Title of the thesis

Definition of a "court or tribunal" in the preliminary ruling procedure under article 234 EC

RESUMÉ

The concept of "court or tribunal" has gone through a remarkable evolution from its simple definition in the EC Treaty up to the concept of European law. It has been richly expanded in the practice of the European Court of Justice and still remains a focal point of enthusiastic debate; not only among academics, but also among Advocate Generals of the Court and the Court itself, despite the fact that a couple of decades have already passed since the Court tried to determine this concept for the first time.[286] While this concept may seem to be simple and clear; in fact it is quite complex and unclear and embraces a number of grey zones.

The ECJ decided to use a functional method when trying to define a "court or tribunal" and therefore it now tests the asking body in every single case; in particular it examines the virtue of the procedure before such a body. Eventually, step by step, the Court established the set of criteria that a "court or tribunal" must fulfil. However, the ECJ was considerably generous when testing the judicial bodies and in the course of time the Court has been free to bow, curve and pardon a number of criteria; e.g. the *inter partes* criterion was proclaimed to

[286] The Court articled first five criteria already in 1966 in the case 61/65 *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf* [1966] ECR 377

be a relative condition,[287] the ECJ accepted the preliminary question asked by a body of professional autonomy,[288] etc. Also the Court's approach to the bodies performing competition supervision or public procurement supervision lacked a notable portion of transparency (cases *Gabalfrisa*[289] and *Syfait*[290]). In a nut shell: controversial decisions started to increase.

Naturally, critical voices were soon raised, not only from the academics, but also from the Advocates General, whose approach to the asking bodies is generally a little bit stricter and often legally more precise and more consistent than the one of the ECJ. The Court has been upbraided for choosing a way that resulted in a lack of clarity regarding the concept of "court or tribunal" and that it has not come up with a clear definition of a "court or tribunal" yet. The Court has also been criticized for defining a "court or tribunal" in a way too casuistic and ambiguous, as well as for the fact that even after 40 years of effort to determine the concept of "court or tribunal", it remains blurry and unclear. The critics point out that the Court's acceptance of preliminary questions from administrative bodies is easily able to harm the special dialogue between a national court and the ECJ. Last, but not least, the critics claim that too broad a definition of a "court or tribunal" results in an uncontrollable amount of submitted questions and therefore it takes about two years on average for the Court to respond to them. This certainly does not contribute to legal certainty in particular member states. After all, this issue is also dealt with in some reform schemes that adopt a restrictive approach to a "court or tribunal"; however, no agreement on any has yet been reached.

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[287] Case C-54/96 *Dorsch Consult Ingenieursgesellschaft v. Bundesbaugesellschaft Berlin* [1997] ECR I-4961, point 31

[288] Case 246/80 *Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311, point 15-17

[289] Joined cases C-110/98 to C-147/98 *Gabalfrisa and others* [2000] ECR I-1577

[290] Case C-53/03 *Syfait and others* [2005] ECR I-4609

With respect to the above, it is natural that one asks the questions: why doesn't the Court listen to its critics and why doesn't it follow the Advocates General's opinion? Why does the Court often choose to compromise at the expense of legal accuracy and consistency? Considering the fact that the Court consists of experienced and recognized legal authorities, one can hardly suspect the ECJ of ordinary legal dilettantism. We inevitably come to the conclusion that there must be a real persuasive reason, a strong driving motive, which forces the Court to make various definition compromises.

The motive is probably the fact that the Court does not want to allow a situation in which it would not have a chance to respond to a preliminary question submitted by a body which may not fulfil all the criteria set for a "court or tribunal", but which decides on the communitarian rights of individuals in the last instance and for which there is no possibility of remedy against such a body's decision. Therefore the ECJ, from time to time, closes its eyes a bit and accepts preliminary questions even from bodies which do not fully fall within the definition of a "court or tribunal". If the Court would not do so, it might happen that the main objective of the preliminary ruling procedure, which is the uniform application and interpretation of the *acquis communautaire*, would not be fulfilled. And this is something that the Court does not want to risk and why it still keeps the back door open.