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Procedural Issues Relating to EU Law in the Estonian Supreme Court

1. Introduction

Estonia, being a small but very ‘pro-European-Union’ country with a liberal approach to economy^{*1} and law, has shown a remarkable willingness to adapt to European Community (EC) principles such as supremacy, direct effect, and consistent interpretation, led in this by its Supreme Court (Riigikohus). The Supreme Court has not hesitated to confirm unconditional supremacy of EC law (even over the Constitution) or apply directive consistent interpretation of national law. These questions have been addressed in other publications of this author.^{*2} This article seeks to address aspects of procedural law that have surfaced during the first three years of post-accession jurisprudence. Although the relevant case law in Estonia is not voluminous, there are important questions nonetheless, which deserve academic attention.

In the pre-accession period, Estonian legislation was significantly amended to implement the substantive law of the EC. Few or no amendments were made to the laws regulating court procedure. On the date of accession, the procedural laws even lacked provisions referring to the existence of the European Court^{*3} and the preliminary rulings procedure.^{*4} Equally, there was no regulation regarding other possible procedural nuances arising out of the need to apply EC law. As a result of this lack of regulation, internal courts were faced with challenging choices when interpreting and applying internal rules, which were not designed to work in ‘the new legal order’.

¹ According to the 2007 assessment of the Heritage Foundation, Estonia is ranked 12th in the world and 5th in the region in the index of economic freedom. See <http://www.heritage.org/research/features/index/country.cfm?id=Estonia> (7.10.2007).

² See C. Ginter. Constitutional Review and EC Law in Estonia. – *European Law Review* 2006 (31) 6, pp. 912–923; C. Ginter. Effective Implementation of the Trade Mark Directive in Estonia. – *European Competition Law Review* 2007 (28) 6, pp. 337–345.

³ The term European Court refers to both the Court of First Instance (CFI) and the Court of Justice of the European Communities (ECJ). See <http://curia.europa.eu/> (7.10.2007).

⁴ A procedure arising out of article 234 EC, which allows internal courts to ask for interpretative guidance on questions of EC law from the ECJ before rendering a final decision on a particular case. Hereinafter all references to articles are to those of the Treaty Establishing the European Community (EC); Consolidated text published: Official Journal (OJ) C 321E, 29.12.2006.

Although there were no references for preliminary rulings until 2007 by Estonian courts⁵, this article still focuses on issues related to the preliminary rulings procedure. This includes discussing *acte clair* and *acte éclairé*⁶ and questions regarding what effect arises from a pending challenge to secondary Community law in the European Court to internal proceedings that relate to the same issue or norm. In some contexts, alternative solutions to those used by the courts are proposed.

It was almost two years after Estonia's accession to the European Union (EU) when in late April of 2006 issues relating to preliminary rulings were first addressed by the Supreme Court.⁷ An administrative court (*halduskohus*) had suspended a pending case regarding tax claims for surplus stock during accession.⁸ The Supreme Court had to deal with the question of whether Poland having challenged the validity of the regulation under an action for annulment in the Court of First Instance⁹ (CFI) would serve as sufficient grounds for suspending the administrative court case where the same regulation was of significance and of what would be the correct legal basis for such suspension.

In March 2006, the Civil Chamber of the Supreme Court decided not to ask for a preliminary ruling in a case demanding interpretation of national law in the light of the Trade Mark Directive.¹⁰ In this case, the court for the first time relied on the concept of *acte éclairé* and elaborated on the grounds on which a national court against whose decisions there is no further recourse is permitted to refrain from making a reference to the Court of Justice of the European Communities (ECJ).

In October 2006, the Administrative Law Chamber of the Supreme Court decided not to ask for a preliminary ruling in a case relating to taxation of surplus stocks at the time of Estonia's accession to the EU.¹¹ This time, the court decided that it was relieved of the obligation to make a reference, on the basis of *acte clair*.

Three years after Estonia's accession in — mid-May 2007 — the first reference for a preliminary ruling was made by the Supreme Court, in a case concerning support for rural development.¹² This first reference serves as a potential demonstration of style for further references by the Estonian courts.

In June 2007, the Administrative Law Chamber of the Supreme Court applied EC law discussing agricultural supports.¹³ Even though the Estonian Agricultural Registers and Information Board (ARIB) asked the court to make a reference for a preliminary ruling, the Supreme Court resolved the matter without asking the ECJ for its assistance. The Supreme Court annulled the administrative discretionary measure on the basis of lack of reasoning.

The few rulings and decisions referred to above serve as a basis for drawing preliminary conclusions regarding how the rules related to the system of preliminary rulings have been accepted and applied by the Supreme Court.

2. Challenging the validity of Community acts as a basis for suspending internal proceedings

It is a known fact that at times court cases are put on hold for compelling reasons. On the basis of the principle of procedural autonomy, the Member States of the EU are more or less at liberty to lay down their own rules regarding this issue, provided that the general principles of European law are abided by.¹⁴ In Estonia, the

⁵ See official statistics of the ECJ for 2006, available at http://curia.europa.eu/en/instit/presentationfr/rapport/stat/06_cour_stat.pdf (7.10.2007). The statistics show that there were also no references from Latvia and only one reference from Lithuania. It is interesting to note that according to the same statistics Hungary has made nine new references.

⁶ Substance of those terms is explained in detail in section 3 of this article.

⁷ Ruling of the Administrative Law Chamber of the Supreme Court (ALCSCr) 25.04.2006, 3-3-1-74-05.

⁸ Commission regulation (EC) No. 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. — OJ L 293, 11.11.2003, pp. 3–6

⁹ T-257 & 258/04 (Poland v. Commission). Not yet decided.

¹⁰ Decision of the Civil Law Chamber of the Supreme Court (CLCSCd) 30.03.2007, 3-2-1-4-06; First directive 89/104/EEC of the Council, of 21 December 1988, to approximate the laws of the Member States relating to trade marks. — OJ L 40, 11.2.1989, p. 1–7.

¹¹ Decision of the Administrative Law Chamber of the Supreme Court (ALCSCd) 5.10.2006, 3-3-1-33-06.

¹² ALCSCr 14.05.2007, 3-3-1-95-06; Council regulation (EC) No. 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations. — OJ L 160, 26.6.1999, pp. 80–102

¹³ ALCSCd 20.06.2007, 3-3-1-26-07.

¹⁴ See case 33/76 (Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland). — ECR 1976, p. 1989.

suspension of proceedings in administrative court cases used to be covered by the Code of Administrative Court Procedure^{*15} (CACP).

The CACP provided for situations where the administrative court was required to suspend proceedings and where suspension of the proceedings was at the court's discretion. The administrative court was required to suspend proceedings when the party to the proceedings had died or the relevant legal person had been dissolved or when a person's legal capacity had been restricted.^{*16} The administrative court was required to suspend the proceedings also "if the hearing of a matter is not possible before the adjudication of another matter, until the entry into force of the decision".^{*17} The administrative court had the right to suspend proceedings upon certain conditions in cases of illness, in the event of long-term official business travel, and upon the request of the parties to a public-law contract. The administrative court also had the right to suspend the proceedings "during the time when the constitutional review matter is adjudicated in the proceedings of the Supreme Court, until entry into force of a judgement made in the matter, if this may affect the validity of legislation of general application subject to application in the administrative matter".

The CACP contained no explicit reference to proceedings taking place in the ECJ or CFI. The Code of Civil Procedure (CCP) contains from 1 September 2006 a clear obligation for the internal court to suspend proceedings where it has made a reference for a preliminary ruling.^{*18} The CCP does not address other potential types of litigation in Luxembourg. Therefore it was not, and still is not, obvious how a pending action for annulment in the CFI initiated by a third party or a preliminary rulings procedure in the ECJ commenced in a different case relates to the court's right or obligation to suspend the proceedings.

In the case analysed here^{*19}, the applicant challenged a directive of the Ministry of Agriculture determining the amount of surplus stocks of rice and a tax notice of the Estonian Tax and Customs Board, which ordered the applicant to pay approximately 25,000 EUR in additional tax on the surplus stock.

Regulation EC 1972/2003 (the Surplus Stock Regulation) places an obligation on Estonia to levy charges on holders of surplus stocks as of 1 May 2004, for products in free circulation.^{*20} On the basis of the Surplus Stock Regulation, Estonia adopted the Surplus Stock Fee Act^{*21} (SSFA), introducing rules on determination of surplus stocks. This legal framework will be of importance also for the discussion of the application of the *acte clair* exception, below.^{*22} For the case at hand, it is sufficient to note that the applicant did not want to pay the tax that was claimed from it on the basis of the SSFA (which, in turn, was related to the Surplus Stock Regulation). As mentioned above, the Surplus Stock Regulation was challenged by Poland in the CFI under article 230 EC proceedings.^{*23}

The applicant in the proceedings challenged provisions of the SSFA, arguing that they were contrary to the Estonian Constitution^{*24}; namely the principle of proportionality; the right to freely choose one's own area of activity, profession, and place of work; the right to engage in enterprise and to form commercial undertakings and unions; the right to property and principles of legal certainty; and others. The applicant also considered the *ex post* imposition of taxes to be retroactive punishment. The administrative court found that Poland's action for annulment of certain provisions of the Surplus Stock Regulation could in principle have an effect on the amount of tax to be imposed on the applicant and thus suspended the internal proceedings.^{*25} The administrative court held that, before ruling on a case, the court must ascertain whether the provisions of the SSFA are in accordance with European law and whether the provisions of the Surplus Stock Regulation are legally applicable. Should the Surplus Stock Regulation be partially annulled, the question arises of whether the SSFA can still be applied. Interestingly enough, the court pointed out that the court would have no doubts

¹⁵ Halduskohtumenetluse seadustik. – RT I 1999, 31, 425; 2007, 12, 66 (in Estonian). Unofficial translation available at <http://www.legaltext.ee/text/en/X30054K8.htm> (7.10.2007). From 1 September 2007 the relevant section of the CACP (§ 22) refers to grounds listed in the Code of Civil Procedure (Tsiviilkohtumenetluse seadustik). – RT I 2005, 26, 197; 2007, 12, 66 (in Estonian). As the procedure in the case discussed in this article took place before the amendments, the references in this article are made to the CACP as of before the amendments.

¹⁶ Section 22 of the CACP.

¹⁷ *Ibid.* The current § 356 of the CCP gives the court a right, but not an obligation to suspend the proceedings.

¹⁸ Subsection 356 (3) of the CCP.

¹⁹ ALCSCr 25.04.2006, 3-3-1-74-05.

²⁰ See article 4 of the Surplus Stock Regulation.

²¹ Üleliigse laovaru tasu seadus. – RT I 2004, 30, 203, substantially changed retroactively by RT I 2005, 38, 296 (in Estonian).

²² See section 3.2 of this article.

²³ T-257 & 258/04 (Poland v. Commission). Not yet decided. Article 230 EC foresees bringing actions against acts of the Community institutions on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings are to be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. This author has discussed questions of standing of private applicants under article 230 EC in C. Ginter, Access to Justice in the European Court in Luxembourg. – European Journal of Law Reform 2002 (4) 3, p. 381.

²⁴ Põhiseadus. – RT I 2007, 43, 311; 2007, 33, 210 (in Estonian).

²⁵ The proceedings were suspended partially.

as to the validity of the regulation except for the fact of the existing challenge by Poland.^{*26} The court relied by analogy on the provision of the CACP that allowed suspension of the proceedings during the time when the constitutional review matter was being adjudicated in the Supreme Court.^{*27}

The ruling suspending the proceedings was appealed by the Estonian Tax and Customs Board. The appellant argued primarily that if the court had doubts as to the validity of the regulation, it should have expressed its views on the matter and made a reference for a preliminary ruling. The Tallinn Circuit Court (Tallinna Ringkonnakohtus) granted the appeal.^{*28} The Supreme Court, reviewing the case as the court of cassation, upheld the ruling of the circuit court — however, substantially amending its reasoning. The court elaborated on the duties of the administrative court in a situation where the validity of a European norm has already been challenged in the European Court.

In the case at hand, the SSFA had been adopted in order to allow performance of duties arising out of the Surplus Stock Regulation. Thus, the internal court may indeed have to check whether the SSFA is in harmony with the regulation. The Supreme Court pointed out that where the court has doubts about whether a secondary Community act is in conformity with primary Community law, it is under an obligation to make a reference for a preliminary ruling. However, it seems that the Supreme Court also conditionally accepted the possibility that the proceedings could be suspended without making such reference. According to the ruling:

If the same question has already been presented to the European Court in a reference for a preliminary ruling or if there are pending proceedings in the ECJ or CFI checking the validity of a EC norm, the Estonian court must decide whether to suspend the proceedings and, if necessary, ask the ECJ for a preliminary ruling on its own.^{*29}

This paragraph clearly refers to two possible alternatives, with the possibility of (a) suspending the proceedings and making a reference for a preliminary ruling or (b) suspending the proceedings without making such a reference. It is not clear in which circumstances choosing the second option would be justified or necessary.

As was pointed out above, the CACP contained two possible alternatives for suspending proceedings, one being existing constitutional review proceedings in the Supreme Court and the other being a more general reference to impossibility of resolving the case before another case has been adjudicated. The same alternatives currently exist in the CCP.^{*30}

Given that the CACP was adopted in 1999, approximately five years before Estonia's accession to the EU, it is understandable that the legislator did not intend to provide for a solution in a situation where the validity of secondary Community law has been challenged in the European Court. Accordingly, the Supreme Court argued that the legislator could not have foreseen that a reference to constitutional review would implicitly include proceedings conducted by the European Court. On the basis of this, the Supreme Court found that an analogy to constitutional review does not serve as appropriate grounds for suspending the proceedings.

It is certainly true that there is no evidence of the original legislative intent behind the CACP being directed at regulating questions of European law. Also, the wording of the relevant section of the CACP clearly referred to constitutional review only. Therefore, it is difficult to challenge this conclusion of the court. On the other hand, a focus on the original legislative intent may not be the most appropriate approach for a test, given the changes in the Estonian and European legal environment. Teleological interpretation does not have to be limited by the factual circumstances surrounding the legislator at the time of passing of the particular norm concerned. The term 'teleology' comes from the Greek word 'telos', which is interpreted as 'end', 'purpose', or 'goal'. Teleology can be described as the study of purposiveness, or the study of objects with a view to their aims, purposes, or intentions.^{*31} When using the teleological method for interpretation, we need to determine the purpose of the law and to choose from among the possible interpretations the one that makes the greatest contribution to the achieving of this goal. It is not imperative that this be related to the original circumstances in which the legislator acted; rather, it may also relate to what the legislator attempted to achieve in general. Changed circumstances do not have to render the ultimate aim of the legislator inapplicable or unachievable. Therefore, a teleological interpretation should focus on the goal that the particular norm was intended to achieve, in view of the fact that the same goal may require extending the applicability of the particular norm to new situations. Also the European Court of Human Rights has opted for a dynamic interpretation of the convention.^{*32} Authors referring to the interpretative methods of the European Court of Human Rights have described them as follows: The court determines the content of [the rights] [...] always in the light of today's

²⁶ Paragraph 5 of the discussed ruling.

²⁷ *Ibid.*

²⁸ Ruling of the Tallinn Circuit Court 26.08.2005, 2-3/753/05.

²⁹ Paragraph 14 of the discussed ruling.

³⁰ Section 356 of the CCP.

³¹ See Wikipedia at [http://en.wikipedia.org/wiki/Telos_\(philosophy\)](http://en.wikipedia.org/wiki/Telos_(philosophy)) (7.10.2007).

³² See L. Wildhaber, O. Diggelmann. Euroopa inimõiguste konventsioon ja eraelu kaitse. Uuemad arengusuunad (European Convention on Human Rights and the Protection of Private Life. The Latest Trends). – *Juridica* 2007/1, p. 3 (in Estonian).

circumstances and takes into account important social, legal and technological changes.³³ This evolving approach to interpretation allows taking into account the possibility that the original directive of the legislator may over time have become unreliable. The deciding judge may take into account the changed political, social, and legal considerations. It may even be argued that evolving interpretation follows the hypothetical legislative intent had the legislator been deciding under the changed circumstances.³⁴ Therefore, basing the reasoning on the original legislative intent does not have to be an imperative.

When interpreting the law, one must always be able to perceive the values behind the letter of the law and be mindful of the fact that these values are themselves in constant change.³⁵ Why then would the legislator provide for the possibility to suspend proceedings during constitutional review? The obvious explanation would be that there may simply be no point in continuing to handle cases on the basis of a law that may very well prove to be inapplicable. Allowing the judge to wait until the shadow cast over the existing rule has dissipated provides for greater legal certainty.

Dynamic interpretation would force us to consider what has changed since the adoption of the CACP. Definitely one of the most significant changes has been the accession of Estonia to the EU. This, in turn, led to a significant change in the legal environment, with EU law becoming part of our legal heritage and concepts of primacy and direct effect finding their way into our legal system and courts. With the national judge entrusted with the task of applying the *acquis communautaire*, a suspicion of potential contradiction with EC law may arise similarly to a suspicion of potential contradiction with the Constitution. Unconstitutionality of an internal law will lead to its inapplicability. Contradiction of a secondary Community norm with primary Community law will equally render the norm inapplicable. Where unconstitutionality is to be established by the Supreme Court, the finding of a contradiction with primary EC law is solely within the competence of the European Court.³⁶

The above would lead to a parallel allowing for extensive interpretation. Where an internal court needs to either apply EC law or check the validity of an internal norm vis-à-vis EC law that has been challenged in the ECJ or the CFI, it is in a very similar situation to that in which it would need to apply national law that has been challenged in constitutional review proceedings. Either of the proceedings could potentially lead to the inability to apply a particular law. Therefore, an expansive interpretation of the grounds for suspending proceedings by referring to pending constitutional review proceedings covering challenges to the validity of the *acquis communautaire* in the ECJ or CFI or its application by analogy should have been acceptable.

However, as noted above, the ruling of the Supreme Court does not support this line of argumentation. The Supreme Court did not deny the right of an internal court to suspend the proceedings. It, however, decided that the appropriate legal foundation for such suspension would be the other alternative in the CACP, that of “if the hearing of a matter is not possible before the adjudication of another matter, until the entry into force of the decision”.³⁷ Thus, if the validity of a secondary Community act has been challenged in the ECJ or the CFI, the internal court has the right in principle to suspend the proceedings.

It would be quite dangerous if a case pending in the European Court were to lead to a more or less automatic suspension of the internal proceedings. It is well known that not all challenges are successful, and at times, to be frank, they may be frivolous to begin with. This risk is addressed by the Supreme Court in criticising the ruling of the administrative court for its lack of reasoning. There was insufficient description of the motives for the judge questioning the validity of the Surplus Stock Regulation. The fact that a third party has begun article 230 EC proceedings against a particular Community norm does not serve per se as grounds for suspending the proceedings. Instead, the court must establish whether in its view there are grounds for questioning the validity of the European norm.³⁸

An additional condition for suspending the proceedings arising from the prior case law of the Supreme Court is that the delay caused must be proportionate to the reason for suspending the case.³⁹ The Supreme Court pointed out that the arguments of parties in the case at hand are different to some extent from those that Poland presented to the CFI. The Supreme Court referred to the Gaston Schul case, pointing out that potentially different factual circumstances may lead to different judicial outcomes.⁴⁰ In addition, the decision of the CFI may be appealed to the ECJ. Therefore, the Supreme Court concluded that, in order to be in keeping with the condition of not causing unnecessary delay, the administrative court should have made a reference for

³³ *Ibid.*, p. 3.

³⁴ For a discussion on dynamic interpretation in U.S.A. see, e.g., Ross F. Stephen. *The Location and Limits of Dynamic Statutory Interpretation in Modern Judicial Reasoning*. – *The Journals of Legal Scholarship*, article 6, 2002 Berkeley Electronic Press.

³⁵ See R. Narits. *The Republic of Estonia Constitution on the Concept and Value of Law*. – *Juridica International* 2002 (7), p. 13.

³⁶ As was uniformly established in case 314/85 (*Firma Foto-Frost*). – ECR 1987, p. 4199.

³⁷ See § 22 of the CACP. The same ground is now reflected in CCP § 356 (1), which gives the court a right to suspend proceedings if the decision depends on the existence or absence of a legal relationship which is the object of a court proceedings conducted in another matter or the existence of which must be established by administrative proceeding or other court proceedings.

³⁸ See paragraphs 21–22 of the discussed ruling.

³⁹ See, e.g., ALCSCr 16.01.2003, 3-3-1-2-03.

⁴⁰ Case C-461/03 (*Gaston Schul Douane-expéditeur*). – ECR 2005, I-10513.

a preliminary ruling to the ECJ. If the internal court has doubts as to the validity of secondary EC law, it is under an obligation to make a reference.

It is argued here that in most cases where validity of European law is questioned a logical step for the internal court would be to suspend the proceedings and to make a reference for a preliminary ruling instead of waiting for the final outcome of independent challenges. The Supreme Court case analysed here illustrates that a reference should preferably be made, but the ruling does not speak of this in imperative terms. It would be difficult to see good reasons for an internal court to suspend its proceedings with reference to a pending action for annulment at the CFI by a third party, and not to make a reference for a preliminary ruling of its own. The problems of such an approach begin precisely with the risk of different factual circumstances. The wording of a long-awaited decision of the European Court may be such as to leave aside factors whose consideration is crucial for resolving the suspended case. In addition, the European proceedings in the ‘original challenge’ may take longer than it would take to address the new reference. A new reference would also permit the parties to present additional arguments to the ECJ, allowing for a broader basis for review of the validity of the secondary Community norm. These are just a few arguments in favour of preferring an independent reference. Should the parallel case ultimately provide for a good solution before the new reference has been handled, there are options for closing the preliminary rulings procedure without making a final decision.^{*41}

3. Refraining from making references for preliminary rulings

According to article 234 EC, where a question of the interpretation of the EC Treaty, the validity and interpretation of acts of the institutions of the Community and of the European Central Bank, or the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide, “is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”^{*42} The ECJ has emphasised the central importance of this procedure by stating that it seeks “to prevent a body of national case-law not in accord with the rules of community law from coming into existence in any Member State”.^{*43} Article 234 EC provides for a tool of co-operation between the ECJ and the national judiciary in order to permit uniform development and application of EC law throughout the Community. The obligation of the court of last instance to make a reference provides a certain assurance for the parties that they will have an opportunity to present their arguments before the appropriate forum.

The obligation for courts of last instance to refer cases to the ECJ did not remain unconditional for long. In the 1963 *Da Costa* decision, the ECJ had to take a practical approach in order to resolve a situation where article 234 EC could have led to ‘automatic’ references where the very same question had already been answered by the ECJ.^{*44} In this famous decision, the ECJ introduced a substantial limitation stating that

Although the third paragraph of [article 234] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law [...] to refer to the Court every question of interpretation raised before them, the authority of an interpretation under [article 234] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the **question raised is materially identical** with a question which has already been the subject of a preliminary ruling in a similar case. [emphasis added]

This doctrine, known as *acte éclairé*, relieved the courts of last instance from the duty to refer questions to the ECJ that have already been answered.

⁴¹ See, e.g., article 104 (3) of the Rules of Procedure of the Court of Justice.

⁴² In the official Estonian text only the term *kohus* (court) is used in the last two sections of article 234 EC. In the English version the term “court or tribunal” and in the French text the term *une juridiction* is used. Looking at the French and English texts, as well as the decisions of the ECJ it is clear that the provision is intended to apply to a much larger variety of dispute settlement bodies than courts *stricto sensu*. Thus, the Estonian translation is problematic as it does not represent the true extent of the provision regarding the bodies that are entitled to or obligated to ask for a preliminary ruling. For the interpretation of the term “court or tribunal” see, e.g., C-54/96 (*Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*) (ECR 1997, p. I-4983) paragraph 23: “In order to determine whether a body making a reference is a court or tribunal for the purposes of Article [234] of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent.” [references omitted]

⁴³ See case 107-76 (*Hoffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*). – ECR 1977, p. 957.

⁴⁴ Case 28 to 30–62 (*Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration*). – ECR 1963, p. 31.

The obligation to make a reference was further limited by the 1982 CILFIT decision.^{*45} In this case, the ECJ was asked to provide guidance to the national courts regarding what to do in cases where the question is not identical to one already answered by the ECJ but the correct answer to it clearly arises out of the practice of the ECJ. Once again a practical approach was adopted by the ECJ, and the courts of last instance were permitted to refrain from making references for a preliminary ruling in cases where “the correct application of Community law is so obvious as to leave no scope for reasonable doubt as to the manner in which the question raised is to be resolved”.^{*46} In order to avoid abuse, the possibility of relying on this exception was tied to strict conditions. According to the ECJ:

[T]he 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. [emphasis added]

This doctrine is known as *acte clair*. The above two case-law-based exceptions to the EC Treaty have had a significant effect on the preliminary rulings system. Whereas it is difficult to deny that at times, considering the prior case law of the ECJ, a reference would simply cause delay, it is equally difficult to deny that the exceptions have at times led cases being decided on the national level that would have needed interpretative guidance from the ECJ. The well-publicised Köbler case is just one example where resolving the case without a preliminary ruling led to an incorrect interpretation of Community law and ended up with the applicant being denied compensation to which he was rightfully entitled.^{*47} The relative importance of the two exceptions is further illustrated by the fact that the Supreme Court had an opportunity to rely on both of them before a single reference for a preliminary ruling had been made by Estonian courts.^{*48} This is certainly a significant shift of balance when compared to the original mandatory nature of the obligation arising from article 234 EC.

3.1. Applying *acte éclairé*

In its 30 March 2007 decision, the Civil Chamber of Supreme Court was faced with a problem of the Estonian Trade Mark Act^{*49} (TMA) not being in conformity with the Trade Mark Directive (TMD).^{*50} Subsection 16 (3) of the TMA set out the rules on exhaustion as follows:

The proprietor of a trade mark is not entitled to prohibit further commercial exploitation of goods that have been marked with the trade mark by the proprietor or with the proprietor’s consent and that have been put on the market in Estonia or in a state party to the Agreement of the European Economic Area under that trade mark, **unless the condition of the goods has changed** after they have been put into circulation. [emphasis added]

The TMD, on the other hand, in its articles 7 (1) and (2), states:

The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.

Paragraph 1 shall not apply **where there exist legitimate reasons** for the proprietor to oppose further commercialisation of the goods, **especially where** the condition of the goods is changed or impaired after they have been put on the market. [emphasis added]

Thus, one can see that where the TMD refers to the condition of the goods being changed as an example of legitimate reasons for opposing further commercialisation of the trademarked goods, the TMA indicates this as the only existing foundation for doing so. In view of the present publication’s focus on procedural law considerations, a thorough analysis of the referred case would be out of place.^{*51} Accordingly, the discussion will focus on the applicant’s request for a preliminary ruling. In the particular case considered here, the defendant (a parallel importer) was using the applicant’s trade mark in a manner going against good business practices in that it created an impression of it being commercially tied to the trade mark proprietor or even being the trade mark proprietor. The trade mark was a central element in the design of the commercial premises, homepage, company name, vehicles, etc. In the referred case, the applicant had argued in both the first- and

⁴⁵ Case 283/81 (Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health). – ECR 1982, p. 3415.

⁴⁶ *Ibid.*, paragraph 16.

⁴⁷ Case C-224/01 (Gerhard Köbler v. Republik Österreich). – ECR 2003, p. I-10239; The author has further discussed the Köbler case in C. Ginter. Riigi vastutus õigusemõistmisel tekitatud kahju eest (The State’s Liability for Damages Incurred by Administration of Justice). – Juridica 2004/8, pp. 520–525 (in Estonian).

⁴⁸ In CLCSCd 30.03.2007, 3-2-1-4-06 the court relied on *acte éclairé* and in ALCSCd 5.10.2006, 3-3-1-33-06 the court relied on *acte clair*. The first reference was made in ALCSCr 14.05.2007, 3-3-1-95-06.

⁴⁹ Kaubamärgiseadus. – RT I 2002, 49, 308; 2006, 7, 42 (in Estonian).

⁵⁰ CLCSCd 30.03.2007, 3-2-1-4-06. Trade Mark Directive (Note 10).

⁵¹ For a discussion on the substantive law issues of the case see C. Ginter. Effective Implementation of the Trade Mark Directive in Estonia (Note 2), pp. 337–345.

second-instance courts that the case law of the European Court must be taken into account in interpretation of the extent of protection granted to the trade mark proprietor. At the level of the Supreme Court, as the court of last instance, the applicant filed a petition asking the court to make a reference for a preliminary ruling to the ECJ. The main argument of the applicant was that the law must be interpreted in accordance with the case law of the ECJ interpreting the TMD. Such an interpretation would give the applicant a right to oppose the use of the trade mark in more cases than just those where the condition of the goods had changed.

In discussion of the applicant's petition for making a reference for a preliminary ruling, two procedural questions arose. Firstly, the implications of the fact that the request was filed after the cassation deadline were discussed. The CCP contains no reference to when such a petition should be made. Indeed the applicant argued that a need for a reference for a preliminary ruling may arise at any time during the proceedings. The Supreme Court considered it necessary to analyse the procedural nature of the applicant's petition in light of the CCP. The court concluded that, since the right to make a reference for a preliminary ruling rests with the court, a petition to the court asking for the court to make a reference cannot be considered a formal 'petition or application' within the meaning of the CCP. Instead, the Supreme Court found that such a petition must be classified as a petition to interpret and apply the law, by which the court is not bound.^{*52} The law permits presenting arguments regarding interpretation and application of law also after filing of the cassation claim.^{*53}

The reasoning of the Supreme Court in this respect may be agreed with. Making of a reference for a preliminary ruling is in the hands of the court, and the court is not bound by such a request. Indeed a reference may arise *ex officio* and at any time during the proceedings.^{*54} It is questionable whether it is necessary to qualify a petition of the party as a proposal or request to interpret the law in a certain way using terminology of internal procedural laws. However, as long as this does not entail unreasonable limitations to raising questions regarding a potential need for a preliminary ruling, it should be acceptable.

The second question to be addressed was whether or not the court should indeed make a reference for a preliminary ruling. The Supreme Court considered that the questions proposed in the applicant's petition had already been answered by the ECJ. It did, however, point out that the lower courts maintained the right to make such a reference should doing so be necessary in further proceedings. The Supreme Court concluded that the nonconformity could be overcome via interpretation of internal law, referring to the cases of Parfums Christian Dior, Bayerische Motorenwerke AG, Silhouette, Medion, and Gillette.^{*55} The court confirmed that the rights of the trade mark proprietor are indeed broader than those listed expressly in the TMA.

The decision analysed here is of central importance in introducing the position of substantive and procedural European law in Estonia. The decision of the Supreme Court was motivated extensively regarding proper interpretation of Estonian law in light of the practice of the ECJ. This sent a clear message that the Supreme Court accepts that, where refraining from making a reference for a preliminary ruling on the basis of *acte éclairé*, it must specify clear motives and references to the relevant case law of the ECJ. Although the applicant argued that a reference is necessary, the court dismissed these arguments with clear reasoning relying on the practice of the ECJ. The court's decision contains extensive analysis of the European case law, which gives credibility to its conclusion that the questions posed had already been answered. Refraining from making of a reference for a preliminary ruling in this case must be considered to be justified.

3.2. Applying *acte clair*

The case where the Supreme Court first relied on *acte clair* brings us back to the Surplus Stock Regulation and the SSFA. In the 6 October 2006 decision, the Administrative Law Chamber of the Supreme Court discussed whether the method of calculating surplus stock as laid down in the SSFA was in accordance with the requirements of the Surplus Stock Regulation.^{*56} The reasoning of the decision relies heavily on the general principle of proportionality; however, the resolution was to declare particular provisions of the SSFA contrary to the Surplus Stock Regulation. The court considered the contradiction with European law so clear as to permit it to overcome its obligation arising out of article 234 EC on the basis of *acte clair*.

The court's reasoning seems to focus mainly on questions of proportionality and legitimate expectations, pointing out that, while falling under the obligation to collect fees for excessive stock from undertakings, internal laws may not be disproportionate or run counter to legitimate expectations.^{*57} Due to the fact that the

⁵² Paragraph 56 of the discussed decision.

⁵³ *Ibid.*

⁵⁴ See, e.g., C-312/93 (Peterbroeck). – ECR 1995, p. I-4599 paragraphs 20–21; C-72/95 (Kraajeveld). – ECR 1996, p. I-5403 paragraph 60.

⁵⁵ See cases C-337/95 (Parfums Christian Dior v. Evora). – ECR 1997, p. I-6013; C-63/97 (BMW). – ECR 1999, p. I-905; C-355/96 (Silhouette International Schmied v. Hartlauer Handelsgesellschaft). – ECR 1998, p. I-4799; C-120/04 (Medion). – ECR 2005, p. I-8551; C-228/03 (Gillette Company and Gillette Group Finland). – ECR 2005, p. I-2337.

⁵⁶ ALCSCd 5.10.2006, 3-3-1-33-06.

⁵⁷ See paragraph 27 of the discussed decision.

present article focuses on issues of procedural law, the discussion of substantive law will be limited, and no final solution is presented. It is argued that the decision did not contain sufficient reasoning to justify reliance on *acte clair* and that without an interpretation from the ECJ it is not possible to determine whether the final decision as to the SSFA being contrary to EC law was correct.

As for the facts, once again a company had challenged the determined amount of surplus stock and the imposition of a corresponding fee.^{*58} The applicant raised issues of unconstitutionality, retroactive effect of the law, etc and argued for direct application of the Surplus Stock Regulation or, failing that, for the SSFA to be interpreted in the light and purpose of the referred regulation.^{*59} One of the central arguments was related to the fact that the SSFA foresaw mathematical calculation of the normal stock by multiplying the average stock of four years, counting back from 2004 (1 May), by a coefficient of 1.2. The applicant argued that such a calculation violated the principle of proportionality. Although the SSFA contained a method of adjusting the result to take into account certain circumstances, the applicant argued that the options listed did not adequately consider the position of sellers and exporters.

The Supreme Court focused in its reasoning on the question of whether the system established is in conformity with EC law and “helps to achieve its goals as fairly, legally, effectively, and proportionally as possible”.^{*60} The statement of reasons begins by pointing out that similar rules had been adopted by the EC before previous rounds of enlargement. These rules have been subject to interpretation by the ECJ, which had considered them to be proportionate and had confirmed the European Commission’s competence to adopt the regulation on surplus stock.^{*61} The court referred to the William Hinton case^{*62}, wherein the ECJ stated:

However, collection of such a charge must also observe the principle of proportionality which the Court has consistently held to be one of the general principles of Community law. By virtue of that principle, measures imposing financial charges on traders are lawful provided that the measures are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question, it being understood that, when there is a choice between several appropriate measures, the least onerous measure must be used and the charges imposed must not be disproportionate to the aims pursued.^{*63}

The above section confirms in essence that, as is the case with any area relating to the Single Market, principles of proportionality must be observed. The Supreme Court pointed out that the Surplus Stock Regulation leaves a wide margin of discretion to the Member State concerning how exactly to determine surplus stocks.^{*64} The Supreme Court concluded that European law does not foresee the use of a mathematical coefficient of 1.2 and that the coefficient does not sufficiently enable taking into account circumstances under which the stock was accrued. The decision concludes that “[t]he Chamber finds that the Surplus Stock Fee Act does not enable determining of surplus stock in a manner that is fair and in accordance with EU law”.^{*65} The court found that the mathematical coefficient does not enable taking into account the particular circumstances of the undertaking, which according to the decision is required by article 4 (2) (c) of the Surplus Stock Regulation.^{*66}

When deciding to refrain from making a reference for a preliminary ruling, the Supreme Court repeated the well-known preconditions, stating that “[a]ccording to the principle of *acte clair*, the highest court of a Member State is relieved of the duty to request a preliminary ruling if the answer to the question is obvious to the courts of other Member States as well as the European Court despite the fact that the question has not yet been answered. The court of the Member State must be convinced of the obviousness of the answer.”^{*67}

Although the questioned provisions of the SSFA may have been contrary to European law, it is possible to challenge the conclusion that there was no need to make a reference for a preliminary ruling. In the case currently under consideration, many factors had to be balanced, and the reasoning of the European Court may or may not have been different from that applied in the decision analysed. It cannot be ruled out that, in the proceedings of the ECJ, a solution could have been found allowing for the principle of proportionality to be observed via conforming interpretation.

⁵⁸ Maltrodexin and Maltrodexin syrup.

⁵⁹ Due to a focus on procedural law issues, the discussion will not cover all legal aspects of the case.

⁶⁰ See paragraph 10 of the decision.

⁶¹ Referring to cases C-30/00 (William Hinton). – ECR 2001, p. I-7511; C-179/00 (Gerald Weidacher). – ECR 2002, p. I-501. The Supreme Court also pointed out that since the parties had not challenged the validity of the regulation, it had no need to make a reference for a preliminary ruling on that basis. As the administrative court undoubtedly has a right to raise questions of law *ex officio*, this may refer that the justices do not consider the existing information sufficient to raise doubts as to the validity of the regulation.

⁶² C-30/00 (Order William Hinton & Sons). – ECR 2001, p. I-7511.

⁶³ Paragraph 59 of the decision. The ECJ referred to Case 265/87 (Schröder v. Hauptzollamt Gronau). – ECR 1989, p. 2237 paragraph 21, and Case C-295/94 (Hüpeden). – ECR 1996, p. I-3375, paragraph 14.

⁶⁴ Article 4 (2).

⁶⁵ Paragraph 27 of the decision.

⁶⁶ Paragraph 29 of the decision.

⁶⁷ *Ibid.*

The *acquis communautaire* imposes a clear requirement for the Member States to collect fees for surplus stocks from undertakings. Therefore, there is indisputably a Community goal to be achieved. Due to the commitment of loyalty and sincere co-operation that arises out of article 10 EC, a Member State has the duty to contribute to achieving this goal effectively and without undue delay. Therefore, *a priori* one would have to be careful before adopting any actions that could postpone the fulfilment of this obligation. Even in *Simmenthal* the right of the internal court to set aside provisions of internal law was declared by the ECJ in reference to those provisions of internal law that “might impair the effectiveness of Community law”.⁶⁸

On the other hand, there was the question of whether the method of calculating surplus stock under the SSFA was in concordance with the principle of proportionality. One must agree that the principle of proportionality forms an integral part of Community law. However, before finding a certain provision contrary to Community law on the basis of proportionality, one would need a thorough analysis of the internal law in order to determine whether there are other provisions that could provide for sufficient protection of the rights of the particular individual or company. One tool for overcoming a collision between EC law and internal law is the principle of conforming interpretation. It can be argued that in this case conforming interpretation could have provided a solution.

The main problems from the point of view of the applicants seemed to be that (a) the method of calculation seemed mathematically oriented without taking into account their particular circumstances and (b) the right to be heard and to participate in administrative proceedings was not adequately guaranteed because the law did not make it clear what kind of evidence they should have provided and to what extent they would need to be heard during the proceedings after having filed the documents with the authorities.

It seems undisputed that European law does not exclude the possibility of using coefficients per se, as long as there remains a possibility for the person to provide evidence and prove that the factual circumstances point to a different conclusion. One must therefore consider whether Estonian law contains a basis for such a possibility. For example, subsection 10 (2) of the SSFA allows for deviation from applying solely the mathematical coefficient and includes for this purpose a list of exceptions, which ends with the words “or other circumstances not dependent on the handler”. This phrase could be interpreted as a gate to a rule of reason test, to see whether there are other logical explanations for the surplus stock besides that of wishing to make speculative profits from accession. It is true that a grammatically based interpretation of subsection 10 (2) of the SSFA would inevitably lead to the need to check whether the factors were outside the handler’s control (referring to “dependent on the handler”). However, it could be argued that such a narrow interpretation would not be in conformity with the legislative goal, which was to determine surplus stock as referred to in article 4 (2) c) of the Surplus Stock Regulation. Therefore, one could advocate an expansive interpretation of subsection 10 (2) of the SSFA and derive from it a right for persons to provide additional evidence regarding the circumstances of how the stock had been compiled. In the *Pupino* case, the ECJ repeated the limits of conforming interpretation, stating that “[t]he principle that national law must be given a conforming interpretation cannot lead to an interpretation that is *contra legem*, or to a worsening of the position of an individual in criminal proceedings”.⁶⁹ Interpretation as proposed in this article would not go against a clear limitation of law or against clear legislative intent, nor would it negatively affect the rights of the person subject to the proceedings. In conclusion it is argued that the SSFA could have been interpreted to take into account objectively justified explanations for an increase in stock for sellers or exporters.

Even if the SSFA would not have provided for sufficient interpretative material, one could conclude from the above-mentioned March 2006 decision of the Supreme Court regarding directive conforming interpretation of the TMA that conforming interpretation does not have to be limited to the provisions of the particular act of *lex specialis*.⁷⁰ One could argue that the general principles of administrative law, such as proportionality and the right to be heard and to participate in the administrative procedure, must be observed even without codification. In Estonia, the rules of administrative procedure are indeed at least partially codified in the Administrative Procedure Act⁷¹ (APA).⁷² The APA sets forth a requirement of proportionality for administrative acts⁷³ and clearly includes a duty to exercise the right of discretion “in accordance with the limits of authorisation, the

⁶⁸ Case 106/77, case 106/77 (*Amministrazione delle Finanze dello Stato v. Simmenthal SpA*). – ECR 1978, p. 629 paragraph 22.

⁶⁹ C-105/03 (*Pupino*). – ECR 2005, p. I-5285 paragraph 24. Although this decision was made with a reference to a framework decision, its wording refers to a clear parallel with that used by the ECJ describing the indirect effect of European law in C-106/89 (*Marleasing SA*). – ECR 1990, p. I-4135 paragraph 7.

⁷⁰ See section 3.1. of this article.

⁷¹ *Haldusmenetluse seadus*. – RT I 2001, 58, 354; 2007, 15, 76 (in Estonian).

⁷² See K. Merusk. Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding. – *Juridica International* 2002 (7), p. 76. Professor Merusk makes an express reference to the fact that the APA was introduced in a situation where the existing specific laws failed to secure the procedural rights of participants. Although the SSFA did not exist at that time, it may well be argued that the APA is still fit to serve as a sufficient instrument to protect parties to the administrative proceedings also under the SSFA. For a discussion on the rights of the participants in administrative proceedings in Estonia see the same article and also K. Merusk. Administrative Law Reform in Estonia: Legal Policy Choices and Their Interpretation. – *Juridica International* 2004 (9), pp. 57–59.

⁷³ APA, § 3 (2).

purpose of discretion, and the general principles of law, taking into account important circumstances and considering legitimate interests".⁷⁴ As stated by Professor K. Merusk, "For a long time now, the courts' practice in democratic states has accepted the principle according to which officials are not only servants of the state but also helpers of citizens".⁷⁵ The APA imposes a clear obligation on the administrative body to explain to the participant in the proceedings which applications, evidence, and other documents must be submitted.⁷⁶ It also imposes a clear and uniform duty on the administrative authority to "grant a participant in proceedings a possibility of providing his or her opinion and objections in written, oral, or any other suitable form" before an act is adopted and to grant "a possibility to provide his or her opinion and objections" before adopting a decision that may damage the rights of the participant in the proceedings.⁷⁷ The possibility of adopting acts without hearing out the participant in the proceedings has been limited to very exceptional circumstances.⁷⁸

Reference is made to the ruling of the Supreme Court of May 2005⁷⁹ and April 2003,⁸⁰ in which the court stated that the APA is applicable even in areas where the field-specific law does not make express reference to it. In order to exclude the applicability of the APA, the "specific regulation must be of such volume, density, and detail as is comparable to that of the APA and guarantee to the person procedural legal protection comparable to that under the APA".⁸¹ According to the Supreme Court, "Through not applying the APA in proceedings that are not sufficiently regulated by specific laws, the person's rights and obligations may be endangered".⁸² In the case at hand, the SSFA expressly states that the whole procedure in question is subject to the rules of the APA, taking into account the particularities of the SSFA.⁸³ The above analysis leads to a conclusion that the rules of the APA are applicable as long as clear provisions of the SSFA do not exclude their applicability. Therefore, it is difficult to comprehend how the authorities could have conducted the administrative proceedings under the SSFA without applying to the full extent the procedural guarantees included in the APA. This, in turn, makes it difficult to see why the SSFA was checked against the principle of proportionality or compatibility with European law without regard having been given to the additional guarantees arising from the APA. It is argued here that the internal law included possibilities for guaranteeing the rights of applicants in administrative proceedings. Any violations of persons' right to be heard or to file documents, or of the principle of proportionality, could have been dealt with in the process of individual applications. In each case, the administrative courts could have checked whether the individuals' rights had been taken into sufficient consideration, and if the rights had been violated the court could have annulled the particular decision determining the surplus stock, without necessarily having to set aside the provisions of the SSFA.

The above discussion does not aim at, and is not intended to provide, a final answer to the question of whether or not the Supreme Court was right in declaring the particular provisions of the SSFA at issue to be contrary to the Surplus Stock Regulation. The reasoning is presented in order to demonstrate that there are several counter-arguments to the solution adopted by the Supreme Court. In such a case, the rule on *acte clair* demands that the court relying on it provide reasoning as to why this approach would be equally obvious to the courts of other Member States and to the ECJ.

The fact that reliance on *acte clair* was not sufficiently well motivated is further illustrated by the structure of the decision under discussion. The part of the decision introducing the test for *acte clair* is not followed with reasoning showing the clarity of the situation for the ECJ and the courts of other Member States. The reasoning of the decision reads as follows:

The **Administrative Law Chamber of the Supreme Court is convinced** that article 4, subsection 2, and its points a–c, of European Commission Regulation No. 1972/2003/EC must be considered together and that Member States cannot exclude the application of some subsection of article 4, section 2. In this case, **the chamber considers it obvious** that the SSFA does not guarantee the taking into account of circumstances laid down by article 4, subsection 2, point c of European Commission Regulation 1972/2003/EC.⁸⁴ [emphasis added]

The above statements solely reflect the internal conviction of the Administrative Law Chamber of the Supreme Court. They are not followed by clear references to the hypothetical position of the courts of other Member

⁷⁴ *Ibid.*, § 4 (2).

⁷⁵ See K. Merusk, Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding (Note 72), p. 83.

⁷⁶ APA, § 36.

⁷⁷ *Ibid.*, § 40.

⁷⁸ *Ibid.*

⁷⁹ ALCSCr 5.05.2005, 3-3-1-12-05, paragraph 11.

⁸⁰ ALCSCr 4.04.2003, 3-3-1-32-03, paragraphs 12–14.

⁸¹ *Ibid.*

⁸² ALCSCr 5.05.2005, 3-3-1-12-05, paragraph 11. The court made a reference to the 17.02.2003 decision of the Constitutional Review Chamber of the Supreme Court in case 3-4-1-1-03 where the Supreme Court stated that the APA is a specific expression of the general principle of good administration. Paragraphs 17–18.

⁸³ SSFA, § 1 (2).

⁸⁴ Paragraph 29 of the discussed decision.

States or the ECJ. This again supports the conclusion that the decision does not set forth sufficient reasoning to justify relying on *acte clair*. Although the ECJ might have come to the same conclusion, it is not obvious from the reasoning of the decision discussed that this would necessarily have been the case.^{*85} Arguments contained in a recent publication of Judge Uno Lõhmus support the same conclusion. After a brief introduction of the reasoning supporting the decision of the Supreme Court, the following is stated in the article referenced: “Were the arguments to the contrary less significant? What should have been done in such a case? Such a situation justifies — and in the case of the Supreme Court obliges — asking for a preliminary ruling. The response of the European Court could have influenced the decision in this complicated yet fundamental court case.”^{*86}

Before concluding the present discussion, it is important to clarify the legal force of a decision of a chamber of the Supreme Court. Legally, the positions set out in a decision of the Supreme Court on the interpretation and application of the law are mandatory for the court conducting a new hearing of a matter.^{*87} Therefore, the effects of the decision should in principle be limited to being *inter partes*. However, in practice the decision was taken as a basis for partial annulment of the SSFA and had the effect of closing most of the pending cases. It is common practice for Estonian courts to take interpretative guidance from the decisions of the Supreme Court. If the law had not been changed after the decision considered here, due to the *inter partes* nature of the judgement, it may in theory have happened that other chambers of the Supreme Court could have decided differently. The legal nature of the position of different chambers of the Supreme Court is further illustrated by analogy with the position taken by the Administrative Law Chamber in another ruling, where it is expressly stated that “[t]he decision of a court of any instance, including the Administrative Law Chamber of the Supreme Court, cannot be a guarantee that the law applied by the court is considered in accordance with the Constitution in constitutional review proceedings as well”.^{*88} Thus, there exists no guarantee that the position adopted by the Administrative Law Chamber would have been upheld by other chambers, lower courts, or the European Court.

4. Conclusions

The above discussion illustrates the questions the Supreme Court has been faced with in its practice, when deciding on procedural issues related to effects of EC law. It demonstrates that the parallel existence of European and national law and of the European and national judiciary is a good foundation for addressing substantial questions regarding court procedure. The internal procedural rules do not yet take into account the changed legal circumstances. Internal courts are left with the hurdle of solving the riddle.

The Supreme Court in May 2007 made its first reference for a preliminary ruling.^{*89} The ECJ was asked for guidance regarding the proper interpretation of Regulation (EC) 1257/1999. As for the style of the reference, the court presented extensive reasoning as to why it considered the internal rules to be potentially in violation of EC law and pointed out that the proper solution to the questions is not clear and that there is no consistent practice of the ECJ.

It is also pointed out here that in June 2007 the Supreme Court again saw no need to make a preliminary reference.^{*90} This time, the court pointed to a European Commission working document as a source for interpretation of Community law.

It may be concluded that the Supreme Court has had the possibility to address all major issues related to the preliminary rulings procedure. Despite the minimal quantity of actual references, the decisions and ruling discussed here do send out a clear signal that the Estonian courts are expected to take into account the existence of Community law and the preliminary rulings procedure. As discussed in this article, the Supreme Court has confirmed the right of the internal court to suspend proceedings where the validity of a Community act has been placed under question in the European Court. The Supreme Court decided that the proper legal basis for suspending the proceedings would be a reference to the impossibility of resolving the case before another case is resolved. The national court must provide reasoning that specifies why it believes that there are grounds to doubt the validity of the Community norm. The Supreme Court also pointed out that, preferably, the internal court should make a reference for a preliminary ruling of its own. It has been argued in this article that potentially a better basis for suspending the proceedings would have been to apply by analogy the

^{*85} For example the Supreme Court rightly pointed out that the European Commission had not challenged the SSFA. This may (or may not) refer to the Commission considering the methods introduced in the SSFA to be in conformity with EC law.

^{*86} U. Lõhmus. Kuidas liikmesriigi kohtustüsteem tagab Euroopa Liidu õiguse tõhusa toime (How Does the Court System of a Member State Ensure Effective Functioning of EU Law)? – *Juridica* 2007/3, p. 151 (in Estonian).

^{*87} CACP, § 74.

^{*88} ALCSCr 19.06.2007, 3-3-2-1-07 paragraph 14.3.

^{*89} ALCSCr 14.05.2007, 3-3-1-95-06.

^{*90} ALCSCd 20.06.2007, 3-3-1-26-07.

provision referring to parallel proceedings for constitutional review. It was also argued that the courts should make a reference for a preliminary ruling on their own instead of simply suspending the proceedings with a reference to a parallel case, over the processing of which one has no control.

The discussion showed that the Supreme Court has applied both *acte éclairé* and *acte clair* when refraining from making a reference for a preliminary ruling. In the case related to *acte éclairé*, the Supreme Court also gave an internal-law meaning to the parties' request that the court make a reference and drew a parallel between such requests and a party's proposal to interpret the law in a certain way. When focusing on *acte éclairé*, the court provided for an extensive analysis of the case law of the European Court before coming to a conclusion that the questions presented had been answered. In the case of *acte clair*, the situation was not so clear and this article submits that there is at least some interpretative doubt as to whether the court offered sufficient motivation for its decision to refrain from making a reference. The final outcome of the saga of collection of the fees, which are considered to be state aid incompatible with the Single Market, is yet to be seen. It seems clear from the recent *Lucchini* decision of the ECJ that the national laws and practices, including the potential argument of *res judicata*, which has arisen due to ignoring Community laws and procedure, cannot be applied if they would prevent the recovery of state aid granted in breach of Community law.⁹¹ Therefore, interesting litigation in the internal courts and the European Court can be predicted, and complex questions regarding the relationship between EC and internal law are bound to arise.

⁹¹ C-119/05 (*Lucchini Siderurgia*). – Decided in 2007, not yet published in the ECR.