



## **Specific Acts of the Court of Justice of the European Union – Opinions of the Court of Justice**

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**Abstract:** The present paper is dedicated to analysis of the problems related to the acts of the judicial authority of the European Union (hereinafter "EU"). Its importance lies in the fact that this EU institution is established at the beginning of the European integration process and has rich history and case-law of more than 60 years, which are to a great extent unfamiliar to the broad public and even to members of the judiciary or to researchers in Bulgaria and Romania – the states that have most recently joined together the EU in 2007. This study aims to contribute to earlier studies dedicated to the work and acts of the various EU institutions, bodies, offices or agencies. The author has made former attempts to explain some specific aspects of the regulation and the functioning of the institutional framework of the Union. In order to achieve better results the analysis is based on survey, observation, comparison and translation of various sources such as EU and international legal acts and case-law and systematisation of the available doctrine in this area. This is an attempt to explain the legal regulation, characteristics and effects of the preliminary opinions of the Court of Justice and to distinguish these acts from other more well-known acts of the Court of Justice. The study may be of special interest to academics and members of the judiciary because it presents in detailed and concise manner the basic features of these unfamiliar but undoubtedly important acts. Its main contribution lies in the fact that it constitutes a first attempt in Bulgaria for a thorough study of those specific acts.

**Keywords:** EU jurisdictions; international agreements; compatibility with the Treaties; community law

### **1. Introduction**

The present paper aims to explain in clear, concise and thorough manner one of the specific acts delivered by the Court of Justice. The interest in these acts stems from the fact that to some extent they are not familiar to the public in general and in particular to specialists (academics or magistrates). The author knows closely the

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work of the EU jurisdictions as former employee of this institution and has worked with different acts of the courts and tribunals of the EU. The author's interest in this subject-matter was provoked by the importance of the Opinions of the Court of Justice whose role is underestimated because of the lack of proper explanation and understanding of their legal regulation and characteristics. It is the author's hope that this paper shall explain adequately the issues with regard to these acts and shall bring about better understanding of this particular area of the activity of the Court of Justice.

## 2. The Institution and its Powers

The Court of Justice of the EU, which has its seat in Luxembourg, consists (under article 19 of the Treaty on European Union, hereinafter "TEU") of three courts: the Court of Justice, the General Court (created in 1988 as the Court of First Instance till the entry into force of the Treaty of Lisbon) and the Civil Service Tribunal (created in 2004).

Unlike other international jurisdictions which are rather latent, the three jurisdictions of the EU have so far delivered approximately 15 000 judgments.

Since the establishment of the Court of Justice of the EU in 1952 with the creation of the first European Community, namely the European Coal and Steel Community, its mission has been to ensure that "*the law is observed*" "*in the interpretation and application*" of the Treaties (under article 19 of the TEU).

Besides, under article 218 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") the Court of Justice of the EU has also the mission to **deliver a preliminary opinion** as to whether an agreement envisaged is **compatible** with the Treaties in any procedure with regard to the negotiation and the conclusion of agreements between the Union and third countries or international organisations upon the request addressed to the Court under the provisions of the EU law.

These powers of the Court of Justice reveal its role as a Constitutional court of the EU. In order to show its proximity to Constitutional courts it is sufficient to reveal some of the analogous powers of the Constitutional court of Bulgaria. Thus, under art. 149 of the Constitution of the Republic of Bulgaria the Constitutional Court *inter alia* shall provide binding **interpretations** of the Constitution and rule on the **compatibility** between the Constitution and the international treaties concluded by the Republic of Bulgaria **prior to** their ratification, and on the compatibility of

domestic laws with the universally recognized norms of international law and the international treaties to which Bulgaria is a party.

### **Legal Regulation Applicable to the Court of Justice of the European Union and its Acts**

The legal framework within which works the Court of Justice of the EU is defined on several levels. First of all, it is the primary law, meaning the Treaties, which define the powers and the characteristics of the jurisdictions of the EU. Thus, the relevant legal provisions with regard to the Court of Justice of the EU stem from several provisions of the TEU, the TFEU and the Treaty establishing the European Atomic Energy Community.

Besides, the Statute of the Court of Justice of the European Union is laid down in a separate Protocol (No 3) to the TFEU.

Finally, most detailed regulation with regard to the functioning and the acts of the Court of Justice of the EU is provided in the Rules of Procedure of the Court of Justice, the Rules of Procedure of the General Court and the Rules of Procedure of the European Union Civil Service Tribunal (as last amended of 23 March 2010 (OJ L 92 of 13.4.2010, p. 12) with the necessary amendments following the entry into force of the Treaty of Lisbon in 2009).

Thus, the legal acts of the Court of Justice are regulated in greatest details in its Rules of Procedure and in particular in articles 63 to 68 of Chapter 4 Judgments of Title II of the Rules of Procedure of the Court of Justice and with special regard to the opinions of the Court, that regulation is set out in articles 107 and 108 of Chapter 11 Opinions of Title III of the same Rules of Procedure.

### **Classification of the Acts of the Court of Justice**

According to the provisions of the Rules of Procedure of the Court of Justice and with regard to their characteristics and legal effects (Everson, 2006, pp. 98-116) we can distinguish several groups of acts delivered by the Court of Justice as follows:

- judgments;
- decisions;
- orders;
- opinions;
- opinions and views of the Advocates General.

Most known and numerous among these acts of the Court of Justice are the Judgments of the Court of Justice. So far there are more than 15 000 judgments delivered by the three jurisdictions of the EU since their establishment most of which are delivered by the Court of Justice being both the oldest court among all EU jurisdictions and at the same time the highest instance in the court proceedings. I wish to set out below merely for the sake of completeness a brief description of these acts.

#### **A. Judgments (arrêts in FR)**

The Court delivers acts in the form of Judgments under article 63 et seq. of the Rules of Procedure of the Court of Justice. The Court delivers its judgments in the following court proceedings:

- **references for a preliminary ruling** (see for example Case C-497/10 PPU: Judgment of the Court (First Chamber) of 22 December 2010 (**reference for a preliminary ruling** from the Court of Appeal of England and Wales (Civil Division) — United Kingdom) — Barbara Mercredi v Richard Chaffe (Judicial cooperation in civil matters — Regulation (EC) No 2201/2003 — Matrimonial matters and parental responsibility — Child whose parents are not married — Concept of ‘habitual residence’ of an infant — Concept of ‘rights of custody’ ) OJ C 55, 19.2.2011, p. 17–17 );

- **direct actions** such as actions for failure to fulfil an obligation and actions for annulment (see for example Case C-233/10: Judgment of the Court (Seventh Chamber) of 16 December 2010 — European Commission v Kingdom of the Netherlands (**Failure of a Member State to fulfil obligations** — Directive 2007/44/EC — Prudential assessment of acquisitions and increase of holdings in the financial sector — Procedural rules and evaluation criteria) OJ C 55, 19.2.2011, p. 16–17);

- **appeals** (see for example Case C-480/09 P: Judgment of the Court (Second Chamber) of 16 December 2010 — AceaElectrabel Produzione SpA v European Commission, Electrabel SA (**Appeal** — State aid — Aid declared compatible with the common market — Condition requiring prior repayment by the beneficiary of earlier aid declared unlawful — Concept of ‘economic unit’ — Joint control by two separate parent companies — Distortion of the pleas in law relied on in the application — Errors and defective reasoning) OJ C 55, 19.2.2011, pp. 15–16).

**B. Decisions (decisions in FR)**

The Court delivers Decisions on different occasions. Such are delivered for example under article 123b of the Rules of Procedure of the Court of Justice (see for example Decision of the Court of Justice (special chamber provided for in article 123b of the Rules of Procedure) of 8 February 2011. Review. Case C-17/11 RX).

**C. Orders (ordonnances in FR)**

Orders of the Court of Justice may be delivered in the form of orders terminating proceedings by judicial determination or orders made following an appeal against an order concerning interim measures or intervention or orders terminating the case by removal from the register, declaration that there is no need to give a decision or referral to the General Court. Thus, the Orders of the Court of Justice are delivered on different occasions e.g. in the cases under article 43 of the Rules of procedure of the Court of Justice (see for example Order of the Court - 12 January 2011 Eriksen v Commission Joined cases P, C-217/10 P, C-222/10 P) or in the case of suspension of operation or enforcement and other interim measures under article 86 of the Rules of procedure of the Court of Justice (see for example Order of the Court - 31 January 2011, Commission / Éditions Jacob Case C-404/10 P-R).

**D. Opinions of the Court (avis in FR)**

Opinions are the specific acts delivered by the Court under articles 107 and 108 of the Rules of procedure of the Court of Justice which are subject of detailed consideration further in the present paper (see for example Opinion of the Court (Grand Chamber) of 30 November 2009. Opinion pursuant to article 300(6) EC - General Agreement on Trade in Services (GATS) - Schedules of specific commitments - Conclusion of agreements on the grant of compensation for modification and withdrawal of certain commitments following the accession of new Member States to the European Union - Shared competence - Legal bases - Common commercial policy - Common transport policy. Opinion 1/08).

**E. Opinions (conclusions in FR) and Views (prise de position in FR) of the Advocates General**

Since unlike the other EU jurisdictions the Court of Justice is composed both of Judges and of Advocates General it is necessary to mention the specific acts delivered by Advocates General in particular under article 59 of the Rules of procedure of the Court of Justice (see for example Opinion of Advocate General

Kokott delivered on 11 November 2010. Haribo Lakritzen Hans Riegel BetriebsgmbH (C-436/08) and Österreichische Salinen AG (C-437/08) v Finanzamt Linz. Reference for a preliminary ruling: Unabhängiger Finanzsenat, Außenstelle Linz - Austria. Free movement of capital - Corporation tax - Exemption of nationally-sourced dividends - Exemption of foreign-sourced dividends only if certain conditions are complied with - Application of an imputation system to non-exempt foreign-sourced dividends - Proof required as to the foreign tax creditable. Joined cases C-436/08 and C-437/08).

The Advocates General may also deliver Views under article 123e of the Rules of Procedure in the procedure for **review of decisions of the General court** (see for example View of Advocate General Mazák delivered on 28 October 2009. M v Agence européenne des médicaments (EMEA). Review of the judgment in Case T-12/08 P - Whether the state of the proceedings permits final judgment to be given - Fair hearing - Rule that the parties should be heard - Whether the unity or consistency of Community law is affected. Case C-197/09 RX-II) or in the recently new **urgent procedure** under article 104b f the Rules of procedure of the Court of Justice (see for example View of Advocate General Mazák delivered on 10 November 2009. Said Shamilovich Kadzoev (Huchbarov). Reference for a preliminary ruling: Administrativen sad Sofia-grad - Bulgaria. Visas, asylum, immigration and other policies related to free movement of persons - Directive 2008/115/EC - Return of illegally staying third-country nationals - article 15(4) to (6) - Period of detention - Taking into account the period during which the execution of a removal decision was suspended - Concept of 'reasonable prospect of removal' Case C-357/09 PPU).

### **3. Legal Regulation, Characteristics, Scope and Effects of the Preliminary Opinions of the Court of Justice**

#### **3.1. Legal Regulation of the Preliminary Opinions of the Court of Justice**

From a legal point of view Opinions of the Court of Justice are provided for under article 218 (11) of TFEU. According to the wording of this article:

*"11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. 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."*

This regulation is further developed in the Rules of Procedure of the Court of Justice. These specific acts of the Court of Justice are regulated in particular by the provisions of articles 107 and 108 (Chapter 11 OPINIONS) of the Rules of procedure of the Court of Justice which read as follows:

*"Article 107*

*1. A request by the European Parliament for an opinion pursuant to article 218 TFEU shall be served on the Council, on the European Commission and on the Member States. Such a request by the Council shall be served on the European Commission and on the European Parliament. Such a request by the European Commission shall be served on the Council, on the European Parliament and on the Member States. Such a request by a Member State shall be served on the Council, on the European Commission, on the European Parliament and on the other Member States. The President shall prescribe a period within which the institutions and Member States which have been served with a request may submit their written observations.*

*2. The Opinion may deal not only with the question whether the envisaged agreement is compatible with the provisions of the Treaties but also with the question whether the Union or any Union institution has the power to enter into that agreement.*

*Article 108*

*1. As soon as the request for an Opinion has been lodged, the President shall designate a Judge to act as Rapporteur. 2. The Court sitting in closed session shall, after hearing the Advocates General, deliver a reasoned Opinion. 3. The Opinion, signed by the President, by the Judges who took part in the deliberations and by the Registrar, shall be served on the Council, the European Commission, the European Parliament and the Member States."*

### **3.2. Characteristics of the Preliminary Opinions of the Court**

Any Member State as well as any institution of the EU among the three decision-making institutions, namely the European Parliament, the Council or the Commission **may** demand and receive an Opinion by the Court. Apparently, it is

clear by the wording of article 218 (11) of the TFEU that this is a mere possibility or an option and not an obligation in itself. In practice this possibility, however, has been often put in effect by various addressees of this legal disposition. Thus for example Opinion 1/08 of the Court of Justice is delivered upon request by the Commission. Opinion 1/03 is given in response to a request by the Council of the European Union whereas Opinion 3/94 is requested by a Member State of the EU, namely the Federal Republic of Germany.

Among the three EU jurisdictions only the Court of Justice may give Opinion under the procedure for preliminary opinions. Neither the General Court nor any special jurisdiction may do so. Moreover, the Court of Justice delivers such preliminary opinions either sitting as full Court, composed of all the Judges as in the case of Opinion 1/03 or as Grand Chamber, composed of 13 Judges as in the case of Opinion 1/08. In each particular case all Advocates General participate in the hearing of the case.

There are specific policy areas in the TFEU where there is explicit referral to the procedure for preliminary opinions by the Court of Justice established under article 218 of the TFEU. Such areas in particular are the common commercial policy and the procedure concerning the negotiation and conclusion of international agreements in the field of transport (under article 207 (5) of the TFEU).

By contrast, there are explicit derogations in the TFEU from the procedure for preliminary opinions delivered by the Court of Justice. These derogations concern the case of formal agreements on an exchange-rate system for the euro in relation to the currencies of third States (under article 219 (1) of the TFEU) as well as where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations (under article 219 (3) of the TFEU).

### **3.3. Scope and Effects of the Preliminary Opinions of the Court**

In accordance with article 107 (2) of the Rules of Procedure of the Court of Justice within the scope of the Opinion may fall either (1) the question whether the envisaged agreement is compatible with the provisions of the Treaties or (2) the question whether the Union or any Union institution has the power to enter into that agreement. Within the scope of the former group may be pointed out Opinions



1/59, 1/76 or 1/91. Within the meaning of the latter group may be considered as examples Opinions 1/75, 1/78 or 2/91.

Under article 219 of the TFEU where there is an **adverse opinion** of the Court (that is for example where an agreement envisaged is found by the Court to be incompatible with the Treaties) the agreement envisaged to be negotiated or concluded between the Union and third countries or international organisations **may not enter into force** unless it is amended or the Treaties are revised.

As regards **the binding effect of the Opinion of the Court of Justice** to the Member States and the decision-making institutions of the EU in the absence of an explicit provision in the Treaties it is the Court of Justice in one of its Opinions that gives the answer to this important question. In its Opinion 1/91 the Court of Justice points out in point 61 that it is impossible to admit that the answers that the Court of Justice gives to the jurisdictions of the EFTA states have purely consultative effect and are deprived of obligatory effects. Such a situation distorts the function of the Court of Justice, envisaged in the EEC Treaty and in particular the function of a jurisdiction whose judgments are binding. Even in the very particular case of [article 218] **the Opinion of the Court of Justice is in possession of the binding effect** pointed out therein.

### **3.4. Opinions of the Court of Justice from the important pre-accession case-law**

The significant role of the Opinions of the Court of Justice may be found in the presence in the List of the 57 judgments from 1954 to 2000 in the languages of the 2007 accession countries (Bulgaria and Romania) of three of the most important Opinions of the Court delivered before 2007 as follows:

#### **3.4.1. Opinion of the Court of 14 December 1991**

Opinion delivered pursuant to the second subparagraph of article 228 (1) of the Treaty. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. (**Opinion 1/91** European Court reports 1991 Page I-06079).

In this case the Court of Justice gives the opinion that the system of judicial supervision which the agreement on the European Economic Area proposes to set

up **is incompatible** with the Treaty establishing the European Economic Community.

#### **3.4.2. Opinion of the Court of 15 November 1994**

The Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - article 228 (6) of the EC Treaty. (**Opinion 1/94** European Court reports 1994 Page I-05267).

The opinion of the Court of Justice in this particular case is that the [then] Community has sole competence to conclude the Multilateral Agreements on Trade in Goods, the Community and its Member States are jointly competent to conclude the General Agreement on Trade in Services and the Community and its Member States are jointly competent to conclude the Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods.

#### **3.4.3. Opinion of the Court of 28 March 1996**

Accession by the Community to the European Convention for the protection of Human Rights and Fundamental Freedoms. (**Opinion 2/94** European Court reports 1996 Page I-01759).

The Court of Justice shares on this occasion the opinion that in the actual state of the Community law the Community does not dispose of powers to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms since, on the one hand, there is no disposition of the [EC] Treaty which confers general power to the Community institutions to edict legal rules in the area of human rights or to conclude international conventions in this sphere and, on the other hand, such an accession could not be effected by reference to article 235 of the [EC] Treaty.

### **4. Conclusion**

In the light of the foregoing considerations it may reasonably be concluded that the Opinions of the Court of Justice are an important instrument in the process of the negotiation and conclusion of international agreements by the Union or its institutions. Through this legal mechanism the Court of Justice often plays a decisive role in the treaty relations between the Union and third countries or international organisations.

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