"Ceci n’est pas une Pipe": The Notion of Tax Court under Article 267 of the TFEU

This article sheds light on the notion of “tax court” employed by the CJEU within the framework of article 267 of the TFEU. The significant volume of criticism and commentary targeted at the Vaassen-Göbbels (Case 61/65) criteria suggest the need to agree on a definition of “tax court” for the purpose of referring a question for a preliminary ruling. The contradictions in the existing case law, however, have thwarted such attempts.

1. Introduction

Pursuant to article 267 of the Treaty on the Functioning of the European Union (TFEU) (2007),1 the courts or tribunals of the Member States are entitled to bring a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling. Contrary to what one might think, the notion of “court” enshrined in this article not only still sparks controversy amongst scholars,2 but has not yet been settled by the case law of the CJEU either.3 As such, the CJEU is continuously being “fed” by references requested by national bodies without having adopted, a priori, a rigorous definition of “court” wherein which such national bodies can be categorized. The Court has shied away from adopting a uniform and clear concept of “court” within the procedural framework of article 267 of the TFEU. Consequently, questions are continually being raised before the CJEU regarding the judicial nature of the requesting body.

This contribution scrutinizes the concept of “tax court” for the purposes of referring a question for a preliminary ruling. What features “customize” a national body as a “tax court” within the meaning of article 267 of the TFEU? In order to unlock this concept, the author first addresses the same overwhelming difficulties with regard to elaborating on a uniform and consistent concept of “court”. Thus, the article not only addresses tax cases, but also cases regarding other fields of EU law.

This article is divided into three parts. Section 2. focuses on the rationale behind the argument that there should be an autonomous concept of “court” for the purpose of referring a question for a preliminary ruling. Although this autonomous concept of “court” is anchored in several requirements set out in the Visayan-Göbbels (Case 61/65) line of cases,4 the outcome is not particularly consistent. Section 3. challenges the Vaassen-Göbbels criteria regarding the specificities of bodies specialized in dealing with tax disputes. As this second section extensively discusses, the contradictions put forward in the case law reflect a casuistic and contradictory approach that reflects the wide discretionary power of the CJEU to define the notion of “tax court” for this purpose. Finally, in section 4., this empirical-based research on the Vaassen-Göbbels requirements leads to certain normative conclusions on the interplay between national courts and the CJEU. The author argues that the discretionary power of the CJEU to admit or reject a reference implies that, contrary to article 267 of the TFEU, which places the CJEU on the same level as national courts, the Court is acting in the role of a Supreme Court, i.e. at the apex of European judicial power.5

2. An Autonomous Concept Devoid of Consistency

One would think that the notion of “court” enshrined in this article would come within the scope of the sovereignty of the Member States. Due to the paramount importance of the preliminary reference procedure in ensuring an effective and uniform interpretation of EU law in all Member States,6 however, the concept of “court” or “tribu-

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3. Recent cases, such as DK: ECJ, 9 Oct. 2014, Case C-223/13, TDC [not yet reported]; PT: ECJ, 12 June 2014, Case C-377/13,Ascend Beiras Litoral and Alta, Auto Estradas das Beiras Litoral and Alta, S.A. v Autoridade Tributária e Aduaneira, ECJ Case Law IBFD; and BG: ECJ, 31 Jan. 2013, Case C-394/11, Below: [not yet reported] show that the meaning of “court or tribunal” under article 267 of the TFEU is still under dispute.
nal” within article 267 of the TFEU is a matter of EU law. As Advocate General Jacobs pointed out in his Opinion in Syfait (Case C-53/03), delivered on 28 October 2004, “it is clear from the Court’s case-law that the concept of ‘court or tribunal’ is one of Community law”.

Since its initial decisions, and following a purposive approach, the CJEU has not confined the concept of “court” or “tribunal” to those bodies belonging to the Member States’ judiciary that are entitled to exert their jurisdictional function as a result of an express constitutional mandate. In light of the above considerations, in her Opinion in Paul Miles and others v. European schools (Case C-196/09), Advocate General Sharpston supported the arguments of the Commission and the claimants concerning a teleological interpretation of article 267 of the TFEU: “therefore, Article 234 EC should be construed purposively and the words a ‘court or tribunal of a Member State’ should be given a broad interpretation”.

Accordingly, the Court devised an autonomous notion of “court or tribunal” based on several criteria laid down in Vaassen-Göbbels and the case law that followed it. When a national court makes a reference to the CJEU for a preliminary ruling, the Court needs to determine if certain requirements have been met, i.e. whether or not the body is established by law, whether it is permanent, whether it applies rules of law, whether its jurisdiction is compulsory, whether it is independent, whether it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature and, finally, whether its procedure is inter partes. It is a well-known fact, however, that despite what the CJEU purported to do with the Vaassen-Göbbels criteria, the final outcome is far from compelling or rigorous. As Advocate General Colomer stated in De Coster (Case C-17/00):11

The result is case-law which is too flexible and not sufficiently consistent, with the lack of legal certainty which entails. The profound contradictions noted between the solutions proposed by Advocates General in their Opinions and those adopted by the Court of Justice in its judgments 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 for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted.

In the field of taxation, the CJEU constantly faces questions posed by a wide variety of bodies, including administrative tax tribunals, courts of arbitration and tax advisory boards. Administrative tax tribunals, the members of which are usually appointed by the Ministry of Finance, are not considered judicial bodies despite the fact that their decisions on tax appeals can be challenged before jurisdictional courts. Courts of arbitration, such as those recently implemented in Portugal, offer an alternative means of judicial resolution of tax disputes. Finally, some Member States have established tax advisory boards that issue decisions in response to questions raised by taxpayers concerning the interpretation of national tax provisions applicable to planned transactions in order to prevent them from incurring liabilities resulting from an incorrect interpretation of tax provisions. Although there are some differences among the Member States regarding the regulation of these advisory bodies, the main characteristic of such bodies is the binding nature of their decisions in respect of questions raised by taxpayers. This means that not only the taxpayers, but also the tax authorities, are obliged to follow the criteria put forward by these advisory boards.

With regard to these administrative tax bodies, an abundance of case law confirms a striking lack of clarity and results in internal contradictions see, for example, Corbiau (Case C-24/92), Galabrisia and others (Joined Cases C-110/98-147/98), Schmidt (Case C-516/99), Victoria Film (Case C-134/97) and Nidera (Case C-385/09). To put it differently, the Court depicts a canvas in respect of which the boundaries between administrative and judicial bodies are clearly blurred. Therein lies the author’s reference to Magritte’s famous painting in the title of this article. For instance, the traditional notion of independence allocated to judicial bodies does not always fit within the particular understanding of the Court. The vast amount of commentary and criticism targeted at these rulings of the Court suggests the need, as outlined in section 3., to point out the internal contradictions arising from the Vaassen-Göbbels criteria.

3. Vaassen-Göbbels Criteria: Untangling the Notion of “Tax Court”

3.1. Introductory remarks

The aim of this section is thus to challenge the Vaassen-Göbbels criteria in relation to tax bodies that can refer questions for a preliminary ruling. The author, in examining the contradictions that arise from the case law of the Court in respect of assessing the references made to it by bodies specialized in taxation, seeks to demonstrate that the concept of “tax court” articulated by the CJEU does not resemble the classical notion of a court embedded within the judicial branch and that a proper definition cannot be

Community law, meaning that the definition does not refer to national law.

10. It should be stressed that this requirement was introduced almost 20 years after Vaassen-Göbbels (61/65) in IT: ECJ, 11 June 1987, Case 14/86, Pretore di Salò [1987] E.C.R. 2545, para. 7.
13. See the description of the main features of the Swedish Board for Advance Rulings in C. Brokelind, Enhancing Taxpayers’ Community Rights: A Tax Board for Advance Rulings in EC Law and the ECP in Legal remedies in European Tax Law (P. Pistone ed., IBFD 2009), Online Books IBFD. In Spain, the tax advisory board is called the Dirección General de Tributos as set out in ES: Law 58/2003 of 17 December, art. 89.1.
grasped. Thus, the concept of a “tax court” that is entitled to refer a question for a preliminary ruling falls within the discretionary power of the Court.

3.2. Adversarial procedure

First, one of the classical features of the Member State’s ordinary court systems requires that the body be bound by rules governing adversarial procedures. Since Dorsch Consult (Case C-54/96), this requirement has not been an absolute condition:

It must be reiterated that the requirement that the procedure before the body concerned must be inter partes is not an absolute criterion. Besides, under Paragraph 3(3) of the Verordnung über das Nachprüfungsverfahren für öffentliche Aufträge, the parties to the procedure before the procurement review body must be heard before any determination is made by the chamber concerned.

For the purposes of article 267 of the TFEU, it seems that the Court has replaced the adversarial procedure requirement with a requirement that the parties have the right to a hearing.

The CJEU, however, has allowed references made by national bodies in the course of proceedings where not only the inter partes nature of the procedure was not fulfilled, but a public hearing was also not available (i.e. in the event of an interlocutory proceeding). In the author’s opinion, the outcome of these decisions reveals that the Court has definitely quashed this requirement. For instance, many advisory tax boards — for example, the Skatterättsnämnden in Sweden and Dirección General de Tributos in Spain — do not provide for a public hearing prior to reaching a final decision, but could, hypothetically, be qualified as “courts” or “tribunals” within the meaning of article 267 of the TFEU.

3.3. A permanent body established by law with compulsory jurisdiction

Second, the requirements that the body be established by law, be permanent and have compulsory jurisdiction do not typically apply to arbitration bodies, as the CJEU pointed out in Eco Swiss (Case C-126/97) and Nordsee (Case C-102/81). According to the Court, there are three reasons to justify the exclusion of these courts of arbitration from article 267 of the TFEU. Firstly, the parties are free to have their disputes resolved by the ordinary courts or opt for arbitration by inserting a clause to that effect in the contract. Secondly, as the Court remarked in Eco Swiss, inasmuch as the public authorities of the Member States are not involved in the decision to opt to solve the dispute before a court of arbitration, they also cannot regulate the proceedings before the arbitrator. Thirdly, the arbitration awards can usually be challenged before a judicial court, which can always refer a question of interpretation of EU law for a preliminary ruling. There is thus no need to entitle a court of arbitration to refer a question within article 267 of the TFEU, as long as, in the course of the judicial review of an arbitration award, these questions can be raised.

In Handels (Case C-109/88), the Court admitted a question addressed by the Danish industrial arbitration Board on the grounds that “either party may bring a case before the board irrespective of the objections of the other. The board’s jurisdiction thus does not depend upon the parties’ agreement”. Although in Nordsee, the parties could opt between a judicial court and an arbitrator, in Handels it was sufficient for one party to decide to bring the matter to the court of arbitration to bind their counterpart. Additionally, Danish law governed the composition of the arbitration board. In other words, the appointment of the board’s members was not up to the parties’ discretion.

In the field of taxation, in the recent Ascendi (Case C-377/13) decision, the CJEU confirmed that the Tax Arbitral Courts in Portugal meet all the requirements to be qualified as a court entitled to refer a question for a preliminary ruling. Despite the fact that the Portuguese arbitration courts did not meet the requirement of having compulsory jurisdiction — the parties were under no obligation, in law or in fact, to refer their disputes to arbitration —, the CJEU found it relevant that their decisions were binding on the parties and that “their jurisdiction stemmed directly from the provisions of Decreto-Law 10/2011 and is not, as a result, subject to the prior expression of the parties’ will to submit their dispute to arbitration”. The compulsory jurisdiction requirement is mitigated by the need for a state’s intervention either in establishing the arbitrator or in regulating the composition of the body:

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The blurring of the compulsory jurisdiction requirement is also present in other areas of EU law, such as trademark law. In Emanuel (Case C-259/04),26 the appellant had a choice to bring his appeal to either the High Court of Justice or an "Appointed Person", appointed by the Lord Chancellor. In Emanuel, the Court accepted the reference by the Appointed Person even though the appellant clearly had this choice, on the grounds that the other requirements had been met:27

The Appointed Person is a permanent body which makes findings of law in application of the Trade Marks Act 1994 and according to the procedural rules laid down by rules 63 to 65 of the Trade Marks Rules 2000. The procedure is inter partes. The decisions of the Appointed Person are binding and, in principle, final, subject exceptionally to an application for judicial review.

In concluding, the Court suggested that compulsory jurisdiction is outweighed by the importance of the state’s intervention in designing the referring body. The fact that the taxpayer can choose the body that he brings his appeal before does not preclude the access of courts of arbitration to the preliminary reference procedure, provided that, first, these bodies are set up by law and, second, the state regulates their composition and appoints the arbitrators.

3.4. An independent body

One of the paramount features of courts and tribunals is that they have the necessary independence to ward off any undue pressure from the executive power. In the area of taxation, the CJEU, therefore, has to address the independence of administrative tax tribunals. In its case law, the CJEU seeks to ensure that administrative tax tribunals are not bound by any instructions received from the executive branch (Ministry of Finance, tax authorities, etc.), as well as the impartiality of their members. Due to imprecise, hesitant and, in many instances, confused case law, the notion of independence has undergone several permutations.

3.4.1. From organizational links to functional links

It was Corbiuath28 that paved the way for a discussion regarding whether or not administrative tax tribunals could refer a question for a preliminary ruling. The CJEU rejected the reference on the grounds that there was a clear organizational link between the referring body, a French administrative tax tribunal (Directeur des Contributions Directes et des Accises) and the body that raised the tax assessment that was under dispute. The Directeur was embedded within the Ministry of Finance. If the taxpayer were to lodge an appeal against the Directeur’s resolution before the Supreme Administrative Court (Conseil d’État), national law provided that the former would defend the interests of the administration.

In subsequent rulings, however, the Court moved away from the organizational link argument towards the notion of a functional link. This step forward in the reasoning of the Court was taken in Gabelfrisa and others.29 In this decision, despite the fact that the Spanish Administrative Tribunal (Tribunal Económico-Administrativo Regional de Cataluña) was embedded within the structure of the Ministry of Economic Affairs and there was a clear organizational link, the CJEU began to analyse the existing functional links between the Ministry of Economic Affairs and the Spanish Administrative Tribunal. In pursuing a clear set of rules to ascertain whether an administrative tax tribunal can perform its tasks with enough safeguards of independence and impartiality, however, it is first necessary to confront the contradictory interpretations given by the CJEU in its rulings, on the one hand, and by the Advocates General, on the other.

In Gabelfrisa and others,30 the fact that the presidents and members of the Tribunales Económico-Administrativos were civil servants appointed with the approval of the Minister of Economic Affairs, coupled with the power conferred on the Ministry to remove them, did not prevent the Court from accepting these administrative bodies as third party independent parties, contrary to the Opinion of Advocate General Saggio, who considered the entire Spanish economic-administrative complaint system to be under the influence of the executive power. Nevertheless, in Schmid,31 the Court seems to disregard a previous decision in respect of the Appeal Chamber of the regional finance authority for Vienna, Niederösterreich and Burgenland. The response of the Court was completely the opposite on the grounds that the President of the regional finance authority not only had the power to nominate and modify at his discretion the members of the Appeal Chamber, even in the course of an inquiry, but could also bring an appeal (subject to possible direction from the Ministry of Finance) against the decision of the Appeal Chamber. The same circumstances, however, apply to the Spanish regional administrative tax tribunals (Tribunales Económicos-Administrativos Regionales), in respect of which the Spanish Ministry of Economic Affairs decides on composition, appointments and removal/withdrawal of members, as well as the competence to challenge a decision before the Central Spanish Administrative tax tribunal (Tribunal Económico-Administrativo Central).32

In other areas of EU law, a casuistic approach prevails. The CJEU found that the generic and vague provisions laid down either in administrative legislation or the Constitution are sufficient and adequate to guarantee the independence of the appeal body, disregarding a deeper analysis of the interplay between that body and the executive.

27. Id., para. 23.
28. Corbiuath (C-24/92), paras. 15-16.
29. Gabelfrisa and others (C-110/98/147/98), paras. 39-40.
30. Id. In his Opinion delivered on 7 October 1999 (ES: Opinion of Advocate General Saggio, 7 Oct. 1999, Joined Cases C-110/98/147/98, paras. 13-21) Advocate General Saggio disagreed with the ECI criteria given in the decision: paras. 13-21. Advocate General Saggio remarked, concerning the appointment of the members of these Spanish Administrative tax tribunals (Tribunales Económicos-Administrativos) that: “It appears unlikely to say the least that the Tribunales enjoy a measure of independence sufficient to ward off undue interference or pressure from the executive”.31
31. Schmid (C-516/99), paras. 36-41.
32. See, in Spain, at the time of Gabelfrisa and others (C-110/98/147/98), ES: Legislative Decree 2795/1980, art. 11.1.d) and ES: Real Decreto 391/1996, art. 120.
branch. In Wilson (Case C-506/04), the issue was not the characterization of the national body within article 267 of the TFEU, the Court’s approach to the definition of impartiality of the members of the Disciplinary and Administrative Committee of the Bar Association of Luxembourg reinforced the idea that an appeal committee should not be exclusively composed of a large number of members who make the decision in the first instance.

In Pilato (Case C-109/07), the CJEU rejected the reference made by the Industrial Tribunal (Praud homie de pêche de Martigues) (France) on the grounds that the members of the industrial tribunals are subject, at least in respect of some of their activities, to supervision by the administration and the process of dismissing a member of an industrial tribunal is not subject to specific guarantees.

In the area of competition law, in Syfait (Case C-53/03) the Court declined the reference made by the Greek Competition Commission based on the existence of functional links between the referring body and the Ministry of Finance. Although several scholars observed, in this decision, a clear trend of the Court to exclude administrative appeal boards from the preliminary reference procedure, according to the author’s understanding, Syfait is specific to this field of competition law. There are substantial differences between the national competition authorities and appeal boards that specialize in taxation. The CJEU highlighted the duty of cooperation of the national competition authorities with the European Commission in rejecting the judicial nature of the proceedings of the Greek competition authority.

The proof of this view is that, in Nidera Handelscompanie (Case C-385/09), the Court returned to Gabalfrissa and others, setting aside Schmid and disregarding Syfait, in response to a reference lodged on 29 September 2009 by the Lithuanian Tax Disputes Commission. Although its members are appointed by the government of the Republic of Lithuania, acting on a joint recommendation from the Minister of Finance and the Minister of Justice for a term of six years, they are independent in the following respects: (1) they are candidates of irreproachable repute; (2) the members hold office only in the Commission; and (3) they are appointed for a term of six years. Strikingly, the CJEU does not examine the fact that the members of the Commission can be dismissed before their term of office expires when they seriously violate their work duties. In TDC (Case C-222/13), unlike Nidera Handelscompanie the fact that the Danish Government at the hearing confirmed that the members of the Teleklagenævnet could be removed from office by the Minister, who also has the power to appoint them, was relevant enough to conclude that the Court did not have jurisdiction to answer the questions referred.

To the extent that the appraisal of this event fits within the discretionary power of the executive, the independence of the members to thwart pressures from the executive branch can be compromised. Likewise, although the Lithuanian law on tax administration envisages a duty of cooperation with the Ministry of Finance, the Lithuanian government stated at the hearing that “there are no cases in which the Tax Disputes Commission had received from the Ministry, instructions or guidance as to the solution which would be preferred in a certain case”.

Nidera Handelscompanie inherited the current casuistic approach. Arguably, the Court did not find it relevant that the members of the Commission can be dismissed before their term of office expires and blindly believed the observations submitted at the hearing by the Lithuanian government. The meaning of independent body hinges on whether the Court zooms in or zooms out in reviewing the factual settings provided by the referring national court and the observations submitted by the Member States at the hearing (Nidera Handelscompanie and TDC). It is thus difficult to conclude that Nidera Handelscompanie is the final word regarding the interpretation of the notion of independence and the admissibility of questions posed by appeal boards that specialize in taxation.

3.4.2. Wide discretion grounded on a casuistic concept of independence

On the basis of this case law, a conclusion can be drawn: qualifying tax appeal boards as independent depends on the assumption that these bodies are functionally autonomous from revenue bodies even though both are embedded within the executive branch (Ministry of Finance). This is precisely the Gordian knot of the struggle between the Court and the Advocates General. Suffice it to recall here the controversy in De Coster between the Court and Advocate General Ruiz-Jarabo Colomer. In De Coster, the Court takes a restrictive approach. To the extent that

33. In AT: ECJ, 4 Feb. 1999, Case C-103/97, Kollenpeger and Aetzinger, [1999] E.C.R I-531, the ECJ held that the independence of the body is guaranteed by the application of the General Law on Administrative Procedure provisions and by the express prohibition against giving instructions to the members of the body whilst performing their duties; see: ECJ, 6 July 2000, Case C-407/98, Abrahamsson v. Fogdåvist, [2000] E.C.R I-5539, paras. 36-37: “[a]s regards independence, it is clear from the provisions of the Swedish Constitution mentioned in paragraph 32 of this judgment that the Überklagdenämnden gives judgment without receiving any instructions and in total impartiality on appeals against certain decisions adopted within universities and higher educational institutions.”


35. Id., para. 49: “The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision (see: to that effect, inter alia Case C-24/92, Corbiau [1993] ECR I-1277, paragraph 15, and Case C-516/99, Schmid, [2002] ECR I-4573, paragraph 36)”.


39. See Syfait (C-53/03), para. 34. Likewise, the admission of references from 28 national competition authorities could increase the workload of the EC resulting in delays in achieving justice. See Rodriguez Medal, supra n. 2, at p. 128.

40. Nidera Handelscompanie (C-385/09). It is worth mentioning that the Court does not quote Syfait in its findings in Nidera Handelscompanie with regard to the admissibility of the question posed to it.

41. TDC (C-222/13), paras. 34-38.

42. BE: ECJ, Case C-17/00, 29 Nov. 2001, De Coster, [2001] E.C.R. I-9445, paras. 18, 19 and 20 versus AG Opinion in De Coster (C-17/00), para. 116.
the members of the Tax Appeal Board (Collège juridictionnel) are appointed by the Brussels Regional Counsel (Conseil de la Région de Bruxelles-Capitale) and not by the municipal authorities, whose tax decisions are challenged before the Tax Appeal Board (Collège juridictionnel), there is no a functional link between the Collège juridictionnel and the municipal authorities that issue the tax assessment. By contrast, Advocate General Ruiz-Jarabo Colomer, in his Opinion delivered in this case, advocates a wide definition of tax authority, according to which the Collège juridictionnel should be framed within the administrative organization of Brussels-Capital:43

The Collège is an institution which exercises its function independently but is still part of the administrative organization of Brussels-Capital and has jurisdiction to settle complaints relating to the taxes imposed in the region. In actual fact, it is a filter between the administrative authorities which manage and assess the taxes and the courts of justice. Of course, it does not form part of the judiciary and it necessarily follows that its members cannot be judges. If it is not a court of justice, it should not be accorded the status of court or tribunal for the purposes of Article 234 EC.

The assessment of independence, however, depends on a casuistic approach based on the factual settings put forward by the national court. In certain decisions, the Court highlights certain characteristics of the body, whilst in others the same features are completely ignored. For instance, in Nidera Handelscompanie, the CJEU paid no attention to the fact that the members of the Commission can be dismissed before their term of office expires when they seriously violate their work duties. The contradictory assessments of the Court in respect of quite similar appeal boards (Gabalfrisa and others versus Schmid) reflect the “zooming in/out” effect.

3.5. Judicial nature of the procedure

Finally, the requirement that the procedure be of a judicial nature seems to preclude tax advisory boards from referring a question for a preliminary ruling, as the Court decided in Victoria Film.44 In this case, the Swedish tax consultative Board (Skatterättsnämnden) was not entitled to make a reference on the grounds that it performed an administrative role instead of a judicial function. Inasmuch as the role of the tax advisory board is to respond to interpretative questions applicable to planned transactions, the questions referred to the CJEU by these bodies could be characterized as hypothetical and consequently rejected. In a certain line of cases, the Court accepted references made by bodies that handed down consultative opinions on questions that were outside the purview of a dispute (Oesterreichischer Gewerkschaftsbund, Garofalo and Nederlandse Spoorwegen (Case C-36/73)).45

In Oesterreichischer Gewerkschaftsbund,46 the reference was made by the Austrian Supreme Court in the course of a proceeding under Austrian law that entitled associations of employers and employees to raise questions concerning the existence of rights/legal relationships independent of whether or not a named person existed. The questions that both associations could address concerned the interpretation of substantive questions of labour law relevant to at least three employers. In this case, the role of the Austrian Supreme Court was to give an advisory opinion that, according to Austrian law, was binding, ‘on the parties who cannot make a second application for a declaration relating to the same factual situation and raising the same legal question’. Despite the consultative nature of the proceeding, the Court admitted the reference highlighting, among the Vaassen-Göbbels criteria, the compulsory jurisdiction of the Austrian Supreme Court, together with the inter partes nature of the proceeding, as well as the fact that the proceeding was governed by law. The Court set aside the argument that the Austrian Supreme Court answered, through this proceeding, purely hypothetical questions.47 Although the employers and employee bodies submitted to the Austrian Supreme Court a description of the factual circumstances that arose in the case, the Court was only concerned with interpreting substantive law. As the CJEU emphasized in this case, the legal questions are not abstract or hypothetical because the factual situation was given by the parties involved. Therefore, the requirement that the question referred by a national body be linked with the settlement of a dispute has clearly lost ground. The unitary treatment of the Austrian Supreme Court had weight in this decision, which could overturn previous decisions, such as Job Centre (Case C-111/94),48 in which the Court declined to give a preliminary ruling in respect of a reference made by a national court in the course of non-contentious proceedings (giurisdizione volontaria).

In Garofalo and Nederlandse Spoorwegen,49 the Court faced questions raised by the Council of State functioning as an advisory body. In Garofalo, the CJEU characterized the Italian Council of State as a court or tribunal within the meaning of article 267 of the TFEU in the course of an extraordinary petition proceeding:50

The council of State is a permanent, impartial and independent body whose members must satisfy the legal requirements of independence and impartiality, whether they are part of the advisory section or of the judicial section, and may not belong to both sections at the same time.

In Nederlandse Spoorwegen, the Court allowed the questions referred by the Netherlands Council of State (Raad van State) or a preliminary ruling, overlooking considerations regarding whether or not this body fulfills the requirements to be qualified as a court or tribunal within the meaning of article 267 of the TFEU. The Council of State operated in this case as an advisory board of the

43. AG Opinion in De Caster (C-17/00), para. 116.
44. Victoria Film (C-134/97), paras. 14-19.
46. Oesterreichischer Gewerkschaftsbund (C-195/98), paras. 21-32.
47. Id., para. 2.
49. Garafalo (C-69/96 and C-79/96), paras. 17-27; and Nederlandse Spoorwegen (C-36/73).
50. See Garafalo (C-69/96 and C-79/96), para. 12.
Crown entitled to give reasoned opinions on administrative disputes. As the Advocate General opined,\textsuperscript{51} in so far as the Crown must give Royal Assent to the opinion conveyed by the Council of State (residual jurisdiction). Her Majesty the Queen of the Netherlands is herself involved in the dispensation of justice.

Broberg and Fenger (2010)\textsuperscript{52} argued that the position of the Court in those rulings demonstrates a clear willingness to admit the questions addressed by the highest national constitutional advisory boards. Notwithstanding the above, the reasoning of the Court in those cases provides enough arguments to run counter to the exclusion of tax advisory boards in \textit{Victoria Film Garofalo} and \textit{Nederlandse Spoorwegen} as follows: (1) these bodies (Austrian Supreme Court and the Italian/Netherlands Councils of State), like the Swedish Tax Board, do not rule on disputes; (2) the resolutions issued are binding on the parties;\textsuperscript{53} and (3) there is no risk of qualifying the questions posed to these bodies as hypothetical, due to the fact that the parties submit enough facts to enable the body to interpret and apply the relevant legal provisions.

4. The Emergence of a Discretionary Power: The Interplay between the CJEU and National Courts

The existing case law confirms a purposive and fuzzy concept of tax court. The classical jurisdictional function, however, requires the existence of a dispute to be solved by a court by means of a resolution grounded in law (l'existence d'un litige, qui sera réglé par une décision obligatoire fondée sur le droit).\textsuperscript{54} In \textit{Garafalo and Nederlandse Spoorwegen} the Court follows a broad concept to enable a Council of State performing an advisory function to request a reference for a preliminary ruling. Whereas the notion of independence is heralded as an indissoluble attribute of judges and courts, the above-mentioned case law concerning the tax appeal boards conceals the fact that these bodies form part of the executive branch and, therefore, are potentially subject to political pressure.

Hence, the CJEU is endowed with a great margin of discretion in assessing the admissibility of references by national bodies. As De La Mare (1999) indicates, “the Court has set the valve fairly wide open by taking a broad, purposive view of what is a court”.\textsuperscript{55} The relative restrictiveness of the Court in admitting a reference made by a national body can be influenced by the workload of the Court. Whilst, in the early years of the establishment of the European Union, it was necessary to admit the maximum number of questions possible through the preliminary reference system in order to achieve a correct and uniform interpretation of EU law, the enlargement of the European Union to 28 Member States has required the Court to become more restrictive.

This casuistic approach of the Court clearly jeopardizes the principle of legal certainty. In determining whether or not a tax court is empowered to refer a question for a preliminary ruling, the Vaassen-Göbbel criteria do not function \textit{a priori}. The qualification of certain national tax bodies as courts within the meaning of article 267 of the TFEU – the Danish National Tax Tribunal, the Finnish Assessment Adjustment Board and the Austrian Independent Fiscal Senate (Unabhängiger Finanzsenat) still casts a shadow of doubt.\textsuperscript{56} With regard to the Finnish Assessment Adjustment Board (Appeal Tribunal), Finnish scholars have rejected the qualification of such a body as a court entitled to refer a question for a preliminary ruling on the grounds that it is “closely associated with the tax administration”.\textsuperscript{57} Bearing in mind the blurry notion of independence espoused by the Court, only a question referred by this body would dispel existing doubts.

The definition of tax court falls within the discretionary powers of the Court based on the factual setting provided by the referring national court.\textsuperscript{58} The “zoom in/out” technique entitles the CJEU to balance several features of the referring body, as laid down in the order of reference, against others. As such, rather than setting out general abstract categories (independence, judicial nature, inter partes, etc.) to be judged against the current features of the referring body, the CJEU enters into the realm of judicial discretion based on a sometimes debatable interpretation of the description of the body furnished in the order of reference. The dissipation of the \textit{Vaassen-Göbbel} criteria paved the way to cases such as \textit{Broekmelen} (Case 246/80)\textsuperscript{59} and \textit{Belov} (Case C-394/11),\textsuperscript{60} wherein the absence or existence of an upper jurisdictional channel to challenge the decisions of the Appeal Committee (\textit{Kommissie van Beroep Huisartsgeneeskunde}) and the Commission for Protection against Discrimination (\textit{Komisija za zashtita od diskriminacija}), respectively, became the yardstick for deciding whether or not the reference should be admitted.

The effectiveness of EU law would be jeopardized if the question posed by the Appeal Committee (\textit{Kommissie van Beroep Huisartsgeneeskunde}) were not admitted based on a finding that there was an absence of a right of appeal

51. See NL: Opinion of Advocate General Mayras, 7 Nov. 1973, Case C-36/73, 'Nederlandse Spoorwegen', which was in favour of admitting the preliminary reference on the grounds of the judicial nature of the procedure.
52. Broberg & Fenger, supra n. 2, at p. 84.
53. With regard to the Council of State (Raad van State/Consiglio di Stato), a nuisance must be introduced. Although Netherlands/Italian law foresees the possibility of dissent, the regulation makes it extremely difficult. Therefore, advisory opinions issued by these Councils of State are likely to become binding for the crown/Italian Council of Ministers.
55. T. De La Mare, \textit{Article 177 and legal integration}, in \textit{The evolution of EU Law} p. 220 (P. Craig & G. De Burca eds., Oxford University Press 1999).
58. Some authors urge the ECI to put an end to this discretionary power in favour of the Member States. See, for instance, Rodriguez Medal, supra n. 2, at p. 146: “The CJEU should not waste time assessing whether a certain body meets the criteria to be considered as meeting the concept of a court or tribunal. It should already know in advance who is authorized, or at least have a clear idea beforehand. Only those cases where there are doubts on the exercise of the jurisdictional function by a judicial body should be evaluated. This problem would be solved if it were up to the Member States to decide what national courts, tribunals and bodies are considered [to have] jurisdiction.”
60. Belov (C-394/11), para. 52.
of its decision to the ordinary courts. The need to ensure the effectiveness of EU law will always prevail over a list of requirements used to deem a body as a court or tribunal within the meaning of article 267 of the TFEU. One might think that the logic of Brockmeulen⁶¹ or Belov⁶² could serve as a suitable argument to reconsider the position of the Tax Appeal Boards within the preliminary reference procedure. To the extent that the resolutions issued by these administrative bodies (Tribunales Económicos-Administrativos) can be challenged before the judiciary, there is no need to grant them access to article 267 of the TFEU. In the author’s understanding, the failure of the Vaassen-Göbbels criteria should trigger the Court to generalize an approach based on whether or not rejecting the question posed by the national court could jeopardize the effectiveness of EU law.

This phenomenon yields normative considerations regarding the position of the CJEU within the dialogue enshrined in article 267 of the TFEU. Taking into account the fact that the preliminary reference procedure is an emanation of the spirit of cooperation between national courts and the CJEU, does this discretionary power result in the application of “docket-control” or “certiorari” techniques?⁶³ Unlike the US Supreme Court, which generally refrains from indicating the reasons for denying a review, the CJEU is forced to disclose its reasons for rejecting a reference. In the author’s view, the need to provide specific reasons for rejecting a reference made by a national court has mitigated against such American style “docket-control”.

Under a broad and flexible notion of tax court, however, what emerges is a clear attempt to discipline the dialogue with the national courts. Since Costa v. Enel (Case 6/64)⁶⁴ the separation of functions between national courts and the CJEU prevented the latter from either investigating the facts of the case or criticizing the grounds and purpose of the request for interpretation. The CJEU explicitly acknowledges that the interplay between itself and the national courts cannot be construed as imposing a hierarchical structure.⁶⁵ Rather than conceptualizing the relationship as hierarchical, the above-mentioned case law regarding the notion of tax court reveals a clear attempt to steer the preliminary reference procedure vertically.⁶⁶ Admittedly, the Court has the last word: its decision on admissibility of the questions posed cannot be challenged.

5. Conclusion

Challenging the Vaassen-Göbbels yardstick employed by the CJEU with regard to bodies in the area of taxation, this article has demonstrated that the concept of tax court operates as an “empty shell” to be filled up depending on the circumstances of the case at issue. The “zoom in/out” technique, which is based on the description of the body provided by the referring court, can lead to contradictory decisions regarding similar bodies (Gabalfrisa and Others versus Schmid). The lack of consistency, and the ensuing debate as to whether or not a national tax body is entitled to refer a question, is far from settled, as recent case law demonstrates (Ascendi and Belov).

Turning to the article’s initial endeavour to define the concept of a “tax court”, the outcome clearly reveals the blurring of the classical features of the judiciary. Neither the inter partes nature, permanence, independence, nor the judicial nature of the decisions classify a body a priori as a “tax court”. The broad notion of “tax court” employed by the CJEU continues to be subject to challenge. Unlike the previous cases framed under the classical analysis of the Vaassen-Göbbels criteria, in Brockmeulen and Belov a different logic emerges. The need to ensure the effectiveness of EU law serves as the ultimate justification employed by the Court in admitting references in cases in which the resolution of the referring body could not be challenged before the judiciary. Perhaps, in the long term, the need to ensure the effectiveness of EU law will replace the murkiness of the Vaassen-Göbbels criteria.

Finally, taking into account this casuistic and discretionary approach regarding national bodies specialized in taxation, the author challenged the classical separation of functions between the CJEU and the national courts laid down in Costa. The Court had placed itself at the apex of European judicial power by disciplining the dialogue with national courts.

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⁶¹ Brockmeulen (246/80), paras. 16-17.
⁶² Belov (C-394/11), para 52.
⁶³ See, for a definition of “docket-controls,” H. Rasmussen, Issues of admissibility and justiciability in EC judicial adjudication of federalism disputes under article 177 EEC, in Schermers, Timmermans, Kellermann and Stewart Watson, supra n. 2, at p. 380: “[by docket-control] I mean the fundamentally important judicial task of isolating cases and conflicts which are to be dismissed as non-litigable from those which are admitted and dealt with by a full judicial opinion on the merits. Decisions of this sort should often be taken under the exercise of a certain measure of discretion”; and L. Heffernan, The Community courts post NICE: a European Certiorari revisited. International and Comparative Law Quarterly 52, p. 920 (2003): “Certiorari, in turn, has facilitated a gradual accommodation of the Supreme Court’s burgeoning docket, thereby obviating the need for dramatic institutional reform. It allows the Court to select from among the vast number of petitions submitted annually for review those cases that most clearly invoke the Court’s essential functions. Thus, in theory at least, it enables the Court to map out the parameters of the legal landscape, identifying the important issues of the day and resolving conflicts among the lower courts over the application of federal law. The Supreme Court has the capacity to decide only a small percentage of the cases it receives and, consequently, some form of filter mechanism is an operational necessity.”
⁶⁵ L. Potvin-Solis, Le concept de dialogue entre les juges en Europe, in Le dialogue entre les juges européens et nationaux: Incantation ou réalité? p. 23 (L’Harmattan 2010).
⁶⁶ F. Lichti, L. Potvin-Solis & A. Raymond eds. Bruylant 2004); and A. Arnulf, The European Union and its Court of Justice p. 96 (Oxford University Press 1999): “Rather the proceedings take the form of a dialogue or conversation in which the two courts jointly seek a solution to the case in hand which is in harmony with the requirements of Community law”.
⁶⁷ See P. Craig & G. De Burca, EU Law Text, Cases and Materials p. 443 (Oxford University Press 2011): “[t]he relationship has become steadily more vertical and multilateral. It has become more vertical in that developments have emphasized that the ECJ sits in a superior position to that of the national courts. The verticality of the relationship also manifests itself in a less obvious, but equally important, manner. The ECJ has, in effect, enrolled the national courts as enforcers and appliers of EU law. They are perceived as a central part of EU-wide judicial hierarchy, with the ECJ sitting at its apex”; and D. Sarmiento, Poder Judicial e integracion Europea p. 206 (Civitas 2004).