

THE EFFECTS OF PRELIMINARY RULINGS

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Abstract

The study analyses the effects of the preliminary rulings rendered by the Court of Justice for the judicial body that made the reference and for other bodies dealing with similar cases, for the member states, for the European Union's institutions and for EU legal order. Starting from the binding effect of the preliminary judgment for national judicial bodies, which requires them to follow the ruling or make a new reference, to the lack of precedent doctrine in EU law, continuing with the possibility to indirectly verify the compatibility of national law of the member states with EU law and ending with the administrative or legislative measures that can or must be taken by the member states, the study intends to highlight the limits, nuances and consequences of the binding effect. It mentions the contribution of the national courts and of the Court of Justice of the European Union to the development of EU law, such as clarifying autonomous notions and it emphasizes the preliminary procedure's attributes of being a form of judicial protection of individual rights, as well as a means to review the legality of acts of EU institutions. The paper is meant to be a useful instrument for practitioners. Therefore, it also deals with the possibility and limits of asking new questions, in order to obtain reconsideration or a refinement of the legal issue and with the problem of judicial control over the interpretation and application of the preliminary ruling by the lower court.

Keywords: *preliminary ruling/judgment; binding effect; precedent doctrine; interpretation; validity.*

Introductory notes

Article 267 of the Treaty on the Functioning of the European Union establishes the Court of Justice's jurisdiction to give preliminary rulings concerning the interpretation of the European Union's treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The European Court answers questions referred by national courts or tribunals of the member states, dealing with a European Union law issue that is applicable in a pending case.

The national judicial body that asks the question suspends the national proceedings and waits to receive the preliminary ruling.

Once the Court of Justice renders the preliminary ruling¹, the judgment or order is sent back to the national court which made the reference and it is published on the official web-site of the Court of Justice². The study covers the thematics of the legal effects of these rulings.

Depending on the object of the question or questions asked by the national courts, the effects of the preliminary rulings can be divided into two separate issues: the effects of rulings on the interpretation of treaties, of acts of the institutions, bodies, offices or agencies of the European Union (EU) and the effects of rulings on the validity of acts of the institutions, bodies, offices or agencies of the EU³.

The other important criteria is the subject that observes the ruling and the effects are different for the national judicial body that made the reference, for the other judicial bodies in the same member state or in the other member states, for the institutions of the European Union, for the member states and, of course, for the Court of Justice itself, with respect to that particular case or to subsequent cases.

It is important for national judicial bodies, member states and institutions of the EU to understand and apply correctly EU law, as they may otherwise be subjected to national or international sanctions. Therefore, it is also important for them to have a complete image of the legal effects of the preliminary rulings that interpret EU law or decide on its validity.

The study intends to analyse in a synthetic and structured manner the limits, nuances and consequences of the binding effect of these rulings, covering, at the same time, all the aspects that can be of interest for legal practitioners, administrative bodies or state authorities, in order for them to find it a useful instrument.

There are few national doctrinal works that deal with the effects of the preliminary rulings in detail. Foreign authors have been more preoccupied on covering this subject, but their books might not be as easily accessible to Romanian readers. The study tries to present and acknowledge the existing contributions by prominent national and foreign authors.

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¹ At present, only the Court of Justice has jurisdiction to decide on preliminary questions, even if article 256 paragraph 3 of the Treaty on the Functioning of the European Union renders jurisdiction to the General Court to hear and determine questions referred for a preliminary ruling, in specific areas laid down by the Statute. The Statute of the Court of Justice has not yet been modified in this respect.

² www.curia.europa.eu

³ The Court of Justice does not have jurisdiction to decide on the validity of the treaties that establish the European Union. They are international conventions and are subject to the will of the member states, acting within the limits of public international law.

2. Binding effect of preliminary rulings

2.1 Binding effect for national courts of the member states

A. The national court that made the preliminary reference and the parties to the main action

First, it must be noted that the words “courts or tribunals of a member state” have an autonomous meaning in EU law, describing any national judicial body from a member state, established by national law, permanent, that has the power to apply national law and to render a definitive decision, independently, after following an adversarial procedure⁴.

The Court of Justice⁵ shall establish if a judicial body fulfills these conditions and may give on order of inadmissibility if the body does not have legal standing to ask a preliminary question of if the body asks the question outside its judicial function.

If this body receives an order of inadmissibility for these reasons, it may not ask a new preliminary question. Also, the body may not ask new questions if the first one was declared inadmissible on the ground that the national dispute does not need the application of EU law.⁶

If the Court of Justice renders a preliminary ruling, the judgment is binding on the body that sent the question in the sense that it must observe the solution, as well as the reasons for which it was given⁷, as more important rules are presented in the part dedicated to the grounds of the judgment, not in the operative part, which contains the concise answer to the preliminary questions⁸. The preliminary judgment is binding in the main action that gave rise to the reference (*inter partes litigantes*), but cannot be ignored by other courts dealing with the same legal issue (*erga omnes*)⁹.

The practical consequence is that the national body cannot use a different interpretation of the EU act to give a solution in the national dispute and may not apply the act if it was declared void. This effect is *ex tunc*, for both types of judgments, meaning that the rule, as interpreted by the Court, must be applied by

the national courts even to legal relationships arising and established before the preliminary judgment¹⁰.

The national court does not have the power to limit the effects in time of the preliminary ruling. Only the Court of Justice may do so and only in the judgment whose effects are limited¹¹, for reasons like respecting the principle of legal certainty¹² or avoiding serious financial consequences¹³. If this is the case, the national court cannot establish a different application in time.

Sometimes, the European Court’s rulings “are so detailed that they leave national courts little room for discretion in how they decide the dispute in hand.”¹⁴, but there is also the possibility that the national judicial body gives a solution without using the preliminary ruling because, as one author observed¹⁵, depending on the procedural moment of the national dispute when the question was referred, the national court may directly give a solution to the case or it may continue to administer evidence or supplementary evidence or it may ascertain the parties will to desist or to settle the litigation amiably.

If the national judicial body gives a solution in the main proceedings based on the Court of Justice’s response, it is not recommended to just copy or quote parts of the preliminary judgment. The grounds and solution rendered by the Court should be integrated in the arguments of the decision given by the national judicial body¹⁶.

The judicial body of a member state may refer new preliminary questions, on different EU law issues or on the same issue, if the need of clarifying the effects or motivation of the first preliminary ruling arises¹⁷. The new questions may be about an act that was not declared void, as the Court can analyse new reasons for annulment.¹⁸

The Court of Justice has stated that an interpretation it has given binds the national court in question “but it is for the latter to decide whether it is sufficiently enlightened by the preliminary ruling

⁴ For more information, see Andreșan-Grigoriu, 2010, 72-140, Steiner and Woods, 2009, 226-229, Kaczorowska, 2009, 255-260.

⁵ The name Court of Justice is used both for the present Court of Justice, as part of the three courts that compose the Court of Justice of the European Union, as well as for the former Court of Justice of the European Communities, its predecessor.

⁶ For more examples of reasons not to send preliminary questions, see Șandru, Banu and Călin 2013, *Refuzul*.

⁷ Judgment of 16 March 1978 in case 135/77 Bosch/Hauptzollamt Hildesheim, paragraph 4, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 24 February 2015.

⁸ Andreșan-Grigoriu, 2010, 352.

⁹ See Toth, 1990, 422.

¹⁰ Judgment of 27 March 1980 in case 61/79 Amministrazione delle finanze dello Stato/Denkavit italiana, paragraph 16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

¹¹ Broberg and Fenger, 2010, 420.

¹² For example, judgment of 15 December 1995 in case C-415/93 Union royale belge des sociétés de football association and others/Bosman and others, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 5 March 2015.

¹³ For example, judgment of 9 March 2000 in case C-437/97 EKW and Wein & Co., http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 5 March 2015.

¹⁴ Chalmers, Davies and Monti, 2010, 169.

¹⁵ Andreșan-Grigoriu, 2010, 349.

¹⁶ Șandru, Banu and Călin, 2013, *Procedura*, 527.

¹⁷ For example, three preliminary questions were sent by British courts in the Factortame dispute: cases C-213/89, C-221/89 and joint cases C-46/93 and 48/93.

¹⁸ Broberg and Fenger, 2010, 413. Arnall et al., 2006, 528.

given or whether it is necessary to make a further reference to the Court.”¹⁹

It was emphasized that the preliminary ruling procedure is a non-contentious one. Thus, only the national court may decide whether it has obtained sufficient guidance from the preliminary ruling delivered in response to its question or to the question of a lower court or whether it appears necessary to refer the matter once more to the Court of Justice. Accordingly, the parties to the main action cannot rely on article 43 of the Protocol on the Statute of the Court of Justice of the European Union in order to request the Court to interpret judgments delivered in pursuance to article 267 of the Treaty on the Functioning of the European Union.²⁰

This early jurisprudence has been enshrined in the Rules of procedure²¹. Article 104 states that article 158 of the Rules of procedure, relating to the interpretation of judgments and orders, shall not apply to decisions given in reply to a request for a preliminary ruling.

This is not the case with errors in the preliminary judgments. Article 103 provides the right of an interested person, *i.e.* including a party to the main proceedings, to ask that clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders to be rectified by the Court of Justice. The request must be made within a period of two weeks from the delivery of the judgment or service of the order.

One author²² expressed the contrary view that, since there are no parties to the non-contentious preliminary ruling procedure, only the Court of Justice can rectify errors. The same author noted that not even the national court that sent the question can ask for rectification.

This argument may be a valid one in relation to the means provided by article 155 of the Rules of procedure, regarding the failure of the Court to adjudicate on a specific claim or on costs and the right of a party to ask the Court, within a month after service of the decision, to supplement it. The point of view that only the Court of Justice can supplement its judgment *ex officio* is supported by a literal and systematic interpretation of the texts: in article 103 the term used is not „party”, but „interested person”. Also, article 103 is included in the part of the rules of procedure dedicated to the preliminary ruling procedure (Title

III), whereas article 155 is in Title IV „Direct actions”, Chapter 9 „Requests and applications relating to judgments and orders”.

The judgment of the Court cannot be the object of a question on its validity or interpretation under article 267 of the Treaty on the Functioning of the European Union. The Court stated that a preliminary ruling does not rank among the acts of the EU institutions whose validity is open to review by the means of a new preliminary question.²³

Another issue that may arise is if the preliminary judgment has a binding effect for the national court which sent the question with respect to the part of the ruling that exceeds the question or questions asked (*ultra vires* answers). In our opinion, the entire judgment must have a binding effect, as the Court of Justice tries to offer a useful answer and this might entail extracting the real question from the imperfect questions that have been referred, with the result of an apparent *ultra vires* judgment. A contrary interpretation would open up a Pandora’s Box of uncertainty as to what part of the judgment is binding, at the discretion of the national court that made the reference, whereas all other courts have to observe the judgment in its entirety.

French and British courts have expressed a different opinion, based on the argument that the Court of Justice does not have standing to decide on the facts or to apply law in the main proceedings, but they seem to have reconsidered this position in recent cases²⁴.

Although examples of nonconformity are rare²⁵, it must be stressed that EU law does not provide sanctions for the national judicial bodies that don’t apply correctly the preliminary rulings. It is for the national law of each member state to establish efficient legal means to prevent and amend such a situation. Otherwise, the state might be the subject of an infringement procedure²⁶ or of an action in engaging state responsibility²⁷.

Thus, the final decisions of national judicial bodies might be challenged in national courts by the parties to the main action. In what regards judgments rendered by national courts in the strict sense of the word, in Romanian civil procedural law the parties to the national dispute that want to complain of the incorrect interpretation and application of a the preliminary ruling by the national court may use the regular appeal procedure (article 466 and the following

¹⁹ Judgment of 24 June 1969 in case 29/69 Milch-, Fett- und Eierkontor/Hauptzollamt Saarbrücken, paragraph 3, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 24 February 2015.

²⁰ Order of 18 October 1979 in case 40/70 Sirena/ Eda, paragraph 3 and paragraph 4, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

²¹ http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf, last accessed on 5 March 2015.

²² Broberg and Fenger, 2010, 431.

²³ Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraph 16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

²⁴ Broberg and Fenger, 2010, 408-409.

²⁵ Broberg and Fenger, 2010, 407. Vaughan and Robertson, 2012, 2.430. Chalmers, Davies and Monti, 2010, 169.

²⁶ Articles 258-260 of the Treaty on the Functioning of the European Union.

²⁷ Judgment of 30 September 2003 in case C-224/01 Köbler, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 5 March, 2015. See Schütze, 2012, 300. See Şandru, Banu and Călin 2014, *Există sancţiuni*, 708-713. For Romanian case law in this respect, see Şandru, Banu and Călin 2013, *Refuzul*, LXIV-LXX.

of the Civil Procedural Code) or the appeal in cassation (article 488 paragraph 1 point 8 of the Civil Procedural Code²⁸).

If the decision of the court is final, Romanian law does not provide a specific procedural means for the parties to criticize this aspect. The motion for annulment (articles 503-508 of the Civil Procedural Code) and the motion for revision (articles 509-513 of the Civil Procedural Code) provide specific grounds for changing a definitive judgment and the incorrect use of a preliminary ruling is not one of them, as it could, in some cases, entail the censoring of higher courts by lower courts in applying material law.

However, Romanian administrative law stipulates, in article 21 paragraph 2 of Law no. 554/2004, as a supplementary reason for revision of judgments in this field, the situation when a definitive judgment is given by disrespecting the principle of priority (supremacy) of EU law, stated by article 148 paragraph 2 corroborated with article 20 of Romania's Constitution²⁹.

This paragraph was declared contrary to the Romanian Constitution by the Romanian Constitutional Court³⁰ and then repelled by Law no. 299/2011, which was itself declared contrary to the Romanian Constitution, with the effect that the paragraph in question is still in force and is applicable in the manner described by the Constitutional Court.³¹

This last decision states that Law no. 299/2011 is a forbidden limitation of the procedural means that ensure the uniform application of EU law, as interpreted by the Court of Justice of the European Union (CJEU). In stating the grounds, the Romanian Constitutional Court emphasizes the binding effect of preliminary rulings for member states and makes references to Romanian case law subsequent to cases C-402/09 Tatu and C-263/10 Nisipeanu, concluding that the lack of such a revision motive would be equivalent to denying the binding force of CJEU's judgments for national courts of the member states and that depriving the litigant of these effects would mean to disconsider the principle of priority (supremacy) of EU law.³²

B. Other national courts

The other national courts from the same member state as the court that sent the question or from the other member states must observe the preliminary ruling. Its binding effect (*erga omnes*) means that the EU act must be applied according to the interpretation given to it by the Court of Justice and that the EU act declared void cannot be applied in other pending or subsequent cases. This effect is justified by the role of the preliminary ruling procedure in ensuring a uniform interpretation and application of EU law in all member states.

The ruling can be applied without having to send a new question³³, even by a court that pronounces a final solution in a case, with no possibility of appeal.³⁴

"The ruling is also binding on appellate courts or courts of review dealing with the same case, although they may also put further questions to the Court of Justice to clarify the initial ruling."³⁵

At the same time, other national courts cannot ignore a preliminary ruling on the ground that they consider it to be wrong or inequitable. In British law "it is provided by section 3(1) of the European Communities Act 1972 that any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning, or effect of any Union instrument, must, if not referred to the European Court for a ruling, be decided in accordance with the principles laid down by any relevant decision of the European Court."³⁶

Indeed, as was shown above, the possibility to ask new questions cannot be used as an instrument to contest the validity of a preliminary ruling, as this would call in question the allocation of jurisdiction between national courts and the Court of Justice under article 267 on the Treaty on the Functioning of EU³⁷.

The Court of Justice stated that if a judgment declaring an act of an institution to be void is directly addressed only to the national court which referred the preliminary question, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment it has to give³⁸. Otherwise, "chaos would result."³⁹

The other national courts may not ask new questions on the same points of law, in similar cases, even if they are courts of final resort, unless they have serious grounds to believe the Court of Justice might

²⁸ Article 488 paragraph 1 point 8 of the Civil Procedural Code states: "The cassation of judgments can be asked only for the following reasons of illicitness: [...] 8. When the judgment was given by infringing or incorrectly applying material law." (our translation)

²⁹ The paragraph was introduced by article 30 of Law no. 262/2007, in force from 2 August 2007.

³⁰ Decision of the Romanian Constitutional Court no. 1609/2010, available on www.ccr.ro.

³¹ For further details, see Șandru, Banu and Călin, 2013, *Procedura*, 559-584.

³² Decision of the Romanian Constitutional Court no. 1039/2012, <http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx>, last accessed on 24 February 2015.

³³ Judgment of 13 May 1981 in case 66/80 International Chemical Corporation/Amministrazione delle finanze dello Stato, paragraph 13, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

³⁴ Pertek, 2001, 161, 163 and 165.

³⁵ Vaughan and Robertson, 2012, 2.429.

³⁶ Hartley, 2010, 319.

³⁷ Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraph 15, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

³⁸ Judgment of 13 May 1981 in case 66/80 International Chemical Corporation/Amministrazione delle finanze dello Stato, paragraph 18, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 24 February 2015.

³⁹ Vaughan and Robertson, 2012, 2.430.

reconsider its case law. They may also ask about the effects of the ruling. For example, about the grounds, the scope and the consequences of the nullity, in the case of a judgment declaring an EU act void⁴⁰.

If it finds no reason to reconsider its case law, the Court of Justice shall dismiss, as inadmissible, the questions whose answer can be found in its previous jurisprudence.

2.2. Effect for the European Union's institutions

The preliminary judgments are a means to review of the legality of the acts of EU's institutions, bodies, offices or agencies of the Union, supplementary to the direct action for annulment⁴¹.

The effect of a judgment declaring an act void is *ex tunc* and *erga omnes*, i.e. the act is to be considered inexistent since the moment it came into force and can no longer be applied by anyone. The institutions must, therefore, retract or repeal the act and, if the act is only partially void, to modify and/or amend it.

The institutions must observe the judgments rendering a certain interpretation of their acts, as they must apply the act in accordance to that interpretation. The effect of a judgment on interpretation is also *ex tunc* and *erga omnes*⁴².

This is the reason for which EU institutions are allowed to intervene and express their point of view in the written and/or oral procedure before the Court of Justice in preliminary actions⁴³. Article 96 paragraph 1 letters c) and d) of the Rules of procedure of the Court of Justice stipulate that the European Commission and the institution which adopted the act the validity or interpretation of which is in dispute shall be authorised to submit observations.

The Court of Justice has reserved to the EU "institution concerned the exclusive right to draw conclusions from the invalidity of its act and take the necessary measures to remedy the situation."⁴⁴ In spite of that, it can offer alternatives for the institution for the period of time needed to take the appropriate

measures in order to comply with the Court's judgment.⁴⁵

2.3. Effect for the Court of Justice of the European Union

A. Case law

There are no *stare decisis* or precedent doctrines⁴⁶. However, the European Court of Justice "tends to follow previous decisions to maintain consistency and will cite previous judgments or parts of a judgment as a basis for a current decision."⁴⁷

The Court can reconsider its case law in similar cases, on the same point of law, if there are serious grounds to do so.

The preliminary judgment and order are not subject to appeal in EU procedural law. The Court expressly stated that its judgments cannot be the object of an exceptional review procedure either.⁴⁸ The Court of Justice decides as a first and last instance court⁴⁹. From this perspective, the preliminary judgment can be considered final⁵⁰.

B. EU law

The Court of Justice's judgments are not sources of EU law. But, by rendering preliminary rulings, the Court of Justice has defined autonomous notions in EU law, contributing to EU law development. For example: the definition of measures having equivalent effect to quantitative restrictions on imports or exports⁵¹; the direct effect doctrine⁵²; the invention of state liability for breaches of EU law⁵³; its case law on the free movement of persons inspired the adoption of Directive 2004/38/EC etc..

The doctrine⁵⁴ noted that the preliminary reference procedure contributes to the development of EU legal and judicial orders in four ways: the development of EU law by new interpretations of the norms, resolving uncertainties, correcting injustices and enunciating principles; maintaining the institutional balance through judicial review by private parties; ensuring the uniformity and consistency of EU law in all member states, as all Union courts are part of a single judicial order and legal territory; the

⁴⁰ Judgment of 13 May 1981 in case 66/80 International Chemical Corporation / Amministrazione delle finanze dello Stato, paragraph 18, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 24 February 2015.

⁴¹ Articles 263-264 of the Treaty on the Functioning of the European Union.

⁴² Judgment of 27 March 1980 in case 61/79 Amministrazione delle finanze dello Stato/Denkavit italiana, paragraph 16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

⁴³ See article 40 of the Protocol on the Statute of the Court of Justice of the European Union.

⁴⁴ Kaczorowska, 2009, 284. See also Judgment of 19 October 1977 in joint cases 124/76 and 20/77 Moulins Pont-à-Mousson/ONIC, paragraph 28, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

⁴⁵ Judgment of 29 June 1988 in case 300/86 Van Landschoot/Mera, paragraph 24, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March, 2015.

⁴⁶ Schütze, 2012, 298. Chalmers, Davies and Monti, 2010, 169.

⁴⁷ Foster, 2009, 197.

⁴⁸ Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraph 14, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

⁴⁹ Fuerea 2002, 132.

⁵⁰ Petrescu, 2011, 152.

⁵¹ Judgment of 20 February 1979 in case 120/78 Rewe/Bundesmonopolverwaltung für Branntwein, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

⁵² Judgment of 5 February 1963 in case 26/62 Van Gend en Loos/Administratie der Belastingen, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

⁵³ Horspool and Humphreys, 2008, 111.

⁵⁴ Chalmers, Davies and Monti, 2010, 157-158.

administration of justice in national disputes by tapping into the expertise of the Court of Justice.

Two authors⁵⁵ expressed the view that the Court of Justice's emphasis on maximum uniformity through the preliminary ruling procedure has the potential to jeopardize legal integration because the European Court's insistence on accepting references and its unwillingness to trust national courts undermines the role of national courts as a network of EU courts. Also, its attachment to uniformity runs strongly against any claim that may be made by the EU to be evolving into a more mature legal order.

Two main arguments run against such a conclusion. First, the increasing number of preliminary references is due to the need of national courts to engage in dialog with the European Court. Thus, the increasing number of preliminary rulings can be interpreted not as an expression of distrust between the Court of Justice and national courts, but as an expression of success⁵⁶, of the good cooperation throughout time. National courts perceive this dialog as a fruitful one.

At the same time, one must not forget the objective reality that the number of member states has increased considerably, reaching 28, that the number of EU acts has increased and the complexity of the legal issues is higher than it was ten or twenty years ago. All of these factors have a great influence on the need for dialog through preliminary references.

Besides, as another author observed: "The increase in cases and increasing case backlog is argued to have led to a change in attitude on the part of the ECJ and it is now less willing to accept all references without question."⁵⁷

Secondly, it is arguable if a more mature legal order implies an even greater independence in rendering judgements on EU law issues at a national level, greater than the possibility of dialog left at the discretion of the national courts, without endangering the uniform application of EU law in all member states.

In this respect, it can be noted that the preliminary ruling procedure inspired the introduction in the Romanian civil procedural law of the means provided by articles 519-521 of the Civil Procedural Code that allows a chamber of the High Court of Cassation and Justice, of the court of appeal or of the

tribunal to ask the High Court of Cassation and Justice to give a preliminary judgment on a point of national law that is necessary for solving the pending dispute, if the point of law has not been the object of a ruling of the High Court. The court that refers the question must suspend the proceedings until it receives an answer from the High Court. The answer is binding for the court, from the moment it is given, as well as for the other national courts, from the moment it is published in the Official Journal of Romania.

Like the preliminary ruling procedure, this internal procedure is free of costs and it allows the parties to send written observations, but, unlike the preliminary ruling procedure, it entitles other national courts dealing with similar cases to suspend the proceedings until the preliminary decision is given.

2.4 Effect for the member states and their nationals

The authorities of a member state are under the obligation to take all necessary measures to ensure that EU law is observed and implemented correctly on their territory. Thus, in order to comply with preliminary rulings, the states may find themselves obliged to take administrative measures (for example: repayment of a pollution tax, with interest⁵⁸) or legislative measures (changing the law that provides the pollution tax⁵⁹) and even offer compensation for damages⁶⁰.

The preliminary ruling procedure allows for an indirect verification of the compatibility of national law with EU law⁶¹. Though the Court of Justice has stated in numerous occasions that it does not have jurisdiction to apply law in the main action⁶², the compatibility can often be deduced without any reasonable doubt from the grounds of the ruling⁶³.

When a national court or administrative authority has given a decision which conflicts with a subsequent Court judgment, one effect can be the need to reopen or review the case, even if the decision is final.⁶⁴ One author observed that: "Legal certainty will prevent it being reopened unless four criteria are met: there is an administrative body that has the power to reopen the decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is based on a misinterpretation of EU law and the court failed to refer; the person concerned complained to the

⁵⁵ Craig and de Búrca, 2011, 391-393. For a contrary opinion, in favour of dialog, see Kombos, 2010, 145.

⁵⁶ Smit, Herzog, Campbell and Zagel, 2011, 45-46. Arnulf, 2006, 100.

⁵⁷ Foster, 2009, 198.

⁵⁸ Judgment of 18 April 2013 in case C-565/11 Irimie, an answer to a preliminary question sent by a Romanian court, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 5 March 2015.

⁵⁹ Judgment of 7 April 2011 in case C-402/09 Tatu led to the repelling of Government Ordinance no. 50/2008 by Law no. 9/2012, that established a new way to calculate the pollution tax on motor vehicles, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 5 March 2015.

⁶⁰ Arnulf et al., 2006, 527.

⁶¹ See Vaughan and Robertson, 2012, 2.412.

⁶² For example, judgment of 21 January 1993 in case 188/91 Deutsche Shell/Hauptzollamt Hamburg-Harburg, paragraph 27, judgment of 3 March 1994 in joint cases C-332/92, C-333/92 and C-335/92 Eurico Italia and others/Ente Nazionale Risi, paragraph 19, judgment of 17 June 1999 in case C-295/97 Piaggio, paragraph 29, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accessed on 5 March 2015.

⁶³ See Dollat, 2010, 390.

⁶⁴ Judgment of 13 January 2004 in case C-453/00 Kühne&Heitz, paragraphs 23-27.

administrative body immediately after becoming aware of that decision of the Court⁶⁵. The author also noted that these conditions are cumulative and restrictive and that there is no general obligation to reopen cases simply because they conflict with subsequent preliminary rulings.

As shown above, if member states do not take efficient measures, the European Commission may start the infringement procedure or private persons may file a motion in order to engage the state's responsibility for the way national courts and other internal authorities apply EU law.

For the nationals of the member states, the preliminary ruling procedure is an indirect way of access to the Court of Justice, as the parties to the main action may ask judicial bodies to refer preliminary questions. The Court's jurisprudence gave powerful rights to individuals to use article 267 of the Treaty on the Functioning of EU, which has encouraged more litigation and more references to be made⁶⁶. Thus, private persons can highlight different possible interpretations of an EU act and put forward motives for declaring an EU act invalid⁶⁷. This ensures a form of protection of individual rights, keeping in mind that individual access by means of the direct action for annulment⁶⁸ is highly limited⁶⁹.

It has been pointed out that the Court's narrow interpretation of the availability of direct actions for private parties has caused them to raise such issues in front of national courts, asking for the referral of preliminary questions. In this respect, an important role is played by interest or pressure groups such as trading associations or unions that can present well-documented motions and make concerted attacks, often by group action⁷⁰. For example, in Romania, in the last few years, there have been group actions, consumer actions and actions brought by the national institution with power to enforce consumer protection legislation, all in the field of unfair provisions in credit agreements, which have resulted in a few preliminary questions referred to the Court of Justice regarding the

interpretation of some provisions of Council Directive 93/13/CEE of 5 April 1993 on unfair terms in consumer contracts⁷¹.

However, the Court indicated that the preliminary ruling procedure cannot be used to examine the validity of an EU act when the interested party could have, without any doubt, challenged it by virtue of a direct action in annulment.⁷²

3. Conclusions

"It is hard to exaggerate the importance of the preliminary rulings procedure."⁷³ Its utility is probably best understood when dealing with the final product of the procedure: the Court of Justice's judgment on the interpretation or on the validity of an EU act.

The study approached the main issues of the effects of the preliminary rulings by analysing them with respect to the subject that observes the ruling, as well as the type of ruling: judgment or order, concerning either the interpretation or the validity of an EU act.

The result is a synthetic, but structured and comprehensive presentation of the theme, meant to be a useful instrument for practitioners, researchers and other persons interested in a concise material about specific issues on the preliminary ruling procedure, a vast topic, which may entail further research on subjects such as the effects of the preliminary ruling for non-member states⁷⁴, in relation to article 96 paragraph 1 letters e) and f) of the Rules of procedure of the Court of Justice or on comparative law regarding the obligation of national courts to suspend proceedings while the Court of Justice gives an order or a judgment on the preliminary question, correlating national procedural provisions with article 23 of the Protocol on the Statute of the Court of Justice of the European Union.

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⁶⁵ Chalmers, Davies and Monti, 2010, 171. See also Kaczorowska, 2009, 278-280, Leclerc, 2011, 190.

⁶⁶ Steiner and Woods, 2009, 223.

⁶⁷ As the Court stated, private persons asking national courts to send preliminary questions on validity of EU acts are not restricted by the time-limit or by the grounds set in article 263 of the Treaty on the Functioning of the European Union. See in this respect judgment of 12 December 1972 in cases 21 to 24/72 International Fruit Company and others/Produktschap voor Groenten en Fruit, paragraph 5 and judgment of 27 September 1983 in case 216/82 Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder, paragraphs 5-12,

http://curia.europa.eu/en/content/juris/c1_juris.htm, last accessed on 5 March 2015.

⁶⁸ Articles 263-264 of the Treaty on the Functioning of the European Union.

⁶⁹ Mathijsen, 2010, 144.

⁷⁰ Craig and de Búrca, 2011, 383-385.

⁷¹ For example, case C-143/13 Matei, pending case C-110/14 Costea and removed cases C-47/11 S.C. Volksbank România S.A., C-571/11 S.C. Volksbank România S.A., C-108/12 S.C. Volksbank România S.A., C-123/12 S.C. Volksbank România S.A., C-236/12 S.C. Volksbank România S.A..

⁷² Mathijsen, 2010, 147. See also Kaczorowska, 2009, 282-283 and judgment of 12 October 1978 in case 156/77 Commission/Belgium, paragraph 25.

⁷³ Arnall, 2006, 97.

⁷⁴ See de Búrca and Weiler, 2012, 105-149.

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