The preliminary reference procedure and direct taxation

Dr. Ricardo García Antón
Postdoctoral Research Fellow IBFD

Visit us at www.ibfd.org
Article 267 TFEU – channel to build up EU Direct taxation

Need to supersede Bentham’s conception in EU tax law.

Frequently, our scholarship neglects institutional aspects to rather focus on the analysis of the substantive outcomes of the CJEU.

My research question: Which are the techniques/powers granted upon the CJEU within article 267TFEU? Which is the meaning of judicial cooperation in EU Direct taxation?
The narrative of “protection of EU rights

- Clash between Fundamental Freedoms and national tax law

- Article 267 TFEU is not a mere consultation procedure: assess the compatibility of national law with EU law

- The citizens’ infringement procedure (Pescatore – Van Gend en Loos)

- The CJEU as a Constitutional Court
A tridimensional crisis

► **Organic crisis**
  - The vanishing of *Vaasen-Göbbels*
  - Contradictions and lack of clarity (no rigorous case law)

► **Functional crisis**
  - *Costa v. Enel* (separation of functions axiom)
  - CJEU – no abstract interpretation is provided

► **Normative crisis**
  - Factual settings v. erga omnes effects of the rulings
  - The emergence of general principles echoes tensions: *acte clair* doctrine and limitation of temporal effects of the rulings
The narrative of “protection of EU rights” places the CJEU at the apex of the European Judicial Power.

Vertical and Constructive Cooperation Model: a broad degree of discretion conferred upon the CJEU to drive art. 267 TFEU.

The vertical model: The CJEU monitors the references requested by national courts (i.e. admissibility of references).

The constructive model: The CJEU is empowered with certain techniques to foster integration (i.e. reformulation).
The CJEU works as a Constitutional Court

The CJEU does not engage in judicial activism

What is the role of the negative integration within the Post-BEPS scenario?

How do we overcome the current Court’s workload? Towards a “decentralized” European Judicial Power