be seen that the member states, especially the founding members do not favour giving supremacy or supranationality to the EAEU, any interpretation that may arise will be in most cases highly restrictive and not favourable towards further EAEU integration. Ultimately, this raises the questions if the principle of direct effect in the EAEU will have a chance to be effective at all and does help push for further integration in the EAEU.

⁸² Petrov and Kalinichenko (n 19) 299.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ Kembayev (n 20) 357.

2.3 Comparison with the ECJ's Principle of Direct Effect

While some scholars have called the *Vertical Agreements case* a sort of Eurasian *Van Gend en Loos*.⁸⁶ This remains to be seen, especially in regard to how they compare between the two. One on hand, they do both formulate the direct effect principle in their respective spheres. On the other hand, their substance in regards to the criteria of a provision having direct effect is very different.⁸⁷ Therefore in this section, some noticeable difference and similarities will be pointed out, as they might hint on the style of integration that the EAEU Court is pursuing and aiming for.

In both regimes, the principle of direct effect is not implicit in the respective founding treaties.⁸⁸ Only through the supranational court's acts did they become explicit and introduced in their legal regimes. In the EU, the *Van Gend en Loos* case introduced the principle when the ECJ stated that EU law not only imposes obligations on individuals but also confer the right to them which national courts must protect.⁸⁹ On the other hand, the EAEU Court introduced the principle in the *Vertical Agreements case*, where it stated that "General rules of competition have direct effect".⁹⁰ Therefore, it can be seen that there is an already substantial difference between the EAEU and EU's direct effect principle. This is further exemplified when the ECJ with *Van Gend en Loos*, claimed that EU Law does not fulfil traditional categories of international law, and therefore belongs to a new legal order with its own powerful authority.⁹¹ On the other side, the EAEU Court makes no mentions of any establishment of a new legal order. This can be possibly be explained by the formulation of EAEU member states regarding the EAEU legal framework. They drafted the EAEU treaty in the sense to avoid supranational implication by regarding the EAEU not as a supranational organization but as an "international organization of regional economic integration."⁹² Also, it must be reminded that the member states were wary of the judicial activist

⁸⁶ Kalinichenki (n 10).

⁸⁷ Rosano (n 56) 217.

⁸⁸ Teasdale and Bainbridge (n 33) 218.

⁸⁹ Alina Kaczorowska, *European Union Law* (Taylor & Francis 2010) 305.

⁹⁰ 'Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)' (n 24).

⁹¹ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Cambridge University Press 2014) 293.

⁹² Rosano (n 56) 217-218.

attitude by the EurAsEC Court, and thus reduced the powers of the EAEU Court.⁹³ It seems that the EAEU Court understood this and did not try to endanger itself by formulating extra powers with the introduction of the principle of direct effect. Specifically, it mentions in the *Vertical Agreements case* that “neither the Member States nor the bodies of the Union shall encroach on the competence of one another.”⁹⁴ Therefore, it can be seen that the approaches of the two Courts regarding direct effect is not closely similar. While it can be argued that in both cases, the Courts intention in introducing the principle of direct effect was to strengthen the supranational legal regime. The subsequent approaches are very different. The ECJ, heavily engaged in judicial activism which resulted in the creation of a new legal order within the EU. The EAEU Court, on the other hand, probably influenced by the member states attitude towards the EurAsEC Court’s judicial activism, did not take the path of the ECJ. Rather it took a seemingly passive approach and only discussed that “common rules” regarding competition under the EAEU Treaty have direct effect, without mentioning on how this affects the EAEU legal order.

The substance regarding the direct effect principles is also very different between the two regimes. The ECJ, in *Van Gend en Loos*, did state that the principle of direct effect does not automatically apply to all Treaty provisions.⁹⁵ But rather for an EU provision to have direct effect, it must be clear, precise and unconditional, and in addition, must confer rights on individuals.⁹⁶ Therefore, due to this, such provisions are capable of generating legal effects in the member states, without the need for any implementation measures.⁹⁷ This results in setting an criteria for invoking the principle of direct effect, which is seemingly absent in the EAEU context.⁹⁸ In the *Vertical Agreements case*, it mentions only that common policy exists when there is “unified legal regulations” and there is a transfer of competence by the member states to the Union.⁹⁹ In this specific case, the EAEU Court mentions that since the common rules

⁹³ Karliuk, ‘The Limits of the Judiciary within the Eurasian Integration Process’ (n 76) 7.

⁹⁴ Entin and Pirker (n 23) 21.

⁹⁵ Chalmers, Davies and Monti (n 91) 294.

⁹⁶ Kaczorowska (n 89) 305.

⁹⁷ Teasdale and Bainbridge (n 33) 219.

⁹⁸ Rosano (n 56) 217.

⁹⁹ ‘Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)’ (n 24).

governing competition in transnational markets can be defined as common policy, it, therefore, grants direct effect to the relevant EAEU Treaty provisions.¹⁰⁰ However, we see therefore a stark distinction between the criteria of direct effect by the EAEU and the EU. Whereas the ECJ formulated a strict test especially by mentioning that a provision must be “clear, precise, and unconditional”. The EAEU Court on the other hand only mentions the existence of “unified legal regulations”, but does not even explain or give a test to determine if a provision fulfils this criterion. As mentioned before this brings uncertainty rather than clarity to the effect principle in the EAEU context. Furthermore, the EAEU’s criteria have also a stark difference with the EU’s, namely the lack of the “granting of rights to individuals” criterion. In the *Vertical Agreements case*, one of the probable reasons why the EAEU Court choose not to make such a criterion, namely because the provision in question, Article 76(4) of the EAEU Treaty, does not grant any rights at all.¹⁰¹ Therefore, the Court might have reasoned that in the current cases there was no need to introduce such a criterion. However, again such a criterion brings clarity and enforceability towards the principle, and thus remains the ambiguity surrounds the EAEU’s Court’s direct effect principle.

In conclusion, it can be examined that in regards to the principle of direct effect there are some stark differences between the EU’s and EAEU’s. Firstly, the ECJ with its support of judicial activism through the principle gave itself more powers and established the new legal order of EU Law. Whereas the EAEU Court did not use this opportunity to do the same, possibly due to the member states wariness towards and ECJ-like judicial activism. Secondly, the substance of the criteria regarding the principle is totally different between the two regimes. It can be seen that the ECJ created strict criteria, especially in regards to what a provision that has direct effect must entail. Whereas, the EAEU has not defined the core element of “common rules” that is inherent to its criteria for the principle of direct effect. As a result, this question if the EAEU Court in its development of the principle of direct effect, was merely a Eurasian restatement of *Van Gend en Loss*? However, the discussion above points demonstrated that this is probably not the case. Coupled with the fact that the EAEU Court is not legally bound to refer to the ECJ’s case law, the EAEU

¹⁰⁰ Rosano (n 56) 215.

¹⁰¹ *ibid* 217.

Court could be developing its own version of the principle of direct effect and maybe a different way to push for further Eurasian integration.¹⁰²

3 The Integration Capability of the EAEU Court

In the previous sections focused on the discussion regarding the principle of direct effect developed by the EAEU Court. In the following sections, the focus will be on the capability of the EAEU Court in the context of Eurasian integration. As a result, firstly, an overview of what are the Court's competences will be discussed. Afterwards moving to discourse regarding some of the major obstacles that are faced by the Court. This will cumulate in an overview of if the principle of direct effect will help or not the Court in the context of further integration in the EAEU, and if so to what extent?

3.1 The Competences of the EAEU Court

Article 19 of the EAEU Treaty, establishes the EAEU Court as the permanent judicial body of the Union.¹⁰³ The substantial legal basis of the Court lies in Annex 2 of the EAEU Treaty, which is the Statute of the EAEU Court, and the Rules of Procedure of the Court of the Union.¹⁰⁴ In the Statute it explains that the objective of the Court's activities is to ensure the uniform application by the Member States and the EAEU institutions of international treaties within in the Union, international treaties of the Union with a third party, and decisions of the Union's institutions.¹⁰⁵ Interestingly, it is also mentioned that for the purposes of the Statute, the Court is excluded from being considered as an EAEU institution.¹⁰⁶ Therefore, this means that the Court, in essence, is not there to ensure the uniform application of its own decision. This, of course, has consequence towards the enforcement and effectiveness of the EAEU Court.

Chapter IV of the EAEU Court Statue mentions that the jurisdiction of the Court is to consider disputes arising in connection with the implementation of the EAU Treaty, international treaties within the Union

¹⁰² *ibid.*

¹⁰³ Treaty on the Eurasian Economic Union

¹⁰⁴ Vinokurov, *Introduction to the Eurasian Economic Union* (n 8) 52.

¹⁰⁵ Chapter 1, para. 2, Annex 2 to the Treaty on the Eurasian Economic Union

¹⁰⁶ *ibid.*

and/or decisions of the EAEU institutions.¹⁰⁷ In addition, the jurisdiction of the Court can be broken down into two main groups.¹⁰⁸ Firstly, the Court has the competence to resolve disputes brought by member states or economic entities.¹⁰⁹ Secondly, the Court has competence in regards to clarification of EAEU law, which can be brought by member states, EAEU institutions, or EAEU civil servants.¹¹⁰

There are some interesting points that must be highlighted regarding the initial overview of the Court's competence. Firstly, the main distinction between the two types of Court's act is that only judgements regarding the first category are binding, while the clarifications are only recommendary in nature.¹¹¹ Secondly, while one of the objectives of the Court is the uniform application of international treaties of the Union with a third party, there is no implicit competence given by the EAEU Court Statute regarding this.¹¹² Rather, Chapter IV, para. 40 of the EAEU Court Statute, mentions that the member states "may" expand the jurisdictions of the Court to any other dispute, provided that the resolutions of these "other disputes" is expressly provided by the EAEU Treaty, international treaties within the Union, between the Union and a third party, between member states.¹¹³ Therefore, the uniform application of international treaties of the Union with a third party, must either be agreed by the member states or agreed in the treaty with a third party itself. Thirdly, the Court cannot hear disputes brought by the EAEU institutions, especially the Commission. This is in stark contrast with the EurAsEC, the predecessor of the EAEU, where the Commission had the right to initiate dispute proceeding against member states for the non-implementation of EurAsEC Law.¹¹⁴ In the EAEU regimes, it only may join a dispute as an "interested party", if it thinks that the Court's decisions will affect its own interests.¹¹⁵ As a result, the EAEU Court has very limited competence in regards to legal matters of the Union, when compared to other supranational courts like that of the ECJ.

¹⁰⁷ Chapter 4, para. 39, Annex 2 to the Treaty on the Eurasian Economic Union

¹⁰⁸ Diyachenko and Entin (n 7) 55.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Kembayev (n 20) 353.

¹¹³ Chapter 4, para. 40, Annex 2 to the Treaty on the Eurasian Economic Union

¹¹⁴ Kembayev (n 20) 354.

¹¹⁵ *ibid.*

Nevertheless, this limitation on the competence of the Court does not end just in the initial overview. Para. 42 of the EAEU Court Statute, states that the Court is not allowed to extend the competences of the EAEU institution in excess of that provided by the EAEU Treaty and international treaties within the Union.¹¹⁶ Para. 43-45 mentions that a dispute cannot go directly to the Court but rather must go through pretrial procedures with the member states or commissions, and only through mutual consents or the expiration of time in the pretrial motions, can the Court hear the case.¹¹⁷ Subsequently, as mentioned in previous sections, para. 47, stipulated that the clarification of the court is not absolute since member states have the right for joint interpretation of international treaties.¹¹⁸ In regard to the conclusion and enforcement of disputes, Para. 101 of the Statute, mentions the judgment of the Court may not exceed the issues in the dispute.¹¹⁹ More importantly Para. 102, states that the Court cannot amend or revoke any existing EAEU law, member states legislations, and surprisingly is not allowed to create new laws.¹²⁰ Finally, Para. 103 allows the parties to the dispute, the freedom to determine how the judgment of the Court will be carried out.¹²¹ These provisions of the EAEU Court Statute are just some of the examples that show the complicated and restrictive nature of the EAEU Court's competences. Primarily, it shows that the EAEU Court does not have exclusive jurisdictions over EAEU law, specifically since member states have the right of interpretation.¹²² Secondly, the drafters of the EAEU Court Statute, limit the ability of the Court to define implied powers as has been done by the ECJ and even the International Court of Justice.¹²³ In addition, they also removed the law-making capability of the Court, which was present in the EurAsEC Court.¹²⁴ These restrictive and reduction in competences has led to the idea that the EAEU Court does not resemble a constitutional court but rather an administrative one.¹²⁵ Where the tasks are only to check the compatibility

¹¹⁶ Chapter 4, para. 42, Annex 2 to the Treaty on the Eurasian Economic Union

¹¹⁷ *ibid* Chapter 4, para. 43-45.

¹¹⁸ *ibid* Chapter 4, para. 47.

¹¹⁹ *ibid* Chapter 7, para. 101.

¹²⁰ *ibid* Chapter 7, para. 102.

¹²¹ *ibid* Chapter 7, para. 103.

¹²² Karliuk, 'The Eurasian Economic Union' (n 72) 69.

¹²³ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 10.

¹²⁴ *ibid*.

¹²⁵ Petrov and Kalinichenko (n 19) 306.

of EAEU Law and national laws of the member states with the EAEU Treaty.¹²⁶ This is further supported by the fact that the EAEU Court does not have a role in the protection of human rights of EAEU nationals, and therefore might be problematic especially in question regarding the compatibility of EAEU law with international standards of protection of human rights, specifically with the European Convention of Human Rights, of which Russia and Armenia are parties to.¹²⁷ Such restrictions to the EAEU Court can be explained by the fact that the member states wanted to limit the possibility of the EAEU Court following the shoes of the EurAsEC Court, specifically in regards to its judicial activist tendencies.¹²⁸ However, this has been seen by some as an overreaction towards the assertive attitude of the EurAsEC Court and thus has led to the complicated legal order of the EAEU Court, especially in regards to its own competencies.¹²⁹

One last point in regard to the EAEU Court's jurisdictions is the decision of the EurAsEC Court. According to the Treaty on Termination of the EurAsEC, the decision of its court will "continue to have effect with the purpose of ensuring uniformity and stability of legal regulations in the EAEU."¹³⁰ One of example of where the EAEU Court has done this is retaining the procedure established by the EurAsEC Court, where economic entities, including foreign ones, are allowed to bring cases regarding the compliance of a Commission's decisions that directly affect their economic rights, with the EAEU Treaty and international agreements within in the Union.¹³¹ More importantly, this mean that the Commission, due to the ruling of the EurAsEC Court, must " approach the Court regarding the interpretations of the Community Law, if there are reasons to believe that the Community Law is not applied uniformly in one or more Member States(s) with respect to different business entities".¹³² This, therefore, actually allows the EAEU Court to remedy some of the restrictions placed on it by its Statute. Specifically, by potentially allowing

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Karliuk, 'Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship' (n 32) 45.

¹²⁹ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 9.

¹³⁰ Kembayev (n 20) 360.

¹³¹ Karliuk, 'Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship' (n 32) 46.

¹³² Kembayev (n 20) 360.

the Court to control the national legislations of the Member States compliance with EAEU law.¹³³ However, it remains to be seen if the Court will use this to circumvent some of its restrictions, or rather disregard it in order not to escalate into conflict, especially with the member states.¹³⁴

3.2 Obstacles Towards Further Integration by the EAEU Court

After discussing some of the competences of the Court, and highlighting how some it might be seen a restrictive, especially towards Eurasian integration, some of the major obstacles towards the integration capability of the EAEU Court need to be explored. Therefore, in these sections, three main obstacles will be discussed, namely the lack of preliminary ruling procedure, the attitude of Russian national courts, and the independence of the judges.

3.2.1 Lack of Preliminary Ruling Procedure

The preliminary ruling procedure can be described as a single system of judicial oversight within the judicial systems of member states in cooperation with an organization's court, regarding the interpretation of the law of the organization.¹³⁵ It is seen as highly essential to the uniformity and effectiveness of EU law.¹³⁶ It essentially gives the ECJ the exclusive competence on the final say regarding matters on the interpretations and validity of EU Law.¹³⁷ Interestingly, the concept of preliminary rulings is not foreign in the Eurasian context. Under the EurAsEC Court, any supreme judicial authority could request the Court for a preliminary ruling regarding the application of international treaties of the Customs Union and acts of the Commission of the Customs Union.¹³⁸ However, the EurAsEC Court preliminary ruling has also a substantial difference with that of the ECJ. Firstly, only the supreme courts of the Member States have the right to enact the procedure.¹³⁹ As a result, public

¹³³ *ibid* 361.

¹³⁴ *ibid*.

¹³⁵ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 6.

¹³⁶ Elspeth Berry, Matthew J Homewood and Barbara Bogusz, *Complete EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 246.

¹³⁷ *ibid* 227.

¹³⁸ Diyachenko and Entin (n 7) 60.

¹³⁹ Kembayev (n 20) 358.

authorities were deprived of such rights, and an economic entity must request the supreme judicial authority to exercise the right to preliminary rulings.¹⁴⁰ Secondly, the cases that can be raised are only those that involve the rights and legitimate interest of economic entity if the issue of application of EurAsEC Law will seriously influence the outcome of those cases.¹⁴¹ Consequently, this means that the economic entity has to request the supreme court to imitate the preliminary rulings, which would also result in the suspensions of the proceedings in the national court.¹⁴² Finally, the legal character of preliminary rulings under the EurAsEC regime was not explicitly laid down in any legal frameworks.¹⁴³ Rather, it was first assumed that the preliminary rulings were only meant to be recommendatory in nature, and thus substantially different to the ones by the ECJ, where they are binding in nature.¹⁴⁴ However, the EurAsEC Court in its internal regulations stipulated that preliminary rulings will have binding force since it will be classified as a Court decision.¹⁴⁵ Even though, the EurAsEC Court only received and ruled one preliminary ruling request during its three years of existence, which is Case No. 1-6/1-2013 *Reference for a preliminary ruling submitted by the Supreme Economic Court of the Republic of Belarus*.¹⁴⁶ In this case, the Court rules that the preliminary ruling decision is “is binding, is not subject to appeal, comes into force after its declaration and is effective directly on the territory of the Member States of the Customs Union.”¹⁴⁷ This, therefore, resulted in the EurAsEC Court giving preliminary rulings binding and interestingly also “direct effect”. In addition, the Court also stated that its decisions have an effect not only to the parties of the conflict but also *erga omnes*, are subject to strict execution and declared that acts that are aimed at the non-execution or improper execution of its decisions are null and void.¹⁴⁸ This then resulted in the Court trying to establishing itself as a sort of quasi-law

¹⁴⁰ Diyachenko and Entin (n 7) 61.

¹⁴¹ Kembayev (n 20) 358.

¹⁴² *ibid.*

¹⁴³ *ibid.*

¹⁴⁴ *ibid* 358–359.

¹⁴⁵ *ibid* 359.

¹⁴⁶ Diyachenko and Entin (n 7) 62.

¹⁴⁷ *Reference for a preliminary ruling submitted by the Supreme Economic Court of the Republic of Belarus* [2013] Court of the Eurasian Economic Community Case No. 1-6/1-2013 13.

¹⁴⁸ Kembayev (n 20) 351.

making body, and as an effective enforcer of the uniform application of, in its cases, EurAsEC law.

However, when it came to the EAEU Court, the member states took a highly different path, especially considering their experience with the EurAsEC Court. As one scholar pointed out by stating that “The unconditional and humiliating approach taken by the EurAsEC Court made a painful impression on the highest national courts.”¹⁴⁹ Now it is, of course, arguably if the approach taken by the EurAsEC court can necessarily be called unconditional, considering that it could have been just pushing for a more ECJ style approach. Nevertheless, the consequence of the concept of preliminary ruling in the EAEU Context is undeniable. Firstly, the exclusive jurisdiction that the EurAsEC Court had, is not stipulated in the EAEU Court Statute.¹⁵⁰ Resulting in the weakening of the Court’s position as the final say on EAEU Law. The significance is that it leads to disunified application or interpretation of EAEU law, which is, of course, is in contrary to the objective as laid down in its statute, namely to ensure the uniform application. Secondly, the drafters also put a high barrier for the EAEU Court to issue any acts like preliminary rulings.¹⁵¹ Namely that clarification of EAEU law are only recommendatory in nature, and that the member states are the only ones who can determine the national authorities who can seek clarification to the EAEU Court.¹⁵² This does not mean that preliminary ruling procedure is wiped out from the EAEU Legal regime. It must be pointed out that in the EAEU Treaty, there is nothing that precludes national courts from being designated by member states as national authorities that can request clarification.¹⁵³ However, as it currently stands no member states have indicated any other courts as the authorized national authorities, mainly it has been the Ministry of Justice who have received this role.¹⁵⁴

It remains now to be seen, how the EAEU Court will navigate in light of having the high barriers placed on it regarding preliminary ruling procedure. One on hand it is very important for the effectiveness and

¹⁴⁹ *ibid* 359.

¹⁵⁰ Karliuk, ‘The Limits of the Judiciary within the Eurasian Integration Process’ (n 76) 10.

¹⁵¹ Kembayev (n 20) 360.

¹⁵² *ibid*.

¹⁵³ Diyachenko and Entin (n 7) 62.

¹⁵⁴ *ibid*.

uniform application of EAEU Law, that the EAEU Court has an operative preliminary ruling procedure. The Court needs to have the power to make the member states, especially the national courts, follow its reasoning especially since the Court was created for the uniform application of EAEU Law. On the other hand, if the EAEU Court now wants to use the mechanism that it currently possesses to push for the revival of preliminary proceedings, it needs to convince both member states and national courts.¹⁵⁵ The Court needs to explain to member states why it is beneficial and necessary for national courts to have access to the clarification procedures, namely reason of uniform application. Furthermore, the Court also needs to demonstrate why national courts should exercise such rights, especially since under the current statute, national authorities do not have an obligation to ask for clarification of EAEU law to the Court.¹⁵⁶ Therefore only through practice, can the EAEU Court establish a sort of quasi-preliminary ruling procedure, that while is not as effective as the one by the ECJ, it nonetheless supports the Court's objective and the effectiveness of EAEU Law. Also resulting in further integration in the Eurasian context.

3.2.2 The attitude of the Russian National Courts

For a supranational court to be effective, other than having binding procedures it needs also to have members who are willing to abide by its rule. In the Eurasian context, there is an inherent difficulty towards the effectiveness of supranational courts presented not only by the member states governments but also their national courts. It must be taken into account that the EAEU Court faces more difficulty as it receives the same reluctant attitude given to its predecessor the EurAsEC Court, and thus received stricter limitations.¹⁵⁷ The Russian Federation is the largest member in the EAEU, with a GDP six times larger than that of the other member states combined, has undoubtedly significant influence over the future of the EAEU and Eurasian integration.¹⁵⁸ In connection to this may of the member states legal system stem from the former USSR and Russian Empire, and thus constitute a sort of fusion of Roman continental and

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ Kembayev (n 20) 352.

¹⁵⁸ Mostafa and Mahmood (n 42) 169.

Soviet socialist legal systems.¹⁵⁹ Therefore, the actions of the national courts of Russia without a doubt play a role in the effectiveness of further Eurasian integration by the EAEU Court, especially in influencing the legal system of other member states. However, the practice taken by the Russian courts seems to hinder any real progress in Eurasian integration.

The Russian Constitution mentions that international agreements form part of its legal system and is above national laws, except the Constitution when international treaties are not in line with it.¹⁶⁰ Yet, the Constitution does not distinguish the EAEU as its own legal regime, as some EU members have done in their own constitutions.¹⁶¹ Therefore the EAEU legal regime falls under the same category as that of international treaties, this has some significant consequences. The Russian Constitutional Court has already made jurisprudence regarding international courts. One of the landmark cases being the *2015 Yukos Judgment*, where the Russian Constitutional Court decided that itself has to power to determine if there is a conflict between European Court of Human Rights (ECtHR) judgments and the Russian Constitutions, and the execution of such judgments.¹⁶² Furthermore, it also decided that a state has the right to refuse the implementation of an ECtHR judgment, especially when the Court is interpreting a provision if it sees as going beyond the obligations that it voluntarily accepted when ratifying the Convention.¹⁶³ This form of reasoning has already been applied in the EAEU legal regimes, where the Russian Constitutional Court, decided that the Customs Code of the Customs Union, should be implemented according to Russia own interpretation.¹⁶⁴ The consequence is thus, now if the EAEU Court decides to pursue a stronger integrationist path that Russia does not particularly like, it may just disregard the judgments of

¹⁵⁹ Werner Miguel Kühn, 'The Eurasian Economic Union – Risks and Opportunities of an Emerging Bipolar Europe –' (2017) 20 *Zeitschrift für europarechtliche Studien* 185, 209.

¹⁶⁰ Karliuk, 'The Eurasian Economic Union' (n 72) 61.

¹⁶¹ Karliuk, 'Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship' (n 32) 36.

¹⁶² Maxim Timofeyev, *Money Makes the Court Go Round: The Russian Constitutional Court's Yukos Judgment* (Fachinformationsdienst für internationale und interdisziplinäre Rechtsforschung Staatsbibliothek zu Berlin-Preußischer Kulturbesitz 2017) 1.

¹⁶³ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 12.

¹⁶⁴ Karliuk, 'Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship' (n 32) 48.

the Court. In such cases, the Russian Constitutional Court can state that such EAEU Court judgments are either against the Constitution or go beyond the obligation that was “voluntarily accepted” by Russia when ratifying the EAEU Treaty. Nevertheless, it must be highlighted that the EAEU Treaty does enjoy supremacy over national Russian law except for the Constitution, as per Article 15(4) of the Constitution.¹⁶⁵ This has been reaffirmed by the Supreme Court of Russia, which decide that for cases of conflict between provisions of EAEU law and Russian law regarding customs matter, EAEU law prevails.¹⁶⁶

Another worrying aspect is the refusal of Russian national courts to be fully under a supranational court regime. Examples include the reluctance to make use of the preliminary rulings procedures when it was available in the EurAsEC regime or adhere to the judgments and reasoning of the Court.¹⁶⁷ During its existence, the Supreme courts of Russia denied 12 motions to make reference to the EurAsEC Courts, citing in most cases that the parties of the cases do not have the right to submit the cases.¹⁶⁸ However, the most consequential judgement is when the Supreme Court stated that refereeing to the EurAsEC Court is a right and not an obligation and thus refusing to refer to it is no breach of procedural EurAsEC Law.¹⁶⁹ Subsequently, the arbitration courts of Russia, have also declined to revise national court judgments where the EurAsEC court had a different opinion on the matter.¹⁷⁰ This is further evident in the EAEU context, where Russian Procedural Law states that national courts do not have to suspend their proceedings while waiting for a judgment by the EAEU Court, and more importantly that national judgments cannot be revised following an EAEU Court’s judgment.¹⁷¹ In line with this, Russian courts do not have the obligation to follow the interpretation of the EAEU Court regarding EAEU law provisions.¹⁷² This has been also shown in practice, specifically with regards to EurAsEC, where the national courts have assimilated some of the Courts judgments while disregarding others.¹⁷³ However, it must be

¹⁶⁵ Karliuk, ‘The Eurasian Economic Union’ (n 72) 61.

¹⁶⁶ Entin and Pirker (n 23) 6.

¹⁶⁷ Diyachenko and Entin (n 7) 61.

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.* 62.

¹⁷⁰ *ibid.* 65.

¹⁷¹ *ibid.*

¹⁷² *ibid.*

¹⁷³ *ibid.*

pointed out that the decisions that have been assimilated are decisions that “contained universal rules applicable to a broad range of similar cases”.¹⁷⁴

These trends and attitudes of the Russian courts undoubtedly have a strong effect on how the EAEU Court will push for further integrations. On one hand, it needs to push for further integration, in order to ensure its objective of uniform application of EAEU law. On the other hand it needs to carefully take into account the interest of the national judiciary, especially the Russian one so that it does not oppose and block its judgments. While there is hope, that the EAEU Court and the national courts can work well together, as seen in the cases of the formation of “universal applicable rules” in EurAsEC Court’s decisions. However, this cooperative attitude between the EAEU Court and national courts might ultimately weaken its integrative capacity. Since the relationship is not that of a hierarchical nature where the Court has the final say on EAEU law, but rather where it is threatened by the Supreme Courts of the member states, that if it overstepped its competences, they can simply disregard and undermine the EAEU legal regime and justify it by giving the reason of “safeguarding national sovereignty”.¹⁷⁵ This results in the EAEU Court not having a wide range of discretion in regard to its judgments, as compared to other international courts like that of the ECJ, and ultimately weakening its integrative capacity.

3.2.3 Judicial Independence of EAEU Court Judges

Judicial independence is crucial to the functioning of any legal regime. Not only does it bring stability to a legal system but also public trust and respect towards the courts.¹⁷⁶ Economic and political actors need to believe that the court is an impartial arbiter that will adjudicate their difference with clarity and the unbiased application of laws relevant to a case.¹⁷⁷ Moreover, judicial independence is also important in regards to the protection of rights, as it is the court role to make sure such rights are

¹⁷⁴ *ibid.*

¹⁷⁵ Miguel Kühn (n 159) 212.

¹⁷⁶ Theodor Meron, ‘Judicial Independence and Impartiality in International Criminal Tribunals’ (2005) 99 *American Journal of International Law* 359, 359.

¹⁷⁷ *ibid.*

not infringed, and if they are on how it may be rectified.¹⁷⁸ Finally, judicial independence is important in allowing courts to hold government in account of the prevailing laws and also serve as an independent arbiter for solving political and social disputes that governments might face.¹⁷⁹ As a result, judicial independence is even more needed in the supranational context, especially in a relatively young organization like that of the EAEU. With multitudes of political and social actors, the EAEU Court has to demonstrate that it can act as an impartial arbiter in the Eurasian realm. This is important in order to build trust with the Court, especially in light of the weakening of its power by the member states and their national courts. Naturally, the more cases the EAEU Court he more legitimate it is seen in the eyes of the Eurasian actions, which in turn can also more effectively hold the national government to account with EAEU Law.

The issue regarding judicial independency in the EAEU Court lies in the dismissal of judges' procedure. In the EurAsEC Court, the dismissal of judges can only be done by the Parliamentary Assembly by the proposal of the Interstate Council.¹⁸⁰ Furthermore, in the ECJ, the judges can only be dismissed by unanimous votes of ECJ judges and Advocates General.¹⁸¹ In Paragraph 13 of the EAEU Court Statute, it mentions that the initiative to dismiss a judge may be put forward by the Court, the judge him/herself, and most striking, the member state who nominated the judge.¹⁸² Furthermore, one of the grounds of dismissal provided for in Paragraph 12 of the Statute, mentions "grave misconduct" but does not specify what they clearly are.¹⁸³ This worrying because, since the Court role is to be the impartial arbiter and ensure the uniform application of EAEU law. Adding to the fact that the EAEU Court also allows dissenting opinions, this, therefore, makes judges vulnerable towards political pressure.¹⁸⁴ Since now, if a judge makes a judgement or a dissenting opinion, he/she need to take into account the attitudes of member states. As they might initiate dismissals procedures by simply citing "grave misconduct". In particular,

¹⁷⁸ *ibid* 360.

¹⁷⁹ *ibid*.

¹⁸⁰ Kembayev (n 20) 347.

¹⁸¹ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 11.

¹⁸² Chapter 2, para. 13, Annex 2 to the Treaty on the Eurasian Economic Union

¹⁸³ Miguel Kühn (n 159) 208.

¹⁸⁴ *ibid*.

this is also problematic for the Court's role in further Eurasian integration. As demonstrated before, first the EAEU Court need to take into account the attitudes of the different national court, in order to ensure the effective application of its judgements. Therefore, when the Court makes judgments that are integrative in nature and possibly seen as an exercise of judicial activism, it needs to strike a balance so that such judgments will be followed. However, this already restricts the Court's extent it can take in the Eurasian integration process and adding now the fact that its own judges need to make sure its judgments do not incite anger by the member states. Since political manoeuvring by the member states government who are negatively affected by the Court judgements can force the judge's home state to dismiss him/her. Therefore, in conclusion, the "possibility of premature dismissal of judges of the EAEU Court by the Member States certainly seriously undermines the perceived independence of the judicial body of the Eurasian integration grouping."¹⁸⁵

¹⁸⁵ Kembayev (n 20) 348.

4 Possible Scenarios for further integration by the EAEU

After discussing the development of the Principle of Direct effect and examining the problems regarding the competences of the EAEU Court with respect to further Eurasian integration. In this section, the focus will be on some of the possible ways the Court can push an achieve further integration. There will be mainly three ways scenarios discussed here, namely and ECJ style integration, a state-centric integration, or a “Eurasian Path”.

4.1 ECJ Style of Eurasian Integration

The ECJ is seen as able to significantly push regional integration by using its landmark rulings.¹⁸⁶ The early days of the ECJ resemble in some sense to that of the EAEU Court, in terms of its effectiveness. In the 1950s, it was described as “quite limited” due to limited support from the European political spheres.¹⁸⁷ Nevertheless, its judgments, especially in the early years, have been described as “integration-friendly”, and thus there is a disagreement if the ECJ is pushing for a federalist agenda or just acting in the interest of EU Law.¹⁸⁸ However, the role that the ECJ played in European integration is unquestionable, regardless of its motives. The principle of direct effect that was explicitly established in the *Van Gend en Loos case*, is seen as a cornerstone of a multidimensional legal order, where it puts not only the individual but also the ECJ and national court at the heart of EU law.¹⁸⁹ Nonetheless, because of acceptance by the national judiciaries of the EU member states, and was one of the key aspects of why the ECJ was successful in strengthening the EU legal order and the ECJ itself, resulting in placing a substantial role in European integration.¹⁹⁰

¹⁸⁶ Christina Fanenbruck and Lenya Meißner, *Supranational Courts as Engines for Regional Integration?: A Comparative Study of the Southern African Development Community Tribunal, the European Union Court of Justice, and the Andean Court of Justice* (Freie Universität Berlin 2015) 11 <https://refubium.fu-berlin.de/bitstream/handle/fub188/17965/WP-66-Fanenbruck_Meissner_WEB.pdf?sequence=1&isAllowed=y>.

¹⁸⁷ *ibid* 10.

¹⁸⁸ Katrin Nyman-Metcalf and Ioannis Papageorgiou, *Regional Integration and Courts of Justice* (Intersentia 2005) 67.

¹⁸⁹ Morten Rasmussen, ‘Revolutionizing European Law: A History of the Van Gend En Loos Judgment’ (2014) 12 *International Journal of Constitutional Law* 136, 98.

¹⁹⁰ W John Hopkins, ‘Falling on Stony Ground: ASEAN’s Acceptance of EU Constitutional Norms’ (2015) 13 *Asia Europe Journal* 275, 280.

For the EAEU Court to follow in the footsteps of the ECJ Style, especially in regard to further regional integration, there are some substantial benefits but also major obstacles. Firstly, by following the ECJ, the EAEU Court would be able to achieve uniform application of EAEU Law in a more effective manner by placing itself as the final arbiter of EAEU Law. When analyzing the *Van Gend en Loos* judgment of the ECJ, it can be seen that the ECJ, in essence, gave itself more competences over matters of EU Law. Especially by arguing that in order to ensure that the EU is effective and accountable to the citizens, leaving the matters in the hand of state executives and organizational bureaucracy is not enough.¹⁹¹ Therefore, the EAEU Court can make future decisions in line with those of the ECJ, by arguing that such decisions are necessary to the functioning of the EAEU. Resulting in it solidifying in its positions as the final arbiter on EAEU Law. Moreover, the Court can argue that this is in line with itself fulfilling the objective given to it by the member states, namely ensuring the uniform application of EAEU Law.

Secondly, by following the ECJ path, the EAEU Court can form a stronger connection with national courts. With *Van Gend en Loos*, the ECJ effectively made the national courts of the member states as agents of EU law, especially with the preliminary ruling procedure embedded in the Rome Treaty. National courts are particularly important since they strengthen domestic democratic mechanisms and develop legal tools that address current and past challenges in the member states.¹⁹² Therefore, if the EAEU Court successfully makes national courts as agents of EAEU law, not only does this increase the uniform application of such a law. Rather, it also increases the relevance and accessibility of EAEU law, since national courts would be applying it in response to the dynamic disputes arising across the EAEU. Therefore, through practice, more parties would see how the EAEU legal regime can be an effective arbiter of their disputes. Resulting in an increasing interest to be under the EAEU law regime and supporting the path towards further integration.

Lastly, by following the ECJ path the EAEU Court can also more effectively protect the people in the smaller member states. In the EU, the smaller member states had the most to gain from joining the Common Market., however, there is

¹⁹¹ Eyal Benvenisti and George W Downs, 'The Premises, Assumptions, and Implications of Van Gend En Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions' (2014) 25 *European Journal of International Law* 85, 87.

¹⁹² *ibid* 91.

a perception that their governments could be under pressure for stronger member states.¹⁹³ Therefore, with the ECJ present, the national courts in the small member states knew that they are protected by a supranational court regardless of their national government position.¹⁹⁴ Since now these national courts have a direct line to the ECJ and thus do not have to go through their national government. As a result, such national courts of weaker member states can focus more on protecting the rights given by the supranational regime, without the fear of political pressure from different actors. This is important especially in a relatively new legal regime like the EAEU. Since only through effective use and practice of EAEU Law can it be strengthened. Now if the weaker member state's national courts know that the EAEU Court is there to protect their independence, therefore they can focus on making relevant decisions regarding the protection of rights rather than worrying about political pressure from their own government or those from the stronger member states.

Now the obstacles that prevent the EAEU Court from successfully adopting an ECJ style of integration are numerous, however, three main ones will be highlighted in response to the benefits outlined above. Firstly, in regard to the EAEU Court acting as the final arbiter of EAEU Law, it has been pointed out that it lacks some of the fundamental procedure which was available to the ECJ. Primarily, the lack of an effective preliminary ruling procedure, which has been discussed in previous sections. To summarize, an effective preliminary ruling procedure not only helps the uniform application of laws but also the protection of individual rights.¹⁹⁵ As such, the explicit removal of the preliminary ruling procedure from the EAEU regime effectively meant the removal of national courts from the EAEU judicial system.¹⁹⁶ Resulting, in the EAEU Court not having its place as the final arbiter of EAEU Law, and the member states who hold the keys to its final interpretation.¹⁹⁷

Secondly, the attitudes of current national courts do not really demonstrate the view that the EAEU Court as someone to form stronger connections with. This was demonstrated as mentioned in previous sections, where the Russian national courts have been unwilling to use the preliminary ruling procedure

¹⁹³ *ibid* 87.

¹⁹⁴ *ibid*.

¹⁹⁵ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 7.

¹⁹⁶ Karliuk, 'Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship' (n 32) 45.

¹⁹⁷ *ibid*.

when it was available to them under the EurAsEC regime.¹⁹⁸ As such, it questions if the national courts do indeed want to become agents of EAEU law, as they might not be convinced or see the relevance of it.

Lastly, since national courts are removed from the EAEU judicial system, this means there are more chances for them to be subject to pressure, especially since most of the member states of the EAEU are considered to be authoritarian.¹⁹⁹ Coupled with the fact that the countries in the Eurasian regions formed mostly Russia-centric economic integrations, in light of the benefits provided by Russia.²⁰⁰ Especially in cases like Armenia, where it was given a gas discount when it agreed to join, and a further discount when it actually joined.²⁰¹ Undoubtedly, this means that the national court, especially of weaker member states need to consider the political backlash and pressure from Russia if it becomes agents of EAEU Law. In addition, since national courts do not have direct access to the EAEU Court, they cannot rely on the Court to make decisions that might guarantee the rights provided by the EAEU for the particular situation. This ultimately results, in EAEU Law not being put into practice in national courts, and therefore affecting its relevance and strength. Resulting in a weaker push for further integration.

In conclusion, the path taken by the ECJ does seem at first glance to be a highly appealing one. This is due to the fact that the benefits include securing the role as the primary arbiter of EAEU law, the symbiotic relations with national courts, and the increased protection for the citizen in weaker member states. However, the EU and the EAEU, have a very different background to them, and thus it not as simple as to just copy and apply it in the Eurasian context. As some obstacles include the lack of a preliminary ruling procedure, the attitude of national courts, and the influence of Russia in the EAEU. Therefore, it is highly debatable if the integration path taken by the ECJ is the right one for the EAEU Court.

¹⁹⁸ Diyachenko and Entin (n 7) 61.

¹⁹⁹ Sean Roberts, 'The Eurasian Economic Union: The Geopolitics of Authoritarian Cooperation' (2017) 58 Eurasian Geography and Economics 418, 423.

²⁰⁰ Selda Atik, 'Regional Economic Integrations in the Post-Soviet Eurasia: An Analysis on Causes of Inefficiency' (2014) 109 Procedia - Social and Behavioral Sciences 1326, 1334.

²⁰¹ Sean P Roberts and Arkady Moshes, 'The Eurasian Economic Union: A Case of Reproductive Integration?' (2016) 32 Post-Soviet Affairs 542, 558.

4.2 State-Centric Style of Integration

The Eurasian post-Soviet states have a typical strong attitude regarding sovereignty, as demonstrated by the tensions caused when Vladimir Putin made remarks undermining the independence of EAEU member states.²⁰² Therefore, an active role taken by the EAEU institutions, specifically by the EAEU Court, in the push for further Eurasian integration might not be the most effective way towards achieving this. One of the benefits of allowing the member states to completely steer the direction of Eurasian integration and limit the activities the supranational organization conducts is that it ensures the survival of the EAEU. This has been the case of much post-Soviet integration organization, where they have survived because of them conducting only minimum activities.²⁰³ When applied to the context of the EAEU Court, there is one case where it supports that the Court should adopt a more laid-back approach to ensure its survival. Due to the activist tendency of the EurAsEC Court, which irritated the member states, the survival of an Eurasian Supranational Court was seriously threatened.²⁰⁴ Only through the reduction of powers, was the EAEU Court able to continue functioning as the successor of the EurAsEC Court. Therefore, if the EAEU Court adopts a more activist attitude and pushes for further integration, this might irritate the member state further, and lead to further curtailing of its power, to the extent that it might become a non-functioning court.

Another benefit of the state-centric approach is that member states will not be able to put the blame on the EAEU for the problems associated with it. Since in such an approach, the member state would not want to risk being blamed for issues that they might have caused due to them taking the reins of Eurasian integration.²⁰⁵ In such a case, Russia would want to keep the prestige of the EAEU, since it uses as a tool for its foreign and regional policy.²⁰⁶ Other member states, such as Armenia and Belarus, will make sure the EAEU stays relevant, as long as it serves their interests, such as the right to work in Russia for its citizens.²⁰⁷ As a result, the member states would not try to put blame towards the EAEU, and this, in turn, allows the EAEU Court to continue functioning and stay relevant in the

²⁰² Mostafa and Mahmood (n 42) 169.

²⁰³ *ibid* 170.

²⁰⁴ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 8.

²⁰⁵ Mostafa and Mahmood (n 42) 170.

²⁰⁶ *ibid*.

²⁰⁷ *ibid*.

region. Albeit in such a case the Court would rather serve the interest of member states and act more as an administrative court rather than a quasi-constitutional court since it would just be checking if such interests are in line with EAEU Law, but not pushing for any further integration.²⁰⁸

Lastly, another possible benefit of allowing a state-centric approach to Eurasian integration is the possibility of the EAEU gaining further competences down the line due to political and functional spillover. It can be highlighted that the main purpose of the EAEU was for economic reasons. Some have described that the Russian-led Eurasian integration aims are not to achieve Russian dominance over Eurasia but rather develop a regime where uncertainty, transaction costs and market failures will be minimized.²⁰⁹ As such, the focus on the economy in the Eurasian region, namely through the development of the Customs Union and a sort of Eurasian common market, serves a solid groundwork for integration.²¹⁰ Some have also estimated that further integration in the EAEU would lead to significant welfare gains in all of the member states.²¹¹ As a result, of the increase of welfare in the EAEU regions, the member states might feel that it would be more effective and reasonable to delegate some of its competences to the EAEU in order to make sure these welfare gains remain. In connection to this, weaker member states might also trust the EAEU more in securing these welfare gains, as opposed to Russia. In turn, to continue the success of the EAEU, Russia might agree towards this further transfer of competences. This would help also the political dimension of the EAEU, in showing that it is not Russia-centric, would help build further trust in the EAEU.²¹²

Nevertheless, there are some drawbacks with the State-Centric model. Firstly, there is no guarantee that the member states would push for further integration in the EAEU. Due to the falling of oil prices and the sanctions placed on Russia, this has severely weakened not only its economy but also the regional integration

²⁰⁸ Petrov and Kalinichenko (n 19) 306.

²⁰⁹ Kirkham (n 4) 113.

²¹⁰ Evgeny Vinokurov, 'Pragmatic Eurasianism: Prospects for Eurasian Integration' (2013) 11 *Russia in Global Affairs* 93 <<https://papers.ssrn.com/abstract=2741636>> accessed 27 August 2019.

²¹¹ Alexander Knobel and others, 'Deep Integration in the Eurasian Economic Union: What Are the Benefits of Successful Implementation or Wider Liberalization?' (2019) 60 *Eurasian Geography and Economics* 177, 200.

²¹² Vinokurov, 'Pragmatic Eurasianism' (n 210) 93.

in the EAEU.²¹³ This has significantly impacted the other member states, such as in Armenia, where it lost 50% of the value of remittance coming from its guest workers in Russia.²¹⁴ As a result, the economic attractiveness of the EAEU is decreasing, and thus the other member states will try to protect their own markets from being dominated or heavily relying on Russia.²¹⁵ Therefore, this seriously questions if further Eurasian integration is on the minds of the member states and if they will pursue it. The fallout could be another stagnation in the EAEU project or worse the end of the organization itself.

In line with the above-mentioned drawback, there is also no guarantee that even if the EAEU achieves welfare gain, that it would result in the member state transferring more competence to it. In fact, past experiences with the EurAsEC might show that the member states favour power-preserving measures.²¹⁶ Coupled with the attitude of the national courts, where for example the Constitution Court of Russia, emphasizes that it will follow its own interpretation of EAEU Law.²¹⁷ This put doubts on if the different actors in the EAEU would actually be willing or even consider that it would be more effective to transfer competences to the EAEU level. Since, theoretically, if the EAEU achieves significant progress due to adopting a state-centric integration approach, some of the actors would probably not see the need to transfer competences. In regards to the EAEU Court, the national court might feel that their limelight is taken away when they have effectively brought success to the EAEU when the Court has been a passive actor.

Lastly, there is a possibility that with the state-centric approach, the EAEU becomes only an administrative organization and not one that actually facilitates and pushes for further integration. One of the premises of Eurasian integration was that the member state was ready to commit in delegating their recently acquired sovereignty to a supranational institution.²¹⁸ However, in reality, the member states have attempted to use economic integration to strengthen their own sovereignty, an example being the institutional arrangements of the

²¹³ Jan Strzelecki, 'The Eurasian Economic Union: A Time of Crisis' (Centre for Eastern Studies (OSW) 2016) 5 <<https://www.osw.waw.pl/en/publikacje/osw-commentary/2016-02-01/eurasian-economic-union-a-time-crisis>> accessed 27 August 2019.

²¹⁴ *ibid.*

²¹⁵ *ibid.* 7.

²¹⁶ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 7.

²¹⁷ *ibid.* 11.

²¹⁸ Roberts and Moshes (n 201) 560.

EAEU.²¹⁹ Furthermore, there seems to be a lack of willingness to transfer sovereignty to the supranational level in order to overcome possible integration blockades at the national level, as was done in the EU.²²⁰ Since by keeping its sovereignty, member states can act with more independence and was the case of Russia with the Crimean Crisis and the Ukrainian Conflict.²²¹ This demonstrates, the inherent tensions and coordination problems that exist, and therefore the more unlikely chances that there can be a sort of spill-over in the EAEU.²²² Resulting, in the EAEU being some sort of administrative body, or specifically in the case of the EAEU Court an administrative court, due to the lack of willingness to transfer competences to it. Therefore, in such cases, it would be very difficult for the EAEU to facilitate any further integration, and thus only sticking to the specific objective laid down in the Treaty.

In conclusions, a state-centric approach might guarantee the continuing survival of the EAEU, the protection from blame, and the chance to get further competencies down the road. However, the past history of regional integration in the Eurasian context, place some heavy doubts if such benefits can happen. Especially in light of the existing tensions between member states in the EAEU, as a result of Russia's recession, and also a growing protectionist attitude that is not necessarily conducive for Eurasian integration. As such, this also questions if the State-centric model is the right approach for the future of Eurasian integration.

4.3 A hybrid approach – Eurasian Direct Effect?

After examining two opposing sides regarding the possible path that Eurasian integration can take. It might be possible that there is a third way that the EAEU and its institution can push for further integration. A sort hybrid between state-centric and judicial activist approach. This approach can be deduced from the *Vertical Agreements Case*, where the principle of direct effect is introduced. It must be recalled that in previous sections is has been mentioned that the cases, while it introduces the principle of direct effect, it does not share

²¹⁹ *ibid.*

²²⁰ Alexander Libman, 'Russian Power Politics and the Eurasian Economic Union: The Real and the Imagined' (2017) 1 *Rising Powers Quarterly* 81, 93.

²²¹ *ibid.*

²²² Roberts and Moshes (n 201) 560.

many similarities to *Van Gend en Loos*.²²³ To recall, whereas the ECJ used its case to give itself more competences, the EAEU did not.²²⁴ One of the probable underlying reason for this is the Court is aware of the weariness of the member state towards judicial activism in the EAEU. In addition, the substantive elements of its EAEU's direct effect principle are basically that it must be common policies that have "unified legal regulations" and transfer of competence.²²⁵ This is inherently different from the ECJ's strict criteria for the application of direct effect. However, when considering that the national courts have generally adopted EAEU Court judgments that contain "universal rules applicable to a broad range of similar cases".²²⁶ It demonstrated possibly why the Court did not adopt a strict ECJ style of criteria since it would probably be rejected not only by the member states but also their national courts. This is the premise behind the idea of a third hybrid integration approach, that the EAEU institutions, especially the Court, will still exercise judicial activism and push for further integration. But rather than aiming to imitate the style of the ECJ, of which the member states are wary off, the EAEU Court seem to adopt a reconciliation approach. Meaning that, as demonstrated in the *Vertical Agreements Case*, the EAEU Court will in its advisor opinion, give principles that could be considered "universal rules", and the national courts may adopt such principles in its own judgments. The result of more national courts adopting such principles, like direct effect, is that it establishes a practice and strengthen the EAEU legal regime, especially in light of the fact that national courts are removed from this regime.

One of the benefits of such an approach is that it allows the EAEU Court to have a judicial activist attitude without making the member states wary about it. Since in this approach, it must be reminded that member states still have power over the Court, such as the fact that they have the right of joint interpretation in regards to advisory opinions.²²⁷ Therefore, the Court knows that in the development of any new principles or landmark cases it needs to take into account the interest and opinion of member states. As such, when it pushes for further integration, it does it in a sense that is allowable under the eyes of the

²²³ Rosano (n 56) 217.

²²⁴ Entin and Pirker (n 23) 21.

²²⁵ 'Summary of Case No. CE-2-1/1-17-BK (Clarification upon the Request of the Ministry of Justice of the Republic of Belarus)' (n 24).

²²⁶ Diyachenko and Entin (n 7) 65.

²²⁷ Lushnikov Andrey and Lushnikova Marina, 'The Eurasian Model of International Labour Legislation in the Context of Globalization' (2016) 4 Russian Law Journal 108.

member states. One example is of course that the principles developed by the EAEU Court should not explicitly infringe on the national sovereignty of the member states. Especially when it is clearly seen that member states, such as Russia are jealous in maintaining its own sovereignty and eagerly advancing its own views.²²⁸ Only by taking such interest into account, can the EAEU Court make integrative principles that would actually be followed not only by member states but also the national courts.

Another benefit is that this approach might push the need for further integration from inside the member states themselves. As have reiterated in previous sections, national courts generally adopt EAEU judgments that contain universal rules that can be applied to a broad range of similar cases.²²⁹ Now if the EAEU Court continues to develop landmark judgments and principles that the national courts are willing to apply in their own cases that touch upon EAEU Law. Firstly, it creates an indirect link between the EAEU Court and national courts. Since in the current regime, there is no link, therefore only through the initiative of the national courts can a sort of link be established. In order to convince national courts to start such initiative, the EAEU Court in response needs to show that its arguments are well-founded and that it provides general guidance for application in domestic proceedings.²³⁰ Secondly, the more national courts use the judgments and opinions of the EAEU Court, the more its own authority over EAEU law is strengthened. As a result of its strengthened authority, national courts might request their member states to be part of the list of national authorities that have the right to ask the EAEU Court for advisory opinions. Since in such cases the court might feel it is more effective to ask the EAEU Court directly rather than through the national governments. This is, therefore, an example of how further integration can stem from a push from inside the member states. In such cases, we see that the possible situations of the EAEU Court having a judicial activist tendency. However rather being the main pusher for increased integrations, it rather influences other actors inside the member states to conduct such push.

Therefore, another benefit of this approach is that the EAEU Court can protect itself more from political backlash. The case of the EurAsEC Court's

²²⁸ Richard Sakwa, 'The Problem of "the International" in Russian Identity Formation' (2012) 49 *International Politics* 449, 452.

²²⁹ Diyachenko and Entin (n 7) 65.

²³⁰ *ibid* 62.

judicial activist tendency, demonstrate that direct confrontation with the member states is not healthy for the functioning of the court.²³¹ As such by the Court taking a more subtle approach towards further integration, it nevertheless protects itself. This happens due to the more conciliatory tactic that the Court may apply, in this approach, towards integration, where it tries not to go into direct confrontation with member states. Rather, it can present the push for integration as more of a united front by mainly different domestic actors, where the Court plays a supporting role. In short, the Court, in essence, places a new lawyer of quasi agents of EAEU Law (national courts who acknowledge its authority) between it and the member states, in order to give it more breathing room for its judicial activist tendencies that it may have under this hybrid approach.

There are also some particular drawbacks with this approach. There is no guarantee that the member states would not be weary with the EAEU Court own judicial activism. The example of EurAsEC Court, not only showed what happened when a supranational court goes into a confrontation with the member states but also shows the severity of their response.²³² Examples of this are the stripping of the EAEU Court from any legal provisions giving it non-contentious jurisdiction, and a high barrier for the revival of preliminary rulings.²³³ There further no protection for the EAEU Court that does not allow the member states to further strip powers when it feels that the Court has overstepped its competences. Compounded with the fact that the member states of the EAEU, have been described as consolidated autocracies and very jealous over their sovereignty.²³⁴ Any hint of judicial activism in the EAEU Court, might be view with irritation and motivate the member states to make the court weak or specifically an administrative type of court, only checking the compatibility of EAEU law and national law with the EAEU treaty.²³⁵

Another possible drawback of this approach is the fact it reduces the effectiveness of the EAEU Court. It is generally agreed that impartiality should

²³¹ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 8.

²³² *ibid.*

²³³ Kembayev (n 20) 359–360.

²³⁴ Alexander Libman and Evgeny Vinokurov, 'Autocracies and Regional Integration: The Eurasian Case' (2018) 30 *Post-Communist Economies* 334, 335.

²³⁵ Petrov and Kalinichenko (n 19) 306.

be a defining quality of any international court.²³⁶ This implies that the actors are evaluated to the extent on which they observe their obligation rather than on factors unrelated to such, for example, the interest of national governments.²³⁷ However, in this hybrid approach, the EAEU Court has to take into account the different political interest of member states in order to make sure its judgments and opinion do not cause confrontation. This can be argued that it does further legitimize the Court, but rather makes different actors lose trust with it. Since now different actors might not see the point to bring their cases to the EAEU Court when national courts might have a more legitimizing image. In connection, there is always the possibility that when the Court explicitly takes into account of the interest of members state, that it won't be seen as an agent of EAEU Law, but rather as an agent of the member states political agendas.

One final possible drawback is that this approach does not necessarily give the EAEU Court additional protection from backlash by the member states. To recall, due to the judicial activist attitude of the EurAsEC Court, in the EAEU Court Statute, the member states made a significant change in regards to the dismissal of judges. This is that unlike in the EurAsEC, judges can only be dismissed by the Parliamentary Assembly, now in the EAU, they can be dismissed at the initiative of the home member state.²³⁸ As a result, even if different domestic actors, like national courts, become agents of EAEU law, this does not give the Court further protections. Since the member states can anyway consolidate together and dismiss the judges, they feel are judicial activist, regardless if domestic actors acknowledge the Court's authority over EAEU law. As long as member states have a direct way to influence the composition of the EAEU Court, it cannot protect itself effectively against the political backlash.

In conclusion, the hybrid approach, demonstrated in cases such as *Vertical Agreements case*, provide a sort of middle point between a heavily judicial activist court and a complete state-centric integration approach. In this case, the Court has a judicial activist tendency but takes into consideration the member states interest in order to avoid confrontation. Some of the benefits of such an approach are that it allows the Court to have a judicial activist tendency, might initiate a push for further integration by domestic actors, and could increase

²³⁶ Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 *American Political Science Review* 417, 417.

²³⁷ *ibid.*

²³⁸ Kembayev (n 20) 347.

protection from political backlash. However, the drawback, include the possibility of an increase of political backlash due to the court having any judicial activist tendency, reduction in the Court's effectiveness, and question if such an approach actually offers more protection against the political backlash. As such the effectiveness of this hybrid approach can only be seen if it keeps being implemented in practice.

5 Conclusion

The principle of direct effect was seen as a landmark development in the context of European integration. The resulting effects allowed individuals to claim the rights granted by EU law and enforce them in their national courts without needing the express permission of the member states.²³⁹ In turn, it also made national courts as a part of the European judiciary system and agents of EU law. Therefore, when the EAEU Court developed the same principle in the *Vertical Agreements case*, it might have been perceived that the Court is following in the footsteps of the ECJ in the pushing of further regional integration.

However, upon further examination of the principle itself, it can be argued that it is not comparable to the ECJ's principle. This is based on the premise by some considering the EAEU is not a symmetrical reflection of the EU.²⁴⁰ Upon examination of the reasoning and legal basis, it can be seen that the principle was formed to strengthen EAEU Law, and the basis was stipulated in the EAEU Treaty. Consequently, this may also serve as a blueprint for the future development of likewise legal principles. However, whereas the ECJ's principle of direct effect was legally binding and had strict criteria in order to apply, the EAEU's did not. In the *Vertical Agreements case*, firstly the Court was only asked for an advisory opinion, which in its nature is only recommendatory. Moreover, the criteria developed by the Court, had some very vague elements, such as the definition of "common rules". This all then ties down to the effectiveness of the principle in the Eurasian spheres, especially when its member states view the concept of supranationality with weariness. Therefore, when compared with the EU's direct effect principle, it is possible only similar in the spirit of strengthening regional legal regimes. However, due to the difference in the actions of the respective courts and the substantive difference in each principle,

²³⁹ Cini and Borragán (n 34) 169.

²⁴⁰ Rosano (n 56) 219.

it demonstrates that the EAEU Court did not simply restate *Van Gend en Loos* in the Eurasian regime.

After determining that the EAEU Court did not refer or mirrored the ECJ regarding the direct effect principle, the integration capability of the Court needed to be examined in order to show what it might be capable to do in regard to further regional integration. The Court's competencies are in some sense highly restricted, such it cannot hear cases brought by the EAEU institutions or become a rulemaking body. This in turn seriously undermines its potential as an instigator or facilitator of regional integration. Moreover, there are some serious obstacles that the Court faces that will allow it to take on a leading role in Eurasian integration. Firstly, the preliminary ruling procedure has been effectively removed from the Eurasian regime. This is argued to be due to the member states wanting to limit the ability of the Court to define the implied powers of an organization.²⁴¹ The importance of such a procedure is that it would have allowed national courts to be agents of EAEU Law, and further ensure the uniform application of such law. However, when examining the attitude of the national courts of the largest EAEU members, the Russian Federation, it also further undermines the integrative capacity of the court. Especially due to the tendency to reject the supranational court's judgements if it feels that it is overstepping its competence. Lastly, the independence of the EAEU Court also questions, especially in the case of the dismissal of its judges. The issue here is that the member states have the power to initiate the dismissal procedure of its own judges in the EAEU Court. This all cumulates into questioning if the EAEU Court does have the capacity to push for further integration.

There are some possible scenarios on how the EAEU Court might be able to push for further integration. Firstly, it could follow the footsteps of the ECJ. The benefits include securing the role as the primary arbiter of EAEU law, the symbiotic relations with national courts, and the increased protection for the citizen in weaker member states. But the obstacle includes the lack of a preliminary ruling procedure, the attitude of national courts, and the influence of Russia in the EAEU. Secondly, there is the State-Centric approach, where it might guarantee the continuing survival of the EAEU, the protection from blame, and the chance to get further competencies down the road. However, past regional integration projects in the Eurasian context, existing tension in the

²⁴¹ Karliuk, 'The Limits of the Judiciary within the Eurasian Integration Process' (n 76) 10.

EAEU, and the growing protectionist attitude place doubts on the approach. Lastly, there is a hybrid approach, where can be demonstrated in cases such as *Vertical Agreements*. This approach might allow the Court to have a judicial activist tendency, initiate a push for further integration by domestic actors, and could increase protection from political backlash. However, the drawbacks of this approach, include political backlash due to the court having any judicial activist tendency, reduction in the Court's effectiveness, and question if this approach offers actual protection against the political backlash. Therefore, from this we see that there is no one size fits all approach. Only through time and practice, can we determine which approach it uses and works for pushing for further Eurasian integration.

In conclusion, the direct effect principle developed by the EAEU Court in the *Vertical Agreement case* is not simply a Eurasian restatement of *Van Gend en Loos*. But rather, it is a principle that highlights the possibility of how the EAEU Court may push for further regional integration. However, the competences and the obstacles the Court faces, show that it might not be able to use the newfound direct effect principle to effectively push for greater regional integration. The possible scenarios and approaches for further Eurasian integration, highlight the complicated task of the Court to balance the national interest of member states and the push to make the EAEU stronger. As such, only through time and practice can it be determined if the Eurasian direct effect principle will be a prime initiator for further Eurasian integration.

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About the Author

Felix Sames is a public affairs consultant based in Brussels, Belgium, with an interest in topics related to regional integration. He holds a Master of Laws in European and European Legal Studies from the Europa-Kolleg Hamburg, a Master of Laws in International and European Law from Tilburg University in the Netherlands and a Bachelor of Laws from Universitas Pelita Harapan in Indonesia.

Contact: felix.t.sames@gmail.de

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Editors

Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Jörg Philipp Terhechte, Managing Director
Dr. Andreas Grimmel, Research Director
Windmühlenweg 27
22607 Hamburg, Germany
<http://www.europa-kolleg-hamburg.de>

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