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Editorial

The Uniform Application of European Union Law: The Court of Justice Confirms its Role as Ultimate Cerberus

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In order to ensure the uniform application of European Union law, Articles 19 (3)(b) TEU and 267 TFEU provide for a special cooperation between the European Court of Justice (EUCJ) and the national courts. By means of a preliminary ruling, a national court may be given the necessary guidance by the EUCJ on the interpretation of EU law in order to settle the case at hand. The courts and tribunals of the Member States may refer a question to the Court on the interpretation or validity of EU law when they consider that a decision of the Court on the question is necessary to enable them to issue a judgment (Article 267 (2) TFEU). As noticed by the Court in its recommendations of 20 July 2018:

> *'such a reference for a preliminary ruling may*, inter alia, *prove particularly useful when a question of interpretation is raised before the national court or tribunal that is new and of general interest for the uniform application of EU law, or where the existing case-law does not appear to provide the necessary guidance in a new legal context or set of facts'*.[1]

In certain circumstances, a national court or tribunal is obliged to refer to the Court for a preliminary ruling. This situation occurs when a question is raised in the context of a case that is pending before a court or tribunal and against which there is no judicial remedy under national law. In this hypothesis, the court or tribunal concerned is required to bring a request for a preliminary ruling before the Court (Article 267, (3) TFEU). The *ratio legis* of this provision is to prevent the highest case-law in a Member State from evolving in breach of EU law and thereby influencing other courts of that Member State to decide in the same sense.[2] As the Court of Justice has pointed out, a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by EU law. For instance, in Belgium this obligation applies to the Constitutional Court, the Supreme Court (Court de Cassation, Hof van Cassatie), the Council of State and the Benelux Court. Courts adjudicating at last instance have the task of ensuring at national level the uniform interpretation of rules of law.[3]

The second and third paragraphs of Article 267 TFEU provide that a national court is obliged by the third paragraph of that Article to refer to the Court of Justice for a preliminary ruling on the interpretation of EU law, if the decision on that point is considered *necessary* to decide on the dispute at hand (i.e. the requirement of pertinence or relevance). In addition, the Court of Justice has identified three circumstances in which a court, referred to in the third paragraph of Article 267 TFEU, is not obliged to submit a pertinent question: firstly when the national court finds that the question raised is irrelevant; secondly if there is already well-established case law on the question raised (the so called *acte éclairé* exception) and thirdly, if the correct interpretation of the rule of law in question leaves no room for reasonable doubt.[4] However, according to the Court, the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union.[5] The latter exception is also known as the *acte clair*-doctrine.

The risk exists that the highest courts as mentioned in Article 267 (3) TFEU erroneously invoke these exceptional situations and therefore do not refer to the Court of Justice for a preliminary ruling. This may jeopardize the unity of the application of EU law. As has rightly been pointed out by Advocate General Bot in the Ferreira da Silva e Brito case:

> *'the non-compliance on the part of national courts and tribunals against whose decisions there is no judicial remedy under national*

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1 Court of Justice of the European Union, *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings*, 61 Official J., C 257, nbr. 5 (20 July 2018).

2 EUCJ, 15 Mar. 2017, C-3/16, Aquino, s. 33.

3 For example, EUCJ 15 Mar. 2017, C-3/16, Aquino, ss 34–36; EUCJ, 4 June 2002, C-99/00, ss.

4 EUCJ, 6 Oct. 1982, 283/81, Cilfit, ss 13–21; EUCJ, 15 Sept. 2005, C-495/03, Intermodal Transports, ss 39; *See also* Court of Justice of the European Union, *Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings*, 61 Official J., C 257, nbr. 6 (20 July 2018).

5 EUCJ 6 Oct.1982, 283/81, Cilfit, ss 17 and 21.

law with their obligation to make a reference, has the effect of depriving the Court of the fundamental task assigned to it by the first subparagraph of Article 19(1) TEU, namely to ensure that in the interpretation and application of the Treaties the law is observed'.[6]

In this respect, the EUCJ issued an important ruling[7] on 4 October 2018, as part of a tax related infringement procedure. For the first time[8] the Court decided that a domestic court adjudicating at last instance – *in casu* the French Conseil d'État – was in breach of the obligation to refer for a preliminary question according to Article 267 (3) TFEU, given that the interpretation of EU law was not clear in the case at hand.

Firstly, it should be emphasized that in this case the infringement proceedings against France were not initiated by the Commission due to the fact that the Conseil d'État had not fulfilled its duty to refer for a preliminary ruling *in a structural manner.*[9] As the Commission indicated, the complaint on the denial of Article 267 (3) TFEU only concerned the fact that the Conseil d'État failed to fulfil its obligation in the *specific circumstances of the case.*[10]

For a good understanding of these specific circumstances the background of this judgment is summarized hereafter.

In 2011 the EUCJ concluded in the Accor Case[11] that the French legislation on the elimination of double taxation of dividends was in breach with the EU free movement of establishment (Article 49 TFEU) and capital (Article 63 TFEU). Following the delivery of the judgment in the Accor Case, the Conseil d'État established the conditions of the refund mechanism and the required proof in its judgments of 10 December 2012 and of 10 December 2012.[12] After these judgments, the Commission received several complaints concerning these conditions for reimbursement from French companies which had received foreign dividends. Following these complaints, the Commission initiated in 2016 an infringement procedure against France. In this case the EUCJ addressed four complaints raised by the Commission, namely the failure to take into account the taxation of sub-subsidiaries, the disproportionate evidentiary requirements, the capping of the reimbursable amount and the infringement of Article 267 (3) TFEU, resulting from the failure of the French Conseil d'État to refer preliminary questions to the EUCJ.

The EUCJ first concluded that the French Republic failed to fulfil its obligations under Articles 49 and 63 TFEU 'by refusing to take into account, in order to calculate the reimbursement of the advance payment made by a resident parent company in respect of the distribution of dividends paid by a non-resident sub-subsidiary via a non-resident subsidiary, the tax on profits underlying those dividends incurred by that non-resident sub-subsidiary, in the Member State in which it is established, even though the national mechanism for the avoidance of economic double taxation allows, in the case of a purely domestic chain of interests, the tax levied on the dividends distributed by a company at every level of that chain of interests to be offset'.[13]

Secondly, after rejecting the second complaint as not well founded[14] and dismissing the third complaint,[15] the EUCJ concluded that since the Conseil d'État failed to make a reference for a preliminary ruling to the Court before establishing the procedures for reimbursement of the advance payment, the levying of which was found to be incompatible with Articles 49 and 63 TFEU, the French Republic has failed to fulfil its obligations under the third paragraph of Article 267 TFEU.

To that end, the Court, referring to previous rulings, first recalled [that a court, as referred to in Article 267 (3) TFEU, is not obliged to refer for a preliminary ruling:

6 Opinion Advocate General Bot, C-160/14, 9 Sept. 2015, Ferreira da Silva e Brito e.a., s. 102. This opinion was also cited by Advocate General M. Wathelet in his Opinion case C-416/17, 25 July 2018, *Commission v. France*, s. 90.

7 EUCJ 4 Oct. 2018, C-416/17, *Commission v. France.*

8 The fact that in this case the EUCJ had to rule on this situation for the first time, was emphasized by Advocate General M. Wathelet in his Opinion (Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, ss 3 and 87). In fn. 2 of his Opinion he mentions some other cases, especially EUCJ, C-129/00, 9 Dec. 2003, *Commission v. Italy* and EUCJ, C-154/08, 12 Nov. 2009, *Commission v. Spain.* In the first case, the Commission had asked the Court for a declaration that, by maintaining in force of a legal provision, 'as construed and applied by the administrative authorities and the courts (in Italy) (. . .), the Italian Republic has failed to fulfil its obligations under the EC Treaty'. However, in that case the Commission did not put forward an infringement expressly based on Art. 267 TFEU. In the second case against Spain (cons. 65 of the ruling), the question arose whether the Commission's related to an infringement of Art. 267 TFEU, but the Commission expressly informed the Court that that was not the case ('Toutefois, en réponse à une question posée par la Cour lors de l'audience, la Commission a indiqué que son recours ne vise pas une violation par le Royaume d'Espagne de l'Art. 234 CE').

9 In his opinion Advocate General M. Wathelet mentions (Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, fn. 2) the existence of an infringement procedure introduced against the Kingdom of Sweden because the Högstra domstol (the supreme court in civil and penal cases), of Sweden did not consequently comply with its duty of referral for a preliminary ruling. (Reasoned Opinion of the Commission, 2003/2161, 12 Oct. 2004, C (2004), 3899). However, in that case the Commission has not brought the case before the Court.

10 Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, s. 86.

11 EUCJ, C-310/09, 15 Sept. 2011, Accor: more specifically the Court concluded that granting a French company a tax credit for advance tax payments due in respect of French source dividends redistributed to its shareholders, while no equivalent tax credit is available in respect of dividends received from subsidiaries located in other Member States, is contrary to the freedom of establishment and the free movement of capital.

12 More specifically the Conseil d'État subjected the refund of the unduly levied taxes to certain conditions, namely (1) the refusal to take into account taxation suffered by non-resident sub-subsidiaries; (2) the production of certain evidentiary documents and (3) the limitation of the refunded amounts to one third of the dividends distributed.

13 EUCJ 4 Oct. 2018, C-416/17, *Commission v. France*, s. 46.

14 EUCJ 4 Oct. 2018, C-416/17, *Commission v. France*, s. 83.

15 EUCJ 4 Oct. 2018, C-416/17, *Commission v. France*, s. 99.

> *'when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and that the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union'.*[16]

Furthermore, the EUCJ established that in view of its findings on the first complaint, the Conseil d'État in the absence of a reference for a preliminary ruling in the cases giving rise to its judgments of 10 December 2012 and of 10 December 2012, has adopted a solution in those judgments, based on an interpretation of the provisions of Articles 49 and 63 TFEU which is at variance with that of the EUCJ in its own judgment. As a consequence, the Court stated that *the existence of reasonable doubt* concerning that interpretation could not be ruled out when the Conseil d'État delivered its ruling.[17] The EUCJ therefore declared that in the case at hand, since the Conseil d'État failed to make reference for a preliminary ruling, France had failed to fulfil its obligations under the third paragraph of Article 267 TFEU.

Advocate General Wathelet rightly points out that recognizing that a Member State has failed to fulfil the obligation to make a reference for a preliminary ruling is all the more justified if this non-compliance, as in the present case, follows a first judgment of the EUCJ.[18] If the Court finds that a Member State has failed to fulfil an obligation under the Treaties, the State is required, according to Article 260 (1) TFEU, to take the necessary measures to comply with the judgment of the Court. According to the EUCJ this first means that *'all the institutions of the Member States concerned must, in accordance with that provision, ensure within the fields covered by their respective powers, that judgments of the Court are complied with […]'*,[19] and secondly that *'for their part the courts of the Member State concerned have an obligation to ensure, when performing their duties, that the Court's judgment is complied with'*.[20] This consideration is also valid for national courts that have referred for a preliminary ruling to the EUCJ. After all, the interpretative judgments of the Court have a general effect in the legal order of the European Union.[21] If the court, after referring for a preliminary ruling, still has doubts about the meaning of the rule, it is obliged to question the Court again before making a final decision. Indeed, in those circumstances, the Court's reply is necessary in order to solve the dispute, which leads to the conclusion that an obligation to refer for a preliminary ruling exists in line with the Cilfit judgment, cited above.

The foregoing does not imply that the reasoning of the Court should be limited to situations similar to those in the case at hand, i.e. where the EUCJ has already issued a first preliminary ruling. The reasoning followed by the EUCJ in case C-416/17 seems also valid in other situations, such as when a court or tribunal as meant in Article 267 (3) TFEU is confronted with a question about the application and the interpretation of EU law on which the EUCJ has never ruled up until now. It is clear that in those situations a national court, within the meaning of Article 267 (3) TFEU, may equally have reasonable doubts as to the interpretation and application of EU law, forcing the court to refer to the EUCJ for a preliminary ruling. If however that court does not refer for a ruling, the individuals involved in this procedure can lodge a complaint with the European Commission,[22] which may initiate the infringement procedure (Articles 258–260 TFEU).

In summary, the *Commission v. France* – judgment of 4 October 2018 is important because it confirms the central role of the EUCJ as the ultimate watchdog on the uniform interpretation and application of EU law. It creates a precedent, given that it is the first time that the Commission successfully refers an EU Member State to the EUCJ for its failure to refer for a preliminary ruling. This judgment also clarifies that the application of Article 267 (3) TFEU is not merely limited to the structural failure of domestic courts to refer for preliminary questions, but may also apply to breaches of EU law in specific cases. And finally, as pointed out by Advocate General M. Wathelet, the possibility of tackling these types of infringements is not only coherent with the purpose of the obligation to refer for a preliminary ruling laid down in Article 267(3) TFEU, but also with the conditions concerning the liability of Member States violating EU law: *'the liability of a Member State (under Article 258 TFEU) arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'*.[23]

[16] EUCJ 4 Oct. 2018, C-416/17, *Commission v. France*, s. 110.

[17] EUCJ 4 Oct. 2018, C-416/17, *Commission v. France*, s. 112.

[18] Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, ss 88–89, with reference to a.o. EUCJ, 77/69, 5 May 1970, *Commission v. Belgium*, s. 92.

[19] EUCJ, C-224/01, 23 Sept. 2003, Köbler, s. 55; EUCJ, C-173/03, 13 June 2006, Traghetti del Mediterraneo, s. 32 en EUCJ, C-16815, 28 July 2016, Tomasova, s. 25. *See also* Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, ss 88–89, with reference to a.o. EUCJ, 77/69, 5 May 1970, *Commission v. Belgium*, s. 92.

[20] EUCJ, C-224/01, 23 Sept. 2003, Köbler, s. 55; EUCJ, C-173/03, 13 June 2006, Traghetti del Mediterraneo, s. 32 en EUCJ, C-16815, 28 July 2016, Tomasova, s. 25. *See also* Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, ss 88–89, with reference to a.o. EUCJ, 77/69, 5 May 1970, *Commission v. Belgium*, s. 92.

[21] Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, ss 88–89, with reference to a.o. EUCJ, 77/69, 5 May 1970, *Commission v. Belgium*, at 92, with further references in fns 46 and 47.

[22] For more information, *see* http://ec.europa.eu/atwork/applying-eu-law/complaints_en.htm (accessed 11 Mar. 2019).

[23] Opinion Adv. Gen. M. Wathelet, C-416/17, 25 July 2018, *European Commission v. France*, ss 88–89, with reference to a.o. s, 77/69, 5 May 1970, *Commission v. Belgium*, s. 15.