THE OBJECT OF THE PRELIMINARY QUESTION

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Abstract
The study intends to explain what may be the object of a preliminary question sent by a national court or tribunal of a member state to the Court of Justice of the European Union (CJEU), analyzing the first paragraph of article 267 of the Treaty on the Functioning of the European Union, with references to the CJEU's relevant case law.

Keywords: *national court, member state, Court of Justice of the European Union, preliminary question, article 267 of the Treaty on the Functioning of the European Union.*

I. Introductory considerations

The preliminary ruling procedure is an instrument at the disposal of national courts or tribunals[1], which have the possibility and, sometimes, the obligation, to ask the Court of Justice of the European Union (CJEU) to give a ruling on the interpretation of the Treaties, on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union (EU).

Its purpose is to enable the national judicial body to receive the Luxembourg Court's opinion on a question on the interpretation or validity of European Union law, opinion necessary in order to give a ruling in the case it has been vested with. It is a means of cooperation between the national judge and the European Union Court, meant to help the national judge in his/her mission to apply and interpret European Union law.[2]

Article 267 of the Treaty on the Functioning of the European Union provides that:

"The Court of Justice of the European Union 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;

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.

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[1] An autonomous notion in European Union law. In the interpretation of the European Court of Justice (ECJ), the meaning of "national court or tribunal" is not restricted to the judicial system *stricto sensu*, but includes, also, bodies authorised to give rulings of a judicial nature. The characteristics of such a body were defined by the ECJ in case 246/80 *Broekmeulen, judgment of 6 October 1981 (http://curia.europa.eu/en/content/juris/c1_juris.htm).*

[2] See also **Petersen, John; Shackleton, Michael;** *The Institutions of the European Union*, Second Edition, (Oxford University Press, 2006) p.132.

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."[3]

The goal of this study is to explain what may be the object of a preliminary question sent by the national court of a member state, with references to the CJEU's relevant case law on the interpretation of the first paragraph of article 267 of the TFEU.

II. Questions on the interpretation of the Treaties

The interpretation of Treaties includes the interpretation of the founding treaties, of the treaties that have modified and amended the founding treaties and of the treaties of accession of the member states. As they have the same legal force as Treaties, the protocols and declarations annexed to Treaties, such as the Charter of Fundamental Rights of the European Union, can also be interpreted by the Court of Justice (CJ).

The Treaties cannot be the object of a question about their validity, as they are, first of all, international covenants, concluded under public international law, with a series of inherent characteristics deriving from their judicial nature[4]. Once ratified, they express the will of the party states.

The judicial institutions created on the basis of these international covenants, in order to ensure the functioning of the international organisation established by the parties, do not have jurisdiction to rule on the validity of the agreement of the states.

For the same reason, national courts cannot ask preliminary questions on the validity of the Treaties. The Court of Justice has never received such a question.

However, in the EU literature it has been pointed out that "one cannot exclude entirely the annulment by the Court, in exceptional circumstances, of a provision of the Treaty as being null and void, for example, because it is in obvious contradiction to a fundamental principle of EU law or it has been introduced by an amendment to the Treaty that has been adopted without following the procedure set forth by the Treaty."[5]

In our opinion, this possibility can only be received with certain reserve, since article 267 of TFEU establishes expressly the limits of the Court's jurisdiction.

III. Questions on the interpretation of acts of the institutions, bodies, offices or agencies of the Union

The interpretation of acts of the institutions, bodies, offices or agencies of the European Union covers binding acts, such as Regulations, Decisions, Directives, as well as Recommendations and Opinions, "if the use of such instruments is necessary to aid the interpretation of national law adopted to implement Community law"[6].

This conclusion is derived from the principle of interpretation according to which where the law does not distinguish, nor should the interpreter (*ubi lex non distinguit, nec nos distinguere debemus*) and has been confirmed by the Court of Justice of the European Communities[7] in case

[3] See, in Romanian, **Tudorel Ştefan, Beatrice Andreşan-Grigoriu,** *Tratatele Uniunii Europene. Versiune consolidată.*, (Hamangiu Publishing, Bucharest, 2010), p. 163.

[4] See also **Raluca Miga-Beşteliu,** *Drept internaţional public*, Second Edition, Volume I, (C.H. Beck Publishing, Bucharest, 2010), p. 89-112 and Volume II, (C.H. Beck Publishing, Bucharest, 2008), p. 57-106.

[5] **Morten Broberg, Niels Fenger,** *Procedura trimiterii preliminare la Curtea Europeană de Justiţie*, translated in Romanian by Constantin Mihai Banu, (Wolters Kluwer Publishing, Romania, 2010), p. 102 (our translation).

[6] **Margot Horspool, Matthew Humphreys, Siri Harris, Rosalind Malcolm,** *European Union Law*, Fourth Edition, (Oxford University Press, 2006), p.110.

[7] Today, the Court of Justice, after the coming into force of the Lisbon Treaty, on the 1 of December, 2009.

322/88 *Grimaldi*[8], which concerned a Recommendation issued by the Commission. The Court stated that it has jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception. It therefore has jurisdiction to rule on the interpretation of Recommendations adopted on the basis of the Treaty.

The Court observed that Recommendations are generally adopted by the institutions of the Community[9] when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules. Since they are measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects, they cannot create rights upon which individuals may rely before a national court. However, since Recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.

Most frequently, preliminary questions concern the interpretation of Regulations, Decisions and Directives. The main provisions on these types of acts are found in Article 288 of TFEU. This text sets forth their features. In a nutshell, the Regulation has general application; it is binding in its entirety and directly applicable in all member states (it does not require transposition in national law).

The Decision is binding in its entirety and, if it specifies those to whom it is addressed, it is binding only on them.

The Directive is binding, as to the result to be achieved, upon each member state to which it is addressed, but, leaves to the national authorities the choice of form and methods. The Directive is not directly applicable, as it requires transposition in national law[10]. The consequence is that the national judge shall apply the national provision and not the Directive, as such[11].

The Court of Justice stated that it is not necessary that the acts of the institutions should be directly applicable in order to be the object of a preliminary question. For example, in case 111/75 *Mazzalai* [12] the Court was asked to interpret a provision from a Directive. It stated that it has jurisdiction to give preliminary rulings concerning the interpretation of acts of the institutions, regardless of whether they are directly applicable.

In its jurisprudence, the Court of Justice has accepted jurisdiction for the interpretation of international treaties which the European Union has concluded, on the basis that they also constitute acts of the institutions. Consequently, their interpretation can be the object of a preliminary question.

In the *Kupferberg*[13] ruling, the preliminary question asked by the German court was on the interpretation of a free trade agreement concluded by the European Community (EC)[14] with Portugal, before Portugal aceeded to the European Coomunities. The Court held that the agreement was equally binding for the member states and for the EC institutions, empowered to conclude it and that they fulfil, in ensuring respect for commitments arising from an agreement, an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement form an integral part of the Community legal system.

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[8] *Judgment of 13 December 1989, Grimaldi (*http://curia.europa.eu/en/content/juris/c1_juris.htm*).*

[9] Today's European Union, after the coming into force of the Lisbon Treaty, on the 1 of December, 2009.

[10] See **Augustin Fuerea**, *Manualul Uniunii Europene*, Fifth Edition, (Universul juridic Publishing, Bucharest), 2011.

[11] See **Marcela Comşa,** *Caracteristicile dreptului comunitar european şi rolul judecătorului naţional*, Dreptul, number 10, 2007, p.104-105.

[12] *Judgment of 20 May 1976, Mazzalai / Ferrovia del Renon (*http://curia.europa.eu/en/content/juris/c1_juris.htm*).*

[13] *Judgment of 26 October 1982, Hauptzollamt Mainz / Kupferberg & Cie.,* 104/81 (http://curia.europa.eu/en/content/juris/c1_juris.htm).

[14] Today, the European Union.

In a series of cases, the Court stated that there can be the object of preliminary questions provisions of EU law that apply to strictly internal situations, due to the fact that national law extended their application to purely internal matters. For example, in case 166/84 *Thomasdünger*[15], the Court said that, with the exception of cases in which it is clear that the provision of Community law which it is asked to interpret does not apply to the facts of the dispute in the main proceedings, ECJ leaves it to the national court to determine whether a preliminary ruling is necessary in order to decide the dispute pending before it.

III. Questions on the validity of acts of the institutions, bodies, offices or agencies of the Union

The Court has jurisdiction to rule on the validity of the acts issued on the basis of and for the application of the Treaties (primary sources of EU law[16]), in the context of the annulment proceedings, instituted by article 263 TFEU (a direct action) or of the preliminary ruling proceedings, an indirect means for exercising legal control over the acts issued by the EU institutions.

The jurisdiction belongs solely to the Court of Justice and national courts do not have the power to declare acts of the EU institutions invalid. To this end, in case C-344/04 *IATA and ELFAA*[17], the Court said that it is necessary to ensure that Community law[18] is applied uniformly by national courts. Differences between courts of the member states as to the validity of Community acts would be liable to jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty.

The Court emphasized that the preliminary ruling procedure does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a preliminary question has been raised.

The Court held that courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. On the other hand, where such a court considers that one or more arguments for invalidity, put forward by the parties or, as the case may be, raised by it of its own motion, are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity.

The substance of the judgement gives rise to the idea that if the national court has reasonable doubts regarding the validity of the EU act applicable to its case, it is under the obligation to ask the preliminary question, regardless of the fact that it is or not a court against whose decisions there is a judicial remedy under national law.

However, in other cases, the Court in Luxemburg stated that, if the EU norm could have been the object of a direct annulment action, provided by article 263 of TFEU, introduced by the person who asked for the preliminary question to be sent, but it was not or the action was dismissed because the 2 month term expired, the national court shall reject the request to send a preliminary question, without having to analyze the righteousness of the reasons offered by the parties in claiming invalidity.[19]

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[15] *Judgment of 26 September 1985, Thomasdünger / Oberfinanzdirektion Frankfurt am Main (*http://curia.europa.eu/en/content/juris/c1_juris.htm).

[16] See **Augustin Fuerea**, *Drept comunitar european. Partea generală.,* (All Beck Publishing, Bucharest, 2003), p. 49-105.

[17] *Judgment of 10 January 2006, IATA and ELFAA (*http://curia.europa.eu/en/content/juris/c2_juris.htm).

[18] Today, EU law.

[19] See cases C-188/92 *TWD*, C-119/05 *Lucchini*.

IV. Questions outside CJEU's jurisdiction

The object of the preliminary question is limited by article 267, paragraph 1 of TFEU to the three situations above. Thus, a first exception is the questions regarding the validity of the Treaties, the primary sources of European Union law.

Also, national courts cannot ask questions about international agreements that have not been concluded on the basis of TEU or TFEU. In case 44/84 *Hurd/Jones*[20] the Court was asked a series of preliminary questions about article 3 of the Act concerning the conditions of accession and the adjustments to the Treaties, annexed to the Treaty concerning the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, with regard to the levying of domestic taxation on the salaries paid by the European school at Culham in the United Kingdom to the British members of its teaching staff.

The Court established it has jurisdiction to interpret article 3 of the Accession Act. However, the Court observed that the European schools were not set up on the basis of the Treaties establishing the European Communities or on the basis of measures adopted by the Community institutions, but on the basis of international agreements concluded by the member states, namely the Statute of the European school and the Protocol on the setting-up of European schools. Those agreements together with the instruments, measures and decisions of organs of the European schools adopted on that basis do not fall within any of the categories of measures that may be the object of a preliminary question.

However, the Court held that, in order to determine the scope of article 3 of the Act of Accession with regard to such instruments, it may be necessary to define their legal status and, consequently, to subject them to such scrutiny as is necessary for that purpose. In performing that task the Court does not acquire, on the basis of article 3 of the Act of Accession, full and complete jurisdiction to interpret the instruments in question.

Often national courts ask if provisions of internal law are contrary to European Union law, because the parties to the legal dispute are trying to determine the national court not to apply internal laws that are not favourable to their interests.

European Union law authors have emphasized that „such a question involves the application of Community law rather than its interpretation, but the Court will usually confine its ruling to the issue of interpretation, leaving it to the national court to draw the conclusion (which may then be readily apparent), whether in the light of that interpretation the national provisions should be applied.[21]

In case 13/61 *Bosch*[22] the jurisdiction of the Court was challenged on the ground that, among others, the question was not on the interpretation of the Treaty, but its application. The Court held that the Treaty does not prescribe, either expressly or by implication, a definite form in which the national court must put its request for a preliminary ruling. The national court is free to put its request in a simple and direct form, leaving it to the Court of Justice to rule on that request only within the limits of its jurisdiction that is insofar as it involves questions of interpretation of the Treaty. The Court concluded that the direct form of the question allows it to extract without difficulty the questions on interpretation.

In another case, 16/65 *Scwarze*[23], the national judge asked the Court to interpret a Community measure, whereas a ruling on the measure's validity was clearly required. The Court answered, stating that the real purpose of the question submitted by the national court is concerned rather with

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[20] *Judgment of 15 January 1986, Hurd / Jones (* http://curia.europa.eu/en/content/juris/c1_juris.htm)

[21] **Neville Brown, Tom Kennedy,** *The Court of Justice of the European Communities*, Fourth Edition, (Sweet&Maxwell Publishing, London, 1994), p. 205.

[22] *Judgment of 6 April 1962, De Geus en Uitdenbogerd / Bosch and others (*http://curia.europa.eu/en/content/juris/c1_juris.htm*)*

[23] *Judgment of 1 December 1965, Schwarze / Einfuhr- und Vorratsstelle für Getreide und Futtermittel (*http://curia.europa.eu/en/content/juris/c1_juris.htm*)*

the validity of Community measures than with their interpretation. The Court found it is appropriate to inform the national court at once of its view without compelling the national court to comply with purely formal requirements which would uselessly prolong the procedure of the preliminary ruling and would be contrary to its very nature.

Thus, even in the situation of an imperfect question, the Court shall try to offer the national court a useful answer, without exceeding its own jurisdiction. Still, as the number of cases registered by the Court increased, it has adopted a more strict position. „Now, therefore, not only are hypothetical questions refused, as we saw above, but also the national judge is expected to describe the factual and legal background of the national proceedings in sufficient detail to enable the Court to reply usefully to the questions submitted: this is particularly necessary in the field of competition law. If this is not done, the Court may refuse to answer the question submitted as manifestly inadmissible."[24]

The Court of Justice cannot rule that an internal law is contrary to an EU law, but it can offer the national court all the elements necessary to draw its own conclusions on that matter.[25]

Within the framework of the preliminary ruling procedure, the Court shall, in principle, only interpret EU law and not advise a national court on the application of EU law, not will it order a national court to declare its national law invalid.[26]

The Court does not only reject, as inadmissible, those questions ouside its jurisdiction *ratione materiae,* but also the questions ouside its jurisdiction *ratione temporis*. For example, in case C-302/04 *Ynos*[27], the Court was sent a question on the interpretation of a provision from a Directive, that had been transposed in national Hungarian law before Hungary's accession to the European Union. The Court noted that the facts of the main case had happened before Hungary became a member of the EU and concluded that it did not have jurisdiction to interpret the Directive.[28]

V. CONCLUSION

The preliminary ruling procedure is an instrument at the disposal of national courts, a means of cooperation between national courts and the CJEU, that enables the national court to ask the Court of Justice to give a ruling on the interpretation of the Treaties, on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the European Union.

The object of the preliminary question is limited to the three situations enumerated in paragraph 1 of article 267 of TFEU. The Court of Justice does not have jurisdiction to answer questions about the validity or the application of the Treaties or about international agreements that have not been concluded on the basis of EU law.

The Court of Justice cannot rule that an internal law is contrary to an EU law, nor will it order a national court to declare its national law invalid, but it can offer the national court all the elements necessary to draw its own conclusions on those matters.

Even in the situation of an imperfect question, the Court shall try to offer the national court a useful answer, without exceeding its own jurisdiction. Still, as the number of cases registered by the Court increased, it has adopted a more strict position[29]. It is settled case-law that a reference from a

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[24] **Neville Brown, Tom Kennedy,** *The Court of Justice of the European Communities*, Fourth Edition, (Sweet&Maxwell Publishing, London, 1994), p. 206.

[25] *Judgment of 12 December 1990, SARPP (*http://curia.europa.eu/en/content/juris/c2_juris.htm)

[26] **Margot Horspool, Matthew Humphreys. Siri Harris, Rosalind Malcolm,** *European Union Law*, Fourth Edition, (Oxford University Press, 2006), p.111.

[27] *Judgment of 10 January 2006, Ynos*, C-302/04 (http://curia.europa.eu/en/content/juris/c2_juris.htm).

[28] For other examples, see **Laurențiu Brînzoiu,** *Examen de jurisprudență a Curții de Justiție a Comunităților Europene în materia admisibilității trimiterilor preliminare*, Revista Română de Drept Comunitar, number 6, 2007, pages 83-85.

[29] See also **James Hanlon,** *European Community Law*, Second Edition, (Sweet&Maxwell Publishing, London, 2000), p.140.

national court may be refused if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of EU law.

If a matter of invalidity of EU legislation is raised, the national judge cannot declare the European Union act invalid. If a decision of the Court of Justice is necessary to enable the court to give judgement and if the point is not as clear as to simply declare the legislation to be valid, the domestic court is under the obligation to send the question to the CJ.

The Court shall reject, as inadmissible, all those questions ouside its jurisdiction *ratione materiae* or *ratione temporis*.

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