



# **A new narrative of Article 267 TFEU: towards national competent authorities as European courts.**

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## Art. 267 TFEU – Preliminary Reference Procedure



Mechanisms that allows the CJEU to provide interpretative assistance to national courts in order to guarantee uniformity in a decentralised system of application and interpretation of EU law.



This mechanism is active by « *a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law* » - Art. 267(3) TFEU

## Problems of the definition

- Art. 267 TFEU's definition is too simplistic – unable to reflect the specificities of 27 different national judicial systems.
- The CJEU has the sole responsibility to interpret this concept → its approach has evolved, but inconsistently.

## Relevance of this research

- The extent of the definition → expansion or restriction of the CJEU's jurisdiction and so, in different degrees of control over the interpretation and application of EU law.
- The expansion of the preliminary ruling procedure → alter the article's original spirit
- Question of constitutional identity of the Member States → the CJEU might consider the referring body as 'a court or a tribunal of a Member State' under EU law, although this body was not initially conceived as such under national law or vice-versa.

# Research question:

Explore how the concept of 'court or tribunal of a Member State' has evolved - in particular whether it includes National Competent Authorities (NCAs).

## Steps:

- Describe the dynamic but uncoherent approach of the CJEU.
- Additional perspectives – Advocate Generals.
- Analysis of the CJEU's case-law on NCAs.

## Preliminary consideration:

The CJEU has progressively codified the requirements guiding its assessment - the so-called **Dorsch criteria**:

- 1) whether the body is established by law;
- 2) whether it is permanent;
- 3) whether its jurisdiction is compulsory;
- 4) whether its procedure is *inter partes*;
- 5) whether it applies rules of law;
- 6) whether it is independent;
- 7) a case is pending before the referring court and this latter is called upon to give judgment in a proceeding that leads to a decision of judicial nature;
- 8) act in the exercise of judicial function.

In principle - these criteria represent the threshold to determine whether a referring body is 'a court or a tribunal of a Member State'.

## Inconsistency

Despite being persistent in building the admissibility test of Art. 267 TFEU on the above conditions, the CJEU has not been particularly coherent in their application and interpretation.

For example:

- **Judicial independence** → *Banco de Santander vs Gabafrija* cases - *Minister Sprawiedliwości* case - *Getin Noble Bank* and *Perfumesco* cases.

## An open dialogue

In view of the increasing number of different authorities established in and by Member States, the Court has been repeatedly asked **the question of whether bodies others than judicial ones may make references for a preliminary ruling.**

The above CJEU's anti-formalism in evaluating the compliance with the Dorsch criteria and the fact of carrying out a case-by-case assessment have allowed a different variety of national bodies to interact with the CJEU.

## Advocate Generals have also actively discussed the issue:

- **Advocate General Ruiz-Jarabo Colomer** – *De Coster* case - ‘tighten the definition of court or tribunal of a Member State, to bring together its various components in order to provide a precise frame of reference and so to prevent uncertainty from becoming a permanent feature of this sphere’.
- **Advocate General Colomer** – *Umweltanwalt* case - a limited extension of the bodies allowed to interact with the Court → Similarly, Advocate General Campos Sánchez-Bordona - *CityRail* case.
- **Advocate General Kokott** - *Grillo Star*, *Tedesco* and *Weryński* cases - considerations of procedural economy should encourage a reference to be made at the earliest possible stage, since the finding of facts is typically the task of the lower courts and not of courts of last resort.



In this context, literature has discussed whether public administrative bodies, more generally, are competent to make a preliminary reference to the CJEU. No research exists on whether national competent authorities could also be courts or tribunals under Art. 267 TFEU. This contribution fills this gap.



## Can NCAs refer a preliminary ruling?

**NCAs** - administrative authorities whose structure and functions are a direct consequence of the requirements arising under EU law.

### *Case law:*

- *Syfait case - Epitropi Antagonismou* (Greek Competition Commission).
- *RTL Belgium case* - Licensing and Control Authority of the Broadcasting Authority, Belgium.
- *Belov case - Komisia za zashtita ot diskriminatsia* (Commission for Protection against Discrimination or 'the KZD').
- *Westbahn Management case - Schienen-Control Kommission* (Administrative Authority part of the Schienen-Control GmbH, the Austrian Authority in the railways sector).
- *Anesco case - Comisión Nacional de los Mercados y la Competencia* (National Commission on Markets and Competition or 'NCCM', Spain).
- *CityRail case* - Czech Transport Infrastructure Access Authority.

➤ Yes – a NCA can be ‘a court or a tribunal of a Member State’ in the meaning of Art. 267 TFEU.

*Cityrail* – para 70 – « a body performing functions of both an administrative and judicial nature and satisfying the structural criteria referred to in paragraph 41 above may be regarded as a ‘court or tribunal’ within the meaning of Article 267 TFEU where **the judicial functions which it carries out are objectively and strictly separated from its administrative functions.** [...]»

Example of administrative functions are:

- the power to initiate infringement proceedings *ex officio* and the power to impose, also *ex officio*, penalties in matters within its jurisdiction constitute evidence that the body in question exercises not judicial but administrative functions;
- adopt a position for the first time on a complaint lodged by a person, against whose decisions there is a judicial remedy;
- not acting as a third party in relation to the authority which adopted the decision forming the subject matter of the proceedings.

# Conclusions

- In principle, the fact that the referring body performs certain administrative functions does not rule out its status as a court or tribunal *a priori* → this is a question that is determined on the basis of criteria relating both to the constitution of that body and to its function.
- The CJEU carries out a case-by-case assessment of the specific functions exercised by a body in the proceeding pending before it → it is necessary to determine in what specific capacity that body is acting within the particular legal context in which it seeks a ruling from the Court.
- In the hypothesis in which EU law would lay down harmonised structural and functional conditions, obstacles to the status of court or tribunal under Art. 267 TFEU of the regulatory authority would persist. The EU models might need to be transposed by national legislation and often overlaps with the traditional scope of State administration → the Court's case-by-case analysis of the functions exercised by the referring body could lead to different outcomes.

Thank you for your attention!