Seminar organized by the Council of State of Italy and ACA-Europe

"Law, Courts and guidelines for the public administration"

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Answers to questionnaire: ECJ

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"LAW, COURTS AND GUIDELINES FOR PUBLIC ADMINISTRATIONS"

QUESTIONNAIRE

1. Introduction

1.1 The seminar to be held in Fiesole, on the 19th and 20th October 2020 at the European University Institute, is the first meeting organised by the Italian presidency.

As explained during the initial presentation of the programme for the upcoming Italian presidency, its leitmotiv will be to enhance and foster the value and the experience of "horizontal dialogue" among the highest administrative national Courts, aiming to create and develop a common culture and shared standards in judicial review of the activity of the public authorities.

This "horizontal dialogue", more than "vertical dialogue", aims to focus on examining and comparing modes of judicial decision making and judicial conduct, and the impact of judgments on the activities of public authorities.

Horizontal dialogue between Courts of Member States is the best way to achieve an effective European citizenship, that is to say a common standard of legal protection for citizens and companies living in Europe and dealing with public powers.

1.2 The purpose of this questionnaire and of the subsequent seminar is to provide a greater understanding of similarities and differences among our legal systems, especially regarding:

a) the interpretation of law by judges;

b) the binding effect of judgments both so as to ensure the judges' compliance with the nomophylactic statements of the Supreme Administrative Courts (SACs) and to act as an instrument to address the future action of public administrations in similar cases;

c) the effect of the administrative judgments on the activity of public administration and their enforcement;

d) the consultative role of the SAC, if existing.

1.3. The seminar will cover the following topics:

a) The method followed by administrative courts in the interpretation of the law, focusing on the criteria applied by judges (including reference to *ratio legis*, reference to preparatory work, reference to the advice of the SAC regarding the adoption of the law, if existing, etc.). A special focus will be placed on the tools for supporting judicial activity with regard to services for classifying and archiving judgments, e.g. databases and AI instruments.

b) The application of the law by the Court, with specific reference to the nomophylactic pronouncements of the SAC. Jurisprudential stability and the predictability of decisions are important values related to the general principles affirmed by the European Court of Justice such as legal certainty, predictability for citizens and companies of the consequences of their behaviour and the protection of legitimate expectations. Therefore, there will be a special focus on the ways and the procedures, where they exist, through which SACs ensure compliance with the nomophylactic statements in the administrative system.
The "binding or steering effect" of the of Supreme Court judgments: this topic aims to foster mutual understanding of the capacity of administrative judgments to bind the public administration in the subsequent exercise of its power. It covers not only the binding effect on decided case, but it also aims to analyze judgments as instruments to orientate the future action of public administrations in similar cases (i.e. judgement as guidelines).

c) The seminar will also examine the enforcement of the administrative judgment, in case the public administration fails to comply with it spontaneously and correctly, with special reference to judicial enforcement measures provided by each legal jurisdiction, if they exist.

d) Finally, a brief session will be devoted to the consultative role of the SAC, if existing, and its impact on administrative action.

1.4 It is intended that the Seminar will provide each Supreme Administrative Court with a better understanding both of the decision making process underpinning the judgments of other SACs and of their impact on the activity of public authorities.

In a constitutional democracy, administrative courts are seen as performing a vital function in the interaction between law and administration.

The purpose, to reiterate, is to verify whether it is possible to find or develop a homogeneous method to scrutinize the way public administrations exercise their powers and to guarantee a common standard of legal protection for citizens and companies in all Member States.

The questionnaire which follows represents an initial information gathering exercise the purpose of which is to clarify the interaction of the administrative courts with the law, on the one hand, and the administration, on the other, so as to ensure certainty, legality and quality of justice for citizens and public institutions.

I SESSION

THE METHOD OF INTERPRETATION OF LAW AND ITS APPLICATION BY THE COURTS

1. The role of the Supreme Administrative Courts in the interpretation of law.

1.1. Does your legal system provide general rules for the interpretation of law?

□ No

X Yes

1.2. What is the level of general rules for interpreting the law?

□ Law

□ Public authority regulations

□ Guidelines

X Supreme Court rulings

□ Other

Please explain and give an example.

In the EU legal order, there is no general provision of primary or secondary law listing the general rules for interpreting EU law. Methods of interpretation are rather singled out by the European Court of Justice ('ECJ') case-law (see the seminal judgment of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335, paras 17-20 and, more recently, judgment of 5 June 2018, Coman and Others, C-673/16, EU:C:2018:385, para 20).

It shall be noted, in this respect, that explicit rules of interpretation are provided for in Article 52 of the Charter of Fundamental Rights of the European Union ('CFR'). However, as the Explanations relating to the CFR make it clear, not only these rules are specific to the CFR, but they also lay down balancing rules and arrangements for the limitations of the rights contained therein, with respect to other fundamental freedoms or rights guaranteed by the Treaties and the ECHR. Rather that identifying or defining an order of precedence among methods of interpretation of the CFR provisions themselves, these rules could therefore be better described as "rules of competences" (*règles de compétence*) with reference to other sources of EU law.

1.3 What are the criteria for interpretation of the law?

X literal interpretation

X reference to purpose of law (so-called *ratio legis*)

X consistency within the legal system

X reference to preparatory work

□ reference to the advice of the SAC regarding the adoption of the law, if existing

□ Other

Explain, if necessary.

The methods of interpretation referred to in the ECJ case-law mirror the traditional rules of interpretation of national law laid down by the majority of Member States' legislation. They also reflect the methods of interpretation of (public international) law defined by Articles 31 and 32 of the 1969 Vienna Convention on the law of the Treaties ('VCLT'), i.e. literal, contextual and teleological interpretation, supplemented by the recourse to the preparatory works (see, in this respect, judgments of 10 December 2018, Wightman and Others, C-621/18, EU:C:2018:999, paras 47 and 70, and of 12 September 2017, Austria v Germany, C-648/15, EU:C:2017:664, in which the ECJ expressly referred to Article 31(1) VCLT). Similarly to the International Court of Justice ('ICJ'; see, to this effect, Article 38(1) of the ICJ Statute), in interpreting EU law the ECJ also takes into account general principles of law recognized by civilized nations, such as, for example, the principle of *nemo judex in sua causa* or *ad impossibilia nemo tenetur*, to the extent to which they are enshrined in the constitutional traditions common to the Member States or in general principles of EU law and fundamental rights laid down by the EU primary law (cf. judgment of 6 November 2018, Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci, C-622/16 P to C-624/16 P, EU:C:2018:873, para 79).

However, as the CILFIT case-law shows, these interpretative methods are also influenced by the "characteristic features of Community law and the particular difficulties to which its interpretation gives rise". Among these features, the existence of several equally authentic language versions of EU legislation, the autonomous and peculiar meaning of legal concepts employed by such legislation, and the evolving nature of EU primary and secondary law as a reflection of the EU integration process, should be particularly emphasised (cf., in this respect, judgments of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335, paras 17-20 and, more recently, of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, para 49 and of 25 June 2020, VL (Authority likely to receive an application for international protection), C-36/20 PPU, EU:C:2020:495, paras 53-64).

1.4. What criteria do judges apply when there are gaps in the law?

X Analogy (reference to similar *ratio* of other rules)

X General principles of the legal system

□ Other

Explain, if necessary.

A recent and significant example of reasoning by analogy in order to fill a legal gap in EU primary law can be found in the judgment of 10 December 2018, Wightman and Others, C-621/18, EU:C:2018:999, paras 48, 57 and 58. The Court, in the absence of an express provision governing revocation of the notification of the intention of a Member State to withdraw from the European Union under Article 50 TEU, held that this revocation is subject to the rules laid down in Article 50(1) TEU for the withdrawal itself.

The ECJ case-law on the horizontal division of powers among EU institutions, on the other hand, provides numerous examples of general principles of EU law, and notably the principles of institutional balance, conferral of powers and sincere cooperation under Article 13(2) TEU, being resorted to in order to fill legal gaps related to ways and means of acting of EU institutions (see, most recently, judgment of 28 July 2016, Council v Commission, C-660/13, EU:C:2016:616).

1.5. Does the SAC elaborate general interpretative *criteria*?

□ No

X Yes

Please explain and give an example.

See above, § 1.3 and 1.4

1.6 In deciding the case, to what extent does the Court take the following into account and within which limits?

- EU law (Nice Charter, EU regulations, EU directives) and the judgments of the EU Courts;

□ never □ seldom □ sometimes X often

- The European Convention of Human Rights and the general principles elaborated by the ECHR;

□ never □ seldom X sometimes □ often

- The general clauses of proportionality and of reasonableness.

□ never □ seldom □ sometimes X often

- The statements (or case law) of the Courts of other countries in similar cases;

□ never X seldom □ sometimes □ often

See, as a recent illustrative example of a reference to the case-law of a national court, the judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, para 55)

- The general interests involved (i.e: order and public safety, environmental protection, consumer protection, the economic, financial and social effects on the labour market)

□ never □ seldom □ sometimes X often

- The results of regulatory impact analysis (AIR), if applicable;

X never □ seldom □ sometimes □ often

- The impact of the decision;

□ never □ seldom X sometimes □ often

X Other. Please specify.

- Consistency with previous ECJ case-law

- Legal principles established in the jurisprudence of international Courts and notably that of the ICJ (see, as a recent example, judgment of 12 November 2019, Organisation juive européenne and Vignoble Psagot, C-363/18, EU:C:2019:954, paras 35, 48 and 56)

2. Tools for supporting judicial activity.

2.1. Are there any services established in the Supreme Administrative Court responsible for classifying the judgments and drafting their abstracts?

□ No

X Yes

The Research and Documentation Directorate of the Court of Justice of the EU ('CJEU') is responsible for drafting, under the supervision of the Judge-Rapporteur, the summaries of the judgments and orders published in the European Court Reports. The

summaries contain the essential points of law stated in the decision in question, based as closely as possible on the actual wording of the decision, accompanied by a series of keywords reflecting the content of the point of law raised by it.

2.2. What other activities do these Services perform?

X preparation of useful material for the most important judgments of the SAC ;

X comparative studies;

X information about new developments in the law and in the case law;

□ training of judges

X other activities.

Please specify.

In addition to the drafting of the summaries of all ECJ decisions published in the European Court Reports, the Research and Documentation Directorate is responsible for a number of other documentation and research activities, such as:

- performing an early review of all requests for a preliminary ruling made to the Court, in order to identify, at an early stage of the proceedings, any problems relating, in particular, to the admissibility of the reference, and to assess, where necessary, the need to deal with a case under the urgent preliminary ruling procedure;
- performing a preliminary analysis of the appeals brought before the ECJ against the decisions of the General Court ('GC') in some areas, with a view to identifying as rapidly as possible those which could be dealt with by reasoned order;
- providing information on legal developments of EU interest and collecting case-law of the most relevant Member States' national courts in the field of EU law; particular attention is paid to the national decisions and actions taken upon the judgments and orders delivered by the ECJ in the framework of preliminary ruling proceedings;
- maintaining the Digest of case-law (Répertoire de jurisprudence), a systematic collection of the summaries of ECJ judgments, organised on the basis of a classification scheme, and of the 'Numerical access' database, where all information relating to every case brought before the CJEU are collected and listed by number in the order in which they were lodged at the relevant Registry;
- contributing to the drafting of the ECJ Annual Report;
- maintaining a list of 'Annotations of judgments', setting out publication references for all commentaries on CJEU judgments published in the law reviews to which the Court's Library subscribes.

2.3. Are administrative Court judgments stored on a searchable and free database?

□ No

X Yes

Please explain.

On the one hand, judgments and opinions rendered by ECJ are published, in all the official languages of the EU, on the European Court Reports. From 1 January 2012, the Reports have been published, free of charge, exclusively in digital format on the EUR-Lex website, but access to the Reports published on EUR-Lex is also available on the ECJ website (at the following link: https://curia.europa.eu/jcms/jcms/P_106311/en/).

On the other hand, all ECJ decisions, regardless of whether they are published on the European Court Reports, are stored on a free and searchable database operated by the CJEU and accessible via the 'InfoCuria case-law' search form (at the following link: http://curia.europa.eu/juris/recherche.jsf?language=en). Besides that, numerical access to the case-law by case number it also possible (at the following link: https://curia.europa.eu/jcms/jcms/Jo2_7045/en/), in order to find information relating to every case brought before the CJEU since 1953.

2.4. What kind of database do the administrative judges consult in their daily work?

X public and free databases

X private databases, provided by their institution

□ other

Please explain.

ECJ judges consult on a daily basis two main publicly available databases: (i) the 'InfoCuria case-law' search form hosted on curia.europa.eu, where all the judgments, orders and opinions rendered by the ECJ and GC can be accessed, and (ii) the EUR-Lex database, which provides the official access to EU legal documents, including preparatory documents, along with texts of national transposition measures and national case-law related to EU law.

In addition to that, a number of internal databases run by the Research and Documentation Directorate of the Court are essential for the drafting of ECJ judgments. Among these databases, 'Eureka' and 'Dossier électronique' stand out. The former provides access and allows performing simultaneous searches on all the decisions taken by the Court as well as on all applications, pleadings, and procedural documents lodged before the CJEU. The

latter enables judges to consult all the relevant documents submitted to the Court and drafted by the members of the competent formation of the Court in a given case.

2.5. Are there projects implementing advanced artificial intelligence systems operating in the decision making process and/or for the preparation of decisions?

X No

□ Yes

2.6 If yes, explain the role of the AI systems in the decision-making process (e.g. drafting final decisions, supporting judges for some significant aspects of the case, such as for example the calculation of damages, etc.)

n/a

3. The application of law: the "nomophylactic" statements in the administrative judicial system.

3.1. Does the judgment of the SAC have binding effect on lower courts?

□ No

X Yes

□ Only if the SAC decides in special composition

ECJ decisions are, in essence, binding upon the General Court ('GC'). *De iure*, this flows from Articles 54(2) and 61(2) of the CJEU Statute, in cases where (i) the ECJ finds that an action falls within the jurisdiction of the GC and refer that action to it, whereupon the GC may not decline jurisdiction, and (ii) the ECJ quash the decision of the GC and, instead of giving itself final judgment in the matter, refer the case back to the GC, whereby the GC shall be bound by the decision of the ECJ on points of law. *De facto*, save in exceptional cases in which the GC distinguishes itself from the previous ECJ case law, essentially to induce the

Court to reconsider its jurisprudence, the GC abide by the interpretation of a given EU law provision given by the ECJ.

Insofar as the national courts are concerned, according to the settled ECJ case-law, every judgment or reasoned order rendered by the ECJ in a preliminary ruling proceedings is binding on the referring national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings (see, in this respect, judgment of 16 June 2015, Gauweiler and Others, C-62/14, EU:C:2015:400, para 16). Moreover, the interpretation given by the ECJ of a given EU provision is also binding on all the other national courts.

3.2. If the answer to question 3.1. above is no, what percentage of lower court cases comply with SAC decisions?

□ less than 25%

□ from 25% to 50%

□ from 50% to 75%

□ from 75% to 100%

3.3. If the answer to question 3.1. above is no, how is the consistency and predictability of court decisions ensured?

Please explain and give an example.

3.4. When solving jurisprudential conflicts or stating principles of law, does the SAC work in a special composition (for example a Plenary Assembly or a larger panel)?

□ No

X Yes

If the answer is yes, please explain.

According to Article 16 of the CJEU Statute and Article 60 of the ECJ Rules of Procedures, cases brought before the Court are heard, in principle, by Chambers of five and of three Judges.

However, cases are assigned to the Grand Chamber, composed of 15 judges including the President and Vice-president of the Court, where the difficulty or importance of the case or particular circumstances so require. This applies in particular where the case raises an important issue of EU law or gives the ECJ the opportunity to clarify his previous divergent case-law.

Lastly, pursuant to Article 16(4) and (5) of the CJEU Statute, a case may be assigned to the full Court either where it is of exceptional importance, or where the ECJ has to rule on the compulsory retirement of members of the Commission or the Court of Auditors.

3.5. Is there a specific procedure for referring a question to the SAC working in special composition?

□ No

X Yes

In accordance with Articles 59 and 60 of the ECJ Rules of Procedures, cases are assigned to the Grand Chamber (or to the full Court) by the general meeting of the Court, on a proposal from the Judge-Rapporteur made in the Preliminary report submitted to the general meeting. Besides that, pursuant to the third paragraph of Article 16 of the CJEU Statute, a Member State or an EU institution participating in the proceedings may request that the case is assigned to the Grand Chamber.

3.6. If the answer to question 3.5 above is yes, if a judge of the SAC does not agree with the principle affirmed, what can he or she do?

□ it is not possible to disagree

□ it is possible to take a different decision, giving reasons

X a new referral to the Court is necessary

The EU judicial system does not provide for the adoption of dissenting opinions. Since ECJ decisions are always taken on a collegial basis by the whole competent formation to which the case has been assigned, they are signed by all the judges who took part in the deliberations. The Chambers of three and five judges may however depart from previous judgments and orders delivered by other lower Chambers or may further develop or supplement previous Grand Chamber judgments. Furthermore, the general meeting of the Court may decide, by assigning the case to the Grand Chamber, to revise its previous case-law (*revirement*).

3.7. In order to guarantee the consistency of jurisprudence among the various sections of the SAC or with another Supreme Court**,** if such exists, are there organizational mechanisms in place to promote this aim (for example, periodical meetings among judges or among presidents)?

□ No

X Yes

If the answer is yes, please explain.

The following procedural and organizational mechanisms to promote the consistency of the ECJ case-law are available:

- Assignment of a case to the Grand Chamber, where an important clarification of the previous case-law is needed, and/or where divergent lines of case-law emerge from the jurisprudence of the Chambers of three and five judges; this can be done also at the initiative of the formation to which a case has been assigned, at any stage of the proceedings, pursuant to Article 60(1) and (3) of the ECJ Rules of Procedures;
- Weekly general meetings of the Court: in accordance with Article 25 of the ECJ Rules of Procedure, the general meeting is only competent to take decisions concerning administrative issues or the action to be taken upon the procedural proposals contained in the preliminary report submitted by the Judge-Rapporteur (such as, in particular, the proposals to assign the case to a given formation, or to dispense with a hearing or with an Opinion of the Advocate General). However, the general meeting, in which all the the Judges and Advocates General shall take part and have a vote, gives all the Members of the ECJ the opportunity to become aware and discuss, at an early stage, all major legal issues raised by cases pending before the Court;
- Weekly meetings among presidents of Chambers, to discuss general organizational issues related to the functioning of the ECJ Chambers;
- Annual plenary meetings among members of the ECJ, to discuss cross-cutting emerging issues concerning the functioning of the Court or major developments in EU law, with a view to adapting the internal decision-making practice and discussing possible developments in the ECJ jurisprudence (so-called *Forum des membres* and *Journée de réflexion*);
- Annual general assembly of all the Members of the CJUE (i.e. ECJ and GC judges, and the Registrars), to discuss issues of common interest also in order to promote consistency of CJEU case-law (so-called *Assemblée générale*).

3.8. If your judicial system has administrative Courts separated from other Courts (civil ones), which body or Court is entitled to resolve conflicts of jurisdiction between administrative and ordinary courts? (e.g. *Tribunal des Conflits*).

n/a

SESSION II.

THE IMPACT OF DECISIONS OF SUPREME ADMINISTRATIVE COURT ON THE FUTURE DEVELOPMENT OF ADMINISTRATIVE ACTIVITY

1. To what extent does the administrative judgment bind the public administration in the new exercise of its power?

Please explain.

ECJ decisions are binding upon EU institutions and Member States' administration.

According to the settled ECJ case-law, on the one hand, national administrative authorities called upon, within the exercise of their respective jurisdiction, to apply provisions of EU law, are under a duty to give full effect to those provisions, as interpreted by the ECJ, if necessary refusing of their own motion to apply any conflicting provision of national law (see, to that effect, judgments of 22 June 1989, Costanzo, 103/88, EU:C:1989:256, para 31, and, more recently, judgment of 14 September 2017, The Trustees of the BT Pension Scheme, C-628/15, EU:C:2017:687, para 54).

On the other hand, pursuant to the principle of sincere cooperation, Member States are required to nullify the unlawful consequences of an infringement of EU law. Hence, following a judgment given by the ECJ from which it is apparent that national legislation is incompatible with EU law, it is for the authorities of the Member State concerned to take the general or particular measures necessary to ensure that EU law is complied within that state. While Member States retain the choice of the measures to be taken, those authorities must in particular ensure that national law is changed so as to comply with EU law as soon as possible and that the rights which individuals derive from EU law are given full effect (judgments of 21 June 2007, Jonkman and Others, C-231/06 to C-233/06, EU:C:2007:373, para 38 and, more recently, of 31 October 2019, Commission v Netherlands, C-395/17, EU:C:2019:918, para 98).

2. Can the decision of an administrative judge influence the work of public administrations even beyond the objective and subjective context of the case decided?

□ No

X Yes

Please explain.

See above, §1

3. According to regulatory rules or practices, may the effects of an administrative judgment be extended by the administration itself beyond the case decided?

□ No

X Yes

Please explain.

As stated above, the ECJ decisions are binding upon all national administrative authorities. The effects of interpretative judgments and reasoned orders rendered by the ECJ, on the one hand, and the duty to give full effect to the EU law provisions as interpreted by the Court, if necessary setting aside conflicting national provisions, on the other hand, therefore extend to the entire national administration of the Member States concerned.

SESSION III

IMPLEMENTATION AND ENFORCEMENT OF THE DECISIONS.

1. Is there a specific legal procedure in your system aimed at monitoring and pursuing the full and complete execution of the judgment?

X No

□ Yes

1.1 If the answer to question 1 above is yes, in what percentage of cases are such remedies used?

2. If there is no specific procedure, how does your system ensure the full compliance of the judgment?

ECJ decisions are binding upon the EU institutions and Member States. By virtue of Articles 280 and 299 TFEU, the judgments of the Court shall be enforceable.

As stated above, in the framework of preliminary ruling proceedings, national courts are bound by the decisions delivered by the ECJ, as regards the interpretation or the validity of the acts in question, for the purpose of the decision to be rendered in the main proceedings.

If the ECJ finds that a national provision conflicts with an EU law provision, the referring national court is under an obligation to interpret national law in compliance with the requirements of EU law, and, where it is unable to do so, is under a duty to give full effect to those provisions. In order to do so, the national court shall, if necessary, disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it, without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means (see judgment of 24 June 2019, Popławski, C-573/17, EU:C:2019:530, paras 57-61). As noted above, the same obligation applies also to Member States' administrative authorities.

Where the national judicial or administrative authorities do not abide by the judgment, the respective Member State is deemed to have failed to fulfil its obligations under EU law. The Commission may therefore decide to initiate an infringement procedure pursuant to Article 258 TFEU, which may result in an action being brought by the same Commission (or by another Member State, pursuant to Article 259 TFEU) before the ECJ. According to Article 260 TFEU, if the ECJ finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court. Failing that, the Commission may bring another case before the ECJ, in order for the Court to impose a lump sum or penalty payment under Article 260(2) TFEU. Lastly, besides the infringement procedures, individuals may also bring an action for damages against the respective Member State, for its failure to comply with the ECJ judgments and reasoned orders.

3. If there is such a judicial remedy, does it require the judgment to become final?

□ No

□ Yes

Please explain.

4. Do judges have the power of substitution, directly or through Commissioners *ad acta*, in the case of *inertia* or incorrect execution of judgments?

X No

□ Yes

Please specify.

5. Is the administration (and/or the official) liable for damages due to non-execution or incorrect execution of the judgment?

□ No

X Yes

5.1. If the answer above is yes, is it within the jurisdiction of the administrative judge to decide on the action for damages?

Please explain and give an example.

Any individual adversely affected by the incompatibility of national law with EU law, including for failure to comply with the obligation to give effect to a judgment rendered by the Court, may rely on the case-law stemming from the judgment of 19 November 1991, Francovich and Others (C‑6/90 and C‑9/90, EU:C:1991:428), in order to obtain from the Member State compensation for any loss sustained, provided that the conditions laid down in the abovementioned ECJ case-law are met.

This action for damages is however to be brought before the ordinary national lower courts and is therefore excluded from the jurisdiction of national administrative courts.

SESSION IV

THE CONSULTATIVE ROLE OF THE SAC (IF EXISTING) AND ITS IMPACT ON ADMINISTRATIVE ACTION.

1. Does the SAC play advisory functions for the government or for the public administration?

□ No

X Yes

1.1 Where the answer to the above question is yes, please specify the kind of acts to which the advisory functions apply.

(More options are possible)

□ primary legislative acts (of parliament or of government)

□ governmental and ministerial regulatory acts

□ resolution of specific questions on request of a public administration, on the interpretation of a law or in the definition of a specific matter.

X Other

Please specify.

Under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the ECJ as to whether an envisaged international agreement, binding upon the Union, is compatible with the provisions of the Treaties.

It should be noted that, according to the ECJ case-law, the review which the Court is called upon to carry out in the context of the Opinion procedure, is closely circumscribed by the Treaties. The ECJ shall indeed verify that the agreement does not infringe any provision of primary law but also that it contains every provision that primary law may require (cf. Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para 150). However, the ECJ has also held that all questions that are liable to give rise to doubts as to the substantive or formal validity of the agreement with regard to the Treaties should be able to be examined in the context of the procedure provided for in Article 218(11) TFEU, including questions relating to the compatibility of a procedural or susbstantive provision of the agreement with the guarantees enshrined in the CFR (Opinion 1/17 (CETA) of 30 April 2019, EU:C:2019:341, para 167).

2. The SAC's advice in its consultative role is:

□ optional and non binding

□ mandatory and binding

□ mandatory but not binding

X optional and, once required, binding

□ it depends on circumstances (please clarify)

Pursuant to Article 218(11) TFEU, the ECJ opinion on the compatibility of an envisaged international agreement to be concluded by the Union with the Treaty is optional. However, where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

3. In exercising its advisory functions, can the SAC consult experts in economics or statistics in order to assess the economic and social impact of regulations?

X No

□ Yes

□ In certain circumstances only (please specify)

4. Are there forms of collaboration of administrative judges in the activity of the Government or of public administrations? (for example, secondment of individual magistrates to head legislative boards of a Ministry or as members of an independent authority, participation in study commissions, etc.).

X No

□ Yes

5. Can the advisory function of the SAC also consist in the resolution of a specific dispute working as an ADR (alternative dispute resolution)?

□ No

X Yes

According to Article 273 TFEU, the ECJ shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties. To date, only one dispute has been brought before the Court pursuant to this provision: the case that gave rise to the judgment of 12 September 2017, Austria v Germany, C-648/15, EU:C:2017:664.

It should be stressed, in this respect, that the ECJ clarified that, in order for the Court to have jurisdiction under Article 273 TFEU, the dispute shall not necessarily be submitted to it pursuant to an arbitration clause specifically adopted with a view to resolving the dispute. An application may equally be lodged pursuant to a general term of a bilateral convention between Member States, by which the States Parties undertook to bring before the Court all difficulties which could arise concerning the interpretation or the application of that convention not resolved by amicable agreement.

It shall also be noted that, when ruling on a dispute submitted pursuant to Article 273 TFEU, the ordinary Rules of procedures for direct actions apply (see, to this effect, Article 122(2) ECJ Rules of Procedures and judgment of 12 September 2017, Austria v Germany, C-648/15, EU:C:2017:664, para 59).