

THE REQUEST FOR PRELIMINARY RULING AND PRACTICE IN THE REPUBLIC OF CROATIA

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ABSTRACT

The Republic of Croatia joined the European Union on 1 July 2013 marking the end of a process which started in 2001 with the signing of the Stabilisation and Association Agreement. Membership in the Union brought significant changes in Croatian legal practice, particularly in its case law. Reference-based relationship between national courts and the Court of Justice of the European Union (CJEU) calls for changes in existing perspective. National courts are under an obligation to give full effect to applicable provisions of EU law and, if necessary, to refuse of their own motion application of any conflicting provision of national legislation. Furthermore, the existence of a rule of national law whereby courts against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot deprive the lower courts of the right provided for in Article 267 of the Treaty on the Functioning of the European Union (TFEU) to refer questions on the interpretation of EU law to the CJEU. From the outset, the author will lay down general remarks on the preliminary ruling procedure, on the scope and relevance of Article 267 TFEU and on the national court's perspective. While discussing the application of EU law in Croatia, the focus will be on the "shift" of powers between legislative and judicial authority arising from direct effects and supremacy of EU law. Namely, the duty of national courts to set aside incompatible national legislation on their own motion amounts to a derogation of existing national legislation. Deciding cases by applying directly applicable EU legislation calls for no prior legislative activity on the side of national legislator. The application of EU law in Croatia also calls for modification of existing judicial hierarchy. Rules of binding decisions of superior courts do not apply as they did since the lower courts still have the right to refer questions of interpretation of EU law to the CJEU whenever in doubt about the correct interpretation of EU law. There is also a matter of possible „bypassing“ of the Constitutional Court (in case of provision of national law that is not only contrary to EU law, but also unconstitutional) that will be addressed. Statistics and summarised analysis of CJEU case law on request for preliminary rulings from Croatia will be given as well as references to subsequent case law of domestic courts. The emphasis will be put on the issues raised so far, namely Article 18 of the Criminal Procedure Act and the case law of Supreme Court of the Republic of Croatia on staying criminal procedure when the request for the preliminary ruling has been made. Also, reference will be made to the existing case law on staying civil procedures when the request for the preliminary ruling has been made.

Keywords: Republic of Croatia, CJEU, preliminary ruling, Supreme Court of the Republic of Croatia

1. KEEPING UP WITH NEW LEGAL ORDER

Croatian membership in the EU brought significant changes for national courts. It is not only because domestic courts are obliged to apply numerous new pieces of European legislation, which is enough of a challenge as it is, but also because of the manner in which the now applicable European law applies.

Direct effect of European law and its supremacy over national legislation and jurisprudence call for a different kind of diligence of Croatian judges. If the matter at hand relates to Union issues, it does not suffice to make a decision in accordance with national law. At best, judges are to interpret domestic legislation in a way to enable full effects of the applicable European rule on the matter. If such an interpretation is not possible without acting *contra legem*, the courts might be under duty, depending on the nature of impugned situation, to set aside provision of domestic law entirely, and directly apply European norms.

When it comes to situations regulated by the Union, relying entirely on domestic laws is a luxury that does not exist anymore. While the fact that courts are not lawmakers remains, ultimately the courts are the last line of the defence of the European legal order with both the power and duty not to apply incompatible national legislation. In other words, domestic laws and well established practice of domestic courts are not an excuse for hindering intended effects of EU law. Judges should be well aware and mindful of such a duty. It is a novelty but a novelty well worth accepting as the mistakes in application of EU law can rise issues of responsibility both at a domestic and European level.

Furthermore, as the obligation to properly apply EU law lies with all judges working at all levels of jurisdiction; all judges should pay attention to it. The idea that only the highest courts in a country are under an obligation to apply European law is incorrect. While it is true that the highest courts bear specific responsibilities to that effect, it by no means implies that lower courts are without responsibilities. The earlier the procedure in which the application of European law is recognized, discussed and applied, the better.

When a question of interpretation of EU law arises it should not suffice, as judges normally do, to weigh all arguments, reach a reasoned decision and let appellate courts deal with it. Although it is true that lower courts are free to essentially do exactly that, one should be mindful of preserving the principles of procedural economy and reasonable length of procedure. In that regard, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (further in text: ECHR) applies.

Application of European law brings us to the biggest novelty of all – its interpretation. A new player has stepped in on the Croatian judicial scene. Not only that national courts are to seek guidance on interpretation of law applicable in Croatia from a Court sitting up north in Luxembourg, but they are not bound by such interpretation when given by superior national courts if that interpretation is contrary to EU law. Consequently, rules on binding decisions of superior courts are somewhat overridden. It changes existing dynamics in judicial hierarchy and requires adjustments of the existing practice.

2. INTERPRETATION OF EU LAW

As noted above, when interpreting EU law, domestic courts are not bound by the interpretations of law given by higher national courts, not even the highest one. The existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice.¹ “The lower court must be free, in particular if it considers that a higher court’s legal ruling could lead it to give a judgment contrary to EU law, to refer to the CJEU questions which concern it.”² The reasoning is simple – the CJEU alone bears exclusive jurisdiction for the correct and uniform interpretation of EU law in all Member States, regardless of different national circumstances. Uniform interpretation enables uniform application.

This exclusive privilege of the CJEU cannot be circumvented by the transpositions of some directly applicable norms of EU law (i.e. regulations) into national legislation by way of merely copying relevant EU norms into national legislation. Such a transposition essentially creates a situation in which European norms become domestic and, as such, are exclusively interpreted by domestic courts. That is the reason why a regulation is a binding legislative act and must be applied in its entirety across the EU. For example, when the EU wanted to make sure that there are common safeguards on recognition and enforcement of judgments in civil and commercial matters, it adopted a regulation³. Given such universal application of regulations, one can assume that transposition of regulations into national law is

¹ Judgment of 16 December 2008, *Cartesio*, C-210/06, ECLI:EU:C:2008:723, paragraph 94

² Judgment of 22 June 2010, *Melki and Abdeli*, joined cases C188/10 and C-189/10, ECLI:EU:C:2010:363, paragraph 42

³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1)

useless – courts do not apply domestic legislation, even if completely compatible with regulations, when dealing with matters in which there is directly applicable EU regulation. Usefulness of such a practice is less important, though. More serious is the issue of interpretation. As stated earlier, when written in national codes, European norms become national norms and domestic courts could be tempted to interpret them essentially as they wish. Such interpretation may vary in different Member States, hindering the uniform application of the law which originated as European and was intended for unification.

Even though Croatian lawmakers were generally mindful of the fact that EU Treaties and regulations have general application and are binding in their entirety and directly applicable in all Member States, there are some exceptions where EU law was rewritten in domestic codes. The most serious is the one concerning Article 18 of the Criminal Procedure Act which basically copies Article 267 TFEU. The case-law developed and its compatibility with EU law will be analysed later on in this article.

On the other hand, it is possible to make provisions of EU law applicable to purely internal situations. It is due to reference made by domestic law to the contents of EU provisions.

Recently adopted legislation on private international law potentially creates seemingly confusing situation in which Croatian courts are to apply EU regulations providing that matters at hand fall outside of scope of some EU regulations.

The Act on Private International Law came into force on 29 January 2019.⁴ It determines which state law is applicable to situations crossing out the borders of one particular state involving a “foreign element“; which country’s courts are the appropriate forum for the dispute; and the recognition and enforcement of judgments rendered by foreign courts.

It is a subsidiary legislation and applies only when the issue at hand is not regulated by directly applicable European law, international agreement or other applicable laws in force.

However, according, for example, to Article 25, which regulates law applicable to contractual obligations, if such obligations fall outside the scope of Regulation Rome I, they are still regulated by the same Regulation (if there is no applicable international agreement or *lex specialis*).⁵

⁴ Official Gazette No 101/2017

⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, p. 6.-16.)

Although such a legislative solution may be regarded as progressive and modern, it should be noted that lawmaker did not make European norms subject to entirely domestic interpretation regardless of the fact that the issue at hand falls outside the scope of EU law.

In other words, if the Supreme Court of Croatia is faced with a dispute which falls under the scope of Regulation Rome I, if in doubt on the correct interpretation of Regulation, it is obliged to seek guidance from the CJEU. Just as well, if the same court is dealing with an issue outside of scope of the same Regulation, it still applies the Regulation and is obliged to seek guidance on proper interpretation.

“It is clear, however, from the Court’s settled case-law that the Court has jurisdiction to give a preliminary ruling on questions concerning provisions of EU law in situations in which, even if the facts of the case in the main proceedings do not fall directly within the field of application of EU law, provisions of EU law have been rendered applicable by domestic law due to renvoi made by that law to the content of those provisions ... In such circumstances, it is clearly in the interest of the European Union that, in order to forestall future differences of interpretation, provisions taken from EU law should be interpreted uniformly ... irrespective of the circumstances in which they are to be applied. Thus, an interpretation by the Court of provisions of EU law in situations not falling within the scope of EU law is warranted where such provisions have been made directly and unconditionally applicable to such situations by national law, in order to ensure that those situations and situations falling within the scope of EU law are treated in the same way”.⁶

3. REFERENCE PROCEDURE – CROATIAN EXPERIENCE

3.1. Foundation – Article 267 TFEU

The interpretation of European norms is given by the CJEU in a special reference procedure that is envisaged as a form of dialogue between national courts and the CJEU.

Foundations are laid down in Article 267 of TFEU.

In fact, preliminary ruling proceedings make the most significant part of CJEU workload. In 2017 alone, out of 739 cases brought before CJEU, 533 were references for preliminary ruling (72 %). In the same year, the CJEU gave judgments

⁶ Judgment of 7 November, *C and A*, C257/17, ECLI:EU:C:2018:876, paragraphs 31.-33. See, to that effect and judgement of 18 October 2012, *Nolan*, C583/10, EU:C:2012:638, paragraphs 45.-47. and of 22 March 2018, *Jacob and Lassus*, C327/16 and C-421/16, EU:C:2018:210, paragraph 34

in 447 preliminary ruling proceedings while completing 699 cases all together (63,9 %).⁷ In CJEU practice, the references of interpretations are far more numerous than those concerning validity of secondary legislation, so the rulings on validity are not analysed in this paper.

The decision to refer the question of interpretation of EU law to the CJEU is based on cooperation between domestic courts and the CJEU. The ratio of that cooperation is to enable proper and uniform application of European law across the European Union. When the CJEU gives a preliminary ruling on interpretation of some norm of EU law than it essentially explains how that norm should have been understood and applied from the very moment it came into force.⁸ That makes the interpretation rulings of CJEU ones with *ex tunc* effect⁹ since the given interpretation is applicable even to those legal relations that originated before the ruling was given. The interpretation obliges not only the court seeking the ruling and all other national courts of all instances deciding the dispute which gave rise to the interpretation, but also all the courts of all the Member States in EU (*erga omnes* effect).

The ruling of the CJEU is the ruling solely on interpretation of EU law while the national court remains with the duty to rule on the dispute at hand.

Article 267 TFEU clearly enables lower courts and obliges courts of last resorts to request the CJEU to give a ruling on interpretation of EU law.

The obligation of courts of last resorts (last instance court) to refer questions of interpretation to the CJEU is laid down in Article 276/3 TFEU and is linked to the role which those courts have in their respective Member States – to uniform national case law. When it comes to application of particular provisions of EU law, the development of divergent case law across EU must be avoided.

On the other hand, the opening of the possibility for lower courts to make references for preliminary rulings on interpretation (Article 267/2 TFEU) aims to applying EU law in all instances of adjudication and motivates judges of lower instances to correctly apply EU law. The benefits of such an approach on length of proceedings and procedural economy are obvious.

The fact that Croatian courts of lower instances are well aware of the possibility to refer and of the benefits of such a referral transpires from the fact that so far Croa-

⁷ 2017 Annual Report, The year in review, [https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_pan_2018.0421_en.pdf] Accessed 20.03.2019

⁸ Judgement of 7 August 2018., *Hochtief*, C-300/17, ECLI:EU:C:2018:635, paragraph 55

⁹ Judgement of 16 January 2014., *Pohl*, C-429/12, ECLI:EU:C:2014:12, paragraph 30

tian courts made a total of nineteen references for preliminary rulings.¹⁰ Seventeen of these were made by courts of first instances - municipal courts made ten references (all in civil procedures), lower misdemeanour courts made two references, commercial courts made four and one reference was made by county court acting as a court of first instance in criminal procedure. High courts made two references (High Administrative Court and High Commercial Court). The Supreme Court made none so far. The CJEU gave twelve decisions with seven procedures still pending.

3.2. Preliminary procedure - way around otherwise binding legal opinions of higher courts and constitutional court

The possibility to directly apply for cooperation of the CJEU as the only relevant authority on proper interpretation of EU law gives rise to changes of the position of lower courts in the national judicial hierarchy.

As noted in *Rheinmühlen-Düsseldorf*, a rule of national law, pursuant to which “a court is bound on points of law by the rulings of a superior court cannot deprive inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings... inferior court must be free, if it considers that ruling on law made by the superior court could lead to a judgement contrary to Community law, to refer to the Court questions which concern it. If inferior courts were bound without being able to refer matters to the Court, the jurisdiction of the latter to give preliminary rulings and the application of Community law at all levels of judicial systems of the Member States would be compromised.”¹¹

The possibility to seek guidance from the CJEU on the interpretation of EU law opens the window for lower courts to circumvent legal rulings of a higher court that are otherwise binding in renewed proceedings after referral from the higher court. It can be used as a tool to resist binding legal opinions of higher courts, but only when these opinions concern EU law.

Recently, a somewhat similar situation occurred in Croatia. The Court of first instance refused to abide by a decision of the Supreme Court of Croatia given in civil proceedings concerning insurance claim for damages. The Supreme Court was of the opinion that the directives relating to insurance against civil liability

¹⁰ References made until April 24 2019

¹¹ Judgement of 16 January 1974., Case 166/73, *RheinmühlenDüsseldorf*[1974] ECR 33, paragraph 4

in respect of the use of motor vehicles¹² are not applicable to road accident that happened in Croatia in 2002.¹³ The same first instance judge deciding on a case brought up by different plaintiffs injured in the same accident decided to refer the question of applicability of the insurance directives to the CJEU with clear disregard to legal ruling given by the Supreme Court on the applicability of EU law on that particular road accident.¹⁴ Comparable situation occurred in a civil procedure that gave rise to the reference made in *Hrvatska radiotelevizija*.¹⁵

Also, it is well established case-law of the CJEU that “rules of national law, even of a constitutional order, cannot be allowed to undermine the unity and effectiveness of European Union law”.¹⁶ The national rule which obliges national courts to follow the legal position of the national constitutional court cannot prevent the referring court from submitting a request for a preliminary ruling to the CJEU at any point in the proceedings which it judges appropriate, and to set aside, if necessary, the assessments made by the constitutional court which might prove to be contrary to European Union law.¹⁷

Consequently, Article 267 TFEU enables national court to make, of its own motion, a request for a preliminary ruling to the CJEU. And this “even though it is a ruling on a referral back to it after its first decision was set aside by the constitutional court of the Member State concerned and even though a national rule obliges it to resolve the dispute by following the legal opinion of that latter court”.¹⁸

The obligation of Croatian courts to, in renewed proceedings, resolve the dispute by following the legal opinion of Constitutional Court expressed in the decision

¹² Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17.-20.), as amended by Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 (OJ 2005 L 149, p. 14) and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33) (‘the Third Directive’)

¹³ Supreme Court of Croatia, Rev-x 478/17., 14 February 2018

¹⁴ Municipal Court in Sesvete, Pn 652/2019

¹⁵ Case C-657/18. Here a decision of the first instance court was to dismiss the claim. It was quashed by appellate court which expressed the opinion that arguments raised by lower court concerning application of EU law were incorrect. In the subsequent procedure the first instance court made request for interpretation to CJEU. The Court made it clear that legal position of appellate court was correct

¹⁶ Judgement of 15 January 2013, *Križan and others*, C-416/10, ECLI:EU:C:2013:8, paragraph 70

¹⁷ *Ibid*, paragraph 71

¹⁸ *Ibid*, paragraph 73

to set aside decisions of national courts is stipulated in Articles 76 and 77 of Constitutional Act on the Constitutional Court of the Republic of Croatia.¹⁹

The obligation to follow the legal opinion of the Constitutional Court expressed in the decision repealing the act, does not preclude national courts, when it comes to the interpretation of EU law, to exercise its discretion laid down in Article 267/2 TFEU and request an interpretative decision from the CJEU in the renewed proceedings. Needless to say, the same court is obliged to render its decision based on the interpretation given by the CJEU regardless of the fact that such a decision may not, in a clear breach of Article 77/2 of Constitutional Act on Constitutional Court, follow the legal opinion of the Constitutional Court expressed in the decision repealing earlier act.

CJEU also explained position of national courts in the situations in which the questions of interpretation of EU law coincide with the questions of constitutionality of laws and the constitutionality and legality of other regulations.

“Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling... The national court must remain free to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary ... [and] to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law”.²⁰

Turning the attention to the Croatian legal framework determined by Article 37/1 of Constitutional Act on Constitutional Court, if a national court in the course of proceedings before it determines that the law to be applied, or some of its provisions, are not in accordance with the Constitution, it shall stay the proceedings and present a request with the Constitutional Court to review the constitutionality of the law, or some of its provisions.

¹⁹ The consolidated text published in Official Gazette, No 49/02, May 3 2002

²⁰ Judgment of 22 June 2010, *Melki and Abdeli*, joined cases C188/10 and C-189/10, ECLI:EU:C:2010:363, paragraph 57

The duty to stay the proceedings and request review of the constitutionality of the law, does not, in a view of cited case law of CJEU and the direct effect of Article 267 TFEU, affect the discretion of national courts to seek guidance on interpretation from the CJEU if the matter of constitutionality coincides with the doubts in conformity with the applicable EU law.²¹ In other words, if the question of correct application of EU law arises at the same time as the question of conformity of the same national provision with the Constitution, Croatian judges are free to seek guidance from the CJEU on the correct interpretation of EU law. Furthermore, regular courts are free, even after the proposal for revision of constitutionality of national provision is refused, to set aside the same national provision if it is contrary to EU law, as interpreted by the CJEU.

On the other hand, if a national court finds that a provision of national legislation is both unconstitutional and contrary to EU law, it has the discretion to refer the question on interpretation to the CJEU. If the CJEU interprets EU law in a manner that precludes the national provision in question, national courts are bound to set aside the said provision, regardless of the fact that a review of its constitutionality is not initiated.

Consequently, the opinion that the applicability of domestic legislation can only be reviewed by the national constitutional court and not by the CJEU which was expressly stated in a ruling of the County Court in Karlovac, Permanent Division in Gospić²², is, therefore, unfounded and should not prevail in domestic case-law. While it is true that the CJEU interprets EU law (and not national law), such interpretation can (and it usually does) result in precluding incompatible or not precluding compatible national legislation.

3.3. Relevance – whose business is it (not)?

Exercising the right to request preliminary ruling on the interpretation of EU law when the interpretation is necessary to enable it to give judgement is entirely up to the lower court dealing with the proceedings in which such a question on interpretation arises.

Where any such question is raised in a case pending before a court of a Member State against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the CJEU. Whether the question raised is necessary to enable the national court to give judgment is entirely up to that court to

²¹ Judgment of 22 June 2010, *Melki and Abdeli*, joined cases C188/10 and C-189/10, ECLI:EU:C:2010:363, Judgment of 15 January 2013, *Križan and others*, C-416/10, ECLI:EU:C:2013:8

²² County Court in Karlovac, Permanent Division in Gospić, Gž 212/18-2, 23 May 2018

assess. “It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, necessitating a decision on their part.”²³ The system of “references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court’s assessment as to whether a reference for interpretation is appropriate and necessary”.²⁴ Furthermore, there is a presumption of relevance in favour of questions on the interpretation of EU law referred by a national court. Consequently, the CJEU shall, in principle, give ruling whenever there is a reference on interpretation of EU law.

The presumption of relevance of the reference on interpretation can be rebutted only exceptionally and only by the CJEU. “The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.”²⁵

Consequently, whether a question which gives rise to reference on interpretation is necessary to enable it to give judgment is entirely for a court dealing with the issue to decide. Given that the relevance of such a question is presumed and the fact that the final decision on relevance lays with the CJEU whose control of relevance is limited, it is clear that domestic courts of higher instances have no direct saying on the relevance of reference on interpretation on EU law given by courts of lower instance.

When ruling on separate procedural issue brought to it by an appeal on the decision of lower court to stay the criminal proceedings until the CJEU rules on the interpretation of EU law, the Supreme Court of Croatia expressed its opinion on the relevance of the reference made by the lower court.²⁶ Furthermore, the ruling to set aside a decision of a lower court to stay proceedings was reasoned by the view that the higher court took on the relevance of the question referred. Although it was criticized in judicial and academic circles, the right to give opinion on relevance of reference was defended and even reprised in renewed proceedings.

²³ Judgement of 16 December 2008, *Cartesio*, C-210/06, ECLI:EU:C:2008:723, paragraph 88

²⁴ Judgement of 15 January 2013, *Križan and others*, C-416/10, ECLI:EU:C:2013:8, paragraph 66

²⁵ Judgement of 12 October 2017, *Sleutjes*, C-278/16, ECLI:EU:C:2017:757, paragraph 22

²⁶ Supreme Court of Croatia, I Kž Us 102/2017-4, 19 September 2017, ECLI:HR:VSRH:2017:1328 and I Kž Us 4/2018-4, 22 May 2018, ECLI:HR:VSRH:2018:429

²⁷ The very principle of assuming jurisdiction on relevance by higher courts is in a clear breach of Article 267/2 and CJEU case-law. The matter of relevance was finally resolved by the CJEU that did not find reasons to rebut the relevance of the question, thus deeming it relevant.²⁸

The legal opinion of the Supreme Court was given in light of applicable domestic legislation, namely Article 18/3 – 5 of Criminal Procedure Act.²⁹

In view of the fact that the discretion and obligation to request interpretation on EU law arises from primary law (Article 267 UFEU), discretion of lower courts and obligation of the courts of last instances to seek guidance from the CJEU on the matters of interpretation of EU law exist regardless of the fact that such an obligation or discretion is or is not envisaged in domestic procedural codes. That is the reason why it is unnecessary and completely redundant to rewrite Article 267 in national legislation. If a provision of national legislation is redundant and irrelevant (since it literally rewrites EU law that is directly applicable, as is the case with Article 267) or must be disregarded (since it does not literally rewrite – limits or expands - EU law with direct effect) it is better not to have it all together.

The Croatian Civil Procedure Act³⁰ does not contain provisions that regulate discretion or obligation to refer questions of interpretation of EU law to the CJEU or conditions that must be met as a result. Given the fact that the CJEU has ruled on references for interpretation required by Croatia's civil courts, it is apparent that the system of interpretative rulings in civil procedure cases functions normally based solely on the TFEU without any transposition of Article 267 into domestic Civil Procedure Act.

If, however, the state decides to copy primary law into domestic legislation, that should be done in a matter to preserve the distinctiveness of discretion/obligation from Article 267 and to avoid any possible confusion with existing institutes of domestic procedural law. The reasoning of such firm distinction lies with the fact that request for interpretation of EU law is a unique institute that correlates, either by its content or its scope, to no other legal instrument or institute of domestic legislation. The only similarity arises from the somewhat unfortunate translation

²⁷ Čapeta Tamara; Rodin, Siniša, *Osnove prava Europske unije*, Zagreb, Narodne novine, 2018, p. 199. i Okrugli stol održan 24. svibnja 2018. u palači HAZU, *Europska budućnost hrvatskog kaznenog pravosuđa*, Zagreb, HAZU, 2018, p. 71 -75. i 150

²⁸ Judgement of 25 July 2018, *AY*, C-268/17, ECLI:EU:C:2018:602, paragraphs 24.-31

²⁹ Official Gazette No 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14 and 70/17. Detailed analysis see in work cited in footnote 27, Okrugli stol, p. 69 - 76

³⁰ Official Gazette No 35/91, 53/91, 91/92, 112/99, 88/01, 117/03, 84/08, 123/08, 57/11, 148/11, 25/13, 43/13 and 89/14

of Article 267 which states that CJEU shall have jurisdiction to give “preliminary rulings”. The Croatian translation states that the CJEU shall have jurisdiction to decide on “preliminary questions”. Such a translation is the most probable reason why Article 267 TFEU was transposed into Article 18 of the Criminal Procedure Act. Since it came to force, Article 18/1 of CPA regulated preliminary question as a question of law which falls within the jurisdiction of a court in some other type of proceedings or within the jurisdiction of some other authorities providing that the application of criminal law depends on a prior decision of that question.

The criminal court may decide on this question by applying the provisions which regulate the process of proof in criminal proceedings. “The decision of this question of law rendered by a criminal court shall affect only the criminal case which is being tried before this court. If such a prior question has already been decided by a court in some other type of proceedings or by another authority, such a decision shall not be binding on the criminal court when deciding on whether a criminal offence has been committed” (Article 18/1 and 2 of Criminal Procedure Act).

When compared with the earlier cited provisions of Article 267 TFEU it is clear that the preliminary question from Article 18/1 – 2 does not correlate to requests for preliminary rulings from Article 267.

Firstly, unlike with “domestic” preliminary questions, in cases of requests for preliminary rulings of interpretation on EU law, the criminal court remains with jurisdiction to decide question of law on which the application of criminal law depends and the CJEU does not assume jurisdiction to rule on that legal question. Rather, it is a situation in which criminal courts acting inside their jurisdiction seek guidance on EU law, the application of which falls within the jurisdiction of the referring court.

It is clear, especially bearing in mind the *erga omnes* effect of preliminary rulings, that request for interpretation of EU law should not be confused with “domestic” preliminary question since the differences of nature and scope of these institutes are obvious. Regulating these two institutes in the same article of domestic code was erroneous. The matter asks for different regulation *de lege ferenda*. At the very least provisions on discretion of lower courts and obligations of the highest courts to seek guidance from the CJEU on interpretation of EU law (Article 18/3 and 4) should be omitted altogether giving the direct applicability of Article 267 TFEU. The staying of the procedure should be regulated in a manner that respects the principle of effectiveness of EU law and the appeal system should be framed in a manner that precludes examination of the relevance of the issue raised for interpretation.

4. STAYING OF DOMESTIC PROCEDURE(S) – ISSUE OF SIMILAR PROCEEDINGS

Article 267 contains no provisions as regards the status of procedure pending before domestic courts which gave rise to the interpretation of EU law. The question of staying the procedure is a procedural one and Member States enjoy procedural autonomy to independently regulate the effects of preliminary procedure on national procedure. However, national procedural autonomy is limited by the principles of equivalence and effectiveness of EU law. “... [I]t is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)”.³¹

It is hard to imagine how a principle of effectiveness of EU law can be preserved if the referring court is obliged to render a judgement before the ruling on proper interpretation of EU law. It is in view of such a notion that *Recommendations of CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*³² state that „Although the referring court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity, the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court has given its ruling. [...] The national courts and tribunals should also note that the withdrawal of a request for a preliminary ruling may have an impact on the management of similar cases (or of a series of cases) by the referring court or tribunal. Where the outcome of a number of cases pending before the referring court or tribunal depends on the reply to be given by the Court to the questions submitted by that court or tribunal, it is appropriate for that court or tribunal to join those cases in the request for a preliminary ruling in order to enable the Court to reply to the questions referred notwithstanding any withdrawal of one or more cases.”³³

Croatian procedure acts (both Criminal and Civil) contain provisions on mandatory staying of the procedure in case of a reference for interpretation to CJEU.³⁴

³¹ Judgement of 11 July 2002, *Marks & Spencer*, C-62/00, ECLI:EU:C:2002:435, paragraph 34

³² OJ 2018 C 257, p. 1-6

³³ Articles 23 and 25, *ibid.*

³⁴ Article 18/5 of Criminal Procedure Act, *op. cit.*, note 20 and Article 213/1 of Civil Procedure Act, *op. cit.*, note 21

Although clearly compatible with the principle of effectiveness of EU law, these particular procedural provisions did raise some issues in national case-law as regards civil procedure. The staying of the procedure which gave rise to interpretation is clear. What remains unclear, though, is the managing of other similar cases pending before the referring and other courts in the country. Where the outcome of a number of similar cases pending before the referring or other courts depends on the reply to be given by the CJEU to the questions submitted by one court in one civil procedure, the staying of similar proceedings seems reasonable. At least more reasonable than referring the same question in all other similar cases with identical factual and legal grounds, since those can be numerous. In that aspect the decision of the County Court in Karlovac, Permanent Division in Gospić³⁵, quashing the staying of the proceedings of similar case pending before a court which is different than the one that made a reference on interpretation, may seem overly formalistic, providing that the dispute and hand was indeed factually and legally similar. Although the situation may be resolved with informal staying of the proceedings, that is to say by mere inactivity of courts, it would be opportune to regulate the staying of similar civil proceedings *de lege ferenda*.

5. APPLICATION OF EU LAW WITHOUT PRIOR PRELIMINARY RULINGS FROM CJEU - *ACTE CLAIRE* AND *ACTE ÉCLAIRÉ*

The obligation to request preliminary ruling on the interpretation of EU law is not absolute, even for the courts of last resorts. There are certain situations, determined by the CJEU case-law, in which even the court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, are free to apply EU law without seeking guidance on interpretation. This freedom of national courts of last resorts to apply EU law without prior preliminary rulings from the CJEU was analyzed in *Cilfit*.³⁶ “Court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.”

³⁵ See in note 14

³⁶ Judgement of 6 October 1982, *Cilfit*, Case 283/81, ECLI:EU:C:1982:335, paragraph 21

Courts of last instances are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 267, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical (*acte éclairé*). However, even in such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 267, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so. “Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it” (*acte claire*).³⁷

In the latter situation, to be able to properly interpret EU law and apply it without making a reference for interpretation to the CJEU deeming it *acte claire*, national court must be convinced that the matter is equally obvious to as it is to the courts of the other Member States and to the Court of Justice. “To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic.

An interpretation of a provision of Community law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States. Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied”.³⁸

³⁷ *Ibid.*, paragraphs 16

³⁸ *Ibid.*, paragraphs 17.-20

6. PARTIES' DISPOSITIONS AND ARTICLE 6 OF ECHR

As stated before, whether or not it will seek guidance on interpretation is entirely on the national court to decide. In this regard, it must be pointed out in the first place that Article 267 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 267. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

However, the fact that a party to a case pending before a national court did demand staying of the proceedings and requesting a preliminary ruling on the interpretation on EU law may in certain situations when such a demand is declined, reflect on the concerned party's right to a fair hearing guaranteed by Article 6 of European Convention on Human Rights (hereafter: ECHR).

Article 6 § 1 of the ECHR does not guarantee an absolute right to have a case referred by a domestic court to the Court of Justice of the European Union. "Where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings (*Ullens de Schooten and Rezabek v. Belgium*, §§ 57-67, with further references). This is so where the refusal proves arbitrary:

- where there has been a refusal even though the applicable rules allow no exception to the principle of preliminary reference or no alternative thereto;
- where the refusal is based on reasons other than those provided for by the rules;
- or where the refusal has not been duly reasoned in accordance with those rules."³⁹

This means that national courts within the European Union against whose decisions there is no judicial remedy under national law, and which refuse to request a preliminary ruling from the CJEU on a question raised before them concerning the interpretation of European Union law, are required to give reasons for such refusal in the light of the exceptions provided for by the case-law of the CJEU.

³⁹ Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), updated to 31 December 2018, Council of Europe/European Court of Human Rights, 2018, paragraphs 275 -276, [https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf] Accessed 15.04.2019

They must therefore indicate the reasons why they have found that the question is irrelevant, that the European Union law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt.

Following these principles, in *Dhabbi v. Italy*⁴⁰ the European Court of Human Rights for the first time found a violation of Article 6 because of the lack of reasons given by a domestic court for refusing to refer a question to the CJEU for a preliminary ruling. The Court of Cassation had made no reference to the applicant's request for a preliminary ruling or to the reasons why it had considered that the question raised did not warrant referral to the CJEU, or reference to the CJEU's case-law. It was therefore unclear from the reasoning of the impugned judgment whether that question had been considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it had simply been ignored. This fact alone was enough for the Strasbourg Court to find violation of Article 6. Whether the decision not to refer to the CJEU was in fact a correct one was irrelevant.

7. CONCLUSION - EMPOWERMENT OF JUDICIAL AUTHORITY

The importance of preserving the uniformity of the EU legal order, which the preliminary reference procedure is designed to uphold, has been expressly emphasized by the Court of Justice on many occasions.

This obligation and responsibility strengthens the judicial branch of the state authority in relation to the legislature – another novelty worth paying attention to. Provisions of EU law apply directly in the Croatian legal order and have legal effect by the mere fact of Croatia's membership in European Union. Obligation of national courts to set aside national provision in conflict to EU law in order to protect rights and interest of individuals that are protected by EU provisions undoubtedly cause the shift between state powers – judiciary and legislature. The principle of direct effect of EU provisions with general application (e.g. regulations) calls for no national legislative activity. Moreover, supremacy of EU law derogates any such activity if incompatible to EU law.

In fact, as seen in *Milivojević*⁴¹, reference procedure initiated by court of lower instance can essentially annul intended effects of legislation which was unanimously passed by legislature. And this since crucial provisions of Law on the invalidity of

⁴⁰ *Dhabbi v. Italy*, no. 17120/09, 8 April 2014, ECLI:CE:ECHR:2014:0408JUD001712009, paragraphs 31-34

⁴¹ Judgement of 14 February 2019, *Milivojević*, C-630/17, ECLI:EU:C:2019:123

credit agreements featuring international elements concluded in the Republic of Croatia with non-authorized lender⁴², have been declared incompatible with EU law and thus utterly ineffective for the most of the purposes intended. It was not done in a legislative process of amending laws or in lieu of the review of its constitutionality. Rather, it was a result of pure judicial activity which was bestowed upon national judges by primary EU law regardless of their level of jurisdiction.

New power brings new responsibilities in respecting the legal order inherent to the membership in the EU. Judiciary case-law remains the last resort in enforcing European legal order in any Member State and Croatia is no exception. The adoption of national legislative measures, even those correctly implementing a directive, does not exhaust the effects of the directive, as the state remains bound to ensure its full application even after the adoption of those measures. Judiciary case-law based on uniform interpretation is crucial to that end and it is indispensable in achieving results sought by applicable EU law.

There is no doubt that professional training of Croatian practitioners is important because it contributes to correct application of law. It is important to continue and further develop professional training in respect of EU law interpretation and application. Proper and foreseeable application of EU law as interpreted by the CJEU in domestic proceedings raises the level of integrity of national courts and boosts public's confidence in national judicial institutions, as well as in EU institutions.

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