



Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 1 October 2019¹

Case C-274/14

Banco de Santander SA

(Request for a preliminary ruling from the Tribunal-Económico Administrativo Central (Central Tax Tribunal, Spain))

(Reference for a preliminary ruling — State aid — Tax system — Corporation tax — Deduction — Amortisation of goodwill resulting from acquisitions by undertakings resident for tax purposes in Spain of shareholdings of at least 5% in undertakings resident for tax purposes outside Spain — Article 267 TFEU — Admissibility of preliminary reference — Definition of ‘a court or tribunal’ — Independence — Lack of jurisdiction of the Court)

I. Introduction

1. In his Opinion delivered on 7 October 1999 in Joined Cases *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:1999:489), Advocate General Saggio concluded that a Spanish tax tribunal, the Tribunal Económico-Administrativo Regional de Cataluña (Regional Tax Tribunal of Catalonia, Spain), was not a court or tribunal for the purposes of Article 177 of the EC Treaty (now Article 267 TFEU).² As he was not convinced that the Regional Tax Tribunal of Catalonia could be regarded as sufficiently independent to satisfy the requirements stipulated by the Court, he concluded that it could not properly be regarded as a court or tribunal for the purposes of what is now Article 267 TFEU.

¹ Original language: English.

² See also Opinion of Advocate General Ruiz-Jarabo Colomer in *De Coster* (C-17/00, EU:C:2001:366, point 26), in which he referred to the gradual relaxation of the requirement of independence, which culminated in the judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145). Advocate General Ruiz-Jarabo Colomer agreed with the assessment of Advocate General Saggio in his Opinion delivered on 7 October 1999 in Joined Cases *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:1999:489) and stated in his Opinion in *De Coster* (C-17/00, EU:C:2001:366, point 28) that ‘the members of the [tax tribunal] are employed by the administration and appointed by the minister, who has the power to dismiss them without abiding by conditions clearly and categorically laid down by law. It cannot be said, therefore, that the body’s rules of operation guarantee the irremovability of its members and, consequently, it seems doubtful that it has a degree of independence which allows it to resist possible undue intervention and pressure from the executive’. Advocate General Ruiz-Jarabo Colomer concluded that the [tax tribunals] cannot be described as ‘judicial’.

2. To this end Advocate General Saggio pointed to the close structural links the Regional Tax Tribunal of Catalonia enjoyed with the Ministerio de Economía y Hacienda (Spanish Ministry of Economy and Finance),³ along with the fact that the President and members of the Tribunal were ‘civil servants appointed with the approval of the Minister’.⁴ He also observed that the Minister had the power to remove the members of the Tribunal from office, ‘but the circumstances in which that power may be exercised do not appear to be clearly and exhaustively defined by law’.⁵

3. As it happens, in its judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145), the Court disagreed with the Opinion of Advocate General Saggio. It concluded that there was a ‘separation of functions between, on the one hand, the departments of the tax authority responsible for management, clearance and recovery’ of taxes and, on the other hand, the Regional Tax Tribunal of Catalonia, which ruled ‘on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority’.⁶

4. EU law has not stood still since the judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145) was decided. Article 2 TEU now provides that the Union is founded on the value of respect for the rule of law. Article 19(2) TEU provides that the judges and Advocates General of the Court of Justice ‘shall be chosen from persons whose independence is beyond doubt’. Article 47 of the Charter of Fundamental Rights of the European Union (‘the Charter’) provides for a guarantee of an effective remedy and a hearing before an ‘independent and impartial tribunal’.

5. In line, perhaps, with these Treaty and Charter developments, the Court has subsequently developed an impressive line of case-law addressing the requirements of judicial independence. Much of this contemporary case-law has been summarised by the Court in its judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

6. In that judgment the Court stressed that the independence of national courts and tribunal was essential ‘to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU’.⁷ The essence of these requirements of judicial independence was then admirably summarised by the Court in the following terms:

‘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 ...that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

The concept of independence presupposes, in particular, that the body concerned exercises its judicial 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 that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions ...

3 See Opinion of Advocate General Saggio in Joined Cases *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:1999:489, point 15). It would appear from the file before the Court that the competent Spanish Ministry is now the Ministry of Finance and Civil Service (Ministerio de Hacienda y Función Pública). I shall, however, to avoid confusion, continue to refer to the Ministry of Economy and Finance.

4 See Opinion of Advocate General Saggio in Joined Cases *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:1999:489, point 16).

5 Opinion of Advocate General Saggio in Joined Cases *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:1999:489, point 16).

6 Judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145, paragraph 39).

7 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 43).

Like the protection against *removal* from office of the members of the body concerned (see, in particular, judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587, paragraph 51), the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.’⁸

II. Background to preliminary reference

7. All of this is brought into sharp focus by the present request for a preliminary ruling under Article 267 TFEU which was made by the Tribunal Económico-Administrativo Central de Madrid (Central Tax Tribunal, Madrid, Spain; ‘the TEAC’) by decision dated 2 April 2014 and lodged with the Court on 5 June 2014. Although this reference concerns the TEAC, similar entities also sit in the various autonomous communities of Spain. In the case giving rise to the judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145), the preliminary reference happened to come from the Regional Tax Tribunal of Catalonia, but nothing at all, for present purposes, turns on whether the tax tribunal sits centrally in Madrid (as in the present case) or in an autonomous community (as in the case giving rise to the judgment of 21 March 2000, *Gabalfrisa and Others* (C-110/98 to C-147/98, EU:C:2000:145)).

8. The preliminary reference in the present case principally concerns the interpretation of Commission Decision 2011/5/EC of 28 October 2009 (which deals with the State Aid aspects of a special Spanish tax scheme providing for the tax amortisation of financial goodwill following the acquisition of foreign shareholdings) as applied by the Kingdom of Spain.⁹ The reference also raises the validity of the Commission’s decision to open proceedings as provided by Article 108(2) TFEU in relation to State aid SA.35550 (13/C) (ex 13/NN, ex 12/CP) — Tax amortisation of financial goodwill for foreign shareholding acquisitions¹⁰ and Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (notified under document C(2014) 7280).¹¹

9. The preliminary reference arises in the context of an appeal to the TEAC by Banco de Santander against a tax assessment made by the Spanish Tax Inspectorate. That tax assessment arose following the acquisition by Banco de Santander in May 2002 of 100% of the shares in a German company, AKB, for the sum of EUR 1 099 999 999. Some 6 months later Banco de Santander transferred the shares in AKB to two related companies. Banco de Santander ultimately claimed that the financial goodwill associated with that transaction could be amortised in accordance with the tax advantages provided for in Spanish tax legislation.

10. It is not necessary for present purposes to examine in any detail either the merits of the preliminary reference or, indeed, the rather tangled procedural history of this reference, since it has lain suspended since it was first made in 2014 by reason of the existence of a multiplicity of other proceedings by which the legality of Decision 2011/5 has been challenged before the General Court

⁸ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 43 to 45). Emphasis added.

⁹ Commission Decision on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

¹⁰ OJ 2013 C 258, p. 8.

¹¹ OJ 2015 L 56, p. 38.

and the Court, most notably in the case giving rise to the judgment of 21 December 2016, *Commission v World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981).¹² I would also note that the legality of Decision 2015/314 is also currently being challenged before the General Court.¹³

III. Jurisdiction of the Court

11. The reason why I have but lightly sketched out the merits of the preliminary reference and the history of the proceedings to date is because there is presently before the Court but one single issue, namely, whether the TEAC is ‘a court or tribunal’ for the purposes of Article 267 TFEU.

12. In its preliminary reference, the TEAC states that the tax tribunals are courts or tribunals for the purposes of Article 267 TFEU because they fulfil the conditions laid down by the case-law of the Court. The TEAC stated that this position was confirmed by the judgment of 21 March 2000, *Gabalfrija and Others* (C-110/98 to C-147/98, EU:C:2000:145). I would note that in paragraph 38 of its judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), the Court stated that the factors to be taken into account in assessing whether a body is ‘a court or tribunal’ include, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. In its observations, the Commission raised doubts as to the independence of the TEAC. By decision of the 30 April 2019, the Court decided that the question of whether it has jurisdiction to answer the questions referred by the TEAC should be examined initially. A number of written questions were sent to the parties on the matter of the jurisdiction of the Court in order that they could furnish written observations in that regard and an oral hearing was held on the 2 July 2019.

13. If the TEAC is not such a court or tribunal, then the questions contained in preliminary reference from the TEAC may not be answered as the Court lacks jurisdiction to entertain the reference. If, however, the contrary opinion were to be reached, then, of course, the Court would be obliged to address the substantive merits of those questions in the course of a later judgment.

14. All of this raises in turn the central question of whether the judgment of 21 March 2000, *Gabalfrija and Others* (C-110/98 to C-147/98, EU:C:2000:145), remains good law in the light of developments in the case-law of the Court since that judgment was first delivered.

15. In my view, the decision of the Court in that case to the effect that the tax tribunals enjoyed sufficient guarantees of independence such that they qualified as a court or tribunal for the purposes of Article 267 TFEU is no longer sustainable — not least in view of the reasoning of the Court in subsequent cases such as the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117). I therefore consider that the judgment of 21 March 2000, *Gabalfrija and Others* (C-110/98 to C-147/98, EU:C:2000:145) should not be followed in the present proceedings. It follows, therefore, that for my part I do not consider that the TEAC enjoys a sufficient degree of independence such that it could be constituted as ‘a court or tribunal’ for the purposes of Article 267 TFEU. It therefore follows in turn that the Court lacks jurisdiction to answer the questions referred by the TEAC.

¹² By its appeal in Case C-20/15 P, the European Commission asked the Court to set aside the judgment of 7 November 2014, *Autogrill España v Commission* (T-219/10, EU:T:2014:939), whereby the General Court annulled Article 1(1) and Article 4 of Decision 2011/5. The Court annulled the judgment of the General Court and referred the case back to that Court. In its judgment of 15 November 2018, *World Duty Free Group v Commission* (T-219/10 RENV, EU:T:2018:784), the General Court rejected the application to annul Decision 2011/5. By Case C-64/19 P, the Kingdom of Spain brought an appeal on 29 January 2019 against the judgment of the General Court delivered on 15 November 2018 in Case T-219/10 RENV *World Duty Free Group v Commission* (OJ 2019 C 112, p. 36).

¹³ See, for example, Case T-252/15: Action brought on 21 May 2015 — *Ferrovial and others v Commission* (OJ 2015 C 245, p. 35).

16. Before explaining why I reach this conclusion, it is necessary first to examine the relevant Spanish legislation and practice.

A. The relevant Spanish law and practice

17. The present law governing the TEAC is set out in a variety of Spanish laws and decrees. The TEAC's function is to resolve claims brought against administrative acts issued, inter alia, by the organs of the Ministry of Economy and Finance. This function was originally bestowed on the tax tribunals according to a royal decree-law of 16 June 1924.

18. The current regulation of the TEAC is principally set out in the Ley 58/2003 General Tributaria (Law 58/2003 establishing the General Tax Code) of 17 December 2003 ('the LGT')¹⁴ and the Real Decreto 520/2005 (Royal Decree 520/2005) of 13 May 2005.¹⁵ This decree has, however, been amended on occasion.

1. Appointment and removal from office of President and members of the TEAC

19. The President¹⁶ and members¹⁷ of the TEAC are civil servants who are responsible for the resolution of tax disputes. They are appointed by Royal Decree by the Spanish Government (Council of Ministers) on the proposal of the Minister of Economy and Finance from among the civil servants who are noted to have the requisite experience and reputation in this area. The various tax tribunals (including the TEAC) do not, moreover, come under the auspices of the Department of Justice or a body responsible for court organisation; they are, rather, an integral part of the Ministry of Economy and Finance.¹⁸

20. While it is true that the members of the TEAC are not in themselves responsible for the actual management and collection of taxes, it is nonetheless difficult to avoid the impression that the TEAC itself is an integral part of the entire system of tax administration in Spain.

21. Banco de Santander noted that the mandate of the President and members of the TEAC is indefinite in duration and it may be for life until they retire. In addition, the fact that the President and members of TEAC are appointed and removed by the Council of Ministers by decree, which is the supreme collegial body of the executive branch, avoids any interference by the tax administration. Moreover, according to Banco de Santander, the power of a government to appoint, remove or not renew the mandate of members of a court does not, in itself, affect their independence. They further contend that the power to appoint and remove members on a discretionary basis is unsurprising, since these are mandates with no time limit. In reality, the consequences of this power are similar to those of the power not to renew a mandate when it has a fixed term.

22. The Spanish Government stated that the members of the tax tribunals are appointed for an indefinite period and are not subject to changes in the composition of the government. This can be seen in respect of the TEAC, whose members are appointed for a long term, even decades, despite political changes during the 4-year legislatures. In addition, according to the Spanish Government, the

¹⁴ BOE No 302 of 18 December 2003, p. 44987.

¹⁵ BOE No 126 of 27 May 2005, p. 17835.

¹⁶ He or she has the grade of Director-General of the Ministry of Economy and Finance.

¹⁷ They have the grade of Vice-Director-General of the Ministry of Economy and Finance.

¹⁸ See Article 6 of Real Decreto 1113/2018 (Royal Decree 1113/2018) of 7 September 2018. It must be noted that despite the fact that the tax tribunals report to the Secretary of State for Finance, Article 6(1) of Real Decreto 1113/2018 (Royal Decree 1113/2018) states that this shall be without prejudice to their functional independence in the resolution of economic-administrative disputes.

members of the tax tribunals are subject to the same rules for abstention and recusal as the administrative courts. These rules are expressly set out in Spanish legislation and apply in a perfectly normal manner. The independence of the tax tribunals is strengthened by the fact that their members can express dissenting opinions.

23. I would note that the power of the Council of Ministers to appoint the members of the TEAC also extends to a power to remove the members of the TEAC, whose members can, it seems, be removed through the simple expedient of the publication of a royal decree in the Spanish Official Bulletin.¹⁹ Indeed, as the Commission observed in its written answers to certain questions specifically put to the parties by the Court, this power has been frequently exercised in recent years.

24. Thus, for example, and as indicated by the Commission, on the 13 January 2012, the President of the TEAC²⁰ and a member of the TEAC²¹ were removed and the latter member was nominated as the new President of the TEAC.²² Likewise on 1 June 2018, the President²³ of the TEAC was removed and another was nominated.²⁴ On the 6 July 2018, four other members of the TEAC were removed and eight more were confirmed.²⁵

25. It is not, of course, my intention to cast any doubt or aspersions on the legitimacy of either the specific nominations or the removals from office which have been brought to the attention of the Court by the Commission. Nevertheless, while many members of the various tax tribunals (including the TEAC) may very well remain in office for considerable periods of time²⁶ — a fact highlighted by the Spanish Government — it is nonetheless striking that there are no clear legislative safeguards in place in order to ensure the irremovability without just cause or incapacity of the President and members of those entities.

26. In this respect, history has been on the side of Advocate General Saggio in the case giving rise to the judgment of 21 March 2000, *Gabalfria and Others* (C-110/98 to C-147/98, EU:C:2000:145) when he expressed concern that the circumstances in which the power of removal from office might be exercised ‘do not appear to be clearly and exhaustively defined by law’.²⁷ Ultimately, as Spanish law currently stands, the President and members of the TEAC hold office at the will and pleasure of the Spanish Government (Council of Ministers). Therefore, the President and members of the TEAC do not, either in theory or in fact, enjoy fixity of tenure or any guarantee against removal save for just cause or incapacity in the manner which is a customary and indispensable aspect of judicial independence and which reflects both the theory and practice of the constitutions and fundamental laws of all of the Member States of the Union.

2. Article 243 of the LGT — extraordinary appeal for the unification of precedent

27. The jurisdiction of the tax tribunals is compulsory and it is only if the dispute is not resolved within 1 year that recourse may be had to the ordinary Spanish courts.²⁸ There is equally no doubt that the tax tribunals (including the TEAC) are bound by the applicable law and apply conventional legal standards in the resolution of these tax disputes.

¹⁹ Article 29(2) of Royal Decree 520/2005.

²⁰ Real Decreto 117/2012 (Royal Decree 117/2012) of 13 January 2012, BOE No 12 of 14 January 2012, p. 2867.

²¹ Real Decreto 118/2012 (Royal Decree 118/2012) of 13 January 2012, BOE No 12 of 14 January 2012, p. 2877.

²² Real Decreto 125/2012 (Royal Decree 125/2012) of 13 January 2012, BOE No 12 of 14 January 2012, p. 2884.

²³ Real Decreto 614/2018 (Royal Decree 614/2018) of 22 June 2018, BOE No 152 of 23 June 2018, p. 64031.

²⁴ Real Decreto 620/2018 (Royal Decree 620/2018) of 22 June 2018, BOE No 152 of 23 June 2018, p. 64037.

²⁵ Real Decreto 836/2018 (Royal Decree 836/2018) of 6 July 2018, BOE No 164 of 7 July 2018, p. 68370.

²⁶ Due, perhaps, at least in part, to the open ended duration of their mandate.

²⁷ Opinion in Joined Cases *Gabalfria and Others* (C-110/98 to C-147/98, EU:C:1999:489, point 16).

²⁸ See, Articles 240(1) and 249 of the LGT.

28. In addition to ordinary appeals to the TEAC from the regional and local tax tribunals,²⁹ Article 243 of the LGT also makes provision for what is described as an extraordinary appeal for the unification of precedent.³⁰

29. What is clear from the provisions of Article 243 of the LGT is that the Spanish tax authorities can make an extraordinary appeal to a Special Chamber of the TEAC where they contend that a previous ruling or previous rulings of that body are wrong.

30. It is particularly striking that the appeal in question can be lodged only by the Director-General of Taxation of the Ministry of Economy and Finance,³¹ even though he or she will also sit as part of the Special Chamber of the TEAC along with the Director-General of the State Tax Administration Agency, the Director-General or the Director of the Department of the State Tax Administration Agency to which the body that issued the act which is referred to in the decision that is the object of the appeal is functionally attached, and the President of the Council for the Defence of Taxpayers.

31. The fact that the Director-General of the Department of the State Tax Administration Agency is also a member of the eight person Special Chamber — even though it is his or her Agency that issued the decision which is under appeal — is also a very singular fact. It is, in my view, contrary to the maxim *nemo iudex in causa sua* and, by definition, contrary to the fundamental principle laid down in Article 47(2) of the Charter requiring an independent and impartial tribunal.

B. Whether the TEAC enjoys the requisite degree of independence such that it could be constituted a court or tribunal for the purposes of Article 267 TFEU

32. As Advocate General Stix-Hackl pointed out in point 45 of her Opinion in *Wilson* (C-506/04, EU:C:2006:311), the criterion of independence ‘is perhaps the most important distinction between national courts and administrative authorities’.

²⁹ See Article 241 of the LGT.

³⁰ Article 243 of the LGT entitled ‘Extraordinary appeal for the unification of precedent’ provides as follows:

‘1. An extraordinary appeal for the unification of precedent may be filed by the Director-General for Taxation of the Ministry of the Economy and Finance against the tax decisions issued by the Central Tax Tribunal, when that Director-General disagrees with the content of such decisions.

Such an extraordinary appeal may also be filed by the Directors-General for Taxation of autonomous communities and cities with autonomous status, or equivalent bodies, when the appeal relates to a decision by a body dependent on the respective autonomous community or city with autonomous status.

2. The Special Chamber for the Unification of Precedent shall be competent to resolve such an appeal. The Special Chamber shall be composed of the President of the Central Tax Tribunal, who shall preside, three members of that Tribunal, the Director-General for Taxation of the Ministry of the Economy and Finance, the Director-General of the State Tax Administration Agency, the Director-General or the Director of the Department of the State Tax Administration Agency to which the body that issued the act which is referred to in the decision that is the object of the appeal is functionally attached, and the President of the Council for the Defence of Taxpayers.

When the appeal relates to a decision of a body which is dependent on an autonomous community or city with autonomous status, references to the Director of the State Tax Administration Agency and to the Director-General or Director of the Department of the State Tax Administration Agency shall be understood as being to the equivalent or similar to bodies of the said autonomous community or city with autonomous status.

3. The decision on appeal shall be adopted by a majority of the members of the Special Chamber. In the event of a tie, the President shall always have the casting vote.

4. The decision on appeal shall be issued within 6 months and shall respect the particular legal situation relating to the appealed decision, establishing the applicable precedent.

5. The precedent established by such appeal decisions shall be binding on the [tax tribunals], on the tax bodies of the autonomous communities and of the cities with autonomous status and on the remainder of the State Tax Administration and of the autonomous communities and cities with autonomous status.’

31 Or by the Directors-General for Taxation of autonomous communities and cities with autonomous status, or equivalent bodies, when the appeal relates to a decision by a body dependent on the respective autonomous community or city with autonomous status.

33. The Court also spoke to the same effect in paragraphs 37 and 38 of the judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126):

‘In that regard, it should be recalled that 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 ...’

34. In that case it was held that a civil servant court registrar (Secretario Judicial) ‘receives, and is required to comply with, instructions from his hierarchical superior’, except when he is exercising his judicial authenticating functions. The Court found that the Secretario Judicial (Registrar) in that case had been entrusted with determining the action for the repayment of fees at issue ‘in the main proceedings in observance of the principles of unity of action and subordination to hierarchy’.³²

35. It followed that the Secretario Judicial was not ‘a court or tribunal’ within the meaning of Article 267 TFEU.

36. For the reasons I have already indicated, I do not consider that the members of the TEAC enjoy the requisite degree of independence such that that body could properly be regarded as a court or tribunal for the purposes of Article 267 TFEU. I reach this conclusion for the following reasons.

37. First, while the TEAC clearly applies the law and conventional legal standards in the resolution of tax disputes and has the degree of permanence which is characteristic of judicial bodies, the members of the TEAC lack the essential quality of fixity of tenure³³ which, as the Court pointed out in paragraph 45 of the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117), is a prerequisite for the administration of justice.

38. The very fact that members of the TEAC have been removed by royal decree for reasons which seem expedient to the Government of the day is, in itself, sufficient to demonstrate that the TEAC lacks this vital and essential quality.³⁴ To satisfy this aspect of the requirement of independence it would be necessary for the members of the TEAC to enjoy real and effective legal guarantees against removal save for just cause or incapacity.

³² See judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126, paragraph 41). Finally, this point had also been made by the European Court of Human Rights in Application No 22107/93, judgment of 25 February 1997, *Findlay v. United Kingdom* (CE:ECHR:1997:0225JUDOO2210793) where it pointed to the fact that under the court martial regime then prevailing in the United Kingdom, the members of the court martial in question were all subordinate in military rank to the convening officer. Here the European Court of Human Rights observed: ‘In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay’s case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay’s doubts about the tribunal’s independence and impartiality could be objectively justified...’.

³³ The Court refers to ‘protection against removal from office of the members of the body concerned’.

³⁴ In paragraph 53 of the judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587), the Court stated ‘those guarantees of independence and impartiality require rules, particularly as regards 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’. Emphasis added.

39. Second, a further aspect of the requirement of independence as expressed in paragraph 44 of the judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117) is the requirement that the body concerned ‘exercises its judicial 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’.

40. Much the same could be said in the present case so far as the extraordinary appeal for the unification of precedent is concerned, since the Director-General of the very entity which brought the appeal will perforce sit by virtue of Article 243 of the LGT as a member of the Special Chamber of the TEAC which hears the appeal, as will the Director-General of the State Tax Administration Agency, which made the very decision that is under appeal. While it is true that the taxpayer’s interests will presumably be represented by the President of the Council for the Defence of Taxpayers,³⁵ the fact remains that in the minds of the average, reasonable taxpayer who has brought his or her tax complaint before the TEAC, the very system established by Article 243 of the LGT for the procedure of an extraordinary appeal for the unification of precedent must, in view of the particular composition prescribed by law in respect of the Special Chamber, *appear* to be weighted in favour of the tax authorities.

41. In any event, the fact that certain members of the Special Chamber of the TEAC have strong institutional ties to the tax administration must in itself also cast doubt on the independence of the TEAC. As the Court observed in paragraph 49 of the judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587), ‘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’. Given the hierarchical status and standing within the tax administration of the Director-General of Taxation of the Ministry of Economy and Finance, the Director-General of the State Tax Administration Agency, the Director-General or the Director of the Department of the State Tax Administration Agency, it would be hard to say that these persons could be regarded as acting as third parties in a tax dispute in the sense envisaged by the Court in the judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587).

42. The very fact, moreover, that Article 243 of the LGT provides for such an extraordinary appeal procedure by means of an appeal which the tax authorities alone can bring further conveys the impression that the TEAC should perhaps not depart too readily from an interpretation of the tax legislation favoured by the authorities, since, if it ever were to do so, the Director-General of Taxation of the Ministry of Economy and Finance could then invoke the extraordinary appeal procedure provided for by Article 243 of the LGT. This is further inconsistent with notions of independence, since the very existence of this procedure and the membership of the Special Chamber may serve as a form of subtle pressure liable, in the words of the Court in paragraph 37 of the judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126), ‘to jeopardise the independent judgment of its members as regards proceedings before them’.

43. For all of these reasons, therefore, I am of the view that the TEAC does not satisfy the requirements of independence necessary to constitute it as ‘a court or tribunal’ for the purposes of Article 267 TFEU. While the Court does not operate any strict system of precedent, it is nonetheless clear that the reasoning in the judgment of 21 March 2000, *Gabalfrija and Others* (C-110/98 to C-147/98, EU:C:2000:145) is unsatisfactory and that decision should no longer be followed so far as this issue is concerned.

³⁵ Article 34(2) of LGT provides that:

‘The Council for the Defence of Taxpayers, which is integrated into the Ministry of Finance, shall ensure the effectiveness of the taxpayers’ rights, deal with complaints arising from the application of the tax system performed by the State bodies and make the relevant suggestions and proposals, in the form and with the effects foreseen in the regulations.’

44. I would therefore propose that the Court hold that it has no jurisdiction to rule on the request for a preliminary ruling submitted by the TEAC.

IV. Conclusion

45. In the light of the foregoing considerations, I propose that the Court hold that it has no jurisdiction to rule on the request for a preliminary ruling submitted by the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain).