

## **THE IMPORTANCE AND UTILITY OF THE „PRELIMINARY RULING” PROCEDURE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION**

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### **ABSTRACT:**

*THE COURTS OF THE 28 MEMBER STATES MAY INTERPRET AND APPLY THE EUROPEAN LEGISLATION IN DIFFERENT WAYS, WHICH COULD “IRREMEADIABLY COMPROMISE THE FULFILMENT OF THE EUROPEAN UNION’S OBJECTIVES”<sup>2</sup>.*

*FOR THE INTERPRETATION OF THE UNION’S LAW TO NOT BE LEFT SOLELY TO THE DISCRETION OF THE NATIONAL COURTS, THIS ARTICLE AIMS TO REVEAL THE IMPORTANCE OF THE PRELIMINARY RULING PROCEDURE, BASED ON WHICH THE COURT OF JUSTICE OF THE EUROPEAN UNION HAS THE COMPETENCE TO JUDGE WITH A PRELIMINARY TITLE, ACCORDING TO ART 19 PARA 3 LET B) OF THE TEU CORROBORATED WITH ART 267 OF THE TFEU, AT THE REQUEST OF THE NATIONAL COURTS, REGARDING THE INTERPRETATION OF THE EUROPEAN UNION’S LAW OR THE VALIDITY OF THE ACTS ADOPTED BY THESE INSTITUTIONS.*

*THIS IS WHY THIS MECHANISM HAS THE ROLE TO PREVENT A DIVERGENT JURISPRUDENCE WITHIN THE UNION USING THE “PRELIMINARY RULING PROCEDURE” BY THE COURT OF JUSTICE OF THE EUROPEAN UNION.*

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**KEYWORDS:** *UNITARY INTERPRETATION AND APPLICATION OF THE EUROPEAN LAW, COURT OF JUSTICE OF THE EUROPEAN UNION, PRELIMINARY RULING, EUROPEAN MODEL*

### **INTRODUCTION**

The European legal order is formed by an ensemble of courts with general competencies regarding the interpretation and application of the European law, on top of which is the supreme judicial authority, namely the Court of Justice of the European Union (CJEU).

The most important attribution of the CJEU is the unitary interpretation and application of the European legislation by all the courts of the Member States.

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<sup>2</sup> Mircea Duțu and Andrei Duțu, *Dreptul contenciosului european*, (Bucharest: Universul Juridic, 2012), 125.

## 1. RELEVANT PROVISIONS

Art 4 Para 3 of the Treaty on European Union<sup>3</sup> states that “*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties*”. According to Art 19 Para 3 Let b) of the TEU “*The Court of Justice of the European Union shall, in accordance with the Treaties give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions*”.

Art 267<sup>4</sup> of the Treaty on the Functioning of the European Union<sup>5</sup>, “the jewel of the Crown”<sup>6</sup> of competence of the CJEU<sup>7</sup>, states that it “*shall have jurisdiction to give preliminary rulings concerning:*

- a) *The interpretation of the Treaties;*
- b) *The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union*<sup>8</sup>.

*Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*

*Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*

*If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”*

Regarding the procedure of the preliminary questions<sup>9</sup>, it shall be applied Art 23 of the Statute of the CJEU<sup>10</sup>, as well as Art 93-118, Title III “References for a preliminary ruling” of the Rules of Procedure of the Court of Justice of the European Union of 25 September 2012.

According to Art 256 Para 3 of the TFEU, the tribunal has the competence to determine questions referred for a preliminary ruling based on Art 267 of the TFEU, “in specific areas established by the Statute”. But, given the fact that the Statute of the CJEU has not been adjusted in this area, the Court of Justice is, currently, the only institution with competence in issuing preliminary rulings.

<sup>3</sup> Further, TEU.

<sup>4</sup> Initially Art 177 of the EEC (1958), subsequently Art 234 of the EC and, nowadays, Art 267 of the TFEU (2009) – consolidated version, 2010/C 83/01.

<sup>5</sup> Further, TFEU.

<sup>6</sup> Paul Craig and Grainne de Burca, *Dreptul Uniunii Europene*, 4<sup>th</sup> Edition (Bucharest: Hamangiu, 2009), 576.

<sup>7</sup> Further, “Court of Justice” or “CJEU”.

<sup>8</sup> The “interpretation” and “validity”, according to P. Pescatore, can be joined in the meaning that the answer to a validity issue depends on the prior solution of an interpretation question, Pierre Pescatore, “*Le renvoi préjudiciel: l’évolution du système*”, *Etude de droit communautaire européen 1962-2007* (Collection de l’Union Européenne), dirigée par F. Picod, Bruylant, (Bruxelles, 2008), 853 quoted by Ion Deleanu, “Dialogul judecătoriesor – forme și implicații ale dialogului judecătoriesor”, *Revista Română de jurisprudență* 1(2012): 37, footnote 58.

<sup>9</sup> In the same meaning are used the expressions “prejudicial matter”, “reference for a preliminary ruling”, “reference for a prejudicial ruling”, “preliminary request” or “request for a preliminary decision”.

<sup>10</sup> The consolidated version of the Protocol No 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as it has been modified by Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council on 11 August 2012 (OJ L 228, 23 August 2012, p.1) and by Art 9 of the Act on the conditions for accession of Croatia, as well as the adjustments to the TEU, TFEU and to the Treaty establishing the European Atomic Energy Community (OJ L 112 of 24 April 2012, p.21).

## 2. THE IMPORTANCE AND UTILITY OF THE REGULATION

The reference for a preliminary ruling procedure<sup>11</sup> represents a fundamental mechanism, *sui-generis*<sup>12</sup>, of the European Union, which has the role to support the Member States' courts in insuring a unitary interpretation and application of the law within the Union, when the European texts which are about to be applied in specific cases subjected to their ruling must be cleared<sup>13</sup>.

Art 267 of the TFEU states a general condition according to which the reference for preliminary ruling must be addressed by a Member States' court and the preliminary ruling of the Court of Justice to be necessary for the national judge to issue a decision<sup>14</sup>.

Once the issue has been clarified by the CJEU, the interpretation given by the Court to the European text shall contribute to the resolution of the pendent litigation, subjected to trial in front of a national court of a Member State, without interfering with the prerogatives of the national judge regarding the solution of the litigation<sup>15</sup>.

This procedural instrument is the "main way to shape the relation between the national and communitarian (European – A/N) legal systems"<sup>16</sup>, using the direct dialogue between the national courts and the court of the European Union, the national judge becoming "the communitarian (European – A/N) judge of common law"<sup>17</sup>, as an expression of the principle of the direct effect and that of the priority of the Union's law.

The jurisdictional feature of the national judge has been resized towards the European legal order, through communication or collaboration with the European judge using the mechanism of the "prejudicial issue", for the interpretation of the Treaties and of the European norms, thus representing a "bridge" of the European legal order, "an institutionalized mean for such communication"<sup>18</sup>.

The Court itself has defined this instrument as being one of cooperation<sup>19</sup> between the Court and the national judges, at the initiative of the latter ones, "differently, but integrated within the Member States' legal systems"<sup>20</sup>.

Art 267 of the TFEU especially aims "the prevention of the divergences of jurisprudence within the Union regarding certain aspect of communitarian (European – A/N) law"<sup>21</sup> by "entrusting the power of its autonomous interpretation solely to the communitarian

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<sup>11</sup> The reference for a preliminary ruling is a *prejudicial matter*. The matter is prejudicial when it is indispensable or solving litigation submitted in front of the court and must be subjected, beforehand, to the examination of the competent jurisdiction which shall rule by a jurisdictional act. Serge Guinchard and Frédérique Ferrand, *Procédure civile, Droit interne et droit communautaire* (Paris: Dalloz, 2006), 722-55, quoted by Mircea Duțu and Andrei Duțu, *Dreptul contenciosului european*, 130.

<sup>12</sup> Gyula Fabian, *Drept instituțional al Uniunii Europene* (Bucharest: Hamangiu, 2012), 405. According to the author, this procedure contains non-contentious elements of procedure, but also elements characteristic for the actions in annulment of certain Union normative acts.

<sup>13</sup> Simina E. Tănăsescu, "Trimiterea preliminară și cooperarea judiciară loială", *Revista Română de Drept European* 3 (2012): 18.

<sup>14</sup> Lavinia-Mihaela Vladilă, Constanta Matusescu and Steluta Ionescu, *Jurisdicții Internaționale și Europene*, (Bucharest: ProUniversitaria, 2014), 283.

<sup>15</sup> Fabian, *Drept instituțional*, 407.

<sup>16</sup> Craig and De Burca, *Dreptul Uniunii Europene*, 578.

<sup>17</sup> Decision of the CJEU on 5 February 1963, Case file 26/62 Van Gend&Loss v. Holland.

<sup>18</sup> Deleanu, "Dialogul judecătorilor", 37.

<sup>19</sup> Decision of the CJEU on 1 December 1965, Rec. 1965, 1081.

<sup>20</sup> Decision of the CJEU on 15 July 1964, Case file 6/64, Costa v. E.N.E.L.

<sup>21</sup> Decision of the CJEU on 6 October 1982 (Case file 283/81, CILFIT v. Ministry of Health) on the interpretation of Art 177 Para 3 of the Treaty on the EEC.

(European – A/N) judge which has been the optimal solution for the unitary and identical interpretation and application of the EU law”<sup>22</sup>.

P. Craig and G. de Burca consider that it represents “a mechanism by which the internal jurisdictions and CJEU are in dialogue for the correct application of a communitarian (European – A/N) norm which is in conflict with a national legal provision”.

Thus, the preliminary actions are based on the collaboration, not subordination, between the CJEU and the national courts, with the mutual respect for the competencies. The national judge shall have to be “a union judge every time he apprehends vagueness in the statement and application of the Union’s law, especially that the new institutions, expressions and mechanisms created by the Union, which cannot be found in the national legal order, have implications, different relevance for each Member State but, nevertheless must be unitary applied and interpreted”<sup>23</sup>.

The mechanism of the preliminary ruling represents a protection offered by the CJEU for the right to a fair trial, stated by Art 6 Para 1 of the European Convention on Human Rights, the active role of the judge representing a principle inherent for each legal procedure performed in a state of law<sup>24</sup>.

“The national judge is not just the judge for the national law, but also for the European law, as well as for the European Convention on Human Rights and Fundamental Freedoms”<sup>25</sup>.

It must be noted that, first of all France then Romania took over this European procedure, as national model, as the notification for approval of the French Court of Cassation<sup>26</sup>, namely the prior decision for solving certain law issues of the Romanian High Court of Cassation and Justice<sup>27</sup>. These procedural instruments have the same purpose, within the national legal order, namely that of the uniform interpretation of the law by the Supreme Court.

## CONCLUSIONS

As a conclusion, for over more than 53 years of application in the Community<sup>28</sup>, the procedure of the prejudicial reference is a special one, original by a series of features<sup>29</sup>.

This form of dialogue and cooperation between the national judge and the European judge by the so-called prejudicial question, aims to promote and protect the same values and principles, the compliance with, consolidation and unity of an European legal order, as well

<sup>22</sup> <http://www.juridice.ro/267796/procedura-hotararii-preliminare-la-cjue-si-jurisprudenta-instantelor-romane-sinteza.html>, last modified June 25, 2014.

<sup>23</sup> Fabian, *Drept institutional*, 431.

<sup>24</sup> Art 22 of the new Code of Civil Procedure (Law No 134/2010 published in the Official Gazette of Romania, Part I, No 545/3 August 2012, with subsequent modifications and amendments).

<sup>25</sup> Tănăsescu, “*Trimiterea preliminară*”, 39.

<sup>26</sup> In France, by the Law of 31 December 1987, in front of the State Council, was created within the reformation of the administrative contentious, the procedure named *renvoi pour avis* (notification for approval), procedure created to unify the interpretation of the law. Since 1991 in the French Code of Judicial Organization have been inserted Art 151-1 and following (republished in 2006, the articles have become 144-1 and following with the same content), the Court of Cassation has the possibility to issue approvals by which it interprets the newest legal provisions with serious difficulties.

<sup>27</sup> In civil matters, the legal framework is represented by Art 519-521 of the Code of Civil Procedure (Law No 134/2010 on the Code of Civil Procedure, with subsequent modifications and amendments, republished in the Official Gazette of Romania, Part I, No 485/15 July 2010) and in criminal matters by Art 475-477<sup>1</sup> of the Code of Criminal Procedure (Law No 135/2010 on the Code of Criminal Procedure, with subsequent modifications and amendments, republished in the Official Gazette of Romania, Part I, No 486/15 July 2010).

<sup>28</sup> The first preliminary ruling is the Bosch case No 13/61 of 14 April 1962, *Recueil*: 104.

<sup>29</sup> Duțu and Duțu, *Dreptul contenciosului european*, 133.

March 2015

as the insurance of a legal protection of the rights of the Member States' citizens, natural or legal persons, rights representing the object of the European legal norms.

*This paper has been financially supported within the project entitled "Horizon 2020 - Doctoral and Postdoctoral Studies: Promoting the National Interest through Excellence, Competitiveness and Responsibility in the Field of Romanian Fundamental and Applied Scientific Research", contract number POSDRU/159/1.5/S/140106. This project is co-financed by European Social Fund through Sectorial Operational Program for Human Resources Development 2007-2013 Investing in people!*

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