

PRELIMINARY RULING OF THE COURT OF JUSTICE OF EUROPEAN UNION AND ITS LEGAL EFFECTS

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ABSTRACT: *This study analyzes the preliminary question procedure as an essential legal mechanism for ensuring the uniformity and consolidation of European Union legislation. The analysis of the manner of referral to the Court of Justice of the European Union aims to establish the importance of delimiting the situations that entitle the national court to formulate a preliminary question, from the situations in which it is obliged to do so. As a novelty, the impossibility of limiting the right of the national court to request the establishment of the manner of interpretation or the validity of European Union law was affirmed in the recent jurisprudence of the Court. At the same time, from the perspective of the legal effects of the preliminary decision issued by the Court of Justice of the European Union, it is imperative to analyze its binding effect, as well as the moment from which it produces its effects, and last but not least, the possibility of considering these decisions as judicial precedent.*

KEYWORDS: preliminary ruling; preliminary judgement; Court of Justice; interpretation; validity

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1. PRELIMINARIES

The preliminary ruling is an essential legal mechanism for the uniform application of European Union legislation, contributing to the development of law and the correct interpretation of European normative provisions. In this sense, according to the provisions of art. 19 para. 3 let. b) of the Treaty on the European Union and art. 267 of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has exclusive jurisdiction to rule on preliminary questions asked by national courts regarding the interpretation of treaties; the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union.

The preliminary ruling can be defined as the jurisdictional instrument by which the national courts of a member state can request, or as the case may be, have the obligation to request, the Court of Justice's competition in order to rule on the interpretation or validity of the legal acts of the European Union. Being a non-contentious procedure that essentially contributes to the correct interpretation of the provisions of European

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regulations, it is in close correlation with basic principles of European Union law, such as the principle of direct application of European Union legislation and the principle of primacy.

From a procedural point of view, the preliminary action is an atypical one, in the sense that it differs essentially from other actions that can be exercised before the Court of Justice, especially regarding the conditions for triggering the procedure, the initiation of the action and the functions performed in the system of European Union law. Given the interpretive nature of the action, this was considered to be an intermediate procedure, which involves the referral to the Court of Justice in order to rule *ex ante* on concretely determined questions, problems, concerns (GYULA FABIAN, 2018). However, by resolving the preliminary reference, the Court must avoid any interference with regard to the resolution of the main litigation, its competence being strictly limited to providing solutions regarding the interpretation or validity of some provisions necessary for the settlement of the fund.

Given the interference between the national law and the European Union law, the preliminary questions will remain indisputable in order to consolidate and develop the legislation of the European Union, but also for its unitary interpretation. Through this procedure, the Court of Justice must ensure that the EU legal norms produce similar effects in each member state, exercising at the same time forms of indirect control over the legislation from the perspective of national compatibility with the provisions of European Union law (GYULA FABIAN, 2018).

This article aims to summarize the stages of the preliminary procedure, including the recent and relevant jurisprudential aspects regarding this subject, but also to highlight the effects produced by the preliminary ruling issued by the Court of Justice on a national level as well as in relation to other EU member states.

2. INSTITUTING THE PROCEEDINGS – RIGHT OR OBLIGATION?

The initiation of the procedure itself materializes only at the initiative of the national court, which has the exclusive prerogative to decide on the referral to the Court in order to give a preliminary ruling on the interpretation or validity of a provision, regardless of whether or not the parties involved in the process show a desire to use this procedure. Depending on the specifics of the case, the national court may request a preliminary decision to be able to resolve the dispute. The initial phase of the procedure involves the existence of a trial pending before the national court, a trial in which the application of a European Union rule is incidental, which presents ambiguities or problems related to its validity or interpretation. Being in such a situation, the national judge can or, as the case may be, must refer the Court to clarify these uncertain aspects by means of a preliminary question. Although the parties involved in the pending litigation are entitled to raise an exception before the national court regarding the need to clarify a European Union rule, they do not have the legitimacy to proceed to the Court of Justice's referral, since the preliminary action has only the national courts as subjects and is intended to promote cooperation and direct collaboration between the national court and the supranational court (GYULA FABIAN, 2018).

The preliminary action is, therefore, a non-contentious procedure that takes place between the national and the supranational court, which involves a dialogue between them

aimed at ensuring the unity of interpretation of European Union law. Regarding the notion of a court competent to refer a preliminary question to the CJEU, jurisprudence has established certain criteria for qualifying a body as a national court. The fundamental conditions that define a court were clarified by the *Vaassen-Gobbels case in 1966*, these being: the independence of the decision-making forum; the institution's affiliation to the bodies that are part of the state power; permanent character; mandatory jurisdiction, dividing some lines of contentious procedure; taking the decision based on legal norms contained in national normative acts¹. Under the auspices of the Court's jurisprudence, the conclusion was reached that the administrative bodies, the prosecution bodies, the management of a bar of lawyers are not part of the category of courts².

As regards the obligation or right of the national judge to address a preliminary question to the Court, it is essential to delimit the situations in which the national court is left to freely appreciate whether to proceed to address a preliminary question, from the situation in which it is obliged to do so. Therefore, according to *art. 267 paragraph 2 of the TFEU*, any national court has the possibility to request the clarification of a doubt that arose during a real trial before it by introducing a preliminary action. The third paragraph of the same article establishes the obligation to start the procedure in the event that the court judges the dispute as the last instance, more precisely when the decision to be pronounced by the national court is not subject to any ordinary appeal.

However, there are also exceptions to the obligation to address the preliminary question, in the situation where the question itself is not a relevant one, there is already a previous decision pronounced on an identical or similar issue from which the answer can be deduced or the answer to the question is obvious (Augustina Dumitrascu, 2015). The *Cilfit* judgment in *Case C-283/81* is the one that substantiated the theory of the *clear act*, more precisely, the exception from the obligation to refer to the Court of Justice in the hypothesis that the question is irrelevant, in the sense that it does not contribute to the solution of the process, or there is no reasonable doubt as to the answer, with the proviso that the national court must ensure that the answer is equally obvious to all courts in all member states and in all language versions.

The Court of Justice recently reaffirmed the criteria imposed by the *Cilfit Judgment*, in case *C 561/19 Consorzio Italian Management, Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA*³. The question raised in the previously mentioned case refers to the interpretation of European Union law when this issue is invoked by a party at an advanced stage of the proceedings, after the case has remained pending for the first time or when a first preliminary reference in this case already exists. Regarding the procedural stage at which the preliminary question can be addressed, the Court highlighted in the judgment that it is strictly the competence of the national court to decide at which stage of the procedure it is appropriate to initiate the preliminary action. With regard to the second issue cited, in the case under discussion the national court requested the issuance of a preliminary ruling on which the Court ruled in 2018. After this moment, the parties requested the referring court to address a second referral of preliminary questions, reason

¹Judgment of the Court in Case 61/65 Vassen Goebbels / Beamten Fonds over het Mijnbedrijf, of June 30, 1966.

²The decision of the Court of Justice of the European Union in case 138/80 Broker, of June 18, 1980.

³The decision of the Court of Justice of the European Union in case C-561/19 - Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi, of October 6, 2021.

for that the national court requested clarifications, *Cilfit's* exceptions being unclear in the hypothesis that previously in the same case it had already appealed to the preliminary reference procedure. In this sense, the Court of Justice considered that the national court charged with resolving the dispute in the last instance cannot be exempted from the obligation to request a preliminary ruling for the simple fact that it has already made a reference to the Court in the same national procedure. Therefore, the mere fact that in the same case a preliminary question has already been addressed to the Court is not likely to exempt the national court from the obligation to request clarifications from the supranational court. The national court can be exempted from the obligation to make a preliminary reference only if its decision is based on the occurrence of an exceptional situation among those listed. The national court charged with resolving the case in the last instance must independently assume the responsibility of determining whether or not the case being resolved involves one of the three situations in which it would be exempt from the obligation to make a preliminary reference. If the national court finds that it does not have such an obligation, its decision must include the appropriate reasoning, namely the indication of the incident exception. Another aspect reiterated by the Court concerns the situation related to the definition of the notion of reasonable doubt regarding the interpretation of a provision, arguing in this sense that the simple hypothesis in which a provision of European Union law allows its interpretation in several ways is not sufficient to consider that there is reasonable doubt as to the concrete interpretation of this provision. However, if the national court finds the existence of divergences in the jurisprudence of the courts of a member state, it must pay more attention in assessing the existence of a reason for reasonable doubt regarding the interpretation⁴.

The right of the national court to refer to the Court of Justice regarding the interpretation or establishment of the validity of European Union law cannot be limited or censured by supreme national courts. The only institution competent to analyze the admissibility or legality of a preliminary action is exclusively the Court of Justice. In its recent jurisprudence, more precisely in the judgment of 23 November 2021 delivered in case *C-564/19* concerning Hungary, the Court decided that the supreme national court is not entitled to find the illegality of preliminary questions addressed to the Court of Justice by a lower national court. The original dispute concerned a Swedish national arrested by Hungarian authorities for violating the countries' arms and ammunition regulations. The accused was heard through an interpreter, but later the national Court found that it could not verify the accuracy and quality of the translation, because there is no official register of interpreters, therefore the court was unable to determine if the accused has been informed of his rights and obligations. Consequently, the judge proceeded to refer the case to the Court of Justice in order to clarify some aspects necessary for the legal settlement and in accordance with the European Union regulations of the dispute. The supreme court in Hungary found the illegality of the preliminary questions, arguing that the questions have nothing to do with the settlement of the dispute, and the subject of the questions can only be the European Union law and not the national legislation. However, this attempt to censor the preliminary questions was rejected by the supranational court. Taking into account the cooperation system established by *art. 267 TFEU*, national courts do not have

⁴The decision of the Court of Justice of the European Union in case *C-561/19 - Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*, of October 6, 2021.

the right to rule on the legality or illegality of the request for a preliminary ruling on the simple grounds that they are not relevant or necessary for the resolution of the case. Such a check would overlap with the exclusive competence of the Court of Justice to rule on the admissibility of preliminary actions. The exercise of such control by national supreme courts would considerably limit the prerogative of national courts to refer a preliminary question to the supranational court. Moreover, a censure of this kind from the higher courts would inevitably lead to discourage of national courts from referring to the Court of Justice, a fact that would implicitly cause a gap in the unitary application of European Union law⁵.

The decision of the national court to request clarifications through the preliminary question is materialized by issuing a referral decision to the Court of Justice, which in turn must meet certain criteria established and reviewed regularly through specific recommendations issued by the Court⁶. In essence, the act of referral to the Court of Justice must come from a national court, i.e. it must include the court's question, but also the factual and legal reasoning. Regarding the form conditions, the Court's Rules of Procedure do not impose a specific mandatory form, any form accepted by national law being allowed. However, the Court recommends that the referral document be clear and concise, being limited to approximately 10 pages. This limit is explained by the need to translate the request for a preliminary decision into all the official languages of the European Union, disregarding this recommendation would make the procedure more difficult and excessively long. Under the penalty of rejection as inadmissible, the summary of the subject matter of the main litigation, the content of the national provisions applicable in the case and the statement of the reasons that led the national court to have doubts regarding the interpretation or validity of some provisions of European Union law must be found in the referral decision.

3. JUDGMENT GIVEN BY THE COURT OF JUSTICE

The registration of the request for a preliminary ruling is followed by a written stage and an oral stage. In the written phase of the procedure, the referral decision is communicated to the "participants". By the notion of participants, we understand both the parties in the original process, as well as the European Commission, the EU Member States and the Council.

After the communication, the parties have the opportunity to submit written clarifications regarding the dispute, these statements have the role of clarifying the concrete situation. The oral procedure provides the opportunity for the parties to express their opinion in relation to the resolution of the case regarding the question of the interpretation of European Union law. The oral stage is mandatory, however, it can be omitted when the Court finds that the question is identical to another question already solved previously, or in the situation where none of the participants shows interest in this regard⁷.

⁵Judgment of the Court in Case C-564/19 – Pesti Kozpontí Kerületi Bíróság (Central District Court of Pest, Hungary), of November 23, 2021.

⁶Recommendations to the national courts and tribunals in relation to the initiation of preliminary ruling proceedings - 2019/C380/01 - in the Official Journal of the European Union

⁷The Court's decision in case C-248/11 – Nilăş and others, of March 22, 2012.

In exceptional situations and in well-reasoned cases, the President of the Court can order the settlement of the request through the accelerated procedure or the emergency procedure (Gabriel Liviu Ispas, 2019). In essence, the accelerated procedure and the emergency procedure involve the granting of shorter deadlines and a possible limitation of the number of member states called to submit observations. In this regard, the Court's 2021 Annual Report⁸ shows that out of 567 preliminary proceedings registered, only 9 were considered urgent. Therefore, we can note that the situations that present the need to accelerate the procedure are limited and strictly regulated in order to prevent the lengthening the procedures in disputes of major importance that need to be resolved in the shortest possible time.

The procedure of the preliminary rulings is completed by the pronouncement of the preliminary decision in open session. The decision is the result of secret deliberation and is adopted by majority vote. From a structural point of view, the judgment is composed of three parts: the first part reiterates the conditions in which the national court decided to refer the Court and indicates the questions raised; in the second part these questions are examined and the Court's answer is justified; last but not least, the operative part briefly includes the conclusions reached by the Court of Justice. The atypical formula at the beginning of the device "*La Cour, statuant sur les questions a elles soumise par ... dit pour droit ...*" reaffirms the Court's role in the preliminary question procedure, more precisely that of interpreting an abstract question, without prejudices the substance of the case (Gyula Fabian, 2018).

Last but not least, the judgment rendered will be communicated to the referring court and the participants in the procedure, then the decision will be published in the Official Journal of the European Union, respectively the judgment in its entirety will be published in the annual collection of jurisprudence of the Court of Justice.

4. LEGAL EFFECTS OF THE PRELIMINARY RULINGS

The analysis of the effects of the preliminary ruling is of particular importance, as they occur both at the national level and in relation to the institutions of the European Union, but also in relation to other member states, which in turn must take into account the interpretation offered by the Court.

At the level of the national court that made the preliminary reference, the effect of the decision consists in the obligation of the national judge to take into account the interpretation offered by the supranational court. It is important to mention, however, that the binding effect of the decision concerns strictly the court, not by the parties involved in the main litigation, because preliminary references are understood to be a legal mechanism available to the court that contributes to the correct application of European Union legislation.

As I have shown previously, the Court of Justice's answer to the preliminary questions is embodied in a decision, which is binding and to which the national court is bound in terms of the interpretation attributed to European Union law. The Court by its decision cannot influence the solution to be pronounced, its competence being limited to the interpretation or establishment of the validity of European Union legislation.

⁸Overview of the year – Annual Report 2021 – Court of Justice of the European Union, www.curia.europa.eu

The binding nature of the decision results indirectly from the provisions of *art. 148 para. 2 and 4 of the Romanian Constitution*, aspect confirmed by the *Decision of the Constitutional Court no. 1039/2012* in which the constitutional court held the following: "*(the Court of Justice) having the competence to interpret the law of the European Union, its preliminary rulings are binding erga omnes, at the level of all member states*⁹".

The binding nature of the judgment delivered by the Court of Justice reinforces its function as a supranational court, as conceived by the Treaties. The national court must take into account in the settlement of the main dispute the preliminary ruling, respectively the method of interpretation indicated or, as the case may be, the validity of the legislation or acts of the EU institutions. The effects of the decision of the supranational court extend to all national courts, which are obliged to take into account the interpretation offered. Therefore, the decision of the Court of Justice regarding the interpretation or validity of European Union law cannot be disregarded by other national courts if the litigation before the court presents the same or similar problems regarding the interpretation or validity of some European Union rules.

The obligation of the national courts to take into account the Court's decision presupposes the impossibility of derogating from the solution offered by the supranational court and consequently the application of the normative acts and the legal norms of the Union according to the interpretation established by the Court¹⁰. However, we can identify an exception to the obligation to apply the Court of Justice's decision, more precisely in the situation where the national judge finds after the preliminary reference is settled, that the EU legal norm is not applicable in the case. In this situation, the lack of incidence of European law in the pending litigation implicitly removes the obligation of the national court to apply the Court's solution (Gyula Fabian, 2018).

Failure to comply with the mandatory nature of the preliminary ruling is a violation of European Union law and consequently the liability of the national court will be carried out by the European Commission which can proceed, based on *art. 258 TFEU*, to file an action for failure to fulfill obligations by a member state. At the national level, the parties to the dispute can invoke the non-compliant interpretation or the wrong application of the preliminary ruling by way of appeal (*art. 466 CPC*) or the appeal in cassation (*art. 488 CPC*) (Iuliana Mădălina Larion, 2015).

Another dispute regarding the effects of the preliminary action concerns the application in time of the solution contained in the Court of Justice's decision. The effects of the decision are usually produced retroactively, but in the event of the declaration of invalidity of some union acts and in cases of interpretation, the effects can also be extended *ex nunc* (Gyula Fabian, 2018).

The retroactive effect of a preliminary ruling results from the fact that the interpretation given to the European legislative provision aims at how it should have been understood and applied from the moment of its entry into force. The interpretation offered can and must be applied by the national court including legal relationships born before the time of the judgment on the preliminary question¹¹. However, with the aim of respecting the

⁹Decision of the Constitutional Court of Romania No. 1039 of 5 December 2012 regarding the exception of unconstitutionality of the provisions of Law no. 299/2011, published in M. Of. no. 61 of January 29, 2013.

¹⁰Judgment of the Court in case C-69/85 – Wunsche v Germany, of 5 March 1986.

¹¹Judgment of the Court in case C-110/15 – Nokia Italia and others, of 22 September 2016.

general principle of legal security inherent in the European legal order, the Court has exceptionally established certain time limitations regarding the effects of the preliminary ruling. These limitations can be imposed if there is good faith on the part of those interested and there is a risk of serious disruption (Daniel Mihail Şandru, 2019). In essence, the limitations had the effect of applying the Court of Justice's decision only for the future as there were divergences regarding the constitutive or declarative effect of the preliminary decision. In practice, the limitation was imposed in situations where the preliminary ruling censured regulations that conferred advantages for a certain category of participants in the common market, a situation in which the retroactive application of the ruling would have resulted in the loss of these advantages. The second limitation of the *ex tunc* effect of the preliminary ruling was represented by the situation in which, following the interpretation offered, there was an obligation to return certain payments made, a situation that would produce a significant imbalance in terms of the common market (Gyula Fabian, 2018).

Starting from the principle according to which the preliminary decision has binding effect *erga omnes*, the question automatically arises whether the interpretation decision can be assigned the value of judicial precedent? Although, as a rule, it is believed that the preliminary ruling has effects only with regard to the case in which it was pronounced, the fact that the national courts, including the last court, is not obliged to refer to the Court of Justice in the event that there is already an answer to a similar question, or slightly similar, pronounced in another case, confirms the effect of judicial precedent. Since at the level of the majority of member states the judicial precedent has no value as a source of law, the preliminary ruling could be more likened to the jurisprudence of the supreme national courts, whose effects also extend to other cases (Gyula Fabian, 2018).

5. CONCLUSIONS

According to the treaties and fundamental principles, the law of the European Union produces direct effects on the legislation of the member states. Thus, European regulations become an integral part of the national legal system.

The obligation of national courts to take into account the regulations of the European Union and to apply them in the disputes brought before them imposes the need for a procedure that allows the interpretation of European Union law in situations where the rules involve ambiguities, uncertainties or the question of their validity arises. In this context, the preliminary question procedure is a necessity for the unification and consolidation of European Union law.

The binding effect of the conferred interpretation is intended to strengthen the role of the Court of Justice as a supranational court exclusively competent to rule on the correct interpretation of European Union legislation. Through this procedure, the Court practically contributes to the effective administration of justice at national level.

Although it may seem a relatively simple procedure, the importance of regulating such an approach is indisputably an absolute necessity, since in the absence of a uniform interpretation and application of European Union law, fundamental principles of the European construction would be endangered.

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