Inadmissibility of the Referral Request for Preliminary Questions to the Court of Justice of the European Union. National Case-Law vs. CJEU Case-Law[1]

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Abstract

The purpose of this study is to highlight the importance of the CJEU's referral with preliminary questions, but also to sound an alarm about the laxity with which some national courts allow such requests. We also wish to point out that more and more national courts tend to send requests for preliminary questions to the CJEU which actually appear to be asking for guidance from the Court on the national dispute and not for clarification or interpretation of the Treaties or European law. In order to achieve the objectives of this approach, using the comparative and logical method, we shall analyse the specific legislation, the relevant case law of the Court of Justice of the European Union as well as the practice of national courts. The starting point for the analysis shall be the provisions of Article 267 of the Treaty on the Functioning of the European Union, through which we shall analyse the conditions for the admissibility of a reference for a preliminary ruling. We shall also highlight the importance of the role of the national court in analysing the usefulness of the referral to the CJEU, in relation to the subject matter of the dispute, as there is no obligation per se to refer. We have proposed this scientific approach as an observation of the superficiality with which national courts are increasingly granting requests for referral to the CJEU, without a rigorous analysis of both the express conditions of Article 267 TFEU and the usefulness of a possible response from the Court in the specific case.

***Keywords**: Treaty on the Functioning of the European Union, preliminary question, admissibility, Court of Justice of the European Union, case law, national court.*

JEL Classification: K23

1. Introduction

A preliminary ruling is an action under Union law[4] by which a national court of the Member States of the European Union may or is bound to request the CJEU to assist it by giving a decision on the interpretation of the founding Treaties, on the validity and interpretation of the regulatory deeds adopted by the institutions, bodies, offices or agencies of the European Union and EURATOM, if in a dispute pending before it has doubts as to the interpretation of the Treaties or the interpretation and validity of secondary Union law and the clarification of this issue by the CJEU contributes to the resolution of the dispute on the merits[5].

After years ago, following Romania's accession to the European Union, the instrument of preliminary questions was rather timidly understood and recognised by the national courts, in recent years we can notice an excessive use of it. Thus, the number of requests for referral to the CJEU has vertiginously increased, and often the referral to the European court is totally inadmissible or useless or unnecessary to resolve the case in question.

This is the main reason for the present approach, in which we have proposed ourselves that, after a theoretical and legislative presentation of the conditions for admissibility of the referral to the CJEU, we should analyse the recent practice of both the Court and the national courts with regard to the admissibility of manifestly inadmissible applications, both in terms of the essential conditions of Article 267 TFEU and the lack of causal link between the questions and the subject matter of the action before the Court, *i.e.* the lack of necessity of the questions.

Hence the natural question arises as to whether it is a matter of ignorance on the part of the national courts (unlikely) or of a lack of assumption of responsibility? Most of the time, this is

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[4] Regarding the actions that can be brought to the Court of Justice of the European Union see Cătălin-Silviu Săraru, *Tratat de contencios administrativ*, Universul Juridic Printing House, Bucharest, 2022, p. 50-56.
[5] Gyula Fabian, *Institutional Law of the European Union*, Hamangiu Printing House, Bucharest, 2012, p. 404.

probably the answer, as the courts choose the easier but much longer way to resolve the case, given that they can directly apply European law rules under Article 148 of the Romanian Constitution.

2. Referral to the CJEU of questions referred by the national court for a preliminary ruling. Rules and conditions of admissibility. Theoretical issues

From the outset, it should be noted that, as the CJEU held in Case C-102/10[6] „*it must be emphasised that Union law does not apply automatically and without any limitation to any relationship existing between litigants in the Member States. Thus, by virtue of the principle of conferral, enshrined in Article 5(2) TEU, the Union acts only within the limits of the powers rendered to it by the Member States under the treaties for the purpose of attaining the objectives set out in those treaties. Any competence not rendered to the Union under the treaties belongs to the Member States. Union law can therefore have an influence on the resolution of a dispute before a national court only to the extent that a national rule falls within the scope of Union law".* The CJEU shall therefore rule only to the extent that such jurisdiction is not rendered to a Member State. On basis of this recital, which is also expressly enshrined in Article 4(4) of the EC Treaty, the Court of Justice may only rule that the jurisdiction of the Court of Justice is not rendered to a Member State. Based on this recital, which is also expressly enshrined in Article 4(1) of TFUE[7] we shall analyse the provisions expressly governing the conditions of admissibility of references for a preliminary ruling from the CJEU.

According to the provisions of Article 267(1)(a) and (b) of the Treaty on the Functioning of the European Union (TFUE)[8] „*the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings on: (a) the interpretation of the treaties; (b) the validity and interpretation of treaties adopted by the institutions, bodies, offices or agencies of the Union*". The provisions of paragraph (2) are also of interest in this scientific approach, according to which "*Where such a question is raised before a 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 of Justice to give a ruling thereon*".

Several important issues emerge from these texts:

- the referral to the CJEU by a national court concerns only the interpretation of the treaties and not national law;
- the CJEU has jurisdiction to answer preliminary questions concerning the interpretation or validity of European law;
- referral by the national court is a possibility and not an obligation, and only if the national court considers that a decision on the matter is necessary to resolve the case.

It can be said that the preliminary ruling procedure before the CJEU is a form of cooperation, consisting of the national courts asking preliminary questions with a view to interpreting the Treaties and the rules deriving from them.

It should be pointed out that the preliminary ruling procedure provided for in Article 267 TFEU enables the courts of the Member States to refer questions to the Court of Justice in the course of a dispute pending before them, the questions concerning the interpretation or validity of European Union law being referred before judgment is given in the pending dispute, the national court alone being competent to decide whether the questions are relevant to the resolution of the dispute and on their content. In other words, "*the preliminary ruling procedure ensures the uniform interpretation of Union law, i.e. its uniform application by the national courts of the Member States, and the protection of the rights of natural and legal persons, since it gives them the opportunity to obtain the*

[6]https://curia.europa.eu/juris/document/document.jsf;jsessionid=92CA3D30340767BD5E65156D3BF15DBE?text=&docid=83936&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=5415845, consulted on 1.03.2023.
[7] In accordance with Article 5, any competence not rendered to the Union under the treaties belongs to the Member States.
[8] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:12016E267, consulted on 1.03.2023.

application of Union law by the national courts of the Member States"[9].

It may be noted that the wording of Article 267 TFEU does not *per se* impose an obligation on the national court to formally refer the questions referred for a preliminary ruling to the CJEU, since the national court is entitled to assess the usefulness and necessity of such questions in the resolution of the case before it. Moreover, it could even be said that the national judge has an obligation to consider whether a possible answer to the preliminary question is useful to him/her in the resolution of the case, precisely in order not to overload the CJEU with this type of request.

In this context, we note that the procedure established by Article 267 TFEU is more an instrument of cooperation between the Court of Justice and the national courts, with the help of which the European court provides the latter with the elements of interpretation of EU law which are necessary for the resolution of the dispute before them[10].

Relevant is also the document „*Recommendations to national courts concerning the making of preliminary references*", (hereinafter "CJEU Recommendations"), published in the Official Journal of the European Union no. 2018/C 257/01 of 20 July 2018, which stipulates as follows:

„*1. Provided for in Article 19(3)(b) of the Treaty on European Union („TEU") and Article 267 of the Treaty on the Functioning of the European Union („TFEU"), a preliminary reference is a fundamental mechanism of European Union law. This mechanism is intended to ensure the uniform interpretation and application of that law within the Union by giving the courts and tribunals of the Member States an instrument enabling them to bring preliminary actions before the Court of Justice of the European Union (hereinafter called „the Court") on questions concerning the interpretation of Union law or the validity of deeds adopted by the institutions, bodies, offices or agencies of the Union. [...]*

3. The Court's jurisdiction to give preliminary rulings on the interpretation or validity of Union law shall be exercised on the exclusive initiative of the national courts, irrespective of whether or not the parties to the main proceedings have expressed a wish that the Court should be notified. Since it is called upon to assume responsibility for the judgment to be given, it is for the national court notified with the resolution of a dispute - and for that court alone - to assess, taking into account the specific features of each case, both the need for a reference for a preliminary ruling in order to be in a position to give its own judgment and the relevance of the questions which it puts to the Court. [...].

5. The courts of the Member States may refer questions to the Court on the interpretation or validity of Union law if they consider that a decision of the Court on the matter is necessary in order for them to give judgment (see Article 267, second paragraph, TFEU). A preliminary reference may prove particularly useful, especially where a new question of interpretation is raised before the national court which is of general interest for the uniform application of Union law or where existing case-law does not appear to provide the necessary clarification in a novel legal or factual context.

6. Where such a question is raised in a case pending before a court against whose decisions there is no appeal under national law, that court is, however, bound to make a reference to the Court for a preliminary ruling (see the third paragraph of Article 267 TFEU), unless there is already settled case-law on the matter or the correct interpretation of the rule of law in question leaves no room for reasonable doubt. [...]

7. On the other hand, it is settled case-law that, although national courts may dismiss pleas of invalidity raised before them against a deed of an institution, body, office or agency of the Union, the possibility to declare such an act invalid is, on the other hand, a matter for the Court alone. Where it has doubts as to the validity of such a deed, a court of a Member State must therefore refer the matter to the Court, stating the reasons for which it considers that the deed is invalid.

9. The Court may not rule on a reference for a preliminary ruling unless European Union law is applicable to the main proceedings. In that regard, it is essential that the referring court should set out all relevant de facto and de jure matters which determine it to consider that the provisions of

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[9] Vlad Podoleanu, Diana Iurescu, *How do we refer preliminary questions to the Court of Justice of the European Union?*, available at https://www.juridice.ro/500842/cum-sesizam-curtea-de-justitie-a-uniunii-europene-cu-intrebari-preliminare.html, consulted on 1.03. 2023.

[10] Decision of 27 November 2012, Pringle, C-370/12, EU:C:2012:756, item 83. [item 20, C-556/15 and C-22/16].

European Union law are capable of applying in this case. [...]

15. The contents of any reference for a preliminary ruling are set out in Article 94 of the Rules of Procedure of the Court and are summarised in the Annex to this document. In addition to the wording of the questions referred to the Court for a preliminary ruling, the reference for a preliminary ruling must contain:

- a summary statement of the subject matter of the proceedings and of the relevant facts as found by the referring court, or at least a statement of the factual circumstances on which the questions referred for a preliminary ruling are based;

- the content of the national provisions likely to be applied in the case and, where appropriate, the relevant national case-law; as well as

- a statement of the reasons which led the referring court to doubt 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 law applicable to the main proceedings.

In the absence of one or more of the foregoing elements, the Court may find that it has no jurisdiction to rule on the questions referred for a preliminary ruling or may dismiss the reference for a preliminary ruling as inadmissible".

The conditions under which national courts declare admissible requests for references to the CJEU are clear from the above. Thus, according to the recommendations, references concerning interpretation may be made when the national court considers it necessary for the resolution of the case before it. Courts whose decisions are not subject to appeal under national law are bound to refer the case to the Court unless:

- the Court has already ruled on the matter (and there is no new context raising serious doubts as to whether European case law can be applied in that case);

- if the correct interpretation of the law in question is obvious (item 12 of the Recommendations). Thus, the national court, in particular when it considers that sufficient guidance is given by the previous case law of the Court, may itself decide on the interpretation of European Union law and its application to the factual situation[11].

Furthermore, under Article 92(1) of the Rules of Procedure of the Court of Justice of the European Union, the Court shall give its decision by reasoned ordinance when:

a) the Court manifestly lacks jurisdiction (i.e. the subject matter of the questions does not fall within the scope of Union law, in other words the dispute is purely internal, so the Court does not have material jurisdiction to rule);

b) the reference for a preliminary ruling is manifestly inadmissible.

From these rules, several grounds for manifest inadmissibility of the reference for a preliminary ruling to the CJEU can be inferred:

- the reference for a preliminary ruling does not contain an adequate description of the *de facto* and *de jure* situation;

- the referring court does not adequately explain why it needs the Court's reply in order to resolve the dispute;

- the questions are not relevant to the resolution of the dispute before the referring court or are hypothetical;

- the referring body does not meet the criteria for being a referring court within the meaning of Article 267 TFEU;

- the facts of the main proceedings occurred before the accession to the EU of the Member State to which the referring court belongs;

- the dispute is not genuine, but artificially created for the purpose of bringing a reference for a preliminary ruling.

A special situation is where the national court before which the application is brought gives a decision which is not subject to any appeal under national law. In this situation, the court is bound to

[11] https://www.juridice.ro/373591/incheierea-de-sesizare-a-curtii-de-justitie-a-uniunii-europene-in-procedura-intrebarii-preliminare.html, consulted on 1.03.2023.

refer the case to the CJEU, but only if the conditions laid down in Article 267 TFEU are met, *i.e.* if it considers that a decision of the Court of Justice of the European Union on the interpretation of the treaties or on the validity and interpretation of deeds adopted by the institutions, bodies, offices or agencies of the Union is necessary for the resolution of the case.

Therefore, for the questions referred to the CJEU to be referred in this procedure, they must be relevant to the resolution of the dispute, that is to say, they must relate to the subject matter of the dispute, and the rules the interpretation of which is sought must be relevant to the resolution of the case, that is to say, they must apply to the situation which is the subject matter of the case, so that the answer of the Court of Justice of the European Union is useful for the resolution of the dispute.

There are a number of situations, noted in the relevant case law, in which the Court has declared itself without jurisdiction. For example: *the hypothetical nature of the question*[12], *questions which are not relevant to the resolution of the dispute*[13], *questions which are not formulated clearly enough*[14], *the de facto situation is not sufficiently clear*[15]. In relation to the subject matter of the main proceedings, we believe that this question is inadmissible because one of the admissibility criteria is not met, namely: "*the interpretation of EU law sought has no connection with reality or the subject matter of the main proceedings."* (Case C-310/10 *Agafiței*, item 27[16]; Decision ruled in case C-13/05, *Chacón Navas*, item 33[17]; Decision ruled in case C-409/06, *Winner Wetten*, item 37[18] and the case-law cited therein).

Therefore, the referral of preliminary questions to the CJEU by a judicial review court is not mandatory *per se*, but only if it proves to be necessary for the resolution of the case. The need for referral arises either from the desire for uniform application of Union law or from the lack of case-law providing the necessary clarification in a novel *de jure* or *de facto* setting.

In the practice of national courts, there has been a tendency to grant requests for preliminary rulings in situations where either the question was not helpful to the resolution of the case or the question concerned issues falling within the national court's own jurisdiction, such as the direct application of a European regulation.

It is therefore clear that the institution of a reference for a preliminary ruling to the CJEU by a court of a Member State was intended exclusively to deal with the interpretation of the Treaties, *i.e.* the validity and interpretation of deeds adopted by the institutions, bodies, offices or agencies of the Union which create law in the European Union, and not with the application or non-application of a regulation by the national court. A contrary conclusion would turn the CJEU into a universal court of judicial review, bound to rule on all cases brought before the courts of the Member States, which is unacceptable and certainly contrary to the shall of the European legislator.

In national law, Law no. 340/2009[19] which transposed into national law the principles underlying the preliminary ruling procedure, enables national courts to refer a request for a preliminary ruling to the CJEU whenever the delivery of a judgment in question is dependent on a decision on the interpretation or validity of Community law. Through the preliminary question

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[12] Case C-467/04 - Criminal proceedings against Gasparini and Others (2006) ECR I 9199 - see Paul Craig Grainne de Burca, *European Union Law, Commentaries on Case Law and Doctrine*, Sixth Edition, Hamangiu Publishing House, Bucharest, 2017, p. 550.

[13] Case C-134/95 Unita - Socio Sanitaria Locale nº 47 di Biella (USSL) v. Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL); Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd; C-314/01 Siemens AG Österreich and ARGE Telekom & Partner v. Hauptverband der österreichischen Sozialversicherungsträger; C-152/03; Hans-Jürgen Ritter-Coulais and Monique Ritter-Coulais v. Finanzamt Germersheim; C-313/07 Kirtruna SL and Elisa Vigano v. Red Elite de Electrodomésticos SA and Others; Paul Craig Grainne de Burca, *op. cit*., 2017, p. 551.

[14] C-318/00 Bacardi-Martini SAS and Cellier des Dauphins v Newcastle United Football Company Ltd; C-88/99 Roquette Frères SA v Direction des services fiscaux du Pas-de-Calais; C-235/95 AGS Assedic Pas-de-Calais v François Dumon and Froment, mandataire liquidateur des Etablissements Pierre Gilson - see Paul Craig Grainne de Burca, *op. cit.*, 2017, p. 552.

[15] C-320/90 Telemarsicabruzzo SpA and Others v Circostel, Ministero delle Poste e Telecomunicazioni and Ministero della Difesa; C-386/92 Monin Automobiles-Maison du Deux Roues; C-458/93 Criminal proceedings against Mostafa Saddik; C-316/93 Nicole Vaneetveld v SA Le Foyer and SA Le Foyer v Fédération des mutualités socialistes et syndicales de la province de Liège. Paul Craig Grainne de Burca, *op. cit*., 2017, p. 553.

[16] Decision of the Court (Fourth Chamber) of 7 July 2011 in Case C-310/10 *Agafiței*, European Court Reports 2011 I-05989, p. 27.

[17] Decision from 11 July 2006, *Chacón Navas*, Rec., p. I 6467, item 33.

[18] Decision of the Court (Grand Chamber) of 8 September 2010, Winner Wetten, C-409/06, European Court Reports 2010 I-08015, p. 37.

[19] In the making by Romania of a declaration on basis of the provisions of art. 35 para. (2) of the Treaty on the European Union.

procedure, the national court has been empowered to refer a case to the CJEU in order to eliminate any inconsistency of the rules of national law with the treaties or with secondary EU law, but also to ensure a uniform interpretation of European rules where they appear unclear to the referring court.

To move on to the next chapter, we note that in a case[20], he Grand Chamber of the CJEU stated, with regard to the principles of Union law, loyal cooperation, procedural autonomy and the principles of equivalence and effectiveness, that ”*The cornerstone of the judicial system thus conceived is the preliminary reference procedure laid down in Art. 267 TFEU which, by establishing a court-to-court dialogue between the Court and the courts of the Member States, is designed to ensure unity in the interpretation of European Union law” and ”Article 267 TFEU gives national courts the widest possible opportunity to refer questions to the Court in so far as they consider that a case pending before it raises issues requiring interpretation or assessment of the validity of the provisions of European Union law necessary for the resolution of the dispute before them (Decision of 5 October 2010, Elchinov, C 173/09, EU:C:2010:581, item 26, as well as Decision of 24 October 2018, XC and Others, C 234/17, EU:C:2018:853, item 42 and the case law cited therein.)”.*

3. CJEU practice on the admissibility of the reference for a preliminary ruling

The CJEU's practice has been consistent over time regarding the inadmissibility of requests for preliminary questions that did not comply with the mandatory requirements of Article 267 TFEU.

Thus, in Case C-368/12 concerning a reference for a preliminary ruling from the Court of Appeal of Nantes, the CJEU rejected the reference by Order of 18 April 2013 *as manifestly inadmissible*[21].

Concurrently, by the Decision of 26 March 2020 (Joined Cases C-558/18 and C-563/18) Miasto Łowicz and Prokurator Generalny, the Grand Chamber of the Court declared inadmissible the references for a preliminary ruling made by the Łódź Regional Court (Poland) and the Warsaw Regional Court (Poland). By those two references, the referring courts essentially asked the Court to rule on the question whether the new Polish legislation on the disciplinary regime for judges was compatible with the right of individuals to effective judicial protection guaranteed by the second subparagraph of Article 19(1) TEU. After confirming its jurisdiction to interpret the second subparagraph of Article 19(1) TEU, the Court ruled on the admissibility of the two applications and noted that, under Article 267 TFEU, the preliminary ruling sought must be ”necessary” to enable the referring court to „give a judgment”. The Court found, first of all, that *the main proceedings have no connection with European Union law and in particular with the second subparagraph of Article 19(1) TEU to which the questions referred for a preliminary ruling relate*. The Court also stated that an answer to those questions did not appear to be capable of providing the referring courts with an interpretation of European Union law which would enable them to resolve procedural questions of national law before being able to rule, if necessary, on the substance of the main proceedings. Accordingly, the Court has held that it is not apparent from the decisions for reference that there is a connection between the provision of European Union law concerned in the questions referred for a preliminary ruling and the main proceedings such as to make the interpretation requested necessary in order for the referring courts to be able, in applying the conclusions to be drawn from such an interpretation, to give those decisions. *The Court therefore held that the questions referred were of a general nature, so that the references for a preliminary ruling must be declared inadmissible*[22].

It has been held in the specialized literature that „*the Court's jurisdiction is limited solely to the interpretation of Community law. The Court cannot take account of the general scheme of the provisions of national law which have made the application of Community law possible*”[23]. At the

[20] Decision from 24 October 2018, ruled in case C-234/17.

[21] Published in Electronic Directory (General Directory - Section ”Information on non-public decisions”), https://curia.europa.eu/jcms/jcms/P_106320/ro/?rec=RG&jur=C&anchor=201304C2056, consulted on 1.03.2023.

[22] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200035ro.pdf, consulted on 1.03.2023.

[23] André Bywater, Mihai Șandru, *The relationship between European courts - the European Court of Justice and the European Court of Human Rights - and national courts*, p. 184.

same time, it should be emphasised that „*by virtue of the supremacy of Community law, the provisions of the Treaty and those directly applicable deeds of the institutions have the effect, in their relations with the national law of the Member States, of rendering applicable by operation of law, by their very entry into force, any provision contrary to national law"*[24].

The CJEU has consistently held that an application to the Court of Justice is inadmissible even if the questions are not relevant to the case or if they do not assist the outcome of the case before the national court. The lack of usefulness of the application has therefore been sanctioned in the consistent practice of the CJEU.

Thus, in one case[25], the Court held that „*under Article 267 TFEU, the Court has no jurisdiction to rule either on the interpretation of national laws, regulations or administrative provisions or on the conformity of such provisions with European Union law" (Decision of 11 March 2010 in Case C 384/08 Attanasio Group, EU:C:2010: 133, item 16 and the case-law cited) and, second, that it is not for the Court to ascertain whether the decision to refer was made in accordance with national rules of judicial organisation and procedure (Decision of 14 January 1982, Reina, 65/81, EU:C:1982:6, item 8, and Decision of 23 November 2006, Asnef Equifax and Administración del Estado, C 238/05, EU:C:2006:734, item 14)*".

In another case, the CJEU held that the application was manifestly inadmissible on the ground that the *grounds of the application relied on were not sufficient to justify the need for an answer to the question referred for a preliminary ruling*[26]. Similarly, in another very recent case,[27] the Court held that the application was inadmissible, given the lack of a causal link between the question referred for a preliminary ruling and the subject matter of the case on the merits before the national court „*does not set out the reasons why those provisions would be applicable in the main proceedings, nor how the national legislation at issue in the main proceedings might affect those provisions*".

In a similar case[28], the Court first recalled that, *under Article 267 TFEU, the preliminary ruling sought must be „necessary" to enable the national court to „give a judgment" and it is not apparent from the decisions referred to it that there is a connection between the provision of European Union law referred to in the questions referred for a preliminary ruling and the main proceedings such as to make the interpretation sought necessary for the national courts to be able, applying the conclusions to be drawn from such an interpretation, to give those decisions.*

The very recent practice of the CJEU has also held that „*the procedure established by Article 267 TFEU constitutes an instrument of cooperation between the Court and the national courts by means of which the Court provides the latter with the elements of interpretation of Union law which are necessary for the resolution of the disputes which it is called upon to rule on, so that the justification for a reference for a preliminary ruling is not the formulation of advisory opinions on general or hypothetical questions, but the need inherent in the actual resolution of a dispute (see in this respect Case 244/80 Foglia, 16 December 1981, EU:C:1981:302, item 18, and Joined Cases C 558/18 and C 563/18 Miasto Łowicz and Prokurator Generalny, 26 March 2020, EU:C:2020:234, item 44)"*[29].

In practice, it is often argued that if the court before which the application is made is a court of last instance, it would be obliged to refer the case to the CJEU. Although in a recent decision[30], the Bucharest Tribunal granted such an application, including on the grounds that the judgment to be delivered is not subject to any appeal, this solution is nevertheless invalidated by the constant practice of the European courts, as we shall show below.

In order to reinforce our conviction that there is no per se obligation for national courts of

[24] Diana Alina Rohnean, *European Union law*, Hamangiu Publishing House, Bucharest, 2011, p. 93.
[25] Decision of the Court (First Chamber) of 7 July 2016 in Case C-389/07 C-567/14.
[26] Order of the Court (Seventh Chamber) of 8 May 2019 (reference for a preliminary ruling from the Bucharest Tribunal- Romania) - SC Mitliv Exim SRL v. National Tax Administration Agency, General Directorate for Administration of Large Taxpayers (Case C-311/09) C-9/19).
[27] Decision of the Court (Fifth Chamber) of 2 March 2023 in the case C-394/21.
[28] Decision in Joined Cases C-558/18 and C-563/18 Miasto Łowicz and Prokurator Generalny, ruled on 26 March 2020.
[29] Decision of the Court NV Construct SRL (Case C-403/21), ruled on 26 January 2023.
[30] Judgment of the CJEU of 24.02.2023, Bucharest Tribunal, Administrative and Fiscal Litigation Section II, Case no. 25238/4/2021.

judicial review to refer preliminary questions to the CJEU (not even if we are appealing to a court whose judgment is final), we refer to the relevant CJEU case-law on the subject, which details the conditions under which the court before which the need to ask questions is raised may refuse such a request, giving reasons.

In the Decision ruled in Case C-283/81[31], it was held „*that it is not sufficient for a party to argue that the dispute raises a question of Community law for the court to be automatically obliged to make a reference. Notwithstanding the provisions of Article 234(3), in analysing the relationship between that text and para. 2, the national courts referred to in para. 3 have the same discretion, as the other courts, to assess the need for a decision of the Court on a question of interpretation of Community law. A national court need not make a reference if: the question is irrelevant; the Community provisions in question have already been interpreted by the Court; the correct application of Community law is so obvious as to leave no room for doubt".*

The CJEU pointed out in its judgment in Case Aquino[32] C-3/16, that *„under the third paragraph of Article 267 TFEU, national courts whose decisions are not subject to a right of appeal under national law are obliged to refer the matter to the Court", the obligation being „established with a view to ensuring the correct application and uniform interpretation of Union law in all the Member States" and with the „objective of avoiding the emergence in any Member State of national case-law which does not correspond to the rules of Union law".*

A year earlier, the CJEU had stated in Association France Nature Environnement, no. C-379/15[33], that *„the Court ruled in paragraph 21 of its judgment of 6 October 1982 in Cilfit and Others (283/81, EU:C:1982: 335), that a court whose decisions are not subject to a right of appeal under national law must, when a question of European Union law arises in the case before it, fulfil its obligation to make a reference unless it finds that the correct application of European Union law is so obvious as to leave no room for reasonable doubt and that the existence of such a possibility must be assessed in the light of the specific characteristics of European Union law, the particular difficulties involved in its interpretation and the risk of divergences of case-law within the European Union".* The practice of the ECHR has also been generous over the years on the issue of references to the CJEU for a preliminary ruling.

In Baydar v. The Netherlands[34], the ECHR referred to the Court of Justice's Aquino judgment to show the exceptions to the obligation to make a preliminary reference in the case of a court that is a court of last instance and again lists the three exceptions permitted by the Court of Justice for a court of last instance to refuse a preliminary reference in a reasonable manner, namely: on the ground that the question referred is *irrelevant*; on the ground that the provision of EU law *has already been interpreted* by the Court of Justice; or on the ground that *the correct application of EU law is so obvious as to leave no room for reasonable doubt* (Decision of 24 April 2018, Baydar v. the Netherlands, application no. 55385/14, EC:ECHR:2018:0424JUD005538514, para. 44).

In Ferreira Santos Pardal v. Portugal[35], the European Court summarised the relevant case-law, stating that there is an arbitrary refusal to make a preliminary reference where there is a refusal even though the relevant rules do not provide for any exception to the obligation to make a reference, or where the refusal is based on grounds other than those provided for by the exception, or where the refusal is not sufficiently reasoned by reference to the relevant exceptions (Decision of 30 July 2015, Application No. 30123/10, CE:ECHR:2015:0730JUD003012310).

Concluding on this point, a national court which refuses to make a reference for a preliminary referral has both the general obligation imposed by Article 6 of the Convention that, when refusing such a referral, it must not give reasons able of leading to the conclusion that the refusal was arbitrary, and that, when it is a court of last instance, the refusal must expressly fall within the exceptions laid

[31] https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0283-1981-200802159-05_00.pdf, consulted on 1.03.2023.
[32] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62016CA0003&from=FI, consulted on 1.03.2023.
[33] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62015CJ0379, consulted on 1.03.2023.
[34] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-182454%22]}, consulted on 1.03.2023.
[35] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-172432%22]}, consulted on 1.03.2023.

down by the CJEU.

We would also point out that the CJEU has held that a proposed question may be regarded as irrelevant only „*if, whatever the answer to that question may be, it is not likely to have any bearing on the outcome of the dispute*", while pointing out in *Consiglio nazionale dei geologi*, no. C-136/12[36], that „*on the contrary, if the national courts find that it is necessary to have recourse to European Union law in order to resolve the dispute before them, Article 267 TFEU compels them, in principle, to refer to the Court any question of interpretation which arises".*

4. The current strong trend of referrals to the CJEU before national courts. Case law analysis

In recent years there has been an increase in requests for preliminary questions to the CJEU, often seen as a life-jacket by applicants or perhaps even as a legal way of delaying the final disposal of cases. In such a context, it should be noted that the request for referral to the CJEU has become some kind of *trend* in national courts, even if once they are brought before the Court, the Court rejects them as inadmissible, in a constant practice. In this respect, one author remarked that „*it is enough to refer to the large number of orders issued by the Court, many of which reject as inadmissible applications by Romanian courts*".[37] The same author draws attention to the existence of a „*use and abuse in the conduct of some parties with regard to applications for referral to the Court of Justice*", noting that „*some parties (...) have no interest in having cases heard and decided (...), lawyers have discovered a new El Dorado of postponement (...)* "[38].

In this respect, there have been national courts that have shown courage and dismissed such requests as inadmissible. Thus, the High Court of Cassation and Justice has ruled that a reference for a preliminary question to the CJEU may be made only where, in the course of pending litigation, the interpretation or validity of a European legal rule is at issue. In that regard, the question which may be referred by the national court relates exclusively to matters of interpretation, validity or application of European Union law, and not to matters of national law or particular issues of the case before it. In this case, the High Court held that such an application is not a genuine request for a reference to the CJEU, since the applicant is seeking a ruling on the substance of the case (determination of the merits) and the conditions laid down in Article 267 of the Treaty on the Functioning of the European Union have not been met[39]. At the same time, in another case[40] the High Court also ruled that *the requested preliminary opinion is not useful and relevant in this case. The High Court notes that the manner in which the application is formulated is actually intended to obtain a „guiding decision" in the actual resolution of the case by the national court from the Court of Justice of the European Union, which is inadmissible, since it exceeds its jurisdiction (...) the request for referral to the Court of Justice of the European Union is made only where, in the course of a dispute pending before it, the interpretation or validity of a Community rule is at issue. It is therefore for the national court to determine the relevance of Community law for the resolution of the pending dispute and whether or not a reference for a preliminary question is necessary. The High Court notes that, in this area, the Court of Justice has recognised that national courts have a wide margin of discretion in assessing the relevance of a preliminary ruling, and that the national court is required to make a preliminary request only where it considers that there is doubt as to the application or interpretation of Community law. The question that may be raised by the national court relates exclusively to questions of interpretation, validity or application of Community law, and not to questions of national law or*

[36] Decision of the Court from 18 July 2013, https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62012CJ0136&from=RO, consulted on 1.03.2023.

[37] Daniel Mihail Șandru, Constantin Mihai Banu, Dragoș Alin Călin, *Problems in the jurisprudence of preliminary references formulated by Romanian courts*, in „Pandectele Române" no. 6/2013, p. 35.

[38] Idem, p. 44-45.

[39] Conclusion of the Administrative Jurisdiction and Tax Chamber of the High Court of Cassation and Justice of 6 April 2012 - reference to the Court of Justice of the European Union.

[40]http://www.euroavocatura.ro/jurisprudenta/3046/Conditiile_de_admisibilitate_ale_unei_cereri_de_sesizare_a_CJUE_cu_o_intrebare_preliminara, consulted on 1.03.2023.

particular aspects of the case before it. Analysing the documents and the case-file from this perspective, the High Court notes that the application made by the applicant is not a genuine request for a referral to the CJEU, as the applicant is seeking a decision on the merits of the case (determination of the substance of the case), the conditions laid down in Article 267 of the Treaty on the Functioning of the European Union not having been met.

At the same time, in another case, the CJEU[41] dismissed the request to refer the case to the CJEU, holding that „*to ask the CJEU, by interpreting its own case-law in a given matter, to express its view on a specific factual situation at issue, is a misguided reasoning which forces the limits of the powers conferred on the Court by the provisions of the TFEU to be exceeded. The High Court also holds that the case provides sufficient evidence for the adoption of a solution, since the High Court is in a position to give a reply in the light of the national legislation in a manner consistent with European Union law".*

Also, in a case under appeal, the Bucharest Tribunal[42] dismissed the application to the CJEU as inadmissible, holding in essence that: *the jurisdiction of the CJEU covers only the interpretation of EU law, which means that the dispute must present an element within the scope of EU law, not be purely domestic. Given that the legal relationship at issue is between an institution of the Romanian State and a commercial company established in Romania and the law applied to sanction the latter, Law no. 123/2012, the Tribunal holds that there is no element of extraneity which would make EU law applicable and that the application (...) is therefore inadmissible. ...) given that the proposed questions seek the interpretation of domestic law by reference to EU law, the ratione materiae competence of the CJEU does not exist, (...) it seeks the interpretation of domestic law by reference to European law, the latter procedure being within the jurisdiction of the national court.* In another case, the Bucharest Tribunal also ruled that *"the application made by the public prosecutor's office is not a genuine request for a referral to the CJEU, seeking a decision on the merits of the case" and pointed out that the application made by a party/participant, which actually seeks to obtain from the Court of Justice of the European Union a „guiding decision" in the actual resolution of the case by the national court, is inadmissible, as in this situation the conditions laid down in Article 267 of the Treaty on the Functioning of the European Union are not met[43].*

Also, in a case before a court of last instance[44], it held that „*it is necessary that the questions asked be relevant to the resolution of the dispute, i.e. that they be connected with the subject matter of the dispute, i.e. that they be connected with the resolution of the case, i.e. that they apply to the situation which is the subject matter of the case, so that the CJEU's answer is useful for the resolution of the dispute (...) The CJEU cannot rule on a preliminary question when the interpretation of a Community rule is not related to the subject matter of the main proceedings (...) Even national courts whose decisions are not subject to any remedy under national law are free to assess the relevance of a request for a preliminary question. ANRE has sanctioned the petitioner for non-compliance with the legal rules of transparency in the relationship between supplier and consumer, has not sanctioned the change/modification of the supply price and has not regulated in any way the supply price, so that the questions have no relevance (are not pertinent and necessary) for the resolution of the case concerning the contravention complaint*".

However, there have also been courts[45] that have not had the courage to take the decision to dismiss the application to the CJEU as inadmissible, or perhaps out of convenience, not wanting to make lawsuits of intent.

[41] Conclusion of the public sitting of 2 October 2020 of the Administrative Jurisdiction and Tax Chamber of the High Court of Cassation and Justice on the reference to the Court of Justice of the European Union.
[42] Conclusion of 13 June 2019 in file no. 20853/299/2018.
[43]https://www.chirita-law.com/cerere-de-sesizare-curtii-de-justitie-uniunii-europene-cu-intrebari-preliminare-pe-tema-prescriptiei/, consulted on 1.03.2023.
[44] Conclusion of 23.02.2023 of the Târgu-Mureș Court.
[45] Conclusion of 25238/4/2021 delivered by the Bucharest Tribunal.

5. Conclusions

Starting from the preamble of a paper[46] in which it was pointed out that „*the practice of Romanian courts (...) clearly demonstrates difficulties in understanding and applying EU law*", the conclusions of this paper are intended more as a hope that the national courts will show more courage, having the necessary power and competence on the one hand to apply European law directly (referring here to regulations that are of immediate and direct application), but also to dismiss applications to the CJEU where they are often manifestly inadmissible.

It is true that in recent years there has been an increasing use of this legal instrument, which is often seen by the parties in the cases as a real "life jacket", and not necessarily as a well-founded one.

In such a context, it must be stressed that the national court has, dare we say it, not only the right but even the obligation to apply European regulations directly, without waiting 2-3 years for the European court to say the same thing. On the other hand, it is also an obligation of the national court to analyse whether the preliminary questions referred to the CJEU are related to the resolution of the case, are useful for its resolution. As the constant practice of the CJEU has shown, there is an increasing number of decisions rejecting many referrals as manifestly inadmissible, a situation which has led to overcrowding at the European Court, which can be prevented by the national court assuming greater responsibility.

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