# THE MEANING OF NATIONAL COURT IN ARTICLE 267 TFEU AND THE IMPORTANCE OF THE COURT'S INDEPENDENCE

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**Abstract**

*The notion of "court or tribunal of a Member State" in Article 267 of the Treaty on the Functioning of the European Union has been given an autonomous meaning by the Court of Justice of the European Union (CJEU), resulting from its rich case-law of preliminary rulings. One of the recent developments in the analysis of this notion concerns the importance of the independence of the judiciary, as an element of the rule of law, one of the key values of the European Union. The study presents the requirements a judicial body must fulfil in order to be allowed to request a preliminary ruling, with emphasis on the criterion of independence and focus on the latest jurisprudence. The goal is to draw conclusions on the effect that measures adopted by the European Union's institutions for the protection of the rule of law in some Member States might have on CJEU's jurisdiction to accept requests for preliminary rulings from the courts of the Member States in question..*

**Keywords:** *European Union; preliminary rulings procedure; national court; rule of law; independence of the judiciary.*

## 1. Introduction

Article 267 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis for the Court of Justice of the European Union's[1] jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union (EU), at the request of a court or tribunal of a Member State.

The preliminary rulings procedure is a dialogue between the national court and the Court of Justice. It is meant to facilitate the national courts' mission to interpret and apply the EU law and the Court of Justice of the European Union's mission to ensure coherent and uniform application of EU law in all Member States.

This procedure does not establish a hierarchy between the reffering court and the responding court. National courts are EU courts and are the first called upon to interpret and apply EU law. Only if they face difficulties in fulfilling this task, which cannot be overcome by studying the case-law, if they consider that are grounds for a revision of the jurisprudence, if they have doubts about the validity of an EU rule or about its uniform interpretation in all the Member States, they may use this procedural instrument to obtain the opinion of the specialized supranational court, which has the legitimacy and the experience necessary to give rulings with binding effects in the Member States.

In the Court of Justice's own words[2]:

"In order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law (…).

In that context, in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law (…).

In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties."

This system of cooperation is founded on the principle of mutual trust between Member States, a principle resulted from sharing the values enshrined in Article 2 of the Treaty on European Union (TEU)[3].

The study aims to clarify, with respect to the relevant case-law of the Court of Justice, the meaning of "national court or tribunal of a Member State", in order to focus on the most recent relevant cases and to determine the possible legal consequences on the application of Article 267 TFEU of the loss of mutual trust between Member States as to some of the Member State's ability to ensure and guarantee the

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[1] A system presently composed of the Court of Justice and the Tribunal.

[2] Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraphs 35-37.

[3] Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

independence of the judiciary, a key element of the rule of law.

Since the subject-matter of the study focuses on recent case-law developments, there are few contributions in legal literature and many points open to debate.

## 2. National court or tribunal of a Member State within the meaning of Article 267 TFEU

The notion of court or tribunal, found in Article 267 TFEU is an autonomous notion in EU law[4]. The Court of Justice determined that its meaning is not limited to the judiciary system, but may include other bodies authorized to render rulings of a judicial nature.

The characteristics of such a body were defined by the Court of Justice in the *Broekmeulen*[5] case. The Appeals Committee for General Medicine raised a preliminary question in the context of an appeal lodged by doctor Broekmeulen, of Netherlands nationality, who obtained a diploma of doctor in Belgium and was refused authorization to practice medicine in the Netherlands by the Registration Committee. Both the Registration Committee and the Appeals Committee were private bodies, established by the Royal Netherlands Society for the Promotion of Medicine, a private association. The great majority of doctors in the Netherlands belonged to this society.

The Court noted that a study of the internal legislation revealed it was impossible for a doctor who intended to practise in the Netherlands to do so and to be recognized by the sickness insurance schemes, without being registered by the Registration Committee. If registration was denied, an appeal could be made to the Appeals Committee. This body was composed of medical practitioners, representatives of university medical faculties and government representatives, appointed for five years. Thus, it included a significant degree of involvement on the part of public authorities. Also, it determined disputes on the adversarial principle and its decisions could be challenged in the ordinary courts, but that had never happened before.

The Court observed that this body was acting under a degree of governmental supervision and, in conjunction with the public authorities, created appeal procedures which could affect the exercise of rights granted by Community law. Thus, the Court considered imperative, in order to ensure the proper functioning of Community law, that it should have the opportunity of ruling on issues of interpretation and validity arising out of such procedures.

The Court concluded that, as a result of the foregoing considerations and in the absence, in practice, of any right of appeal to the ordinary courts, the Appeals Committee, which operated with the consent of the public authorities and with their cooperation, and which, after an adversarial procedure, delivered decisions which were, in fact, recognized as final, must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State.

The solution of the Court of Justice was different in the *Borker*[6] case, in which another professional body, the Bar Council of the Paris Court, was not considered a judicial body able to ask for a preliminary ruling. The Court observed that it does not have jurisdiction to give a ruling, since it can only be requested to give judgments in proceedings intended to lead to a decision of a judicial nature. The Bar Council was not under the legal duty to try the case. It was only requested to give a declaration relating to a dispute between a member of the bar and the courts or tribunals of another member state.

The Court of Justice also had the task to establish, by way of interpretation, the territorial sphere of the notion of court from a Member State. Thus, in the *Bar and Montrose Holdings Ltd.* case[7], the Court held that its jurisdiction applied to the Isle of Man, which was not covered by the entire Treaty establishing the European Economic Community (TEEC), but to which a special Protocol annexed to the Treaty applied, since the Protocols have the same legal force as the Treaty itself.

The Court also declared its jurisdiction over French Polynesia, in joint cases *Kaefer and Procacci*[8]. The administrative tribunal was situated in French Polynesia. The Court noted that it was not disputed that the administrative tribunal was a French court and that part four of the TEEC empowers the institutions of the Community, in particular the Council, to lay down provisions relating to the overseas countries and territories on the basis of the principles set out in the Treaty. Since the preliminary reference concerned such a provision, the Court decided it had jurisdiction to answer the question raised by the administrative tribunal.

On the other hand, in the *Andersson*[9] case, the Court stated that, although it has, in principle, jurisdiction to give preliminary rulings concerning the interpretation of the Agreement on the European Economic Area (EEA) when a question arises before one of the national courts, since the provisions of that Agreement form an integral part of the Community legal system, that jurisdiction applies solely with regard to the Community, so that the Court has no jurisdiction to rule on the interpretation of the EEA Agreement as regards its application in the states belonging to the

[4] See Fuerea, 2016, 104, and, also, Broberg and Fenger, 2010, 211.
[5] Judgement of 6 October 1981, *Broekmeulen*, 246/80, EU:C:1981:218, paragraphs 16 and 17, quoted in Craig and De Búrca, 2017, 524-525.
[6] Order of 18 June 1980, *Borker*, 138/80, EU:C:1980:162, paragraphs 3-5.
[7] Judgment of 3 July 1991, *Bar and Montrose Holdings Ltd.*, C-355/89, EU:C:1991:287, paragraphs 6-10.
[8] Judgment of 12 December 1990, *Kaefer and Procacci*, C-100/89 and 101/89, EU:C:1990:456, paragraphs 6-10.
[9] Judgment of 15 June 1999, *Andersson*, C-321/97, EU:C:1999:307, paragraphs 23-33.

European Free Trade Association (EFTA). The fact that the EFTA state in question (Sweden) subsequently became a Member State of the European Union, so that the question emanates from a court or tribunal of one of the Member States, cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order. Thus, the Court has no jurisdiction to rule on the effects of that Agreement within the national legal systems of the contracting states during the period prior to their accession to the European Communities.

Even a court that belongs to the judiciary system of more than one Member State may ask the Court of Justice to render a preliminary ruling. One example is the *Parfums Christin Dior*[10] case.

The preliminary reference was sent by the Benelux Court of Justice, a court common to the three Benelux Member States (Belgium, the Netherlands and Luxembourg). The Court concluded that, in order to ensure the uniform application of Community law, this common court, faced with the task of interpreting Community rules in the performance of its function, must be regarded as entitled to refer questions to the Court of Justice for a preliminary ruling.[11]

According to the settled case-law, the criteria used by the Court to determine if a body is a court or tribunal able to refer for a preliminary ruling are:

a) the body is established by law;
b) it is permanent;
c) its jurisdiction is compulsory;
d) its procedure is adversary (*inter partes)*;
e) it applies rules of law;
f) it is independent.[12]

The enumeration of these criteria is found, for example, in paragraph 23 of the judgment in the *Dorsch*[13] case.

The preliminary reference was made by the German Federal Public Procurement Awards Supervisory Board, on the interpretation of an article from a Directive, relating to the coordination of procedures for the award of public service contracts. The Court stated that the German Federal Public Procurement Awards Supervisory Board, which is established by law as the only body competent to determine, upon application of rules of law and after hearing the parties, whether lower review bodies have committed an infringement of the provisions applicable to procedures for the award of public contracts, whose decisions are binding and which carries out its task independently and under its own responsibility, satisfies the conditions necessary to be considered a national court.

The conclusion of the Court was the same in joint cases *Jokela and Pitkäranta*[14], with respect to the Finnish Rural Businesses Appeals Board, which was established by law and composed of members appointed by public authority and enjoying the same guarantees as judges against removal from office. The body had jurisdiction by law in respect of aid for rural activities, gave legal rulings in accordance with the applicable rules and the general rules of procedure, and, under certain conditions, an appeal could be lodged against its decision to the Supreme Administrative Court.

Another example is the *Abrahamsson and Anderson*[15] case. The Appeals Commission of the University of Göteborg was a permanent body, set up by law to examine appeals against certain decisions taken in relation to higher education, with members appointed by the government (three must be or must have been serving judges; at least three must be lawyers), the parties were given an opportunity to submit observations and to examine the information provided by the other parties, its decisions were binding and not subject to appeal. Although an administrative authority, it was vested with judicial functions, it applied rules of law and the procedure before it was *inter partes*. The judgement was given without receiving any instructions and in total impartiality.

On the contrary, in the *Syfait and others*[16] case, the Court held that the Greek Competition Commission did not satisfy the criteria because it was subject to the supervision of the Minister for Development, which implies that that minister was empowered, within certain limits, to review the lawfulness of its decisions. Even though its members enjoyed personal and operational independence, there were no particular safeguards in respect of their dismissal or the termination of their appointment, which was not an effective safeguard against undue intervention or pressure from the executive on those members.

In the judgment given in the *Corbiau*[17] case, the Court stated that the Director of the Direct Taxes and Excise Duties Directorate of the Grand Duchy of Luxembourg is not a court, because he answered complaints against the decisions of his subordinates and was himself under the direct authority of the Minister for Finance, so he could not be considered impartial. Furthermore, if his decision was challenged in court, he would be a party in the proceedings.

With regard to arbitral courts, in the *Vaassen-Goebbels*[18] case, the Court ruled that an arbitral tribunal

[10] Judgment of 4 November 1997, *Parfums Christin Dior*, C-337/95, EU:C:1997:517, paragraphs 15-31.
[11] See Hartley, 2010, 299-300.
[12] For a detailed analysis of these criteria, see Andreşan-Grigoriu, 2010, 72-143.
[13] Judgment of 17 September 1997, *Dorsch*, C-54/96, EU:C:1997:413, paragraph 23.
[14] Judgment of 22 October 1998, *Jokela and Pitkäranta*, C-9/97 and C-118/97, EU:C:1998:497, paragraphs 18-24.
[15] Judgment of 6 July 2000, *Abrahamsson and Anderson*, C-407/98, EU:C:2000:367, paragraphs 28-38.
[16] Judgment of 31 May 2005, *Syfait and others*, C-53/03, EU:C:2005:333, paragraphs 29-38.
[17] Judgment of 30 March 1993, *Corbiau*, C-24/92, EU:C:1993:118, paragraphs 14-17.
[18] Judgment of 30 June 1966, *Vaassen-Goebbels*, 61/65, EU:C:1966:39, paragraphs 272-273.

constituted under Netherlands' law, whose members were appointed by a minister, with permanent activity, bound by rules of adversary procedure similar to those used by ordinary courts of law and bound to apply rules of law, can be considered a national court.

However, in the *Nordsee*[19] case, the Court conclouded that an arbitrator who decides a dispute by virtue of a clause inserted in a contract between parties is not a national court, because the contracting parties are under no obligation, in law or in fact, to refer their dispute to arbitration and the public authorities in the Member State concerned are not involved in the decision to opt for arbitration and are not called upon to intervene automatically in the proceedings before the arbitrator. The Court stated that, if in the course of arbitration, questions of Community law are raised which the ordinary courts may be called upon to examine in the context of their collaboration with arbitration tribunals or in the course of a review of an arbitration award, it is for those courts to ascertain whether it is necessary for them to make a preliminary reference, in exercising such functions.

Also, in the order given in the *Greis Unterweger*[20] case, the preliminary reference was declared inadmissible, on the ground that the body asking the preliminary question, a Consultative Commission for currency offences, was not competent to resolve disputes (to give a ruling in proceedings which are intended to result in a judicial decision), but its task was to submit an opinion within the framework of an administrative procedure.

Even if a body may be considered a court or tribunal when it is exercising a judicial function, if the preliminary question is submitted to the Court when the body is exercising other functions, like administrative ones[21], the question shall be declared inadmissible.

As to courts, *stricto sensu*, their right to refer for a preliminary ruling is recognized irrespective of whether they decide in first or in last instance. Their right cannot be limited by provisions of national law.[22]

## 3. The independence criterion

In recent case-law of the Court of Justice, the *Margarit Panicello*[23] case raised the question whether a court clerk (a registrar), who had the exclusive competence to decide actions for the recovery of fees of agents and lawyers, can refer to the Court of Justice a request for a preliminary ruling. The Court decided it didn't have jurisdiction to answer, because the registrar is not a court, within the meaning of Article 267 TFEU. The proceedings were administrative in nature and the clerk could not be regarded as exercising a judicial function. Furthermore, it did not meet the criterion of independence.

As to this last condition, the Court stated: "the requirement for a body making a reference to be independent is comprised of two aspects. The first, external, aspect presumes that the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (…), and is thus protected against external interventions or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.

The second, internal, aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law."

The Court decided that the registrar fulfils this criterion with regard to the internal aspect, but not with regard to the external aspect, "which requires there to be no hierarchical constraint or subordination to any other body that could give him orders or instructions", since Spanish law provided that the court clerk receives, and is required to comply with, instructions from his hierarchical superior.

The Court's assessment of this criterion was different in the *MT Højgaard and Züblin*[24] case. The reference for a preliminary ruling was made by the the Public Procurement Complaints Board from Denmark. The Court held that this Board is a third party in relation to the parties to the proceedings and has no functional link with the Danish Ministry for Business and Growth, but carries out its functions in an entirely independent manner. The Board does not occupy a hierarchical or subordinate position and does not take orders or instructions from any source whatsoever. Its members are bound to perform their duties in an independent manner. Most of them are members who come from the ranks of Danish judges and who have a decisive role in the decisions adopted by the Board.

Furthermore, the members of the Board who are members of the judiciary enjoy, in that capacity, the particular protection against dismissal, a protection which also extends to the performance of the tasks of a member of the presidency of the referring body.

Thus, the independence of the judges, who had a decisive role in adopting the decisions of the Board, led to the conclusion that the entire refering body, with judicial functions, is acting independently.

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[19] Judgment of 23 March 1982, *Nordsee*, 102/81, EU:C:1982:107, paragraphs 7-16.

[20] Order of 5 March 1986, *Greis Unterweger*, 318/85, EU:C:1986:106, paragraphs 2-5.

[21] See order of 26 November 1999, *RAI*, 440/98, EU:C:1999:590, paragraphs 5-16 and judgment of 15 January 2002, *Lutz and others*, C-182/00, EU:C:2002:19, paragraphs 11-17.

[22] See Foster, 2009, 192.

[23] Judgment of 16 February 2017, *Margarit Panicello*, C-503/15, EU:C:2017:126, paragraphs 34, 36-43.

[24] Judgment of 24 May 2016, *MT Højgaard and Züblin*, C-396/14, EU:C:2016:347, paragraphs 25-32.

## 4. Independence of the judiciary

The rule of law is amongst the common values of the Member States of the European Union, values that are to be respected and promoted under Article 2 of the Treaty on European Union (TEU). The independence of the judiciary is a key element of the rule of law and one of the grounds for mutual trust between the Member States.

The Court of Justice has already analysed some of the factors which guarantee the independence of the judiciary. Amongst these factors are guarantees to protect the person who has the task of adjudicating in a dispute against removal from office[25] and the receipt by members of the judiciary of a level of remuneration commensurate with the importance of the functions they carry out[26].

Also, in the *TDC*[27] case, the Court emphasized the essential role in guaranteeing independence and impartiality of the existence of rules regarding the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

In the last few years, the European Union's institutions have expressed concerns about the way in which some legislative measures adopted by some Member States might affect the independence of the judiciary in the Member States in question. The European Commission and the European Parliament have taken steps in triggering the procedure established by Article 7 TEU[28], simultaneously with infringement actions, on the basis of Articles 258-260 TFEU[29].

In this context, in the *LM*[30] case, the High Court in Ireland asked the Court of Justice to answer two preliminary questions, in order to decide on the execution of a European arrest warrant, issued by Polish authorities for the purpose of conducting criminal prosecutions for trafficking in narcotic drugs and psychotropic substances.

The person concerned, detained in Ireland, opposed to being surrendered to Polish authorities. The person argued before the reffering court that he would be exposed to a real risk of a flagrant denial of justice in contravention of Article 6 of the European Convention on Human Rights (ECHR)[31]. He contended that the recent legislative reforms of the system of justice in the Republic of Poland deny him his right to a fair trial, as those changes fundamentally undermine the basis of the mutual trust between the authority issuing the European arrest warrant and the executing authority and he relied on the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7 paragraph 1 of the Treaty on European Union regarding the rule of law in Poland.

In the reasoned proposal, the Commission sets out in detail the context and history of the legislative reforms and addresses two particular issues of concern: the lack of an independent and legitimate constitutional review and the threats to the independence of the ordinary judiciary. The Commission invites the Council to determine that there is a clear risk of a serious breach by the Republic of Poland of the values referred to in Article 2 TEU and to address to that Member State the necessary recommendations in that regard.

On the basis of this reasoned proposal the referring court concluded that, as a result of the cumulative impact of the legislative changes that have taken place in the Republic of Poland since 2015 concerning, in particular, the Constitutional Court, the Supreme Court, the National Council for the Judiciary, the organisation of the ordinary courts, the National

[25] Judgment of 19 September 2006, *Wilson*, C-506/04, ECLI:EU:C:2006:587, paragraph 51.

[26] Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 45.

[27] Judgment of 9 October 2014, *TDC*, C-222/13, EU:C:2014:2265, paragraph 32.

[28] Article 7 TUE reads: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union."

For a study on protecting EU values by the means provided by Article 7 TEU, see Larion, 160-176.

[29] See Order of 17 December 2018, *Commission/Poland*, C-619/18 R, EU:C:2018:1021. The Court has ordered the suspension of some provisions of Polish law that modified the laws of judicial organisation, which the Commission considered to represent a breach of the independence of the Polish Supreme Court. The case on the grounds of the matter is still pending.

[30] Judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586, paragraphs 14-25,

[31] International treaty signed by the Member States of the Council of Europe, in Rome, on 4 November 1950. The Treaty entered into force on 3 September 1953. Romania ratified this treaty by Law no. 30/1994, published in the Official Monitor, Part I, no. 135 of 31 May 1994.

School of Judiciary and the Public Prosecutor's Office, the rule of law has been breached in that Member State.

The referring court explained that it has based its conclusion on changes found by it to be particularly significant, such as: the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Constitutional Tribunal and its refusal to publish certain judgments; the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice; the fact that the Supreme Court is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and the fact that the integrity and effectiveness of the Constitutional Court have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system.

Following this conclusion, the reffering court considered that there is a real risk of the person concerned being subjected to arbitrary in the course of his trial in the issuing Member State, wich is sufficent ground, under Irish law, to refuse his surrender.

The preliminary questions refered to the Court of Justice concerned the interpretation of Article 1 paragraph 3 of Framework Decision 2002/584[32], relating to the circumstances in which the executing judicial authority may refrain from giving effect to a European arrest warrant on account of the risk of breach, if the requested person is surrendered to the issuing judicial authority, of the fundamental right to a fair trial before an independent tribunal, as enshrined in Article 6 paragraph 1 of the ECHR, a provision which corresponds to the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

Thus, the referring court asked, in essence, if the executing judicial authority has information, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7 paragraph 1 TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, it must determine, specifically and precisely, whether there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State and, if the answer is in the affirmative, what are the conditions which such a check must satisfy.

The Court of Justice decided to rule in the composition of the Grand Chamber, in urgent preliminary procedure and offered a detailed response. The Court's assessment on the grounds of the case began with recalling that EU law is based on the fundamental premiss that each Member State shares with all the other Member States a set of common values on which the European Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the EU law that implements them will be respected.

The Court emphasized that the European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition, meant to facilitate and accelerate judicial cooperation in order to contribute to achieving EU's goal of being an area of freedom, security and justice, and is based on the high level of trust which must exist between the Member States. That is why Framework Decision 2002/584 sets the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition. Refusal to execute is intended to be an exception which must be interpreted strictly.

The Court underlined that the reasons for refusal are found in Articles 3, 4 and 4a of the Framework Decision 2002/584 and recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States in exceptional circumstances. The Court held that, first of all, it must be determined whether a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to a European arrest warrant, on the basis of Article 1 paragraph 3 of Framework Decision 2002/584.

The Court stated that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded. It recalled that, in accordance with Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law. Consequently, every Member State must ensure that the bodies which, as courts or tribunals within the meaning of EU law, come within its judicial system in the fields covered by

[32] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in the Official Journal of the European Union L 190 of 18 July 2002.

EU law, meet the requirements of effective judicial protection, including the criterion of independence.

The Court stated, in paragraph 54 of its judgment: "The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that, in accordance with the Court's settled case-law, that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence."

Also, in paragraph 67, the Court noted: "The requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary."

The Court held that preserving the independence of judicial authorities is, also, primordial in the case of the European arrest warrant. The existence of a real risk that the individual concerned will suffer a breach of his fundamental right to an independent tribunal, and, thus, of his right to a fair trial, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article 1 paragraph 3 of Framework Decision 2002/584.

The Court of Justice offered the reffering court the necessary guidelines, stating that the executing judicial authority must, as a first step, assess, "on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State" (paragraph 61), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached (having regard to the standard of protection guaranteed by Article 47 paragraph 2 of the Charter). Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7 paragraph 1 TEU is particularly relevant for the purposes of that assessment.

The Court reiterated its findings regarding the criterion of independence in its judgements in cases *Wilson*, *Associação Sindical dos Juízes Portugueses* and *TDC* and noted that they represent a check point for the assessment in the fist stage, in order to determine the existence of a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts.

If the risk exists, the second step is to assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk.

An automatic refuse to execute a European arrest warrant could only be founded on a decision of the European Council determining, as provided for in Article 7 paragraph 2 TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent to the rule of law, and if the Council were then to suspend Framework Decision 2002/584 in respect of that Member State.

Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1 paragraph 3 of Framework Decision 2002/584, to give effect to a European arrest warrant issued by a Member State, which is the subject of a reasoned proposal as referred to in Article 7 paragraph 1 TEU, only in exceptional circumstances where that authority finds, after carrying out a specific and precise assessment of the particular case, that there are substantial grounds for believing that the person in respect of whom that European arrest warrant has been issued will, following his surrender to the issuing judicial authority, run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial.

In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, to which the material available to it attests are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject. The court must regard his personal situation, as well as the nature of the offence for which he is being prosecuted and the factual context that forms the basis of the European arrest warrant.

Also, it must, pursuant to Article 15 paragraph 2 of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. In the course of such a dialogue, the issuing judicial authority may, where appropriate, provide the executing judicial authority with any objective material on any changes concerning the conditions for protecting the guarantee of judicial independence in the issuing Member State, material which may rule out the existence of that risk for the individual concerned.

If all the information obtained does not lead to the conslusion that the person concerned shall not suffer

such a risk, then the executing judicial authority must refrain from giving effect to the European arrest warrant.

## 5. Conclusions

Recent case-law of the Court of Justice, with relevance to the notion of national court of a Member State of the European Union, within the meaning of art. 267 TFEU and, in particular, the considerations of the Court in cases where the criterion of the independence was analysed, pose, undoubtedly, innovative aspects.

The legal issues the Court has dealt with in the last few years have a pronounced character of novelty and are the product of the developments recorded in EU's recent history, in the context of the unprecedented challenges that the EU's institutions, as well as Member States, have had to manage. The concerns expressed by the European Commission and the European Parliament in relation to the existence of a clear risk of a serious breach by some Member State of the values referred to in Article 2 TEU, including systemic deficiencies in ensuring the independence of the judiciary and the steps taken to trigger Article 7 TEU, produce legal consequences upon the notion of court of a Member State in Article 267 TFEU, an autonomous notion in EU law.

From the grounds of the Court of Justice's judgment in the *LM* case, it results the idea that, even in the absence of a decision of the European Council, adopted on the basis of Article 7 paragraph 2 TEU, declaring the existence of a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, national courts have the competence to make their own assessment on the existence of a real risk of breach of the fundamental right to an independent tribunal in another Member State. This competence is derived from the principle of mutual trust between Member States, which is itself grounded on promoting and respecting common values.

Furthermore, another important idea derived form this judgment is that the independence of the national courts is also esenatial for the efficiency of the preliminary procedure machanism, since this procedure can only be initiated by a body that has the task to apply EU law and that fulfills, *inter alia*, the criterion of independence.

Thus, it is open to debate if one can deduce that, if the Europan Council determines the existence of a serious and persistent breach by a Member State of the value of rule of law, referred to in Article 2 TEU, by not ensuring and guaranteeing the independence of the judiciary, the Court of Justice would lose its jurisdiction to answer preliminary references made by the national courts of the Member State in question. It is also unclear, at this point, if such loss of jurisdiction would be automatic or would remain at the Court's discretion in each particular case, in the situation in which the Council would not decide to suspend the application of Article 267 TFEU for the Member State concerned.

The study intends to encourage debate on these legal points and other that may be identified, as further research topics could include the Court's judgements in other relevant pending cases and the evolution of the jurisprudence in assesing the notion of court of a Member State, for the purpose of appliying Article 267 TFEU.

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