



FACULTY OF LAW  
University of Lund

Timothy Dayton Maldoon

A court or tribunal within the meaning of  
Article 234 of the Treaty  
The Court's jurisprudence from *Vaassen (née Göbbels)* to *Syfait*

Master thesis  
20 points

Hans Henrik Lidgard

European Community & competition law

Spring semester 2005

# Contents

<b>SUMMARY</b>	<b>4</b>
<b>PREFACE</b>	<b>5</b>
<b>ABBREVIATIONS</b>	<b>6</b>
<b>1 INTRODUCTION</b>	<b>7</b>
1.1 Background	7
1.2 Purpose	8
1.3 Method, material, and delimitations	8
1.4 Disposition	9
<b>2 DEFINING THE CRITERIA: THE CASE-LAW OF THE COURT</b>	<b>10</b>
2.1 Establishing the criteria	10
2.1.1 <i>Vaassen (née Göbbels)</i>	10
2.1.1.1 Background and admissibility	10
2.1.1.2 Remarks	11
2.2 Final decision of a judicial nature	12
2.2.1 <i>Borker</i>	12
2.2.1.1 Background and admissibility	12
2.2.1.2 Related rulings: Razanatsimba, Broekmeulen, and Bauer	12
2.2.1.3 Remarks	13
2.2.2 <i>Job Centre</i>	14
2.2.2.1 Background and admissibility	14
2.2.2.2 Related rulings: Salzmann, HSB-Wohnbau, & Lutz and Others	15
2.2.2.3 Remarks	17
2.3 Whether the body is independent	17
2.3.1 <i>Pretore di Salò</i>	18
2.3.2 <i>Corbiau</i>	18
2.3.3 <i>Köllensperger and Atzwanger</i>	19
2.3.4 <i>Gabalfrisa and Others</i>	20
2.3.4.1 Background and admissibility	20
2.3.4.2 Critique from the Advocate General	21
2.3.5 <i>Schmid</i>	21
2.3.6 <i>Remarks</i>	22
2.4 The inter partes criterion: <i>Politi</i> and beyond	23
2.5 Compulsory jurisdiction: <i>Nordsee, Danfoss, &amp; Almelo</i> and Others	24

2.6	The Court's current position: the legacy of Dorsch Consult	25
<b>3</b>	<b>AN ADVOCATE GENERAL'S CONCERN REGARDING THE COURT'S APPROACH</b>	<b>28</b>
<b>4</b>	<b>THE OPINION OF ADVOCATE GENERAL JACOBS IN SYFAIT</b>	<b>31</b>
4.1	Background and admissibility	31
4.2	A correct Opinion?	36
4.3	The potential implications of Syfait	37
4.3.1	<i>Background: the role of national courts and competition authorities under Regulation 1/2003</i>	37
4.3.2	<i>The positive and negatives of allowing national competition authorities the right to use Article 234</i>	38
4.3.3	<i>Possible consequences for the Swedish, Danish, and Finnish national competition authorities</i>	40
4.3.3.1	Sweden	41
4.3.3.2	Denmark	42
4.3.3.3	Finland	43
<b>5</b>	<b>CONCLUDING REMARKS</b>	<b>45</b>
	<b>BIBLIOGRAPHY</b>	<b>46</b>
	<b>TABLE OF CASES</b>	<b>48</b>

# Summary

The thesis you are about to read concerns the expression “court or tribunal of a Member State” contained within Article 234 of the Treaty. While the Article is silent as to what is to define such a body, the European Court of Justice has ruled that it is for the Court to rule upon which bodies constitute a court or tribunal for the purposes of making a preliminary ruling reference. Hence, the Court has, since the early days of the Community, established and refined certain criteria it can take into account when making such a judgement. As in all aspects of law, the ECJ’s jurisprudence on the matter is not without its fair share of controversy. There are many, and I am one of them, that have accused the Court of being lax regarding a strict interpretation of the criteria it some decades ago held so dear. Moreover, the Court’s liberal attitude comes to blaring light in the Opinion of Advocate General Jacobs in Case C-53/03 *Syfait*, in which he opted to allow a reference from a national competition authority with certain judicial characteristics. While an Opinion of an Advocate General is not binding upon the ECJ, the potential implications of *Syfait*, following a positive ruling by the Court, are important to consider.

# Preface

I dedicate this thesis to my mom, a Swedish exchange student that, luckily for my own existence, never decided to come home from the United States of America. Having her in my life has afforded me with the determination to better oneself despite the obstacles that may lie ahead. I would also like to thank the country of Sweden and the city of Lund for their hospitality, which I hope to enjoy for one more year before pursuing another year of study at an American university. Last but not least, a warm thank you to the Law Faculty at the University of Lund. Without their expertise and helping hand, the knowledge I take away with would not have been possible.

April 13, 2005 / Lund, Sweden

Timothy Dayton Maldoon

# Abbreviations

AG	Advocate General
C.M.L.R	Common Market Law Review
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Community
EU	European Union
NCA	national competition authority
OJ	Official Journal of the European Union
SFS	Svensk Författningssamling

# 1 Introduction

## 1.1 Background

Article 234 of the Treaty (formerly Article 177 EEC)<sup>1</sup> provides for the preliminary ruling procedure and has been of paramount importance to the development of Community law. Namely, it is through the system of preliminary rulings that the Court has developed various groundbreaking concepts, two such being the direct effect and supremacy of EC law<sup>2</sup>. Moreover, the provision is an indirect way of testing the validity of Community action and has been a valuable mechanism through which national courts and the ECJ have engaged in a legal discourse on the appropriate reach of Community law. There would have been few, at the inception of Treaty, that could have fathomed the importance of the Article, yet it is very much the “icing on the cake” of the Court’s jurisdiction<sup>3</sup>. It reads as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Despite its relative straightforwardness, it is essential to observe that Article 234 is framed in terms of a “court or tribunal of a Member State”, that *may* or *shall* make a reference. The provision is, however, silent in providing an exact definition of what is to define such a body. In a lesser world, we could be aimlessly pondering the following question: to which courts or tribunals does Article 234 of the Treaty apply? Luckily, this is not the case, since the

---

<sup>1</sup> In order to avoid confusion, all material in the remainder of this thesis using the former numbering Article 177 is replaced with the current numbering Article 234.

<sup>2</sup> The ECJ first articulated its doctrine of direct effect in 1963 in what is probably the most famous of all its ruling, namely Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I. The supremacy of Community law was ruled upon in Case 6/64 *Flaminio Costa v. ENEL*, [1964] ECR 585.

<sup>3</sup> Craig, Paul, and De Búrca, Gráinne, *EU Law: Text, Cases, and Materials*, 3<sup>rd</sup> edition, 2003, pp. 432, 433.

European Court of Justice has made it clear that it is for Court to decide whether a body is a court or tribunal under Article 234 and that the categorization of that body under national law is not conclusive. Based upon their vested powers, a helping hand is there for the taking in the roughly four decades of jurisprudence tackling this matter. To this regard, the ECJ has developed, in an array of judgements, various factors it can take into account when determining if an entity is an actual court or tribunal. More specifically, these criteria include: whether law establishes the body, whether it is permanent, whether it applies rules of law, whether its final decision is judicial in nature whether it is independent, whether its procedure is *inter partes*, and whether its jurisdiction is compulsory<sup>4</sup>

## 1.2 Purpose

With the above in mind, the objective of this thesis is to relay how the European Court of Justice has defined “court or tribunal of a Member State” contained within Article 234 of the Treaty.

## 1.3 Method, material, and delimitations

In order to accomplish the above task, I will make use of a traditional legal method. I further assume that the reader has prior knowledge of Community law. Court rulings and the Opinions of various Advocate Generals, defining a court or tribunal for the purposes of Article 234, make up the bulk of the material used. The remaining material comes from Community legislation, relevant legal doctrine, correspondence via email with varying national competition authorities, and the World Wide Web.

While this paper deals with Article 234 of the Treaty, I will for the most part limit myself to defining what constitutes a court or tribunal within its meaning; consequently, other aspects of the Article fall outside the scope of the thesis. Furthermore, while this paper touches briefly upon Regulation 1/2003<sup>5</sup>, I will only provide the precise amount of information relevant to assessing the possible implications of allowing certain national competition authorities the right to make use of Article 234. Hence, a detailed analysis of the Regulation will not be relayed here, yet can be readily attained in the vast sea of literature on the topic. Lastly, Articles 81 and 82 of the Treaty and their application, while important to have in mind when reading Chapter 5 of the thesis, will not be expanded upon in any greater detail.

---

<sup>4</sup> Ibid., p. 436.

<sup>5</sup> Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.



## 1.4 Disposition

*Chapter 2* contains the leading jurisprudence concerning the criteria the Court of Justice can take into account when defining a court or tribunal allowed to make a preliminary ruling reference. These rulings are divided, more or less, into subsections on a criterion-by-criterion basis. I conclude the chapter with a recent Court ruling that takes into full account the roughly four decades of jurisprudence, making it easier to see the Court's current position on the matter.

*Chapter 3* relays the concern of Advocate General Colomer towards what he sees as a far too liberal approach taken by the Court of Justice in its case-law. His proposal for a more straightforward definition as to what *should* constitute a court or tribunal under Article 234 is also provided for.

*Chapter 4* begins with a section that examines AG Jacob's arguments for allowing the Greek Competition Commission the right to refer questions to the Court in Case C-53/03 *Syfait*<sup>6</sup>. Immediately following that section, I will attempt to analyze the correctness of his reasoning from a jurisprudential point of view, where relevant aiming criticism at his arguments. I conclude the chapter with a section that shortly summarizes the most important changes brought on by way of Regulation 1/2003, follows the positive and negative implications of allowing an NCA to refer questions, and ends with whether the Swedish, Finnish, and Danish national competition authorities could theoretically also seek the ECJ's guidance.

*Chapter 5*, though short and sweet, makes way for my concluding remarks.

In conclusion, it is my sincere wish that my readers finds this thesis informative, furthering their understanding on this aspect of Community law. That being said, without delay, let us begin!

---

<sup>6</sup> Opinion of Advocate General Jacobs in Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline AEEVE*, awaiting the judgement of the Court, currently available on [www.curia.eu.int](http://www.curia.eu.int).

## 2 Defining the criteria: the case-law of the Court

This section aims to look at the jurisprudence of the Court establishing, defining, and refining the criteria they can take into account when determining whether a national body constitutes a court or tribunal within the meaning of Article 234 of the Treaty.

### 2.1 Establishing the criteria

In the beginning days of the Community, the Court lacked clear factors it could take into consideration if it were to rule whether a Member State entity was a court or tribunal for the purposes of Article 234. More specifically, not until 1966 did the Court establish these much-needed interpreting tools.

#### 2.1.1 Vaassen (née Göbbels)

The question of whether or not an entity constituted a court or tribunal arose for the first time in *Case 61/65 Vaassen (née Göbbels)*<sup>7</sup>.

##### 2.1.1.1 Background and admissibility

The case concerned Mrs. Vaassen, a widow of a Dutch non-manual worker, who was entitled in that capacity to a pension paid out of the pension fund of the Beambtenfonds voor het Mijnbedrijf (BFM). Mrs. Vaassen came into conflict with the management of the BFM and took her case before the Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf (the Arbitration Tribunal of the Fund for non-manual workers employed in the mining industry, hereinafter “the Arbitration Tribunal”), which had the jurisdiction to entertain appeals against the former’s decisions. Mrs. Vaassen argued before the Arbitration Tribunal that the management of the BFM had reached a decision contrary to Community law. In order to resolve the case, the Arbitration Tribunal referred to the European Court of Justice a request for interpretation.

It did not however do so without examining its own right to submit the case. The Arbitration Tribunal maintained that although it could not be considered as a court or tribunal under Dutch law, this did not exclude the possibility that it should be regarded as a court or tribunal within the meaning of Article 234 of the Treaty. To their defence, they added that, according to the rules governing the BFM, the Arbitration Tribunal was the only body that could give judgments on any disputes that arose and there was no appeal against its decisions. Disagreeing with the Arbitration

---

<sup>7</sup> *Case 61/65 G. Vaassen (née Göbbels) v. Scheidsgerecht van het Beambtenfonds voor het Mijnbedrijf*, [1966] ECR 261.

Tribunal, the management of the BFM submitted that the former reached only non-binding opinions and was therefore not competent to make the reference.<sup>8</sup>

The ruling on admissibility was as follows. The Court of Justice found that the Arbitration Tribunal was properly constituted under Dutch law and was provided for by the rules governing the BFM. Further account was taken to the fact that the Minister responsible for the mining industry was to appoint the members of the Arbitration Tribunal, he designated its Chairman, and laid down its rules of procedure. Moreover, the Arbitration Tribunal was a permanent body that settled disputes in general terms under the rules governing the BFM and abided by rules of adversary procedure similar to those used in ordinary courts of law. Concluding its reasoning, the Court articulated that the persons referred to in the rules governing the BFM were compulsorily members of the BFM by virtue of a regulation laid down by the Council of the Mining Industry, a body established under public law. They were to take any disputes between themselves and their insurer to the Arbitration Tribunal as the proper judicial body that applied rules of law.<sup>9</sup>

Based on the above, the ECJ found that the Arbitration Tribunal constituted a court or tribunal within the meaning of Article 234 of the Treaty.

### 2.1.1.2 Remarks

W.L. Haardt, from the University of Leyden, argued in the C.M.L.R 1966-1967 that the ruling gave no direct answer to the question whether pursuant to Article 234 arbitrators may, and sometimes are bound to, request the Court of Justice to render a preliminary ruling concerning matters of Community law. He maintained that although the Court in the present case replied in the affirmative, its ruling was largely determined by the special character of the Arbitration Tribunal. Consequently, he warned of drawing any general conclusions in respect to ordinary arbitral tribunals.<sup>10</sup> An analysis of under what conditions an arbitral court or tribunal can qualify as a court or tribunal within the meaning of Article 234 is examined in a later section of this chapter.

What *Vaassen (née Göbbels)* did determine was that the Court now had five criteria it could rely upon when determining if an entity was to be considered a court or tribunal, namely: whether law establishes the body, whether it is permanent, whether it applies rules of law, whether its jurisdiction is compulsory, and whether its procedure is *inter partes*. It should also be noted that, since this judgment, the ECJ has in subsequent

---

<sup>8</sup> Opinion of Advocate General Gand in Case 61/65 *Vaassen (née Göbbels)*, [1966] ECR 279, p. 280, paras. 3-5.

<sup>9</sup> Note 7 above, p. 272, 273, paras. 2-5 in the section *Grounds of Judgement*, subsection *The admissibility of the request for interpretation*.

<sup>10</sup> Haardt, W.L., *Annotation on Case 61/65 Vaassen (née Göbbels)*, C.M.L.R. 1966-1967, p. 441.

cases sought to ascertain whether those requirements are met, it has refined and perfected them, and even added others.<sup>11</sup>

## 2.2 Final decision of a judicial nature

This section provides for the case-law relating to the final decision of a judicial nature criterion, not provided for in *Vaassen (née Göbbels)* and first established some 15 years later.

### 2.2.1 Borker

The factor of whether a final decision is judicial in nature was added in Case 138/80 *Borker*<sup>12</sup>.

#### 2.2.1.1 Background and admissibility

By a decision of 27 May 1980, the Conseil de l'Ordre des Avocats à la Cour de Paris (Bar Council of the Cour de Paris) submitted a reference at the behest of Jules Borker, a member of the Paris Bar who had been refused the right to the pursuit of his activities as a lawyer before two German courts.<sup>13</sup>

After a review of the scope of Article 234 of the Treaty, the Court concluded that it was apparent that the ECJ can only be requested to give a preliminary ruling by a court or tribunal that is called upon to give a judgement in proceedings intended to lead to a decision of a judicial nature. That was not the position in the case at hand, since the Bar Council of the Cour de Paris did not have before it a case that it was under a legal duty to try, but rather a request for a declaration relating to a dispute between a member of the Paris Bar and the courts or tribunals of another Member State. Accordingly, the body had no right to seek a reference before the Court.<sup>14</sup>

#### 2.2.1.2 Related rulings: Razanatsimba, Broekmeulen, and Bauer

The decision of the Court of Justice in *Borker* demonstrated the correctness of a decision reached just three years earlier by the French courts. In **Case 65/77 *Razanatsimba***<sup>15</sup>, the Cour d'Appel of Douai shot down the decision of the Conseil de l'Ordre des Avocats au Barreau de Lille (Bar Council of Lille) to refer to the Court two questions concerning the claimed right of a third-country national to be admitted at the Lille Bar. The Cour d'Appel of Douai articulated that when the Bar Council of Lille gave a ruling on admission it was acting in an administrative capacity and not as a court or tribunal.<sup>16</sup>

---

<sup>11</sup> Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster*, [2001] ECR I-9447, p. 9452, para. 17.

<sup>12</sup> Case 138/80 *Jules Borker*, [1980] ECR 1975.

<sup>13</sup> *Ibid.*, p. 1976, paras. 1, 2.

<sup>14</sup> *Ibid.*, p. 1977, paras. 3-5.

<sup>15</sup> Case 65/77 *Jean Razanatsimba*, [1977] ECR 2229.

<sup>16</sup> *Ibid.*, pp. 2236, 2237, paras. 1-5.

In **Case 246/80 *Broekmeulen***<sup>17</sup>, the ECJ entertained a reference for a preliminary ruling from a Dutch body called the Commissie van Beroep Huisartsgeneeskunde (Appeals Committee for General Medicine, hereinafter “the Appeals Committee”). The Appeals Committee heard appeals from a body that was responsible for registering those who wished to practice medicine in the Netherlands. Both of the bodies were established under the Royal Netherlands Society for the Promotion of Medicine. The Society was considered a private association, even though it was indirectly recognized in other parts of Dutch law. The Appeals Committee was not a court or tribunal under Dutch law, yet followed an adversarial procedure and allowed for legal representation. C. Broekmeulen, a Dutch national that was qualified for practice in Belgium, sought to establish himself as a doctor in the Netherlands, but his application for registration was denied.<sup>18</sup>

Before ruling on the substantive issues of the case, the Court found that the Appeals Committee was a court or tribunal for the purposes of Article 234 of the Treaty. It articulated the following:

(...) in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operates with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivers decisions which are recognised as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 234 of the Treaty.<sup>19</sup>

A final ruling of interest is **Case C-166/91 *Bauer***<sup>20</sup>. In the case, the ECJ accepted a preliminary ruling reference from the Conseil d’Expression Française l’Ordre des Architectes (an appellate committee of the Belgian Association of Architects). The appellate body was to give judgement upon a refusal of a regional council of the Association of Architects to register an architect with non-Belgian qualifications. Neither the Advocate General nor the ECJ commented on the admissibility of the reference. Most likely, this was because the case was seen as an application of the position established in *Broekmeulen*.<sup>21</sup>

### 2.2.1.3 Remarks

Member States often delegate the task of implementing their EC law obligations to professional associations. In the field of the free movement of professional persons and the freedom to provide services this is especially common. So long as there exists sufficient governmental involvement to confer the requisite official status upon such bodies, professional appellate committees whose decisions are capable affecting the exercise of such rights

---

<sup>17</sup> Case 246/80 *C. Broekmeulen v. Huisarts Registratie Commissie*, [1981] ECR 2311.

<sup>18</sup> Note 3 above, p. 436.

<sup>19</sup> Note 17 above, p. 2328, para. 18.

<sup>20</sup> Case C-166/91 *Gerhard Bauer v. Conseil National de l’Ordre des Architectes*, [1992] ECR I-2797.

<sup>21</sup> Anderson, David W.K., *References to the European Court*, 1995, p. 35.

may very well be capable of making preliminary references.<sup>22</sup> However, as seen in *Borker* and similar rulings, their decisions must be judicial in nature.

## 2.2.2 Job Centre

In the spirit of *Borker*, Case C-111/94 *Job Centre*<sup>23</sup> also articulated that a national court or tribunal's decision must be judicial in nature.

### 2.2.2.1 Background and admissibility

The case concerned a reference from the Tribunale Civile e Penale di Milano (Civil and Criminal District Court of Milano, hereinafter “the District Court of Milano”) for a preliminary ruling concerning two questions on the interpretation of the Treaty. Those questions were raised in the context of an application submitted by representatives of Job Centre Coop. (JCC) to the District Court of Milano for confirmation of its memorandum of association, in accordance with the Italian Civil Code. JCC was a cooperative that was in the course of setting up its business operations. According to its articles of association, its activities were to include serving as an intermediary in the job placement market. In Italy, however, the employment market was subject to a mandatory placement system administered by public employment agencies and Italian law prohibited acting as an intermediary between supply and demand for paid employment. In response, JCC submitted that such a prohibition was contrary to Community law.<sup>24</sup>

The Commission and the Italian government raised objections as to the admissibility of the questions referred. In particular, they maintained that the questions were raised in the context of non-contentious proceedings (“giurisdizione volontaria”) whose purpose was to issue an administrative decision, not to settle a dispute after hearing arguments from opposing parties.<sup>25</sup>

The ECJ agreed that an application for confirmation of the articles of association of a company was examined in Italy under non-contentious proceedings. According to the Italian Civil Code, if after hearing the submissions of the public authorities the District Court of Milano found that the article of association met the conditions laid down by law, it had to order the registration of the company. Only after registration could the company acquire legal personality and the right to appeal against any adverse decision.<sup>26</sup>

---

<sup>22</sup> Ibid., p. 34.

<sup>23</sup> Case C-111/94 *Non-contentious proceedings brought by Job Centre Coop. arl*, [1995] ECR I-3361.

<sup>24</sup> Ibid., pp. 3384, 3385, paras. 1-5.

<sup>25</sup> Ibid., p. 3385, para. 6.

<sup>26</sup> Ibid., p. 3386, para. 7.

Based on the above observations, the Court stated the following:

When, in accordance with the applicable national legislation and under the *giurisdizione volontaria* procedure, the national court rules on an application for confirmation of a company's articles of association with a view to its registration, it is performing a non-judicial function which, in other Member States, is entrusted to administrative authorities. It is exercising administrative authority without being at the same time called upon to settle any dispute. Only if the person empowered under national law to apply for such confirmation seeks judicial review of a decision rejecting that application, and thus of the application for registration, may the court seized be regarded as exercising a judicial function, for the purposes of Article 234, in respect of an application for the annulment of a measure adversely affecting the petitioner.<sup>27</sup>

Consequently, the European Court of Justice deemed that, in this particular situation, the District Court of Milano lacked the ability to seek a preliminary ruling.

#### **2.2.2.2 Related rulings: Salzmann, HSB-Wohnbau, & Lutz and Others**

The ruling in *Job Centre* was confirmed some six years later in **Case C-178/99 Salzmann**<sup>28</sup>. The case concerned a reference for a preliminary ruling by the Bezirksgericht Bregenz (District Court of Bregenz, Austria) in the course of a claim by Mrs. Salzmann for the registration in the land register of a contract of sale of an undeveloped plot of land. According to Austrian law, the District Court of Bregenz was competent to register real property transactions in the land register.<sup>29</sup>

The Commission, Spanish Government, and Austrian Government maintained that the District Court of Bregenz, when it was acting as the tribunal responsible for the land register, was not required to decide disputes, but to check that applications for registration of titles to property in the land register complied with the conditions laid down by law. Recalling *Job Centre*, they were of the opinion that the District Court of Bregenz, in that regard, was performing an activity of an administrative, not judicial, nature. The Court agreed and denied the reference for a preliminary ruling.<sup>30</sup>

In **Case C-86/2000 HSB-Wohnbau**<sup>31</sup>, the Amtsgericht Heidelberg (Local Court of Heidelberg, Germany) referred for a preliminary ruling in the context of an application by HSB-Wohnbau GmbH, a company incorporated under German law, for entry in the German commercial register of the transfer of its registered office to Spain.<sup>32</sup>

In its order of 10 July 2001, the ECJ determined that it was apparent from the order for reference that the Local Court of Heidelberg made a reference to the Court in its capacity as an authority responsible for keeping the

---

<sup>27</sup> Ibid., p. 3387, para. 11.

<sup>28</sup> Case C-178/99 *Doris Salzmann*, [2001] ECR I-4421.

<sup>29</sup> Ibid., pp. 4438, 4440, paras. 1, 2, and 9.

<sup>30</sup> Ibid., pp. 4441-4443, paras. 11-17.

<sup>31</sup> Case C-86/2000 *HSB-Wohnbau GmbH*, [2001] ECR I-5353.

<sup>32</sup> Ibid., p. 5356, paras. 1, 2.

commercial register, there was no dispute pending before the Local Court of Heidelberg between HSB-Wohnbau and any defendant, and they were the first authority to deal with the application for entry of the company. For those reasons, the Local Court of Heidelberg was not performing a judicial function and the reference was denied.<sup>33</sup>

A final case of interest is **Case C-182/00 *Lutz and Others***<sup>34</sup>. In the case, by decision of 9 May 2000, the Landesgericht Wels (Regional Court of Wels, Austria), sitting as a commercial court in cases relating to the register of companies, referred for a preliminary ruling under Article 234 in the course of an application brought before that court by Lutz GmbH and Others. Under the Austrian Commercial Code, the statutory representatives of capital companies had to submit to the court keeping the register of companies in whose district they were established the annual accounts and the annual report. Recalling that legal obligation, by decision of 2 November 1999, the Regional Court of Wels ordered Lutz and Others to submit within four weeks the annual accounts and annual report, failing to do so resulting in a periodic penalty. In view of the fact that the Supreme Court of Austria had consistently ruled that the threat of a periodic penalty could not be the subject of an action, Lutz and Others brought an application before the Constitutional Court of Austria. Before that court, they sought a declaration that the national provisions on disclosure of annual accounts and the annual report were contrary to a number of fundamental rights and to Community law. Waiting for the ruling of the Constitutional Court, the Regional Court of Wels extended the period for submission of the accounting documents. By order of 29 November 1999, the Constitutional Court dismissed the application lodged by Lutz and Others on the ground that a periodic penalty could be suspended until a ruling had been given on the legality of the obligation breach of which attracted that penalty. In need of clarification, the Regional Court of Wels, in the present action, sought the wisdom of the ECJ on the above matters.<sup>35</sup>

After a review of the wording and case law of Article 234 of the Treaty, the European Court of Justice found that the Regional Court of Wels, when sitting as a commercial court, was not dealing with a dispute, but was simply maintaining a register of companies. They were limited to establishing whether the statutory requirements as to disclosure had been satisfied, and could, if necessary, order production of those accounting documents on a pain of a periodic penalty. Moreover, the Court found no evidence that there existed any dispute before the Regional Court of Wels between Lutz and Others and a potential defendant. Based on the above reasoning, the ECJ articulated that the Regional Court of Wels was, in performing such an activity, exercising a non-judicial function. The reference for a preliminary ruling was thereby inadmissible.<sup>36</sup>

---

<sup>33</sup> Ibid., p. 5360, paras. 14-17.

<sup>34</sup> Case C-182/00 *Application brought by Lutz GmbH and Others*, [2002] ECR I-547.

<sup>35</sup> Ibid., pp. 562, 563, paras. 8-10.

<sup>36</sup> Ibid., p. 566, paras. 15-17.



### 2.2.2.3 Remarks

The conclusion drawn from *Job Centre, Salzmann*, and *HSB-Wohnbau* was that the activities concerned had a non-judicial character, based on the following factors:

- The questions arose in proceedings related to the entry of a particular legal situation in a register;
- the referring body was the first instance seized of an application for registration;
- before proceeding with the entry, the referring entities limited themselves to establishing that the application satisfied statutory requirements;
- and, a judicial remedy lay against the decision taken.

While *Lutz and Others* also established that the Regional Court of Wels performed an administrative activity, the case distinguished itself from the above three cases, in that they did not have before them an application for entry of a particular legal situation in a register. *Lutz GmbH and Others* were already registered as a companies and the Regional Court of Wels, sitting as a commercial court, was merely requested to review a previous administrative decision on the disclosure of those companies' accounting documents.

What all these cases confirmed is that national courts and tribunals that satisfy the institutional requirements but apply the procedure for obtaining a preliminary ruling when exercising non-judicial functions are not considered courts or tribunals within the meaning of Article 234 of the Treaty.<sup>37</sup>

## 2.3 Whether the body is independent

Independence in the decision-making process is the hallmark of any civilized legal system. Consequently, this section will look at the ECJ's interpretation of that criterion when deciding whether an entity qualifies to make use of the preliminary ruling procedure.

---

<sup>37</sup> Opinion of Advocate General Geelhoed in Case C-182/00 *Lutz and Others*, [2002] ECR I-547, pp. 553-556, paras. 15-27. For further rulings on the judicial nature criterion, see Case 318/85 *Criminal Proceedings against Regina Greis Unterweger*, [1986] ECR 955; Joined Cases C-69/96 to 79/96 *Maria Antonella Garafalo and Others v. Ministero della Sanità and Unità Sanitaria Locale (USL) No. 58 di Palermo*, [1997] ECR I-5603; Case C-134/97 *Proceeding for a preliminary decision brought by Victoria Film A/S*, [1998] ECR I-7023; Case C-192/98 *Ex post facto review proceedings concerning Azienda Nazionale Autonoma delle Strade (ANAS)*, [1999] ECR I-8583; and Case C-440/98 *Ex post facto proceedings concerning Radiotelevisione Italiana SpA (RAI)*, [1999] ECR I-8597.

### 2.3.1 Pretore di Salò

Rather surprisingly, it also took some 20 years for the European Court to demand that a court or tribunal must be independent in order to make a preliminary ruling reference. The first authority establishing this factor is Case 14/86 *Pretore di Salò*<sup>38</sup>.

In the case, by order of 13 January 1986, the Pretore di Salò (Magistrate for the District of Salò, Italy, hereinafter “the Magistrate”) referred to the Court for a preliminary ruling in the course of criminal proceedings against persons unknown that were found to have violated a number of provisions relating to the protection of waters. The proceedings were initiated following a report submitted by an anglers’ association after the death of many fish in the River Chiese, due to the many dams placed in the river for hydroelectric and irrigation purposes that were said to cause significant and sudden changes in the water level. In the context of the preparatory inquiry in the aforementioned criminal proceeding, the Magistrate determined it necessary to seek the wisdom of the European Court of Justice.<sup>39</sup>

Arguing against admissibility, the Italian Government articulated that the Magistrate had the functions of both a public prosecutor and an examining magistrate, since the Magistrate carried out preliminary investigations in his capacity as a public prosecutor and, where those disclosed no grounds for continuing the proceedings, he made an order accordingly in the place of an examining magistrate. That order was not a judicial act because it did not acquire the force of *res judicata* and because no reasons needed to be given for it, whereas Italian law imposed a strict obligation to state reasons in the case of judicial acts.<sup>40</sup>

The Court, taking into account the above, determined the following:

The Court has jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which give rise to the reference for a preliminary ruling are not strictly speaking, of a judicial nature.<sup>41</sup>

### 2.3.2 Corbiau

Although reference had been made in *Pretore di Salò* to independence as one of the conditions for a body to be regarded as a court or tribunal for the purposes of Article 234, the judgement in Case C-24/92 *Corbiau*<sup>42</sup> was the first to give it its fundamental meaning.

---

<sup>38</sup> Case 14/86 *Pretore di Salò v. Persons unknown*, [1987] ECR 2545.

<sup>39</sup> *Ibid.*, p. 2566, paras. 1-4.

<sup>40</sup> *Ibid.*, p. 2567, para. 3.

<sup>41</sup> *Ibid.*, p. 2567, para. 4.

<sup>42</sup> Case C-24/92 *Pierre Corbiau v. Administration des Contributions du Grand-Duché de Luxembourg*, [1993] ECR I-1277. The Court was equally categorical in Joined Cases C-

The background was as follows. In January 1992, the Directeur des Contributions Directes et des Accises (Director of Taxation and Excise Duties) of the Grand Duchy of Luxembourg requested a preliminary ruling in the context of a question that had arisen in an administrative appeal before him and Mr. Courbiau for the repayment of excessive amounts of income tax.<sup>43</sup>

Regarding the question of admissibility, the Court of Justice articulated that the expression “court or tribunal” is a concept of Community law, which, by its very nature, 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. In this instance, the Court found that the Director of Taxation and Excise Duties did not act as such a third party. He had a clear organizational link with the departments that made the disputed tax assessment, against which the complaint submitted to him was directed. The Director of Taxation and Excise Duties was not, therefore, a court or tribunal within the meaning of Article 234 of the Treaty.<sup>44</sup>

### 2.3.3 Köllensperger and Atzwanger

In Case C-103/97 *Köllensperger and Atzwanger*<sup>45</sup>, the Tiroler Landesvergabeamt (Procurement Office of the Land Of Tyrol, Austria, hereinafter “the Procurement Office”) sought a preliminary ruling based upon questions raised in proceedings between Köllensperger and Atzwanger and the Association of Municipalities for the Schwaz District Hospital concerning the award of a contract for works relating to an extension to the Schwaz District Hospital.<sup>46</sup>

Ruling on the admissibility of the reference, the ECJ determined that the Procurement Office was established by law, its jurisdiction was compulsory, it was permanent, its procedure was *inter partes*, and it applied rules of law. Doubt, however, was cast upon whether the condition of independence was satisfied. More specifically, the Court found that the Austrian law governing that body, which included a passage referring to the cancellation of appointments of its members, was too vague, since it did not contain any specific provisions on the rejection or withdrawal of members. The ECJ found comfort, however, in the fact that the independence of the Procurement Office’s members was guaranteed by the application of the General Law on Administrative Procedure, which contained very specific provisions on member withdraw and expressly prohibited the giving of

---

74/95 and C-129/95 *Criminal proceedings against X*, [1996] ECR I-6609, in which the reference for a preliminary ruling had been made by the Procura della Repubblica (Office of the Public Prosecutor). The Court declared that it did not have jurisdiction because the prosecutor did not fulfil the requirement of independence.

<sup>43</sup> Ibid., p. 1301, paras. 1-2.

<sup>44</sup> Ibid., p. 1304, paras. 15-17.

<sup>45</sup> Case C-103/97 *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v. Gemeindeverband Bezirkskrankenhaus Schwaz*, [1999] ECR I-551.

<sup>46</sup> Ibid., p. 568, paras. 1,2.

instructions to members of the Procurement Office in performance of their duties. Consequently, the preliminary ruling reference was admissible.<sup>47</sup>

### 2.3.4 Gabalfrisa and Others

Another ruling often cited in current case-law, concerning the independent criterion, is Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others*<sup>48</sup>.

#### 2.3.4.1 Background and admissibility

In the judgement, the Court of Justice examined whether the Tribunal Económico-Administrativo Regional de Cataluña (Regional Economic and Administrative Court, Catalonia, Spain, hereinafter “the Regional Court”) constituted a court or tribunal within the meaning of Article 234. The named body made a preliminary ruling reference based upon a question raised in proceedings between several entrepreneurs/practitioners and various departments of the State Tax Administration Agency concerning the deduction of value added tax.<sup>49</sup>

Before answering the question referred, the ECJ first determined whether the Regional Court had the right to refer questions. Recalling Case C-54/96 *Dorsch Consult*<sup>50</sup>, the Court carefully checked off each of the conditions that can be taken into account when making such a determination. First, Spanish law provided for the Regional Court and stipulated that it was to rule on complaints which were submitted before them. The decisions of the tax authority could not be challenged before the administrative courts until complaints were first brought before the Regional Court. Consequently, it was of statutory origin, permanent, and had compulsory jurisdiction. Furthermore, according to Spanish law, the decisions of that body were final and binding. As to requirement that the procedure be *inter partes*, the Court reminded that this condition is not an absolute criterion and they were satisfied by the fact that the parties could lodge written submissions /evidence and request a public hearing. After finding that the Regional Court also applied rules of law, the ECJ went on to examine the independence of the body. Spanish law stipulated a separation of functions between the departments of the tax authority responsible for management, clearance, and recovery and, on the other hand, the economic-administrative courts which ruled on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority. Consequently, the European Court of Justice found that the existence of such a safeguard gave the Regional Court, unlike the Director of Taxation and Excise Duties in *Corbiau*, the character of a third party in relation to the departments that

---

<sup>47</sup> Ibid., pp. 574, 575, paras. 16-25.

<sup>48</sup> Joined Cases C-110/98 to C-147/98 *Gabalfrisa SL and Others v. Agencia Estatal de Administración Tributaria*, [2000] ECR I-1577.

<sup>49</sup> Ibid., p. 1598, paras. 1, 2.

<sup>50</sup> Case C-54/96 *Dorsch Consult v. Bundesbaugesellschaft Berling*, [1997] ECR I-4961. The case is explored in more detail in the last section of this chapter.

adopted the decision forming the subject matter of the complaint. In other words, it was sufficiently independent to be regarded as a court or tribunal for the purposes of Article 234 of the Treaty.<sup>51</sup>

#### 2.3.4.2 Critique from the Advocate General

Advocate General Saggio in his Opinion<sup>52</sup> wished to deny the Regional Court the status of a court or tribunal within the meaning of Article 234 of the Treaty. First, he articulated that the separation of functions, stipulated in Spanish law, did not provide an adequate degree of impartiality. Moreover, the Regional Court was incorporated in the Ministry of Economic Affairs and Finance, that is to say, the very authority whose acts taxpayers contested before them. The members of the Regional Court were also appointed with the approval of the Minister, who had the power to dismiss them without abiding by conditions clearly and categorically laid down by law.<sup>53</sup>

Second, the Advocate General was sceptical to the question of whether their procedure was *inter partes*. Recalling earlier case-law, he stated that while the condition is not absolute, the Court has admitted references where the defendant was not present only if that deficiency was offset by a high level of impartiality and independence in the adjudicating body. Furthermore, while the parties were able to lodge submissions and evidence in support of their claim and to request a public hearing, the Regional Court could grant or refuse such a request based on a discretionary assessment that the person concerned was expressly precluded by Spanish law from challenging.<sup>54</sup>

Finally, various other considerations were given in support of denying the preliminary ruling reference. In short, AG Saggio determined that the function of the Regional Court was not judicial in nature and that its decisions, were without exception, open to review before the administrative courts. Since these courts were able to, upon assessment, make preliminary ruling references to the ECJ, there was no danger that EC law would not be uniformly applied.<sup>55</sup>

#### 2.3.5 Schmid

In Case C-516/99 *Schmid*<sup>56</sup>, the Court was referred two questions for a preliminary ruling by the Berufungssenat (Fifth Appeal Chamber of the Regional Finance Authority for Vienna, Niederösterreich, and Burgenland, hereinafter “the Fifth Appeal Chamber”). Those questions were raised in the course of an appeal brought by Mr. Schmid, resident in Austria, against his

---

<sup>51</sup> Ibid., pp. 1610-1612, paras. 33-41.

<sup>52</sup> Opinion of Advocate General Saggio in Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others*, [2000] ECR I-1577.

<sup>53</sup> Ibid., pp. 1584, 1585, paras. 15-17.

<sup>54</sup> Ibid. p. 1583, para. 14.

<sup>55</sup> Ibid., pp. 1585-1587, paras. 18, 19.

<sup>56</sup> Case C-516/99 *Proceedings brought by Walter Schmid*, [2002] ECR I-4573. See also the Opinion of Advocate General Tizzano in Case C-516/99 *Schmid*, [2002] ECR I-4573, where a denial of admissibility was also reached.

income tax assessment notice issued by the Regional Finance Authority seeking a reduction in the tax on dividends which were paid to him by a company established in another Member State.<sup>57</sup>

As to the admissibility of the reference, the European Court of Justice found that the criterion of independence was not fulfilled. After reviewing both *Corbiau* and *Gabalfrisa and Others*, the ECJ stated that an organisational and functional link existed between the Fifth Appeal Chamber and the Regional Finance Authority. More specifically, two of the five members of the former belonged to the latter: the President of the Regional Finance Authority, by way of law, could exercise the function of President of the Fifth Appeal Chamber and the second member also came from the Regional Finance Authority, yet continued to pursue his activities within that authority and was, in that capacity, subject to the directions of his superiors. Furthermore, the President of the Regional Finance Authority had the power to nominate members of the Fifth Appeal Chamber, with no legislative provision to prevent him from modifying, at any time and at his discretion, its composition. Hence, the Fifth Appeal Chamber's members could not be said to enjoy sufficient safeguards against undue intervention or pressure on the part of the executive. Finally, the President of the Regional Finance Authority, subject to possible directions from the Finance Minister, could bring an appeal against a decision of the Fifth Appeal Chamber and on that occasion defend a point of view different from that adopted by the Fifth Appeal Chamber of which he was President. Hence, the Court found that the Fifth Appeal Chamber of the Regional Finance Authority did not constitute a court or tribunal for the purposes of Article 234 of the Treaty.<sup>58</sup>

### 2.3.6 Remarks

The deduction to be drawn from the above case-law is that a gradual relaxation of the requirement that the body should be independent has taken place. From having established its fundamental meaning in *Corbiau*, that a body which makes a preliminary ruling reference should act as a third party in relation to the authority which adopts the decision forming the subject matter of the proceeding, the Court in *Köllensperger and Atzwanger* and *Gabalfrisa and Others* considered that generic national provisions intended to ensure their impartiality and independence were adequate. Despite protests in the legal literature and by Advocate Generals, the ECJ has overlooked the requirement that the body taking the decision should not be linked to the parties and instead focused on the point that its objective should be to carry out its task independently and under its own responsibility.<sup>59</sup>

---

<sup>57</sup> *Ibid.*, pp.4594, 4595, paras. 1, 2.

<sup>58</sup> *Ibid.*, pp. 4606-4608, paras. 34-44.

<sup>59</sup> Note 11 above, pp. 9452-9455, paras.19-28.

## 2.4 The inter partes criterion: Politi and beyond

Though we have seen in *Gabalfrisa and Others*, which recalls *Dorsch Consult*, that the *inter partes* criterion is not absolute, it is, nonetheless, important to briefly examine the various cases on the matter.

While *Vaassen (née Göbbels)* first brought forth the *inter partes* condition, **Case 43/71 Politi**<sup>60</sup> and **Case 162/73 Birra Dreher**<sup>61</sup> made clear that a preliminary ruling reference to the Court of Justice is not conditional on whether the proceedings are *inter partes*. The decisive factor is that the body seeking the preliminary ruling is exercising the functions of a court or tribunal and considers an interpretation of EC law essential for it to reach a decision.

In **Case 70/77 Simmenthal**<sup>62</sup> and **Joined Cases C-277/91, C-318/91, and C-319/91 Ligur Carni and Others**<sup>63</sup>, the ECJ articulated that in the interest of the proper administration of justice that a question *should* be referred only after hearing both parties. Despite the foregoing, the Court determined that it was for the national courts alone to assess the necessity of a reference.

At first glance, it might seem that the ECJ has not attached much importance to the *inter partes* requirement. However, if the facts are studied carefully it will be noted that the principle was not absent in the above cases. The absence was simply compensated for by the impartiality and independence of the bodies concerned. In later judgements, the Court nonetheless, seems to have abandoned that course, *Gabalfrisa and Others* and *Dorsch Consult* being prime examples.

Consequently, the requirement that the procedure be *inter partes* has lost ground and the Court will, in most cases, not assume that a reference for a preliminary ruling is inadmissible based solely on the fact that the proceedings are undefended.<sup>64</sup>

---

<sup>60</sup> Case 43/71 *Politi S.A.S. v. Ministry for Finance of the Italian Republic*, [1971] ECR 1039, in which the referring President of the Tribunale di Torino was hearing a special procedure on the basis of the plaintiff's allegations alone, without any prior discussion between the parties.

<sup>61</sup> Case 162/73 *Birra Dreher SpA v. Amministrazione delle Finanze dello Stato*, [1974] ECR 201, in which the question arose in an Italian summary procedure in which the court could make an order against the defendant based on the plaintiffs allegations alone, without giving him the opportunity to submit his own observations, although afterwards it was possible to raise objections to the decision.

<sup>62</sup> Case 70/77 *Simmenthal SpA v. Amministrazione delle Finanze dello Stato*, [1978] ECR 1453, in which the reference was made by the Pretura di Alessandria in collection proceedings in which the court gave judgement on the sole basis of plaintiff allegations.

<sup>63</sup> Joined Cases C-277/91, C-318/91, and C-319/91 *Ligur Carni Srl and Others v. Unità Sanitaria Local No. XV di Genova and Others*, [1993] ECR I-6621, in which questions were referred by the President of the Tribunale di Genova in proceedings for the adoption of interim measures.

<sup>64</sup> Note 11 above, paras. 29-38.

## 2.5 Compulsory jurisdiction: Nordsee, Danfoss, & Almelo and Others

One of the factors defining a court or tribunal for the purposes of Article 234 of the Treaty is whether its jurisdiction is compulsory. That left arbitration tribunals out of the picture.

In **Case 102/81 Nordsee**<sup>65</sup>, a German arbitrator, settling a dispute between several German shipbuilders, sought a preliminary ruling. While the Court noted that there existed similarities between the activities of an arbitration tribunal and those of an ordinary court or tribunal, those characteristics did not suffice to give the arbitrator the status of a court or tribunal within the meaning of Article 234. More specifically, the parties were under no obligation to refer their disputes to arbitration. If questions of Community law were raised in arbitration resorted to by agreement, the ordinary courts could be called upon to examine them either in the context of their collaboration with arbitration tribunals or in the course of reviewing the arbitration award.<sup>66</sup>

On the other hand, in **Case 109/88 Danfoss**<sup>67</sup>, the Court ruled the Faellige Voldgiftsret (a Danish industrial arbitration board) to constitute a court or tribunal. In particular, comfort was found in the fact that Danish law granted the industrial arbitration board final jurisdiction, the jurisdiction did not depend upon the parties' agreements – since either could bring a case before the board irrespective of the objections of the others, and the composition of the industrial arbitration board was not within the parties' discretion<sup>68</sup>

Finally, in **Case C-393/92 Almelo and Others**<sup>69</sup>, the European Court of Justice was asked to determine whether a national court or tribunal which determined an appeal against an arbitration award was to be regarded as a court or tribunal for the purposes of Article 234 of the Treaty if under the arbitration agreement made between the parties it was to give judgement according to what appears fair and reasonable.<sup>70</sup> The Court answered affirmatively and gave the following reasoning:

It follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5 of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law, even where

---

<sup>65</sup> Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982] ECR 1095.

<sup>66</sup> *Ibid.*, pp. 1108-1111, paras. 1, 2, 10, 11, 14.

<sup>67</sup> Case 109/88 *Handels- og Kontorfuntionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on the behalf of Danfoss*, [1989] ECR 3199.

<sup>68</sup> *Ibid.*, pp. 3324, 3325, paras. 7-9.

<sup>69</sup> Case C-393/92 *Municipality of Almelo and Others v. Energiebedrijf Ijsselmij NV*, [1994] ECR I-1477. See also Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, [1999] ECR I-3055, in which the Court of Justice again accepted several questions referred for a preliminary ruling in the context of an appeal against an arbitration award.

<sup>70</sup> *Ibid.*, p. 1514, para. 20.



it gives judgement having regard to fairness, observes the rules of Community law, in particular those relating to competition<sup>71</sup>

## 2.6 The Court's current position: the legacy of Dorsch Consult

As we have seen, beginning with *Vaassen (née Göbbels)* and being refined throughout time, the Court can take a number of criteria into account when defining a court or tribunal for the purposes of Article 234 of the Treaty. In particular: whether law establishes the body, whether it is permanent, whether it applies rules of law, whether its jurisdiction is compulsory, whether it is independent, whether its procedure is *inter partes*, and whether its final decision is judicial in nature. Nonetheless, these criteria serve only as a road map and the European Court of Justice has the final say in the matter. Consequently, the ECJ has not always adopted a consistent approach in its jurisprudence, opting for admissibility in questionable cases. Despite what may seem as a somewhat “pick and choose” methodology, Case C-54/96 *Dorsch Consult*<sup>72</sup> is a leading authority, cited consistently in recent case-law, concerning the Court's current position on the matter. A further examination of the judgement is thus necessary.

As to the background, by order of 5 February 1996, the Vergabeüberwachungsausschuß des Bundes (Federal Public Procurement Awards Supervisory Board, hereinafter “the Federal Supervisory Board”) referred to the Court for a preliminary ruling a question raised in proceedings between Dorsch Consult Ingenieurgesellschaft mbH and a contract awarding authority concerning a procedure for the award of a service contract. On 28 June 1995, the awarding authority published in the Official Journal of the European Communities a notice advertising the award of a contract for architectural and construction engineering services. Dorsch Consult bid for the contract and was informed that its proposal was the most advantageous economically, yet was not chosen by the contract awarding authority. Disappointed with the decision, Dorsch Consult sought to have the contract-awarding procedure stopped and the contract awarded to it by the Federal Ministry for Regional Planning, Building and Urban Planning, the body responsible for reviewing public procurement awards. The latter found that it had no power to review the award of contracts when they relate to services and Dorsch Consult appealed before the Federal Supervisory Board that the review body had wrongly declined jurisdiction. In turn, the Federal Supervisory Board suspended proceedings and sought the guidance of the ECJ.<sup>73</sup>

Before the question submitted by the Federal Supervisory Board was addressed, it was necessary to determine whether the body was to be

---

<sup>71</sup> *Ibid.*, p. 1515, para 23. Article 5 is currently Article 10.

<sup>72</sup> Note 50 above.

<sup>73</sup> *Ibid.*, pp. 4984-4987, paras. 1-7.

regarded as a court or tribunal under Article 234. Recalling earlier case-law, the Court began its reasoning.<sup>74</sup>

Contrary to the Commission's arguments, the Court determined that the Federal Supervisory Board was established by law and was permanent. German law provided for the establishment of the body and it was deemed immaterial that domestic legislation had not conferred upon it powers in the specific area of public service contracts.<sup>75</sup>

As regards the question of compulsory jurisdiction, the Commission submitted that the Federal Supervisory Board did not fulfil the criterion, a condition, which, in its view, could mean two things: either that the parties were required to apply to the relevant review body for settlement of their dispute or that determinations of that body were to be binding. The Commission, adopting the second interpretation, concluded that German legislation did not provide for the determinations made by the Federal Supervisory Board to be enforceable. Shooting down the Commission's arguments, the Court of Justice concluded that German law established the Federal Supervisory Board as the only body for reviewing the legality of determinations made by review bodies. Moreover, when they found such determinations to be unlawful, they directed the relevant review body to make a fresh determination in conformity with the Federal Supervisory Board's findings on points of law. Hence, compulsory jurisdiction and binding decisions of a judicial nature existed in the eyes of the Court.<sup>76</sup>

The Commission also stated that, according to the Federal Supervisory Board's own evidence, procedure before the entity was not *inter partes*. The European Court reiterated that the requirement that the procedure be *inter partes* was not an absolute criterion, adding that the parties were indeed heard before any determination was made.<sup>77</sup>

Moving on to the application of rules of law criterion, the Court found that the Federal Supervisory Board was required to apply provisions governing the award of public contracts, laid down in Community directives and domestic regulations adopted to transpose them.<sup>78</sup>

Finally, both Dorsch Consult and the Commission considered that the Federal Supervisory Board was not independent. They pointed out that it was linked to the organizational structure of the Bundeskartellamt – which was itself subject to supervision by the Ministry for Economic Affairs, that the term of office of the chairman and the official assessors were not fixed,

---

<sup>74</sup> Ibid., p. 4992, paras. 22-23. At para. 23 the Court acknowledged the judgements in Case 61/65 *Vaassen (née Göbbels)*, [1966] ECR 2612; Case 14/86 *Pretore di Salò*, [1987] ECR 2545, para.7; Case 109/88 *Danfoss*, [1989] ECR 3199, paras. 7, 8; Case C-393/92 *Almelo and Others*, [1994] ECR I-1477; and Case C-111/94 *Job Centre*, [1995] ECR I-3361, para 9, as exemplifying their current position as to what may constitute a court or tribunal.

<sup>75</sup> Ibid., p. 4993, paras 24-26.

<sup>76</sup> Ibid., pp. 4993, 4994, 4996 paras. 27-29, 37.

<sup>77</sup> Ibid., p. 4994, paras. 30, 31.

<sup>78</sup> Ibid., p. 4995, para. 33.

and that the provisions guaranteeing impartiality applied only to lay members. The Court observed that, according to domestic legislation, the Federal Supervisory Board was to carry out its task impartially, independently, and under its own responsibility, subject only to observance of the law.<sup>79</sup>

For those reasons, the Federal Supervisory board was deemed a court or tribunal for the purposes of Article 234 of the Treaty, so that the question it had referred was admissible. Overall, a rather lenient attitude taken by the Court, yet, upon reflection, the admissibility ruling was, in my opinion, on par with earlier jurisprudence on the matter.

---

<sup>79</sup> Ibid., pp. 4995, paras. 35-36.

### 3 An Advocate General's concern regarding the Court's approach

Having relayed, in the previous chapter, the Court's definition of a court or tribunal within the meaning of Article 234, let us, in the interest of letting both sides be heard, explore Advocate General Ruiz-Jarabo Colomer's discouragement with the Court's approach.

In his Opinion<sup>80</sup>, AG Colomer reviewed the various judgements, most of which are to be found in Chapter 2, where the Court set the tone as to what can constitute a court or tribunal for the purposes of a preliminary ruling reference. He delivered the following hard-hitting conclusion:

(...) the Treaty does not define the term "national court or tribunal". Nor does the Court of Justice, which has merely laid down a number of criteria for guidance, such as whether the body is established by law, whether it is permanent and independent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether the decision is of a judicial nature, and whether it applies rules of law.

The result is case-law which is too flexible and not sufficiently consistent, with the lack of legal certainty which that entails. The profound contradictions noted between the solutions proposed by the Advocates General in their Opinions and those adopted by the Court of Justice in its judgements illustrate that the path is badly signposted and there is therefore a risk of getting lost. The case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred by Sancho Panza as governor of the island of Barataria would be accepted.<sup>81</sup>

Adding fuel to the just named, he proceeded to show, through a review of the Court's jurisprudence, how the requirement that the body should be independent has gradually been relaxed, the *inter partes* criterion has diminished in importance, and the final decision of a judicial nature requirement adds only further confusion to the equation.<sup>82</sup>

As a direct consequence of his observations, AG Colomer was of the opinion that, since Article 234 of Treaty is fundamentally essential to the construction and consolidation of the Community legal order, the ground rules concerning the Court's jurisdiction must be clearly defined in a Community governed by rule of law. Both the national courts and Community citizens are entitled to know who may be deemed a court or tribunal under Article 234. He added that in order to further the uniform dissemination and application of Community law, in the early years of its development, the Court of Justice was justified in encouraging the use of the preliminary ruling procedure by using a broad interpretation of the

---

<sup>80</sup> Note 11 above.

<sup>81</sup> *Ibid.*, pp. 9450, 9451, paras. 13, 14.

<sup>82</sup> *Ibid.*, pp. 9452-9461, paras. 19-47.

definition of a court or tribunal. However, what was previously clearly justified is today disturbing and a hinder to the work of the Court. Therefore, the Advocate General stated that, “as Community law now stands, there is a need to tighten the definition of a court or tribunal of a Member State, to bring together its various components to provide a precise frame of reference and so to prevent uncertainty from becoming a permanent feature of this sphere”.<sup>83</sup>

Proposing a new definition of a court or tribunal under Article 234 of the Treaty, AG Colomer articulated that it would be unsettling if the preliminary ruling procedure would be made available to bodies that do not give judgements, in other words executive bodies whose decisions are open to review by judicial bodies. First, Article 234 introduces an instrument of judicial cooperation, a dialogue by courts and between courts. Second, the Advocate General added that the judicial body which reviews an administrative decision adopted on the basis of the reply given by the Court of Justice may consider that it was unnecessary to make the reference or that it should have been approached from another point of view. Consequently, if a judicial body, reviewing a decision of an executive body, decides that neither the interpretation nor the application of rules of Community law are at issue in the point, the reference for a preliminary ruling and the time/expense invested will have been utterly pointless, with the added disadvantage that the legitimacy of the Court’s judgments is undermined. On the other hand, if the reviewing body considers that the question should have been formulated differently, two options are available: it could in theory seek a new preliminary reference or for reasons of procedural economy find it better to just let be. In short, he determined that the acceptance of references for preliminary rulings by administrative bodies deprives the “real judicial body” to a large extent the right to use the procedure, seriously hinders the dialogue between courts established by the Treaty, distorts its aim, and undermines the judicial protection of the Community citizen.<sup>84</sup>

In order to avoid such a situation, the Advocate General maintained that as a *general rule* the bodies which form part of the national court systems are always courts or tribunals under Article 234, with the reservation that the referring body must act in the capacity of an independent court or tribunal and have a dispute between litigants before it that it is called upon to settle by interpreting and applying legal rules. In short, it must be exercising its judicial powers. As an *exception to the general rule*, Advocate General Colomer was willing to accept that the Court of Justice should allow, for reasons of effective legal protection, the questions referred for a preliminary ruling by a body that does not form part of the national court system, when the referring body has the last word in the national legal order. Such an exception was, however, to be made strictly on the condition that the Court

---

<sup>83</sup> Ibid., pp. 9464, 9465, paras. 61, 63, 64

<sup>84</sup> Ibid., pp. 9468-9470, paras. 75, 76, 78-80.

of Justice adheres rigorously to the criteria of independence and adversarial proceedings.<sup>85</sup>

According to Colomer, the central advantage to his approach was that it was more straightforward and had the virtue of rendering much clearer results than seen in the Court's previous case-law. With regard to preliminary ruling questions referred by bodies that form part of the court system of a Member State, the ECJ would only need to confirm that they were acting in the exercise of their power to give judgment. On the other hand, if the question came from a body that is not part of that system, the Court would first have to determine whether the entity's decision lacked further judicial review and then meticulously check that it fulfils the criteria characterising a body which exercises a function of a judicial nature. A second advantage, according to the Advocate General, was that his proposal would effectively reduce the number of references for preliminary rulings. He was highly concerned that a significant increase in the number of cases before the Court could adversely affect the uniform application of Community law, which Article 234 of the Treaty purports to safeguard.<sup>86</sup>

Obviously, the Court in Case C-17/00 *De Coster*<sup>87</sup> did not agree with his recommendations and, adopting yet another liberal attitude, allowed the reference for a preliminary ruling. Moreover, since this short section can in no way do Advocate General Colomer's arguments the justice they so rightfully deserve, I would like to recommend that those with further interest on the topic take the time to read his revealing Opinion in its entirety.

---

<sup>85</sup> Ibid., pp. 9471-9476, paras. 83-95.

<sup>86</sup> Ibid., p. 9476, paras. 96, 97.

<sup>87</sup> Case C-17/00 *François De Coster v. Collège des bourgemestre et échevins de Watermael-Boitsfort*, [2001] ECR I-9445.

# 4 The Opinion of Advocate General Jacobs in Syfait

A plausible consensus, based on my own review of the case-law and the critique of various Advocate Generals, is that the Court has adopted, under certain circumstances, a rather liberal approach when determining which bodies constitute a court or tribunal for the purposes of a preliminary ruling reference. While certain criteria exist as guidance as to what constitutes a court or tribunal, the Court has in several rulings accepted vague assurances that these are fulfilled, possibly with regard to the important role preliminary rulings play for the application of Community law. The Opinion of AG Jacobs in Case C-53/03 *Syfait*<sup>88</sup>, delivered on 28 October 2004, is one such ruling that incorporates all of the just named. Consequently, in the service of legal research, this section will relay the decision on admissibility, analyze its correctness, and conclude with a discussion on its implications.

## 4.1 Background and admissibility

In the case, the Epiteproi Antagonismou (Greek Competition Commission) referred to the ECJ preliminary questions concerning whether and in what circumstances a dominant pharmaceutical company may, in order to limit the parallel trade in its products, refuse to meet in full the orders that it receives from pharmaceutical wholesalers. Causing quite a stir in both the legal and business communities, AG Jacobs reached the conclusion that such conduct does not automatically constitute an abuse within the meaning of Article 82 of the Treaty if it can be objectively justified. While not legally binding on the Court, a future positive ruling on this matter by the ECJ will have important consequences for certain pharmaceutical corporations conducting business within the Community.<sup>89</sup>

Not downplaying the importance of the above potential implications, a more relevant aspect brought forth in the case is whether the Greek Competition Commission constituted a court or tribunal within the meaning of Article 234. AG Jacobs answered the question in the positive. The following will provide for his reasoning.

As to the admissibility of the reference, according to Article 234(2) of the Treaty, only a court or tribunal of a Member State may refer questions to the Court of Justice for preliminary ruling and it is clear from the Court's case-law that the concept of "court or tribunal" is one of Community law.<sup>90</sup>

---

<sup>88</sup> Note 6 above.

<sup>89</sup> Hull, David W., *Parallel trade in pharmaceutical products in Europe: The Advocate General's Opinion in Syfait v GlaxoSmithKline*, Competition Law Insight, 9 November 2004, pp. 3-6, [www.cov.com/publications/download/oid48041/504.pdf](http://www.cov.com/publications/download/oid48041/504.pdf).

<sup>90</sup> Note 6 above, para. 17.

As examined in the previous chapters, several criteria exist in the Court's jurisprudence as being relevant to the assessment whether a given entity constitutes a court or tribunal within the meaning of Article 234. More specifically, these include whether law establishes the body, whether it is permanent, whether it applies rule of law, whether its jurisdiction is compulsory, whether it is independent, whether its procedure is *inter partes*<sup>91</sup>, and whether its final decision is judicial in nature<sup>92</sup>. The Greek Competition Commission, the European Commission, and GlaxoSmithKline were unanimously of the view that the body in question met the named criteria. Two sets of complainants contested the admissibility of the reference in their written submissions, yet one of these later changed its position and accepted that the Greek Competition Commission could refer questions under Article 234 of the Treaty. The Swedish Government made no submissions as to the admissibility of the reference.<sup>93</sup>

AG Jacobs, after an analysis of the information supplied in the order for reference, agreed that the Greek Competition Commission clearly satisfied many of the criteria that the Court has in the past identified as relevant when considering whether a given body may be classified as a court or tribunal. More specifically, he determined the following:

- The Greek Competition Commission was permanently established by Article 8 of Law 703/77 on the control of monopolies and oligopolies and protection of free competition as the body which was competent for ensuring observance of the provisions of that law;
- it reached its decisions by applying both domestic and Community competition norms;
- and, its jurisdiction was compulsory since it had the sole competence to impose penalties provided for by Law 703/77.<sup>94</sup>

AG Jacobs was, nonetheless, of the opinion that the factors thus far considered, while probably necessary for any judicial authority, would equally apply to an administrative enforcement agency. He reasoned that more distinctive of a court or tribunal was the fact that both complainants and respondents had the option of being legally represented and were accorded procedural rights in hearings before the Greek Competition

---

<sup>91</sup> See, in particular, the judgments in Case C-54/96 *Dorsch Consult Ingenieurgesellschaft* [1997] ECR I-4961, at paragraph 23 and the case law cited therein: Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, at paragraph 33, and Case C-516/99 *Schmid* [2002] ECR I-4573, at paragraph 34. All the above rulings are provided for in Chapter 2 of the thesis.

<sup>92</sup> See the order in Case C-138/80 *Borker* [1980] ECR 1975, at paragraph 4, and the judgements in Case C-111/94 *Job Centre* [1995] ECR I-3361, at paragraph 9, and Case C-182/00 *Lutz and Others* [2002] ECR I-547, at paragraphs 15 and 16. These judgments are also found in Chapter 2 of the thesis.

<sup>93</sup> Note 6 above, paras. 18, 19.

<sup>94</sup> *Ibid.*, para. 20.



Commission. In AG Jacobs view, such guarantees reasonably fulfilled the *inter partes* criterion.<sup>95</sup>

Despite having identified certain characteristics that aided in allowing the Greek Competition Commission to classify as a court or tribunal within the meaning of Article 234, Advocate General Jacobs felt the need to elaborate upon whether the entity's structure and composition was consonant with those of an independent judicial authority.<sup>96</sup>

As far as the composition of the Greek Competition Commission was concerned, it consisted of nine members appointed by the Minister of Development for a three-year period. The Minister chose four of the members from lists of three candidates supplied to him by trade and industry bodies. The remaining five members were as follows: one member from the State Legal Service or other high judicial officer, two academics – one a lawyer and the other an economist, and two persons of acknowledged repute and relevant experience. Moreover, Article 8(1) of Law 703/77 expressly designated the Greek Competition Commission as an “independent authority”. Attached to the just named was a secretariat with the task of investigating cases arising before the former and making written proposals as to how they should be resolved. According to the President of the Greek Competition Commission and the Greek Competition Commission, the secretariat was a fully independent entity, since the President acted as the secretariat's administrative superior only when it came to the exercise of certain disciplinary powers and neither the President nor the Greek Competition Commission was involved in the secretariat's proposals.<sup>97</sup>

Having reviewed the above structure and composition, Jacobs had two specific doubts. First, he was of the view that it was relevant when assessing whether a body was judicial in nature to consider how many of its appointees possessed qualifications as lawyers and judges. To this regard, the Greek Competition Commission had only two lawyers out of nine total members and there existed no legal guarantees that the President of the Greek Competition Commission would be legally qualified. AG Jacobs argued that such a limited number of posts specifically assigned to lawyers raised certain doubts as to the Greek Competition Commission's designation as a court or tribunal. Despite his initial reservation, he concluded that the limited number of posts reserved for lawyers or judges was not sufficient to rule out its judicial status. The Advocate General found consolation in the following:

- Persons of acknowledged repute with experience in national and Community economic law and competition policies were to hold two further positions;

---

<sup>95</sup> Ibid., para. 21.

<sup>96</sup> Ibid., para. 22.

<sup>97</sup> Ibid., paras. 23-25.

- all the representatives on the body were described in the order for reference as having acknowledged experience with regard to competition law and were bound to exercise their duties in accordance with the law;
- and, it could be reasonably expected to have a lower proportion of personnel holding purely legal qualifications on a judicial body charged with operating in a complex technical field such as competition law.<sup>98</sup>

The Advocate General's second doubt concerned the structural links between the Greek Competition Commission and its secretariat. Recalling the ECJ's ruling in *Gabalfrisa and Others*<sup>99</sup>, the operational separation between a judicial body and an administrative body establishes judicial independence. In that case, the European Court of Justice allowed a reference from a regional body in Spain responsible for the hearing of fiscal complaints partly on the basis that a separation existed between its functions and those of the State Tax Administration Agency whose departments adopted the decision forming the subject matter of the complaint. In the present case, AG Jacobs stated that only if the secretariat had the necessary degree of separation from the Greek Competition Commission could it qualify as a third party independent of both the party being investigated and of the Greek Competition Commission as a judge. To this regard, the Advocate General noted that, according to the order for reference, the President of the Greek Competition Commission could not influence investigations conducted by the secretariat. Nonetheless, he was sceptical of the President's role as the secretariat's administrative superior in the exercise of certain disciplinary powers and the fact that no mention was made of any concrete rules or safeguards designed to guarantee the investigatory independence of the secretariat. AG Jacobs was of the opinion that the just named situated the Greek Competition Commission precariously close to that of an administrative authority with certain judicial characteristics. On balance, however, the Advocate General found that it was of sufficient judicial character to qualify as a court or tribunal for the purposes of Article 234. First, he articulated that it was not likely that the exercise of disciplinary powers by the President of the Greek Competition Commission over the secretariat could influence the latter's investigations. Second, Advocate General Jacobs concluded that any threat to the operational separation of the secretariat's investigations was to some degree protected by the Greek Competition Commission's hearings, since the parties by way of their own submissions in the *inter partes* proceedings ensured fair decisions.<sup>100</sup>

---

<sup>98</sup> *Ibid.*, para 26. While I am not absolutely sure as to the relevance of the number of members possessing strict legal qualifications in the Greek Competition Commission, Advocate General Colomer in his Opinion in Case C-17/00 *De Coster* also articulated on the legal qualifications of members of administrative bodies in his quest to deny such entities the right to make use of Article 234, note 11 above, pp. 9469, para. 77.

<sup>99</sup> Note 48 above.

<sup>100</sup> Note 6 above, paras. 27-34.

Having found all the criteria fulfilled as to what constitutes a court or tribunal for the purpose of Article 234 of the Treaty, the Advocate General added an array of further arguments for the admissibility of the reference. First, in Case C-67/91 *Asociación Española de Banca Privada and Others*<sup>101</sup>, the Court admitted a reference from a competition authority, notably the Spanish Tribunal for the Defence of Competition. The body shared many of the same attributes as the Greek Competition Commission, since it too was a permanent body established by law with responsibility for applying competition rules following an adversarial procedure and it acted after receiving a report from a separate body. Second, Article 35 of Regulation 1/2003<sup>102</sup> recognises that Member States have the possibility of conferring the tasks of a competition authority upon bodies having judicial characteristics, and Article 35(4) of the same Regulation preserves the independence of such bodies. Third, AG Jacobs took the view that judicial economy considerations could favour allowing a reference at the earliest possible stage. In essence, such a system might potentially eliminate the need for subsequent proceedings before a reviewing court in order to make an admissible preliminary ruling reference. He added that a specialised competition authority having judicial characteristics might be better placed to identify the relevant issues of Community competition law than a generalist court charged with reviewing the decisions of the former body at a subsequent stage. Fourth, regarding the decentralisation of Community competition law brought on by Regulation 1, Advocate General Jacobs reasoned that the possibility for judicially structured competition authorities to refer questions to the ECJ would improve the uniform application of Community law under such a system. Finally, following from the ruling in Case C-198/01 *CIF*<sup>103</sup>, national competition authorities are obliged to disapply national legislation which requires or facilitates conduct contrary to Article 81(1), or which reinforces the effects of such conduct, specifically with regard to price fixing or market sharing arrangements. AG Jacobs reasoned that such a possibility provided further argumentation for a generous approach towards references from such authorities, in order to ensure that any uncertainties as to the applicable Community rules were clarified before national legislation was disapplied.<sup>104</sup>

Based on all the above, Advocate General Jacobs reached his final conclusion that the Greek Competition Commission was a court or tribunal within the meaning of Article 234 of the Treaty. The order for reference was admissible and Jacobs proceeded to consider the substantive issues raised by the body.

---

<sup>101</sup> Case C-67/91 *Dirrección General de Defensa de la Competencia v. Asociación Española de Banca Privada (AEB) and Others*, [1992] ECR I-4785.

<sup>102</sup> Note 5 above.

<sup>103</sup> Case C-198/01 *Conorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-8055.

<sup>104</sup> Note 6 above, paras. 35, 44, 45.

## 4.2 A correct Opinion?

While Advocate Generals often have impeccable knowledge in the workings of Community law, that is not to say they are free from fault. Hence, the goal of this section is to analyze briefly what I see as both correct and incorrect judgement calls made on behalf of AG Jacobs in his quest to allow the Greek Competition Commission the use of the preliminary ruling procedure.

To begin with, I would like to commend Advocate General Jacobs for not straying in the least bit from the Court's earlier jurisprudence defining a court or tribunal within the meaning of Article 234 – he too seems a loyal follower of the ECJ's rather liberal attitude on the matter. Consequently, I can do nothing more than fully agree with his conclusions that the Greek Competition Commission is established by law, its jurisdiction is compulsory, and it reaches decision through an application of domestic and Community competition law. As to the procedure before the Greek Competition being *inter partes*, one must recall that this is not an absolute criterion and that they allow both complainants and respondents the right to take part in their decision-making process.

As to the question of the Greek Competition Commission being independent, this is where AG Jacobs arguments and my own opinion collide. In what he calls a borderline scenario, he nonetheless opts to find that criterion to be reasonably fulfilled. While Greek law designates the body and its members as being independent, the order for reference states that the secretariat's investigations are without outside influence, and the Advocate General seems just a little concerned with the exercise of disciplinary power by the Commission's President over the secretariat, I strongly disagree with previous Court rulings that vague national provisions providing for independence actually ensure independence.<sup>105</sup> Moreover, AG Jacob's argument that operational separation between the two bodies is sufficiently guarded against by the *inter partes* hearings before the Greek Competition Commission is rather weak and a quick fix at most. By using that argument and relying too readily on the Court's liberal jurisprudence on the issue, the Advocate General is guilty of free-thought treason.

In total agreement with Advocate General Colomer, "independence is not a fortuitous, but an inherent, element of the judicial function". Independence must not only be presented externally through legislative measures, but also internally in a body's organizational structure.<sup>106</sup> I am not the least bit convinced this can be said of the Greek Competition Commission and its secretariat. While Regulation 1 recognises the possibility of conferring the tasks of a competition authority upon bodies having judicial characteristics and AG Jacobs reasons that their right to make use of Article 234 of the

---

<sup>105</sup> See Case C-103/97 *Köllensperger and Atzwanger* and Case C-147/98 *Gabalfrisa and Others*, Note 45 and 48 above.

<sup>106</sup> Note 11 above, p. 9474, para. 92.

Treaty could improve the uniform application of Articles 81 and 82, one cannot simply, for those reasons, pretend that full independence exists. Moreover, as we will see in a later section, it is not entirely certain that allowing certain NCAs the right to refer questions to the Court will have the above named effect.

In conclusion, while Advocate General Jacobs has delivered an Opinion that is consistent with the Court's earlier jurisprudence, it is my sincere hope that the European Court of Justice takes a step back from their previous liberalism and denies the admissibility of the Greek Competition Commission's reference.

### **4.3 The potential implications of *Syfait***

According to Article 222 of the Treaty, the main task of an Advocate General is to make impartial and independent submissions on cases brought before the Court of Justice, in order to *assist* the Court in the performance of their task. While these submissions, in the form of Opinions, are not binding upon the Judges of the Court, they still provide both legalists and scholars with valuable insight into the workings of Community law. Hence, this section is only theoretical in nature, realisation of its conclusions being dependent upon a future green light by the European Court of Justice.

#### **4.3.1 Background: the role of national courts and competition authorities under Regulation 1/2003**

In order to gain a better understanding of the potential implications of *Syfait*, a brief summary of the national competition authorities' new role under Regulation 1 is warranted. Let us begin.

For roughly four decades, Council Regulation 17 of 6 February 1962<sup>107</sup> had allowed a Community competition policy to develop that had helped to anchor a common competition culture within the EC. However, in light of a future Member State enlargement and a completed Common Market, the time was deemed ripe to replace that legislation.<sup>108</sup> On 1 May 2004 that dream was realized with the entering into force of Council Regulation 1/2003 and six Commission Notices<sup>109</sup>, a.k.a "The Modernization Package".

---

<sup>107</sup> Council Regulation 17/62 first regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ L13/204. Articles 85 and 86 are currently Articles 81 and 82.

<sup>108</sup> Note 5 above, para. 1 of the *Preamble* section.

<sup>109</sup> The Notices are as follows: Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C103/43; Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54; Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101/65; Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), [2004] OJ C101/78; Commission Notice Guidelines on the effect on trade concept in Articles 81

The fundamental changes brought by Regulation 1 were as follows:

- The obligation to notify an agreement or business practice to the Commission, which was previously an absolute condition for obtaining an exemption under Article 81(3) EC, was abolished. Consequently, agreements caught by Article 81(1) of the Treaty that satisfy the conditions of Article 81(3) EC shall not be prohibited, no prior decision to that effect being required.<sup>110</sup>
- By way of this directly applicable exemption system, the national competition authorities and courts have the power to apply not only Article 81(1) and Article 82 of the Treaty, which already had direct applicability by virtue of the case law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty. In other words, national competition authorities and courts are to decide whether the conditions of Article 81(3) EC are satisfied each time they confirm an agreement to be restrictive of competition within the meaning of Article 81(1) of the Treaty.<sup>111</sup>
- In all cases that have an effect on trade between Member States, the EC competition rules will be applied. Where a case falls inside the scope of application of Articles 81 and 82, Member States' courts and competition authorities will not be able to base their decisions solely on national law. Under Regulation 1, they have an obligation to apply the EC competition rules, at least alongside national rules or alternatively Articles 81 and 82 EC on a stand-alone basis.<sup>112</sup>

Put simply, the enforcement of Community competition law is currently decentralized through a three-tier application (national courts, national competition authorities, and the Commission) of Articles 81 and 82 in their entirety. The goal is to increase Member State involvement in the fight against restrictive agreements with a Community dimension and to allow the Commission to concentrate more resources on serious infringements of the EC competition provisions.<sup>113</sup>

### **4.3.2 The positive and negatives of allowing national competition authorities the right to use Article 234**

Being the optimist that I am, let us first see to the positive in allowing national competition authorities to send a reference to the Court.

---

and 82 of the Treaty, [2004] OJ C101/81; and Commission Notice on the application of Article 81(3) of the Treaty, [2004] C101/97. Regulation 1 and the named Notices can be found on [www.europa.eu.int/comm/competition/antitrust/legislation](http://www.europa.eu.int/comm/competition/antitrust/legislation).

<sup>110</sup> Note 5 above, Article 1.

<sup>111</sup> Ibid., Articles 1-3 read together.

<sup>112</sup> Ibid., Article 3.

<sup>113</sup> Ibid., paras. 3, 4 of the *Preamble* section.

As mentioned above, Articles 81 and 82 of the Treaty are as of May 2004 to be applied in their entirety by the national competition regimes, currently 25 Member States' courts and competition authorities, each with varying experience in their usage. Consequently, due to the relative difficult application of those provisions and the large number of actors reaching decisions on their basis, a widely forthcoming argument is that such a system presents potential risks to the uniform application of those provisions. While Community legislators have placed certain safeguards in place – such as the creation of the European Competition Network (comprising the Commission and all the Member States' competition authorities), Chapter IV of Regulation 1 on cooperation between the national bodies and the Commission, and the various Commission Notices – a risk for inconsistency looms, nonetheless, precariously close.

Consequently, by allowing NCAs, with certain judicial characteristics, the opportunity to seek the advice of the European Court of Justice could provide an additional safeguard to ensure that Articles 81 and 82 are applied in a correct and uniform manner. Nonetheless, as David W. Hull pointed out in the November 2004 issue of *Competition Law Insight*, “ although a liberal interpretation of court or tribunal that makes it easier for competition authorities to seek guidance from the ECJ is a welcome step in promoting uniformity, it may be difficult to achieve any real measure of uniformity in the absence of a right of appeal to the ECJ on points of EU competition law”.<sup>114</sup> It was also acknowledged to a certain extent in the White Paper, which noted that Article 234 of the Treaty represents a “slow way of maintaining or restoring consistency in competition policy”.<sup>115</sup> Moreover, there is a very significant divergence in the manner in which Article 234 has been applied by the Member States. For example, in certain countries Article 234 is hardly ever invoked, whereas in other countries there has been a significant and effective use of the procedure. Based on the above, it can be seriously questioned whether undue reliance on Article 234 as a means of implementing consistent Community competition policy would be effective.<sup>116</sup>

Regarding the negative aspects, I suggest these are two fold. First, by allowing certain NCAs the right to seek preliminary ruling references will further increase the workload of an already overburdened ECJ. Since its establishment, Article 234 references have been on a steady rise and currently consume a large share of the Court's resources. The establishment of the Court of First Instance in 1989 and the Nice Treaty's amendments to Article 225<sup>117</sup> have done something to alleviate the workload, but not

---

<sup>114</sup> Note 89 above, p. 4.

<sup>115</sup> White Paper on the modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, [1999] Official Journal C132/1, para. 104. Articles 85 and 86 are now Articles 81 and 82.

<sup>116</sup> Kon, Stephen, *The Commission's White Paper: the need for procedural harmonisation*, Fordham Corporate Law Institute: International Antitrust Law and Policy, Chapter 13, pp. 245, 246.

<sup>117</sup> Article 225(1) of the Treaty now provides that the CFI can hear actions covered by Articles 230, 232, 235, 236, and 238, with the exceptions of those cases assigned to a

enough in the long term.<sup>118</sup> We have yet to feel the full impact of 15 new Member States seeking preliminary ruling references, are we also prepared to open the floodgates for NCAs, or even other administrative bodies, with vague judicial characteristics?

A second problem, related to the workload of the Court, is the potential for delay in the resolution of the initial dispute. It is common knowledge that a ruling by the ECJ can take considerable time. National competition authorities will not be able to proceed with their case until the decision by the Court is received, with the added expenses that entails for all parties involved.<sup>119</sup> In most instances, the referring NCA's later decision will also be open to judicial review before the ordinary national courts, which in turn also have the right to make use of Article 234 of the Treaty or to simply let be, possibly for reasons of judicial economy. In essence, a delay of many years under considerable legal uncertainty can be imagined. While I am certain most companies involved in competition litigation matters can shoulder the legal expenses, time is money and it is unfair to deny them the right to fair and speedy trial, a fundamental right, though not always abided by, in most civilized legal systems.

In sum, it is entirely uncertain that allowing NCAs to seek a preliminary ruling will substantially increase the uniform and consistent application of Articles 81 and 82 of the Treaty. Furthermore, by allowing the acceptance of questions referred by national competition authorities, which do not form part of the national judicial system, the Court's workload will increase and add further delays to the dispute's resolution. Such a lengthy, costly process could very well dissuade the ordinary courts in Member States, reviewing an NCA's decision, from submitting questions which are essential for the uniform application of Community law, and the entire system of judicial cooperation established by Article 234 of the Treaty could be undermined.

### **4.3.3 Possible consequences for the Swedish, Danish, and Finnish national competition authorities**

With my heart and legal education connected to the northernmost territory of Europe, this section, in loving service, explores whether the Swedish, Danish, and Finnish national competition authorities could seek the advice

---

judicial panel and those reserved in the Statute for the ECJ itself. Article 225(3) accords the CFI power for the first time to hear preliminary ruling references in specific areas laid down by the Statute of the Court of Justice. Where the CFI believes that the case requires a decision of principle, likely to affect the unity or consistency of Community law, it may refer the case to the ECJ. Preliminary rulings given by the CFI can, exceptionally, be subject to review by the ECJ, under the conditions laid down in the Statute, where there is a serious risk to the unity or consistency of Community law being affected. See Article 62 of the Statute of the Court of Justice.

<sup>118</sup> Note 3 above, pp. 473, 478, 1077.

<sup>119</sup> This conclusion was also shared by Polina Koursarou, Legal officer of the Cyprus Competition Authority, in an email correspondence received on 4 March 2005.



of the European Court of Justice by way of a preliminary ruling reference. Other NCAs fall outside of the scope of this paper, yet are readily analyzed, by those interested, through an application of *Syfait* and the Court's jurisprudence defining a court or tribunal under Article 234 of the Treaty.

#### 4.3.3.1 Sweden

In Sweden, the Swedish Competition Act (1993:20)<sup>120</sup> protects a culture of fair play between market actors. In short, the legislation stipulates that the Swedish Competition Authority (Konkurrensverket) can demand that any company found in violation of Article 81 and 82 of the Treaty, or its national counterparts, is to suspend immediately any such infringing measures.<sup>121</sup> The Swedish Competition Authority, on the other hand, has no power to impose fines. Fines for violating Law 1993:20 are sought before the Local Court of Stockholm (Stockholms Tingsrätt), whereby they assume, in essence, the role of prosecutor.<sup>122</sup> Moreover, decisions of the Swedish Competition Authority can be appealed to the Market Court (Marknadsdomstolen), where they defend their decision as a party to the trial.<sup>123</sup>

As to whether the Swedish Competition Authority can seek a preliminary ruling reference, I find this to be highly unlikely if not impossible. First, while it is true that the body reaches decisions requiring companies to cease their violations, these are, in my opinion, of a strictly administrative nature. Secondly, they have no power to impose penalties, as did the Greek Competition Commission in *Syfait*. Third, the Swedish Competition Authority's composition has none of the same attributes as the Greek Competition Commission with its attached, for the most part independent, secretariat. The Swedish Competition Authority acts as both investigator and decision-maker in national and Community infringement cases. Finally, and maybe most importantly, their independence is not provided for by national legislation. This is not, however, important under the Swedish competition regime, since all decisions reached by the Swedish Competition Authority can be directly appealed before the impartial Market Court, ensuring judicial fairness.

Based on the above, the Swedish Competition Authority lacks the ability to constitute a court or tribunal for the purposes of Article 234 of the Treaty. On the other hand, as ordinary courts of law, both the Local Court of Stockholm and the Market Court can, in cases involving the application of Articles 81 and 82, request a preliminary ruling from the European Court of Justice.

---

<sup>120</sup> Konkurrenslag, SFS 1993:20. English version available at [www.konkurrensverket.se](http://www.konkurrensverket.se), language English, section *Competition*, subsection *Competition legislation*.

<sup>121</sup> *Ibid.*, para. 23.

<sup>122</sup> *Ibid.*, para. 26.

<sup>123</sup> *Ibid.*, para 60.

### 4.3.3.2 Denmark

Denmark promotes workable national and Community competition by way of the Danish Competition Act<sup>124</sup>. The enforcement of the Danish Competition Act and any subordinate rules issued there under fall under the jurisdiction of a politically independent body, the Danish Competition Council. The Council takes up cases on its own initiative, upon notification or complaint, or by referral from the European Commission.<sup>125</sup> As to its composition, the Danish Competition Council consists of a Chairman and 18 members. The King appoints the Chairman for a period of up to four years and the Minister for Economic and Business Affairs appoints the other members. Their makeup is to cover a comprehensive knowledge of public as well as private business activity, including experience in legal, economic, financial, and consumer-related matters. The Chairman and eight of the members shall be independent of commercial and consumer related interests. According to further directions by the Minister for Economic and Business Affairs, the remaining members are appointed on the recommendation of trade, consumer, and municipal organizations.<sup>126</sup>

The Danish Competition Authority is the secretariat of the Danish Competition Council with respect to cases under the Competition Act and attends to its day-to-day enforcement on behalf of the Council.<sup>127</sup> While the Competition Authority falls under the organizational hierarchy of the Ministry of Economic and Business Affairs, full independence when it comes to enforcing the Danish Competition Act is said to exist.<sup>128</sup>

The Minister for Economic and Business Affairs, in addition to his vested powers regarding its composition, also lays down rules of procedure for the Council as well as rules on the activities of the Danish Competition Council and the Danish Competition Authority, including rules on dismissal of Council members or their deputies upon the recommendation of the Chairman of the Competition Council, before the expiry of a period.<sup>129</sup>

Decisions made by the Council may be brought before the Danish Competition Appeals Tribunal. Its jurisdiction is compulsory since decisions made by the Council cannot be brought before any other administrative authority or courts of law until the Appeals Tribunal has made its decision. The Appeals Tribunal is composed of a Chairman, who shall be qualified for the post as a Supreme Court Judge, and two other members, who shall be proficient in economics and law, respectively. The Minister for Economic and Business Affairs lays down the rules on the activities of the

---

<sup>124</sup> Consolidated Competition Act No. 539 of 28 June 2002 (Act No. 384 of 10 June 1997 as amended by Act No. 416 of 31 May 2000 and Act No. 426 of 6 June 2002). Available at [www.ks.dk/english/competition/legislation/comp-act539-02](http://www.ks.dk/english/competition/legislation/comp-act539-02).

<sup>125</sup> *Ibid.*, Article 14(1).

<sup>126</sup> *Ibid.*, Article 15(1).

<sup>127</sup> *Ibid.*, Article 15(2).

<sup>128</sup> *Introduction to The Danish Competition Act*, section 16 *The competition authorities*. Available at [www.ks.dk/english/competition/legislation/guide](http://www.ks.dk/english/competition/legislation/guide).

<sup>129</sup> Note 124 above, Article 14(3).

Appeals Tribunal and appoints the Chairman and the members, whereas both are to be independent of commercial interests. Their appointment is to cease by the end of the month in which they attain the age of 70.<sup>130</sup>

Having reviewed the organisation and powers of the above entities, are any of them potential courts or tribunals within the meaning of Article 234 of the Treaty? The Danish Competition Authority answered the question as follows:

In our practice we have so far considered, that it theoretically is possible for the Danish Competition Appeals Tribunal to ask the ECJ for a preliminary ruling, but that it is not possible for the Danish Competition Council to make such a request.<sup>131</sup>

While no further elaboration was given, their conclusion makes perfect sense. Recalling the composition of the Danish Competition Council, only the Chairman and eight out of a total of eighteen members are to be free from commercial and consumer related interest, the remaining are connected to trade, consumer, and municipal influences. Unlike the Greek Competition Commission in *Syfait*, the Danish Competition Act does not specifically provide for the operational and personal independences of its members in relation to the Ministry of Economic and Business Affairs and its secretariat, the Danish Competition Authority. While Denmark attests to the political independence of the Council, its close connection to these two bodies could, in my opinion, raise warning flags. Hence, neither the Danish Competition Council nor the Danish Competition Authority could reasonably fulfil the independence criterion provided for in *Syfait* and defined in the earlier jurisprudence defining a court or tribunal under Article 234.

Regarding the Danish Competition Appeals Tribunal, its jurisdiction is compulsory, independence is provided for in law to all its members, and the Minister for Economic and Business Affairs can only decide upon its rules of activity, not the dismissal of its members. While subsequent legal remedy to Danish courts of law or other administrative authorities is available to affected parties after the Danish Competition Appeals Tribunal has reached its decision, such a possibility should not hinder the right to seek a preliminary ruling, if one follows the reasoning of AG Jacobs in *Syfait*. Based on the above, I whole-heartedly agree with the Danish Competition Authority that it is theoretically possible for the Danish Competition Appeals Tribunal to refer questions on Community law before the European Court of Justice, if the Court follows the Opinion of Advocate General Jacobs in *Syfait*.

#### **4.3.3.3 Finland**

The Finnish Competition Authority is similar to their Swedish counterpart, concerning organisation and powers. By way of the Act on Competition

---

<sup>130</sup> Ibid., Articles 19-21.

<sup>131</sup> Email correspondence with Thomas Herping Nielsen of the Danish Competition Authority, 18 March 2005.

Restrictions (480/1992)<sup>132</sup> and through general advocacy, the Finnish Competition Authority protects sound and effective economic competition.<sup>133</sup> According to the Act, they are empowered to investigate competition restrictions and their effects. Upon finding that a business undertaking or an association of business undertakings competes in a manner contrary to the provisions of the Finnish Competition Act, they are to initiate proceedings to eliminate the competition restriction or its negative effects.<sup>134</sup> If the harmful effects mentioned cannot be eliminated through negotiation or otherwise, the Competition Authority shall bring action before the Market Court, which possesses the dual role of prohibiting competition restrictive measures/imposing infringement fines and acting as the first instance of appeal when appealing against decisions made by the Finnish Competition Authority.<sup>135</sup> Moreover, the certain decisions of the Market Court can be appealed against to the Supreme Administrative Court.<sup>136</sup>

Based on the above, the decisions reached by the Finnish Competition Authority assume, like the competition authority in Sweden, an administrative, not judicial, nature. Consequently, they lack the ability to make preliminary ruling references. However, both the Market Court and Supreme Administrative Court fall under the auspices of Article 234 of the Treaty, when deciding upon issues with a European Community dimension.

---

<sup>132</sup> Act on Competition Restrictions (480/1992), including amendment (318/2004). Available at [www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended](http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended).

<sup>133</sup> Ibid., Article 1.

<sup>134</sup> Ibid., Article 12(1).

<sup>135</sup> Ibid., Articles 12(3), 16, 17, 21(1)

<sup>136</sup> Ibid., Article 21(2).

## 5 Concluding remarks

Through some four decades of jurisprudence defining a court or tribunal of a Member State for the purposes of Article 234 of the Treaty, the Court has systematically relaxed several of the criteria for making such a determination. A liberal approach has been adopted by the Court of Justice and both the *inter partes* and independent criterion have been cast to the wayside. Such disregard could very well have a few of their original establishers in *Vaassen (née Göbbels)* tossing and turning in their graves. Moreover, to the fear of many, a future positive ruling in *Syfait* by the ECJ will allow certain national competition authorities the right to make use of preliminary rulings, with the added potential of becoming a powerful point of reference for other administrative bodies, with certain judicial characteristics, seeking the same right. While a liberal interpretation of a court or tribunal was necessary in the early days for the proliferation of Community law and the establishment of the Common Market, such an approach is today outdated. Due to the Court's overwhelming caseload, with talks of further reform needed in the organisation and structure of the ECJ, and the recent addition of 15 Member States able to make use of Article 234, the time is ripe to tighten the strings. Waiting makes no sense and could have serious repercussions, possibly felt for years to come. So, to the Judges in *Syfait*, ruling upon the admissibility of the Greek Competition Commission's Article 234 reference, I have only three words to say: deny, deny, deny!

# Bibliography

## Community law literature

Anderson, David W.K., *References to the European Court*, Sweet & Maxwell, London, 1995.

Craig, Paul, and De Búrca, Gráinne, *EU Law: Text, Cases, and Materials*, 3<sup>rd</sup> edition, Oxford University Press, Oxford, 2003.

## Community law articles

Haardt, W.L., *Annotation on Case 61/65 Vaassen (née Göbbels)*, C.M.L.R. 1966-1967, p. 441.

Hull, David W., *Parallel trade in pharmaceutical products in Europe: The Advocate General's Opinion in Syfait v GlaxoSmithKline*, Competition Law Insight, 9 November 2004, pp. 3-6.

Kon, Stephen, *The Commission's White Paper: the need for procedural harmonisation*, Fordham Corporate Law Institute: International Antitrust Law and Policy, Chapter 13, Juris Publishing Inc., New York.

## Community legislation

Council Regulation 17/62 first regulation implementing Articles 85 and 86 of the Treaty, [1962] OJ L13/204.

White Paper on the modernisation of the rules implementing Articles 85 and 86 of the EC Treaty, [1999] Official Journal C132/1.

Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C103/43.

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C101/54.

Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101/65.

Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), [2004] OJ C101/78.

Commission Notice Guidelines on the effect on trade concept in Articles 81 and 82 of the Treaty, [2004] OJ C101/81.

Commission Notice on the application of Article 81(3) of the Treaty, [2004] C101/97.

### **National legislation**

Act on Competition Restrictions (480/1992), including amendment (318/2004).

Consolidated Competition Act No. 539 of 28 June 2002 (Act No. 384 of 10 June 1997 as amended by Act No. 416 of 31 May 2000 and Act No. 426 of 6 June 2002).

Konkurrenslag, SFS 1993:20.

### **Email correspondence**

Email correspondence with Polina Koursarou, Legal officer of the Cyprus Competition Authority, 4 March 2005.

Email correspondence with Thomas Herping Nielsen of the Danish Competition Authority, 18 March 2005.

### **Internet sites \***

[www.curia.eu.int](http://www.curia.eu.int)

[www.cov.com/publications/download/oid48041/504.pdf](http://www.cov.com/publications/download/oid48041/504.pdf)

[www.europa.eu.int/comm/competition/antitrust/legislation](http://www.europa.eu.int/comm/competition/antitrust/legislation)

[www.konkurrensverket.se](http://www.konkurrensverket.se)

[www.ks.dk/english/competition/legislation/comp-act539-02](http://www.ks.dk/english/competition/legislation/comp-act539-02)

[www.ks.dk/english/competition/legislation/guide](http://www.ks.dk/english/competition/legislation/guide)

[www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended](http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended)

\* In order of footnote appearance

# Table of Cases

Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

Case 6/64 *Flaminio Costa v. ENEL*, [1964] ECR 585.

Case 61/65 *G. Vaassen (née Göbbels) v. Scheidsgerecht van het Beambtenfonds voor het Mijbedrijf*, [1966] ECR 261.

Opinion of Advocate General Gand in Case 61/65 *Vaassen (née Göbbels)*, [1966] ECR 279.

Case 43/71 *Politi S.A.S. v. Ministry for Finance of the Italian Republic*, [1971] ECR 1039.

Case 162/73 *Birra Dreher SpA v. Amministrazione delle Finanze dello Stato*, [1974] ECR 201.

Case 65/77 *Jean Razanatsimba*, [1977] ECR 2229.

Case 70/77 *Simmenthal SpA v. Amministrazione delle Finanze dello Stato*, [1978] ECR 1453.

Case 138/80 *Jules Borker*, [1980] ECR 1975.

Case 246/80 *C. Broekmeulen v. Huisarts Registratie Commissie*, [1981] ECR 2311.

Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, [1982] ECR 1095.

Case 318/85 *Criminal Proceedings against Regina Greis Unterweger*, [1986] ECR 955.

Case 14/86 *Pretore di Salò v. Persons unknown*, [1987] ECR 2545.

Case 109/88 *Handels- og Kontorfuntionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on the behalf of Danfoss*, [1989] ECR 3199.

Case C-166/91 *Gerhard Bauer v. Conseil National de l'Ordre des Architectes*, [1992] ECR I-2797.

Joined Cases C-277/91, C-318/91, and C-319/91 *Ligur Carni Srl and Others v. Unità Sanitaria Local No. XV di Genova and Others*, [1993] ECR I-6621.



Case C-393/92 *Municipality of Almelo and Others v. Energiebedrijf Ijsselmij NV*, [1994] ECR I-1477.

Case C-111/94 Non-contentious proceedings brought by Job Centre Coop. arl, [1995] ECR I-3361.

Case C-54/96 *Dorsch Consult v. Bundesbaugesellschaft Berling*, [1997] ECR I-4961.

Joined Cases C-69/96 to 79/96 *Maria Antonella Garafalo and Others v. Ministero della Sanità and Unità Sanitaria Locale (USL) No. 58 di Palermo*, [1997] ECR I-5603.

Case C-103/97 *Josef Köllensperger GmbH&Co. KG and Atzwanger AG v. Gemeindeverband Bezirkskrankenhaus Schwaz*, [1999] ECR I-551.

Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, [1999] ECR I-3055

Case C-134/97 *Proceeding for a preliminary decision brought by Victoria Film A/S*, [1998] ECR I-7023.

Joined Cases C-110/98 to C-147/98 *Gabalfrisa SL and Others v. Agencia Estatal de Administración Tributaria*, [2000] ECR I-1577.

Opinion of Advocate General Saggio in Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others*, [2000] ECR I-1577.

Case C-192/98 *Ex post facto review proceedings concerning Azienda Nazionale Autonoma delle Strade (ANAS)*, [1999] ECR I-8583.

Case C-440/98 *Ex post facto proceedings concerning Radiotelevisione Italiana SpA (RAI)*, [1999] ECR I-8597.

Case C-178/99 *Doris Salzmänn*, [2001] ECR I-4421.

Case C-516/99 *Proceedings brought by Walter Schmid*, [2002] ECR I-4573.

The Opinion of Advocate General Tizzano in Case C-516/99 *Schmid*, [2002] ECR I-4573.

Case C-17/00 *François De Coster v. Collège des bourgemestre et échevins de Watermael-Boitsfort*, [2001] ECR I-9445.

Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster*, [2001] ECR I-9447.

Case C-86/2000 *HSB-Wohnbau GmbH*, [2001] ECR I-5353.

Case C-182/00 *Application brought by Lutz GmbH and Others*, [2002] ECR I-547.

Opinion of Advocate General Geelhoed in Case C-182/00 *Lutz and Others*, [2002] ECR I-547.

Opinion of Advocate General Jacobs in Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v. GlaxoSmithKline AEVE*.