PART III

THE IMPACT OF THE CJEU IN POST-SOVIET STATES

7

The Impact of the Court of Justice of the European Union on the Russian Legal System

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A. Introduction

This chapter presents the findings of the author on the impact of the Court of Justice of the European Union (CJEU) on the Russian legal system.

Russian courts have applied the EU–Russia bilateral agreements and referred to EU law in their practice for more than twenty years. The first links to CJEU case law in Russian court decisions date back to 2006. This means that the Russian judiciary has only been referring to CJEU practice for the past thirteen years.

Arguably, thirteen years is not long enough to assess a national legal order and judicial developments. Moreover, it is well known that EU–Russia relations have been going through a difficult period since 2014 and have been stagnant due to the Ukrainian crisis in 2014. At the present time, the level of relations is showing a stable decrease. Mutual sanctions, a minimum of political contacts, and cooperation on the basis of 'selective engagement' are at the top of the agenda between the parties. As a result, I decided to regroup the methodological approach for this research and present separate results for the periods before and after 2014.

Consequently, section B includes a brief description of the background to the modern Russian legal system and, in particular, of the structure of the Russian judiciary. Section C briefly describes the Russian model for approximating its legal order with EU rules and standards, as well as some remarks on the application of EU law by the Russian courts. In section D, I explain the specifics of the database used and proceed to describe and analyse the citation of CJEU decisions by

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Russian courts in the period 2006–20. The tables and graphs presenting the findings of the research appear here. Finally, in section E, I present analysis of results and conclusions.

B. Russia's Legal System and Judiciary

The Russian legal order belongs to the continental legal tradition and is characterized by distinct and separate branches of public and private law. In particular, Russian criminal procedural law and Russian civil procedural law are two different branches of public law. The 1993 Constitution of the Russian Federation ratified Russia's international treaties and federal laws, including codified laws (codes), which form the main sources of law in the Russian legal order. Although there is no rule of precedent in the Russian legal order, resolutions (explanatory notes) of higher Russian courts[1] are extremely important for comprehending the legal force of a particular international agreement, as well as domestic legislation within the Russian legal system. These resolutions constitute a source of primary and secondary Russian law interpretation for lower courts, which are obliged to follow these resolutions.

Another important fact to stress is that the Russian legal order is still influenced by Soviet law. Unlike the Bolshevik regime, which extinguished the Law of the Russian Empire after the Revolution of 1917, the modern Russian legal order does not abrogate, but limits the application of Soviet law provisions. Thus, Soviet law can still be applicable to the extent that it does not contradict the Constitution of the Russian Federation.[2]

The political and legal origin of sovereignty in Russia comes from the Declaration on State Sovereignty of the Russian Soviet Federative Socialist Republic (RSFSR) of 12 July 1990[3] that proclaimed the superiority of it and its legislation over the legislation of the USSR. The sovereignty of Russia covers its entire territory and the state ensures the integrity and inviolability of its territory.

The fundamentals of the modern Russian legal order originate from the 1993 Constitution of the Russian Federation ('The Russian Constitution'), which was adopted by a nationwide vote (referendum) on 12 December 1993 as the main law of Russia, based on best constitutional standards and internationally recognized democratic and human rights values. The Russian Constitution came about as a

[1] The higher level of the Russian judicial system consists of the Constitutional Court and the Supreme Court.

[2] In accordance with the 1993 Constitution of the Russian Federation, Second Section, para 2.

[3] Declaration on the State Sovereignty of the Russian Soviet Federative Socialists Republic on 12 July 1990, Vedomosti Syezda narodnikh deputatov RSFSR I Verkhovnogo Sovieta RSFSR ('Bulletin of the Congress of People's Deputies and of the Supreme Council the Russian Soviet Federative Socialists Republic') of 14 July 1990, N 2, Art 22.

result of radical changes in Russian society, which started in the era of Soviet *perestroika*. The Russian Constitution was influenced by West-European constitutional traditions, and therefore reflects Western approaches to the foundations of state power, protection of human rights, and basic principles of economics and law. Undoubtedly, this document laid a firm foundation stone for the Europeanization of contemporary Russian law.[4]

The Russian Constitution consists of a preamble, two sections, nine chapters, and 137 articles. It covers provisions on the fundamentals of the constitutional system,[5] human rights,[6] the federal structure,[7] the fundamentals of the functioning of high-level bodies of state power and local self-government,[8] constitutional amendments, and review provisions.[9] The Constitution declares Russia to be a democratic, federal, law-bound 'State' with a republican form of government.[10] It must be emphasized that the human being, their rights, and freedoms are the supreme value in Russia.[11] Russia is a social state,[12] where all forms of ownership are recognized and protected.[13] Separation of powers,[14] ideological diversity,[15] and the rule of law[16] are guaranteed under the 1993 Constitution.

The constitutional order of Russia is characterized by three features. First of all, some provisions of the Russian Constitution are immune from further amendments. These provisions are those on the fundamentals of the constitutional system and on human rights under constitutional review. A new constitution must be adopted if these provisions are amended. Second, the Constitution integrates international legal acts into its national legal order and recognizes the priority of duly ratified international agreements over conflicting domestic laws.[17] Third, only the Constitutional Court can interpret the Constitution. Its legal rulings are binding[18] and are considered as a source of law within the Russian legal system.[19]

[4] In fact, the time of adoption of the Russian Constitution practically coincided with the entry into force of the Treaty on European Union (TEU) on 1 November 1993.

[5] Russian Constitution, Chapter 1.

[6] ibid Ch 2.

[7] ibid Ch 3.

[8] ibid Chs 4–8.

[9] ibid Ch 9.

[10] ibid Art 1.

[11] ibid Art 2.

[12] ibid Art 7.

[13] ibid Art 8.

[14] ibid Art 10.

[15] ibid Art 13.

[16] ibid Art 15.

[17] ibid Art 15(4).

[18] Article 2 Federal Constitutional Law no 1-FKZ of 21 July 1994 'On the Constitutional Court of the Russian Federation', SZ RF, 1994, no 13, Art 1447: 'Decisions of the Constitutional Court of the Russian Federation shall be obligatory throughout the territory of the Russian Federation for all representative, executive, and judicial bodies of State Power, bodies of local government, enterprises, agencies, organizations, officials, citizens and their associations.'

[19] Valerie Zorkin, 'Precedent Character of the Decisions of the Constitutional Court of the Russian Federation' (2004) 12 J Russ Law 3–9 (in Russian).

It is worth noting that the Russian Constitution is strongly influenced by the Federal Treaty of 1992. This document was based on a populist slogan of Boris Yeltsin: 'You may take as much sovereignty as you can swallow.'[20] Consequently, the Constitution identifies the subjects of the Russian Federation as 'States'.[21] Nevertheless, in 2002 the Constitutional Court unequivocally rejected all claims of sovereignty for the subjects of the Russian Federation.[22]

Notwithstanding the ongoing academic debate on the Russian approach to sharing European common values,[23] it must be acknowledged that the Russian Constitution laid the basis for a principally new Western-style legal system in post-Soviet Russia. The major breakthrough of the 1993 Constitution is a decisive departure from the Soviet legal heritage, in particular with regard to the implementation and application of international law within the national legal order.[24] It is worth noting that at the time of its adoption, the Russian Constitution had the most liberal provisions regarding application of international law within a national legal system among all the former Soviet countries. Consequently, the constitutional provisions on application of international law gave greater opportunities for Russian judges to apply and interpret international law in accordance with their constitutional acts than for any other judges from the former USSR.

The core of 'classic' Soviet legal doctrine was to preserve the concept of 'sovereignty' in order to protect the country's own system of socialistic government and the supremacy of Soviet law, and in particular the supremacy of the fundamental principles of socialist state order (nationalization of property without compensation, wars against colonialism, no protection of private property). Even during *perestroika*, the formal theory of international law in the USSR stated that no international treaty could automatically take precedent over conflicting provisions of Soviet domestic law. International agreements were supposed to be considered as self-executing if their provisions either fully corresponded to existing national laws or regulated gaps in national legislation. International human rights conventions were deprived of supremacy over national law due to their 'vagueness and generality', and therefore were not directly applicable. It should be emphasized that as a matter of principle 'classic' Soviet legal doctrine did not recognize the primacy of international law over national law.[25]

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[20] See Boris Yeltsin's speech in Kazan 6 August 1990 <http://yeltsin.ru/news/boris-elcin-berite-stolko-suverineteta-skolko-smozhete-proglotit> accessed 1 May 2020.

[21] Russian Constitution, Art 5(2).

[22] Order of the Constitutional Court of the Russian Federation no 92-O of 27 June 2000, SZ RF, 17 July 2000, no 29, Art 311; Judgment of the Constitutional Court of the Russian Federation no 10_P of 7 June 2000, SZ RF, 19 June 2000, no 25, Art 2728.

[23] See Päivi Leino-Sandberg and Roman Petrov, 'Between 'Common Values' and Competing Universals—the Promotion of the EU's Common Values though the European Neighbourhood Policy' (2009) 5(15) Eur Law J 669–70.

[24] See Gennady M Danilenko, 'Implementation of International Law in the CIS States: Theory and Practice' (1999) 10 EJIL 51–69.

[25] John N Hazard, 'Soviet Yearbook of International Law 1987' (1990) 84(1) AJIL 303–05. See also FJM Feldbrugge, *Encyclopedia of Soviet Law* (Oceana Publications 1973). The official Soviet doctrine

The modern Russian judicial system is based on constitutional provisions and those of the federal constitutional law 'On the Judicial System of the Russian Federation'.[26] In accordance with these provisions, the Russian judicial system has a complex structural hierarchy. This in turn depends on the federal form of government, and specifically on Russia's subdivisions of different types and levels. The judicial system of Russia consists of federal and regional courts.

The Constitutional Court and the Supreme Court comprise the higher level of the federal courts.[27] The Constitutional Court rules on cases concerning conformity with the Constitution, and judicial disputes between federal and regional bodies. It interprets the Russian Constitution. In addition to judgments, Constitutional Court judges are empowered to issue dissenting opinions, which lack binding effect. The Russian Supreme Court considers the most important cases for the legal order as a court of first instance and sits as the highest instance for the three subsystems of federal courts:

- federal courts of general jurisdiction;
- arbitration (commercial) courts,[28] including the Court of Intellectual Property Rights;
- military courts.

The federal courts of general jurisdiction consist of two levels: Regional Courts (courts at the level of federal subjects—Republic, Kray, Oblast, Federal City, Autonomous Oblast, Autonomous Okrug) and courts of regional subdivisions (town, district, and inter-district courts). These courts consider criminal, civil, administrative, civil, and other categories of cases under their jurisdiction.

Arbitration courts cover three levels of federal court: Arbitration District Courts (ten), Arbitration Appellate Courts (twenty-one) and Arbitration Courts at the level of federal subjects (eighty-five). Arbitration courts consider disputes in the economic field. The Russian system of arbitration courts also includes a special court on intellectual property rights which resides in Moscow.

of the application of international law explicitly stated that the Soviet Constitution of 1977 'possessed prior legal power upon the territory of the country and had priority over the international obligations of the country', in N Blatova (ed), *Mezhdunarodnoe Publichnoe Pravo* (1987) 64.

[26] Federal Constitutional Law no 1-FKZ of 31 December 1996 'On the Judicial System of the Russian Federation', SZ RF, 1997, no 1, Art 1.

[27] Before 2014, arbitration courts were a separate branch of judicial power headed by the Higher Arbitration Court. After the merger, the jurisdiction of the Higher Arbitration Court was transferred to the Russian Supreme Court.

[28] The term 'arbitration courts' is a historical feature of the Russian judicial system. It comes from the term 'state arbitrazh' ('special courts for economic disputes') in the Soviet era. In addition, the term 'commercial' in Russian may mean 'private' or 'non-state', or 'on a paid basis', for example, 'commercial shop' (a small private store) or 'commercial real estate' (rented flat).

The system of Russian military courts is constructed in accordance with military subdivisions. This involves two levels of federal courts: military district courts and garrison courts. Military courts rule on criminal cases involving military personnel.

Courts of the federal subjects include Constitutional (Statutory) Courts of Regions (Subjects of the Russian Federation) and justice of the peace courts. Constitutional (Statutory) Courts of Regions apply and interpret the Constitutions of republics and statutes of other subjects of the Federation accordingly. justice of the peace courts, which represent the lowest level of Russian courts of general jurisdictions, consider small criminal, civil, and administrative cases.

Russian courts consider a significant number of cases. Only in 2018, some 33,000 Russian judges passed judgments on some 31 million different cases.[29] This means that every Russian judge reviews more than 900 cases every year. The number of cases is growing annually.[30]

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According to the Constitution, the Russian president appoints federal judges, except for judges of the Supreme and Constitutional Courts, who are appointed by the Federation Council on the president's proposal. Several conditions are required to obtain the status of a judge. These include, for example, meeting a higher legal education requirement and passing a qualifying exam. Judges should know about the specifics of applying international law in the Russian legal order, but they are not obliged to understand EU law. There are also no special rules requiring judges to speak foreign languages. At the same time, higher legal education in Russia includes the study of European law (including EU law) and a foreign language (as a rule, English). The use of CJEU case law in Russian court judgments is an initiative of individual judges who have knowledge of EU law and can read CJEU judgments in a foreign language. Usually, they access CJEU decisions through the internet via the EU official website. In very rare cases, the Russian courts ask Russian scholars to deliver their expert legal opinion on EU law matters within the framework of the proceedings. At the same time, the Russian courts do not consider any legal doctrine as a source of law and normally do not cite it in their decisions.

Adoption of the new Constitution of the Russian Federation in 1993 afforded the Russian courts a substantially broader opportunity to apply international law and its universal principles. In accordance with the Russian Constitution:

> Universally recognized principles and norms of international law as well as international agreements of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes

[29] M Varaksin, The Supreme Court summed up the results of the courts for 2018: <https://pravo.ru/story/209019/> accessed 1 May 2020.

[30] According to official statistics of the Supreme Court Judicial Department: <www.cdep.ru/userimages/sudebnaya_statistika/2018/SSt_2010-2017.xls> accessed 1 May 2020.

> rules which differ from those stipulated by law, then the rules of the international agreement shall be applied.[31]

These provisions go further than the 1992 Amendments to the Soviet Constitution, which only established the supremacy of internationally recognized human rights over domestic legislation. Moreover, compared with similar constitutional provisions of other former Soviet countries, it is a stringent rule concerning the primacy of international law in the national constitution within the post-Soviet area.[32]

The provisions of ratified international agreements prevail under the rules of Russian domestic legislation. In 1997, the Constitutional Court interpreted in this context that 'law' means laws and all other rules[33]—but not the Constitution. On the one hand, the Constitutional Court ruled that 'international treaties of the Russian Federation that do not correspond to the Constitution of the Russian Federation shall not be implemented or used'.[34] On the other hand, if an international treaty contradicts the Russian Constitution, then the Russian side cannot sign it without necessary amendments to the Constitution.[35] Moreover, the range of international agreements possessing primacy over Russian legislation is limited by the requirement of ratification.

International treaties of the Russian Federation form a 'part of its legal system', so it is impossible to interpret this rule in the light of the *lex posteriori derogat legi priori* principle in the case of contradiction between the provisions of international treaties and future domestic acts. The Supreme Court of the Russian Federation has clarified that national courts should not apply national legal provisions that differ from the provisions contained in ratified international agreements.[36]

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It is important to emphasize that the Constitution offered greater opportunities for Russian judges to apply and interpret various sources of international law in their judgments. As commentators acknowledge, 'international law is no longer "alien" for [Russian] courts. They widely refer to it and apply it as well as domestic norms.'[37]

[31] Article 15(4).

[32] Maksim Karliuk, 'The Russian Legal Order and the Legal Order of the Eurasian Economic Union: An Uneasy Relationship' (2017) 5(2) RLJ 38–39.

[33] 'Order of the Constitutional Court of the Russian Federation no 87-O of 3 July 1997' (1997) 5 Bull Const Court Russ Fed 3.

[34] Constitution of the Russian Federation, Art 125(6).

[35] Article 22 Federal Constitutional Law no 101-FZ of 15 July 1995 'On International Treaties of Russian Federation', SZ RF, 1995, no 29, Art 2757.

[36] See 'Resolution of the Supreme Court of the Russian Federation of 10 October 2003 "On Application by Courts of General Jurisdiction of the Commonly Recognized Principles and Norms of the International Law and the International Treaties of the Russian Federation' (1997) 12 Bull Const Court Russ Fed.

[37] Roman Petrov and Paul Kalinichenko, 'The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine' (2011) 60 ICLQ 337–39.

Resolutions of the Plenum of the Supreme Court of Russia (the highest body of the Supreme Court, which is authorized to issue unified interpretation of Federal laws and their application by lower national courts)[38] specify precise criteria which Russian courts of general jurisdiction are expected to follow in relation to various sources of international law. In particular, these resolutions clarify that the Russian judiciary can apply international agreements that meet the following cumulative requirements: (i) Russia is a party; (ii) the agreement has been duly ratified by the Russian Parliament; (iii) the agreement has been published in an official periodical in Russia; (iv) the agreement is self-executory by its nature.

Therefore, it can be said that international law is widely referred to and cited by national judges.[39] Interpretation and application of the European Convention on Human Rights (ECHR) is of particular significance for the Russian judiciary.[40] This is also relevant for application of the EU–Russia Partnership and Cooperation Agreement (PCA) of 1997[41] and other bilateral agreements between the EU and Russia.[42] However, application of international law by the Russian judiciary is not completely smooth. In some cases, Russian judges openly ignore—or even reject application of—international law in their judgments. Moreover, Russian courts are often guided in their decisions by the judgments of other courts, in particular those of the higher Russian courts and the courts of Moscow Districts and the City of Moscow.[43]

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[38] For instance, 'Resolution of the Supreme Court of the Russian Federation of 10 October 2003' (n 36); Resolution no 8 of 11 June 1999 'On implementation of the international agreements of the Russian Federation referred to the questions of the arbitration procedures', Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoy Federatsii ('Herald of the Supreme Arbitration Court of the Russian Federation') no 6, 1999.

[39] Serge Marochkin, 'International Law in the Courts of the Russian Federation: Practice of Application' 2007 2 Chin J Int 333.

[40] Based on Russian Constitution, Art 15(4), as well as Arts 17 and 18 providing for direct application of international instruments for the protection of human rights, Russia is making steady progress in the process of effective implementation of the ECHR and other acts of the Council of Europe. It is now customary practice for Russian courts to refer to provisions of the ECHR and the case law of the European Court of Human Rights (ECtHR) in their own judgments. See E Alisievich, 'Russian Court Practice of Applying Legal Views of the European Court of Human Rights' in Kaj Hober (ed), *The Uppsala Yearbook of East European Law 2006* (Wildy, Simmonds & Hill 81–83).

[41] Agreement of 28 November 1997 on partnership and cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part [1997] OJ L327 (EU–Russian PCA), 1.

[42] Alfred E Kellermann, 'The Impact of EU Enlargement on the Russian Federation' 2005 2(1) Azerbaijani-Russian Journal of International and Comparative Law 172.

[43] Paul Kalinichenko, 'The Constitutional Order of the Russian Federation and Its Adaptability to European and Eurasian Integration Projects' in Peter Van Elsuwege and Roman Petrov (eds), *Post-Soviet Constitutions and Challenges of Regional Integration: Adapting to European and Eurasian Integration Projects* (Routledge 2018) 170–72.

C. Approximation of Russian Law with EU Rules and Standards

The years of the EU–Russia strategic partnership had different positive results, especially in creating a comprehensive legal basis between the parties. Modern EU–Russia relationships are essentially based on three legal layers. The first layer is the EU–Russia PCA of 1997 and other EU–Russia bilateral agreements.[44] The second layer consists of different memorandums of understanding and other arrangements, which are to be considered as soft law instruments. The third layer covers Russian legislation and the EU *acquis* within EU–Russia sectoral cooperation.

Unfortunately, the EU–Russia legal background is significantly depleted at the present time. Russia's WTO accession in 2012 implies that many provisions of the EU–Russia PCA have become outdated.[45] In order to adapt to this new legal context, the EU and Russia concluded several sectoral trade agreements in 2011,[46] but their effective implementation may face difficulties due to the lack of a new EU–Russia framework agreement.[47]

Since the Ukrainian crisis in 2014, EU–Russia relations have deteriorated. The European Parliament in its Resolution of 10 June 2015 stressed that the EU cannot envisage a return to 'business as usual' and had no choice but to conduct a critical reassessment of its relations with Russia. It highlighted that due to Russian actions in Crimea and in Eastern Ukraine, Russia can no longer be treated or considered as a 'strategic partner'.[48] A new period of 'frozen' partnership has started between the parties, moving such amendments as mutual sanctions, minimum political contact, and 'selective engagement' cooperation to the top of the agenda.

The EU–Russia PCA remains the main legal basis for the approximation of Russian legislation in line with EU law. The 'approximation clause'[49] and other provisions of the EU–Russia PCA identified eighteen crucial areas of legislative

[44] Between 1997 and 2014, Russia and the EU concluded more than ten sectoral bilateral agreements in the areas of trade, environment, security, migration, police cooperation, research, and technological development. Most of them remain in force.

[45] Peter Van Elsuwege, 'Towards a Modernisation of EU–Russia Legal Relations?' (June 2012) 5 CEURUS EU–Russia Papers 2.

[46] 'EU and Russia Sign Bilateral Agreements Ahead of Russia's WTO Accession Ceremony' (16 December 2011) <http://eeas.europa.eu/delegations/wto/press_corner/all_news/news/2011/20111216_kdg_rf_signature.htm> accessed 1 May 2020.

[47] Such agreements are not provided within the scope of the PCA. However, eg the EU–Russia Agreement on trade in services 2011 refers to the PCA provisions on trade in services agreed earlier than the GATS. See Agreement of 29 February 2012 in the form of an Exchange of Letters between the European Union and the Government of the Russian Federation relating to the preservation of commitments on trade in services contained in the current EU–Russia Partnership and Cooperation Agreement [2012] OJ L57, 44–51.

[48] European Parliament resolution of 10 June 2015 on the state of EU–Russia relations (2015/2001/INI), point 2.

[49] EU–Russian PCA, Art 55. However, this PCA article contains only a 'best endeavours' clause. According to this, Russia should, 'endeavour to ensure that its legislation will be gradually made compatible with that of the Community'.

approximation of Russian legislation with EU law. These priority areas were further extended by the roadmap for the EU–Russia Common Economic Space of 2005 and the 'Partnership for Modernization' initiative of 2010, which introduced the idea of 'regulatory convergence' between the parties as a soft version of legislative approximation in the most politically sensitive fields of interaction, in particular in the energy sector.

In addition, one has to emphasize the existence of constitutional and legal obstacles for effective legislative approximation in Russia. In particular, some areas of legislative approximation provided for in the EU–Russia PCA are under the joint jurisdiction of Russian federal and local authorities (for instance, environmental protection). Another problem is the absence of a special programme of legislative approximation in Russia due to the 'pragmatic approach'[50] of the Russian government to the approximation process. As a rule, drafts of Russian laws contain no specific references or explanations regarding approximation with EU rules. In the best cases, explanatory notes to the drafts contain only general references to 'international and European experience'. Consequently, to find any evidence of legislative approximation in Russia in most cases requires deep comparative analysis between the texts of a Russian law and an EU legal act.

Moreover, legislative approximation in Russia embraces rules and standards developed by various international organizations. This concerns approximation of Russian legislation with the rules of the World Trade Organization (WTO), which Russia joined in 2012, as well as the traditional influence on the domestic legal system of the International Maritime Organization (IMO), the International Civil Aviation Organization (ICAO), and the International Labour Organization (ILO) rules.

Last but not least is the impact of Russia's regional integration efforts. In 2010, Russia, Belarus, and Kazakhstan established a Customs Union, with common customs rules and supranational institutions. Consequently, Russia has transferred its competence in the field of technical regulation and customs matters to the supranational Eurasian Economic Commission, which is modelled on the EU.[51] Indeed, the structure and competence of the Eurasian Economic Commission and the Eurasian Court (the Eurasian Economic Community Court/the Eurasian Economic Union Court) resemble the European Commission and the CJEU. Moreover, following the Declaration on Eurasian Economic Integration of 2011, the EU is the most desirable partner for cooperation in different fields.[52] In this

[50] Paul Kalinichenko, 'Legislative Approximation and Application of EU Law in Russia' in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (Routledge 2014) 251.

[51] See 'Eurasian Integration is a Contribution to Forming the New Global Economy' (5 June 2013) Interview with Tatiana Valovaya, Minister of the Eurasian Economic Commission ITAR-TASS <www.itar-tass.com/c49/698208.html> accessed 2 May 2020. See also Chapter 4 by Maxim Karliuk on the EAEU in this volume.

[52] Draft Treaty of the Eurasian Economic Union of 3 September 2012 <www.slideshare.net/Atameken/ss-15620567> accessed 2 May 2020.

context, the Treaty on Eurasian Economic Union (EAEU) signed in Astana on 28 May 2014 has created new expectations and new challenges for the post-Soviet area.

The process of legislative approximation of Russian law with EU law has gone beyond the scope of the approximation clause in the EU–Russia PCA. This process was exercised in line with priority areas of legal reform in Russia and thereby reflected the pragmatic approach of the Russian government towards modernization of the Russian legal system.[53] Two approaches to the legislative approximation of Russian legislation with EU law can be highlighted. The first approach is adoption of legal transplants originating from EU Member States and involves the national law of certain EU Member States. The second approach is adoption of the EU *acquis* in line with the priority areas of the approximation clause in the EU–Russia PCA.[54] This refers to EU (supranational) law as such.

With regard to the first approach, it can be said that in the course of the past fifteen to twenty years, the Russian legal system has been significantly influenced by the legal systems of some EU Member States. This influence materialized through Russia's acceptance of legal transplants originating from certain EU Member States. As a consequence, Russian company law,[55] competition law,[56] financial services law, and also legislation on health and safety at work, have been gradually aligned with EU standards and rules. The most significant application of this approach has taken place in the area of civil law. The 1996 Russian Civil Code was modelled on the civil law traditions of West European countries, particularly on the Dutch Civil Code of 1992. In 2008, the President of Russia issued a Decree 'On Improvement of the Civil Code of the Russian Federation',[57] which explicitly provided for 'approximation of the provisions of the Civil Code to the rules regulating relations in the relevant EU law' and an 'upgrade on the ground of the positive experience of the civil codes of several European countries'. This approach of encouraging adoption

[53] After entry into force of the PCA, the Russian government developed a long-term plan to implement the PCA. The plan contains a description of measures to implement the provisions of the PCA, the responsible government agencies, and the durations. Most of the activities in the plan were to be implemented to the beginning of the twenty-first century, including adoption of measures to 'gradually ensure the compatibility of domestic legislation with EU legislation'. The bodies responsible for implementation were the Russian Ministry of Justice with the participation of relevant ministries and agencies, and the Federal Statistical Agency (Goskomstat). The idea was that these structures were supposed to ensure the development of a special programme of approximation. See Decision of the Government of the Russian Federation no 809 of 21 July 1998 'On Approval of a Prospective Plan of Action for implementation of the Agreement on Partnership and Cooperation establishing a partnership between the Russian Federation, on the one hand, and the European Communities and their Member States, on the other hand', SZ RF, 17 August 1998, no 33, 4043.

[54] Kalinichenko, 'Legislative Approximation' (n 50) 252–53.

[55] See A Astapovitch, *Corporate Reform and Harmonization of Corporate Law in Russia and the EU* (Volters Kluver 2005) (in Russian).

[56] See V Prosvetov and A Shastitko, *Analysis of Currently Effective Antimonopoly Law in the RF and Comparison with Contemporary EU Law. Possible Options for Increasing the Efficiency of Enforcement in Russia. Analysis of Anti-Trust Legislation and Law Enforcement in the EU* (2005).

[57] Decree of the President of the Russian Federation no 1108 of 18 July 2008 'On Improvement of the Civil Code of the Russian Federation', SZ RF, 21 July 2008, no 29 (Part I), Art 3482.

of legal transplants from EU Member States in the course of legal reform in Russia was supported by the ruling Russian political elite.[58]

The process of adoption by Russia of legal transplants originating from EU Member States took place in the area of public law too. In particular, Russia incorporated German and French standards of Value Added Tax (VAT) into its national legal system.[59]

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With regard to the second approach to the process of legislative approximation in Russia, it can be emphasized that Russian legislation is based on various EU sectoral *acquis* in line with priority areas defined in the approximation clause of the EU–Russia PCA. For example, in the field of securities market regulation,[60] Russia implemented EU Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse),[61] together with the rules adopted by the European Commission pursuant to this Directive,[62] as well as the experience of its implementation in Germany and the United Kingdom.

However, it must be admitted that in some areas of legislative approximation (for instance, environmental protection) Russia has not managed to achieve significant progress, despite technical and financial assistance from the EU.[63]

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Furthermore, the process of legislative approximation in Russia is increasingly influenced by 'back door' legislative approximation with the EU *acquis* originating from the Eurasian integration model.[64] Eurasian integration structures have

[58] For instance, former Russian President Dmitry Medvedev advocated modernization of the Russian Civil Code provisions on the basis of EU law norms and the law of EU Member States. See Dmitry A Medvedev, 'Civil Code of Russia: Its Role in the Development of Market Economy and Establishing the Rule of Law' (2007) 2 Journal of Civil Law 7 (in Russian).

[59] See A Kozyrin, 'Comparative Legal Method in Financial Law' (2009) 9 Financial Law 5 (in Russian). Also, appropriate provisions of the Russian Tax Code 1998–2000 take into account recommendations by the European Commission for tax reform in Russia. See O Borzunova, *The Tax Code of the Russian Federation: Genesis, History and Improving Tendencies* (Justicinform 2010) 121 (in Russian).

[60] Federal Law no 224-FZ of 27 July 2010 'On Countering misuse of insider information and market manipulation and Amendments to Certain Legislative Acts of the Russian Federation', SZ RF, 02 August 2010, no 31, Art 4193.

[61] [2003] OJ 2003 L96/16.

[62] An explanatory note to the act refers to the following acts of the Commission, whose provisions were reflected in the above-mentioned Federal Law: Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation [2003] OJ L339/70; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest [2003] OJ L339/73; Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions [2004] OJ L162/70; Commission Regulation (EC) 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments [2003] OJ L336/33.

[63] W Douma and I Krasnova '"Renovation" of the Russian Legislation' (2004) 5 Ecology and Life 24–27 (in Russian).

[64] On the notion of 'back door approximation'.

already indirectly implemented a considerable number of EU sectoral *acqui*s. For example, the provisions of the Customs Code of the Customs Union of 2009 and the technical regulations of the Eurasian Economic Commission are very similar to certain provisions of the EU *acquis*. Although the Eurasian Economic Commission does not pursue formal legislative approximation with the EU *acquis*, potentially the process of informal legislative approximation with EU law may gradually lead to regulatory convergence of the 'Eurasian integration' *acquis* with relevant EU *acquis*.[65]

Besides, implementation of EU–Russia bilateral agreements in the Russian legal order may also generate certain forms of regulatory convergence which are not based on formal legislative approximation by their nature. For instance, the notion 'readmission' was introduced into the Russian legal order by the Federal Law of 27 July 2010[66] in the course of implementation of the EU–Russia agreement on readmission of 2006.[67] Another example is the Facilitated Rail Transit Document for Russian citizens travelling to Kaliningrad through the territory of Lithuania. In order to enable the functioning of the Facilitated Rail Transit Document on the territory of Russia, the Russian Government had to complement relevant EU *acquis*[68] through adoption of a national legal act.[69]

The major incentive for Russian judges to apply the EU *acquis* stems from the EU–Russia PCA. More than 200 cases on applying the EU–Russia PCA and about 1,000 cases with links to EU law are known in today's Russian judicial practice.[70] The Russian judiciary treats the EU–Russia PCA as an international agreement which contains self-executing rules within the Russian legal order. In case of conflict, Russian judges prefer to acknowledge the priority of the EU–Russia PCA over national legislation.[71] This makes the EU–Russia PCA an efficient instrument

[65] Another supranational institution of the Custom Union—The Court of the Eurasian Economic Community—has not yet applied the EU *acquis*. Since its establishment in December 2011, the Eurasian Court has considered only two cases. However, in the *ONP* case (judgment of the Appeals chamber of 21 February 2013) the Court of the Eurasian Economic Community referred to the case law of the ECtHR in *Credit and Industrial Bank v Czech Republic* App no 29010/95 (ECtHR, 21 October 2003). This is the first direct evidence of the Europeanization of the Eurasian Economic Community Court's practice.

[66] Federal Law no 180-FZ of 27 July 2010 'On amendments to certain legislative acts of the Russian Federation in connection with realization of the Treaties of the Russian Federation on readmission', SZ RF, 26 July 2010, no 30, Art 4011.

[67] Agreement of 17 May 2007 between the European Community and the Russian Federation on readmission [2007] OJ L129, 40–60.

[68] Council Regulation (EC) 693/2003 of 14 April 2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual [2003] OJ 2003 L99/8.

[69] Ordinance of the Russian Government no 361 of 23 June 2003 'On measures to fulfillment of the obligations undertaken by the Russian Federation in the Joint Statement of the Russian Federation and the European Union on transit between the Kaliningrad region and the rest of the Russian Federation', SZ RF, 30 June 2003, no 26, Art 2658.

[70] According to query results in the commercial legal data-base 'Consultant Plus'.

[71] More than twenty cases on applying the PCA and about 100 cases with links to EU law are known in Russian judicial practice today. See Petrov and Kalinichenko (n 37) 337–39.

for bilateral cooperation without further implementation into the Russian legal system. Russian courts consider the EU-Russia PCA as an international agreement which guarantees the protection of rights and interests of Russian nationals and subjects in their economic relations with the EU. Thereby, Russian courts have developed considerable experience in applying the provisions of the EU–Russia PCA in their decisions, although this mainly has to do with economic-related fields (trade, customs, and tax). There is a quite limited practice of Russian courts related to democratic and human rights clauses in the EU–Russia PCA, which mainly deals with EU–Russia economic relations. In general, the Russian judiciary has acknowledged the importance of respecting democratic principles and human rights for the partnership between Russia and the EU as enshrined in Article 2 of the EU–Russia PCA. Respect for human rights, fundamental freedoms, and the rule of law are interpreted by Russian courts as principles corresponding to the provisions of the Russian Constitution. Russian courts have confirmed that these principles are of a legal nature and form common values shared by the EU, its Member States, and Russia. For instance, in *British Bank v the Svyatoslav Fyodorov 'Eye Microsurgery' Clinic*,[72] the Russian Supreme Court considered that Article 98 of the PCA could form the legal basis for execution of a judgment by a British court in Russia. In the notorious *YUKOS* case,[73] the Federal Arbitration Court of Moscow District acknowledged that the duty of Russian courts to recognize foreign judicial decisions which can serve as the legal basis for execution of judgments of any national court of an EU Member State,[74] follows from the general objectives of the EU–Russia PCA governing sincere cooperation between the parties to the agreement.[75]

Analysis of the case law of Russian courts shows that, undoubtedly, the EU–Russia PCA has found better reception by Russian courts in economic-related fields rather than in other fields. For instance, even before Russia's accession to the WTO, Russian courts recognized the possibility of applying selected GATT/GATS rules mentioned in the EU–Russia PCA.[76] Russian courts applied the EU–Russia PCA with the purpose of protecting the rights of European investors who exercised freedom of establishment within the territory of Russia, on the basis of the most-favoured nation (MFN) treatment under the EU–Russia PCA.[77] In *Volvo Car Corporation v Patent Dispute Chamber* and '*Verit*' *v Patent Dispute Chamber*, the

[72] Judgment of the Supreme Court of Russia of 7 June 2002 (5-G02-64).

[73] Judgment of the Federal Commercial Court of Moscow District of 2 March 2006 (KG-A40/698-06-P).

[74] EU–Russia PCA, Art 98.

[75] EU–Russia PCA, Art 2.

[76] For instance, Judgment of the Federal Commercial Court of the North-West District of Russia of 8 October 1998 *Master Shipping v Tax Office of St-Petersburg* (A56-11044/98), Judgment of the Federal Commercial Court of Moscow District of 7 April 1999 *'Popelensky and Partners' v Central Bank of Russia* (KA-A40/824-99 *BPP*), Judgment of the Federal Commercial Court of Far East District of Russia of 24 September 2001 *Sakhalinmorneftegas v Office for Monetary Control of Sakhalin Region* (F03-A59/01-2/1791).

[77] Articles 28 and 30.

Federal Arbitration Court of Moscow District confirmed that the EU–Russia PCA imposes binding commitments on Russia with regard to protection of intellectual property rights, and therefore the relevant provisions of the EU–Russia PCA have priority over relevant national legislation.[78] In the *Alternativa* case, the Arbitration Court of Ivanovo Region referred to the Protocol to the EU–Russia PCA on Union enlargement in 2004 to protect the interests of a Russian company which imported doors from Estonia and wanted to enjoy MFN treatment under the agreement.[79]

Furthermore, in their decisions Russian courts have frequently referred to the EU–Russia sectoral agreements in science and technology, the export of certain steel products, and in tax cases. For example, the Arbitration Court of Moscow has applied the provisions of the EU–Russia Agreement on cooperation in the field of science and technology (2000)[80] and the EU–Russia Agreement on export of certain steel products (1997).[81]

In the opinion of some Russian judges, the binding and self-executory character of the EU–Russia PCA provides a legal basis for applying EU primary and secondary legislation in their judgments.[82] Of course, Russian courts have never acknowledged that they should apply EU primary law or the principles of EU law in their decisions. However, in *Nalchinsky Zavod Poluprovodnikovykh Priborov v Custom Office of Kabardino-Balkaria*, the Federal Arbitration Court of North Caucasus District of Russia confirmed at appeal level that Russia was not bound by the EC Treaty but, at the same time, did not exclude the possibility of applying provisions of the EC Treaty if it follows from the objectives of the EU–Russia PCA.[83] In the *Beslan* case, the Constitutional Court of Russia referred to the EU Framework Decision of 13 June 2002 on combating terrorism[84] as a persuasive source of reference.[85]

Nevertheless, it would be premature to suggest that Russian courts consistently and systematically apply EU secondary law in their judgments. EU secondary law has been cited by Russian courts on several sporadic occasions. In some cases, these references were based on Article 55 of the EU–Russia PCA, which contains the soft

[78] See Judgment of the Federal Commercial Court of Moscow District of 29 June 2005 (KA-A40/5565-05) and Judgment of the Federal Commercial Court of Moscow District of 31 August 2005 (KA-A40/8111-05).

[79] Judgment of the Commercial Court of Ivanovo Region of 13 October 2004 *OOO 'Alternativa' v Ivanovo Custom Office* (Case N A17-151A/5-2004).

[80] See Judgment of the Commercial Court of Moscow of 2 September 2005 *Compania Prikladnye Technologii v Tax Office of Moscow* (A40-33242/05-114-247).

[81] See Judgment of the Commercial Court of Moscow of 18 December 2006 *Gruppa TransLiz v Tax Office of Moscow* (A40-65629\06-127-356).

[82] Judgment of the Federal Commercial Court of North Caucasus District of Russia of 2 July 2003 *Nalchinsky Zavod Poluprovodnikovykh Priborov v Custom Office of Kabardino-Balkaria* (F08-1873/2003-839A).

[83] ibid paras 16 and 17.

[84] [2002] OJ L164/3.

[85] Order of 19 February 2009 no 137-O-O (not published officially) <www.consultant.ru> accessed 2 May 2020.

obligation for Russia to approximate its legislation in certain fields to that of the EU. This has happened only in cases where Russian federal laws give preference to Russia's international obligations over its national legislation.[86] In other cases, references to EU secondary legislation were justified by mutual commitments to ensure equal treatment of Russian and EU nationals, as provided in the EU–Russia PCA. Furthermore, Russian courts have referred to CJEU case law, as is explained in section D below.

Looking at the pattern of application of the EU *acquis* by Russian courts more widely, we can make several observations. The first observation is that Russian judges do not apply the EU *acquis* as a separate source of law, but consider it as a part of international public law. Russian judges are fully aware that EU law is not binding in the Russian legal system, and therefore refer to EU legal sources exclusively through the prism of the EU–Russia PCA. However, in some cases, EU primary and secondary laws have found application in judgments of Russian courts not as a binding, but as a persuasive source of law.[87]

D. Citation of CJEU Decisions in Russian Case Law

A special database for judgments of Russian courts -- the 'Justice' State Automatized System of the Russian Federation (<www.sudrf.ru> accessed 3 May 2020)—was installed in 2006. It is open to the public and collects all judgments issued by the Supreme Court and courts of general jurisdiction, including justice of the peace courts and arbitration courts. However, this database does not support a content search by words or phrases, so it is not suitable for the research in this chapter. Similarly, the database on the official webpage of the Russian Constitutional Court also does not support these search options.

So, for this research I used the 'Consultant Plus' commercial legal database, which contains a specific section dedicated to court decisions (some 9 million documents). This database is well known among Russian lawyers and allows advanced options in content search. However, the section on judicial decisions is incomplete, covering only judgments of higher courts, arbitration courts, including the intellectual property rights court, and courts at the federal subject level. Consequently, this research is limited by the technical features of current legal databases on Russian law and judicial practice.

[86] Article 4(4) of Federal Law of 18 December 2002 no 184-FZ 'On technical regulations', SZ RF, 30 December 2002, no 52 (1), Art 5140.

[87] Order of the Constitutional Court of the Russian Federation of 19 February 2009 (137-O-O) *Beslan Mothers* (137-O-O); Judgment of the Constitutional Court of the Russian Federation of 22 June 2010 *Malitsky* (14-P); Order of the High Court of the Russian Federation of 31 July 2008 '*Rezonans*' (KAS08-434); Judgment of the Federal Commercial Court of Moscow District of 15 April 2009 *Natsrybkachestvo* (A40-31562/08-130-338).

In the period between 2006 and 2018, Russian courts issued fifty-two judgments referring to CJEU practice (Table 7.1). Only three of these cases make general reference to 'established CJEU practice' but without mentioning a specific case, while the rest of the cases tend to mention concrete CJEU judgments. These contain seventy-eight citations of twenty-eight CJEU judgments issued in the period from 1981 to 2017. The most-cited CJEU cases are:

1. Joined cases C-354/03, C-355/03, and C-484/03 *Optigen Ltd* (twelve times in the period 2006–11) in cases in the taxation field;
2. Case 139/80 *Blanckaert & Willems* (nine times in the period 2012–16) in the cases in the choice of jurisdiction field;
3. Case C-48/09 *Lego Juris* (six times in the period 2015–17) in cases related to protection of intellectual property rights.

Table 7.1 Cases where CJEU decisions were cited in Russia (2006–18) (number of citations in brackets)

Period	2006–13	2014–18	Total
Constitutional Court	1 (0)[1]	–	**1 (0)**
Supreme Court	–	2 (2)[2]	**2 (2)**
Higher arbitration court	4 (5)[3]	–	**4 (5)**
Arbitration district courts	3 (3)[4]	–	**3 (3)**
Court of IP Rights	–	5 (5)[5]	**5 (5)**
Arbitration appellate courts	8 (8)[6]	24 (48)[7]	**32 (56)**
Arbitration courts at the federal subject level	3 (4)[8]	1 (1)[9]	**4 (5)**
Regional courts of general jurisdiction	–	1(2)[10]	**1 (2)**
Total	**18 (20)**	**33 (58)**	**52 (78)**

Source: Author's own research from access to official and commercial databases.

[1] Dissent of Gadjiev J in the Constitutional Court 27 March 2012 (Case 8-II/2012), in a case concerning review of the constitutionality of Item 1 of Article 23 of the Federal Law 'On International Treaties of the Russian Federation' in connection with the complaint of ID Ushakov.

[2] Supreme Court of Russia 7 December 2015 *Kray* (Case N 307-ЭС15-15317(1)); Supreme Court of Russia 6 March 2017 *Archi.ru* (Case N 305-ЭС16-18302(1)).

Continued

Table 7.1 *Continued*

[3] Order of Higher Arbitration Court of Russia of 13 January 2012 *Socprop Sarl* (Case N BAC-14851/11(1)); Order of Higher Arbitration Court of Russia of 27 February 2012 *Parex Banka* (Case N BAC-16404/11(1)); Presidium judgment of Higher Arbitration Court of Russia of 24 April 2012 *Parex Banka* (Case N 16404/11(2)); Order of Higher Arbitration Court of Russia 2012 *Evian* (Case N BAC-1407/12(1)).

[4] Judgment of Federal Arbitration Court of Moscow District of 4 March 2008 *Business-Center Krylatsky* (Case N KA-A40/1441-08(1)); Judgment of Federal Arbitration Court of Moscow District of 28 January 2010 *Kulon* (Case N A40-2222/09-143-9(1)); Judgment of Federal Arbitration Court of Ural District of 7 August 2013 *ALTA* (Case N Ф09-6855/13(1)).

[5] Judgment of Court of IP Rights of 24 April 2017 *Igrograd* (Case N СИП-82/2017(1)); Judgment of Court of IP Rights of 26 April 2017 *Igrograd II* (Case N СИП-84/2017(1)); Presidium judgment of Court of IP Rights of 4 August 2017 *PLATIUS II* (Case N СИП-234/2016(1)); Presidium judgment of Court of IP Rights of 21 August 2017 *PLATIUS* (Case N СИП-233/2016(1)); Judgment of Court of IP Rights of 18 January 2018 *CHEMPIOIL* (Case N СИП-171/2016(1)).

[6] Judgment of Seventeenth Arbitration Appellate Court of 27 October 2006 *A v Tax Office of Berezovsky Town* (Case N 17АП-943/06-АК(1)); Judgment of Seventeenth Arbitration Appellate Court of 10 November 2006 *U v Tax Office of the Udmurt Republic* (Case N 17АП-1668/06-АК(1)); Judgment of Seventeenth Arbitration Appellate Court of 26 December 2006 *Tax Office of the Sverdlovsk Oblast v D* (Case N A60-5297/2006-C10(1)); Judgment of Seventeenth Arbitration Appellate Court of 12 March 2007 *Tax Office of Alapaevsk v A* (Case N 17АП-1223/07-АК(1)); Judgment of Seventeenth Arbitration Appellate Court of 27 March 2007 *P v Tax Office of Perm Kray* (Case N 17АП-1639/07-АК(1)); Judgment of Seventeenth Arbitration Appellate Court of 17 May 2007 *A v Tax Office of the Udmurt Republic* (Case N A71-992/07-A6(1)); Judgment of Thirteenth Arbitration Appeal Court of 5 September 2013 *Bank of Cyprus* (Case N A56-20403/2013(1)).

[7] Judgment of Thirteenth Arbitration Appellate Court of 5 September 2013 *Bank of Cyprus* (Case N A56-20403/2013(1)); Judgment of Tenth Arbitration Appellate Court of 27 May 2014 *Bistro Pronto* (Case N A41-20424/13(5)); Judgment of Fourth Arbitration Appellate Court of 26 September 2014 *TransMash Holding* (Case N A78-5492/2013(7)); Judgment of Fifth Arbitration Appellate Court of 30 October 2014 *Korea Trading and Industries Co Ltd* (Case N 05АП-13699/2014(1)); Judgment of Fifteenth Arbitration Appellate Court of 8 February 2015 *MODER* (Case N 15АП-4696/2014); Judgment of Fourth Arbitration Appellate Court of 24 February 2015 *Stroy-Trust* (Case N A19-16839/2014(1)); Judgment of Thirteenth Arbitration Appellate Court of 11 March 2015 *ELORG* (Case N A56-41706/2014(1)); Judgment of Nineteenth Arbitration Appellate Court of 30 June 2015 *Kerama Marazzi* (Case N A35-6862/2014); Judgment of Nineteenth Arbitration Appellate Court of 9 July 2015 *ADK Modulraum GmbH* (Case N A14-16077/2014(1)); Judgment of Ninth Arbitration Appellate Court of 30 July 2015 *AstanaNeftStroy* (Case N 09АП-30486/2015(1)); Judgment of Thirteenth Arbitration Appellate Court of 14 October 2015 *KenigOpt* (Case N A21-3416/2015(1)); Judgment of Thirteenth Arbitration Appellate Court of 27 October 2015 *ELORG II* (Case N A56-23775/2015(1)); Judgment of Fifth Arbitration Appellate Court of 4 March 2016 *Lego Juris A/S* (Case N 05АП-573/2016(1)); Judgment of Fifth Arbitration Appellate Court of 28 March 2016 *Lego Juris A/S II* (Case N 05АП-608/2016(1)); Judgment of Ninth Arbitration Appellate Court of 27 May 2016 *Rosenergoprom* (Case N 09АП-13084/2016-АК(3)); Judgment of Ninth Arbitration Appellate Court of 24 June 2016 *UNEHS GmbH* (Case N 09АП-28601/2016-АК(1)); Judgment of Twelfth Arbitration Appellate Court of 2 September 2016 *Biosintez* (Case N A57-26584/2015(3)); Judgment of Fourth Arbitration Appellate Court of 21 December 2016 *Energosberegayusshiye Technologii* (Case N A78-9902/2016(7)); Judgment of Fifth Arbitration Appellate Court of 20 January 2017 *Lego Juris A/S III Radius Service* (Case N A51-23075/2016(1)); Judgment of Seventeenth Arbitration Appellate Court of 13 February 2017 (Case N 17АП-20131/2016-АК(1)); Judgment of Fourteenth Arbitration Appellate Court of 18 October 2017 *ARMC* (Case N A66-6719/2017(3)); Judgment of Eleventh Arbitration Appellate Court of 18 December 2017 *Robert Bosch* (Case N A72-20/2017(3)); Judgment of Fourteenth Arbitration Appellate Court of 22 January 2018 *ARMC II* (Case N A66-2262/2017(3)); Judgment of Seventh Arbitration Appellate Court of 31 January 2018 *Altayenergosbyt* (Case N A03-18412/2017(1)).

[8] Judgment of Moscow Arbitration Court of 27 October 2006 *Adidas* (Case N A40-48445/06-90-252(2)); Judgment of Moscow Arbitration Court of 11 September 2007 *Business-Center Krylatsky* (Case N A40-24994/07-108-118(1)); Judgment of Moscow Arbitration Court of 24 June 2011 *Soyuzreactive* (Case N A40-116507/10-118-652(1)).

[9] Judgment of Moscow Arbitration Court of 28 January 2015 *Novaya Tabachnaya Kompaniya* (Case N A40-87775/14(1)).

[10] Appeal Order of Moscow City Court of 14 November 2017 *AlItalia* (Case N 33-41219/2017(2)).

Table 7.2 Citations of CJEU decisions in Russia according to fields of law (2006–18)

	Constitutional Court	Supreme Court (including Higher Arbitration Court before 2014)	Arbitration district courts (including the Court of IP Rights)	Regional arbitration courts (Arbitration appellate courts and arbitration courts at the federal subject level)	Regional courts of general jurisdiction
Common principles	1	–	–	3	–
Intellectual property	–	2	5	4	–
Transport	–	–	–	–	1
Jurisdiction	–	4	1	6	–
Taxation	–	–	3	12	–
Customs	–	–	–	10	–
Other	–	–	–	–	–

Source: Author's own research from access to official and commercial databases.

Russian courts cited CJEU judgments in their cases in civil and commercial matters, in such fields as taxation, choice of jurisdiction, intellectual property rights, customs, and transport liability (Table 7.2). Most of these cases (forty-four) were considered by the Russian arbitration courts at different levels of the judicial system.

The higher courts of Russia cited CJEU case law seven times in six cases before the Higher Arbitration Court (four) and the Supreme Court (two). As for the practice of the Russian Constitutional Court, this has only one mention of 'established CJEU practice' in the dissenting opinion of Judge Gadjiev in a case regarding the constitutionality of the provisions of Russian legislation concerning interim application of international treaties to which Russia is a party.

The Russian mid-level arbitration courts first quoted CJEU case law in their judgments in tax cases in 2006. The Higher Arbitration Court of Russia referred to CJEU case law for the first time in 2012. During the period between 2006 and 2013 the Russian courts cited five CJEU judgments twenty times in eighteen cases in the tax and jurisdiction fields. Three of these CJEU cases were cited by the High Arbitration Court five times in four decisions.

In the period 2014–18, Russian courts mentioned twenty-five CJEU judgments fifty-eight times in thirty-three cases. The courts have enlarged the scope of where they use CJEU practice, as they began referring to CJEU case law in their decisions in fields other than only tax and jurisdiction. They also started referring to 'principles of law' in accordance with established CJEU practice.

The Supreme Court of Russia has cited two CJEU cases in two decisions in the fields of jurisdiction and intellectual property rights protection, respectively. The first time it referred to CJEU practice was in 2015. The Court of Intellectual Property Rights considered five cases where it quoted CJEU practice in the field of intellectual property rights. The first time that a Court of General Jurisdiction applied CJEU case law in its practice was in a case concerning compensation for a cancelled flight in 2017.

In most of these decisions, Russian courts refer to, or even cite, CJEU case law as an appropriate example of international practice. As a rule, such quoting is not significant for the final conclusion in the case, and thus does not directly impact the outcome (Figure 7.1).

The first time that Russian courts mentioned CJEU case law was in the practice of Arbitration Courts in tax cases in 2006. The Moscow Arbitration Court in its judgment of 27 October 2006 in a case involving an application by OOO[88] '*Adidas*',[89]

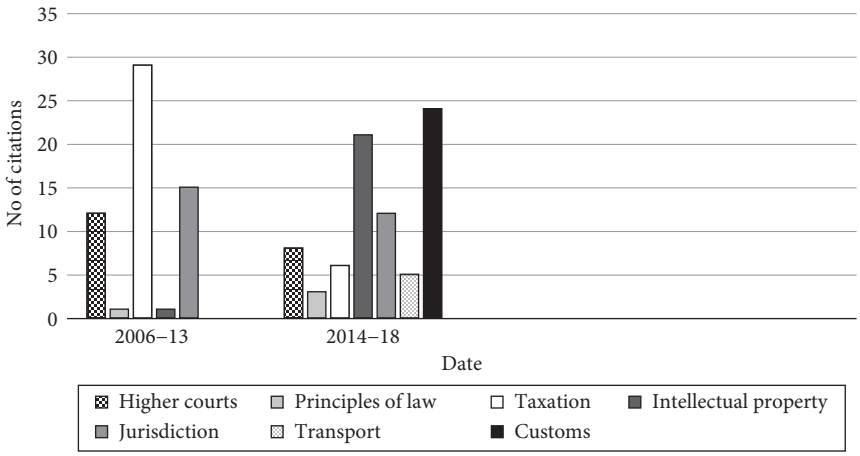

Fig 7.1 CJEU citations by Russian Courts 2006–18

Source: Author's own research from access to official and commercial databases.

[88] This is an abbreviation of a legal entity type under the Russian Civil Code—'Obschestvo s ogranichennoy otvetstvennostyu' (OOO), an analogue of the German 'GmbH'. In its practice on 'Russian' cases, the CJEU mentions this short term without any explanations.

[89] Judgment of the Moscow Arbitration Court of 27 October 2006 *Adidas* (Case N A40-48445/06-90-252).

referred to CJEU case law in interpreting the EC Sixth Tax Directive in relation to the rights of taxpayers regarding VAT.[90] The court mentioned the CJEU's conclusions in *Optigen Ltd* and *Federation of Technological Industries* as examples of best international practice for the background to its own findings and conclusions in *Adidas*.[91] The reference concerned the CJEU's position in relation to the final VAT payer's good faith presumption in the case of a tax offence in a supply chain.

On the same date, the Seventeenth Arbitration Appellate Court (resident in the City of Perm) applied the *Optigen Ltd* case in a similar way in its judgment in a case concerning an application by citizen A against the Berezovsky Town Tax Office.[92] Interestingly, the court considered this case as a second instance for the Sverdlovsk Oblast Arbitration Court judgment of 2 August 2006 in Case A60-36650/2006-C10. However, it is not possible to establish whether the Arbitration Court referred to CJEU case law in its judgment at first instance, as the existing database of Sverdlovsk Oblast Arbitration Court decisions contains only judgments after 2008.

Down the line, both courts started to refer to CJEU case law in their further decisions in cases of a similar nature. In the period between November 2006 and May 2007, the Seventeenth Arbitration Appellate Court referred to *Optigen Ltd* in six cases.[93] The Moscow Arbitration Court mentioned this CJEU case for the second time in *Business-Centre Krylatsky* (judgment of 7 September 2007).[94]

Apart from that, the Federal Arbitration Court of Moscow District in its judgment of 6 November 2007 annulled the Moscow Arbitration Court judgment in *Adidas*.[95] However, the next higher court's reasons for annulment had nothing to do with this reference to CJEU case law. On the contrary, the Federal Arbitration

[90] Joint Cases C-354/03, C-355/03, and C-484/03 *Optigen Ltd, Fulcrum Electronics Ltd, Bond House Systems Ltd v Commissioners of Customs & Excise* [2006] ECR 483; Case C-384/04 *Federation of Technological Industries v Commissioners of Customs & Excise* [2006] ECR 4191.

[91] It is important to notice that nine years before this case, the Supreme Court of Russia dismissed the plea by a party to take into account the provisions of the EC Sixth Tax Directive in the *BrAZ* case (Supreme Court Judgment of 7 February 1997 on application by OAO BrAZ and others, Bulleten Verkhovnogo Suda Rossiyskoy Federatsii (Bulletin of the Supreme Court of the Russian Federation), No 3, 1997).

[92] Judgment of Seventeenth Arbitration Appeal Court of 27 October 2006 *A v Tax Office of Berezovsky Town* (Case N 17АП-943/06-АК).

[93] Judgment of Seventeenth Arbitration Appellate Court of 10 November 2006 *U v Tax Office of the Udmurt Republic* (Case N 17АП-1668/06-АК); Judgment of Seventeenth Arbitration Appellate Court of 26 December 2006 *Tax Office of the Sverdlovsk Oblast v D* (Case N A60-5297/2006-C10); Judgment of seventeenth Arbitration Appellate Court of 12 March 2007 *Tax Office of Alapaevsk v A* (Case N 17АП-1223/07-АК); Judgment of Seventeenth Arbitration Appellate Court of 27 March 2007 *P v Tax Office of Perm Kray* (Case N 17АП-1639/07-АК); Judgement of Seventeenth Arbitration Appellate Court of 17 May 2007 *A v Tax Office of the Udmurt Republic* (Case N A71-992/07-A6); Judgment of Seventeenth Arbitration Appellate Court of 18 May 2007 *B v Tax Office of the Udmurt Republic* (Case N A71-4681/07-A18).

[94] Judgment of Moscow Arbitration Court of 11 September 2007 *Business-Center Krylatsky* (Case N A40-24994/07-108-118).

[95] Judgment of Federal Arbitration Court of Moscow District of 6 November 2007 *Adidas* (Case N KA-A40/1441-08).

Court of Moscow District in another judgment on 4 March 2008 (the second instance in the *Business-Centre Krylatsky* case)[96] especially stressed that the inferior court 'correctly applied' the CJEU legal positions in the *Optigen Ltd* case. Moreover, the Moscow Arbitration Court has applied this CJEU case in some of its later judgments.[97] Consequently, *ex nunc* the Russian mid-level arbitration courts have formed an established judicial practice of referring to CJEU case law in their decisions.

Application of CJEU case law in decisions of the Russian Higher Arbitration Court dates back to 2012 in cases involving choice of jurisdiction. The first time this court mentioned a CJEU judgment was in its Order of 13 January 2012 on an application by the company 'Socprop Sarl' from Luxembourg.[98] The Higher Arbitration Court referred to the CJEU judgment in *Blanckaert & Willems*[99] to support its position that the 'practice of international justice' (*inter alia*, applied in *Luxembourg–PK*) required, in order to establish the state court's jurisdiction, proof of the company's agency affiliation with the state territory where the contested legal relations appeared. In another case, the Higher Arbitration Court in its Order of 27 February 2012[100] referred to *Schotte v Parfums Rothschild*[101] to support its position on recognition of branches and agencies. This case concerned the situation where branches or agencies were not officially established but had a similar name and operations as the subdivision of a foreign legal entity. Considering this case at second instance, the Presidium of the Higher Arbitration Court in its judgment of 24 April 2012 united two previously formulated approaches and cited both of the aforementioned CJEU cases.[102]

In 2013, the Federal Arbitration Court of the Ural District[103] and the Thirteenth Arbitration Appellate Court[104] (resident in St Petersburg) adopted the position of the Higher Arbitration Court in its *Socprop* case and referred to the *Blanckaert & Willems* case in their judgments.

During the period 2010–12, the Russian Higher Arbitration of Russia considered several cases concerning the non-discrimination principle and access to justice by EU citizens under the EU–Russia PCA provisions. According to advocate Anatoly

[96] Judgment of Federal Arbitration Court of Moscow District of 4 March 2008 *Business-Center Krylatsky* (Case N KA-A40/1441-08).

[97] Judgment of Federal Arbitration Court of Moscow District of 28 January 2010 *Kulon* (Case N A40-2222/09-143-9); Judgment of Moscow Arbitration Court of 24 June 2011 *Soyuzreactive* (Case N A40-116507/10-118-652).

[98] Order of Higher Arbitration Court of Russia of 13 January 2012 *Socprop Sarl* (Case N BAC-14851/11).

[99] Case 139/80 *Blanckaert & Willems PVBA v Luise Trost* [1981] ECR I–00819.

[100] Order of Higher Arbitration Court of Russia of 27 February 2012 *Parex Banka* (Case N BAC-16404/11).

[101] Case 218/86 *SAR Schotte GmbH v Parfums Rothschild SARL* [1987] ECR I–04905.

[102] Presidium judgment of Higher Arbitration Court of Russia of 24 April 2012 *Parex Banka* (Case N 16404/11).

[103] Judgment of Federal Arbitration Court of Ural District of 7 August 2013 *ALTA* (Case N F09-6855/13).

[104] Judgment of Thirteenth Arbitration Appellate Court of 5 September 2013 *Bank of Cyprus* (Case N A56-20403/2013).

Semenov,[105] several times he and his colleague, advocate Aleksandr Osokin, who represented the parties in these cases, tried to convince the judges of the Higher Arbitration Court to take into account the CJEU judgment in *Simutenkov*,[106] which granted direct effect to the EU–Russia PCA provisions in relation to the prohibition against discriminatory treatment of Russian individuals within EU territory. However, each time the Higher Arbitration Court rejected their pleas. The Court mentioned this CJEU case only once in an interim award in the *Evian* case, but this was not significant for resolution of the case.[107] Eventually, in its judgment of 1 October 2012 in the *Topol* case,[108] the Higher Arbitration Court confirmed direct effect of the PCA provisions in the Russian legal order, but without reference to the *Simutenkov* case. These situations show that from the beginning Russian courts focused on use of CJEU case law in certain areas only: taxation, choice of jurisdiction, intellectual property rights, and customs.

During the period 2014–18, Russian courts enlarged and developed the practice of CJEU case law citations in their decisions.

Russian courts have referred to the principles of EU law in several cases. Previously, Russian Constitutional Court judge Gadjiev, in a dissenting opinion to the Court's judgment of 27 March 2012 no 8-П/2012,[109] noted that the principle of legal certainty is a common principle of law reflected in CJEU established practice. He did this, however, without reference to concrete cases. Later, the Fourth Arbitration Appellate Court (resident in Chita) mentioned this principle in a similar way in its judgment of 24 February 2015 in the *Stroy-Trust* case.[110]

The Tenth Arbitration Appellate Court (resident in Moscow) in its judgment of 27 May 2014 in the *Bistro Pronto* case[111] mentioned that the CJEU has established a direct-effect principle for EU international agreements. The Court intended to demonstrate that this principle was widely applied in foreign legal orders and mentioned a number of CJEU cases that it considered as the most important in this regard.[112] Thereafter, this judgment was overruled by a judgment of the Court of

[105] On the basis of my interview with advocate Anatoly Semenov, 11 March 2018.

[106] Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I–2579. This case is well known because it deals with a football player and got much press coverage, and also because it is a continuation of the famous *Bosman* case. See Case C-61/89 *Union Royale Belge des Sociétés de Football Association v Jean-Marc Bosman, Royal Club Liégeois SA v Jean-Marc Bosman and others, Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman* [1990] ECR I–3551.

[107] Order of Higher Arbitration Court of Russia of 2012 *Evian* (Case N BAC-1407/12).

[108] Judgment of Higher Arbitration Court of Russia of 1 October 2012 *Topol* (Case N 6474/12).

[109] Dissent of Judge Gadjiev in the Judgement of the Constitutional Court of 27 March 2012 in a case concerning review of the constitutionality of Item 1 of Art 23 of the Federal Law 'On International Treaties of the Russian Federation' in connection with the complaint of ID Ushakov (no 8-П/2012).

[110] Judgment of Fourth Arbitration Appellate Court of 24 February 2015 *Stroy-Trust* (Case N A19-16839/2014).

[111] Judgment of Tenth Arbitration Appellate Court of 27 May 2014 *Bistro Pronto* (Case N A41-20424/13).

[112] Case C-183/95 *Affish BV v Rijksdienst voor de keuring van Vee en Vlees* [1997] ECR I–04315; Joined Cases C-364/95 and C-365/95 *T Port GmbH & Co v Hauptzollamt Hamburg-Jonas* [1998] ECR

Intellectual Property Rights of 29 September 2014.[113] In another case, the Fifteenth Arbitration Appellate Court (resident in Rostov-on-Don), in its judgment of 8 February 2015, noted that in accordance with established CJEU practice, the WTO agreement does not have direct effect in the EU legal order.[114] However, the court did not refer to any examples from CJEU practice in its judgment.

Picking up the baton from the Higher Arbitration Court, the Russian Supreme Court has cited CJEU case law twice. In the first instance, the court recalled the Higher Arbitration Court's approach reflected in the *Socprop* case.[115] In its Order of 7 December 2015 in the *Kray* case[116] the Supreme Court applied *Blanckaert & Willems* to the grounds of the Court's choice of jurisdiction. Furthermore, this citation has also appeared in different decisions of arbitration appeal courts in the period 2014–18.[117]

The other Higher Arbitration Court approach in the *Parex banka* case was enlarged in the Judgment of the Seventh Arbitration Appellate Court (resident in Tomsk) of 31 January 2018 in a case on an application by AO 'Altayenergosbyt' against AO 'GUZhKH'.[118] The Arbitration Appellate Court referred to *Schotte v Parfums Rothschild* in the settlement between two Russian companies within the territory of Russia.

In the second case, the Russian Supreme Court cited the CJEU judgment in *Eva-Maria Painer v Standard Verlags*[119] in its Order of March 2017 on an application by OOO 'Archi.ru'.[120] The Supreme Court quoted the CJEU case to acknowledge its position in justifying using a photo which is identified and available to the public.

Russian courts have started to make heavy use of CJEU case law in their decisions since 2015. While the Thirteenth Arbitration Appellate Court in its decision of 14 October 2015[121] simply mentioned that the CJEU banned the use of a brick

I–01023; Case C-53/96 *Hermes International v FHT Marketing Choice BV* [1998] ECR I–03603; Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior & Assco Geriiste GMbH en T van Dijk v Wilhelm Layher GmbH SCoKG en Jayher BV* [2000] ECR I–3583; Case C-149/96 *Portuguese Republic v Council of the European Union* [1999] ECR I–08395.

[113] Judgment of Court of IP Rights of 29 September 2014 *Bistro Pronto* (Case N A41-20424/2013).

[114] Judgment of Fifteenth Arbitration Appellate Court of 8 February 2015 *MODER* (Case N 15АП-4696/2014).

[115] See n 98.

[116] Order of Supreme Court of Russia of 7 December 2015 *Kray* (Case N 307-ЭС15-15317).

[117] Judgment of Fifth Arbitration Appellate Court of 30 October 2014 *Korea Trading and Industries Co Ltd* (Case N 05АП-13699/2014); Judgment of Nineteenth Arbitration Appellate Court of 9 July 2015 *ADK Modulraum GmbH* (Case N A14-16077/2014); Judgment of Ninth Arbitration Appellate Court of 30 July 2015 *AstanaNeftStroy* (Case N 09АП-30486/2015); Judgment of Ninth Arbitration Appellate Court of 24 June 2016 *UNEHS GmbH* (Case N 09АП-28601/2016-АК).

[118] Judgment of Seventh Arbitration Appellate Court of 31 January 2018 *Altayenergosbyt* (Case N A03-18412/2017).

[119] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and others* [2011] ECR I–12533.

[120] Order of Supreme Court of Russia of 6 March 2017 *Archi.ru* (Case N 305-ЭС16-18302).

[121] Judgment of Thirteenth Arbitration Appellate Court of 14 October 2015 *KenigOpt* (Case N A21-3416/2015).

as a trademark for the famous producer of children's constructions 'Lego', the Fifth Arbitration Appellate Court, in contrast, cited the *Lego Juris* case[122] directly in its judgments in 2016[123] and 2017.[124] Established in 2012, the Court of Intellectual Property Rights confirmed the conclusions of inferior courts in these cases and referred to *Lego Juris* in its similar judgments of 24 and April 2017 on the application of OOO '*Igrograd*'.[125]

The Court of Intellectual Property Rights cited CJEU practice in other cases in the field of trademark protection in 2017–18. References were made to the CJEU position on discontinuing use of a trademark in the *Brandconcern BV* case[126] in the Court of Intellectual Rights judgments of 4 and 21 August 2017 in cases involving *OOO 'Platius'*.[127] Thereafter, in its judgment of 18 January 2018[128] concerning use of the 'CHAMPIOL' trademark within the territory of Russia, the Court of Intellectual Rights quoted the CJEU's conclusion in *Wolf Oil Corp*[129] that the trademarks 'CHAMPION' and 'CHAMPIOL' were different in context and were distinguishable by the public.

Several CJEU cases were cited by Russian arbitration appeal courts in their practice in customs matters (2014–18). These cases fall into three groups. The first group includes the Fourth Arbitration Appellate Court judgments of 26 September 2014[130] and 21 December 2016.[131] In these decisions, the court stressed that in line with CJEU practice, the Explanatory Notes to the Combined Nomenclature of the European Union[132] was not a legally binding act and referred to seven different CJEU cases (with correct references to the paragraphs!).[133]

[122] Case C-48/09 P *Lego Juris A/S v OHIM* [2010] ECR I–08403.

[123] Judgment of Fifth Arbitration Appellate Court of 4 March 2016 *Lego Juris A/S* (Case N 05АП-573/2016); Judgment of Fifth Arbitration Appellate Court of 28 March 2016 *Lego Juris A/S II* (Case N 05АП-608/2016).

[124] Judgment of Fifth Arbitration Appellate Court of 20 January 2017 *Lego Juris A/S III* (Case N A51-23075/2016).

[125] Judgment of Court of IP Rights of 24 April 2017 *Igrograd* (Case N СИП-82/2017); Judgment of Court of IP Rights of 26 April 2017 *Igrograd II* (Case N СИП-84/2017).

[126] Case C-577/14 P *Brandconcern BV v European Uniof IP Property Office (EUIPO) and Scooters India Ltd* [2017] (ECLI:EU:C:2017:122).

[127] Presidium judgment of Court of IP Rights of 21 August 2017 *PLATIUS* (Case N СИП-233/2016): Presidium judgment of Court of IP Rights of 4 August 2017 *PLATIUS II* (Case N СИП-234/2016).

[128] Judgment of Court of IP Rights of 18 January 2018 *CHEMPIOIL* (Case N СИП-171/2016).

[129] Case C-437/16 P *Wolf Oil Corp v European Uniof IP Property Office* [2017] (ECLI:EU:C:2017:737).

[130] Judgment of Fourth Arbitration Appellate Court of 26 September 2014 *TransMash Holding* (Case N A78-5492/2013).

[131] Judgment of Fourth Arbitration Appellate Court of 21 December 2016 *Energosberegayusshiye Technologii* (Case N A78-9902/2016).

[132] Explanatory Notes of 11 November 2016 to the Combined Nomenclature of the European Union [2016] OJ C415, 5.

[133] Case C-173/08 *Kloosterboer Services BV v Inspecteur van de Belastingdienst/Douane Rotterdam* [2009] ECR I–05347, para 25; Joined cases C-410/08–C-412/08 *Swiss Caps AG v Hauptzollamt Singen* [2009] ECR I–11991, para 28; Case C-370/08 *Data I/O GmbH v Hauptzollamt Hannover* [2010] ECR I–04401, para 30; Case C-12/10 *Lecson Elektromobile GmbH v Hauptzollamt Dortmund* [2010] OJ C63, 11, para 17; Joined cases C-288/09 and C-289/09 *British Sky Broadcasting Group plc* (C-288/09) *and Pace plc* (C-289/09) *v The Commissioners for Her Majesty's Revenue & Customs* [2011] ECR I–02851, para 63; Case C-196/

The second group covers decisions where the Russian courts decided the question concerning criteria for customs classification in international practice. The Nineteenth Arbitration Appellate Court in its Judgment of 30 June 2015[134] only mentioned established CJEU practice. But later, in several judgments starting with the judgment of the Twelfth Arbitration Appellate Court on 27 May 2016 in the *Rosenergoprom* case,[135] the courts noted the CJEU cases *RUMA*,[136] *Skoma-Lux*,[137] *Kloosterboer Services BV*[138] as examples of best international practice for their decisions.[139]

The third group of decisions comprises a couple of Thirteenth Arbitration Appellate Court Judgments of 2015 in the *ELORG* case,[140] where the Russian court mentioned the CJEU conclusion in *Turbon International GmbH*[141] to clarify the position of cartridges for office printers in the Combined Nomenclature.

During the period 2015–17, the Russian arbitration courts quoted CJEU practice in cases involving artificial arrangements in tax law. The Moscow Arbitration Court, in its judgment of 28 January 2015,[142] cited the *Thin Cap Group Litigation* case,[143] questioning the rules applying to thin capitalization in terms of artificial arrangements for tax law purposes. In another case, the Seventeenth Arbitration Appellate Court, in its judgment of 13 February 2017,[144] referred to the CJEU position in *Cadbury Schweppes*[145] concerning the possibility for the taxpayer to make transactions through artificial arrangements.

10, *Paderborner Brauerei Haus Cramer KG v Hauptzollamt Bielefeld* [2011] ECR I–06201, para 32; Joined cases C-320/11, C-330/11, C-382/11, and C-383/11 *Digitalnet OOD and others v Nachalnik na Mitnicheski punkt—Varna Zapad pri Mitnitsa Varna* [2012] (ECLI:EU:C:2012:745) para 33.

[134] Judgment of Nineteenth Arbitration Appellate Court of 30 June 2015 *Kerama Marazzi* (Case N A35-6862/2014).

[135] Judgment of Ninth Arbitration Appellate Court of 27 May 2016 *Rosenergoprom* (Case N 09АП-13084/2016-AK).

[136] Case C-183/06 *RUMA GmbH v Oberfinanzdirektion Nürnberg* [2007] ECR I–01559, para 36.

[137] Case C-339/09 *Skoma-Lux sro v Celní ředitelství Olomouc* [2010] ECR I–13251, para 47.

[138] Case C-173/08 *Kloosterboer Services BV v Inspecteur van de Belastingdienst/Douane Rotterdam* [2009] ECR I–05347, para 26.

[139] Judgment of Twelfth Arbitration Appellate Court of 2 September 2016 *Biosintez* (Case N A57-26584/2015); Judgment of Fourteenth Arbitration Appellate Court of 18 October 2017 *ARMC* (Case N A66-6719/2017); Judgment of Eleventh Arbitration Appellate Court of 18 December 2017 *Robert Bosch* (Case N A72-20/2017); Judgment of Fourteenth Arbitration Appellate Court of 22 January 2018 *ARMC II* (Case N A66-2262/2017).

[140] Judgments of Thirteenth Arbitration Appellate Court of 11 March 2015 *ELORG* (Case N A56-41706/2014); Judgment of Thirteenth Arbitration Appellate Court of 27 October 2015 *ELORG II* (Case N A56-23775/2015).

[141] Case C-250/05 *Turbon International GmbH v Oberfinanzdirektion Koblenz* [2006] ECR I–10531.

[142] Judgment of Moscow Arbitration Court of 28 January 2015 *Novaya Tabachnaya Kompaniya* (Case N A40-87775/14).

[143] Case C-524/04 *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue*, [2007] ECR I–02107.

[144] Judgment of Seventeenth Arbitration Appellate Court of 13 February 2017 *Radius Service* (Case N 17АП-20131/2016-AK).

[145] Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I–07995.

The only decision by a Russian general jurisdiction court referring to CJEU case law was given by the Moscow City Court in its Appeal Order of November 2017 on an application by 'Alitalia Societa Avia IA'.[146] In this case, the Moscow City Court decided that the applicable law for the situation had been contained in the provisions of Regulation (EC) 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.[147] Considering Article 7 of this Regulation, the Moscow City Court applied the CJEU position reflected in *Sturgeon and Lepuschitz*[148] and in *Condor Flugdienst & Air France*[149] concerning the right of compensation for passengers in the case of delayed flights. In this regard, it is important to note that previously the same court refused to apply European Union law (in particular, Regulation 785/2004)[150] in a case against a Russian airline company for the seemingly artificial reason that Russia was not a party to the EU Treaties.[151] However, the Russian Supreme Court had earlier referred to Regulation (EC) 261/2004 in its decisions.[152]

E. Analysis of Results

Considering the impact of CJEU practice on the Russian legal system, we should move beyond a simple description of application of EU law by Russian courts. It is important to reflect what makes—or could make—Russian judges positive about referring to CJEU practice in their judgments. As we shall now see, this is a consequence of both external and internal influences.

Russian judges refer to CJEU practice, as a rule, on their own initiative. They are quite well informed on EU law. This is well demonstrated by the following example. At the end of 2009, Professor Sergey Kashkin organized a survey among twenty-four judges of the Magadan Oblast (the Magadan Oblast Court, the Magadan Oblast Arbitration Court, and the Magadan City Court) regarding their knowledge of European Union law. He kindly shared the following results with me.[153]

[146] Appeal Order of Moscow City Court of 14 November 2017 *AlItalia* (Case N 33-41219/2017).

[147] Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) 295/91 [2004] OJ L46, 17 February 2004, 1.

[148] Joined cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH* (C-402/07) and *Stefan Böck and Cornelia Lepuschitz v Air France SA* (C-432/07) [2009] ECR I–10923.

[149] Joined cases C-402/07 and C-432/07 *Condor Flugdienst GmbH & Air France SA* [2009] ECR I–10923.

[150] Regulation (EC) 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L138, 30 April 2004, 1.

[151] Appeal Order of Moscow City Court of 22 June 2010 (Case N 33-14811/2010).

[152] Judgment of Supreme Court of Russia of 29 May 2008 *Sakhalinskiye Aviatrassy* (Case N ГКПИ08-1212).

[153] Paul Kalinichenko, *European Union: Law and Relations with Russia* (NORMA 2012) 184 (in Russian).

According to the data, eight judges stated that they had applied the provisions of the ECHR in their practice. At the same time, five judges indicated that they had applied ECtHR case law. Furthermore, thirteen judges demonstrated knowledge of EU law, three judges were vaguely aware of EU law, and two judges were not familiar with EU legislation at all, while six judges were undecided. It should be pointed out that eleven judges correctly answered a question about the difference between the ECtHR and the CJEU, while thirteen were undecided. On top of that, eighteen judges were aware of the Lisbon Treaty 2007, while six judges were not. Only ten judges were able to determine the main documents in EU–Russia relations, while fourteen judges remained undecided. In general, this survey indicates the presence of EU law knowledge among judges of the Russian regions, geographically located in North-East Asia.

To understand why the Russian courts refer to CJEU case law in their decisions, it is necessary to take into account several reasons.

First of all, this is a result of EU programmes of a training and educational nature for legal academics and law professionals, including judges and law students (ERASMUS Plus; TAIEX). These efforts stem from the EU's willingness to integrate Russia into European political, economic, and legal spaces.[154] Only closer engagement of Russian judges with European judicial cooperation encourages a better perception of CJEU practice in their judgments.[155] In addition, the issue of reciprocity in enforcement of judgments may play a very important role in EU–Russia judicial cooperation. Finally, the overall worsening in EU–Russia relations has not led to a decrease in the judicial practice of quoting CJEU judgments.

Second, it is worth mentioning an affinity of legal cultures. Although the Russian language is not an official language of the CJEU and the CJEU does not use the Russian language in its judgments, all the main CJEU judgments are translated into Russian informally. In addition, Russian judges (especially, of higher courts) speak foreign languages and can find CJEU judgments on EU official websites. Among internal factors, it is important to note that the Russian judiciary has often been in difficult situations in terms of resolving cases without clear legislation and practice on civil and commercial matters. This is why they turn to EU law and CJEU practice, as they are more developed, have detailed answers, and are close in spirit and grounds to the Russian legal order.

Third, despite current political problems in mutual relations, the EU is ahead of the curve as the main trade and economic partner for Russia. Indeed, the Russian courts quote CJEU case law in their decisions in those spheres that ensure EU–Russia trade relations. These spheres also belong to subjects of legislative

[154] The Common Spaces Initiative; the Justice and Home Affairs Action Plan.

[155] For instance, in 2012, a group of CJEU judges visited Moscow, where they held a series of informal meetings with Russian judges and academics. See S Feklyunin, 'Russian Supreme Commercial Court and European Court of Justice to Cooperate' (4 April 2012) Russian Legal Information Agency <www.rapsinews.com/judicial_news/20120404/262687273.html> accessed 2 May 2020.

approximation with EU law in Russia. The reason might lie in the fact that the European Union is the main and non-alternative trading partner of Russia. This situation has existed for many years. Furthermore, CJEU case law is used by the courts of more developed regions of Russia.

These reasons lead to the strange situation when, in spite of the current deterioration in EU–Russia relations (in the period 2014–18), as can be seen in Figure 7.2, the number of Russian court judgments referring to CJEU case law has been increasing. Comparing two periods (2006–13 and 2014–18), it is important to stress that Russian courts have already formed and have been developing established judicial practice in CJEU case law citation in their judgments. On the one hand, during the second period, the practice of CJEU case citation by Russian courts demonstrates an essential growth in the number of cases, enlarging the scope and range of the courts engaged. On the other hand, the significance of that citation for the resolution of the case is still facultative. CJEU practice is considered as a pragmatic-oriented example. Russian courts usually cite CJEU case law only as an example of best international judicial practice. Of course, they demonstrate that CJEU practice is the Pole Star for their decisions and, sometimes, they even apply CJEU positions, but Russian courts are still far from implementing CJEU approaches in the interpretation of law and practice.

Russian courts argue from CJEU case law sporadically. There is no system or trend that allows us to conclude that there are any forms of impact in order to forestall legislative development, in order to promote free trade, or just the opposite—to close the Russian market. Despite the fact that Russia has adopted a law on the

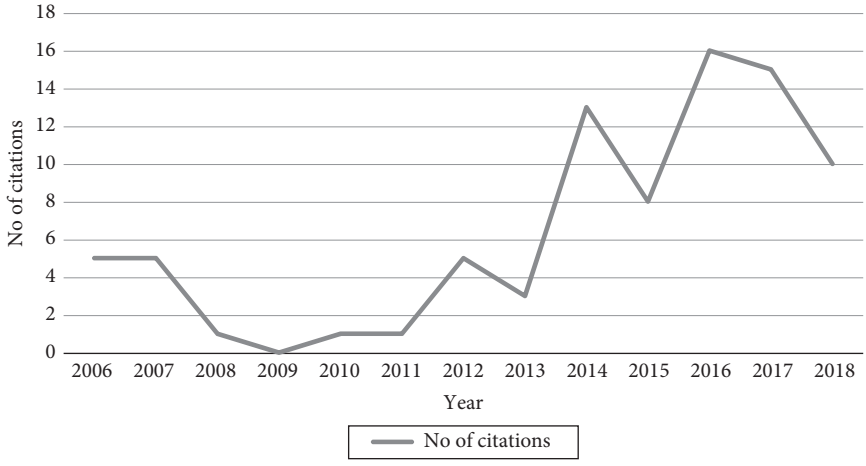

Fig 7.2 CJEU citations by Russian courts according to fields of law

Source: Author's own research from access to official and commercial databases.

Note: The figure for 2018 has been adapted to account for the fact that it only relates to the first six months of 2018.

right to be forgotten and a special chapter of the Russian Labour Code is dedicated to the legal treatment of labour for athletes, it is very difficult to trace the direct impact of such CJEU cases as *Google*[156] or *Bosman* on current Russian legislation. This also concerns harmonization with EU rules and standards in general. Russia has never had a special government programme for legislative approximation. As a rule, drafts of Russian laws do not contain specific references or explanations regarding approximation with EU rules. In the best cases, explanatory notes to the drafts contain only general references to 'the International and European experience'. Consequently, in most cases deep comparative analysis between the texts of a Russian law and an EU legal act is required to find any evidence of legislative approximation in Russia.

F. Policy Recommendations

The above-presented results of the impact of CJEU case law on Russian court practice are somewhat surprising. More precisely, at first glance it is strange that such an impact exists so dramatically in Russia. On the one hand, Russian courts are not obliged to take into account CJEU decisions. Politically, as a backdrop to the crisis in EU–Russia relations, CJEU case law quoting by Russian courts even seems paradoxical. On the other hand, nothing happens on such a scale by accident. This is a direct result of the transit from Soviet primitivism towards constructing a modern open-for-the-world legal system, which Russia has tried to achieve during the past twenty-five years. In this regard, the germ of a European legal culture in the Russian legal order is a logical outcome.

Support for further spread of European legal culture in Russia is in the EU's specific interests. Even using current selective engagement possibilities in relations with Russia, European structures could pay attention to measures aimed at promoting the development of legal education and training in EU law and CJEU case law in Russia, encouraging contacts between the Russian and European judicial communities, and expanding joint projects in the field of law and developing civil society.

[156] Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] (ECLI:EU:C:2014:317).