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The Reference for a Preliminary Ruling. CJEU Recommendations

Liana-Teodora PASCARIU¹

Abstract: The reference for a preliminary ruling is the most useful legal instrument available to the national courts in order to obtain an authentic interpretation of a European Union legislative act or to check the validity of a Union act. The article examines the Court of Justice's recommendations on the reference for a preliminary ruling, recommendations published in the Official Journal of the European Union at the end of 2016, which are intended to ensure the application of this fundamental mechanism under effective conditions.

Keywords: European law, preliminary ruling, Court of Justice's recommendations.

JEL Classification: K10, K33

Introduction – development of the preliminary ruling procedure

The reference for a preliminary ruling or the prejudicial procedure has its roots in the legal systems of the Member States which founded the European Communities, the Community legislator inspired, in particular, by the German or French law systems. In France, for example, the Court of First Instance may bring an action before the administrative courts for a preliminary ruling, just as the administrative court may itself refer the matter to the Court of First Instance. As a consequence, the inclusion of the procedure in the original Article 234 of the EC Treaty was, from the outset, one of the first forms of cooperation between the national courts and the Community institutions, thus encouraging the harmonization of national legislation with the Community law.

In its original form Article 234 stipulates: The Court of Justice of the European Communities shall have jurisdiction to give preliminary rulings on: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts adopted by Union institutions, bodies, offices or agencies. Where such a matter is raised before a court of a Member State, that court may, if it considers that a decision in that regard is necessary in order to give judgment, request the Court to give a ruling on this issue. Where such a question is raised in a case pending before a national court whose decisions is not the

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subject of an appeal under national law, that court is required to bring an action before the Court. Where such a question is raised in a case pending before a national court concerning a person subject to a custodial measure, the Court shall decide as soon as possible (Teodoroiu, 2017).

The first case analyzed by the ECJ in this procedure dates back to 1941 (Case 13/61, Robert Bosch) and underlines the idea that the articles of the Treaty require the provisions to apply from the date of entry into force of the Treaty. It shows, however, that one of the questions cannot be regarded as simply a matter of interpretation of the Treaty since its context is not before the Court, it could not rule on that point without a prior examination, such examination does not fall within the jurisdiction of the Court of Justice when deciding on the basis of Article 177 of the Treaty.

That idea is reiterated later in Case C-159/11 Azienda Sanitaria Locale di Lecce v Ordredegli Ingegneri della Provincia di Lecce, where the Advocate General takes the view in that it would require an identification and assessment of the facts, aspect within the jurisdiction of the Court of Justice in proceedings under Article 267 TFEU. That, however, falls within the competence of the national court because it is under an obligation to ascertain whether the exception provided for in Article 16 (f) of Directive 2004/18 is applicable in the light of all the circumstances of the case in the main proceedings.

If, in the first years, the number of references was low, also motivated by the small number of Member States of the Communities, on the one hand, and by the deep lack of knowledge of the proceedings by the referring courts, on the other hand, they had an exponential growth, and the duration of the procedure also increased from almost 7 months in the first years to an average of over a year and a half after the year 2000, which led to the conclusion that the procedure would become the victim of its own success (Morten Broberg, Fenger Niels, 2011). At the same time, it was noticed that if the Court was more lenient in the first few years regarding the wording of the references, as it became more crowded it became even more restrictive with regard to the formalism of the preliminary request, and it adopted a number of Recommendations to the national courts, concerning the making of preliminary references.

The conditions and the content of the reference for a preliminary ruling

Unlike other types of actions that may be brought before the CJEU, the reference for a preliminary ruling is not an action against a European or
national act but one or more questions put by the national judge of the Court of Justice, which seeks to apply correctly and uniformly the European law, thereby favoring active cooperation between national courts and the Court.

For the first time, the Court issued a set of recommendations in 2012, published in Official Journal C 338 of 6.11.2012, which, although not binding, was intended to supplement the Rules of Procedure of the Court (Title III, Article 93 114). In November 2016, following the extension of the procedure, the Court renewed the Recommendations, highlighting a series of requirements on the subject matter of the application, the appropriate time for a preliminary reference, the form and content of the application, the correspondence between the two courts, the costs of the proceedings but also the conditions of application of the accelerated or urgent procedure. The Recommendations are also accompanied by an Annex that comprises the essential elements to be included in a request for a preliminary ruling.

It is clear from the introduction that the reference is laid down in Article 19 (3) (b) of the Treaty on European Union and Article 267 of the Treaty on the functioning of the European Union, which is a fundamental mechanism of European Union law designed to guarantee the interpretation and uniform application of this right within the Union, conferring on the courts of the Member States an instrument enabling them to bring before the Court of Justice of the European Union a preliminary ruling on questions concerning the interpretation of Union law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

The author of the request can only be the national court, since it is only called upon to assume responsibility for the judgment to be given, taking into account the particularities of each case, from the need for a preliminary ruling request in order to be able to pronounce its own until the relevance of the questions which it submits to the Court. Where such a question is raised in a case pending before a court whose decisions are not subject to any domestic remedy, that court is required to bring an action before the Court, unless there is already established case-law in that matter or where the correct interpretation of the rule of law in question does not leave room for any reasonable doubt.

With reference to the subject-matter and range of the request for a preliminary ruling, the Court can only rule on whether the law of the European Union is applicable to the main proceedings, the application being related to the interpretation or validity of European Union law, and not to the interpretation of the rules of national law or facts raised in the main proceedings.
The essence of the procedure as deduced from art. 11 of the Recommendation consists in the Court's attempt to provide a useful answer to the main dispute, but it is for the referring court to deduce the concrete consequences of the Court's reply by removing, where appropriate, the application of the national rule considered to be incompatible with Union law. However, the national court is best placed to assess the stage of the proceedings in which the application must be addressed. The CJEU has recently redefined the notion of a national court (Case C-503/2015 in Şandru, 2017), stating that, in order to determine whether a national body to which law has been conferred functions of a different nature must be qualified as a "court" of Article 267 TFEU, it is necessary to verify the specific nature of the judicial, administrative or administrative functions which it exercises in the specific legislative context in which it is called upon to bring an action before the Court, in order to ascertain whether there is a pending litigation in the role of such a body and the latter is called upon to adjudicate in proceedings which are to be completed by a decision of a judicial nature.

With reference to the form, it can be in any form allowed by national law as regards procedural steps, the contents of any request for a preliminary ruling as set out in Article 94 of the Rules of Procedure and attached to the Recommendation, consisting essentially of:

- the text of the questions referred to the Court for preliminary ruling;
- a summary of the subject-matter of the dispute and of the relevant facts, as established by the referring court, or at least an exposition of the factual circumstances on which the questions referred are based;
- the content of the national provisions that may be applicable in the present case and, where appropriate, the relevant national case-law;
- explanation of the reasons for which the referring court has doubts as to the interpretation or validity of certain provisions of European Union law and the connection which the referring court establishes between those provisions and the national legislation applicable to the main proceedings.

The preliminary reference may, under certain circumstances, as attested by art. 30, be tried under the accelerated procedure or under the urgency procedure. The application of the procedure is decided by the Court on the basis of the submission by the referring court of a duly substantiated request and setting out the circumstances, in law or in fact, justifying the
application of that or those proceedings or, exceptionally, of its own motion, when the nature or the circumstances of the case seem to impose such a measure.

It appears from the Annex to the Recommendations that certain formalities concerning the request for a preliminary ruling must be carried out; the request will be dated, signed and sent by registered letter, together with the case file of the main cause, to the Registry of the Court of Justice.

As stated in the specialized doctrine, the CJEU's preliminary ruling is binding on the referring court, but only on the dispute in which the question was referred. If the CJEU has been informed by a court whose decision is subject to appeal, the CJEU's preliminary ruling is also binding on the court hearing the appeal in this case. It is emphasized that the preliminary ruling procedure is a reference from a judge to a judge and although it may be requested by one of the parties to the proceedings, it is for the national court to decide to refer it to the CJEU. The High Court recently underlines that the author of the request for referral in a case sought that the CJEU, by way of interpretation, should issue a ruling on an unregulated issue, replacing the legislature, which exceeds the premise laid down in Art. 267 paragraph 1 of TFUE, in reality being not about the interpretation of an act of European law. It is also stated in the Conclusion of 13 September 2016 that admitting, in the sense desired by the author of the request for referral, is equivalent to accepting unlawfully that CJEU may transgress from the position of interpreter of European law to the position of a national court called upon to apply the law to a given factual situation.

However, it would be interesting to determine what would be the sanction applicable to the breach of the obligation to apply for a preliminary ruling under Art. 267 TFEU by the national court. There is an opinion that this would constitute a breach of the obligations of the State under the Accession Treaty, which in principle may entail liability on the part of the Member State for breach of European Union law. But State liability can also be attributed by the procedural means offered by the European Court of Human Rights, so that, in a judgment delivered on 8 April 2014 in Dhahbi v. Italy, application no. 17120/09, the ECHR found that Italy had violated art. 6 para.1 (right to a fair trial) and art. 14 (discrimination against discrimination) combined with art. 8 (the right to respect for private and family life), since the courts have failed to give reasons for refusing to make a preliminary reference to the Court of Justice of the European Union in order to determine whether the Association Agreement between the European Union and Tunisia allowed a Tunisian worker to be deprived of a family support allowance from the Italian authorities and because the applicant was...
treated differently from workers in the Member States of the European Union without objective and reasonable justification (Călin, 2014).

**Conclusions**

The reference for a preliminary ruling is therefore one of the most useful and effective instrument for the harmonization of judicial practice at the level of the European Union, being an indicator of the degree of convergence between EU legislation and the law of the Member States. With a growing number of sensitive references in recent years (from a single cause in the year of accession, none in the following year and one in 2009), our courts, including the Constitutional Court, whose first reference for a preliminary ruling dates back to the end of 2016, have managed to place this procedure among the most popular means of identifying the dialogue between national judges and the CJEU with a view to the correct and uniform application of European Union law. Moreover, our constituent lawmaker had set up in 2011 in a case which is a reference for subsequent case-law that it is not for it to examine the conformity of a provision of national law with the text of the Treaty on the Functioning of the Union but, in the light of Article 148 of the Constitution, it may use a rule of European law in constitutional control as a rule interfering with the reference one.

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