CASE C-648/18 HIDROELECTRICA, CJEU – A PREDICTABLE DECISION

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Abstract

This study proposes a post factum analysis (or rather a final conclusion) of the solution ruled in Case C-648 Hidroelectrica, a case that came before the Court of Justice of the European Union[1], as a preliminary question referred to by the Bucharest Tribunal , as a national court[2]. The case was of real interest in the context in which the preliminary question concerned the interpretation given by a national authority to a rule of domestic law, and not to a rule of European law. Unfortunately, the solution ruled by the CJEU, predictable as of the time of establishing the oral phase in the case, was no surprise, representing a faithful copy of Hidroelectrica's request and adhered to without any reservation by the European Commission.

This study shall be a critical analysis (perhaps too critical in certain places) of the reasoning of the CJEU judgment versus the point of view expressed by the European Commission and the conclusions of the Advocate General of the Court, true defenders of the operator in this case.

Last but not least, an important part shall be devoted to the previous practice of the CJEU in terms of the inadmissibility of the preliminary questions and a sudden change thereof, which leaves deep question marks as to the status of the Court, independent otherwise (or at least so it should be). In the final part, before the conclusions, we shall also refer to the applicability of the principle of proportionality, so much invoked in the CJEU Judgment.

Keywords: *Treaty on the Functioning of the European Union, Preliminary Question, Court of Justice of the European Union, Case-law, European Commission, National Court, National Interest, Advocate General, Proportionality.*

1. WHY SHOULD CJEU HAD TO DISMISS THE PRELIMINARY QUESTION AS INADMISSIBLE, BUT DID NOT

In accordance with the provisions of art. 19 lit. b) of the Treaty on European Union (TEU) "*The Court of Justice of the European Union shall rule in accordance with the treaties: on a preliminary ruling, on the request of national courts, on the* ***interpretation of Union law*** *or the validity of deeds adopted by institutions*".

At the same time, according to the provisions of art. 267 (1) (a) of the Treaty on the Functioning of the European Union (TFEU)[3] " *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:* ***the interpretation of Treaties***". The provisions of par. (2) according to which " *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 judgement, request the Court to give a ruling thereon*" are of interest in this scientific approach. Thus, it **follows** from those provisions that the referral to the CJEU by a national court **exclusively concerns the interpretation of the Treaties and not the national law**, as has been the case here.

The Bucharest Tribunal, as a national court, precisely approved the question in the form of Hidroelectrica " ***is art. 35 of the TFEU compatible with an interpretation*** *of Article 23 paragraph (1) and Art. 28 letter c) of the Law on Electricity and Natural Gas no. 123/2012, according to which Romanian electricity producers are bound to trade the entire amount of electricity produced, exclusively by a competitive, centralized market in Romania, under the conditions in which there is the possibility of exporting energy, but not directly, but through trading companies*?." However, the question remains as to why the national court has granted the application for a preliminary ruling, in the context in which, on the one hand, the interpretation of national law is the exclusive attribute of that court, the CJEU having no powers in such regard, and on the other hand, there are several situation from the practice of the courts which felt bound to refer the matter to the CJEU, but the cases were solved by admitting the inadmissibility or even withdrawing the applications by their holders.[4]

It can be assessed that the request of Hidroelectrica and of the national court was not for the interpretation of art. 35 of the TFEU (incident in this case) but **whether the interpretation given by the Regulatory Authority** to a legal provision of domestic law, *i.e.* art. 23 par. (1) and art. 28 lit. c) of Law no. 123/2012 is **in accordance with the Treaty**. We would

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[1] CJEU.

[2] I extensively wrote on this subject matter in the article *Dilemmas of a Preliminary Question. Case C-648/18 Hidroelectrica*, published in Legal Studies and Researches (p. 747-757), Universul Juridic Publishing House – Volume of the International Conference of PhD Students in Law, 12th Edition, Timișoara 2020.

[3] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:12016E267

[4] For a documented study on this issue, https://www.juridice.ro/377100/exista-sanctiuni-pentru-incalcarea-obligatiei-instantei-nationale-de-efectuare-a-unei-trimiteri-preliminare-la-curtea-de-justitie.html.

say inadmissible and the Romanian Authority and Government also claimed inadmissible, but the surprise came from the CJEU which not only established the admissibility of the question, but also organized an oral debate with specific questions regarding the technical and regulatory part of the case.

And above all, even admitting the error of the court of first instance, the CJEU also ruled expressly on *the interpretation* of *ANRE* as not being compliant with the treaty.

2. WHY HAS THE *INADMISSIBILITY* BECOME *ADMISSIBLE* IN CASE C-648/2018 - the overwhelming practice of the CJEU denied for a private interest?

The practice of the CJEU has been constant in time in terms of the inadmissibility of requests for preliminary questions, which did not comply with the mandatory requirements of art. 267 TFEU.

Thus, in Case C-368/12, concerning a reference for a preliminary ruling from the Court of Appeal in Nantes, the CJEU rejected by the Ordinance from 18 April 2013 the application as ***manifestly inadmissible***[5].

Concurrently, by the Decision Miasto Łowicz and Prokurator Generalny (related Cases C-558/18 and C-563/18) ruled on 26 March 2020, the Grand Chamber of the Court declared ***inadmissible*** the applications of preliminary decision filed by the Regional Tribunal from Łódź (Poland) and the Regional Tribunal from Warsaw (Poland). By those two applications, the referring courts essentially asked the Court to rule on the issue of the compliance of the new Polish rules on the disciplinary regime of judges with the right of litigants to effective judicial protection, guaranteed in art. 19 par. (1) second indent TEU. Further to confirming its jurisdiction to interpret the art. 19 par. (1) second indent TEU, the Court ruled on the admissibility of the two applications and stated that, according to art. 267 TFEU, the requested preliminary decision has to be "necessary" so as to enable the referring court to "rule a decision". The Court found first that *the main disputes are not related to the EU law and in particular with art. 19 par. (1) second indent TEU to which the preliminary questions refer*. The Court also specified that an answer to such questions did not appear to be such as to enable the referring courts to provide an interpretation of EU law enabling them to resolve procedural issues of national law before they could rule thereon, if necessary, on the merits of the main disputes. As a consequence, the Court has held that it is not apparent from the referral decisions that there would a link between the provision of EU law at issue in the preliminary questions and the main disputes, which should make the requested interpretation necessary, so that the referring courts should be able to rule in the concerned decisions, by applying the conclusions deriving from such an interpretation. Therefore, *the Court considered that the referred questions were of a general nature, so that the applications for a preliminary decision have to be declared inadmissible*[6].

The practice of the CJEU regarding the declaration as inadmissible of the applications for preliminary questions that did not meet the requirements of art. 267 TFEU is overwhelming, but the space assigned to the study does not allow us and we want at this time only to point out the change in case-law of the Court and to show our curiosity about its preservation for future cases.

The question in the title of the chapter was obviously rhetorical and shall remain without a concrete answer, but it indirectly results from the motivation of the CJEU. The Court practically resumed the allegations of the operator in the application for a preliminary question to the national court (which, curiously, did not make any written observations in Case C-648), but its private interest was fully defended both by the Commission and the Advocate General[7].

3. CASE C-648/18. PRELIMINARY QUESTION - the subsequent development of hearing, the conclusions of the Advocate General and the "long-awaited" solution

We start the analysis in this chapter, somehow in the opposite direction, from the solution ruled by the CJEU, then returning to the almost copy-paste link between it and the allegations of the Commission, but also such of the Advocate General.

The decision of the CJEU from 19 September 2020 was that "*Articles 35 and 36 TFEU have to be interpreted so that national legislation which, as interpreted by the authority in charge with its enforcement, requires from national electricity producers to offer the entire amount of electricity available on platforms managed by the sole operator of the national electricity market designated for electricity transaction services is a measure having an equivalent effect to a quantitative restriction on exports, which is not likely to be justified on grounds of public security related to the security of energy supply, insofar as such legislation is not proportionate to the pursued objective*"[8].

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[5] Published in the Electronic Directory (General Directory - Section on "Information on unpublished decisions") https://curia.europa.eu/jcms/jcms/P_106320/ro/?rec=RG&jur=C&anchor=201304C2056.

[6] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200035ro.pdf.

[7] http://curia.europa.eu/juris/document/document.jsf;jsessionid=5FF7BE7970659AE1338E90BB9933C8A2?text=&docid=224896&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=16224220.

[8] http://curia.europa.eu/juris/document/document.jsf?text=&docid=231184&pageIndex=0&doclang=ro&mode=lst&dir=&occ= first&part=1&cid=15329167.

Three essential issues result from the operative part of the Decision:

- It refers (again) to the national legislation in the interpretation of the regulatory authority, so not to the conformity of the domestic legislation with art. 35 and 36 TFEU;
- Trading platforms are operated by the sole operator of the national market, but the situation has been previously notified and authorized by the European Commission[9];
- The measure is not likely to be justified on grounds of security of energy supply, if such a measure is not proportionate[10] to the pursued objective.

What we understand (and not really) is the fact that the European court declared the application of a preliminary question admissible, the Court referring in the operative part to the interpretation of the authority, not to the compliance of the articles of national legislation with such of TFEU, practically ignoring the provisions of art. 267 of the Treaty.

In a second issue, although the European Commission has been notified about the existence of a single operator managing the trading platforms, why does the CJEU put such in the same sentence as a measure having an effect equivalent to a quantitative restriction on exports?

And thirdly, the same Court claims that such a situation is not likely to be justified by security of energy supply, as such legislation *is not proportionate to the pursued scope*.

In the written observations but also in the oral conclusions, the European Commission mentioned that the provisions of art. 23 and art. 28 of Law no. 123/2012 represent an export restriction within the meaning of art. 35 TFEU, unless it proves that *there is a public interest* and the national legislation complies with *the principle of proportionality*, *i.e.* the means used are such as to ensure that the pursued objectives are accomplished and that they do not go beyond what is necessary to achieve such objectives[11]. Although it seems more than obvious that ensuring the electricity supply of the Romanian population is a public interest, general, which must be protected, the final consumer having no other leverage in this regard, the Court adhered to the Commission's conclusions. In the same sense were also the conclusions of the Advocate General in his conclusions[12], *that the scope (or one of the scopes) of the legislative measure is to condition the export of electricity upon the prior satisfaction of domestic consumption. Thus, the restriction imposed on domestic producers as regards access to the external market is clearly recognized, as they are prohibited, as indicated above, from direct export. Even if it is applied indiscriminately to all economic operators producing electricity, it affects the exit of products from the market of the exporting Member State more than the marketing of products on the national market of the concerned Member State, precisely because it gives priority to supply on the market and in this respect favours it to the detriment of foreign trade.* The approach of the Advocate General of the Court, who although he recognizes the public interest invoked by the Romanian state in his plea, nevertheless considers that foreign trade prevails, is interesting. We believe that for each individual state, the national interest must prevail, as any other interpretation will deprive of content the much-discussed principle of proportionality and all measures in which an EU state will take measures to protect the national interest shall be automatically interpreted as a violation of such principle.

Compared to the positions expressed in Case C-648, taken *ad litteram* by the Court in the Decision from 17 September 2020, we consider that it was given in violation of the very principles of the Treaty that should guide its activity.

4. THE MIRAGE OF THE PROPORTIONALITY PRINCIPLE - proportionate and not really

The idea behind this chapter is part of the operative part of the Decision - "*it is not likely to be justified on grounds of public security related to the security of energy supply, insofar as such legislation is not proportionate to the pursued objective".*

In a generic way, this principle so invoked by the CJEU (and not only) refers to the fact that any measure ordered by a state should be proportionate to the pursued scope. The principle of proportionality can be probably best illustrated by the phrase of the illustrious professor of administrative law Fritz Fleiner, who noticed that "*the police should not shoot at sparrows with cannons*" [13].

The principle of proportionality is defined in Article 5 par. (1) and (4) of the Treaty on European Union *"(1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality (...) 4. Under the principle of proportionality, the content and form of Union action, shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions*

[9] On 14 October 2015, the Ministry of Energy, Small and Medium Enterprises and Business Environment notified the European Commission that, according to Law no. 123/2012, there is only one operator of the electricity market at national level.

[10] We shall detail in the next chapter issues related to the principle of proportionality and its implications, with relevant issues from the case-law of the CJEU.

[11] See also Case C-158/04 Alfa Vita Vassilopoulos and Carrefour Marinopoulos [2006] ECR I 8135, paragraph 22.

[12] http://curia.europa.eu/juris/document/document.jsf?text=&docid=224896&pageIndex=0&doclang=RO&mode=lst&dir=&occ= first& part=1&cid=4594961.

[13] In a rough translation, "*The police should not fire cannons at scarecrows*." Quote by Păşcui Adrian-Gabriel in http://avocatpascui.ro/wp-content/uploads/2018/12/Principiul-proportionalitatii-1-1.pdf.

of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality." The criteria for its application are set out in the Protocol (no. 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaties. According to this rule, EU actions *must be limited to what is necessary to achieve the objectives comprised in the Treaties*. In other words, the content and form of the actions must be compatible with the pursued objective.

The practice of CJEU is constant in regard to the application and applicability of such principle. For example, in the case *Hermann Schräder HS Kraftfutter GmbH* versus *Hauptzollamt Gronau*[14] the plaintiff complained that the application of the cereal production tax also infringed the principle of proportionality. The Court dismissed the plaintiff's request, establishing the content of the concept of proportionality. Thus, in the opinion of the CJEU, the principle of proportionality is a general one indispensable to Community law, by virtue of which the measures adopted by the relevant authorities are to be appropriate and necessary to fulfil the legitimate objectives, as well as less costly in case of an option to choose more appropriate measures; *the taxes imposed further to adopting the concerned measures should not be disproportionate to the aims pursued* (par. 21 of the decision). Interesting Decision, similar to the present case, only that it differs in conclusions.

In another case, in which the national court[15] referred a preliminary question to the CJEU "*whether the principle of proportionality precludes the beneficiary from being denied the right to deduct VAT pro rata to the amount of the overall discount granted by the intra-Community supplier, in the event that the local supplier (member of the same group) has ceased its economic activity and can no longer reduce its tax base on delivery by issuing an invoice with its own VAT code, in view of reimbursement of the difference of additionally collected VAT*", the Court ruled that "*article 185 of the VAT Directive must be interpreted as meaning that a regularization of an initial VAT deduction is required in regard to a taxable person established in a Member State, even when the supplier of the said taxable person has ceased its activities in that Member State and due to such reason the concerned supplier can no longer request the reimbursement of a part of the VAT it paid* ". Why did I choose this case? In order to emphasize the discrepancy of rigor between the case which is the subject matter of this study and the one we referred to, both aiming at a reference to the principle of proportionality. If in Case C-684/18 the Court explained in detail the ruled solution in the concerned case, the Court itself merely stated that the measure has to be proportionate, without explaining what this means. And finally, who decides whether or not it is proportional in relation to the scope explained by the Romanian authorities, *i.e.* to ensure the supply of electricity to the population.

5. IN LIEU OF CONCLUSIONS. CJEU SOLUTION – WHAT'S NEXT?

The decision of the CJEU becomes binding and has to be precisely implemented, recognizing the principle of the prevalence and binding nature of its decisions. And no matter how much we debate them, they must be respected as such. What does this mean for the final consumer in Romania? That Hidroelectrica has no longer any obligation to supply the population with electricity, but can export the entire amount of energy. And if (no) such a situation ***is not a reason for security of electricity supply*** (?!) It was stated by the European Commission and the CJEU.

And in lieu of conclusions, we mention the statement of the representative of the concerned operator, after the ruling of the solution "*I consider that a very important step has been taken towards normality and a reality for which Hidroelectrica has been fighting for many years and that it wants final – the free energy market. Liberalization eliminates the gaps between the prices on the markets in Romania and such in other Member States, the main beneficiary of this correct price being, in the end, the customer"*[16].

Maybe from other EU member states, because as the representative of the European Commission declared in the oral debates - *Why should not all EU states benefit from the cheap energy produced in Romania?*.

And the final consumer in Romania? ... Who takes care of him?

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