

CONCEPT OF A COURT OR TRIBUNAL UNDER THE REFERENCE FOR A PRELIMINARY RULING: WHO CAN REFER QUESTIONS TO THE COURT OF JUSTICE OF THE EU?

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Who can refer a question on the interpretation and validity of EU law to the Court of Justice of the EU (CJEU)? The most evident answer is a court or tribunal from a Member State, as it is established in the EU Treaties. The CJEU has developed a European concept of a court or tribunal through case law, but the EU Member States have diverse legal systems and there is no uniformity on the consideration of some bodies as a court or tribunal. Furthermore, the CJEU has had some problems with the interpretation of what a court or tribunal is, has added new criteria and has departed from some positions. On top of that, the EU has been growing and each enlargement has brought and will bring countries with more diverse legal systems. Because of that, the case law of the CJEU should be firm in order to avoid legal uncertainty about who is truly empowered to use the procedure. The aim of this study is to analyse the concept of a court or tribunal through the relevant case law where the criteria have been set and where certain particular bodies which do not exercise a pure judicial function have been considered competent to raise questions.

Keywords: Reference for a preliminary ruling, court or tribunal, Court of Justice of the EU, admissibility, interpretation, article 267 TFEU.

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I. INTRODUCTION

The EU Treaties provide that only courts and tribunals from Member States may raise a question on the interpretation and validity of EU law to the Court of Justice of the EU (hereinafter CJEU). The reference for a preliminary ruling is an important procedure whose aim is to foster dialogue and cooperation between judges at national and European level in order to ensure uniform application of EU law. Instead of leaving it to each Member State to decide which judges can make use of this procedure, the CJEU has opted for developing a concept of a court or tribunal through case law, clarifying which court or tribunal is competent to make a reference. The aim of this study is to analyse this concept through the relevant case law where the criteria have been set and where certain particular bodies which do not exercise a pure judicial function have been considered competent to raise questions.

The preliminary ruling procedure has been very important for the CJEU to develop its doctrine and it has significant effects. Consequently, it is essential to know exactly who can make a reference for a preliminary ruling. The EU Member States have diverse legal systems. This may lead to problems because there might be bodies that are perhaps not entirely judicial, but are still competent for legal purposes on some issues. Thus,

there may be no uniformity on the consideration of some bodies as a court or tribunal. Moreover, the EU has been growing and each enlargement has brought and will bring new countries with more diverse legal systems. For that reason, there is a need for greater soundness on the concept of a court or tribunal in order to avoid legal uncertainty about who is truly empowered to use the procedure. Otherwise, the CJEU will waste time and effort examining competence before admitting or rejecting a reference, thereby having a negative impact on the length of the procedure and on the jurisdictional protection of citizens. In this sense, problems concerning the concept of a court or tribunal have been ongoing for many years, as it will be proven by this article. It could be argued that the issue has never been entirely resolved. To this end, the author remains confident to be able to provide some input and new ground by analysing the relevant case law as well as by pointing out problems, needs and solutions.

It is a very sensitive and extremely complex issue due to the differences amongst Member States' legal systems. Considering the aforementioned importance of the reference for a preliminary ruling (commonly known as a dialogue between judges), the article aims to show how wide the concept of court or tribunal under article 267 TFEU is. This is important for references to the CJEU to be admitted. The criteria developed by the CJEU to establish the concept of court or tribunal will be seen through the analysis of the historic case law. From selected case law it will be observed how the CJEU has admitted references from bodies, courts or tribunals which do not exercise a pure judicial function, which have a dubious judicial function or which do not have a judicial function at all in their own legal systems. The aim is not only to show the casuistic case law that has admitted references from non-judicial bodies, but also to highlight the CJEU's enormous effort to assess the criteria on a case-by-case basis and its effects. For that reason the article attempts to demonstrate the need for a firmer concept.

The study has been divided into six parts. It begins with an introduction that is followed by an explanation of the importance of the reference for a preliminary ruling procedure. Then, it reviews the concept of a court or tribunal through the classic EU case law which has outlined the concept. The fourth part deals with some problematic considerations by analysing those cases where the CJEU considered whether some specific courts, bodies and authorities could be considered a court or tribunal. The fifth section tackles the need for the concept. Finally, the closing section provides the conclusions.

II. THE IMPORTANCE OF THE REFERENCE FOR A PRELIMINARY RULING

Articles 19(3)(b) of the Treaty of the European Union (TEU)¹ and 267 of the Treaty on the Functioning of the European Union (TFEU)² lay out the contours of the procedure for the reference for a preliminary ruling. Whereas article 19(3)(b) TEU simply mentions the procedure, article 267 TFEU further explains it. The articles stipulate that the CJEU is competent to give preliminary rulings concerning the interpretation of the EU Treaties and the validity and interpretation of acts of the European institutions, bodies, offices or agencies. Although article 256(3) TFEU foresees the competence of the General Court of the EU to deal with the reference for preliminary rulings in certain matters, there has been no development at all of that provision so far.³ Thus, it is the Court of Justice within the CJEU that is the sole competent authority to give preliminary rulings. In this procedure, which may also be found in the legal systems of some Member States such as Germany or France,⁴ only courts and tribunals are empowered to use it before the CJEU.⁵

The preliminary ruling procedure is one of the main legal mechanisms used to settle disputes arising from EU law.⁶ It is an essential mechanism to enable national courts to ensure uniform interpretation and application of EU law in all Member States.⁷ As an instrument of cooperation between judges, it provides national courts with an interpretation of EU law by the CJEU in order to give a judgment in cases where they have to adjudicate.⁸ This cooperation implies a distribution of tasks between the national court – which is competent to apply EU law to a case – and the CJEU, which is in charge of ensuring a uniform interpretation of EU law in all the Member

¹ Consolidated version of the Treaty of the European Union (TEU) [2008] OJ C 115/15.

² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

³ Recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings OJ 2012 C-338/01, point 3.

⁴ In the German law for the organisation of courts (*Gerichtsverfassungsgesetz*) and in the *saisine pour avis* of the French legal system, according to Carlos Divar Blanco, *Seguridad jurídica, igualdad ante la ley y aplicación uniforme del derecho*. Crónica de la jurisprudencia del Tribunal Supremo 2008-2009, Tribunal Supremo, Madrid [2009].

⁵ Carl Otto Lenz, 'The role and mechanism of the preliminary ruling procedure', (1994) 18(2) *Fordham International Law Journal* 393.

⁶ Antonio Herrero García, 'Cuestión prejudicial en el derecho de la Unión Europea' (2001), 23, via http://www.recercat.net/bitstream/handle/2072/152108/TFC-HERRERO_SP-2011.pdf?sequence=1 (accessed 17 January 2014).

⁷ René Barents, *Directory of EU case law on the preliminary ruling procedure* (Kluwer Law International 2009), 278.

⁸ Regina Valutyte, 'State liability for the infringement of the obligation to refer for a preliminary ruling under the European Convention on Human Rights' (2012) 19(1) *Jurisprudence* 8.

States.⁹ It is the national judge who is competent to decide if a preliminary ruling is needed on the basis of the existence of a problem coming from an interpretation of EU law.¹⁰

Being a fundamental institution for the construction of EU law,¹¹ the CJEU has also been a driving force behind European integration where the preliminary ruling has played a critical role.¹² This is because the CJEU has primarily developed and constructed its doctrine through case law arising from the preliminary ruling procedure.¹³ When a national judge decides to send a preliminary reference, the CJEU has the opportunity to expand EU law through clarification and to enforce it because its ruling dismantles national legislation which is not compatible with EU law.¹⁴ The supremacy and direct effect of EU law impacts relationships between individuals and it has made national courts raise more frequently the preliminary ruling procedure to the CJEU, which has the monopoly on interpretation of questions of EU law in order to ensure its uniform application.¹⁵ As such, the preliminary ruling constitutes a very useful tool in order to allow the CJEU to guarantee such uniformity, while leaving the effective application to national courts.¹⁶ Thus, the preliminary ruling procedure is designed to uphold the legal order and to give a far-reaching guarantee that EU law will remain uniform in all Member States.¹⁷

A distinction must be made between the reference for a preliminary ruling and other judicial procedures before the CJEU. In this sense, it must be stressed that this procedure is not an appeal against a law, but an inquiry into its interpretation or validity.¹⁸ As the aim of this procedure is to foster cooperation between national and European judges in order to facilitate the uniform application of EU law, any national court dealing with a dispute where such law poses doubts of interpretation or validity is enabled to refer to the CJEU with the aim of clarifying those concerns.

⁹ Isaac Ibáñez García, 'Tres notas de actualidad sobre la cuestión prejudicial comunitaria' (2011) *Diario La Ley* n° 7591, 3.

¹⁰ *ibid.*

¹¹ *ibid.*, 4.

¹² Clifford J Carubba and Lacey Murrah, 'Legal integration and use of the preliminary ruling process in the European Union' (2005) 59 *International Organization* 399.

¹³ Rachel A Cichowski, 'Litigation, compliance and European integration: The preliminary ruling procedure and EU nature conservation policy' Paper presented at the Biennial meeting of the European Community Students Association, Madison, Wisconsin, 31 May-2 June 2001, 2.

¹⁴ *ibid.*

¹⁵ Lenz (n 5) 389.

¹⁶ Joaquín Sarrión Esteve, *El planteamiento de la cuestión prejudicial ante el Tribunal de Justicia por parte del órgano jurisdiccional español*. Los retos del Poder Judicial ante la sociedad globalizada. Actas del IV Congreso Gallego de Derecho Procesal (I Internacional), A Coruña, 2 y 3 de junio de 2011,(2012), 680.

¹⁷ Lenz (n 5) 391.

¹⁸ Sean Van Raepenbusch, *Droit Institutionnel de l'Union Européene* (Larcier, 2011), 540-541.

There are two types of references for a preliminary ruling: when the national judge raises a question about how to interpret a European law in order to correctly apply it, or in the event that a national judge asks for the review of the validity of a European law. In either case, the characteristic feature is that it is a dialogue between judges since the question is directed by a national judge to a European one.¹⁹ This means that the decision about the referral of the question is incumbent on the national judge. While one of the parties in the legal dispute may also suggest it, it will be up to the national judge to determine whether to raise it or not. There is one exception where judges are always obliged to make use of the reference for a preliminary ruling; that is the case when the issue is being dealt with at a Member State's court or tribunal against whose decisions there is no judicial remedy under national law.²⁰

Another important thing to bear in mind is that the reference for a preliminary ruling does not transfer the competence to deal with the dispute to the CJEU. In fact, the CJEU can only pronounce on the elements of the question referred to it. Thus, the national court stays competent to adjudicate on the dispute and the CJEU simply clarifies the interpretation or validity of the European law which is relevant for the original case. At the end of the process, the CJEU makes a decision about the interpretation or validity of the EU law or an act of the European institutions, bodies, agencies and offices.²¹

In the first situation, the decision of the CJEU is binding for all courts and tribunals of the Member States.²² However, this does not prevent any court or tribunal to request a preliminary ruling concerning the interpretation of the same issue if there are new elements or difficulties.²³ In the context of a reference for a preliminary ruling concerning validity, there are two different effects depending on whether the CJEU considers the EU law to be valid or invalid. On the one hand, if the EU law is not considered invalid, the CJEU simply says that the 'examination of the questions referred to the Court reveals no factor capable of affecting the validity of the said Decisions.'²⁴ On the other hand, if the EU law or act is considered invalid, then it is declared invalid.²⁵ It also has the consequence

¹⁹ *ibid*, 540; Opinion of AG Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 76.

²⁰ Art 267 TFEU.

²¹ Art 267 TFEU.

²² Van Raepenbusch (n 18) 574.

²³ *ibid*, 575.

²⁴ See Joined Cases C-73/63 and C-74/63 *Internationale Crediet- en Handelsvereniging* [1964] ECR I.

²⁵ It is invalid not only for the court or tribunal which launched the procedure, but also for the tribunals in other Member States, as stated by the CJEU in Case C-66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR II 91 para 13: 'It follows therefrom that although a judgment of the Court given

that all the instruments which were adopted based on it are similarly invalid. However, the CJEU does not annul the act; it simply confirms its invalidity.²⁶ By analogy with article 266 TFEU, it shall be up to the competent European institutions to adopt a measure to execute the ruling of the CJEU and to rectify the situation.²⁷

Moreover, the CJEU has an obligation to answer a question unless it falls outside its scope of competence.²⁸ This may happen when the act questioned is not subject to this procedure or more likely, when the referral is done by a court or tribunal which is not considered to have jurisdiction in the sense of article 267 TFEU. The acts which are subject to the procedure include not only the list established in Article 288 of TFEU (regulations, directives, decisions, recommendations and opinions), but also the atypical acts provided and not provided by the Treaties.²⁹ Nevertheless, article 267 of the TFEU stipulates that the CJEU can only give preliminary rulings on the validity of acts adopted by the EU institutions, bodies, offices or agencies, whereas it allows the CJEU to interpret not only those acts, but also the Treaties of the EU.³⁰

III. THE CONCEPT OF A COURT OR TRIBUNAL DEVELOPED THROUGH EU CASE LAW

Only a court or tribunal from a Member State can launch the reference for a preliminary ruling before the CJEU. Thus, third countries' and international courts and tribunals, such as the International Court of Justice or the European Court of Human Rights, are not entitled to use this procedure.³¹ However, it is interesting to note that the Benelux Court of Justice is competent to make use of the procedure because its task is to ensure the uniform application of law in three Member States.³² Delimiting the concept of a court or tribunal is important because some Member States have a unique judicial function, whereas some others have a much

under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give'.

²⁶ Van Raepenbusch (n 18) 576.

²⁷ *ibid.* Art 266 TFEU stipulates that: 'The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.'

²⁸ Van Raepenbusch (n 18) 545.

²⁹ *ibid.*, 560.

³⁰ Art 267 TFEU says that: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:(a) the interpretation of the Treaties;(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'.

³¹ Van Raepenbusch (n 18) 547.

³² *ibid.*

more diverse system whose principles are different. To address that issue, two options were considered: deferring to the national law of each Member State to decide what a court or tribunal is or to develop a European concept.³³ The second option was chosen since it is more consistent with the principle of uniform application of EU law.³⁴ This concept has been developed through EU case law and the purpose of this section is to analyse those judgments.

The concept of a court or tribunal has been considered on the basis of two criteria: an organic one, which considers that the question may be referred by a judge engaged by a public order in the framework of a legal competence and; a functional one, which stipulates that a court or tribunal must settle disputes and shall comply with certain characteristics consolidated by EU case law.³⁵ Therefore, the organic aspect would refer to the statutory position of the body, with the content and nature enabling it to secure its independence and impartiality, whereas the functional one has to do with the specific task of an authority when settling a conflict and imposing its decision on the parts in the dispute.³⁶ It seems that the CJEU is more favourable to the functional aspect rather than to the other one when considering what a court or tribunal is.³⁷ Nevertheless, the CJEU has never clarified what a court or tribunal is under article 267 TFEU.³⁸ However, it ruled on the criteria to determine which bodies are competent to use the procedure.³⁹

1. The Criteria to be Considered as Having Jurisdiction: the Vaassen-Göbbels Case.

The position of the CJEU towards the organic and functional criteria of the concept of a court or tribunal is strongly echoed in the *Vaassen-Göbbels* case.⁴⁰ This is a historical judgment for several reasons. First of all, the CJEU confirmed the European character of the concept of a court or tribunal in that ruling.⁴¹ Moreover, it is the judgment in which the CJEU first laid out the criteria for considering what such a concept is.⁴² From

³³ Antonio Herrero García, 'Cuestión prejudicial en el derecho de la Unión Europea' (2011), 23; via http://www.recercat.net/bitstream/handle/2072/152108/TFC-HERRERO_SP-2011.pdf?sequence=1, (accessed 11 February 2014).

³⁴ Van Raepenbusch (n 18) 548.

³⁵ Herrero García (n 33) 23.

³⁶ *ibid.*, 23-24.

³⁷ Van Raepenbusch (n 18) 548.

³⁸ Morten Broberg and Niels Fenger, *Preliminary references to the European Court of Justice* (OUP 2014), 72.

³⁹ Lenz (n 5) 393-394.

⁴⁰ C-61/65 *Vaassen-Göbbels* [1966] ECR 377.

⁴¹ Van Raepenbusch (n 18) 548.

⁴² *ibid.* Fernando M Mariño, Víctor Moreno Catena and Carlos Moreira, *Derecho procesal comunitario* (Tirant Lo Blanch 2001), 238; Marie-Cécile Lasserre, 'Le droit de la procédure civile de l'Union européenne forme-t-elle un ordre procédural?' (2013) Université de Nice Sophia-Antipolis 66; Timothy Dayton Maldoon, 'A court or tribunal within the meaning of Article 234 of the Treaty. The Court's jurisprudence

this ruling, the predisposition of the CJEU towards the functional aspect of the concept can also be perceived. In this case, the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf* – a Dutch Court of Arbitration⁴³ – was dealing with an issue which required interpretation of Regulation No 3 of the Council of the EEC concerning social security for migrant workers.⁴⁴ This Dutch arbitration court brought a preliminary ruling before the CJEU.

The applicant in the action before the Dutch court was the widow of a miner who received a pension from the Dutch Worker Fund of Mining (BFM in Dutch). The applicant went to live in Germany on 31 August 1963 and because of that, was removed from the list of members of a sickness fund for pensioners. The widow asked to be reinserted on the list, but was refused under Article 18.1 of the Rules of the BFM, so she decided to complain to the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf*.⁴⁵

The CJEU admitted the request for interpretation. Despite not being so considered under Dutch law, it found that the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf* should be considered a court or tribunal within the meaning of article 267 TFEU because of several reasons:⁴⁶

- First of all, the CJEU considered that the *Scheidsgerecht van het Beambten- fonds voor het Mijnbedrijf* was an arbitration court, constituted under the law of the Netherlands and provided for by the *Reglement van het Beambten-fonds voor het Mijnbedrijf* (RBFM, Official Rules of the Fund for Mining Company) which governs the relationship between the *Beambtenfonds* and those who are insured by it.⁴⁷ The CJEU also acknowledged that the RBFM and any subsequent amendment to it must be approved not only by the Dutch Minister responsible for the mining industry, but also by the Minister for Social Affairs and Public Health.⁴⁸ Furthermore, the CJEU took note that it was the duty of the Minister responsible for the mining industry to appoint the members of the

from Vaassen (née Göbbels) to Syfait' (2005), 10, via <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1560047&fileOId=1565184>, (accessed 29 April 2014).

⁴³Although the name of the court may confuse, the case had nothing to do with arbitration. Some authors maintain that it was indeed a case of pseudo-arbitration. Paul Storm, *Quod Licet Iovi.... The precarious relationship between the Court of Justice of the European Communities and Arbitration on Essays on International and comparative Law in honour of Judge Erades*. (T.M.C. Asser Instituut 1983), 146.

⁴⁴ [1958] OJ L 30, 561–596.

⁴⁵See the facts of the case C-61/65 *Vaassen-Göbbels* [1966] ECR 377, 263.

⁴⁶ibid. The reasons are stated in the subsection Facts in the main action under the Issues of fact and of law of the judgement.

⁴⁷ibid, 272–273.

⁴⁸ibid.

Scheidsgerecht (Court of Arbitration), to designate its chairman and to lay down its rules of procedure.⁴⁹ Hence, the CJEU recognised and accepted the public character of the *Scheidsgerecht van het Beambten-fonds voor het Mijnbedrijf* since it was created by law, its members and President were appointed by the Dutch Government and its rules of procedure were established by national law.⁵⁰

- Secondly, the CJEU took into account that the *Scheidsgerecht* was a permanent body whose aim was to exclusively settle certain disputes under the RBFM.⁵¹ Besides, the CJEU perceived that the *Scheidsgerecht* was also bound by rules of adversary procedure similar to those used by other ordinary courts of law.⁵² Thus, the CJEU deemed that this was a permanent institution, complying with the requirements of adversary proceedings and whose competences were established by the RBFM to deal exclusively with certain issues.⁵³
- Thirdly, the CJEU noted that the persons referred to in the RBFM were compulsorily members of the *Beambten-fonds*⁵⁴ and they were bound to take any disputes between themselves and their insurer to the *Scheidsgerecht* as the proper judicial body.⁵⁵ Consequently, the CJEU argued that the *Scheidsgerecht* was bound to apply rules of law.⁵⁶

Therefore, the *Scheidsgerecht van het Beambten-fonds voor het Mijnbedrijf* was recognised as a court or tribunal because it was a permanent body of statutory origin, reference to it was compulsory, and it gave its rulings after a proper hearing and in accordance with legal rules.⁵⁷ However, this recognition received some criticism based on the fact that the powers of the Dutch arbitration court did not rely on any agreement between the parties.⁵⁸

⁴⁹ibid.

⁵⁰ibid.

⁵¹ibid, 273.

⁵² ibid.

⁵³ibid.

⁵⁴ This was done due to a regulation laid down by the *Mijnindustrieraad* (Council of the Mining Industry), a body established under public law.

⁵⁵C-61/65 *Vaassen-Göbbels* [1966] ECR 377, 273.

⁵⁶ibid.

⁵⁷ Opinion of Advocate-General Darmon in Case C-24/92 *Corbiau* [1993] ECR I-0000, para 5.

⁵⁸ W L Haardt, 'Widow Vaassen-Göbbels v. Board of the Beambtenfonds voor het Mijnbedrijf ("Tund of Employees in the Mining industry")', Case 61/65. Preliminary ruling given on June 30, 1966' (1967) 4 Common Market Law Review, 443-444; Storm (n 43) 146.

As a result of this judgement, the characteristics relevant for being considered a court or tribunal for the purposes of the reference for a preliminary ruling before the CJEU were laid out.⁵⁹ This has been a very important ruling because subsequently, the CJEU has verified the compliance with such criteria, which have obviously been shaped and completed.⁶⁰

2. No Need for an Adversarial Process: the *Politi* Case

The next problem was to consider whether a court or tribunal should comply with all those requirements in order to be considered competent to launch the procedure. This was answered in *Politi*.⁶¹ This case raised a question whether all the criteria from *Vaassen-Göbbels* should be met in order for a body to be competent to make a reference. In particular, the case was useful to examine whether the court or tribunal had to conduct an adversarial process (i.e. a contest between two opposing parties before a judge who moderates) in order to be entitled to make use of the reference for a preliminary ruling.

Politi was an Italian undertaking importing pig meat from different countries (Sweden, Belgium, France and Ireland).⁶² For each importation, *Politi* was required to pay a duty and a statistical levy according to Italian law.⁶³ The company considered that the charges for importations should not have been imposed since they were not compatible with Regulation No 20 of the Council of 4 April 1962 on the gradual establishment of the common organisation of the market in pig meat and Regulation No 121/67/EEC of the Council of 13 June 1967 on the common organisation of the market in pig meat.⁶⁴ Thus, it brought interlocutory proceedings before the President of the *Tribunale di Torino* against the Ministry of Finance of the Italian Republic with the aim of obtaining a refund.⁶⁵

The *Tribunale di Torino* wanted to obtain an interpretation from the CJEU concerning the Regulations.⁶⁶ Before hearing the other party (the Ministry of Finance of the Italian Republic), it decided to launch the procedure for the preliminary ruling before the CJEU.⁶⁷

⁵⁹ Maldoon (n 42) 11. Besides, all those characteristics have been confirmed in later case-law such as: C-14/86 *Pretore di Salò v Persons unknown* [1987] ECR 2545; C-54/96 *Dorsch Consult v Bundesbaugesellschaft Berlin unknown* [1987] ECR 2545, para 7; C-109/88 *Danfoss* [1989] ECR 3199, paras 7-8, and; C-393/92 *Almelo and Others* [1994] ECR I-1477.

⁶⁰ See Opinion of Advocate General Jarabo Colomer (n 19) para 17.

⁶¹ C-43/71 *Politi SAS v Italian Ministry of Finance* [1971] ECR 1039.

⁶² *ibid*, 1041-1042.

⁶³ *ibid*.

⁶⁴ *ibid*.

⁶⁵ *ibid*.

⁶⁶ *ibid*, 1042-1043.

⁶⁷ *ibid*.

The Italian Government maintained that the *Tribunale di Torino* lacked competence needed to make a reference due to the fact that it had been launched on a unilateral basis without any hearing to appreciate the adversarial aspect of the process.⁶⁸ Besides, it argued that there was a new Italian law changing the legal context of the case, although the CJEU considered it irrelevant by noting that the case was brought by a court or tribunal for the purposes of Article 267 TFEU.⁶⁹

The judgment clarified that the *inter partes* condition stipulated in *Vaassen Göbbels* is not a decisive factor to consider a body a court or tribunal under article 267 TFEU.⁷⁰ This ruling made it clear that the CJEU only needs to confirm that the tribunal launching the procedure exercises a judicial function and that an interpretation on EU law is needed for the national proceedings.⁷¹ Thus, even if the procedure of the body in question did not involve a proper hearing, the reference to the CJEU could still be allowed as long as it was performing a judicial function and considered that an interpretation on EU law was needed.⁷² The same position was maintained by the CJEU in *Birra Deber*.⁷³

Even though in *Simmenthal*⁷⁴ and *Ligur Carni*⁷⁵ the CJEU stressed that the preliminary ruling should be requested only if there is an adversarial process, the truth is that the CJEU did not reject its previous argument.⁷⁶ For example, in *Pretore di Cento*⁷⁷ and *Pretura Unificata di Torino*,⁷⁸ the CJEU approved without any doubt the admissibility of references in cases without parties. Therefore, this particular requirement has lost ground.⁷⁹

3. Independence and Impartiality as Essential Characteristics: the Corbiau Case

The judgment in *Politi* raised another concern related to the judicial function exercised by a court or tribunal. Could any court exercising such a judicial function make a request for a preliminary ruling before the CJEU at any time? The question was answered in the *Corbiau* case.⁸⁰ Since *Vaassen Göbbels*, the CJEU has checked that the requirements laid out in that

⁶⁸ *ibid*, 1044.

⁶⁹ *ibid*.

⁷⁰ Maldoon (n 42) 23.

⁷¹ C-43/71 *Politi* [1971] ECR 1039, para 5 .

⁷² *ibid*, para 5; Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 30.

⁷³ C-162/73 *Birra Dreber v Amministrazione delle Finanze dello Stato* [1974] ECR 201.

⁷⁴ C-70/77 *Simmenthal v Amministrazione delle Finanze dello Stato* [1978] ECR 1453.

⁷⁵ Joined Cases C-277/91, C-318/91 and C-319/91 *Ligur Carni Srl and Genova Carni Srl v Unità Sanitaria Locale n. XV di Genova and Ponente SpA v Unità Sanitaria Locale n. XIX di La Spezia and CO.GE.SE.MA Coop a r l.* [1993] ECR I-6621.

⁷⁶ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 31.

⁷⁷ C-110/76 *Pretore di Cento* [1977] ECR 851.

⁷⁸ C-228/87 *Pretura unificata di Torino* [1988] ECR 5099.

⁷⁹ Maldoon (n 42) 23.

⁸⁰ C-24/92 *Corbiau* [1993] ECR I-1277.

ruling are complied with. However, some other requirements have appeared in subsequent judgments. That was the case with the requirement of independence, firstly mentioned in *Pretore di Salò*,⁸¹ but later further considered in *Corbiau*. In fact, it could be argued that *Corbiau* gave fundamental meaning to the criterion of independence⁸².

In *Corbiau*, the Director of Taxation and Excise Duties Directorate of Luxembourg⁸³ made a request for a preliminary ruling with the aim of interpreting the former article 48 of the Treaty establishing the European Economic Community (EEC Treaty).⁸⁴ According to former article 48 EEC Treaty (current article 45 TFEU), the freedom of movement of workers ‘shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.’⁸⁵

Mr Corbiau had made an application to the *Directeur des Contributions* of Luxembourg under article 131 of the Luxembourgish Tax Code.⁸⁶ He relied on the judgment of the CJEU in *Biehl*.⁸⁷ In that case, the CJEU had ruled that article 48(2) of the EEC Treaty:

precludes a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable.⁸⁸

Mr Corbiau had been working at the Paribas Bank in Luxembourg.⁸⁹ He lived in Luxembourg until 25 October 1990, when he transferred his residence to Belgium while remaining employed in Luxembourg.⁹⁰ From 1 January 1990 to 25 October 1990, the employer of Mr Corbiau had deducted income tax from his salary at the rate applicable to a taxpayer resident in Luxembourg.⁹¹ The refund of overpaid tax was denied under

⁸¹ Case C-14/86 *Pretore di Salò v Persons* [1987] ECR 2545.

⁸² *Maldoon* (n 42) p 18.

⁸³ This is the current *Administration des contributions directes* of the Grand Duchy of Luxembourg, which is a tax service whose main tasks aim to set and cover direct taxes, to establish the basis on which the property tax will be charged and finally, to set and collect taxes. See <http://www.impotsdirects.public.lu/>, (accessed 11 January 2014).

⁸⁴ C-24/92 *Corbiau* [1993] ECR I-1277, para 1.

⁸⁵ Art 48(2) EEC Treaty.

⁸⁶ C-24/92 *Corbiau* [1993] ECR I-1277, para 7.

⁸⁷ Case C-175/88 *Biehl vs Administration des Contributions* [1990] ECR I-1779.

⁸⁸ *ibid*, para 19.

⁸⁹ C-24/92 *Corbiau* [1993] ECR I-1277, para 3.

⁹⁰ *ibid*.

⁹¹ *ibid*, para 4.

Article 154 of the Luxemburgish Income Tax Law that established that those excesses would benefit the Treasury.⁹²

Thus, the Director of Taxation and Excise Duties Directorate decided to request from the CJEU a preliminary ruling to interpret Article 48 of the EEC Treaty in order to clarify his doubts regarding the application of the judgment in *Biehl*.⁹³ In this case, the CJEU wanted to determine whether the Director of Taxation and Excise Duties Directorate could be considered a tribunal or court for the purpose of the preliminary ruling.⁹⁴ That was a key point for the case, since the CJEU would admit the question or not depending on the answer.

The first problem arose due to the fact that the State Council of Luxembourg had recognised its status as a court in some contentious and non-contentious matters.⁹⁵ Nevertheless, Advocate-General Darmon issued an opinion arguing that the concept of a court or tribunal was autonomous and it has been defined by the case law of the CJEU.⁹⁶ Thus, the Advocate General claimed that the recognition by the State Council of Luxembourg was not enough to confer the status of a court or tribunal to the Director of Taxation and Excise Duties Directorate.⁹⁷

Eventually, the CJEU did not admit the reference.⁹⁸ However, it did so not on the grounds provided by the Advocate General, but by considering that the expression 'court or tribunal' is 'a concept of Community law, which can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings.'⁹⁹ In this sense, the CJEU could not consider the Director of Taxation and Excise Duties Directorate as a third party because he was the head of the Taxation and Excise Duties Directorate.¹⁰⁰ Taking this fact into account, he could not be regarded as being impartial in relation to this authority, having been the head of the very authority that had made the appealed decision.¹⁰¹ Therefore, the CJEU concluded that the Director of Taxation and Excise Duties Directorate was not a court or tribunal for the purposes of the reference for a preliminary ruling.¹⁰²

⁹² *ibid*, paras 5-6.

⁹³ C-175/88 *Biehl vs Administration des Contributions* [1990] ECR I-1779.

⁹⁴ C-24/92 *Corbiau* [1993] ECR I-1277, para 14.

⁹⁵ As pointed out in the opinion of Advocate General Darmon in C-24/92 *Corbiau* [1993] ECR I-0000, that recognition was given in *Caisse hypothécaire du Luxembourg* No 5833 on the Court Roll and in *Toussaint v Administration des contributions*, No 5516 on the Court Roll.

⁹⁶ *ibid*, para 4.

⁹⁷ *ibid*.

⁹⁸ C-24/92 *Corbiau* [1993] ECR I-1277, para 17.

⁹⁹ *ibid*, para 15.

¹⁰⁰ *ibid*, para 16.

¹⁰¹ *ibid*.

¹⁰² *ibid*, para 17.

From this judgment, it can be deduced that impartiality and independence are two essential characteristics to consider a body a court or tribunal under article 267 TFEU. Hence, in order to be recognised as competent to make a reference for a preliminary ruling, courts and tribunals must act as third parties in the original litigation process. The the *Corbiau* judgment was later confirmed in *X*,¹⁰³ a case in which the CJEU did not admit a request for a preliminary ruling because the petitioner did not fulfil the requirement of independence.¹⁰⁴ Nevertheless, the CJEU has departed from the consideration of that requirement and this has led to criticism.¹⁰⁵ In a series of cases - starting with *Dorsch Consult*¹⁰⁶ the Court referred to the exercise of the function in an independent way and under own responsibility.¹⁰⁷ This has been later confirmed in *Köllensperger and Atzwanger*.¹⁰⁸

IV. PROBLEMATIC CONSIDERATIONS ON THE CONCEPT OF A COURT OR TRIBUNAL

Now that the characteristics for being considered a court or tribunal have been laid out, it is time to assess this concept with some examples of bodies or authorities that the CJEU has considered to fall within or outside article 267 TFEU. The following section will outline some case law in which the CJEU used functional criteria to examine whether several types of different courts, authorities and bodies could be considered a court or tribunal for the purposes of a preliminary ruling procedure.

It should be highlighted that the selected cases deal with references for preliminary rulings requested by bodies which do not carry out a pure judicial function or which do not even exercise it within their legal systems. The cases have been selected to show the CJEU's wide range of interpretations of the criteria, sometimes leading to the admission of references that are not made by judges. This is done on a case-by-case basis because the nature and functions of bodies may vary between countries, which makes CJEU's task more difficult. Admission of references from non-judicial bodies creates controversy and also legal uncertainty for bodies that would like to question the Court on the interpretation or validity of European law.

I. Can Arbitration Courts be Competent for the Preliminary Ruling? The Nordsee Case

¹⁰³ Joined cases C-74/95 and C-129/95 *X* [1996] ECR I-6609.

¹⁰⁴ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 20.

¹⁰⁵ *ibid*, 19-28; Maldoon (n 42), 22.

¹⁰⁶ C-54/96 *Dorsch Consult v Bundesbaugesellschaft Berlin* [1987] ECR 2545.

¹⁰⁷ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 21.

¹⁰⁸ C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551.

The judgment in *Corbiau*¹⁰⁹ could have brought with it a question of arbitration bodies as courts or tribunals entitled to launch the reference for a preliminary ruling. Arbitration is an alternative dispute resolution mechanism where parties decide to submit their dispute to a third person (“arbitrator”) who will make a legally-binding decision or otherwise as if s/he was a judge. Since it has rapidly evolved as a method of resolving international trade disputes where EU law must be taken into consideration, arbitration has also increased the significance of referring questions to the CJEU about the application and interpretation of EU law.¹¹⁰ Besides, *Vassen Göbbels*¹¹¹ recognised a Dutch arbitration court as a court or tribunal for the purposes of article 267 TFEU. Some authors considered that *Vassen Göbbels* had indicated that the CJEU would later admit references from private arbitration tribunals.¹¹² Moreover, the CJEU had strengthened the condition of third party impartiality for courts and tribunals wishing to make a request for a preliminary ruling in *Corbiau*.¹¹³ Then, could arbitration courts and tribunals be considered a court or tribunal for the purposes of the reference for a preliminary ruling? The answer came in *Nordsee*,¹¹⁴ where the CJEU ruled that arbitration courts are not courts or tribunals.

In *Nordsee*, a dispute submitted for arbitration arose from a contract signed by German shipbuilders.¹¹⁵ The arbitrator used the reference for a preliminary ruling procedure to ask for an interpretation of a series of three Regulations concerning aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund.¹¹⁶ In this case, the CJEU had first to consider whether the arbitration tribunal was a court or tribunal for the purposes of the procedure. In order to solve this issue, the CJEU analysed the nature of the arbitration tribunal in question.

The CJEU perceived certain similarities between the activities of the arbitration tribunal in question and an ordinary court or tribunal.¹¹⁷ This was mainly because the arbitrator had to decide according to law and his decision had the force of *res judicata* between the parties and had to be

¹⁰⁹ C-24/92 *Corbiau* [1993] ECR I-1277.

¹¹⁰ Joseph H H Weiler and Martina Kocjan, 'The law of the European Union. Teaching material. The Community System of judicial remedies: jurisdiction examined: article 234' NYU School of Law 2004/05, 11.

¹¹¹ C-61/65 *Vaassen-Göbbels* [1966] ECR 377.

¹¹² W Paul Gormley, 'The Future Role of Arbitration within the EEC: The Right of an Arbitrator to Request a Preliminary Ruling Pursuant to Article 177' (1968) 12St. Louis University Law Journal 550-563.

¹¹³ C-24/92 *Corbiau* [1993] ECR I-1277.

¹¹⁴ C-102/81 *Nordsee v Reederei Mond* [1982] ECR I-1095. For an analysis of the case see Broberg and Fenger (n 38), 84-86; and Storm (n 43) 150.

¹¹⁵ *ibid*, para 2.

¹¹⁶ Regulation No 17/64/EEC of the Council of 5 February [1964] OJ No 34/586, Regulation (EEC) No 729/70 of the Council of 21 April [1970] OJ No L 94/13 and Regulation (EEC) No 2722/72 of the Council of 19 December [1972] OJ L 291/30.

¹¹⁷ C-102/81 *Nordsee* [1982] ECR I-1095, para 10.

enforceable.¹¹⁸ Nevertheless, the CJEU considered that those characteristics were not enough to make an arbitration court become a court or tribunal in the sense of article 267 TFEU.¹¹⁹

In contrast to *Vassen-Göbbels*, the CJEU pointed out that the parties were not obliged to refer their dispute to arbitration.¹²⁰ In fact, it was underlined that, when signing the contract ‘the parties were free to leave their disputes to be resolved by ordinary courts or to opt for arbitration by inserting a clause to that effect in the contract.’¹²¹ Furthermore, the CJEU stated that the German public authorities were neither involved in the decision to refer the matter to arbitration nor requested to intervene in the arbitral proceedings.¹²² On top of that, the CJEU stressed that the arbitral tribunal lacked the public character criteria laid out in *Vaassen-Göbbels* since it ‘was established pursuant to a contract between private individuals.’¹²³ It also stated that the German State was responsible ‘for the performance of obligations arising from’¹²⁴ EU law within its territory and it had ‘not entrusted or left to private individuals the duty of ensuring’¹²⁵ the compliance of the obligations in this particular case.

Thus, the CJEU refused to consider it as a court or tribunal and it did not accept the reference.¹²⁶ Nevertheless, the judgment did not exclude the possibility of accepting questions raised in an arbitration process through national courts or tribunals which examine them in a context of a collaboration or in the course of a review of an arbitration award.¹²⁷ In any case, it is up to the national court or tribunal to consider making a reference since they are courts or tribunals under article 267 TFEU.¹²⁸

The CJEU has followed the *Nordsee* judgment.¹²⁹ It has made it clear that a conventional arbitration court cannot make a reference for a preliminary ruling.¹³⁰ The reason is that arbitral tribunals lack compulsory jurisdiction,¹³¹

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*, para 13.

¹²⁰ *ibid.*, para 11.

¹²¹ *ibid.*

¹²² *ibid.*, para 12.

¹²³ *ibid.*, para 7.

¹²⁴ *ibid.*, para 12.

¹²⁵ *ibid.*

¹²⁶ *ibid.*, paras 13 and 16.

¹²⁷ *ibid.*, para 14.

¹²⁸ *ibid.*, para 15.

¹²⁹ C-125/04 *Guy Denuit and Betty Cordenier. v. Transorient – Mosaique Voyages et Culture SA* [2005] ECR I-923, para 13.

¹³⁰ The CJEU has recently confirmed it in C-555/13 *Merck Canada Inc v Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthron BV, Ranbaxy Portugal - Comércio e Desenvolvimento de Produtos Farmacêuticos, Unipessoal Lda* [2014] (not published yet), paras 16-17. By analogy, the same could be said for mediation; the author was expecting an opinion of the CJEU in C-492/11 *Ciro Di Donna v Società imballaggi*

which is one of criteria established in *Vaassen Göbbels*. There are scholars who have a different opinion and consider that arbitral courts should be able to refer questions to the CJEU.¹³² Despite the fact that there might be arguments for reconsidering the situation,¹³³ the case law of CJEU concerning preliminary rulings and arbitration courts is very consistent.

However, it has also been clarified that there are situations where arbitration courts can be considered as having jurisdiction entitling them to make use of the reference for a preliminary ruling procedure. For example, that was the case in *Danfoss*¹³⁴ whereby:

the reference for a preliminary ruling was made by a Danish arbitration court granted final jurisdiction by law in disputes relating to collective agreements between employees' organisations and employers, where the jurisdiction did not depend on the agreement between the parties since either might bring a case before it despite the objections of the other, and the decision was binding on everybody.¹³⁵

This has been confirmed very recently in *Merck Canada Inc.*¹³⁶ Therefore, the CJEU admits questions from an arbitral court with a legal origin, whose award is binding for the parties and whose jurisdiction does not depend upon the parties' agreement.¹³⁷ Furthermore, in *Almelo*¹³⁸ the CJEU has also 'accepted jurisdiction to reply to the questions referred for a preliminary ruling by a judicial body determining, according to what appeared fair and reasonable, an appeal from an arbitration award, because it was required to observe the rules of Community Law.'¹³⁹

metallici Salerno srl (SIMSA) [2013] ECR I-00000 but, due to the derogation of the legislation applicable to the dispute, it did not give a ruling.

¹³¹ *Maldoon* (n 42) 24; *Van Raepenbusch* (n 18) 549, and; *Broberg and Fenger* (n 38) 84-85.

¹³² Xavier de Mello, 'Arbitrage et droit communautaire' (1982) *Revue de l'arbitrage* 395; *Van Raepenbusch* (n 18) 549, fn 67.

¹³³ *Terkildsen and Lysholm* argued that arbitral courts should be considered court or tribunal under article 267 TFEU: Dan Terkildsen and Sebastian Lysholm Nielsen, 'Arbitral Tribunals and Article 267 of the Treaty on the Functioning of the European Union – The Danish By-Pass Rule' (2012) *Austrian Yearbook on International Arbitration* 195-206.

¹³⁴ C-109/88 *Danfoss* [1989] ECR 3199, paras 7-9.

¹³⁵ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 50.

¹³⁶ C- 555/13 *Merck Canada Inc*, not published yet.

¹³⁷ C-109/88 *Danfoss* [1989] ECR 3199, para 7; C- 555/13 *Merck Canada Inc*, not published yet, para 18.

¹³⁸ C-393/92 *Almelo and Others* [1994] ECR I-1477.

¹³⁹ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 51.

2. Can Economic and Administrative Courts be Competent for the Preliminary Ruling? The *Gabalfrisa* Case

The *Gabalfrisa* case¹⁴⁰ dealt with the consideration of economic and administrative courts as courts or tribunals entitled to raise questions to the CJEU. Previously, the CJEU had already admitted a reference from the Spanish economic and administrative court in the *Iberlacta* case.¹⁴¹ The *Gabalfrisa* case involved a determination whether a Spanish regional economic and administrative court (Catalonia) would fall under article 267 TFEU. In Spain, these courts are not judicial, but administrative in nature.¹⁴² Despite preceding the *Gabalfrisa* case, the ruling in the *Iberlacta* case did not set any precedent for *Gabalfrisa* since it did not argue how economic and administrative courts could meet the criteria to be considered a court or tribunal under article 267 TFEU.¹⁴³ Thus, it was in the *Gabalfrisa* case that such an examination took place.¹⁴⁴ In this case, there was an important division of opinions between the Advocate General and the CJEU.¹⁴⁵ The former claimed that it was an administrative court that not entitled to refer questions, whereas the latter decided that it fell under article 267 TFEU.

In the original proceedings, various departments of the Spanish Tax Agency had refused several entrepreneurs and professional practitioners the deduction of value added tax (VAT) paid in respect of transactions carried out prior to the commencement of their activity.¹⁴⁶ The Spanish Tax Agency argued that it was done on the grounds of infringement of the requirements laid down in national law, more specifically Article 111 of Law No 37/1992 and Article 28 of Royal Decree No 1624/1992.¹⁴⁷

However, those entrepreneurs and professional practitioners considered that Article 111 of Law No 37/1992 was contrary to Article 17(1) and (2)(a) of

¹⁴⁰ Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577.

¹⁴¹ Joined Cases C-260/91 and C-261/91 *Diversint SA and Iberlacta SA v Administración Principal de Aduanas de la Junquera* [1993] ECR I-1885.

¹⁴² Pilar Charro Baena and Carolina San Martín Mazzucconi, 'Derechos sociales y tutela judicial efectiva en la Constitución Europea' (2005) *Revista del Ministerio de Trabajo e Inmigración* n° 57, 57.

¹⁴³ Francisco M. Carrasco González, *El planteamiento de cuestiones prejudiciales al TJCE por los Tribunales Económico-Administrativos. Necesidad de un nuevo examen*. Ministerio de Hacienda: Instituto de Estudios Fiscales (2009), 99.

¹⁴⁴ *ibid.*

¹⁴⁵ Some authors maintain that Advocate General Saggio was very belligerent against considering this court to fall under article 267 TFEU. See: Clemente Checa González, 'Crítica del carácter obligatorio de la vía económico-administrativa en la nueva ley general tributaria española' (2004) 16(1) *Revista de Derecho* [2004] 154.

¹⁴⁶ Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, para 10.

¹⁴⁷ *ibid.*

the Sixth VAT Directive.¹⁴⁸ Thus, they appealed the decision of the Spanish Tax Agency before the *Tribunal Económico-Administrativo Regional de Cataluña*, which is the regional economic and administrative court of Catalonia. That court had doubts about the compatibility of Law No 37/1992 with Article 17 of the Sixth Directive and referred a preliminary ruling to the CJEU.¹⁴⁹

Advocate-General Saggio considered that the regional economic and administrative court of Catalonia did not meet the criteria to fall under what is currently article 267 TFEU.¹⁵⁰ He insisted on the lack of independence of this court. He also rejected an argument that not admitting references from economic and administrative courts would put the uniform application of EU law at stake because those courts issue resolutions which can be subject to judicial review.¹⁵¹ Thus, the Catalanian economic and administrative court should not be empowered to refer a preliminary ruling. Nevertheless, the CJEU did not follow the Advocate-General's opinion and considered that the court met the criteria developed by EU case law in order to qualify as a court or tribunal competent to request preliminary rulings.¹⁵²

The CJEU considered that the economic and administrative courts were of statutory origin and permanent since their tasks were defined and their procedure for fiscal complaints was organised by Spanish legislation.¹⁵³ It also acknowledged that the jurisdiction of those tribunals was compulsory since national legislation provided that they were able to rule on complaints in order to challenge decisions of the Spanish Tax Authority.¹⁵⁴

¹⁴⁸ Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment OJ L 145/1.

¹⁴⁹ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 13.

¹⁵⁰ Opinion of Advocate General Saggio in Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-01577.

¹⁵¹ Francisco M Carrasco González, 'El planteamiento de cuestiones prejudiciales al TJCE por los Tribunales Económico-Administrativos. Necesidad de un nuevo examen' (2009) Ministerio de Hacienda: Instituto de Estudios Fiscales 100.

¹⁵² Case *Vaasen Göbbels* [1966] ECR 377; Case *Pretore di Salò v Persons* [1987] ECR 2545; Case *Dorsch Consult* [1987] ECR 2545, para 7; Case *Danfoss* [1989] ECR 3199, paras 7-8; Case *Almelo and Others* [1994] ECR I-1477.

¹⁵³ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 34. The tasks were defined by Law No 230/1963 and Legislative Decree No 2795/1980 whereas the procedure for fiscal complaints was organised by Royal Decree No 391/1996, Law No 230/1963, Legislative Decree No 2795/1980 and Royal Decree No 391/1996.

¹⁵⁴ In accordance with Article 35(1) of Legislative Decree No 2795/1980, Article 163 of Law No 230/1963, Article 40 of Legislative Decree No 2795/1980, and Articles 4(2) and 119(3) and (4) of Royal Decree No 391/1996. C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 35.

According to national rules, the final decisions of the tribunals were also binding.¹⁵⁵

Concerning the *inter-partes* nature of the procedure, the CJEU clarified that this was not an absolute criterion as it was laid out in previous case law¹⁵⁶ and the Spanish legislation¹⁵⁷ allowed the parties concerned to lodge submissions and evidence in support of their claims and request a public hearing.¹⁵⁸ For the CJEU, the economic-administrative tribunals may also apply rules of law since the relevant provisions in the Spanish legislation¹⁵⁹ establish that they are competent to give reasons in fact and in law for their decisions and it is in these tribunals' power to rule on fiscal complaints.¹⁶⁰ Unlike in *Corbiau*,¹⁶¹ the CJEU also held that the economic-administrative tribunals did indeed meet the criteria of independence. As such, they were a clear third party in the process since national laws established and ensured a clear separation of functions between the departments of the tax authority responsible for management, clearance and recovery and the economic-administrative courts which independently deal with complaints against decisions of the tax authority's department.¹⁶²

The CJEU's judgment in *Gabalfrisa* has been very much criticised. In his conclusions for *De Coster*,¹⁶³ Advocate-General Ruiz-Jarabo Colomer raised some concerns about that ruling. Ruiz-Jarabo called into question the impartiality and independence of the members of the economic and administrative court because they are officials of the public administration and are appointed by a minister who can dismiss them whenever he or she wants to do so.¹⁶⁴ Moreover, the Advocate-General stressed the fact that complaints before those courts are just administrative appeals.¹⁶⁵

The Advocate-General also pointed out that economic and administrative courts must reply within a year following the appeal; otherwise that appeal is rejected and the complaint may go for contentious administrative proceedings.¹⁶⁶ In order to strengthen his arguments, he also mentioned that the economic and administrative courts may inhibit themselves in

¹⁵⁵ Arts 55, 110 and 112 of Royal Decree No 391/1996. C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 36.

¹⁵⁶ C-54/96 *Dorsch Consultsee* [1987] ECR 2545, para 31.

¹⁵⁷ Articles 30 and 32 of Legislative Decree No 2795/1980 and Articles 90 and 91 of Royal Decree No 391/1996.

¹⁵⁸ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 37.

¹⁵⁹ Arts 20 and 35(2) of Legislative Decree No 2795/1980 and Arts 1 and 40(2) of Royal Decree No 391/1996.

¹⁶⁰ Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, para 38.

¹⁶¹ C-24/92 *Corbiau* [1993] ECR I-1277.

¹⁶² Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, paras 39-40.

¹⁶³ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445.

¹⁶⁴ *ibid*, para 28.

¹⁶⁵ *ibid*.

¹⁶⁶ *ibid*.

those cases considered important or whose amount is remarkably high and leave the decision for the Ministry of Finance.¹⁶⁷ For Ruiz-Jarabo, the *Gabalfrisa* case showed confusion between administrative and judicial bodies.

Besides, Ruiz-Jarabo argued that these courts do not follow an entirely adversarial process since the pleas and evidence admitted have a limited character and the public hearing is settled discretionarily by the body itself without any possibility of appeal.¹⁶⁸ The Advocate General also highlighted that administrative structures which decide under legal criteria do not need to be composed of jurists.¹⁶⁹ To support his position, he pointed out some cases where preliminary rulings were accepted despite the fact that their members were not jurists.¹⁷⁰

The Advocate-General claimed that the admission of 'references for preliminary rulings from administrative bodies seriously hinders the dialogue between courts established by the Treaty, distorts its aims and undermines the judicial protection of the citizen.'¹⁷¹ Even though the CJEU considered the Catalan economic and administrative courts as competent to request a preliminary ruling, many scholars do not agree with this condition.¹⁷² In this sense, the ruling in *Gabalfrisa* has been considered 'a gradual relaxation of the requirement that the body should be independent.'¹⁷³ However, some Spanish scholars have argued over time that economic and administrative courts would be competent to refer questions to the CJEU.¹⁷⁴ This lack of unanimity is a problem when determining who can make use of the reference for a preliminary ruling.

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*, para 39.

¹⁶⁹ *ibid.*, para 77.

¹⁷⁰ *ibid.* See fn 97 where Advocate General Jarabo-Colomer provides examples of the three members of the *Maaseutuelinkeinojen Valituslautakunta* (Rural Businesses Appeals Board), Finland, which led to the reference being accepted in Joined Cases C- 9/97 and C-1W97 *Jokela and Pitkäranta* [1998] ECR I-6267, one was a non-legal specialist. In Case C-7/97 *Oscar Bronner v Mediaprint* [1998] ECR I-7791, the *Kartellgericht* (Court of First Instance in Competition Matters of Austria), which made the reference was composed of three members, two of whom were lay assessors.

¹⁷¹ *ibid.*, para 79

¹⁷² *ibid.* See fn 28, where Ruiz Jarabo-Colomer quotes all the doctrine which is against the judgment.

¹⁷³ Maldoon (n 42) 22.

¹⁷⁴ See for example: Antonio Martínez Lafuente, 'Hacienda Pública y cuestión prejudicial' (1985) Noticias CEE, núm. 11, 91-95; Juan José Zornoza Pérez, 'Notas sobre el concepto de impuestos sobre el volumen de ventas en la Sexta Directiva' (1986) Noticias CEE, núm. 19, 31-37; Ramón Falcón y Tella, *Introducción al Derecho financiero y tributario de las Comunidades Europeas* (Civitas 1988); Clemente Checa González, 'Aspectos controvertidos en relación con las actuaciones de los órganos económico-administrativos: algunas cuestiones' (1992) Revista de Derecho Financiero y Hacienda Pública, núm. 222, 1225-1246; César García Novoa, 'Los Tribunales

3. Can Competition Authorities be Competent for the Preliminary Ruling? The Syfait Case

As courts which do not exercise a pure juridical function have been considered as falling under article 267 TFEU by the CJEU, it leaves open the possibility of accepting other bodies which make decisions with legal implications, but whose function is not entirely juridical. That is the case for competition authorities. National competition authorities are bodies which have a regulatory mandate over competition issues covering all sectors of the economy in their country.¹⁷⁵ As such, they make decisions and sanction market actors that infringe on competition rules.¹⁷⁶ The CJEU had already considered that the former Spanish Competition Authority was allowed to request preliminary rulings.¹⁷⁷ The *Syfait* case again raised the question about whether national competition authorities could be considered a court or tribunal in the sense of article 267 TFEU.¹⁷⁸ The ruling in this case was largely awaited due to reasons which had to do with competition law.¹⁷⁹ Nevertheless, the CJEU rejected the positive opinion of the Advocate General and did not admit the reference for a preliminary ruling. Thus, those expectations were never satisfied.

In this case there was a conflict between GSK plc and its Greek subsidiary GSK AEVE - a company distributing medicinal products - and several of its clients (*Syfait* and others, PSF, Interfarm and Others, and Marinopoulos and Others); all of them were wholesalers or represented associations of wholesalers to whom GSK AEVE had refused to supply three pharmaceutical products (Imigran, Lamictal and Serevent) on the Greek market in order to avoid parallel imports.¹⁸⁰ GSK AEVE based its decision to change its distribution system supplying directly to hospitals and pharmacies on a serious economic situation.¹⁸¹

The wholesalers reported to the Greek competition authority (*Epitropi Antagonismou*) alleging the non-attention of the orders that had been requested of GSK AEVE, claiming that this attitude could constitute an

Económico-Administrativos como jueces de lo comunitario en materia tributaria' (1995) *Revista de Derecho Financiero y Hacienda Pública*, n° 236, 415-447.

¹⁷⁵ Cornelius Dube, 'Competition authorities and sector regulators: What is the best operational framework?' (2008) CUTS International, October #2, 1.

¹⁷⁶ Ashurst, 'Sanctions in Competition law' (2006), DTP/2987 August 2006.

¹⁷⁷ C-67/91, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others* [1992] ECR I-04785, paras 25-26. However the CJEU followed the organic criteria and did not examine whether the criteria established in the *Vassen Göbbels* case were fulfilled. Thus, it simply assumed it was a judicial national body.

¹⁷⁸ C-53/03 *Syfait and Others v GlaxoSmithKlineAEVE* [2005] ECR I-4609.

¹⁷⁹ Carl Johan Björnram *Parallel trade in pharmaceutical products within the EEA: From first to final marketing. - Balancing the need to protect and promote public health and safety with the EC treaty objective of establishing a common market*, Durham theses, Durham University (2007), 54-55, via <http://etheses.dur.ac.uk/2135/>, (accessed 5 May 2014).

¹⁸⁰ *ibid*, para 2.

¹⁸¹ *ibid*, para 12.

abuse of dominant position within the meaning of Article 2 of Greek Law No 703/1977 and article 102 TFEU (former art 82 TEC).¹⁸² On 3 August 2001, the Greek competition authority requested that GSK AEVE temporarily comply with the orders.¹⁸³ The competition authority compelled both GSK plc and GSK AEVE to comply with a circular adopted on 27 November 2001 by the Greek Organisation for Medicines, which provided that all participants in the distribution of prescribed medicines ‘must supply to the domestic market quantities at least equal to current prescription levels ... plus an amount (25%) to cover any emergencies and changes of circumstance.’¹⁸⁴

Then, GSK AEVE appealed to the Administrative Appeal Court in Athens – which confirmed that measure – and afterwards it applied to the Greek competition authority for negative clearance under Article 11 of Law No 703/1977 in respect of its refusal to cover more than 125% of Greek demand.¹⁸⁵ The Greek competition authority decided to make a reference to the CJEU for a preliminary ruling in order to know to what extent the refusal by GSK plc and GSK AEVE to fully meet the orders placed by the complainants constituted an abuse of a dominant position within the meaning of article 102 TFEU.

Advocate General Jacobs considered that there were no grounds for refusing the condition of a court or tribunal to the Greek competition authority.¹⁸⁶ He argued that the authority met the criteria needed to be considered a court or tribunal.¹⁸⁷ However, the CJEU did not follow his opinion. In fact, it stressed the fact that the competition authority was not a court or tribunal since it did not meet the conditions established by EU case law in order to be considered so.¹⁸⁸ Thus, the CJEU had no jurisdiction to answer the questions.¹⁸⁹

The CJEU stressed the facts that the Greek competition authority was supervised by the Greek Minister for Development;¹⁹⁰ its personnel were not free from removal;¹⁹¹ its president was responsible for the coordination and general policy of the secretariat, which investigates and proposes the decisions later adopted by the authority, and; he was the immediate

¹⁸² *ibid*, para 14.

¹⁸³ *ibid*, para 15.

¹⁸⁴ *ibid*, para 17.

¹⁸⁵ *ibid*, paras 15 and 18.

¹⁸⁶ Opinion of Advocate General Jacobs of 28 October 2004 in Case C-53/03 *Syfait and Others v GlaxoSmithKline AEVE* [2005] ECR I-4609. For a detailed analysis of the opinion, see: Maldoon (n 42) 31-37.

¹⁸⁷ Opinion of Advocate-General Jacobs in Case C-53/03 *Syfait and Others v GlaxoSmithKline AEVE* [2005] ECR I-4609, paras 17-46.

¹⁸⁸ Case C-53/03 *Syfait* [2005] ECR I-4609, para 37.

¹⁸⁹ *ibid*, para 38.

¹⁹⁰ *ibid*, para 30.

¹⁹¹ *ibid*, para 31.

superior of the secretariat's personnel.¹⁹² Consequently, the CJEU considered that the Greek competition authority did not meet the criteria of independence since it was not a clear third party 'in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings.'¹⁹³

Finally, the CJEU highlighted that national competition authorities have to cooperate with the European Commission and consequently, may be relieved from their competences to apply articles 101 and 102 TFEU by a Commission's decision.¹⁹⁴ The CJEU also held that, according to the relevant case law,¹⁹⁵ a body having a pending case which requires giving a judgment in proceedings intended to lead to a decision of a judicial nature may refer a question.¹⁹⁶ However, if the Commission can relieve the national authority from its competence, then any proceedings initiated before that authority will not lead to a decision of a judicial nature.¹⁹⁷ This judgment tightens up the requirements to use the preliminary ruling¹⁹⁸ and it could be inferred from it that no national competition authority may be considered a court or tribunal under article 267 TFEU.

On this point, it could be argued that there are advantages and disadvantages of considering competition authorities courts or tribunals under article 267 TFEU.¹⁹⁹ These authorities exist in each Member State and they apply articles 101 and 102 TFEU in their territories. Those provisions are anything but easy to apply and concern many actors on the market. On top of that, each national competition authority has a different experience when using those provisions. As a result, there may be a risk to uniform application of the competition provisions which could be remedied by allowing national competition authorities to refer questions to the CJEU. That being said, this could increase the workload of the CJEU if it had to admit references from 28 national competition authorities. This could in turn result in delays for justice as the CJEU rulings take a significant amount of time. Competition authorities should wait for the CJEU to rule before issuing their decision, which is subject to judicial review and could later lead to another reference for a preliminary ruling.

¹⁹² *ibid*, para 32.

¹⁹³ *ibid*, para 33. See also Maldoon (n 42) 36-37, where the author argues that Advocate-General Jacobs was wrong when considering that the Greek competition authority was independent.

¹⁹⁴ Art 11(6) of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 001.

¹⁹⁵ C-134/97 *Victoria Film* [1998] ECR I-7023, para 14; and C-195/98, *Österreichischer Gewerkschaftsbund* ECR [2000] I-10497, para 25.

¹⁹⁶ See C-53/03 *Syfait* [2005] ECR I-4609, para 35.

¹⁹⁷ *ibid*, para 36.

¹⁹⁸ Broberg and Fenger (n 38) 91.

¹⁹⁹ Maldoon (n 42) 38-40.

Nevertheless, it is clear that this judgment is a reaction of the CJEU to criticism from scholars and Advocates General against previous and soft case law.²⁰⁰ This argument is supported by the fact that the criterion of independence, as explained in the judgment, becomes more difficult to liberally apply as in the past.²⁰¹ It seems that the conclusions of Ruiz Jarabo in *De Coster* have made the CJEU analyse the criteria more severely, especially the condition of independence.²⁰²

4. *Can Administrative Bodies be Competent for the Preliminary Ruling? The Belov Case*

In *Belov*²⁰³ the CJEU examined whether certain administrative bodies or agencies with quasi-judicial functions could be considered a court or tribunal for the purposes of article 267 TFEU. In this case, Valeri Hariev Belov had made a complaint to a Commission of protection against discrimination created under Bulgarian law (*Komisija za zashtita ot diskriminatsia*, KZD).²⁰⁴ The reason the complaint was that Chez Elektro Balaria (CEB) had placed meters to measure electricity consumption at a height of seven meters on posts in two areas of the city of Montana (Bulgaria) mainly inhabited by the Roma community.²⁰⁵ The KZD considered that the measure constituted indirect discrimination on grounds of ethnicity within the meaning of Articles 4.3 and 37 of the Bulgarian Law on protection against discrimination.²⁰⁶ This law had been adopted in order to transpose Directive 2000/43/EC, which implements the principle of equal treatment irrespective of racial or ethnic origin. Consequently, the KZD thought that an interpretation of EU Law was necessary before deciding on the claim.²⁰⁷ For that reason, the KZD referred several questions to the CJEU for a preliminary ruling.²⁰⁸ It is interesting to note that not only KZD itself but also the Bulgarian Government and the European Commission were convinced that it was a court or tribunal under article 267 TFEU.²⁰⁹ However, that is irrelevant since it was up to the CJEU to determine if it is a body entitled to make use of the procedure.²¹⁰

²⁰⁰ Carrasco González (n 143) 103.

²⁰¹ Manuel Cienfuegos Mateo, 'Independencia judicial y planteamiento de cuestiones prejudiciales. Comentario a la sentencia Syfait (C-531/03), de 31 de mayo de 2005, del Tribunal de Justicia' (2006) Unión Europa Aranzadi n° 3, 12.

²⁰² Carrasco González (n 143) 103.

²⁰³ C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balaria AD and Others European* [2013] ECR I-00000.

²⁰⁴ *ibid*, para 23.

²⁰⁵ *ibid*, para 19.

²⁰⁶ *ibid*, para 31.

²⁰⁷ *ibid*, paras 32-34.

²⁰⁸ *ibid*, para 36.

²⁰⁹ *ibid*, para 37.

²¹⁰ The French Government also considered the *Prud'homie de pêche de Martigues* (Martigues Industrial Tribunal for Matters relating to Fishing) as a court or tribunal under art 267 TFEU. However, the assessment carried out by the CJEU rejected

In the analysis of KZD, the CJEU insisted on the fact that 'a national body may be classified as a court or tribunal within the meaning of Article 267 TFEU, when it is performing judicial functions, but when exercising other functions, of an administrative nature, for example, it cannot be recognised as such.²¹¹ By giving several reasons, it concluded that KZD was similar in substance to a national administrative body which makes administrative decisions. The CJEU explained that there were four factors which made it believe that the procedure before the KZD was going to lead to a decision of an administrative nature.²¹²

First of all, the CJEU considered that KZD may bring similar proceedings by way of application, complaint or even of its own motion whose results are very much the same.²¹³ In the second place, the CJEU realized that the KZD may join persons other than those appointed by the party to the proceedings of its own motion when it considers it necessary.²¹⁴ Thirdly, in case of an action brought against a KZD decision, the CJEU explained that this body has the status of defendant before the competent administrative court. Furthermore, if that decision is annulled, KZD may appeal before the Supreme Administrative Court of Bulgaria.²¹⁵ As a fourth factor, the CJEU found that KZD may revoke any action brought against its decision if the party to whom the decision is addressed is favorable.²¹⁶ All these factors made the CJEU decide that KZD has no jurisdictional function and it would not fall under the concept of a court or tribunal in article 267 TFEU. However, the assessment by the CJEU was exclusive to KZD and should not be extended to other administrative bodies, which will require separate specific analysis in order to consider them as a court or tribunal under article 267 TFEU.

5. Can Courts of Audit be Competent for the Preliminary Ruling? The *Elegktiko Synedriou Case*

The *Elegktikou Sinedriou* case²¹⁷ dealt with the consideration of a court of auditors as competent to refer questions to the CJEU. In some Member States, like Portugal, the Court of Auditors is considered to be a true

such condition and it did not admit the reference. See C-109/07 *Jonathan Pilato v Jean-Claude Bourgault* [2008] ECR I-3503, paras 25 and 31.

²¹¹ C-394/11 *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and Others European* [2013] ECR I-00000, para 40.

²¹² *ibid*, paras 46-51.

²¹³ *ibid*, para 47.

²¹⁴ *ibid*, para 48.

²¹⁵ *ibid*, para 49.

²¹⁶ *ibid*, para 50.

²¹⁷ C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000.

financial court by the Constitution of the country.²¹⁸ In this country, it is a sovereign, independent and constitutional body which is not included in the public administration.²¹⁹ In Spain, the Court of Auditors is said to have fiscal and judicial functions. The judicial function would consist of prosecuting the accounting liability incurred by those who are responsible for managing assets, public funds or effects.²²⁰ Thus, the *Elegktikou Sinedriou* case was a good opportunity to assess the judicial functions of those courts for the purposes of the reference for a preliminary ruling procedure.

In this case, the Greek Court of Auditors (*Elegktikou Sinedriou*) made a reference to the CJEU in the context of a dispute between *Epitropos tou Elegktikou Sinedriou sto Ipourgio Politismou kai Tourismou* (the Commissioner of the Court of Auditors at the Ministry of Culture and Tourism) and *Ipourgio Politismou kai Tourismou - Ipiresia Dimosionomikou Elenchou* (The Audit Service of the Ministry of Culture and Tourism). This dispute concerned the Commissioner's refusal to approve the payment order issued by the audit service relating to the remuneration of a member of the staff of the Ministry of Culture and Tourism, who was employed on a private law fixed-term contract.²²¹

The Commissioner had refused the approval by stating that workers employed by the state on private law fixed-term employment contracts are entitled to unpaid leave for trade union business, while the same workers with contracts of indefinite duration are entitled to paid leave for trade union business.²²² The Audit Service resubmitted the payment order for the Commissioner's approval. His refusal and the matter were brought before the first section of the Greek Court of Auditors, which decided to halt proceedings and to refer some preliminary questions to the CJEU.²²³

Before answering, the CJEU had to determine whether it constituted a court or tribunal within the meaning of Article 267 TFEU and whether it

²¹⁸ Art 214 of the 1976 Constitution of the Portuguese Republic states that it is 'the supreme body which examines the legality of public expenditure and rules on the accounts which the law has ordered to be submitted to the Court'. The Portuguese Constitution also stipulates that the Court of Auditors follows the principles of independence and exclusive subjection to the law (art 203) and its decisions are grounded, obligatory and must prevail (art 206).

²¹⁹ *The Tribunal do Contas (Court of Auditors) today*, <http://www.tcontas.pt/en/today/ca-today.pdf> (accessed 28 January 2014), 3.

²²⁰ Javier Medina Guijarro and José Antonio Pajares Giménez, 'La función de enjuiciamiento contable del Tribunal de Cuentas como su <<propia jurisdicción>> en la historia y en la Constitución Española' (2005) *Revista Española de Control Externo* no 21, 44-45.

²²¹ C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000, para 2.

²²² *ibid*, paras 9-10.

²²³ *ibid*. paras 11-13.

was entitled to make use of the reference for a preliminary ruling.²²⁴ Firstly, it analysed whether the Court of Auditors met the criteria of independence established by previous case law.²²⁵ In this case, the CJEU found that the Commissioner was a member of the Court of Auditors, who is attached to each Ministry to carry out a priori auditing of orders for expenditure made by the Ministry concerned.²²⁶ Therefore, the CJEU argued that there was a clear organisational and functional link between the Court of Auditors and the Commissioner attached to the Ministry of Culture and Tourism.²²⁷ Thus, the CJEU explained that it was impossible to consider the Greek Court of Auditors as a third party in relation to the Commissioner.²²⁸

Furthermore, the CJEU claimed that the decision of the Court of Auditors was not part of proceedings intended to lead to a decision of a judicial nature.²²⁹ That lack of *res judicata* force made it impossible for this body to qualify as a court or tribunal under article 267 TFEU.²³⁰ Even though it combined a judicial function with other ones, the CJEU has jurisdiction only to answer those preliminary rulings requests which are referred on the basis of the judicial function.²³¹ It is clear that in this case, the Greek Court of Auditors was not exercising a judicial function. Consequently, it would not meet another requirement to be considered a court or tribunal within the meaning of Article 267 TFEU. On top of that, the CJEU stated that the beneficiary of the expenditure in question in the main proceedings was not a party to the proceedings before the Court of Auditors.²³² That beneficiary would only be a party in proceedings brought afterwards before an administrative court deciding on the issue of remuneration.²³³ It would be up to that administrative court to decide to make use of the reference for a preliminary ruling.²³⁴ Considering all of these facts, the CJEU did not find that the Greek Court of Auditors was acting in a judicial capacity and it did not admit the reference for a preliminary ruling.²³⁵

That being said, the CJEU should assess whether other courts of auditors from different Member States might be considered courts or tribunals for the purposes of a reference for a preliminary ruling. This is because the

²²⁴ *ibid*, para 17.

²²⁵ *ibid*, para 20.

²²⁶ *ibid*, para 23.

²²⁷ *ibid*, para 24.

²²⁸ *ibid*, para 25.

²²⁹ *ibid*, paras 26-28.

²³⁰ Broberg and Fenger (n 38) 82.

²³¹ C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000.

²³² *ibid*, para 29.

²³³ *ibid*, para 31.

²³⁴ *ibid*.

²³⁵ *ibid*, paras 32-34.

analysis of this case only focused on the specific features of the Greek Court of Auditors. In spite of such specific analysis of the Greek Court of Auditors, the judgment helps to conclude that bodies combining judicial and other functions may fall under article 267 TFEU, provided that they refer the question on the basis of their judicial functions and they fulfill other criteria.

6. *Can a Professional Body be Competent for the Preliminary Ruling? The De Coster Case*

The *De Coster* case²³⁶ examined whether a professional body which has been tasked to implement legal provisions could be considered a court or tribunal for the purposes of article 267 TFEU. In this case, there was a dispute between Mr De Coster and *Collège des bourgmestre et échevins de Watermael-Boitsfort* in Belgium because the *Collège* levied a municipal tax on Mr De Coster's satellite dishes.²³⁷ He lodged an appeal before the *Collège juridictionnel de la Région de Bruxelles-Capitale* (Judicial Board of the Brussels-capital region) on the grounds of a restriction of free movement of services (more specifically, a restriction on the freedom to receive television programmes from other Member States).²³⁸ The Judicial Board of the Brussels-capital region decided to launch the reference for a preliminary ruling before the CJEU.²³⁹

By analysing national legislation, the CJEU found that the Judicial Board of the Brussels-capital region exercised similar judicial functions to the permanent deputation in the rest of the provinces of Belgium.²⁴⁰ On top of that, it discovered that the members of the Board had the same rules on ineligibility as the members of the permanent deputations in provinces and that the same rules must be respected in proceedings before them when exercising judicial functions.²⁴¹ Because of that, the CJEU concluded that the Board was 'a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory.'²⁴²

Despite the fact that the CJEU had doubts about the criteria of *inter partes* procedure, independence and impartiality, it finally concluded that the Board met them. The CJEU found several elements that made it consider that the procedure before the Board was *inter partes* (the defendant receives a copy of the application to reply within 30 days, the preparatory inquiries are adversarial, the file may be consulted by the parties and oral

²³⁶ C-17/00 *François De Coster v Collège des bourgmestres et échevins de Watermael-Boitsfort* [2001] ECR I- 09445.

²³⁷ *ibid*, para 2.

²³⁸ *ibid*, paras 5-6.

²³⁹ *ibid*, para 8.

²⁴⁰ *ibid*, para 11.

²⁴¹ *ibid*.

²⁴² *ibid*, para 12.

observations may be presented by the parties at a public hearing).²⁴³ It also explained that the Board was independent and impartial because of the status of its members.²⁴⁴

It is interesting to note that Advocate General Jarabo Colomer had argued in his Opinion that this body did not meet the criteria to be considered a court or tribunal under article 267 TFEU while asking the CJEU to provide a stricter concept.²⁴⁵ Although the CJEU did not follow his advice, it was somehow sensitive to Ruiz Jarabo's Opinion in the sense that it provided a thorough analysis of the criteria to consider the Board as a court or tribunal for the purposes of the reference for a preliminary ruling.²⁴⁶

The question arises as to whether this judgment could be applied by analogy to consider other similar bodies as having competence under article 267 TFEU. Nevertheless, it is worthy to point out that the examination by the CJEU was very specific to the particular situation of the Judicial Board of the Brussels-capital region. Consequently, it is not possible to determine any possible extension. The CJEU will need to analyse the circumstances of each professional body in light of the criteria which determine the condition of jurisdiction.

7. Can an Ombudsman be Competent for the Preliminary Ruling? The Umweltanwalt von Kärnten Case

In principle, ombudsmen only issue recommendations and critical assessments which are not legally binding.²⁴⁷ As such, they should not be competent to make use of the reference for a preliminary ruling.²⁴⁸ Public authorities are not obliged to comply with the ombudsmen's opinions and complainants cannot require national courts and tribunals to enforce such opinions.²⁴⁹ However, some argue that ombudsmen should be entitled to make use of the procedure on the basis that these institutions work in a similar way to administrative courts and that public authorities generally comply with their opinions.²⁵⁰ In a similar way to administrative appeal

²⁴³ *ibid*, paras 15-16.

²⁴⁴ *ibid*, paras 17-21. In this sense, it is interesting that the CJEU does not only talk about independence but also impartiality.: Carrasco González (n 143) 101.

²⁴⁵ Conclusions of Advocate-General Ruiz Jarabo in Case C-17/00 *De Coster* [2001] ECR I-9445.

²⁴⁶ Carrasco González (n 143) 101.

²⁴⁷ Broberg and Fenger (n 38) 94.

²⁴⁸ David W K Anderson and Marie Demetriou, *References to the European Court* (2nd edn, Sweet & Maxwell 2002), 45.

²⁴⁹ The only remedy will be to start legal actions against the public authority before the national court or tribunal. See Broberg and Fenger (n 38) 94-95.

²⁵⁰ *ibid*, 95; Morten Broberg, *Preliminary References by Public Administrative Bodies: When Are Public Administrative Bodies Competent to Make Preliminary References to the European Court of Justice?* (2009) 15(2) *European Public Law* 207-221.

bodies, which are considered to be competent,²⁵¹ 'ombudsmen have a legitimate need for authoritative advice on the correct interpretation of EU law.²⁵² For that reason, it is interesting to analyse the case in the present subsection.

In *Umweltanwalt von Kärnten*,²⁵³ the CJEU dealt with the consideration of an Environmental Ombudsman under article 267 TFEU. The case concerned a reference for a preliminary ruling about an interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment.²⁵⁴ There was a dispute between the *Umweltanwalt von Kärnten* (Environment Ombudsman of Carinthia) and the *Karntner Landesregierung* (Government of the Province of Carinthia) related to the absence of environmental impact assessment for the construction of a cross-border power line between Italy and Austria.²⁵⁵ Directive 85/337 did not contain any provision for trans-boundary projects and the Government of the Province of Carinthia argued that no impact assessment was required since the length of the project on the Austrian territory did not reach the minimum threshold stipulated in national legislation.²⁵⁶

The CJEU ruled that the Environmental ombudsman met the criteria to be considered a court or tribunal entitled to refer questions. After analysing Austrian Federal Laws on the Constitution and on the *Umweltanwalt* 2000,²⁵⁷ the CJEU concluded that it was a legally-established, permanent and independent body with compulsory jurisdiction which applies rules of law.²⁵⁸ It also found that the proceedings before the Environmental Ombudsman had *inter partes* nature.²⁵⁹ The CJEU determined not only that the Environmental Ombudsman's decisions had the force of *res judicata* but also that they were reasoned and delivered in an open court.²⁶⁰

Unfortunately, the judgment should not be extended by analogy to all ombudsmen. The evaluation carried out by the CJEU is confined to the specific circumstances of the Environmental Ombudsman in question.

²⁵¹ See Case C-407/98 *Katarina Abrahamsson and others v Elisabet Fogelqvist* [2000] ECR I-5539.

²⁵² Broberg and Fenger (n 38) 95.

²⁵³ C-205/08, *Umweltanwalt von Kärnten v Karntner Landesregierung* [2009] ECR I-11525. For an analysis of the case, see also: Klement Jan Henrik, *On the Dispensation of Justice by Public Authorities* (2010) 2 *The European Journal of Risk Regulation* 195-199.

²⁵⁴ C-205/08, *Umweltanwalt von Kärnten v Karntner Landesregierung* [2009] ECR I-11525, para 1.

²⁵⁵ *ibid*, paras 2 and 26.

²⁵⁶ *ibid*, paras 27-31.

²⁵⁷ *ibid*, paras 11-25.

²⁵⁸ *ibid*, para 36.

²⁵⁹ *ibid*, para 38.

²⁶⁰ *ibid*, para 37.

Thus, the CJEU will need to examine future cases involving ombudsmen on a case-by-case basis.

8. *Can an Appeal Committee be Competent for a Preliminary Ruling? The Abrahamsson Case*

The *Abrahamsson* case²⁶¹ concerned a request for a preliminary ruling by the Swedish Universities Appeals Board (*Överklagandenämnden*). Similarly to an appeal committee, this body deals with appeals against decisions made by higher education authorities in Sweden. The case involved a claim alleging discrimination by the Swedish University Boards of Appeal against a decision of the University of Gothenburg's selection board for a position of professor.²⁶² The vacancy notice had laid out the intention to use the appointment to promote gender equality and announced that positive discrimination might be utilised, as stipulated in national legislation which gave priority to candidates of an under-represented gender with sufficient qualifications for public posts.²⁶³

The selection board finally chose Ms Fogelquevist, but two candidates appealed the decision before the Swedish University Boards of Appeal - Mr Anderson and Ms Abrahamsson.²⁶⁴ Whereas the first of them argued that the decision was contrary to national legislation and to case law of the CJEU,²⁶⁵ the second one based her appeal on the fact that her merits were better than those of the selected candidate.²⁶⁶ The Boards of Appeal directed several questions to the CJEU concerning the preclusion of national legislation by Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.²⁶⁷

By analysing the relevant national legislation,²⁶⁸ the CJEU considered the Swedish Universities Appeals Board a court or tribunal under article 267 TFEU and admitted the reference.²⁶⁹ The CJEU explained that despite being an administrative authority, it was a permanent body invested with

²⁶¹ C-407/98 *Katarina Abrahamsson and others v Elisabet Fogelqvist* [2000] ECR I-5539.

²⁶² *ibid.*, para 16. For analysis of the case from the point of view of discrimination, please see: Paul Hodapp, Thomas Trelogan and Steve Mazurana, 'Positive action and European Union Law in the year 2000' (2010) 8(1) *Annual Survey of International & Comparative Law* 33-51.

²⁶³ *ibid.*

²⁶⁴ *ibid.*, paras 20-21.

²⁶⁵ C-450/93 *Kalanke v Bremen* [1995] ECR I-3051.

²⁶⁶ C-407/98 *Abrahamsson Katarina Abrahamsson and others v Elisabet Fogelqvist* [2000] ECR I-5539, para 21.

²⁶⁷ *ibid.*, para 27.

²⁶⁸ *ibid.*, paras 30-34.

²⁶⁹ *ibid.*, para 38.

judicial functions, applying rules of law and following an *inter partes* procedure while deciding independently and impartially.²⁷⁰

This case proves that some administrative appeal boards in the EU may be considered a court or tribunal under article 267 TFEU, despite the fact that they are administrative bodies under national law.²⁷¹ However, the analysis of the CJEU is specific to the Swedish University Boards of Appeal. In fact, it was based on the national laws that secure the decisive independence of the Swedish Universities Appeals Board. Thus, it is not possible to extrapolate this case to other appeal committees as courts or tribunals entitled to make references to the CJEU. Such consideration should be individually assessed under the criteria laid out by *Vaassen Göbbels*.²⁷² If such a committee meets the criteria, it will be a court or tribunal for the purposes of article 267 TFEU. However, it will not qualify as such if it does not comply with the criteria. Therefore, it is not feasible to infer general conclusions from this case as to whether appeal committees are courts or tribunals under article 267 TFEU since it will depend on a case-by-case analysis made by the CJEU.

9. Can a Patent Court be Competent for the Preliminary Ruling? The Häüpl Case

Some Member States have courts dealing with patent issues and also covering other intellectual property law problems arising from copyright and trademark. That is the case of the Supreme Patent and Trade Mark Adjudication Tribunal of Austria (*Oberster Patent-und Markensenat*). The *Häüpl* case²⁷³ considered the question whether a court like that could fall under article 267 TFEU. In a case like this, the CJEU also needs to verify that there is a real independence of the body.²⁷⁴ This condition is determined on the basis of the national laws ensuring it.²⁷⁵

The *Hauptl* case dealt with a reference for a preliminary ruling from the Supreme Patent and Trade Mark Adjudication Tribunal of Austria concerning an interpretation of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trademarks.²⁷⁶ Mr Häüpl was the applicant in the original proceedings and claimed that a trademark used by Lidl Stiftung & Co. KG should be cancelled in Austria due to a lack of use in the five-year period stipulated by the national legislation (1970 Austrian Law on the protection of trademarks).²⁷⁷ The Cancellation Division of the Austrian Patent Office had ruled that the trademark was no longer protected, but Lidl appealed against that finding before the Supreme Patent and Trade Mark

²⁷⁰ *ibid*, paras 35-37.

²⁷¹ Broberg and Fenger (n 38) 91.

²⁷² C-61/65 *Vaassen-Göbbels* [1966] ECR 377.

²⁷³ C-246/05 *Armin Häüpl v Lidl Stiftung & Co. KG* [2007] ECR I-04673.

²⁷⁴ Broberg and Fenger (n 38) 91.

²⁷⁵ *ibid*.

²⁷⁶ C-246/05 *Armin Häüpl v Lidl Stiftung & Co. KG* [2007] ECR I-04673, para 1.

²⁷⁷ *ibid*, paras 2, 7 and 10-12.

Adjudication Tribunal of Austria.²⁷⁸ The Tribunal raised two questions before the CJEU asking whether the date of the completion of the registration procedure is the start of the period of protection and what may constitute proper reasons excusing the non-use under the First Council Directive 89/104/EEC.²⁷⁹

The CJEU determined whether this court was entitled to refer questions by analysing the 1970 Austrian Law on Patents.²⁸⁰ It found that the Supreme Patent and Trade Mark Adjudication Tribunal of Austria was a court or tribunal under article 267 TFEU. It argued that it satisfied the criterion related to the establishment by law since the aforementioned law set out its jurisdiction.²⁸¹ This law also provided the independence of the tribunal because it established that its members were to perform their duties autonomously and their mandates could be extended every five years and could finish earlier if justified.²⁸² The CJEU also found that the tribunal had a permanent nature due to the fact that the Austrian Patent Law provided no time limit for its jurisdiction to deal with appeals against decisions of both the Cancellation Division of the Austrian Patent Office and the Opposition Division of the Austrian Patent Office.²⁸³ It also claimed that the tribunal had compulsory jurisdiction on the grounds that the law established its competence to deal with appeals.²⁸⁴ By referring to the procedural rules contained in the Austrian Patent Law, the CJEU also considered that the tribunal applied rules of law and had an *inter partes* procedure. Once again, the analysis of the CJEU was very specific to this tribunal since it was based on the national rules governing it. Consequently, similar tribunals in other Member States should be subject to an assessment by the CJEU in order to determine whether they satisfy the conditions to fall under article 267 TFEU.

V. THE NEED FOR A CONCEPT OF A COURT OR TRIBUNAL UNDER ARTICLE 267 TFEU

This section explains why there is a need to introduce a firmer concept of a court or tribunal under article 267 TFEU. The importance of preliminary rulings for the CJEU to develop EU law has already been outlined. It should be taken into account that only courts or tribunals from Member States are empowered to lodge preliminary rulings. However, the concept of a court or tribunal is not made on the basis of national legal systems, but through the case law of the CJEU. It has also been highlighted that the reasons for such consideration are based on the persuasiveness of the idea

²⁷⁸ *ibid*, para 13.

²⁷⁹ *ibid*, para 14.

²⁸⁰ *ibid*, para 17.

²⁸¹ *ibid*, para 18.

²⁸² *ibid*.

²⁸³ *ibid*, para 19.

²⁸⁴ *ibid*.

of consistency and uniformity in the application of EU law. In fact, the EU Treaties do not define what a court or tribunal is. This definition has been created through the criteria developed by the CJEU over the years. However, these cannot be considered absolute requirements, but only mere guidelines.²⁸⁵ The case law of the CJEU suggests that some of those criteria are more important than others. Moreover, it is unclear whether those criteria are an exhaustive list or whether further additions may be made.²⁸⁶ Thus, the result up to this moment does not suggest that there will be a precise definition of who can make use of the preliminary ruling procedure and how it may be applied.²⁸⁷ As an area marked by disagreements between the Advocates General and the CJEU, it should be stressed that this problem has been raised within the CJEU.²⁸⁸ Therefore, there are several reasons to advocate for a firmer concept of a court or tribunal under article 267 TFEU.

First of all, the relevant case law is very casuistic. Several Advocates General have maintained that the case law on the subject is elastic, non-scientific and vague.²⁸⁹ It is difficult to extract general conclusions that could be valid for similar courts since the Court's reasoning is always very specific to the national body which made the reference. Thus, not even similar bodies in other Member States could get the same result by analogy because they would need their own analysis in order to be considered empowered to make a reference. On top of that, the CJEU has never expressed its position on the relative weighting of the relevant criteria to be considered a court or tribunal.²⁹⁰ As a result, it is not possible to derive an unambiguous definition of a court or tribunal under article 267 TFEU.²⁹¹

Secondly, there is legal uncertainty because the case law does not contain clear and precise components to define the concept.²⁹² The framework is anything but certain as proven by the fact that the CJEU and the

²⁸⁵ Xavier Groussot, 'Spirit, are you there? - Reinforced judicial dialogue and the preliminary ruling procedure' (2008) Eric Stein Working Paper No 4, 12.

²⁸⁶ Broberg and Fenger (n 38) 73.

²⁸⁷ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445; Broberg and Fenger (n 38) 72-74.

²⁸⁸ Opinions of Advocate General Ruiz-Jarabo Colomer in Cases C-17/00 *De Coster* [2001] ECR I-9445; C-195/06 *Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF)* [2003] ECR I-4989; and C-205/08 *Umweltanwalt von Kärnten v Kärntner Landesregierung* [2009] ECR I-11525; Groussot (n 285) 13.

²⁸⁹ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 14; Opinion of Advocate General Sharpston in Case C-363/11 *Epitropos tou Elektikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000, para 32.

²⁹⁰ Broberg and Fenger (n 38) 73.

²⁹¹ *ibid.*

²⁹² Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 58.

Advocates General often do not agree.²⁹³ At times the CJEU has admitted references from bodies whose judicial functions may raise doubts without explaining the reasons why it considered them courts or tribunals under article 267 TFEU.²⁹⁴ It is clear that this lack of legal certainty has disadvantages.²⁹⁵

On the other hand, a wider approach towards admitting references from bodies with a doubtful judicial function also has its advantages. For example, those bodies have been able to rely on the CJEU's interpretation instead of having to come up with their own interpretation of the EU law; EU law has been clarified in cases which otherwise might not have made it to the CJEU, and; this might have reduced the number of appeals at the EU level.²⁹⁶

However, it is important to remember that being considered a court or tribunal under article 267 TFEU provides an essential mechanism to guarantee the uniform application and interpretation of EU law. In fact, preliminary rulings constitute about one half of the CJEU's case load, and they have been responsible for the declaration of several fundamental principles of EU law.²⁹⁷ References for preliminary rulings are lodged in the course of legal proceedings where the judge needs an interpretation or to clarify the validity of European law in order to solve the dispute between the parties. Once a case is referred to the CJEU to resolve the questions, the process in the national court is paralysed waiting for the response. For this reason, anybody considering making a reference to the CJEU should know more or less in advance whether they can use it or not. The same goes for the parties in a legal procedure, who may consider referring questions to the CJEU as part of their procedural strategy to settle a dispute. In order not to slow down the legal proceedings, it is important that judges making use of the preliminary ruling know in advance if they are empowered to do so. Otherwise, there is a risk of improperly delaying a

²⁹³ *ibid*; see also C-54/96 *Dorsch Consult* [1987] ECR 2545; Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-01577; and C-407/98 *Abrahamsson* [2000] ECR I-5539.

²⁹⁴ C-166/91 *Gerhard Bauer v Conseil National de l'Ordre des Architectes* [1992] ECR I-2797; C-447/93 *Dreessen v. Conseil national de l'ordre des architectes* [1994] ECR I-4087; C-67/91 *Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada (AEB) and Others* [1992] ECR I-4785; C-243/95 *Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance* [1998] ECR I-3739; C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag. GmbH & Co. KG and Other* [1998] ECR I-7791; Joined cases C-260/91; and C-261/91 *Diversint SA and Iberlacta SA v Administración Principal de Aduanas de la Junquera* [1993] ECR I-1885.

²⁹⁵ See, Lionel Neville Brown and Tom Kennedy, *The Court of Justice of the European Communities* (Sweet Maxwell 1994), 209-213; Maurice-Christian Bergerès, *Contentieux communautaire* (Presses Universitaires de France 1994), 247-248; Mar Jimeno Bulnes, *La cuestión prejudicial del artículo 177 TCE* (Bosch 1996), 189.

²⁹⁶ Tony Storey and Chris Turner, *Unlocking EU Law* (4th edn, Routledge 2014), 114.

²⁹⁷ Herbert A Johnson, 'Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice' (2000) 33(4) *The John Marshall Law Review*, 1072.

legal process while waiting for a response from the CJEU whose final answer might not admit the reference on the basis of lack of competence from the body who raised the question. This obviously has a negative impact on the efficacy of legal proceedings and justice as well as it creates false expectations for the parties, who are waiting for a ruling that will resolve their dispute.

In the third place, it must be highlighted that at the beginning the idea was to encourage the use of the reference for a preliminary ruling.²⁹⁸ Thus, references were generally admitted for that purpose. However, once EU law becomes an integrated reality in the legal systems of the Member States, perhaps there is no longer a need for a wide concept. The wider the concept is, the more references will have to be admitted. That will in turn increase the CJEU's workload. This outcome not only has negative consequences in terms of judicial economy, but also concerns the uniform application of EU law and the judicial cooperation foreseen by article 267 TFEU, as well as it somehow endangers the European space of freedom, security and justice. To increase the CJEU's workload may continue to delay in time its responses, thereby dissuading references for a preliminary ruling from national courts or tribunals that need a response in a reasonable time or that do not want to be exposed to a long and tiresome waiting time. Therefore, the risk stands in the possibility of each Member States' court or tribunal deciding to create its own interpretation leading to the dispersion in the application of EU law.²⁹⁹

In the fourth place, the General Court has competence, but has never dealt with references for preliminary rulings. If it is ever to exercise it, it is clear that there is a need for solid guidance from the CJEU about who exactly is empowered to make references. Otherwise, there is a risk that the General Court creates confusion by admitting references from bodies which should not be entitled to use the procedure enshrined in article 267 TFEU.

In the fifth place, the aim of the EU is not only to integrate the existing Member States, but also to enlarge by admitting new ones. These potential countries will always have their own judicial structure comprised of bodies of a different nature. They need to know if they can make use of the reference for a preliminary ruling.

When talking about the need for a concept of a court or tribunal, it is clear that this concept must obviously be developed within the CJEU in order to ensure the uniformity of EU law. Besides, the concept should allow judicial bodies to be considered a court or tribunal under EU law.

²⁹⁸ Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 75.

²⁹⁹ *ibid*, para 97.

A good and logical solution would be to as a general rule include under this concept all bodies belonging to the national judicial structure.³⁰⁰ In fact, they always qualify as a court or tribunal under article 267 TFEU, but their references should only be admitted when exercising a judicial function.³⁰¹ As a principle, references should not be admitted from bodies outside this structure, unless they are made by bodies outside of that structure whose decisions are final and undisputable.³⁰² It does not seem convenient to admit references from bodies whose decisions might be later ignored in their legal system, but it is indeed wise to admit references from bodies whose decisions are final. The reason is always to ensure the uniform interpretation and application of EU law. In any case, the criteria laid out in *Vaassen Göbbels* may be perfectly applied to assess whether a court or tribunal is empowered or not to make the reference.

This approach should reduce the workload of the CJEU. This is because it would receive fewer references, in which case it could focus on developing a much firmer doctrine.³⁰³ If the body making the reference is part of the national judicial structure, then the CJEU should only verify whether or not it is exercising judicial functions.³⁰⁴ If it is not part of such a structure, then the analysis on the basis of the *Vassen Göbbels* criteria should be applied. However, those bodies that are outside the judicial structure would already know that they have to undergo such an analysis, thereby considering it beforehand if they meet the criteria or not.

As a consequence of the CJEU having fewer references, there would also be lower risk of delaying the procedures and discouraging bodies to refer because of a fear of getting a late reply. The more references are admitted, the more work for the CJEU and the longer the processes will be. Thus, national judges might be pessimistic about referring to the CJEU if they believe that it will only extend the procedure in time. It is clear that nobody wants to be waiting in a long process, therefore alternative solutions are always being sought. However, in this particular case, there is a risk that the alternative solution is to not go to the CJEU in order to avoid a long and uncertain process where there is no legal certainty that the reference will be admitted.

One criticism to this approach is that it is very restrictive and would impede the possibility of making a reference for a preliminary ruling for administrative bodies.³⁰⁵ Moreover, the effects of a wider approach towards the concept of court or tribunal in the European legal order and in the national legal system of each Member State should be considered. To admit references from bodies that do not belong to the judicial branch

³⁰⁰ *ibid*, paras 83-86.

³⁰¹ *ibid*, para 85.

³⁰² *ibid*, para 87.

³⁰³ *ibid*, para 97.

³⁰⁴ *ibid*, para 96.

³⁰⁵ Groussot (n 285) 13.

means conferring powers not recognised at the national level. This could even alter the constitutional order in the Member State concerned. National judges are competent to apply EU law; they must ensure its efficacy and stop applying those provisions from national legislation that are contrary to EU law.³⁰⁶ Admitting references from bodies that do not belong to the judicial branch of a Member State makes them somehow European judges. The question is what happens when a judge carries out such a task, but does not have full competences within his national legal system? It is difficult to determine how somebody outside the Member State's judicial branch can have the aforementioned competences. In fact, it is more likely that he cannot undertake them in a complete and effective way, thereby compromising the efficacy of EU law. A clear example is the revision that a court or tribunal could make about the decision taken by an administrative body after receiving the response from a reference to a preliminary ruling lodged before the CJEU. Decisions by administrative bodies can afterwards be reviewed by courts or tribunals. Thus, a court revising the decision would be constrained by the ruling of the CJEU, but that does not prevent it from considering the reference unnecessary or considering that it should have been written in a different way. This creates a possibility to revise a reference which has already been dealt with. All of this is said without forgetting another important point: the potential lack of independence and immobility of the members of an administrative body depending on how they are appointed or dismissed.³⁰⁷ Another problem with considering administrative bodies courts or tribunals under article 267 TFEU is that they are governed by the rule of administrative silence, which may have consequences if there is no reply within a concrete period of time. As previously mentioned, a wider concept of a court or tribunal can increase the number of references and create more delays in the responses from the CJEU. It may lead to problems if an administrative body does not provide a reply within a specific period of time because it is waiting for the CJEU to answer its questions.

For all the reasons explained above, it is clear that there is a need for a firmer concept of a court or tribunal under article 267 TFEU. Taking into consideration the idiosyncrasies of the administrative and judicial systems of each Member State, in order to provide an effective and efficient response the solution would be to provide assistance to facilitate, reinforce and simplify the important task of the CJEU when using the reference for a preliminary ruling to continue developing EU law and ensuring its uniform application in all the Member States.

³⁰⁶ C-70/77 *Simmenthal v Amministrazione delle Finanze dello Stato* [1978] ECR I453.

³⁰⁷ See the example of Joined Cases C-110/98 to C-147/98 *Gabalfrija* in the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] ECR I-9445, para 28.

VI. CONCLUSIONS

The reference for a preliminary ruling is an important procedure which can be exercised by national judges. The aim of this procedure is to foster cooperation between national and European judges when interpreting and checking the validity of EU law. Depending on what the reference is seeking (either an interpretation or an assessment of the validity of EU law), the effects are significant but also different because an interpretation is binding for all courts in the Member States, whereas a declaration of invalidity obliges the relevant European institution to remedy the situation, which extends to all acts adopted based on the invalid law.

The judgments of the CJEU have been very important for developing EU law³⁰⁸ and the reference for a preliminary ruling procedure has become an essential tool to clarify doubts and concerns as well as to serve as the ultimate examiner of the validity of the acts.³⁰⁹ That is why it is essential to clarify who exactly is empowered to make use of it. Only national judges are authorised to do so, but each Member State has its own legal system and not all the judicial courts are considered as such in other countries.

The CJEU has preferred to establish the criteria for a European concept of a court or tribunal itself, rather than leaving the issue to the Member States. This makes sense since uniform interpretation and application of EU law is at stake. Despite the fact that the CJEU ruled on the criteria to be considered a court or tribunal along time ago, there have been some additions, clarifications and departures from those original requirements.

It is interesting to note that the criteria were established in 1965 in the *Vaassen Göbbels* case. However, the important criterion of independence was added in the *Corbiau* case in 1987, which seems a long time for not having considered it. Judges are said to be independent, impartial and immovable. Thus, it is surprising that it took so much time to take that particular requirement into account.³¹⁰ However, the CJEU seems to have relaxed this criterion, as seen in later cases.³¹¹

Some of the criteria established in *Vaassen Göbbels* remain unchanged (establishment by law, continuity and decision in law) whereas some others have received a much more confused interpretation. The problem is that those other criteria are independence, adversarial process or juridical

³⁰⁸ Van Raepenbusch (n 18) 313.

³⁰⁹ Case C-66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR II 91, para 13.

³¹⁰ See Opinion of Advocate General Jarabo Colomer [2001] ECR I-9445, para 17.

³¹¹ See C-54/96 *Dorsch Consult v Bundesbaugesellschaft Berlin unknown* [1987] ECR 2545; and, Case *Köllensperger and Atzwanger* C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551.

nature of the decision, which all seem to be more essential for a correct judicial function than the unaltered criteria.³¹²

In this sense, more clarity is needed in the concept of a court or tribunal as established for the purposes of the reference for a preliminary ruling since lack of a firm concept and the hesitation in the judgments are capable of creating legal uncertainty. The *Gabalfrisa* case has been especially eloquent, whereas other ones such as *Nordsee* and *Syfait* are characterised by their soundness. On top of that, the issue is ongoing since there are always cases where the CJEU rejects the admissibility of the reference from courts which are not authorised, but where they would not have made use of it if the concept were more precise.³¹³ The CJEU should not waste time considering the admission or non-admission of references based on the competence of the national court. If it does so, it introduces the risks of slowing down justice and creating legal uncertainty.³¹⁴ Furthermore, the EU is composed of 28 Member States whose judicial systems deserve to know exactly who may or may not pose a question to the CJEU. Besides, the trend is towards the enlargement of the EU, with more countries whose systems are even more diverse. For that purpose, the concept of a court or tribunal should be firmer for national courts to have a sound reference. That would be an advantage for the CJEU since references would then only come from bodies which already knew that they are competent to make a reference. Thus, the CJEU would just need to verify that the circumstances of the case allow such bodies to refer the question.

The CJEU has a key task of interpreting and guiding the development of EU law. In that responsibility, the reference for a preliminary ruling is very useful. It should not be forgotten that EU law has been formulated through the judgements of the CJEU. The wider the concept of a court or tribunal, the higher the number of bodies that will be empowered to make use of the reference for a preliminary ruling and thus, the more references will be made. This will mean more work for the CJEU. As the reference

³¹² See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster Coster* [2001] ECR I-9445, para 18.

³¹³ See cases C-363/11 *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou* [2012] ECR I-00000; and C-394/11 *Valeri Hariev Belov v CHEZ Elektro Bulgaria AD and Others European* [2013] ECR I-00000, C 222/13 *TDC A/S v Erhvervsstyrelsen* [2014] ,not yet published, and; Opinion of Advocate General Niilo Jääskinen in Case C-203/14 *Consorti Sanitari del Maresme* [2015], not yet published.

³¹⁴ See Opinion of Advocate General Nils Wahl in Case C-497/12 *Davide Gullotta and Farmacia di Gullotta Davide & C. Sas v Ministero della Salute and Azienda Sanitaria Provinciale di Catania* [2015], not yet published, para 90, where he states:

Every case dismissed on procedural grounds results in a significant waste of resources for both the national court making the reference and the EU judiciary (in particular, because of the required translation of the order for reference into all official languages of the European Union). The administration of justice is also delayed vis-à-vis the parties in the main proceedings, without producing any benefits.

for a preliminary ruling is a dialogue between judges with the aim of fostering the uniform interpretation and application of EU law, there is a risk of undermining such uniformity in the case that non-judicial bodies in a strict sense are allowed to make use of the procedure³¹⁵. Therefore, it seems logical that the CJEU further develops a much clearer European concept of a court or tribunal.

Moreover and as aforementioned, the CJEU should not waste time assessing whether a certain body meets the criteria to be considered as meeting the concept of a court or tribunal. It should already know in advance who is authorised, or at least have a clear idea beforehand. Only those cases where there are doubts on the exercise of the jurisdictional function by a judicial body should be evaluated. This problem would be solved if it were up to the Member States to decide what national courts, tribunals and bodies are considered jurisdiction; however, that solution was considered and rejected in favour of the development of a European concept, which makes more sense for the purposes of uniform application of EU law. This is important since it should be noted that legal disputes involve parties who expect to settle their disputes by litigating. Those parties aim for quick decisions because even if courts rule in their favour, any delay threatens to harm their interests by fulfilling the legal maxim “justice delayed is justice denied”. From the moment that a national judge refers to the CJEU, the litigation procedure at national level stops until it decides. Thus, there is an issue at stake and the CJEU should be expected to provide an answer within due time.³¹⁶ Consequently, the consideration of the admission of the reference threatens to delay a process that could be expedited if the concept of a court or tribunal was much clearer than it is currently.

³¹⁵ See Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster Coster* [2001] ECR I-9445, paras 76-77 and 79.

³¹⁶ The Court has ruled that failure to adjudicate within a reasonable time constitutes a procedural irregularity. See Case C-185/95 *P. Baustahlgewebe v Commission* [1998] ECR I-08417 para 48.