JUNE 4
2022

Weekend EU LAW LIVE Edition

stay alert | keep smart

Nº102

MAGNUS SCHMAUCH

THE PRESERVATION OF THE VERY NATURE OF EU LAW?

SOME THOUGHTS ON THE JUDGMENT OF THE COURT OF JUSTICE IN *CONSORZIO ITALIAN MANAGEMENT*

ANDREA CIRCOLO

‘THIS IS OUT OF MY JURISDICTION’.

THE COURT OF JUSTICE CONFIRMS THAT THE EXERCISE OF ADMINISTRATIVE FUNCTIONS DOES NOT GET ALONG WITH PRELIMINARY REFERENCES: THE *CITYRAIL CASE*

www.eulawlive.com

EU LAW LIVE 2022 © ALL RIGHTS RESERVED · ISSN: 2695-9593

The Preservation of the Very Nature of EU law? – Some Thoughts on the Judgment of the Court of Justice in *Consorzio Italian Management*

Magnus Schmauch[1]

Introduction

It is necessary to distinguish between interesting legal issues and relevant legal issues. Late last year procedural buffs were awarded with the judgment of the Court of Justice of 6 October 2021 in *Consorzio Italian Management* (2). The case is of particular interest to those of us who follow the (slowly) evolving law on preliminary ruling requests made by national courts to the Court of Justice. The Court's Grand Chamber decided not to follow Advocate General (AG) Bobek's Opinion in the case to revise the long-standing case law stemming from the judgment of the Court in *Cilfit and Others* (3) on the obligations for the highest courts to submit a reference on the interpretation of EU law to the Court of Justice, and (4) the judgment adds to the long list of Italian cases before the Court that contribute to insights on the application of EU law in the Member States.

Under Article 267 TFEU, any national court in an EU Member State can request a preliminary ruling from the Court of Justice when the case concerns the application of EU law. In this case, the Court of Justice does not function as a court of appeal which has to rule on the outcome of the case. The role of the Court in these cases is limited to the interpretation of EU law, and the final adjudication of the matter remains a matter for the national court. This means that the relationship between the Court of Justice and the national courts that refer their questions to it is more a relationship of horizontal dialogue and less a hierarchical relationship between lower courts and their courts of appeal or *cassation*.

1. Senior legal advisor at Finansinspektionen.
2. C-561/19, EU:C:2021:799.
3. Judgment of the Court of Justice of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335).
4. Opinion of 15 April 2021, C-561/19, EU:C:2021:291.

The preliminary ruling procedure has long been considered a fundamental cornerstone in the judicial architecture of the EU and also one of the keys to the successful integration of EU law in the judicial systems of the Member States.

In fact, under Article 267 TFEU, national courts have direct access to the Court of Justice as an interpreter of last instance of EU law. During the most formative years in the development of judge-made EU law, in the decades leading up to the Treaty of Lisbon in 2008, the preliminary ruling procedure enabled legal issues to be handled directly between courts in the EU. Looking back at the nature of the cases brought in the 1990s – as European Community law stood then – and the nature of the cases brought today – as EU law stands today – it is clearly shown how the nature of EU law has evolved as the EU itself has evolved. It is remarkable that Walter Hallstein already in the 50s defined the Community as a *Rechtsgemeinschaft*, a community based on the law (5). While this originally was meant to define a community built on common rules – and the enforcement of them – today it carries a deeper and more symbolic insight of the EU as a legal system based on the rule of law and the independence of the judiciary in the EU.

The preliminary ruling procedure has long been considered a fundamental cornerstone in the judicial architecture of the EU and also one of the keys to the successful integration of EU law in the judicial systems of the Member States

As a matter of fact, legal developments and judicial developments in EU law have not always moved at the same pace, but always in the same direction. The nature of EU law has evolved and matured immensely after the Lisbon Treaty, in particular after the financial crises of the first decade of the current millennium and the advent of the digital age and the age of 'surveillance capitalism' (6).

These developments have had a tremendous impact on the nature of the cases before the Court of Justice. Any reader of the statistics in the annual reports cannot fail to notice the decreasing number of cases relating to 'traditional' EU law such as the fundamentals of free movement or competition law, and an increasing proportion of cases relating to Security, Freedom and Justice and other more recently emerging fields of law. One such example is financial markets law. When I supervise students writing papers in financial markets law at Stockholm University today, their papers look exactly like those that concerned 'pure' EC law in the 1990s: What is the meaning of a Directive? Does a Regulation always trump national law? What happens when the national implementation of a Directive doesn't match the Directive itself? Not to mention supervision, sanctions and administrative measures.

5. Walter Hallstein, 'Die EWG – eine Rechtsgemeinschaft, Rede zur Ehrenpromotion vor der Universität von Padua am 12. März 1962', in: Thomas Oppermann, Walter Hallstein: *Europäische Reden*, 1979, pp. 341, 343.
6. Shoshana Zuboff, The *Age of Surveillance Capitalism*, Profile Books Ltd, 2019.

I have followed the development of EU law and the relationship between national courts and the Court of Justice for 25 years. One of the first papers that I published in 2005 concerned the infringement procedure launched by the Commission against the Kingdom of Sweden for a failure of the highest courts to comply with Article 267 TFEU (more on that later). The case, which never made it to the Court of Justice, was quietly dropped after Sweden changed its legislation, incidentally in line with the conclusions in the judgment *Consorzio Italian Management*. Indeed, it has been very interesting to note that while EU law has continued to evolve at an increasing pace, the procedural jurisprudence around Article 267 TFEU has evolved at a slower pace, almost hesitantly.

In this context, the judgment of the Court of Justice, *Consorzio Italian Management*, should be read in conjunction with the Opinion in *Consorzio Italian Management*, which offers quite a few interesting insights into the case law of the Court concerning the application of Article 267 TFEU.

The facts of the case

The case before the national courts concerned a contract for the supply of cleaning and maintenance services in the Cagliari Regional Operations Division of the Italian railway company RFI, situated in Gagliari, the regional capital on the Italian island of Sardinia. The contractors, Consorzio Italian Management and Catania Multiservizi, requested that RFI review the agreed price for the contract, based on a specific clause in the contract, but RFI refused. The contractors appealed this decision before the administrative courts and raised various issues, including EU law, inter alia the validity of Directive 2004/17 (7). The applicants also requested that the national court refer the case to the Court of Justice. After the case was referred to the Court of Justice by the Italian Council of State (Consiglio di Stato), the result was a first judgment on the case, issued on 19 April 2018 (8). In the subsequent hearing before the national court in Italy, further points of EU law were raised by the applicants.

7. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors
(OJ 2004 L 134, p. 1).
8. Judgment of the Court of Justice of 19 April 2018, *Consorzio Italian Management and Catania Multiservizi* (C-152/17, EU:C:2018:264).

As a consequence of the new pleas in law, the Consiglio di Stato submitted three further questions to the Court of Justice in 2018, which arrived at the Court some time thereafter, in 2019. Two questions were deemed inadmissible in the judgment (paras 67-71). They concerned whether a national court whose decisions are not amenable to appeal is required under Article 267 TFEU to make a preliminary ruling request, even where the question is submitted to it by one of the parties to the proceedings after that party has lodged its initial pleading, or even after the case has been set down for judgment for the first time, or indeed even after a request has already been made to the Court of Justice of the European Union for a preliminary ruling.

Opinion of AG Bobek

In his Opinion in *Consorzio Italian Management*, AG Bobek presented a solution that implied a change in the case law on Article 267 TFEU. According to AG Bobek, the case presented multiple layers. The outer layer is that the national court may always decide whether or not to refer a case to the Court of Justice. The deeper layer, to which the AG turned his attention, is whether all questions should really be referred. In his Opinion, AG Bobek revisits the case law from the judgment of the Court of Justice in *CILFIT*, the duty to refer and the exceptions to that duty that stem from the judgment, and the subsequent case law of the Court of Justice. The AG underlines that in his view, the case law of the Court 'demonstrates very well the difficulty that ensues in the application practice as a result of the conceptual lack of clarity' in the case law itself (point 81).

There are, according to AG Bobek, four problems with *CILFIT*. First and foremost, there is what he calls the '*Hoffmann-Laroche-CILFIT mismatch*', and an insoluble tension between these two cases and the '*acte claire*' exception in CILFIT. Put simply, the logic of the *CILFIT* exceptions does not correspond with the nature of the duty to refer a question for a preliminary ruling according to the principles established in the judgment of the Court in *Hoffmann-Laroche* (9). Since that case the Court of Justice has insisted that the purpose of the duty to refer is to prevent a body of case law being established in a Member State which deviates from that of other Member States and also from that of the Court, something that AG Bobek finds illogical.

The second issue with *CILFIT* is that it is unfeasible to apply the *CILFIT* criteria in the real world, since the identification of the *acte clair* exception is inescapably plagued by the conceptual problem described above. In AG Bobek's harsh words (point 104, which in my humble opinion is not without merit): 'On the one hand, there is a healthy portion of non-ascertainable and thus non-reviewable subjectivism: the national courts must be "convinced" that the matter is not only "equally obvious to the courts of other Member States and to the Court of Justice" but also "necessary for deciding a case", and must have subjective "reasonable doubt". On the other hand, those elements that are stated in objective terms are simply unattainable, at least for mortal national judges not possessing the qualities, time, and resources of Dworkin's Judge Hercules (comparing (all) language versions; interpreting each provision of EU law in the light of EU law as a whole, while having a perfect knowledge of its state

9. Judgment of the Court of Justice of 24 May 1977, *Hoffmann-Laroche* (107/76, EU:C:1977:89).

of evolution at the date on which that provision is interpreted)'. Also, the European Court of Human Rights (ECtHR) after the ruling in *Dhahbi* (10) reviewed whether national courts of last instance have duly explained why they consider that the *CILFIT* criteria have been fulfilled - without the ECtHR examining the merits as to whether that is indeed the case before deciding on its application in the light of the European Convention on Human Rights (points 108-109). In summary, according to AG Bobek, there is a lack of reasonable guidance as to the logic or application of the *CILFIT* criteria.

The third issue, according to AG Bobek, is that the *CILFIT* criteria are oddly disconnected from EU law's own means of enforcing the obligation to make a reference under the third paragraph of Article 267 TFEU, in particular since the judgment in *Commission v France* (11), which established that infringement procedures may be brought by the Commission against Member States when the highest courts violate the duty to refer under Article 267 TFEU. This shows a lack of coherence in penalising the duty to refer under the third paragraph of Article 267 TFEU as a matter of EU law. The Court's own case law on the scope of that duty, certainly the more recent case law, does not appear to be in line with the recently (re)discovered enforcement of that duty under Article 258 TFEU, and wholly disconnected from state liability. Finally, the fourth, and final, point is that the fact that the national courts of last instance are able to handle the preliminary rulings procedure is, at present, in his view, evidenced in a rather unorthodox way: namely that they are not following *CILFIT*. Otherwise the 'annual docket of the Court of Justice would suddenly have several more zeros attached at the end and the system would collapse within a short period' (point 128).

10. Judgment ECtHR of 8 April 2014, *Dhahbi v. Italy* (CE:ECHR:2014:0408JUD001712009).
11. Judgment of 4 October 2018, *Commission v France (Advance payment)* (C-416/17, EU:C:2018:811).

As a consequence, AG Bobek proposed a revision of the *CILFIT* case law. In short, AG Bobek proposed that the criteria should be 'loosened' (point 179). The right way to go about it would be to confirm a duty to refer a case to the Court of Justice, provided that, first, that case raises a general issue of interpretation of EU law, which may, second, be reasonably interpreted in more than one possible way and, third, the way in which the EU law at issue is to be interpreted cannot be inferred from the existing case law of the Court of Justice. Should such a national court or tribunal, before which an issue of interpretation of EU law has been raised, decide not to submit a request for a preliminary ruling pursuant to that provision, it is obliged to state adequate reasons to explain which of the three conditions is not met and why.

The judgment of the Court of Justice

The Grand Chamber chose, instead, to present a more elaborate defence of CILFIT and the duty to refer for the highest courts. Moreover, the judgment in *Consorzio Italian Management* clearly involves the parties to the proceedings to a greater extent than before. The reasoning of the Court of Justice opens with a short summary of the purpose of Article 267 TFEU, inter alia that it intends to avoid divergences in the interpretation of EU law and that is indispensable to the preservation of the very nature of the law established by the Treaties (paras 27 to 33). Then it follows five main points, which are interlinked through cross-references in the judgment. The five main points are as follows.

First, it is for the national court to decide whether the answer to a question of EU law, regardless of what it may be, can affect the outcome of the case. Thus, the responsibility to determine, in the light of the particular circumstances of the case, both the need for and the relevance of the questions which it might submit to the Court of Justice (paras 34 and 35).

Second, if the Court of Justice has already provided an interpretation that is materially identical to the issue raised before the national court, or the case law from the Court already resolves the point of law in question even if the issue in dispute is not strictly identical, there is no need to refer the issue to the Court (paras 36 to 38).

Third, a national court of last instance may refrain from referring a case and take upon itself the responsibility for resolving it where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. In order to do this, the national court or tribunal of last instance must be convinced that the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court. Also, the basis of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union, must be taken into account. As concerns different language versions, while a national court or tribunal of last instance cannot be required to examine, in that regard, each of the language versions of the provision in question, the fact remains that it must bear in mind those divergences between the various language versions of that provision of which it is aware, in particular when those divergences are set out by the parties and are verified. Legal concepts that do not necessarily have the same meaning as the corresponding concepts that may exist in the law of the Member States must be considered.

Finally, every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole (paras 39 to 47).

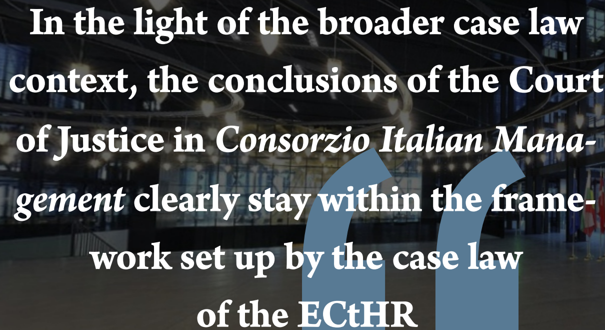
The mere fact that a provision of EU law may be interpreted in another way or several other ways, in so far as none of them seem sufficiently plausible to the national court or tribunal concerned, in particular with regard to the context and the purpose of that provision as well as the system of rules of which it forms part, is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision. Nonetheless, where the national court or tribunal of last instance is made aware of the existence of diverging lines of case law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law (paras 48 and 49).

Fourth, national courts or tribunals against whose decisions there is no judicial remedy under national law must take it upon themselves, independently and with all the requisite attention, the responsibility for determining whether the case before them involves one of the situations in which they may refrain from referring to the Court a question concerning the interpretation of EU law that has been raised before them. The Court concludes with reference to Article 47 of the Charter that the statement of reasons for a decision to deny a request to refer a case must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case law or, in the absence of such case law, that the interpretation of EU law was so obvious to the national court or tribunal of last instance as to leave no scope for any reasonable doubt (paras 50 and 51).

Fifth, the Court reiterates the standing case law that the system of direct cooperation between the Court of Justice and the national courts, established by Article 267 TFEU, is completely independent of any initiative by the parties. It does not constitute a means of redress. The determination and formulation of the questions to be put to the Court are for the national court or tribunal alone. It is for the national court or tribunal alone to decide at what stage in the proceedings it is appropriate to refer a question to the Court of Justice. Finally, a national court or tribunal of last instance may refrain from referring a question to the Court of Justice for a preliminary ruling on grounds of inadmissibility specific to the procedure before that court or tribunal, subject to compliance with the principles of equivalence and effectiveness (paras 52 to 65).

Comment

There are two key issues to take away from the judgment. The first is the choice of case law from the ECtHR, the second is the fact that the approach in the judgment is by no means new, since there is precedent in the infringement case mentioned in the introduction (more on that one below).



In the light of the broader case law context, the conclusions of the Court of Justice in *Consorzio Italian Management* clearly stay within the framework set up by the case law of the ECtHR

In the light of the broader case law context, the conclusions of the Court of Justice in *Consorzio Italian Management* clearly stay within the framework set up by the case law of the ECtHR. The *Dhahbi* case was the first case from the ECtHR where an infringement of Article 6 ECHR was established due to a failure by a national court to refer a case to the Court of Justice. The case was quite clear. The case had a clear link to EU law, and the individual in the proceedings, a Tunisian national, had repeatedly requested that the case should be referred to the Court of Justice. However, the national courts refused to deal with these requests throughout the proceedings and also failed to reason their refusal in the judgments. Therefore, the reasons given in the judgment at issue shed no light on the application of the *CILFIT* criteria, whether this question was considered as irrelevant, or as relating to a clear provision, or to one which had already been interpreted by the Court of Justice, or had simply been ignored. Moreover, the reasoning of the Court of Cassation did not refer to the case law of the Court of Justice. This finding was sufficient to conclude that there had been a violation of Article 6(1) ECHR. Before *Dhahbi*, there had been a long line of cases where no infringement had been established, most notably in *Ullens de Schooten* and *Rezabek* in 2011 (12). In short, for a violation of Article 6 ECHR to be found, first a party needs to request a preliminary ruling before the national court and then, second, the national court must have failed to state its reasons under the *CILFIT* criteria as for why a preliminary ruling request was not made.

At this point, it should be noted that the approach chosen by AG Bobek and the Court is by no means new. The Commission launched its first infringement proceedings when the highest courts in a Member State failed to make preliminary ruling requests (infringement by Sweden of Article 267 TFEU) in March 2004 (13). The case was closed in July 2006 after Sweden introduced a law that required the highest courts to justify any order denying a

12. Judgment of the ECtHR of 20 September 2011, *Ullens de Schooten and Rezabek v Belgien* (CE:ECHR:2011:0920JUD000398907).
13. Magnus Schmauch, 'Lack of preliminary rulings as an infringement of Article 234 EC?', *European Law Reporter* 11/2005.

request for a preliminary ruling (14). It can be added that in the national debate that ensued before the infringement case against Sweden was closed, voices in the national debate argued that the problem was that national courts asked for preliminary rulings *too often* (15). This infringement case and legislation clearly predates the subsequent debate along similar lines that is emphasized in AG Bobek's Opinion, and follows similar lines of argument, such as a willingness to prevent the Court of Justice from being overburdened by a *tsunami* of references from national courts. This last point is one that the Grand Chamber understandably chose not to adhere to. In the light of these previous developments, the findings of the Court of Justice in *Consorzio Italian Management* could ironically have been defined as an acte clair issue and thus unnecessary to answer.

With the addition of a clear duty to state reasons, there is now reasonable guidance as to the practical application of the CILFIT criteria, which it will be up to the courts to apply in a reasoned manner in order to show if they have been fulfilled

Finally, there is the issue of supervision, sanctions and infringement cases ('administrative measures'). The focus on the right of the parties to the national proceedings to know why the national court decided not to refer the case to the Court of Justice also has interesting side-effects. As guardians of the Treaties, the Commission can bring infringement proceedings against any Member State where the highest courts do not comply with their obligation to refer under Article 267 TFEU. An infringement action for a failure to refer was brought – successfully – before the Court of Justice in the case *Commission v France*, where the French Council of State (Conseil d'État) had failed to refer a case to the Court of Justice (16). Any successful supervision requires a certain degree of predictability in the law and how it is applied, as AG Bobek notes in the Opinion in *Consorzio Italian Management*. With the addition of a clear duty to state reasons, there is now reasonable guidance as to the practical application of the *CILFIT* criteria, which it will be up to the courts to apply in a reasoned manner in order to show if they have been fulfilled (17).

The lesson from the Swedish case is that none of these things really matter. After 2006 the number of preliminary rulings from Sweden did not increase and the orders denying a request for a preliminary ruling cannot really be considered reasoned orders either, since they usually only state briefly that (all) the *CILFIT* exceptions apply in the individual case. As a result, the present judgment is interesting, but not necessarily relevant. The relevant issues remain.

14. Magnus Schmauch, 'SFS 2006:502: Sweden introduces national measures to protect the expectations of individuals regarding the application of Article 234 EC', *European Law Reporter* 10/2006.
15. '[I]t is difficult to say that it would be desirable to make the Court's burden of applications for preliminary rulings more heavy. The contrary is rather the case. I would believe that it is a general experience that the courts in all the Member States too often ask for preliminary rulings from the Court of Justice'. Olle Abrahamsson, 'The relation between national courts and the European courts', *Europarättslig tidskrift*, 2/2006.
16. Judgment of the Court of Justice of 4 October 2018, *Commission v France*, (C-416/17, EU:C:2018:811).
17. Cf. Judgments of the Court of Justice of 28 July 2016, *Association France NatureEnvironnement* (C-379/15, EU:C:2016:603) and of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565).

‘This is Out of my Jurisdiction’. The Court of Justice Confirms that the Exercise of Administrative Functions does not Get Along with Preliminary References: the CityRail Case (C-453/20)

Andrea Circolo[1]

Introduction

It is well known that, even though there is no general definition of the notion of ‘court or tribunal’ within the meaning of Article 267 TFEU, the Court of Justice has developed a number of criteria which must be satisfied in order for a body to be entitled to make a reference for a preliminary ruling, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law, and whether it is independent (2).

In the application of that distinguishing criteria, the intent has always been to give the possibility to a body to which a national system has attributed the resolution of a dispute to use the preliminary reference procedure, to support the uniform application of EU law. The great generosity of the jurisprudence of the Court of Justice, however, has sometimes appeared excessive and has fuelled disconcertment, having made the boundaries of the concept of jurisdiction blurred and not unified (3). An example is the *Dorsch Consult* case (4), where the Court re-

1. Assistant Professor of EU Law at the University of Naples ‘Federico II’. The author would like to thank Professors Patrizia De Pasquale and Fabio Ferraro for their valuable suggestions.
2. Judgment of the Court of 30 June 1966, *Vaassen-Göbbels*, 61/65, EU:C:1966:39, p. 273; more recently, see judgment of the Court of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, para 66). In the legal literature, see José Carlos Moitinho de Almeida, *La notion de juridiction d’un État membre (article 177 du traité CE)*, in Gil Carlos Rodríguez Iglesias, Ole Due, Romain Schintgen, Charles Elsen (sous la direction de), *Mélanges enhommage à Fernand Schockweiler*, Baden-Baden, 1999, pp. 463-478; Daniel Sarmiento, *El derecho de la Unión europea*, II ed., Madrid, 2018, pp. 418-421; Morten Broberg, Niels Fenger, *Preliminary References to the European Court of Justice*, III ed., Oxford, 2021, pp. 43-88.
3. Giuseppe Tesauro, *Manuale di dirittodell’Unione europea*, Patrizia De Pasquale & Fabio Ferraro (a cura di), III ed., Naples, 2021, p. 450; Takis Tridimas, *Knocking on Heaven’s Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure*, in 40 *Common Market Law Review* 1, 2003, p. 27.
4. Judgment of the Court of 17 September 1997, C-54/96, EU:C:1997:413.

cognised the German Federal Public Procurement Awards Supervisory Board as a 'court or tribunal' within the meaning of Article 267 TFEU, despite the fact Advocate General Tesauro had pointed out that it did not meet any of the conditions established in the Court's case law (5).

The judgment discussed in this Long Read (of [3 May 2022, case C-453/20, *CityRail a.s.*]) definitely falls outside the Court's generous approach. In this case, the Court has continued a recent 'restrictive' trend that has seen the number of inadmissible preliminary ruling requests growing at the same rate as the Court's workload (6). Indeed, even though the above-mentioned requirements had actually been met in this preliminary ruling request, the Court highlighted the absence of the minimal functional requirements which characterise judicial proceedings, and therefore concluded that the Czech Transport infrastructure access authority (*Úřad pro přístup k dopravní infrastructure, 'the Czech Authority'*) was not a 'court or tribunal' for the purposes of Article 267 TFEU, the preliminary ruling request therefore being inadmissible.

The fulfilment of the traditional criteria is not sufficient for a body which wishes to request a preliminary ruling from the Court of Justice insofar as its activity is 'essentially administrative in nature'

The judgment

Turning to the analysis of the present case, the Czech Authority had requested a preliminary ruling from the Court of Justice to address its uncertainties about the interpretation of Single European Railway Area Directive 2012/34/EU (7). It justified its right to do so based on the fact that, in a previous case, the equivalent regulatory body in Austria, which had the same powers as it, had been considered by the Court to be 'a court or tribunal' within the meaning of Article 267 TFEU (8).

After recalling its settled case law on the notion of a 'court or tribunal' pursuant to Article 267 TFEU (9), the Court also made it clear right away that the fulfilment of the traditional criteria is not sufficient for a body which wishes to request a preliminary ruling from the Court of Justice insofar as its activity is 'essentially administrative in nature'. (10) In order to verify this last circumstance – which the Court 'did not examine' in the *Westbahn case*

5. Opinion delivered on 15 May 1997, EU:C:1997:245.
6. 2 in 2000; 21 in 2010; 39 in 2021. Evidence of the Court's increased workload is provided by the data contained in the Synopsis of the judicial activity of the Court of Justice and the General Court of the European Union – Annual report 2020. Cf. Nils Wahl, Luca Prete, 'The gatekeepers of Article 267 TFEU: on jurisdiction and admissibility of references for preliminary rulings', 55 *Common Market Law Review* 2, 2018, p. 513: 'It is submitted that a new trend seems to emerge (or, *rectius*, to consolidate): in a growing number of cases, the Court has been more rigorous in assessing its jurisdiction under Article 267 TFEU and in checking the admissibility of references from national courts'.
7. Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (OJ 2012, 343, p. 1). For a summary of the judgment, see here; on the merits, see Patricia Perennes, *Goods Platforms: Another Extension of the Scope of the Minimum Access Package?*, EU Law Live, 11 January 2022.
8. *Judgment of the Court of 22 November 2011*, *Westbahn Management I*, C-136/11, EU:C:2012:740.
9. *CityRail case*, para 41.
10. *Ibidem*, paras 42-46, espec. para 45.

(11) – the EU judges recalled that it is necessary to ascertain 'the specific nature of the functions which it exercises in the particular legal context in which it is called upon to make a reference to the Court'. (12) According to the Court, the power to initiate infringement proceedings and to impose penalties in matters within its jurisdiction *ex officio*, as well as the fact that the task attributed to the body in question was not to review the legality of a decision but to adopt a position for the first time on a complaint lodged by a person, against whose decisions there is a judicial remedy, constituted evidence that the Czech Authority exercises not judicial but administrative functions (13).

To further support its own reconstruction, the Court has also noted that the Czech Authority does not have the status of a third party in relation to the interests involved. It is settled case law of the Court that the notion of 'court or tribunal' within the meaning of Article 267 TFEU can cover 'only an authority acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings' (14). On the contrary, in case of review proceedings before the administrative courts, which have jurisdiction to hear an action against a decision of the Czech Authority, the latter has the status of defendant. The fact that the Czech Authority can submit observations, calling into question its own decision, is just more evidence of the fact that it cannot be considered suitable to request a preliminary ruling from the Court (15).

For all these reasons, the Court has (rightly) considered the request for a preliminary ruling to be inadmissible.

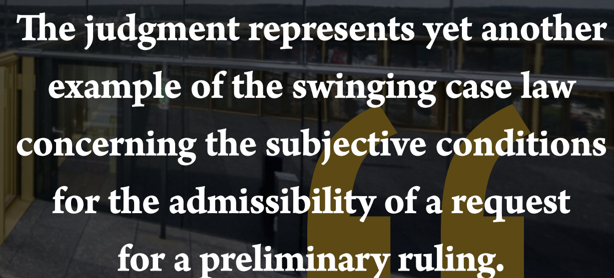
11. *Ibidem*, para 47.
12. *Ibidem*, para 44.
13. *Ibidem*, paras 48-51.
14. *Ibidem*, para 52, but see already the judgment of the Court of 30 March 1993, *Corbiau*, C-24/92, EU:C:1993:118.
15. *Ibidem*, paras 68-69. Cf. judgment of the Court of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, para 37 and judgment of the Court of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, para 25.

Some critical remarks

Thus, the judgment represents yet another example of the swinging case law concerning the subjective conditions for the admissibility of a request for a preliminary ruling.

It is true that the new approach was not unknown in the Court's case law: already on other occasions, the Court held that it had jurisdiction to give preliminary rulings only on questions submitted by a court or tribunal called upon to give judgment 'in proceedings intended to lead to a decision of a judicial nature' (16). Considering otherwise, that is, admitting requests for a preliminary ruling from administrative bodies whose decisions are subject to judicial review, the Court's reply could become useless for the final resolution of the internal dispute (17). That has been, for example, the case of the Italian Court of Auditors. Although it is a body which, given its structure, should undoubtedly be qualified as a 'court or tribunal' for the purposes of Article 267 TFEU, it cannot make a reference for a preliminary ruling, according to the Court, when it carries out functions of assessment and control of administrative activity (18).

But such a restrictive interpretation had never been applied with regard to national regulatory bodies for the railway sector.



The judgment represents yet another example of the swinging case law concerning the subjective conditions for the admissibility of a request for a preliminary ruling.

16. Order of the Court of 18 June 1980, *Borker*, 138/80, EU:C:1980:162, para 4; order of the Court of 5 March 1986, *Regina Greis Unterweger*, 318/85, EU:C:1986:106, para 4; judgment of the Court of 12 November 1998, *Victoria Film*, C-134/97, EU:C:1998:535, para 14; more recently, judgment of the Court of 31 January 2013, *Belov*, C-394/11, EU:C:2013:48, para 39).
17. Ricardo Alonso García has long stated that referrals from such bodies had to be declared in admissible because they were 'órganos dotados legalmente, que no constitucionalmente, de funciones para-judiciales, cuyas resoluciones, además, sí serían susceptibles de revisión por auténticos tribunales integrados en el poder judicial' (*La noción de órgano jurisdiccional a los efectos de activar la cuestión prejudicial*, in Carlos Ramón Fernández Liesa, Carlos Javier Moreiro González, Eduardo Menéndez Rexach (Dirs.), *Homenaje a Dámaso Ruiz-Jarabo Colomer*, Madrid, 2011, p. 156. Cf. also Gisella Gori, *La Notion de juridiction d'un État membre ausens de l'article 234 CE*, in Niels Fenger, Karsten Hagel-Sørensen, Bo Vesterdorf (Eds.), *Festskrifttil Claus Gulmann: Liber amicorum*, København, 2006, p. 173.
18. Order of the Court of 26 November 1999, *RAI*, C-192/98, EU:C:1999:589.

The *revirement* was called for by Advocate General Campos Sánchez-Bordona in the Opinion delivered in the case (19), where he stated that, while it is true that in *Westbahn Management I* the Court accepted that a supervisory commission set up within the Austrian regulatory body could avail itself of Article 267 TFEU, the Court, in so doing, simply 'perpetuated an inertia which, much as it may have been reasonable at the time (2012), I now consider to be outdated' (20). Indeed, the Single European Railway Area Directive (21) made a turnaround necessary to prevent every national rail regulatory body which claimed to be judicial in nature and independent, even if it adopts its decisions via administrative procedures pursuant to the Directive, to keep activating Article 267 TFEU. This had not been possible in *Westbahn Management* I (22 November 2012), as the judgment was issued just one day after the adoption of the Directive (21 November 2012). However, the formalisation of the change in the case law was already foreseeable in the light of the subsequent *Anesco* ruling (22), which was also relevant for the rail regulatory bodies.

Two conclusions may be drawn from this judgment

On the one hand, the Court's restrictive reading of the concept of a 'court or tribunal' under Article 267 TFEU is to be welcomed. The broad interpretation of the notion was entirely justified in the past, as, at the time of the *Vaassen-Göbbels* case, the Court of Justice had only just begun to operate and, therefore, it was very important to encourage the use of the preliminary ruling procedure to promote the correct and uniform application of Community law. These reasons of 'judicial policy' are no longer valid, thus making this approach out of date.

On the one hand, the Court's restrictive reading of the concept of a 'court or tribunal' under Article 267 TFEU is to be welcomed

On the other hand, the shift in the present case represents the umpteenth vacillation of the Court, which makes the words of Advocate General Colomer remain relevant today: that the Court's approach to this matter is 'excessively casuistic' and offers 'a confused and inconsistent panorama, which causes general uncertainty' (23).

On the other hand, the shift in the present case represents the umpteenth vacillation of the Court

19. 16 December 2021, EU:C:2021:1018.
20. *Ibidem*, para 41.
21. Directive 2012/34/EU of the European Parliament and of the Council, of 21 November 2012, establishing a single European railway area.
22. Judgment of the Court of 16 September 2020, C-462/19, EU:C:2020:715, espec. para 36.
23. Opinion delivered on 28 June 2001 in *De Coster*, C-17/00, EU:C:2001:366, para 58.

To mention another episode, with reference to the national competition authorities, the Court of Justice initially included the Spanish Tribunal for the Defence of Competition within the concept of a 'court or tribunal' (24), even though it certainly did not meet the minimum requirements of the Court's case law. It later, however, ruled out the possibility of the Greek Competition Commission making a preliminary ruling request on the assumption that proceedings before that body did not necessarily result in a ruling of judicial nature (25).

The situation of uncertainty is also well portrayed by the fact that there have been many cases in which the Advocates General suggested a restrictive approach and the Court 'widened' the notion of a 'court or tribunal' or, vice versa, in which the Advocates General proposed to declare the reference for a preliminary ruling admissible and the Court declared the request inadmissible (26). In the 15-year period from 1995-2010 three Advocates General, all with a Roman civil law background, have supported the approach that only courts of law, strictly speaking, are competent to make a request to the Court of Justice (27), whereas four Advocates General from a non-Roman common law background have advocated that the Court should generally provide answers to national bodies which must apply the law in resolving a genuine issue (28).

24. Judgment of the Court of 16 July 1992, *Asociación Española de Banca Privada*, C-67/91, EU:C:1992:330. As chance would have it, the *Tribunal de Defensa de la Competencia* has merged into the Spanish National Markets and Competition Commission (CNMC), whose inability to question the Court under Article 267 TFEU was affirmed by the Court itself in the above-mentioned *Anesco* case. In this regard, however, the Court specified that the impossibility of the CNMC to refer to the Court 'may not be called into question by the judgment of 16 July 1992, *Asociación Española de Banca Privada*, in which the Court implicitly acknowledged the admissibility of a request for a preliminary ruling from the Tribunal de Defensa de la Competencia. In that regard, it should be pointed out that that judgment was delivered in the context of the previous Spanish Law on the protection of competition, under which that body was separate from the investigation body in competition matters created by that law, that is to say the Dirección General de Defensa de la Competencia. In the present case, as is apparent from Article 29(1) of the Law establishing the CNMC, the CNMC simultaneously exercises the functions previously attributed to the Tribunal de Defensa de la Competencia and those previously attributed to the General Directorate for the Protection of Competition' (*Anesco*, para 50).
25. Judgment of the Court of 31 May 2005, *Syfait*, C-53/03, EU:C:2005:333, para 9.
26. This is recalled by Advocate General Sharpston in the Opinion delivered on 20 September 2012 in the *Epitropos tou Elegktikou Synedriou* case, C-363/11, EU:C:2012:584, who also added that 'It might be thought that, in eschewing both those approaches, the Court has steered a judicious middle course between Mediterranean formalism and Anglo-Scandinavian informality' (paras 31-32).
27. Advocates General Tesauro *(Dorsch Consult)*, Saggio *(Köllensperger and Atzwanger, Gabalfrisa, Abrahamsson and Anderson)* and Ruiz-JaraboColomer *(De Coster and Österreichischer Rundfunk)*.
28. Advocates General Elmer *(Job Centre)*, Fennelly *(Victoria Film)*, Jacobs *(Syfait and Standesamt Stadt Niebüll)*, and Sharpston *(Miles)*.

The ground rules would be more predictable if the legal framework were more thorough and clarified such as by the adoption of atypical acts

Undoubtedly, some legal uncertainty is inevitable, since the absence of a definition of 'court or tribunal' is closely linked to the need to deal flexibly with 27 different national procedural systems. The ground rules would be more predictable if the legal framework were more thorough and clarified, such as by the adoption of atypical acts. Through a more in-depth analysis of the relevant case law, recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (29) could - and should - provide more detailed indications on the Court's approach, especially on the relationship between organic and functional criteria (30). This would at least help to reduce the number of disputes concerning adherence to the principle of equality of Member States (Article 4(2) TEU) and EU citizens (Article 9 TEU) before the Treaties, as well as to the principle of effective judicial protection (Article 19 TEU).

29. 2019/C 380/01, 8 November 2019.
30. In this sense, Valeria Capuano, *Le condizioni soggettive di ricevibilità del rinvio pregiudiziale*, in Fabio Ferraro, Celestina Iannone (a cura di), *Il rinvio pregiudiziale*, Turin, 2020, p. 58.

News Highlights

30 May to 3 June 2022

Six French banks bring actions against European Central Bank over irrevocable payment commitments measures

Monday 30 May READ MORE ON EU LAW LIVE

Six actions brought by French banks against the European Central Bank (ECB) seeking annulment of certain measures concerning irrevocable payment commitments were published in the Official Journal.

Pharol challenges 12 million euros antitrust fine imposed on it for non-compete agreement with Telefónica

Monday 30 May READ MORE ON EU LAW LIVE

Pharol appealed before the General Court the new decision in case AT.39839 in so far as the European Commission re-imposed on it a fine for entering into a non-compete agreement with Telefónica in breach of EU antitrust rules.

Court of Justice to clarify if obligation to provide fingerprints for issuance of identity card is valid under EU data privacy laws

Monday 30 May READ MORE ON EU LAW LIVE

A request for a preliminary ruling from a German court was submitted to the Court of Justice seeking clarification of whether the obligation imposed by Regulation 2019/1157 on identity cards of Union citizens infringes the Charter of the Fundamental Rights and the General Data Protection Regulation.

Preliminary ruling request on whether national emergency health measures are in line with EU free movement law published

Tuesday 31 May READ MORE ON EU LAW LIVE

A preliminary ruling request on whether national rules imposing general travel restrictions as an emergency health measure are precluded or not by EU free movement law was published: *NORDIC INFO v Belgische Staat*.

Guidance on recovery and resilience plans in the context of REPowerEU published

Tuesday 31 May READ MORE ON EU LAW LIVE

Official publication was made of Commission Notice on Guidance on Recovery and Resilience Plans in the context of REPowerEU. The Commission explains the modalities for devising the REPowerEU chapters.

ECA Special Report: EU budget on climate action has been overstated

Tuesday 31 May READ MORE ON EU LAW LIVE

The European Court of Auditors published its Special Report 09/2022: Climate spending in the 2014-2020 EU budget. The report states that the EU has missed its self-imposed target of spending at least 20% of its 2014-2020 budget on climate action.

ECtHR: municipality's general, gradual accessibility improvements mean no discrimination committed against wheelchair users unable to access buildings

Tuesday 31 May

READ MORE ON EU LAW LIVE

The European Court of Human Rights ruled that no discrimination occurred in the context of a wheelchair user's right to private life due to the inability to access to municipal buildings in Iceland: *Arnar Helgi Lárusson v. Iceland.*

European Council calls for Member States to align over sixth round of sanctions against Russia for its war against Ukraine

Tuesday 31 May

READ MORE ON EU LAW LIVE

The European Council continued to condemn Russia's war of aggression against Ukraine in strong terms, calling for Russia to 'immediately stop' its attacks, and 'immediately and unconditionally' withdraw its troops', and for international humanitarian law to be respected.

Preliminary ruling request concerning EU rail markets and award of concession contracts published

Wednesday 1 June

READ MORE ON EU LAW LIVE

The Italian Council of State's preliminary ruling request concerning EU legislation on rail markets and the award of concession contracts, in the case *Sad Trasporto Locale SpA v Provincia autonoma di Bolzano* (C-186/22), was published.

Court of Justice to rule on relevant date to consider a child's age for family reunification purposes

Wednesday 1 June

READ MORE ON EU LAW LIVE

Official publication was made of a request for a preliminary ruling lodged by the Belgian Council of State in the case *ME v Belgian State* (C-191/22). The request seeks clarification on which date needs to be taken into account so that family reunification can occur in the case of a minor who has attained majority.

General Court dismisses all actions seeking annulment of the resolution scheme of Banco Popular

Wednesday 1 June

READ MORE ON EU LAW LIVE

The General Court dismissed all the actions brought against the resolution scheme decision of the Single Resolution Board in respect of Banco Popular Español, S.A. The cases mark the first time the Court ruled on the lawfulness of a resolution scheme adopted by the SRB.

EFTA Court's judgment on lawfulness of Norwegian rules on limitation of interests deductibility

Wednesday 1 June

READ MORE ON EU LAW LIVE

The EFTA Court adopted a judgment in *Group Europe AS v the Norwegian Government*, ruling that a combination of limited interest deduction rules and group contribution rules in Norway may infringe the principle of freedom of establishment.

Commission registers 'Good Clothes, Fair Pay' citizens' initiative

Thursday 2 June READ MORE ON EU LAW LIVE

The Commission decided to register a European Citizens' Initiative entitled 'Good Clothes, Fair Pay'. The initiative calls on the Commission to propose legislation requiring companies in the garment and footwear sector to carry out due diligence in respect of living wages in their supply chains.

Court of Justice to rule in three criminal cases on the limits of 'ne bis in idem' principle

Thursday 2 June READ MORE ON EU LAW LIVE

Three requests for a preliminary ruling seeking clarification from the Court of Justice on the interpretation of the ne bis in idem principle (Article 50 of the Charter of Fundamental Rights) was published in the Official Journal.

Convergence Report: Croatia fulfils conditions for the adoption of the euro

Thursday 2 June READ MORE ON EU LAW LIVE

The Commission concluded that Croatia is ready to adopt the euro in January 2023, bringing the number of euro Member States to 20. The Convergence Report assessed the progress that Bulgaria, Czechia, Croatia, Hungary, Poland, Romania and Sweden have made towards joining the euro.

AG Rantos: buyers of vehicles equipped with unlawful defeat devices have a right to compensation

Thursday 2 June READ MORE ON EU LAW LIVE

Advocate General Rantos adopted his Opinion in *Mercedes-Benz Group*, concluding that the purchaser of a vehicle fitted with a defeat device should be compensated for the loss incurred while leaving it to Member States to define the calculation of such compensation.

Airlines can claim from air traffic services providers for breaching their obligation to provide services: Court of Justice rules

Thursday 2 June READ MORE ON EU LAW LIVE

The Court of Justice delivered its judgment in *Skeyes*, ruling that airlines have an effective right of recourse before national courts against air traffic service providers for breaches of the latter's obligation to provide services.

Commission gives initial go-ahead for 35 billion in recovery funding to Poland as long as rule of law commitments are met

Thursday 2 June READ MORE ON EU LAW LIVE

The release of financial support in the form of 23.9 billion euros in grants and 11.5 billion euros in loans to Poland has been initially authorised by the Commission from the Recovery and Resilience Fund. The Commission's proposal will now be considered by the Council.

Amazon not liable for trademark infringements of third party sellers under Trademark Regulation

Thursday 2 June READ MORE ON EU LAW LIVE

Advocate General Szpunar issued his Opinion in *Louboutin*, advising the Court of Justice to rule that Amazon cannot be held directly liable for the sale of goods on its platform that infringe trademark rights protected by Trademark Regulation 2017/1001.

Court of Justice: mere extension of operation of waste disposal does not require a new permit under Industrial Emissions Directive

Friday 3 June READ MORE ON EU LAW LIVE

In *FCC Česká republika*, the Court of Justice ruled that the mere extension of the duration of the operation of waste disposal at a landfill does not constitute a 'substantial change' to the operating permit pursuant to the Industrial Emissions Directive.

EU product safety law sets out legal test on danger of products that may be confused for foodstuffs by children, rules Court of Justice

Friday 3 June READ MORE ON EU LAW LIVE

The Court of Justice clarified the interpretation of Article 1(2) of General Product Safety Directive 87/357 in *Get Fresh Cosmetics*, and set out a four-part test for the competent authorities to decide the risks and likelihood of confusion of food-like products.

New Regulation on agricultural statistics: provisional political agreement of Council and Parliament

Friday 3 June READ MORE ON EU LAW LIVE

Provisional political agreement was reached by the French Presidency of the Council of the EU, and the European Parliament, for a new updating regulation on statistics on agricultural inputs and products (proposed by the Commission in February last year).

Council adopts its approach on three laws increasing uptake of greener fuels in aviation and maritime sectors

Friday 3 June READ MORE ON EU LAW LIVE

European transport ministers adopted their position on three legislative proposals of the Fit for 55 package relating to the transport sector, taking a step closer to meeting EU's climate objective, that is, achieving carbon neutrality by 2050 and reducing greenhouse gas emissions by 90%.

Court of Justice delineates formal requirements for validity of waivers of succession

Friday 3 June READ MORE ON EU LAW LIVE

Court of Justice clarified in *T.N. and N.N.* the requirements for declarations on the acceptance or renunciation of inheritance under EU Succession Regulation, ruling that for such declarations to be valid, they only need to comply with the requirements of the courts where such declaration is made.

ECtHR: transit zone conditions for an Iraqi family resulted in degrading treatment and unlawful detention

Friday 3 June

READ MORE ON EU LAW LIVE

The European Court of Human Rights delivered its judgment in the case *H.M. and Others v. Hungary*, ruling that an Iraqi family's detention in a transit zone at the border between Hungary and Serbia after fleeing Iraq breached the family's fundamental rights.

Sixth package of sanctions against Russia adopted

Friday 3 June

READ MORE ON EU LAW LIVE

In light of Russia's continuing war against Ukraine and Belarus' support to it, the Council imposed a sixth package of economic and individual sanctions targeting both Russia and Belarus.

Commission investigates Czech aid for Digital Terrestrial Television operators

Friday 3 June

READ MORE ON EU LAW LIVE

The European Commission opened an in-depth investigation to assess whether public support that Czechia plans to grant in favour of Digital Terrestrial Television operators is in line with EU State aid rules.

Insights, Analyses & Op-Eds

A new chapter in the saga of national res judicata and the effectiveness of EU Law: Confirming the trend towards increasing encroachments upon domestic procedural law

by Araceli Turmo

READ MORE ON EU LAW LIVE

Op-Ed on four judgments published on 17 May 2022, regarding limitations on the applicability of domestic procedural law in proceedings concerning unfair consumer contracts. In the view of the author, the cases confirm the Court of Justice's jurisprudence declaring national rules affecting *res judicata* incompatible when they appear to fall outside an implicit European 'standard' for the principle.

Excluding information provided by cooperating entities in an anti-dumping investigation can put the reliability of definitive anti-dumping duty in question: *Commission v Hansol Paper*

Anna Elizaveta Golouchko

READ MORE ON EU LAW LIVE

Analysis of the Court of Justice dismissal of the appeal brought by the Commission against the General Court's decision in *Commission v Hansol Paper*, confirming that the wide margin of discretion granted to the Commission regarding anti-dumping investigations does not exempt it from taking into account all information provided by cooperating parties, even beyond questionnaire responses.

The Court clarifies the application of the *Hinkley point* case-law and the interpretation of the 'one time, last time' principle: Case T-718/20, *Wizz Air Hungary v Commission* (TAROM – Rescue aid)

by Juan Jorge Piernas López READ MORE ON EU LAW LIVE

Op-Ed on the General Court's judgment in *Wizz Air Hungary v Commission*, concerning an appeal brought by the airline Wizz Air against the Commission's decision authorising Romanian state aid to carrier Tarom. The author argues that the judgment confirms the discretion that Member States enjoy to rescue undertakings in difficulty under the Guidelines in order to prevent social hardship or address a market failure.

AG Szpunar's Opinion in *Commission v Council* on the Member States' accession to the Geneva Act (C-24/20)

by Merijn Chamon READ MORE ON EU LAW LIVE

Op-Ed on *Commission v Council case*, concerning the Commission reproaching the Council for having authorised all Member States to accede to an international law instrument that squarely falls under the exclusive competence of the European Union. The author argues that allowing at least the seven Member States that are parties to the Lisbon Agreement to accede to the Geneva Act serves a legitimate purpose.

Programmes and projects leading to only temporary and short-term deteriorations of the status of surface waters must meet exemption criteria: *Association France Nature Environnement* (C-525/20)

by Antonio Cardesa-Salzmann READ MORE ON EU LAW LIVE

Analysis of *Association France Nature Environnement v Ministre de la Transition écologique et solidaire*, where the French Council of State sought guidance from the Court of Justice on the scope of the obligation of Member States to prevent deterioration of surface water bodies under the Water Framework Directive, when such deterioration is only temporary and for a short period.

Killing two birds with one stone? Effective EAW surrender procedures and fundamental rights: *C and CD* (C-804/21 PPU)

by Lorenzo Cecchetti READ MORE ON EU LAW LIVE

Op-Ed on the Court of Justice's judgment in *C and CD*, in which the Court clarified the interpretation of Article 23(3) of European Arrest Warrant Framework Decision 584/2002. The author considers that it is contended that the Court's findings in the case fairly accommodate the fundamental rights concerns coming into play in the European Arrest Warrant system while guaranteeing its effectiveness and well-functioning.

Tightening up the enforcement of sanctions in the EU: the European Commission's proposal to add sanctions evasion to the list of EU crimes

by Ilaria Curti READ MORE ON EU LAW LIVE

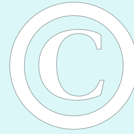
Analysis of the European Commission's proposal, announced on 25 May, to include violation of the Union's restrictive measures in the EU's list of crimes, as well as a proposal to revise the Directive on the freezing and confiscation of the instruments and proceeds of crimes in order to bolster the powers of Member States to confiscate assets frozen in connection with violations of EU restrictive measures.

Convictions In Absentia and the Right to a Fair Trial. The Building of an EU Theory of Justice Continues: *Spetsializirana prokuratura* (C-569/20)

by Leandro Mancano READ MORE ON EU LAW LIVE

Op-Ed on the EU Court of Justice's judgment in *Spetsializirana prokuratura*, which concerned the interpretation of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The author argues that the ruling is important because it establishes a directly effective right to a new trial, although the context in which that right is framed will be key to determining its content.

weekend



Permission to use this content must be obtained from the copyright owner

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Editor-in-Chief:
Daniel Sarmiento

• • • • • • • • •

Managing Editor
Anjum Shabbir

• • • • • • • • •

In-Depth and Weekend Edition Editor
Sara Iglesias Sánchez

• • • • • • • • •

Editorial Board:

Maja Brkan, Marco Lamandini, Adolfo Martín, Jorge Piernas, Ana Ramalho, René Repasi, Anne-Lise Sibony, Araceli Turmo, Isabelle Van Damme, Maria Dolores Utrilla and Maria Weimer.

Subscription prices are available upon request. Please contact our sales department for further information at

subscriptions@eulawlive.com

ISSN
EU Law Live **2695-9585**
EU Law Live Weekend Edition **2695-9593**

www.eulawlive.com