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Research Report

Legal regime of the CJEC preliminary rulings and their impact upon the national legal system

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Legal Regime of the CJEC Preliminary Rulings and Their Impact upon the National Legal System

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Foreword

The creation of the space of freedom, security and justice represented a monumental project for the edification of a Europe without frontiers where citizens may enjoy the same rights, applied unitarily by the national courts of law pursuant to their uniform interpretation.

The cohesion in the interpretation of community law is provided by the Court of Justice of the European Communities through the preliminary procedure mechanism, which institutes the collaboration between the national courts of law – "ordinary law" community courts – and the "supreme" community court. The competence of the Court of Justice in the interpretation of the community law is regulated by the provisions of art. 234 ECT through the preliminary procedure, which institutes a collaboration mechanism between the national courts and the Court of Justice, according to which *any* court can address the Court of Justice a preliminary ruling pronouncement request concerning the interpretation of the community law.

The preliminary procedure has two essential functions. First of all, this mechanism ensures the unitary interpretation of the community law, which has as effect its uniform application by the national courts of law of the member states. To leave to the appreciation of the national courts the mission of non-unitary interpretation of the law would create the risk of the occurrence of a non-unitary legal practice. Consequently, the interpretation offered by the Court of Justice guarantees the fact that the community judgments produce the same legal effect in all Community states. The second function of the preliminary procedure is the protection of the rights of individuals, by the creation of the settlement framework for the contradictions that may exist between the internal law and the community law.

The object of this study is the presentation of the legal regime of the preliminary ruling of the Court of Justice of the European Communities and their impact on the Romanian legal system such as they appear in the theory of the community law and the case-law of the Court of Justice. The study does not claim to fully expose such a vast topic which – in its complex dimension (law, case-law and doctrine) – is in continuous evolution. The purpose of the authors is to offer a view on the legal regime of the preliminary procedure, by presenting the request conditions for a preliminary ruling by the national courts, the provisions of the community law that are subject to interpretation, the procedures of the Court of Justice in preliminary matter as well as the effects of preliminary rulings in the internal law (Part I). In the mean time, within this study, the authors intended to monitor the impact of the community case-law on the internal law, in general, and on the Romanian law in particular (Part II), by exposing cases settled by Romanian courts of law in various circumstances (cases where the courts settle the cases without requesting a preliminary ruling – the clear act theory – cases where the court applies the community law norms as construed by the Court, the request for a preliminary ruling by referral before the Court of Justice).

It also presents the Department for European Affairs, a structure of the Government of Romania that coordinates the formation process of the national position as to the issues of the European affairs and ensures the Romania's representation before the Court of Justice within the preliminary ruling pronouncement request.

The present study brings as a novelty in the field a succinct presentation of the envisaged modifications of the applicable texts in the matter, contained in the civil procedure code project, under public debate, meant to contribute to the improvement of the process context of the collaboration between the Romanian courts of law and the Court of Justice within the mechanism of preliminary procedure.

The conclusions of the study highlight the finding of progresses in the field of improving the legal framework in Romania in the context of establishing an access as large as possible of the courts of law to the preliminary procedure mechanism in all the fields in the sphere of the space of freedom, security and justice.

PART I The legal regime of the preliminary ruling pronounced by CJEC

1.1. Introductory considerations regarding the competence of the Court of Justice in preliminary matters

The Treaty of Amsterdam represented an important progress in the construction of the European Union by establishing the space of freedom, security and justice. This treaty created a flexibility mechanism in the decision-making process at Union level, allowing certain states to evolve faster than others in the fields under the third pillar of the Union, that of internal affairs and justice. This evolution of the decision-making process within the third pillar was represented by the transfer of the provisions concerning the free movement of persons, from the sphere of the inter-government cooperation within the community pillar of the Union. Thus, the problems referring to the free movement of persons (including judicial cooperation in civil matters) were transferred to the content of the new 4th title, under the name "Visas, asylum and other policies related to the free movement of persons". Significant changes were brought to the third pillar, both structural and functional. Thus, Title IV TEU took the name "Police and judicial cooperation in criminal matters" and a new Title VII was created, containing provisions concerning the consolidated cooperation. New legal instruments were created, decisions (art. 34, §2, p.c) TEU) and framework decisions (art. 34, §2, p.b) TEU), as new means of lawmaking in the area of criminal law, their adoption making possible a substantial improvement of the judicial cooperation in criminal matters.

In the Maastricht Treaty, the JHA pillar did not fall under the competence of the Court of Justice; however, along with the partial integration of the third pillar in the Community, the competence of the Court of Justice was extended, as to the freedom, security and justice space created by the Treaty of Amsterdam. Thus, the legal regime of the Court of Justice's competence in preliminary matters is made of art. 234 ECT, art. 68 ECT and art. 35 TEU, structured as follows:"ordinary law" legal regime provided by art. 234 ECT for the 1st pillar matters, the special regime provided by art. 68, §1 ECT for the community integrated fields (concerning visas, asylum and other policies related to the free movement of persons) and the special regime concerning the police and judiciary cooperation in criminal matters. The exceptions are the measures concerning the public order and internal security measures[1], fields in which the national legal provisions continue to exceed the Court's competence and lie within the competence sphere of the national courts.

The preliminary procedure based on art. 68 ECT. The Treaty of Amsterdam provides that the decisions concerning title IV "Visas, asylum and other policies related to free movement of persons" shall comply with a derogatory procedure against the procedure provided by art. 251 ECT. Thus, under art. 34 TEU, the Council may, by unanimous decision, adopt common positions and framework decisions for the purpose of harmonizing the law power acts and administrative norms of the member states. The framework decision binds the states in the results they must achieve, leaving to the national authorities the competence concerning the forms and means of achievement. The same cannot have a direct effect. The Council may also adopt decisions for any other purpose, except the harmonization of acts with law character and administrative norms of the member states. Such decisions are binding, but cannot have

[1] Art. 68 §2 of the Community Treaty excludes the competence of the Court as to the operations or services decided for the application of the principle of free circulation referring to the "maintenance of public order and defence of internal security", as well as art. 35 § 5 EUT, according to which "the Court of Justice is not competent to verify the legality of proportionality of the operations performed by the police or other law enforcement services in a member state and nor to decide about the exercise of the responsibilities falling to the member states in view of maintaining public order and the defence of the internal security."

direct effect. Finally, the Council may draft conventions, the adoption of which is recommended to the member states. In what regards the Court of Justice, its competence in preliminary matter is limited. During the first 5 years, the integration of the policies concerning the visas, asylum, immigration and other policies concerning the free movement of persons in Title IV of ECT results in their inclusion in the sphere of competence of the Court of Justice of the European Communities, under the reserve of two derogations provided in art. 68 of ECT: on the one hand, the preliminary procedures[2] are reserved only to the national courts which pronounce judgments that are not subject to any remedy at law and are optional for these courts; on the other hand, the Council, the Committee or another member state may request the Court of Justice to judge on a certain matter regarding the interpretation of Title IV or the acts adopted by the Community institutions on its basis, without the judgement thus pronounced as reply to such a request be applicable in the case of the decisions of the courts of law from the members states which have the authority of res judicata[3].

Therefore, in the field of visas, asylum immigration and other policies concerning free circulation, art. 68 ECT limits the access to the preliminary procedure only in favour of the national courts of which the judgments are not subject to any remedy at law. This option could be determined by the preoccupation not to overload the roll of the Court of Justice and not excessively extend the settlement duration of the cases by the national courts, considering that the "supreme" courts[4] are those ensuring in each state the unification of the judiciary practice at national level.

However, the restrictive application of art. 234 ECT in the field of Title IV has as effect the impossibility of the hierarchically lower courts to request the Court of Justice to interpret the community law, for which *they must assume full responsibility*. As to the parties, they have the mission to go through all the jurisdiction levels of the internal law if they wish to propose the court to file a petition on pronouncement of a preliminary ruling by the Court of Justice. These procedure restrictions were subject to criticism which underlined that "the limitation of the right of the courts to vest the Court affects the uniform application and interpretation of the community law as a whole; it runs the risk of depriving the parties of the protection of their rights and negatively affects the unity of the case-law"[5].

The preliminary procedure based on art. 35 TEU. With the entering in force of the Treaty of Amsterdam, the provisions concerning the police and judiciary cooperation in criminal matters of the third[6] pillar are subject to the provisions of art. 35 TEU according to which the Court of Justice is competent to:

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[2] The interpretation of Title IV and the validity or interpretation of the acts adopted in the Community institutions under this title

[3] Art. 68 §3 ECT

[4] By supreme courts the present study understands those national courts pronouncing judgments that cannot be subject to a remedy at law in the internal law.

[5] To this effect, upon the proposal of the Committee, a decision project was initiated concerning the adaptation of the provisions concerning the Court of Justice, in the field referring to Title IV of ECT and the cessation of their restrictive application, in favour of applying the general rules comprised in art. 234 ECT. After the endorsement by the Parliament, the Council adopted this decision on December 22, 2004 COM (2006) 346, 28th/06/2006, Council's Decision 2004/927/CE, published in the OJ L 396 of 31.12.2004; http://europa.eu/bulletin/fr/200412/p101003.htm

[6] Art. 30 EUT concerning the police cooperation, art. 31 EUT concerning the judiciary cooperation in criminal matters, art. 32 EUT concerning the intervention on the territory of another member state and art. 34 EUT concerning the coordination of the states' actions and decision-making.

- control the legality of the framework decisions and decisions in the case of an action in cancellation passed by a member state or the Committee, within two months from the issue of the act
- decide concerning any litigation between the member states concerning the interpretation or application of the framework decisions, decisions and conventions adopted under art. 34 or between the member states and the Committee concerning the interpretation or application of the aforementioned conventions
- to decide, under the reserve of a statement made by each member state, preliminarily, regarding the validity and interpretation of the framework decisions and decision, interpretation of conventions and of their application measures (art. 35 §1)[7]. Essentially, art. 35 TEU regulates the competence of the Court of Justice concerning the interpretation and validity of the framework decisions and decisions adopted under this title, as well as the interpretation of the conventions regarding the police and judiciary cooperation in criminal matters, established under art. 34 §2, letter d). The preliminary procedure is optional, in the sense that the member states must have made an explicit statement of acceptance of the Court of Justice's competence. Member states *must specify* whether all courts of law or only courts of which the decisions are not subject to remedy at law are authorized to formulate preliminary questions. The states *may impose a notification obligation* in their national legislation for those national courts of which the judgments are not subject to any remedy at law in the internal law (resuming of the last paragraph of art. 234 ECT).

In the absence of a statement formulated by the member states, the courts of those states cannot address preliminary questions concerning the acts provided in art. 35 §1 TEU.

The national courts from the states that made statements under art. 35 §2 TEU, addressed the Court of Justice requests having as subject the pronouncement of preliminary ruling under art. 35 §1 TEU. Among them, one must mention those whereby the Court of Justice was requested to rule as to the interpretation of certain framework decisions[8], which must be considered as interpretation instruments of the national law. In principle, the purpose of the framework decisions is to harmonize the legislative decisions in the member states within the third pillar and impose on the states the obligation of being implemented as to results, not as to the form and means of implementation. Albeit framework decision are not directly effective at national level, in the sense that they do not create the obligation of the national courts to include them into the national laws, the case-law of the Court decided that the parties may request the national court the interpretation of the national law under the provisions of such a framework decision. To this effect, the Court of Justice was vested with the request of pronouncing a preliminary ruling by an Italian court vested with a case having as object the application of maltreatment by a governess to the underage, so as to know whether the Italian court could have authorized statements of the preschool underage outside the public session taking place in the court hall, in the circumstances in which the Italian trial procedure did not provide this possibility for that offence. In this case inadmissibility was invoked on grounds that it may not produce effects on the judicial procedure, since art. 34 TEU excludes the direct effect of the decisions and framework decisions in the fields concerning Title VI TEU. However, the Court ruled that the provisions of the framework decision must be interpreted in

[7] The Ministry of Justice from Romania has initiated a bill on the formulation by Romania of a statement under art. 35 EUT, posted for consultation on the site http://www.just.ro.

[8] Framework Decision 2002/584/JHA concerning the European arrest warrant and the extradition procedures between the member states examined in case C-303/05, the 3 of May 2007, Advocaten voor de Wereld VZW and case C-66/08, the 17 of July 2008,
Szymon Kozlowski.; Framework decision 2001/220/JHA concerning the status of the victims in the criminal matters examined in the case *Maria Pupino*, the 16 of June 2005, C-105/03,.

the sense that the national court should have the possibility to authorize preschool underage children claiming to have been victims of ill-treatments, to provide statements in such way as to guarantee an adequate protection level, for instance outside the public session and before the same. Thus, the national court is bound to interpret the whole of the national law "in the light of the letter and purpose of the framework decision in order to reach the result pursued by the same and thus to comply with article 34 §2 (b) of the EU".

In conclusion, it is shown that the "preliminary competence of the Court under art. 35 TEU would lack the essence of its useful effect if the private persons would not have the right to invoke the framework decisions in order to obtain their interpretation in compliance with the national law, before the courts of law of the member states." In the same sense, the Court specified that the "European Treaty imposes onto the states to take all effective measures to sanction the behaviors harming the interests of the Community", so as to determine the states to adopt an adequate criminal law to prevent and sanction criminality, in the process of transposing the Community law into the internal law.

1. 2. Terms of the Petition to Pronounce a Preliminary Ruling

A. The Notion of National Court

The Court of Justice of the European Communities may be vested with a petition for the pronouncement of a preliminary ruling only by a court of law from a member state of the European Union[9].

The meaning of this community notion is different from the acceptation awarded to the notion of national court in the law systems of the member states. Generally speaking, the sphere of this notion includes the established courts of law in the law systems of the member states, which enjoy this presumption in the sphere in the community law. To those, other authorities may be added provided these meet the necessary criteria to be deemed as "courts" in the acceptation of the Community law. To this effect, a jurisdictional body, according to the national law of a state, may not be considered as "court" in the community law and vice versa, a jurisdictional body under the community law, sometimes is not regulated as such in the national law.

This legal notion of national court used in the community law must be construed and applied uniformly within the Community[10], therefore the Court defined the criteria characterizing a "court" in the Goebbles case, criteria it resumed in numerous other cases. In the case of Veuve Vaasen-Goebbles, the Court was vested by an Arbitration Court of the Mining Employees Fund from the Netherlands. Under Dutch law, this body is not a court of law. Nevertheless, the Court of Justice considered that the Arbitration Court is a court within the meaning of art. 234, after finding that the same "is established under Dutch law, is a permanent body vested with mandatory competence in what concerns the certain litigations, issues de jure decrees, it is subject to a contradictory procedure, its members are appointed by the Ministry of Mining Industry and its operation regulation is approved by the competent ministers." It results that in order to assess whether the authority which vested it with a preliminary request has the character of a "court" within the meaning of art. 234 of the Treaty, the Court examined a group of elements and namely, *the legal origin of that authority, its permanent character, the mandatory character of the pronounced decrees, the contradictory*

[9] R. Kovar, La contribution de la CJCE à l'édification de l'ordre juridique communautaire, Collected courses of the Academy of European Law, IV-1, 1995.
[10] CJCE, 21 May 1977, Haegen, C-107/76, Rec., p. 957.

nature of the procedure, the application of the legal norms in settling the case as well as its independence[11].

These criteria are constantly examined by the Court and may lead to the admission of a request to issue a preliminary ruling (though it may not be regulated as such in the national law) or to the rejection as such of a request in the event of their non-performance (though it is possible that such authority be a "court" under the national law).

Under the aforementioned criteria, the Court acknowledged the capacity of jurisdictional body that may request the pronouncement of a preliminary ruling to the following authorities:

- The federal commission for the monitoring of public acquisitions in Germany[12]
- The commission for the contestation of appointments in the higher education of Sweden, competent in the matter of contestations against the decisions referring to the employment in universities and superior schools [13]
- "Immigration Adjudicator", an authority having competence in the matter of litigations concerning the entry and residence of foreigners on the territory of England[14]
- The Regional Economic and Administrative Tribunal of Catalonia, competent in the matter of economic-administrative claims [15]
- Commission for contestations in medicine, constituted by a professional body (Dutch Royal Association for medicine practice) [16]
- Commission for contestations in the matter of mandatory insurances against illnesses and invalidity in Belgium [17]
- State Council of Italy, when it issues an advice, within an administrative procedure, which represents the project of the decision to be subsequently made my the competent authority[18]

In the appreciation of the functional competence it exerts as well as of the aforementioned criteria, it was considered as "court" the judicial authority settling a case within the procedure of "référé" (procedure for the urgent settlement and decree of provisory measures, similar to the presidential ordinances from the Romanian civil law procedure).

In return, the Court of Justice ruled that the following authorities do not fulfil the capacity of jurisdictional body:

- the director of the tax service of the Duchy of Luxemburg who, in the management position of an administrative service, "shows an obvious organic connection with the services which established the contested tax and against which the contestation with which it was vested is formulated"[19]. In the case, the director of the tax service of the Duchy of Luxemburg, in the exercise of his attributions, has the capacity of jurisdictional authority under national law, yet the Court deemed as irrelevant whether this authority was or not a "court" in the internal legislation.

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[11] Contradictoriality is not an absolute criterion, see in this sense case *Dorsch*, 17.09.1997, C-54/96, p.31 and case *De Coster*, 29 nov. 2001, C-17/00, p.14.
[12] CJEC, 17.09.1997, Dorsch,C-54/9, p.23-38.
[13] CJEC, July 6, 2000, Abrahamsson & Andresson , C- 407/98, p.29-30.
[14] CJEC, March 2, 1999, Eddine El-Yasni, C- 416/96, p.17-22.
[15] CJEC, March 21, 2000, Gabalfrisa, C-110/98-C-147/98.
[16] CJEC, Oct. 6, 1981, Beoekmeulen, C-246/80, p.17
[17] CJEC, Dec 1, 1970, Union nationale des mutualités socialistes /La Marca, C- 32/70,Rec.1970, p.987.
[18] CJEC, Oct.16, 1997, Garofalo, C- 69/96, C- 79/96, , p.19, concerning the advice issued by Consiglio di Stato italiano, within the procedure of the extraordinary recourse concerning the cancellation of an administrative deed.
[19] CJEC, March 30, 1993, Corbiau, C-24/92, p.15-17.

To this effect, the Court decided that the court must be an authority with the capacity to act as a *third party* to the body that adopted the decision subject to contestation.
- The Court of Accounts *(Corte dei Conti)* of Italy, when exercising the *a posteriori* assessment and verification control of the administrative results, as within this type of activity it does not exercise a jurisdictional function, but an administrative one. The Court, examining in what conditions hybrid activity bodies – administrative and jurisdictional - are courts in the acceptation of the community law, decided that "the specific nature of the exerted function within the normative context proper to the Court vesting must be investigated"[20]. To this effect, a national body may qualify as court when it exerts jurisdictional functions, while, when exerting other functions, especially administrative, this capacity may not be recognized.

Pursuant to the examination of the exerted function within the context of the litigation attributed to the national court, the Court of justice considered that the following authorities do not have the capacity of "court":

- The Consultative Committee concerning offenses in monetary matters having advisory role within an administrative procedure and settlement of litigations[21];
- The Council of the Order of Attorneys at Law, when it is not vested with a litigation it would be legally competent to settle, but with a request for obtaining a statement concerning a member of the bar and the courts of another member state[22].

B. Facultative or mandatory referral before the Court of Justice

The legal regime of the preliminary procedure established by art. 234 ECT sets up a distinction between the national courts of law, the judgments of which are not subject to any remedy at law in the internal law and the other courts of law whose judgments can be subject to a remedy at law[23]. This distinction is not based on the position of the court in the hierarchy of the courts but on the legal regime of the passed judgment and namely, on the regulation of the exercise of a remedy at law against it.

Thus, the courts of which the decisions are not subject to a remedy at law in the internal law are basically bound to vest the Court with a preliminary request concerning the interpretation or validity of the community law. But should the court pass a judgment susceptible of being subject to a remedy at law in the internal law, the vesting becomes optional. The reason of such regulation is due to the fact that the meaning of art. 234 ECT is the unitary application of the community law, so that the risk of an erroneous application is prevented expressly only in the case of those judgments that are not subject to the judicial control. Therefore, as long there is the possibility of judgment modification through the remedy at law, the exercise of the preliminary procedure is not binding for the courts of law. Should the community law be applied erroneously, this interpretation error may be corrected by the judicial control court vested with the settlement of the remedy at law, which may decide the referral before the Court of Justice.

Any national court has freedom of decision with regard to the necessity of the interpretation of the community law and exercise of the cooperation right with the community court offered

[20] CJEC, Nov. 26, 1999, ANAS, C-192/98, p.23.
[21] CJEC, March 5, 1986, Greis Unterweger, C-318/85, Rec., p.955.
[22] CJEC, June18, 1980, Borker, C-138/80, Rec.1980, p.1975.
[23] A. BARAV, "Le renvoi préjudiciel communautaire", Justices, Revue générale de droit processuel, nº 6, 1997, p. 1; A. BARAV, "Une anomalie préjudicielle", Mélanges en hommage à Guy Isaac, 50 ans de droit communautaire, p. 773

by the preliminary procedure mechanism[24]. The national courts of law have basically the possibility of applying and interpreting themselves the community law in the cases they are vested with. But if they require an interpretation of the community law, they may exercise the right to formulate questions addressed to the Court of Justice. The decision to request the pronouncement of a preliminary ruling belongs exclusively to the national court of law, considering the responsibility of the judgment to be pronounced by the same.[25] The parties of the case are not entitled to refer such requests to the Court[26], but may make proposals before the court with reference to the formulation of such requests to the Court of Justice[27].

In certain exceptional circumstances, the Court of Justice may verify the admissibility of the preliminary ruling pronouncement requests, which it may reject when they concern identical questions to the pronounced judgment[28] or when the application of the community law does not leave room for any reasonable doubt[29]. Thus, the Procedure Regulation of the Court provides that "when a preliminarily formulated question is identical to a question on which the Court has already ruled or when the answer to such a question may be clearly deduced from the case-law, the Court, after hearing the Advocate General, may at any time pronounce by a motivated ordinance, within which makes reference to the previous judgment or the pertinent case-law."[30]

The principle of the right of option concerning the referral before the Court of Justice by the courts of law involves an *exception* in the matter of *appreciating the validity of a community act.* This exception is the creation of the case-law of the Court of Justice, by the decision pronounced in the case *Foto-Frost*.[31] According to this decision, the national courts are bound to request the pronouncement of a preliminary ruling in the case of the invalidation of the community acts. The national courts vested with finding the invalidity of a Community act, examining the invalidity reasons invoked by the parties, may decide either that the act is valid, or they may rally to the support of the parties in what concerns the claimed invalidity arguments. In the second circumstance, the national courts do not have the authority to declare as invalid the community acts as the Court of Justice, being competent to cancel a community act, holds exclusive competence also regarding its invalidation. Therefore, when they do not reject the invalidity arguments invoked by the parties, by finding their claims as unsubstantiated, the national courts are bound to invest in the Court of Justice.

The second exception to the principle of the right of option is the special legal regime of the preliminary procedure regulated by article 68 ECT under which, only the national courts whose judgments are not subject to any remedy at law in the internal law may ask the Court to judge *concerning the interpretation of Title IV EC* (referring to visas, asylum, immigration and other policies related to the free movement of persons) or the validity and interpretation of the acts adopted by the institutions of the Community. Therefore, the preliminary procedure mechanism is accessible only to the courts whose judgments are not susceptible to the exercise of an remedy at law, and the other courts are not entitled to request the interpretation of the community law. For instance, in a case concerning a request referred

[24] M. LAGRANGE, L'action préjudicielle dans le droit interne des Etats membres et dans la jurisprudence de la CJCE, RTDE 1974,268
[25] CJEC, April 21, 1984, Pardini C-338/83, Rec. 2041
[26] CJEC, December 9, 1965, Heissische Knappschaft, C-44/65, Rec., p.1191.
[27] CJEC, 22.04.1997, Eunice Sutton, C-66/95, Rec., p.I-2163.
[28] CJEC, Nov. 4, 1997, Parfums Christian Dior, C-337-95, Rec., 6013.
[29] CJEC Oct. 6, 1982, Cilfit, C-283/81, Rec., p.3415.
[30] Art. 104 pt. 3 of the Procedure Regulation of the Court of Justice ; CJEC, July 7, 1998, Societe Beton Expres, C-405/96, C-406/96, C-407/96 and C-408/96, Rec., p.4253.
[31] CJEC, Oct. 22, 1987, Foto-Frost, C-314/85, p.13-20.

under art. 234 by a German court meant to obtain, within the legal procedure, a preliminary ruling concerning the interpretation of a provision of the CE Regulation CE 539/2001[32] referring to the visa regime, the Court declined competence, as the judgment to be pronounced was susceptible to remedy in the internal law[33]. In another case[34] concerning a request addressed under art. 68 EC by the Labour Tribunal of Charleroi (Belgium) in order to obtain a decision concerning the interpretation of a regulation referring to the judicial competence, acknowledgement and execution of the civil and commercial matters judgments[35], the Court found that the judgment pronounced in the main litigation is susceptible of remedy in the internal law and, as it was vested by the court indicated in art. 68 ECT, declined competence to answer the preliminary question.

The courts pronouncing decisions that are not bound to the remedy at law must, under the provisions of art. 234 §3 ECT, vest the Court of Justice. They are bound to cooperate with the Court of Justice so as to guarantee the unitary application of the community law in all the member states of the Community. In the judicial practice of such courts (generically named "supreme" courts), the question arose to know whether the obligation is absolute or if they have the liberty of appreciating when they require an interpretation of the Court of Justice. The answer to this question is essential for the effectiveness of the unitary application mechanism of the Community law. In the judicial practice there were "supreme" courts that construed this obligation as absolute, whereas some others construed the text of art. 234 §3 ECT within the meaning that vesting is not mandatory when the community text is sufficiently clear. The first court to rule as such was the French State Council, administrative jurisdictional authority, which, in 1964, substantiated the "clear act" theory according to which, "a national court whose judgments are not susceptible to be subject to an attack was in the internal law […] is not bound to suspend the judgment in a case it is vested with and to vest CJEC […] except when there is a doubt concerning the meaning or application of one or several provisions of the Treaty, applicable to the litigation and when the solution of the case depends upon this difficulty."[36] By this judgment, pronounced in the case *Societe des petroles Shell-Berre and others,* the French State Council laid the foundations of a relative conception in the application of art. 234 ECT, appreciating that such a conception would allow the avoiding of dilatory referral before CJEC as well as the observance of the decisional power of the courts from the top of the judicial hierarchy. According to this theory, the "clear" act is "the act that creates no doubt in the reasonably enlightened spirit" and, consequently, it may be directly applied by the court of law. On this line of thinking, the "supreme" courts that are bound to vest the Court may make an exception when the Community law is sufficiently "clear" so as a suspension of the case would lack any utility. In other words, the activation of the preliminary request mechanism would depend on the clarity of the Community norm, which is at the discretion of the national court's appreciation. The case-law of the French State Council indirectly added the clarity of the Community law norm as condition concerning the incumbency of the "supreme" courts to vest the Court of Justice. The issue concerning the obligation of the courts that pronounce judgments that are not subject to any remedy at law was the object of a preliminary question in the *Cilfit* case, whereby the Supreme Court of Cassation of Italy wished to find out whether art. 177 "establishes an

[32] EC Regulation 539/2001 of the Council from march 15, 2001, establishing the list of third countries whose nationals are bound to request visa for the crossing of the national border of the member states and of the list of those exempt from this obligation

[33] CJEC, 31.03.2004, Criminal law procedure / Nicoleta Maria Georgescu, C-51/03, p.32.

[34] CJEC, 10.06.2004, Magali Warbecq / Ryanair Ltd., C-555/03, p.14,15.

[35] EC Regulation CE 44/2001 of the Council from December 22, 2000.

[36] Conseil d'Etat de la Republique Francaise, Decision from June 19, 1964, Societe des petroles Shell-Berre and others; Decision from March 1, 1968, Sindicat general des fabricants de semoule de France, www.conseil-etat/fr. By the application of this conception, the State Council addressed between 1964-1974 to CJEC only one request for the pronouncement of a preliminary ruling.

obligation for referral to the Court of the Communities which no longer allows the court to appreciate on the ground of the addressed question or subordinates – and within which limits – this obligation of the preliminary existence of a reasonable doubt concerning the interpretation"[37]. The Court of Justice replied that the courts of the member states of which the decisions may not be subject to any internal remedy at law in the internal law must "fulfil the obligation to notify the Court of Justice, except when it is found that the addressed question is not pertinent or that the Community provision in the case was already subject to an interpretation of the Court or that the correct application of the Community law is obviously mandatory that there is no room for any reasonable doubt; the existence of such possibility must be evaluated in relation to the own characteristics of the Community law, to the specific difficulties its interpretation presents and of the risk of case-law divergences within the Community".

By the *Cilfit* case-law, the Court of Justice defined the application sphere of the obligation and the exceptions concerning the referral before the Court of Justice by the courts pronouncing judgments that are not subject to any remedy at law. Thus, the vesting obligation does not operated in the following 3 circumstances: the formulated question is identical to a question that was already subject to a similar preliminary ruling; there already exists a prior case-law that construes that community law judgment and the application of the community is obviously necessary (indirect acknowledgement of the clear act theory), on condition that the court be convinced that the same evidence would impose on other courts from the other member states, as well as to the Court of Justice. The fulfilment of these conditions assumes that the court of law knows all legal systems of the other member states of the Community "in order to have the conviction that the peer courts in their whole would confirm the correct application of the community law[38]". In conclusion, the mitigation of the obligation of the supreme courts to vest the Court operates, essentially, if the Court *previously interpreted the community decision in the case*, with the purpose of avoiding the *non-uniform interpretation* of the community law within the Community.

The principle of the obligation to vest the Court by the courts pronouncing judgments that are not subject to the remedy at law involve an exception referring to the supreme courts form the member states who did not make *an acceptance statement* of the Court's competence preliminarily judge with reference to the interpretation of title VI EU (police and judicial cooperation in criminal matters)[39]. These courts are not bound to make requests as their competence to request a preliminary ruling was not recognized in the application of art. 35 TEU. It is to be specified that the state may reserve this faculty only to the courts whose judgments are not susceptible for the exercise of a remedy at law.

To conclude with, within the procedure regulated by art. 234 ECT, the difficulty of the national courts is to decide whether they can answer alone to an issue concerning the interpretation of the community law or that they should vest the Court of Justice. That is why, the referral before the Court of Justice – especially by the courts pronouncing definitive judgments, bound to ensure the uniformity of law application – must be considered as a was to expose arguments in favour of law interpretation towards which that national court tends. Should such court not vest the Court, eventually applying the clear act theory, another court shall, and its arguments may come against the national court that chose not to refer to the Court of Justice. From this perspective, the national courts, knowing the case-law of the Court of Justice, may influence by their opinions the future orientation of the same.

[37] CJEC, 6 oct. 1982, SRL Cilfit and Lanificio di Gavardo SPA, C-283/81, p.3
[38] CJEC, Dec. 6, 2005, Gaston Schul Douane, C-461/03, p.49.
[39] Art. 35 §2 and 3 EUT

C. Formulation of the preliminary ruling request

The principle of the procedure autonomy leads to the application of the procedure norms by the national law in the matter of the elaboration and motivation of the preliminary rulings' requests. Thus, a preliminary ruling request referred before the Court of Justice by a national court, may take any procedural form provided in the matter of procedural incidents in the trial law of the sending court's state[40].

The preliminary ruling request is the only instrument recorded in the case file that is submitted to the parties from the national litigation[41], the EU member states, the European Commission and, eventually, to the Council, who have the possibility to make written or oral observations. That is why the court must formulate as fully as possible the request application, by the succinct presentation of the case data, de facto and de jure applicable circumstances in the case[42], as well as the reasons determining the same to request the pronouncement of a preliminary ruling.[43]

The Court's Case-law constantly specified that "the necessity to accomplish the interpretation of the Community law that may be useful to the national court imposes that the same define the de facto and de jure framework where the questions it formulates should integrate or at least to try and explain the hypothesis onto which the formulated questions are substantiated"[44] The conditions such a preliminary ruling request should meet are presented in the Information Note concerning the formulation of the preliminary ruling requests by the national courtal bodies[45], according to which the formulation must:

- comprise a succinct recital of the litigation's object, as well as of the pertinent deeds, such as they have been found or, at least to present the de facto hypothesis underlying the formulated questions;
- to render the content of the internal law provisions susceptible of being applied in the case and to identify, in required, the pertinent national case-law, indicating each time the exact identification elements (for instance, the official gazette page or of a certain case-law collection, and eventually, references to internet sites);
- to identify with sufficient precision the Community law provisions relevant in the case;
- to explain the reasons determining the national court to formulate the questions concerning the interpretation of validity of certain Community provisions[46], as well as the connection between these provisions and the national law applicable to the main litigation;
- to contain, if required, the résumé of the essential arguments of the parties.

The question or questions referred by the national court should be highlighted in a distinct and clearly individualized part of the request decision, usually in the beginning or the end of the same. They must be intelligible without making reference to the recital of reasons of the request, but it shall offer the necessary context for an adequate judgment[47].

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[40] CJEC, March 19, 1964, Unger, C-75/63, Rec., p.349.
[41] CJEC, Jan. 30, 1997, Wiljo/Belgische Staat, C-178/95, Rec. p. 585; CJEC March 20, 1997, Phytheron Int./Bourdon, C-352/95, Rec. p. 1729.
[42] CJEC, Jan. 26, 1993, Telemarsicabruyyo, C-320/90, p.6-10.
[43]CJEC, March 10, 1981, Irish Creamery Milk Suppliers Association, C- 36/80 and 71/80, Rec. p. 735, p. 6.
[44] CJEC, Jul. 14, 1998, Safety Hi-Tech, C-284/95, p.69; CJEC, Apr. 11, 2000, Mme Deliege, C-51/96 and C-191/97, Rec. I 2549, p.30.
[45] Information Note, webpage web: http://curia.europa.eu/ro/
[46] CJEC, Dec. 16, 1981, Foglia Novelo, C-244/80, p.17; CJEC, Apr. 1, 1982, Holdijk, C-141/81, p.6.
[47] Information Note, webpage: http://curia.europa.eu/ro/

Considering the aforementioned, the Court may judge as inadmissible those preliminary ruling requests that do not meet these exigencies[48]. In special situations, the questions addressed to the Court of Justice by the national courts may be reformulated[49], they may be complete[50] or may event receive an interpretation of the Community law that the national court did not request[51].

In what concerns the *process stage* when the preliminary ruling request may be formulated, the competence of its ascertainment belongs exclusively to the national court, that may decide to refer the same before the Court in any stage[52] of the case trial. In the Information Note published on the website of the Court of Justice[53] it is shown that the court "may refer before the Court the preliminary ruling request as soon as it finds that in order to solve the litigation it was referred to, a decision is required to establish on the interpretation or validity of the Community law: the national courtal body is the most entitled to ascertain in what stage of the procedure is best to formulate such requests. Nevertheless, it is recommended that the referral request intervene in a stage of the procedure when the national judge is able to define the de facto and de jure framework of the formulated questions, so that the Court may possess all the necessary elements to verify, if required, the applicability of the Community law in the main litigation. For a good justice administration, it may be useful that the preliminary ruling request should be formulated only pursuant a contradictory debate of the parties on this aspect." Therefore, it is desirable that the trial stage be sufficiently advanced for the de facto and de jure circumstance in the context of which the national court is called to judge upon be clearly determined, an aspect to which parties may significantly contribute. Generally speaking, the national courts of many European states request the parties to express their point of view (Spain, Germany, Sweden, Luxemburg, Greece, Netherlands, France, Belgium et al.), without this being a unanimous rule (Austria). There are also states (Ireland, England, Scotland, and Denmark) where the parties play a very important role in the formulation of the questions, to such an extent that the role of the court is limited to record what the parties agreed[54].

In the case-law of the Court it was specified that it may be useful that the national court settled first those aspects belonging to the internal law that are independent of the Community law whose interpretation is requested[55].

It is also important to specify that art. 104 §5 of the Regulation entitles the Court to request supplementary information from the national court that addressed the preliminary ruling request.

1. 3. Object of the preliminary ruling pronouncement request

The judicial order of the European Communities is made of the assembly of the norms governing the relations established by them, as international law subjects, with the member states, third party states, and international organizations and, in certain situations, with the

[48] Art. 92 and 103 of the Regulation; CJEC, ord. March 19, 1993, Banchero, C-157/92, Rec. I 1085, p.7; CJEC, ord. Apr. 26, 1993, Monin automobiles, C-386/92, p.9; CJEC, ord. June 30, 1997, Banco de Fomento e Exterior, C-66/97, p.19; CJEC ord. Oct. 8, 2002, Viacom, C-190/02, Rec. I 8287, p.26.
[49] CJEC, Nov. 23, 1977, Enka, C-38/77, Rec., p.2203
[50] CJEC, May 12, 1964, Wagner, C-101/63, Rec., p.397.
[51] CJEC, 25 febr. 1999, Carbonari, C-131/97, Rec. 1999, p.1103.
[52] CJEC, 19.11.1998, Berit Hoj Perdersen, C-66/96, Rec. 1998 I p. 7327.
[53] Information note concerning the preliminary requests by the national courts.
[54] Rapport sur le theme du colloque « Le renvoi prejudicial a la Cour de Justice des Communautes Europeennes », 2002, p. 4.9. www.juradmin.eu/colloquia/2002/gen_report_fr.pdf
[55] CJEC, March 10, 1981, Irish Creamery Milk Suppliers Association, C-36/80 şi 71/80, Rec., p. 735.

member states' private persons. Within the Community judicial order there are two categories of legal norms, and namely: legal norms with fundamental, constitutional value[56] and legal norms having the value of ordinary laws, elaborated by the Community institutions in their existence and operation.

Under art. 234 ECT, in its current wording, the Court of Justice is competent to preliminarily rule with concern to:

- Treaty interpretation;
- Validity and interpretation of the acts adopted by the Community institutions and the European Central Bank (ECB);
- The interpretation of the statutes of the bodies created by an act of the Council, should those statutes provide the same.

Consequently, under the provisions of the mentioned article, the object of a request for preliminary ruling may be:

a) *interpretation* of the Community treaties, of the Community institutions' acts, of the European Central Bank acts as well as, under certain conditions, of the statutes of the bodies created by an act of the Council;
b) *validity* of the acts adopted by the Community institutions and the European Central Bank.

Further on, we shall first analyze the Community norms subject to interpretation and, subsequently, the acts which may constitute the object of a preliminary ruling request to ascertain their validity. The analysis is based on the structure established in the specialty literature, especially the one presented by Professor Joël Rideau[57].

A. Interpretation of the Community law

a) Community treaties

The request for interpretation may concern both the constitutive treaties (Treaties of Rome[58], from 1957, entered into force in 1958), as well as the acts[59] and the modifying treaties[60]. Moreover, the protocols and attachments of the constitutive and modifying treaties are integrant part of them, which means that they texts may also be subject to interpretation.

Despite all these, the new title IV, "Visas, asylum, immigration and other policies concerning the free movement of persons", integrated into the European Community Treaty, is subject to the competencies of the Court under the derogatory provisions, vis-à-vis the Community legal paths[61]. Under art. 68, article 234, Title VI is applied under the following circumstances and conditions: "when a matter in invoked with regard to the title hereto or the validity and interpretation of the acts adopted by the Community institutions under the title hereto, in a pending case on the role of a national court of law whose decisions are not subject to any remedy at law in the internal law, should it deem necessary a decision to be pronounced to

[56] It is about the constitutive and modifying treaties.
[57] Joël Rideau, *"Droit institutionnel de l'Union et des Communautés européennes"*, 3rd edition, L.G.D.J, 1999, page 840-848.
[58] Until 2002, we also had the Treaty of Paris, (1951), which came in force in 1952. It was concluded for a period of 50 years, so at present it no longer produces effects.
[59] As an example, we mention: the Protocol on the privileges and immunities of the European Communities of the 8th of April 1965, which came in force in August 1967; the Council Decision of 21 April 1970 on the Communities' own resources, entered in force on the 1st of January 1971.
[60] Single European Act (1986/1987); Treaty of Maastricht (1992/1993); Treaty of Amsterdam (1997/1999); Treaty of Nice (2001/2003).
[61] Art. 68 ECT.

this effect, it requests the Court of Justice to rule about that matter". Paragraph 2 of art. 68 nevertheless limits the competence of the Court in the matter, specifying that: "Under no circumstance is the Court of Justice competent to rule with regard to the decisions made under article 62, point 1, referring to the maintenance of public order the internal security defence".

From the economy of the Treaty one may notice that it does not contain any provision concerning the Court's competence to give a preliminary ruling for the 2nd pillar – external policy and common security (EPCS).

As to Title VII, which concerns the consolidated cooperation, the Court is competent to rule under the conditions established by art. 11 ECT and 40, par. 4 TEU (referral to the Community law paths).

Under the provisions of the Treaty of Amsterdam, the Court's competence extends to art. 6 par. 2[62] TEU, article that envisages the protection of the fundamental rights. One must notice yet, that there is envisaged only the "action of the institutions, to the extent of the Court's competence in the virtue of the treaties establishing the European Community and the Treaty hereto".

Finally, we may conclude that, under the Treaty of Amsterdam, the procedure provided by art. 234 ECT is fully applicable for:

- Establishing treaties, except title IV ECT concerning the derogatory procedure;
- title VII of TEU concerning the consolidated cooperation;
- art. 6, §1 of TEU;
- Final provisions of TEU;
- Provisions concerning the simplification and protocols regarding privileges and immunities.

→ Treaty of Nice does not bring fundamental modifications concerning art. 234, so that they are incident to the provisions of the Treaty of Amsterdam.

b) Community institutions' acts

As to the "acts adopted by the Community institutions and by the European Central Bank"[63], the Court is competent to pronounce by a single preliminary ruling in the interpretation. By acts of the Community institutions one understands the acts provided in the Treaties (regulation, directive, decision), as well as the acts not recorded in the Treaties (also known as *atypical acts*). With reference to the last category, we mention the ruling of the CJEC from October 24, 1973[64]. In the case *Finanzgericht von Baden-Württemberg* requested the CJEC, under art. 177 ECT to give a preliminary ruling concerning the interpretation of two regulations (one of the Council, the other of the Commission), of some EEC Treaty articles but also concerning the interpretation of the Council's Resolution and of the member states' representatives from March 22, 1971, concerning the establishment, on stages establishment, on stages, of the Economic and Monetary Union in the Community. Thus, according to the Court, "article 103 does not exclude the competence of the Community institutions to adopt, without prejudicing other procedures provided by the treaties, conjectural measures required to maintain the objectives of the treaties. The Council, is the one that chooses, as required, the most fit form of the measure it deems"[65]. Thus, the Community court offered the national court the requested interpretation.

[62] Former art. F, §2.
[63] This last reference was added by the Treaty on European Union.
[64] CJEC, October 24, 1973, *Schlüter/Hauptzollamt Loerrach*, C-9/73.
[65] Unofficial translation, C-9/73, precited, point 2 of the Summary.

Under the CJEC case-law, its competence to interpret the acts of the Community institutions is not conditioned nor subordinated to the direct effect[66] of the Community acts, nor to their mandatory nature[67]. To this effect, we mention the judgment *Impresa Construzioni comm. Quirino Mazzalaï del Renom*.[68], where it is specified that "within the terms of art. 177, the Court is competent to establish, preliminarily, on the interpretation of the acts adopted by the Community institutions, independent of the fact that they are directly applicable or not. It is not the Court that is supposed to appreciate the pertinence of the questions addressed under art. 177, which is founded on a clear separation of the competences, leaving the national courts the power to decide if, for the pronouncement of the judgment within the litigations referred before them, it is necessary to call for the pre-judicial procedure"[69]. As to the mandatory or optional character of the Community acts, CJEC, in the judgment *Frecassetti/Amministrazione delle Finanze dello Stato*[70], interpreted the provisions comprised in a document without legal force, specifying that the "recommendation[71] of the Commission, from May 25, 1962, concerning the date of considering the calculation of the customs duties applicable to the merchandise declared as being for consumption, cannot be applicable to samplings"[72].

It must be underlined that the acts of the European Parliament may also be interpreted, although the Court was never directly notified with the interpretation request of such an act. Nevertheless, the Court indirectly ruled with concerned to such an act. Within this meaning, the decisions between 1980[73] and 1985[74] are to be considered. According to the first judgment, "the member states which are, under the present Community law, entitled to impose contingent revenues established by the members of the European Parliament in the exercise of their mandate, must comply with the limits imposed onto them, especially by art. 5 of the EEC Treaty, according to which, the obligation consists in the duty of not adopting measures susceptible to prevent the internal operation of the community institutions and by art. 8, section 1 from the Protocol regarding the privileges and immunities of the European Communities (…). The national authorities are also bound to comply with the decision adopted by the Parliament within the internal organization measures, according to which they must disburse its members on a lump sum basis, the lodging and travel expenses"[75].

In the second decision, CJEC specifies the following: "in the application of art. 10 of the Protocol from April 8, 1965 regarding the privileges and immunities of the European Communities, according to which the members of the European Parliament benefit throughout the sessions of the assembly, on the national territory, of the immunities acknowledged to the parliament members from their country, the duration of the European Parliament sessions should be appreciated only in the light of the Community law. Thus, any reference to a national law to interpret the notion of European parliament session is incompatible not only with the text of the Protocol but also with the very object of such judgment, which attempts at ensuring the immunity on an equal duration for all deputies,

[66] The direct effect consists in the possibility that certain Community acts have (especially the regulation and decision, and under certain circumstances the directive) to give birth to rights and obligations committed to the natural and legal persons from the member states of the EU.
[67] Mandatory acts are the regulation, directive and decision.
[68] Decision from May 20, 1975, *Impresa Construzioni comm. Quirino Mazzalaï del Renom.*, C-111/75.
[69] Unofficial translation.
[70] CJEC Decision from May 15, 1976, *Frecassetti/Amministrazione delle Finanze dello Stato*, C-113/75.
[71] Our remark.
[72] Unofficial translation.
[73] CJEC Decision, of September 15,1981, *Lord Bruce of Donington/Aspden*, C-208/80.
[74] CJEC Decision, of July 10, 1986, *Wybot/Faure*, C-149/85.
[75] Unofficial translation.

regardless of their citizenship. If, under art. 22, §1 of the ECCS, of art. 139 §1 of the EEC Treaty and art. 109 §1 of the ECAE, such as amended by the Merger Treaty, the European Parliament has an annual session and is duly summoned in the second Tuesday of the month of March, no other provision concerning the duration of this session should not be taken off, even indirectly, from other provisions of the Treaties. Thus, the duration of the session is fixed by the European Parliament through the internal organization Regulation"[76].

Considering the CJEC case-law and the "generality" of the provision of article 234 of ECT, one may conclude that the Community court may also interpret these documents. Moreover, the Court is competent to interpret the acts adopted b y the Parliament and Court within the co-ruling procedure.

In what concerns the acts issued by the Accounts Court, they may also be interpreted, as the "Accounts Court was raised to the rank of institution by the Treaty on European Union (...), although at first sight, it seems that this eventuality is less likely vis-à-vis the nature of its acts"[77].

The acts of the Economic and Social Committee, of the Committee of the Regions, as well as of the European Bank of Investments, which are not strictu sensu Community Institutions, may still be subject to a preliminary interpretation. An extensive interpretation remains yet possible[78].

The same applies for the decisions of the European Council, despite its institutional consecration by the Unique European Act, then by the Treaty on European Union. As an argument, we mention that the Community court, in the Ordinance from 1995[79], confirmed the refusal of the Court of First Instance to control the legality of the acts of the European Council.

c) General principles of law

The general principles of law, applicable in the Community legal order, may be interpreted by the Court. But the Community court cannot offer a national court the interpretation elements required for the assessment by the latter of the compliance of a national text with the fundamental rights. Within this meaning is also the CJEC case-law. Thus, in the judgment from May 29, 1997[80], it is specified: "the Court, being preliminarily notified, cannot offer the interpretation elements required for the assessment by the national court, of the compliance of a national regulation with the fundamental rights whose observance the same must provide, such as results, especially from the European Convention of Human Rights, as it targets a situation that does belong to the application sphere of the Community law. Thus, the provisions of the national law that are not meant to ensure the observance of the Community law regulations target a situation that does not enter the application sphere of the Community law, even if an imprisonment punishment, enforced by virtue of these national provisions, prevent the exercise, by the interested party, of the free circulation right. The purely hypothetical perspective of such an exercise does not constitute a sufficient connection with the Community law to justify the application of its provisions"[81].

[76] Unofficial translation.
[77] Joël Rideau, op. cit., page 842.
[78] Idem.
[79] CJEC Ordinance, January 13, 1995, *Roujonsky*, C-235/94 P.
[80] CJEC Decision, May 29, 1997, *Kremzow/Autriche*, C-299/95.
[81] Unofficial translation.

d) The Decisions of the CJCE

"The procedure provided at art. 40[82] from the Statute of the Court of Justice cannot be used for the preliminary rulings by the parties in front of the national judge"[83], an aspect highlighted also by the Court in the Ordinance from May 16, 1968, in the case *Firma Kurt A. Becher/Hauptzollamt München-Landsbergerstrasse*[84]. In the case, the Becher Company requested the Court, invoking art. 67 of the Procedure Regulation, "to amend the judgment of the Court from April 4, 1968". Becher company also added that it substantiates its request on art. 40 of the Protocol to the Statute of the Court of Justice of the EEC. Despite all these, CJEC deemed that art. 40 of the Statute may be applicable in the matter of preliminary rulings, but not by the parties of the main action. Within the same meaning was the reply given by the Ordinance from October 18, 1979, in the case Sirena/Eda[85]. Thus, the Court specified the following: "Art. 177 of the EEC Treaty consecrates a direct cooperation between the Court of Justice and the national courts within the terms of a non contentious procedure, eliminating any initiative of the parties in the case and during which they are only invited to present observations within the legal framework established by the sending court. If, within the limits established by art. 177, only the national courts have the possibility to submit the prejudicial referral, so do these jurisdictions have the possibility to estimate whether the offered interpretation is sufficiently clear. Thus, the parties cannot stand on the provisions of art. 40 of the Court's Statute (…) to request the interpretation of the judgments pronounced under art. 177"[86].
According to Professor Joël Rideau, "the judgments of the Court may be the object of a preliminary interpretation. For the preliminary rulings, the interpretation will be requested either by the jurisdictions referred by with the case or by others. The questions may also concern, the rulings given within other procedures (for instance, for assessing the default of the obligations committed by the member states[87])"[88].

e) International agreements

Under a constant case-law, the Court considered that the agreements entered into by the European Communities, mixed or not, must be assimilated by the institutions of Communities in order to thus implement them in the application scope of art. 234 ECT, §1, letter b). Some authors[89] consider, however, that this assimilation is useless in order to justify the competence of the Court, as it may rely upon art. 220 ECT[90] which defines the mission of the Court under the Treaty. Based on the acknowledged competence for interpreting the international

[82] "*Member states and Community institutions may intervene in the litigations referred to the Court.*
Any person proving to have an interest in the settlement of the litigation referred to the Court has the sane right, except for the litigations between member states, between the institutions of the Community or between the member states on one hand, and the Communities institutions, on the other hand.
Without harming the provisions of the second paragraph, the states party to the Agreement concerning the European Economic Space, others than the member states, as well as the Monitoring Authority of EFTA mentioned by that agreement may intervene in the litigations referred to the Court should they refer to one of the application fields of this agreement.
The conclusions of the intervention request may have as object only the support of one party's conclusions".
[83] Joël Rideau, op. cit., page 843.
[84] C-13/67.
[85] C-40/70 P.
[86] Unofficial translation.
[87] Within this meaning, see the CJEC decisions from December 14, 1982, *Proc. Rép. c./Waterkeyn*, C-314/81, C-316/81 and C-83/82.
[88] Joël Rideau, *op. cit.*, page 843.
[89] Joël Rideau, *op. cit.*, page 843.
[90] Former art. 164.

agreements, the Court also interprets the acts adopted by the bodies established by certain agreements that the Community entered into[91].

The Agreements entered into by the Communities. With regard to the interpretation of the agreements entered by the Communities, the Court ruled, for the first time, as to its competence to interpret in the case Haegeman II[92]. Thus, the Court declared that the association agreement with Greece "was entered by the Council, under art. 228[93] and 238[94] of the Treaty" and that it constituted "henceforth, in what concerns the Community, an act adopted by an institution of the Community, within the meaning of art. 177 §1, letter b), and that its provisions form, since their entering into force, an integrant part of the Community legal order". Therefore, under this judgment, the Court acknowledged its competence to interpret this agreement.

In other cases, the Community court added a reasoned justification on the necessity to ensure a uniform application of the agreements, from the perspective of Community law – national law and of the tight connection with the prejudicial procedure. In the *Hauptzollamt Mainz/Kupferberg*[95] judgment, the Court specified as follows:

"1. The necessary measures to apply the provisions of an Agreement entered into by the Community depend on both the Community institutions and the member states, under the provisions of the current provisions of the Community law, in the fields that make the object of the agreement. The same holds true for the free trade agreements whose contractual obligations extend over several fields having a very different character.

2. Under art. 228 §2 of the Treaty, member states are bound, by international agreements, to the same extent, as the Community institutions, so that they must ensure the observance of the obligations assumed by such an agreement. Thus, the provisions within this agreement are integrant part of the Community judicial order"[96].

The court interpreted, in time, also the mixed agreements[97] without expressly mentioning whether this competence extends over all the agreements or is limited only to the provisions entering the sphere of the Community competencies[98]. But, professor Joël Rideau's opinion must be retained, which considers that the "simple fact that the provisions interpreted in these cause envisage fields that certainly enter the Community competence, does not allow us to infer the implicit interpretation competence that extends over all the provisions of the mixed agreements "[99]. For instance, the Court interpreted the provisions of the Lomé Convention from 1975 concerning the freedom of establishment, without ruling on their Community character[100].

[91] According to Joël Rideau.
[92] CJEC of April 30, 1974, *Haegeman c./Etat Belge*, C-181/73.
[93] Current art. 300.
[94] Current art. 310.
[95] CJEC decision from October 26, 1982, *Hauptzollamt Mainz/Kupferberg*, C-104/81.
[96] Unofficial translation.
[97] Agreements entered by the European Communities and the member states, on the one hand, and a third party state on the other hand.
[98] CJEC Decision from February 5, 1976, *Conceria Daniele Bresciani c./ Amministrazione italiana delle finanze*, C-87/75.
[99] Joël Rideau, *op. cit.*, page 844.
[100] see CJEC Decision, from November 24, 1977, *Razanatsimba*, C-65/77.

In the *Demirel*[101] case, with regard to the association agreement Community-Turkey, the Court reminded the fact that an agreement entered by the Council is an act adopted through a Community's institution. The Court found that, vis-à-vis the nature of the association agreement, "it creates special bonds and privileges with a third party state, which should, at least partially, participate to the Community regime; art. 238 ECT must necessarily grant the Community competence to ensure the fulfilment of all the commitments towards the third party states in all the fields covered by the Treaty"[102].

The *Demirel* is therefore limited to ascertain the competence of the Court to interpret the Community provisions from a mixed agreement. The Court's competence to interpret the whole of the agreement may be justified, according of the logics of the Community jurisdiction in the field, by the fact that the entered agreement is assimilated to an act of the institutions has, and that, the entering by the Council has (bears) force on the entire agreement. "This thesis may risk the occurrence of an interpretation conflict between the Court and the national authorities. The application of interpretation competencies distribution between the national authorities and the Court would prove nevertheless delicate, considering the difficulties to establish a connection between the national or Community competencies and might create the risk of a discrepancy in the application of the mixed agreement"[103].

Identical solutions to those offered by the *Demirel* judgment are applied in the decisions made by the Councils instituted by association agreements[104]. In a decision from 1998, the Court ascertained the competence to interpret the TRIPs[105] agreement.

The agreements entered by the member states that bind the Community. Analysing the older case-law of the Court, the one concerning the Court, the one concerning the GATT, and especially in the case *International Fruit Company III*[106], one may see from the very beginning that the Court interpreted the agreements entered by the member states with the third party states.

Subsequently, the Court reaffirmed its competence by offering replies to the preliminary questions asked in cases that did not concern the validity of a Community act but its interpretation. Thus, in the reunited cases C-267/81 la C-269/81[107], the Court mentioned:

> "1. The effect of the substitution of the Community to the General Agreement concerning the tariffs and trade intervened on July 1, 1968, pursuant to the entering into force of the common customs tariff. Thus, at this time, prior the completion of the transition period, the Community assumes all of its attributions in the field of the application of the General Agreement.
> 2. The Community, substituting to the member states with regard to the fulfilment of the obligations provided in GATT, which entered into force on July 1, 1968, date of application of the CCT, the provisions within the agreement hereto being hereinafter subject to the interpretation of the Court under art. 177 of the Treaty.
> 3. The tariff protocols from July 16, 1962 and June 30, 1967, entered by the Community within GATT constitute acts adopted by the Community institutions

[101] CJEC Decision from September 30, 1987, *Demirel c./Ville de Schwäbisch Gmünd*, C-12/86.
[102] Unofficial translation.
[103] Joël Rideau, *op. cit.*, page 845.
[104] For example, CJEC Decision from September 20, 1990, *Sevince c./Staatsecretaris van Justitie*, C-192/89.
[105] CJEC Decision from June 16, 1998, *Hermés International c./FHT Marketing Choice BV*, C-53/96.
[106] CJEC, Decision from December 12, 1972, *International Fruit CO. et a.c./Produktschap voor Groeten en Fruit*, reunited cases C-21/72 la C-24/72
[107] CJEC Decision of March 16, 1983, *Admin. des Fin. C./SPI et SAMI*, reunited cases C-267/81 to C-269/81.

within the meaning of art. 177, §1, letter B9 of the Treaty, thus entering in the prejudicial competence attributed to CJEC"[108].

Acts adopted by the bodies created by certain international agreements. As mentioned above, under the acknowledged competence for the interpretation of the international agreements, the Court also interprets the acts adopted by the bodies established by certain agreements entered into by the Community. But the Court interprets only those acts that are deemed to be integrant part of the Community judicial order, i.e. only to the extent that these acts have a direct connection to the agreements they enforce. Thus, the Court exercises its interpretation competency regarding the judgments adopted by the councils established by the association agreements. As an example, we mention the CJEC Decision from September 20, 1990[109], wherein the court from Luxemburg specified that "the provisions established for the application of an association agreement entered into by the Community and a third party state, the association Council established by that agreement is integrant part of the Community judicial order since the date of their entering into force, so that the Court is competent to rule under art. 177 of the Treaty"[110].
In the judgment *Deutsche Shell AG,* the Court acknowledged its competence to interpret the acts of the mixed transit committee between EEC and the EFTA[111].

f) The statutes of the bodies established by an act of the Council or of other bodies

It is not excluded that these statutes may also be subject to a preliminary request for interpretation.

g) Interpretation of the conventions entered between the member states

As a rule, the conventions entered between the member states may not be subject to a preliminary ruling under art. 234 ECT. Moreover, an agreement entered between certain member states may not be interpreted by the Court.

h) References to the Community norms by the national law or contractual provision

The purpose of the interpretation made by the Court under art. 234 ECT is to ensure a consistent interpretation of the Community law. The same is possible even when the Community law is applicable pursuant to an internal regulation of the member state. In this sense, we mention the CJEC judgment *Dzodi*[112]. According to the same, "should the Community law become applicable under the provisions of the national law, only the national judge is the one to ascertain the necessity of applying the Community law. If the same considers relevant the application of a Community judgment to the internal situation underlying the referred litigation, the national judge may notice the Court with preliminary questions under the conditions provided by art. 177. Nevertheless, the competence of the Court is limited only to the interpretation of the Community law. The Court may not consider the general economy of the provisions of the internal law that made possible the application of the Community law"[113]. Within the same context there is the judgment of July 17, 1997[114].

[108] Unofficial translation.
[109] Decision S.*Z. Sevince c./Staatsecretaris van Justitie,* C-192/89.
[110] Unofficial translation.
[111] CJEC Judgment from din January 21, 1993, *Deutsche Shell AG ./Hauptzollamt Hamburg-Harburg,* C-188/91.
[112] CJEC Judgment from October 18, 1990, C-297/88.
[113] Unofficial translation.
[114]CJEC Judgment of July 17, 1997, *Leur-Bloem c./Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2*, C-28/95.

The Court is competent to answer a preliminary question, even when it occurred in a litigation where a contractual provision would refer to the content of the Community norms in order to determine the extent to which the financial responsibility of one of the parties may be committed, considering the existence of an obvious interest of the Community legal order. In this situation, the Court is competent only in the interpretation of the Community provisions, being unable to offer an answer concerning the general economy of the agreement or the provisions of the internal law that may determine the force of the contractual obligations. In this situation, only the national judge is the one who can take into consideration the limits that the internal law and the agreement may lead to the application of the Community law[115].

B. Validity of the Community acts

In what concerns the ascertainment of the derived law validity, we remind that article 234 ECT provides that the European court is competent to preliminarily rule on the "*validity of the acts adopted by the Community institutions and the ECB*[116]".

The preliminary request concerning the validity of a Community act represents a means of control of the Community acts legality, whereby "the observance of the legal norms hierarchy is enforced"[117]. Thus, the Court performs an external and internal legality control of the Community acts, similar to the one performed by the action in cancellation[118]. According to the CJEC[119], the national courts may examine themselves the validity of the Community acts, but are not competent to ascertain their validity. In other words, if the national courts consider that the arguments within the meaning of illegality are not substantiated, they may decide that the Community act is legal and shall apply the same in the case. But should the courts find the act illegal, they do not have the competence to declare its invalidity, being bound to notify the Court of Justice.

In what concerns the Community acts that may be the objet of a preliminary request in ascertaining the validity, in the *Grimaldi*[120] judgment the Court demonstrated that "art. 177 awards the Court the competence to issue preliminary rulings with regard to the validity and interpretation of the acts adopted by the Community institutions, without exception", thus including the recommendations. Thus, we may retain that the Community court can control the validity of all the acts provided by article[121] ECT. Moreover, the Court specified, in advice no. 1/75, that the international agreements the Community is part of may be subject to a preliminary request for the ascertainment of the validity. Furthermore, the validity of the European Parliament acts may also be controlled. One must notice that the ascertainment of the validity of the establishing validity and of the modifying acts cannot be requested. Likewise, the validity of the judgments of the Court of Justice may not be requested as they are vested with *res judicata* authority. Nor the judgments of the Court of First Instance may be subject to the verification of validity[122].

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[115] Within this meaning, see CJEC judgment of June 25, 1992, *Federconsorzi c./AIMA*, C-88/91.
[116] European Central Bank.
[117] Viorel Marcu, Nicoleta Diaconu, "*General Community Law. Treaty "*, Lumina Lex Publishing House, Bucharest, 2002, page 271.
[118] Ovidiu Ţincă, "*General Community Law"*, Editura Didactică şi Pedagogică, Bucharest, 1999, page 359.
[119] CJEC Judgment of July 18, 2007, *Ministero dell´Industria, del Commercio e dell´Artigianato c./Lucchini SpA*, C-119/05 , pct. 55.
[120] CJEC Judgment of December 13, 1989, C-322/88.
[121] Former article 189: "*For the fulfilment of their mission, under the circumstances provided by this treaty, the European Parliament, jointly with the Council and the Commission, adopt regulations and directives, make decisions and formulate recommendations or advices*".
[122] They may be attacked by a remedy at law before the CEJEC.

It must be mentioned that in the ascertainment of the Community acts' validity, the Community court considered that the creation of a legality control was necessary, assimilating in this case, validity with legality. The legality control of the Community act in the case is done both formally and materially. In the opinion of professor Guy Isaac[123], the remedy in ascertaining the validity presents itself as a complement of the action for cancellation and the illegality exception, becoming thus an important instrument in defending the interests of the private persons. Within this meaning, we refer, as an example, to the case of the regulations of which the validity may be verified by the Court, also at the request of a private person, through the national court. But the private persons cannot initiate action for cancellation whose object is a regulation, as only the privileged parties, namely the Commission, the Council, the Parlament and the member states, hold the active trial legitimacy in this circumstance.

If the Court of Luxemburg ruled that a Community act is not valid, the same shall not be declared as null and void, continuing to subsist, as it can be deprived it of its effect only by the institution that adopted it. However, the national judge shall not apply that norm in settling a trial.

1.4. Settlement procedure of the preliminary ruling request by the Court of Justice

A. Ordinary procedure

The procedure before the Court of Justice differs from the trial procedure before certain national supreme courts by two elements, namely:

- the procedure before the Court of Justice is regulated by legal norms, expressly provided either in Treaties or in the Statute of the Court of Justice[124] (art. 23), or in its Procedure Regulation[125] (art. 103-104b). Consequently, the Court cannot derogate from these rules;
- the procedure before the Court is subject to a linguistic regime specific to a multilingual Community, which influences the nature and purpose of the written and oral procedure[126].

Moreover, the preliminary rulings procedure differs from the usual procedure followed before the CJEC within other actions brought before the Court of Luxembourg. In the unfolding of this procedure, one must take into account the fact that this is a judge to judge procedure, as there is no other active trial legitimating. Before the Court, in this case, we do not deal with a proper contradictory procedure as the parties cannot exchange replies and rejoinders and can only reply within the oral procedure. By "party in trial" one may understand, within the meaning of this provision, any member state and institution which is a party or intervening in the litigation or which submitted written observations within one of the preliminary procedures.

The national judge who raises a preliminary question suspends the pending trial and notifies his/her ruling to the Court. The ruling of the national court to initiate a preliminary procedure in Luxembourg is notified to the Court. The request is submitted to the Court's Clerk. The parties in the litigation on the roll of the national court may not directly notify the Court and

[123] Quoted by Ovidiu Ținca, in op. cit., page 361.
[124] Since March, 2008.
[125] Since September, 2008.
[126] According to the Guide destined to the Counsels of the parties: http://curia.europa.eu/ro/instit/txtdocfr/autrestxts/txt9.pdf

are not obliged to react until the moment when the request formulated by the national court is communicated to them by the Registry of the Court. According to the Information Note regarding the formulation of requests for the pronouncement of a preliminary ruling by the national courtal bodies[127], the ruling whereby the national judge refers the request for a preliminary ruling to the Court may take any shape allowed by the internal law in the matter of procedure incidents. Obviously, there are certain points that must be detailed in the request, aspects that have already been specified. We remind only an aspect concerning the necessity of mentioning the domicile in the request. "In cases having as object the pronouncement of a preliminary ruling there is no obligation to specify the domicile, as the communication of the procedure documents is done by registered letter, with acknowledgement notice. Despite all these, the parties may approve that the documents be submitted by fax[128] or by any other technical communication means"[129]. The procedure papers as well as the entire correspondence concerning the cases the Court is referred, must be submitted to the Registry of the Court at the postal address[130] or submitted directly to the Registry, at the office of the Court[131] or, outside the Registry's schedule, at the Court's reception. The preliminary submittal of a procedure document by fax or e-mail (ECJ.Registry@curia.europa.eu) is considered with regard to the procedure terms on condition that the subsequent submittal and filing of the procedure deed be done under the conditions established by the Procedure Regulation. Such submittals must be performed only at the mentioned fax number of e-mail.

The application may be written in any of the 23 Community languages. The Community provisions do not set forth any special formality for the introduction of the application. The only conditions are the general ones, for instance: the litigation should have connection with the Community law; to be about an effective litigation; the formulated question must be susceptible of receiving a useful reply and so on.

Under the provisions of the Information Note, the question or questions referred by the national court must be found in a distinct and clearly individualized part of the referral judgment[132]. Having in view the fact that the request for a preliminary ruling is also notified to those who may file observations, it shall be translated[133], wherefore it is required that the application be drafted in a simple, clear and precise manner, avoiding useless details yet being complete and containing all pertinent information to allow the Court, but also the entitled parties, to express observations, to form a clear idea of the factual and legal framework of the main litigation.
The Court's Clerk registers the application and sends it to the parties in the national litigation, the member states of the EU, the European Commission[134] and, eventually, to the Council, if the latter is the author of an act referred to in the application. Within two months from the

[127] Hereinafter named Information Note. It may consulted at the webpage: http://curia.europa.eu/ro/instit/presentationfr/index_cje.htm
[128] (352) 43 37 66.
[129] Guide to the counsels of the parties, page 11.
[130] Konrad Adenauer Av., Luxembourg L-2925.
[131] Boulevard Konrad Adenauer, Luxembourg – Kirchberg.
[132] Usually in the beginning or the end of the same.
[133] Otherwise, it is the only document subject to translation.
[134] States have different interests to intervene within this procedure. Sometimes, the states may defend directly or indirectly, their own interests (the Court in Luxembourg can request the states who did not file observations to adopt a certain position if it is considered that an interest may be affected). In other cases, the states may intervene to defend a general interest. The European Commission, according to Joël Rideau, "systematically submits observations, playing in this procedure a role that may be qualified as *amicus curiae"* (Joël Rideau, "*Droit institutionnel de l'Union et des Communautés européennes", 3rd* edition, L.G.D.J, 1999, page 861). The parties in the national litigation obviously intervene to protect their own interests.

date of the last notification, all recipients have the possibility to submit to the Court written memos or observations.

Under art. 23 §3 of the Statute of the Court of Justice, the judgment of the national court is notified also by the clerk and the states of the parties to the Agreement concerning the European Economic Space, others than the member states[135], as well as of the Monitoring Authority of EFTA mentioned in that agreement, which, should it be targeted by one of the agreement's application fields, may also submit within two months from the last notification, written memos or observations.

"Where an agreement relating to a specific subject-matter, concluded by the Council and one or more non-member States provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations."[136].

The two months deadline a time interval of 10 days is added for reasons related to distance. This deadline is imperative and cannot be prolonged. It is not susceptible to prolongation.

The purpose of the written observations is to suggest the answers which should be given to the questions addressed to the Court, and at the same time, to show, succinctly, but completely, the argumentation in support of the proposed answers. It is important to notify the Court on the factual circumstances of the main action, as well as on the pertinent provisions in the national legislation, applicable in the case[137]. Let us mention that these observations do not have value of conclusions; their object is limited only to Community law issues invoked in the preliminary application. Therefore, the parties cannot bring arguments on the merits of the case.

The written observations must show[138]:

- pertinent factual elements and internal law provisions;
- legal argumentation, including references to the Court case-law;
- answers to the questions addressed by the national court, answers proposed by the party to the Court.

We must mention that, at community level, there is a difference between the drafting language of the application and the procedure language. Thus, according to art. 29, paragraph (2) Section 2, the procedure language, in case of applications for the issue of a preliminary ruling, is the one of the national court which notifies the Court. On a duly motivated request of one of the parties in the main action and after hearing the other party and of the general advocate, one can authorize the use as a procedure language for the oral procedure of another Community language. In case of the States parties at the Agreement on the SEE, other than the member states, as well as the AELS Supervision Authority, these can be authorised to use one of the 23 Community languages, other than the procedure language, when they participate to one of the preliminary procedures. Concerning the third party states participating to a

[135] It is about Norway, Lichtenstein and Iceland.
[136] Art. 23 § 4 of the Statute of the Court of Justice.
[137] Notes for the guidance of the Counsel of the parties: http://curia.europa.eu/ro/instit/txtdocfr/autrestxts/txt9.pdf, page 13.
[138] According to the Guide for the Counsels of the parties, page 17.

preliminary procedure, these can authorized to use one of the 23 Community languages, other than the procedure language.

The rule of the mandatory representation of the parties has undergone certain changes in cases having as object the pronouncing of a preliminary ruling (article 104 paragraph (2) of RP). Any person entitled to represent and/or assist the parties in the litigation pending on the roll of the national court can do that equally before the Court. Therefore, if the procedure regulations applicable in the litigation vested in the national court do not impose on the parties to be represented, these have the right to present personal observations before the Court, written and oral.[139].

The Court's Rules of Procedure also regulate the institution of free legal aid. This "may also be applied for in a preliminary ruling case. However, in such a case, the party concerned must first seek legal aid from the competent authorities in his own country. In order to establish his lack of means, the person concerned must provide the Court with all relevant information, in particular a certificate from the competent authority to that effect.[140].

Before the Court of Justice, the procedure of preliminary rulings, as a rule, supposes two steps: written and oral step. CJCE may, however, decide for the oral procedure not to take place anymore, ruling after the unfolding and closure of the written procedure. The Court in Luxembourg may end the procedure initiated before it by a motivated ordinance, when:

- a question formulated with preliminary title is identical with a question on which the Court has already ruled;
- the answer to such a question may be clearly inferred from the case-law[141];
- the answer to the question formulated with preliminary title leaves no place for reasonable doubt.

Also, after filing the memos or written observations, based on the report of the reporter judge, after notifying the interested persons entitled to file such memos or written observations and if neither of these files a petition showing the reasons for which they want to be heard, the Court, after hearing the Advocate General, may decide to close the procedure, without unfolding the oral step. The petition is to be filed within three weeks from the date of notification to the interested party or person of the files memos or written observations. This deadline can be prolonged by the president.

The Court has the possibility to ask, before ruling, and after hearing the Advocate General, explanations and additional information on the national court.

"With regard to costs incurred in preliminary ruling cases, the Court's decision incorporates a standard form of words referring to the final decision to be taken by the national court which made the reference to the Court of Justice. Institutions, Member States and other EEA States which submit observations bear their own costs."[142].

B. Accelerated procedure

Pursuant to Article 103a, "upon request of the national court, the president, by way of exception, at the proposal of the reporting judge and after hearing the Advocate General, may

[139] In other words, the Court takes into account the rules of procedure applicable before the national courts which notified it.
[140] Guide for the Counsels of the parties, page 8.
[141] The Court, after hearing of the Advocate General, may rule anytime by motivated ordinance, in which it refers to the previous ruling or the pertinent case-law.
[142] Guide for the Counsels of the parties, page 8.

order the judgment of the preliminary committal according to an accelerated procedure, when the invoked circumstances justify the special emergency of the delivery on the question asked as preliminary. In this case, the president shall promptly establish the session date, which shall be notified to the parties from the main action and to the other persons concerned already mentioned.

Within a deadline established by the president, which cannot be less than 15 days, the parties and the other persons concerned may submit written memos or observations. The president may ask the parties and the other persons concerned to limit the written memos or observations to the essential legal issues raised by the preliminary question.

The potential written memos or observations shall be notified before the session to the parties and the other persons concerned. The court will rule after hearing the Advocate General.

C. Urgent procedure

Article 104b of the Rules of Procedure of the Court of Justice of the European Communities introduces a simplified procedure, named urgent procedure. Therefore, upon request of the national court or, by way of exception, ex officio, a preliminary committal asking one or several questions regarding the domains envisaged by Forth title of the Treaty on the Union or the Forth title of the third part of the EC Treaty may be judged according to an urgent procedure[143].

The application of the urgent procedure shall be opened by the Court. Such decision is usually made only at the grounded request of the committal court. By way of exception, the Court may decide, ex officio, the judgment of a preliminary committal according to the emergency preliminary procedure when it seems to be necessary[144].

The request of the national court has to contain the legal and factual circumstances that demonstrate the emergency and justify the application of this derogatory procedure and to indicate, if possible, the answers to the preliminary questions proposed by the national court. Unless the national court made a request for application of the urgent procedure and if the judgment of the case according to this procedure appears, at first sight, to be necessary, the president of the Court may ask the chamber to which the case was assigned, to rule on the need to judge the preliminary committal according to this procedure[145]. The internal examination of the cases submitted to this new procedure is considerably accelerated, because from the very moment when they are received by the Court, all the cases in terms of space of freedom, security and justice are assigned to a chamber made up of five special judges appointed in order to ensure, for a period of one year, the selection and examination of these cases. If this chamber decides to admit the petition for application of the urgent procedure, it will rule shortly after the session, after hearing the Advocate General[146].

[143] http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigueur/noteppu.pdf

[144] Pursuant to the Information note – Supplement further to the entry into force of the preliminary emergency procedure applicable to preliminary committals regarding the space of freedom, security and justice (http://curia.europa.eu/ro/instit/txtdocfr/txtsenvigueur/noteppu.pdf).

[145] Article 104b, paragraph 1.

[146] Pursuant to the Information note of the Press and information department of the Court of Justice of the European Communities no. 12/08.

The decision to judge the preliminary committal according to the urgent procedure shall be adopted by the appointed chamber, based on the report of the reporting judge and after hearing the Advocate General[147].
Pursuant to paragraph 2 of Article 104b, when the national court asked the application of the urgent procedure in case of a preliminary committal or when the president asked to the chamber appointed with the settlement of the case the examination of the need for judging the preliminary committal according to this procedure, the clerk of the court shall notify this issue to the parties involved in the case being on the roll of the national court, to the member state to which this court belongs, as well as to the institutions concerned[148]. Please note that, unlike the common procedure, in order to ensure celerity, the emergency preliminary procedure operates a distinction between the protagonists admitted to take part in the written phase of the procedure and those habilitated to take part in its oral phase. As specified, only the parties in the main litigation, the member state to which this committal court belongs, the European Union and, if applicable, the European Council and Parliament may submit observations within this procedure and within a short term, in the procedure language, if one of their acts is questioned. The other persons concerned and especially the member states, other than the member state to which the committal court belongs, don't have this capacity, but they are invited to a session during which, if they want to, they can communicate their oral observations regarding the questions asked by the national court and the written observations submitted in the case[149].

The decision whether to judge or not the preliminary committal according to the urgent procedure shall be communicated to the national court, as well as to the parties, the member state and the mentioned institutions. The decision to judge the committal according to the urgent procedure shall establish the term in which the intervening parties may submit written memos or observations. The decision may specify the legal issues to which these written memos or observations should refer and may establish the maximum extent of these documents[150].

In order to ensure the aimed celerity, the procedure will be carried out in practice by electronic means. The exchanges of the Court with the national courts, with the parties of the main litigation, with the member states and with the community institutions will be made, as far as possible, by this mean of communication[151].
In special urgent cases, the chamber may decide the absence of the written phase (without submission of the written memos or observations).

Although the introduction of a request to deliver a preliminary ruling results in the adjournment of the national procedure until the Court rules, awaiting its decision, *the committal court shall still remain competent to adopt preservation measures in order to protect the parties' interests*, especially regarding a national administrative deed grounded on a community deed being object of a preliminary committal for validity assessment.

Unless the preliminary committal is judged according to the urgent procedure, the procedure will continue according to the common one.

The court issued the first decision pursuant to Article 104b of the Court Rules of Procedure on July 11th, 2008, in C-195/08 PPU, *Rinau*. "By means of the Ordinance dated May 21st, 2008,

[147] http://curia.europa.eu.
[148] http://curia.europa.eu.
[149] Idem.
[150] Idem.
[151] Idem.

submitted with the Registry of the Court on May 22nd, 2008, Lietuvos Aukščiausiasis Teismas asked for the preliminary committal to be judged according to the urgent procedure established in Article 104b of the Rules of Procedure"[152]. The national court justified this request referring to the ground (17) of the regulation[153], which contemplates the prompt return of a kidnapped child, and Article 11 paragraph (3) of the same regulation, which establishes a six-week term in which the court informed about a return request has to deliver the decision. "The national court ascertains the need to act with celerity based on the reason that any delay would be extremely unfavorable for the relations between the child and the parent that the child is not living with. The degradation of these relations could prove to be irreparable. The committal court also invokes the need to protect the child against a potential damage that might affect him and the need to provide a correct balance between the child's interests and his parents' interests, which would both require the application of the urgent procedure. At the proposal of the reporting judge, after hearing the Advocate General, the Third Chamber of the Court decided to admit the request of the committal court for judgment of the preliminary committal according to the urgent procedure"[154].

The second decision, pursuant to Article 104b, was delivered on August 12th, 2008 in the case C-296/08 PPU, *Santesteban Goicoechea*. "By means of a letter dated July 3rd, 2008, submitted with the Registry of the Court on the same date, the *Chambre de l'instruction de la cour d'appel de Montpellier* requested that the preliminary committal be judged in the urgent procedure established in Article 104b of the Rules of Procedure. The committal court justified this request by showing that Mr. Santesteban Goicoechea was detained, after having served a sentence of imprisonment, only based on a detention for extradition purposes enforced within the extradition procedure in which the preliminary question had been asked. The Third Chamber of the Court ruled on July 7th, 2008, after hearing the Advocate General, to admit the request of the committal court regarding the judgment of the preliminary committal in urgent procedure"[155].

1.5 Effects of the preliminary ruling

As shown in the specialized literature[156], in absence of any subordination between the national courts and the community court, pursuant to the principle of community law over the national law, the national courts have the obligation to observe, in settling their cases, what the Court of Justice has decided regarding the construction of validity of the community law.

The authority of a preliminary ruling consists in its binding force before the court that requested it and the courts that would judge the case in the remedies, and in the general enforceability before the other courts.

The preliminary rulings mainly produce retroactive effects from the date when the deed is issued and, by way of exception, from the date indicated by the Court in the said ruling.

A. Authority of preliminary rulings

[152] Point 43.
[153] In this case it refers to the Council Regulation (EC) no. 2201/2003 from November 27th, 2003 on the competence, acknowledgment and execution of court decisions in the matrimonial field and in the field of parental liability, repealing the Regulation (EC) no. 1347/2000 (Official Journal L 338, p. 1, Special edition, 19/vol. 6, p. 183).
[154] Points 45-46.
[155] Points 32-34..
[156] Commentarie Meget, La Cour de Justice - les actes des institutions, T.10, Edition de l'Université de Bruxelles, p.205.

A preliminary ruling produces effects both in the case in which it was requested and also in other cases, as the construction makes common body with the construed dispositions that it completes. In fact the Court uses the syntagm "say the law" ("dire pour droit") in the enacting clauses of the decision regarding the construction, which suggests the fact that it expresses a legal rule or rather that it gives it a new wording[157].

The construction given by the Court binds the national courts vested with the litigation within which the construction was requested, but the authority of these decisions exceeds these limits taking into consideration the fact that other courts are also bound to respect the authority of the decisions regarding the construction delivered by the Court and cannot give another construction by its own initiative to the texts already construed by the Court. But the courts have an alternative: either they comply with the construction offered by the Court, or they request to the Court the issue of a new preliminary ruling in construction.

a) Authority of preliminary rulings regarding construction

The Court, by its case-law, decided that there is a "binding character that preliminary rulings acquire as far as national courts are concerned"[158]

The Rule regarding the procedure before the Court stipulates, in Article 65, that the preliminary ruling has binding force beginning with the date of its issue.

The decision in construction delivered by the Court has "interpretative authority", which includes both binding force (binding the national court to respect the construction of the community dispositions and deeds) [159] and also the aptitude that the national court has to invest again the Court of Justice[160] with a new preliminary question.

Therefore, this specific authority has two components.
On the one hand, the decision regarding the construction has an *erga omnes* authority, but not absolute. In other words, as the enacting clauses of the preliminary ruling is included in the construed rule, bound to be enforced by the national courts, we can talk about "interpretative authority", which prohibits to any national court to adopt another construction with the meaning and enforceability of the community law, as decided by the Court[161].

On the other hand, at the same time any national court being bound to respect the construction already decided by the Court, preserves intact the power to invest the Court with a new preliminary question liable to result in the adoption of a different solution.

In this sense, in the case *Milch-Fett-und Eierkontor*, the Court ruled that "the decisions issued by the court pursuant to Article 177 *are binding* for the national courts invested with the litigation within which these decisions have been issued" and that "the construction given by the Court binds these courts but they have the capacity to assess whether there are sufficiently grounded by the delivered preliminary ruling, or it is necessary to invest the Court again."

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[157] R. Kovar, Effets des arrêts préjudiciels de la Cour de justice, p.3
[158] Court of Justice of the European Communities, June 11th, 1987, Pretore di Salo, Rec p. 2545.
[159] Regarding the authority of preliminary rulings in construction, see decision *Da Costa from March* 27th 1963, C-28-30/62, Rec. p. 59; for preliminary rulings in validity assessment, see decision *International Chemical Corporation*, May 13th, 1981, C- 66/80, Rec. p. 1191.
[160] Court of Justice of the European Communities, 24 juin 1969, Milch-Fett-und Eierkontor, 29/68, Rec. p. 165 . C.J.C.E., June 11th, 1987, Pretore di Salo, C-14/86, Rec p. 2545.
[161] Joseph Ngambi, Droit communautaire, Universite Paris I, 2007-2008, p.10.

The binding force was reconfirmed by the Court in an ordinance dated March 5th, 1986, *Wunsche*, in which it confirms the national judge's obligation and in addition it mentions the fact that the solution res judicata: "a decision, in which the Court preliminarily decided on the construction or validity of a document adopted by a community institution, settles, with res judicata, one or several community law issues and binds the national judge regarding the solution given in the main litigation". Besides, the Court defines the framework and limits of the court option to ask the Court again, when the national court "faces difficulties in understanding or enforcing the decision, when it addresses to the Court a new question or when it brings new assessment elements liable to result in the Court answering in a different way to an already asked question". However, the court cannot contest the validity of the already delivered decision "Articles 38/41 of the Statutes of the Court, on extraordinary appeals against the Court decisions, are not applicable to the decisions to the decisions given as preliminary. However, the authority of such decision does not represent an obstacle for the national judge appointed to address the court again, before delivering in the main litigation".

In relation to other courts, the answer given by the Court binds all the courts that might subsequently be invested with the settlement of the remedies in which they will have to deliver a solution according to the construction offered by the Court of Justice.

The practice of the remedies at law may bring the litigation on the roll of a court which issues final decisions, in which case this court may consider itself as exonerated from the request obligation to which it is bound, provided it enforces the solution delivered by the Court, however without prejudice to its right to request a new preliminary ruling[162].

Preliminary construction decisions also produce effects in other litigations, both in case of those on the roll of courts delivering decisions subject to remedies at law and also on the roll of courts delivering decisions not subject to remedies.

In case of a court delivering a decision on the merits, the existence of a construction limits the power it has to decide on the construction of the community text which it identifies and determines it to enforce the already existing construction. In this case the court may choose either to enforce the decision already delivered by the Court, or, if deemed appropriate, to use the right to request the delivery of a new preliminary ruling. In this case, the Court has the possibility, when a question is identical to a question on which the Court has already ruled, to use the simplified procedure as established in Article 104 paragraph 3 of the Rule regarding the procedure before the Court, deciding by grounded ordinance with reference to the previous preliminary ruling.

In case of a court which issues decisions not subject to any remedy at law, the situation is similar. In presence of a previous construction, it also has 2 possibilities: either to enforce the Court construction being thus exonerated from the express obligation to request the delivery of a preliminary ruling, or it can use the right to request, if deemed appropriate. In the last case the Court may enforce the simplified procedure as established in Article 104 paragraph 3 of the Rule. Such a case creates an ambivalent situation because on the one hand the court exerts its committal obligation, and on the other hand it is discouraged to proceed as such because of the inutility of the request and the potential summary character of the answer.

b) Authority of preliminary rulings on validity assessment

[162] Court of Justice of the European Communities, October 6th, 1982, Cilfit, C-283/81.

A decision delivered in the other branch – previous procedure regarding the validity control of deeds – produces different effects depending on the content of the decision.

The Court may rule in favor of the validity of the deed. For the committal court this decision mainly has absolute authority. Other courts preserve intact the capacity to invest the Court when they consider that there is an interest to request a new examination based on new grounds[163].

The Court may declare the decision as invalid. This decision has absolute authority both for the investing court and for the other national courts that are no longer able to enforce the invalid disposition in settling a case.

The Court case-law outlined the fact that a preliminary ruling finding the invalidity of a deed, even if it concerns the investing court, "shall represent a sufficient ground for any other court to consider this deed as invalid and the court shall be entitled to deduct which are the consequences of this finding in the concrete case invested in it". The Court – by the motivation in the case *International Chemical Corporation* – confirms the fact that the decision finding the invalidity of a deed has a general enforceability: the courts have to deny the enforcement of the said deed. Consequently, any court shall be entitled to deduct the consequences of the invalidity of the deed or any of its dispositions in order to deny the enforcement in the case invested in it of the deed or the invalid dispositions as well as of the national dispositions grounded on it. The Court of Justice itself, being invested with a request in remedy of the damage caused by a certain deed for the benefit of the damaged party, found that they are exonerated to request the establishment of the deed invalidity[164]. Regarding the courts that have the obligation to request the delivery of preliminary rulings, in case of a deed having been declared invalid, are exonerated of their obligation.

In case of decisions by which the Court delivers in favor of the deed validity, in fact the Court does not declare the deed as being valid, but only declines the invoked reasons for invalidity. The Court claims that the examination of the question did not outline any element liable to affect the validity of the deed[165]. Please note that the Court never decides positively by an affirmation confirming the validity of the deed.

When reasons are invoked before the Court, which have already been examined and rejected by the Court, any court may use its right to request to vest again the Court or may decline these reasons based on the previous case-law of the Court by which it delivered in this sense.

But if reasons are invoked that have never before been examined and rejected by the Court, a distinction operates, depending on the conviction of the court in relation to the invoked arguments of invalidity. The courts have the possibility either to decline them, or – if they have any doubt on the validity – they have to invest the Court, whether or not they are in a position of facultative or imposed cooperation, based on the *Foto-Frost* case-law.

B. Retroactive effect of preliminary rulings

[163] Court of Justice of the European Communities, May 13th, 1981, C-66/80, International Chemical Corporation/Amministrazione delle fianze dello Stato, Rec. p.1191; Court of Justice of the European Communities, February 2nd 1989, Pinna, C-359/87, Rec. p.585.
[164] Court of Justice of the European Communities, May 25th, 1987, H.N.L.
[165] Court of Justice of the European Communities, Emesa Sugar, C-17/98

Any construction involves "a retrospective effect, in the sense that the construed rule is supposed to have had from its origins a certain sense"[166]. The Court case-law constantly specifies that "the construction given to legal rules clarifies and specifies the meaning and extension of such rule, as it should or should have been understood from the very beginning of its entry into force"[167].

The preliminary rulings in construction or in validity assessing have a retroactive effect (ex tunc) operating from the date of the entry into force of the construed rule[168]. The Court case-law often mention the fact that the rule construed by the Court "may and must be construed by the court for legal relations arisen and constituted before the decision regarding the construction request" The same principle of retroactivity also operates in relation with the decisions for finding the invalidity of a deed.[169]

Basically, preliminary rulings have retroactive effect in both domains of the preliminary procedure, both regarding the construction and also the validity.

However the retroactivity principle is not absolute, the Court brought subtly differentiated solutions regarding the effects in time of preliminary rulings, being able to derogate by way of exception, in certain circumstances, limiting the possibility of the parties concerned to invoke the construed disposition. In this case, the effect of the decision shall run from the delivery date[170]. Such a limitation can only be expressly ordered by the Court and not by a member state[171] and can only intervene in the case in which the preliminary ruling regarding the construction was issued[172].
Should the Court decide such derogation, it will take into account two issues, which are the quantitative importance of good faith legal relations as a result of which there may appear the risk of serious economic consequences, on the one hand, and the reasonable possibility of having understood community law otherwise than as construed by the Court[173].

a) Preliminary rulings regarding construction

The case *Defrenne II* is the first case in which the Court explicitly approached the issue of limitation in time of the effects of its preliminary rulings. In this case, the Court delivered regarding the direct effect of the former Article 119 EEC (which became Article 141 of the Treaty of the European Communities) that provided the equality of remuneration between male workers and female workers. As soon as the Court would have conferred a retroactive effect to the solution, it would have been the case to enforce this principle to some remuneration periods before the date when the solution was delivered by the Court. The governments of some member states warned the Court regarding the disastrous economic consequences that might have result from the retroactive effect of such decision, the

[166] P. Pescatore, « Article 177 » Traite instituant la CEE - Commentaire article par article, Ed. Economica, Paris, 1992, p.1120.
[167] Court of Justice of the European Communities, March 27th, 1980, Denkavit Italiana, C-61/79, CJCE, October 19th, 1995, Richardson, C-137/94, Court of Justice of the European Communities February 13th 1996, Societe Bautiaa and Societe francaise maritime, C-197 and C-252/94.
[168] Court of Justice of the European Communities, October 19th 1955, Richardson, C-137/94, Rec. p. I-3407.
[169] Court of Justice of the European Communities, April 26th, 1994, Roquette Freres, C-228/92, Rec. p.I/1445.
[170] Court of Justice of the European Communities, April 8 th, 1976, Defrenne, C-43/75, Rec. p.455
[171] Court of Justice of the European Communities, February 2nd, 1988, Barra /Belgique, C-309/85, Rec. p.355.
[172] Court of Justice of the European Communities, December 15th, 1955, Bosman, C-415/93, Rec. p.I-4921.
[173] Court of Justice of the European Communities, February 13th, 1996, Bautiaa and Societe maritime, C-197/94 and C-252/94, Rec. p.I-505.

consequences liable to cause bankruptcy for certain enterprises[174]. In the name of some "imperious considerations of legal security taking into account the interests at stake, both public and private", the Court, acknowledging the principle of the direct effect of remuneration equality in terms of sex, gave up raising for discussion the remunerations for the previous periods. Therefore, the Court admitted the *exceptional* possibility of *ex nunc*[175] effect, claiming that "enforcing the general principle of legal security, inherent to the community legal order and taking into account the serious problems that its decision might entail in order to transpose it in the legal relations established in good faith, might limit the possibility, or everybody concerned, to invoke the disposition thus construed in order to raise for discussion such legal relations. However, such limitation would be admitted *only* in case of a decision regarding the requested construction. The fundamental requirement for a uniform and general enforcement of the community law involves the fact that *only the Court* has the possibility to decide the intra-temporal limitations brought to the construction given by it"[176].

The Court considered that it may confer a relative effect to retroactivity, allowing to the plaintiff and also to the "workers who have previously filed an service of notice or promoted an equivalent claim" to prevail themselves of the direct effect acknowledged to the principle of remuneration equality between male and female workers. Please note that those persons that had the initiative to invoke the rights before the delivery of the solution by the Court benefited from the retroactivity principle.[177]

b) Preliminary rulings regarding validity assessment

Basically, a preliminary ruling finding the invalidity of a deed also has a retroactive effect[178]. If the Court considered that it may decide a limitation of the effects of the preliminary ruling invalidating a deed, by analogy with the effects of the canceling decisions, which it delivers pursuant to Article 231 paragraph 2 of the Treaty of the European Communities (former Article 174 EEC) stipulating that, in case of cancellation of a rule, the Court may indicate "which are the effects of the cancelled rule that have to be considered as being irrevocable". Therefore, by reference to the regime of the canceling appeal, the invalidity of the deed may produce effects only for the future. In such case the national court found itself in the position of interdiction to establish any consequence as a result of the deed invalidity, even regarding the parts of the initial litigation, the invalidity producing effects only for the future[179]. But the Court case-law evolved, considering however that the non-retroactivity exception bust be invokes by the part whose action forms the basis of the previous committal as well as any author of an action filed before the delivery of the preliminary ruling.

Part II Impact of preliminary rulings on the national legal system

2.1. The role of the national courts of law in the integration of the community legal norms in the internal law

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[174] Court of Justice of the European Communities, April 8th, 1976, Defrenne II, C-43/75, Rec., p.481, p.69-70, p.464-466.
[175] Court of Justice of the European Communities, from April 8th, 1976, Defrene./Sabena, C-43/75, p.43
[176] Court of Justice of the European Communities, from March 27th, 1980, Amministrazione delle finanze dello Stato/Denkavit italiana, C-61/79.
[177] Court of Justice of the European Communities, May 17th, 1990, Barber, C-262/88, Rec., p.I-3407
[178] Court of Justice of the European Communities, April 26th, 1944, Roquette Freres, C-228/92, Rec. p. I-1445.
[179] Court of Justice of the European Communities, October 15th, 1980, Providence agricole de la Champagne, C-4/79, Rec., 2823

The integration of the community law within the legal order of the member states of the European Union was possible through the essential contribution of the Court of justice that, by means of a law-making case-law, consecrated the founding principles of the community law.

The case-law consecration of these principles has its origins in the year 1963, when the Court, by the decision delivered in the case *Van Gend en Loos*[180], pronounced the principle of the direct effect of the community law in the national legal systems of the member states. In 1964 followed the decision delivered in the case *Costa*[181], in which the Court consecrated the principle of supremacy of the community law over the domestic law, according to which the Community represents a new legal order, an autonomous one, whose originality is determined by the definitive transfer of competences from the member states towards the Community. The principle of supremacy of the community law, in the sense of the Court, entails the automatic non-enforcement of the national rule incompatible with the community rule, and the national court has the role to remove the first one in favor of the second one. The community rule serves as a substitute for the domestic rule thus allowing the prevailing effect of the community law. Subsequently, in the year 1978, by the decision *Simmental*[182] the Court outlined the fact that the direct effect is the corollary of the principle of supremacy of the community law. The direct effect and the supremacy of the community law represent two complementary principles taking into account the fact that the first one represents the guarantee of supremacy of community law. Unless the community law rule can be directly enforceable in the national law, the principle of its supremacy over the domestic law would have no effect. In this line of thinking, the Court case-law decided the principle of direct effect of the community law before the principle of supremacy of the community law.

The integration of these principles, and by means of them, of the community rules, within the domestic law of the member states *is incumbent to the competence of the law courts* from the member states. These national courts try the cases vested in them pursuant to the procedural law specific to the national legislation from each state. As the procedural rules are different from one state to another, it is obvious that the enforcement of the principles of community law is different in terms of the procedural means used from one state to another. The Court understood to grant a principle value to these differences, consecrating the procedural autonomy of national courts by its case-law. But the procedural autonomy must provide full efficiency of the community law through effective national procedural means[183].

The principle of procedural autonomy is a creation of the Court case-law which, in the case *Luck* decided that "the provisions of the treaty do not limit the right of the competent national courts to enforce, from the various procedural means established in the national legal system, those which are appropriate in order to guarantee the rights conferred by the community law"[184]. In the same sense, in the case *Salgoil*[185] the Court specified that "the domestic courts have the obligation to ensure the protection of rights, taking into account the fact that the legal order of each member state has the role to indicate in the competences of the courts the legal classification of these rights based on the criteria established in the domestic law". In the same sense, by the case *Rewe,* the Court decided that, according to the legal system "instituted

[180] Court of Justice of the European Communities, February 5th, 1963, Van Gend en Loos, C-26/62
[181] Court of Justice of the European Communities, July 15th, 1964, Costa/Enel CJCE, C-6/64
[182] Court of Justice of the European Communities, September 9th, 1978, Simmental, C-70/77
[183] R. Kovar, Voies ouvertes aux individus devant les instances nationales en cas de violoation des normes et decisions du droit communautaire, Institut d'etudes europeennes, ULB, Bruxelles, Ed. Larcier, p. 262.
[184] Court of Justice of the European Communities, April 4th, 1968, Luck, C-34/67, p.360.
[185] Court of Justice of the European Communities, December 19th, 1968, Salgoil/ Ministry of Foreign Trade of the Italian Republic, C-13/68 p. 675.

by the provisions of the treaty, as that provided in Article 177, the national courts may use any procedural mean provided by the national law in order to guarantee the compliance of the direct effect of the community law under the same conditions regarding admissibility and judgment procedure regulated by the national law in order to guarantee its compliance"[186].

According to the decision pronounced in the case *Rewe*, the community law is enforced in the context of exercising the national procedural rules. Therefore, any national court may be invested with the settlement of some cases in which community law may be incident but no court, regardless it nature, can decline a legal ground of community law motivating the limits of its own competence. This being the case, the community law may be invoked in the context of any procedural phase provided by the national law, regardless the legal branch or the procedural stage of the case.

Although procedural harmonization by case-law seems a mission hard to achieve, the Court established in charge of national courts guide marks aiming in essence at ensuring in an "uniform way some minimal rules" that "ensures an effective jurisdictional control"[187]. Among them it's worth outlining the litigant's right to an effective legal protection, provisional protection of the rights invoked by individuals and invoking ex officio of the enforcement of the community law, which we will briefly present as follows.

a) Litigants' right to an effective legal protection

Pursuant to procedural autonomy being the exclusive competence of the member states, the Court transferred them the obligation to establish the situations in which the litigants are entitled to exercise the remedies. But this autonomy is not absolute, as it is applied provided that the equivalence and effectiveness principles are complied with. Based on them, to be cumulatively applied, the community procedural grounds cannot be less favorable than the ones related to similar domestic remedies (equivalence principle), nor to make impossible or excessively difficult the exercise of the rights conferred by the community legal order (effectiveness principle)"[188]

The access to an effective legal protection was consecrated by the Court in the case *Marguerite Johnston*[189] within the context in which the Ireland legislation, after many terrorist attempts against policemen, provided the gun license for policemen. However, for public safety reasons, gun license was not allowed to women working within the Police (according to a certificate issued by the competent minister, unquestionable before law courts). Therefore, no labor contract for women for a limited period of time was renewed within the Police. Facing this situation, Mrs. Marguerite Johnston filed a complaint against the competent authority invoking the principle of treatment equality between women and men established in EEC directive 76/207/ February 9th, 1976. Within this context, the Irish court entered a petition for delivery of a preliminary ruling regarding the construction of the above-mentioned directive. The court decided that the exclusion of any legal control by the law court regarding the certificate issued by a national authority contravenes to the principle of the right to an effective appeal acknowledged to any person who considers to be damaged because of a discrimination based on sex. In the same sense, in another case the Court showed that "the existence of a remedy against any decision of a national authority is essential in order to

[186] Court of Justice of the European Communities, July 7th, 1981, Rewe-Handelsgesellschaft Nord mbH şi Rewe-Markt Steffen /Hauptzollamt Kiel, C-158/80, p. 47.
[187] Camelia Toader, The judge's role in the European integration, http: //www.scj.ro/toader_art1.asp
[188] CJCE, 16 décembre 1976, *Rewe*, 33/76, Rec. p. 1989 and Court of Justice of the European Communities, September 20th, 2001, *Courage et Crehan*, C-453/99, Rec. p. I-6297, point 29.
[189] Court of Justice of the European Communities, May 15th, 1986, Marguerite Johnston/Chief Constable of the Royal Ulster Constabulary, C-222/84, p. 59.

guarantee the exercise of the individual rights and the exercise of a remedy requires to the national court the compulsoriness to justify the rejection of the petition invested in it" and that "any evidence whose effect is to make impossible or excessively difficult the exercise of the rights guaranteed by the community law are incompatible with the community law"[190].

By this case-law, the Court consecrated the principle of the right to an effective legal protection according to which any person is entitled to file an appeal before the competent court against the deeds considered being contrary to the community law. This principle was developed by the subsequent case-law of the Court, which decided that "the litigants invoking rights pursuant to the community law cannot be treated less favorable than the persons invoking similar claims grounded on provisions of the domestic law"[191]. Therefore, the exercise of the remedies cannot be regulated and examined in a different manner when a legal ground is represented by the community law as compared to the situation in which the legal ground is represented by the domestic law (principle of equivalence of conditions), and the provisions of the national procedural law should not entail the practical impossibility to exercise the rights conferred by the community legal order.

b) Provisional protection of the rights invoked by individuals

The right to provisional protection was consecrated by the Court in the case *Factortame*[192] and then resumed in many other cases. *Factortame* decision is a law making decision, as it was for the very first time when the Court admitted the right of the national court to provisionally suspend the enforcement of the legal dispositions that might be contrary to the community law and to grant provisional measures, pursuant to the community law. The same judgment was subsequently resumed in the case *Zuckerfabrik*[193], when the Court showed that the provisional protection granted to individuals by the national courts pursuant to the community law is not different depending on the nature of the case – construction of a community deed or assessment of its validity – since in both cases the legal ground is the community law.

The Court of Justice outlines several times the importance of provisional measures, since making of justice is often slow and the repair of a potential damage is not always certain. In such situations the national court has to be able to grant any provisional measure liable to protect the individuals' rights deriving from the community law. The national court has competence to grant provisional measures in litigation and should do this even when this possibility is not provided in the national law, pursuant to *Factortame* case-law, delivered by the Court of Justice in 1990.

c) ex officio invoking of community law

In all the member states of the European Union the procedure of settling a case is governed by the principle of availability according to which the parties are entitled to establish the limits of the service of notice[194], without being able to file new petitions after the court is invested, under the legal conditions. The enforcement of this principle allows avoiding the extension of

[190] CJCE, October 15th, 1987, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef)/ Georges *Heylens* etc., C-222/86, p. 14-16.
[191] CJCE November 9th, 1983 Administration des finances de l'État italien contre SpA San Giorgio 199/82 p. 16.
[192] CJCE, July 19th, 1990, Factortame, C-213/90, p.90.
[193] CJCE, February 21st, 1991, Zuckerfabrik Suderdithmarschen A.G./Hauptzollamt Itzehoe, C-134/88 and C-92/89.
[194] Gabriel Boroi, Code of civil procedure with commentaries and annotations, All Beck Publishing House, Bucharest, vol. I, page 118.

the trial framework regarding factual and legal grounds other than those invested in the law court. But national courts also have the obligation to provide to litigants a direct, immediate and effective protection of the rights conferred to them by the community law. Within this context the question is to know whether the national court has or not the obligation to invoke ex officio the exception of non-enforcement of the procedural dispositions from the domestic law that would be contrary to the community law. The Court answered this question in the cases *Verholen, Van Schindel* and *Peterbroeck*, showing that the exception of invoking ex officio the dispositions contrary to the community law is a competence of the court, but it cannot be an obligation.

In the case *Verholen*[195] the Court specified that the national court *may* invoke ex officio the illegality of a national regulation as compared with a directive, claiming that "the litigant's acknowledged right to invoke in certain conditions, before the national judge, a directive whose transposition term has expired does not exclude the competence for the national judge to take into consideration such directive even if the litigant did not invoke before the court its benefit".

In the case *Peterbroeck*[196] the Belgian national court addressed to the Court a petition to deliver a preliminary ruling in order to know if the community law opposes to the enforcement of a domestic procedural rule pursuant to which the national court cannot invoke ex officio a new legal ground – in this case the potential incompatibility of the Belgian law with the community law – in absence of the invocation by the litigant of the pertinent community rule within a given procedural term. The Court answered in the same sense as in the previous case, by saying that a procedural rule prohibiting the taxpayers to invoke a new reason after the expiry of the 60 day term from the submission of the attacked deed, could deprive the litigants from the benefit of procedural protection established by the community law. Therefore, the interdiction of national courts to invoke ex officio a ground of the community law cannot be considered as reasonably justified based on principles as legal security or the good development of the procedure. The Court's conclusion was that "the community law opposes to the enforcement of a national procedural disposition that, under conditions as those of this particular case, prohibit to the national court, invested within its competence, to assess ex officio the compatibility of a legal ground from the domestic law with a community disposition, unless the latter has been invoked within a certain term by the litigant".

In essence, the Court considered that the community law opposes to the enforcement of a national procedure rule prohibiting to the national court to assess ex officio the compatibility of a domestic legal deed with the community law unless it has been invoked within a certain term.

Unlike the previous cases, the Court delivered a different solution in the case *Van Schijndel*[197], in which it was invested by Hoge Raad (the Dutch supreme court) with a petition for delivery of a preliminary ruling in order to know whether a civil court has the *obligation to invoke ex officio* the enforcement of the community law, including in the case when the party interested in its invocation understood to abstain. The Court specified that the community law *does not require to national courts to invoke ex officio* an exception regarding the breach of the community provisions, when the examination of this exception would require to the court to waive the passivity to which it is bound." In this case, unlike the

[195] Court of Justice of the European Communities, July 11th, 1991, Verholen c/Sociale Verzekeringsbank Amsterdam, C/87/90 and C/88/90, p.31.
[196] Court of Justice of the European Communities, December 14th, 1995, Peterbroeck, C-312/93
[197] Court of Justice of the European Communities, December 14th, 1995, Van Schindel, C-430/93 and C-431/93

previous cases, the Court decided that the courts do not have the obligation to invoke ex officio exceptions regarding the breach of the community law when their examination would mean to cross the limits of the litigation as established by the parties.

From the above-mentioned case-law two conclusions may be drawn in terms of invoking exceptions regarding the enforcement ex officio of the community law. In the first place, when the national law gives to the court the right to enforce ex officio a rule from the domestic law, this right represents an obligation when the enforcement of the community law is incident. But the court does not have the obligation to invoke ex officio the exception regarding the breach of the community law if it should waive the procedural passivity, specific to the availability principle, based also on other facts and circumstances than those on which the part interested in the enforcement of the community law grounded its petition.

The Court case-law demonstrates its concern to maintain the equilibrium between the procedural autonomy, on the one hand, and the obligation of courts to provide to litigants a direct, immediate and effective protection of the rights conferred to them by the community law. In conclusion, the invocation ex officio of the community law, although not an absolute obligation, represents in practice a prudent solution, taking into account the principle of the state liability in case of obvious non-acknowledgement of the community law by a court delivering final decisions.

2.2. Impact of Preliminary Rulings issued by the Court of Justice of the European Communities within the Context of the Activities of Romanian Courts of Law

Romanian courts of law, in their activities of case settling, have the obligation to enforce the principles of community law. In many instances they decided to enforce Article 148 paragraph 2 of the Constitution, stipulating the principle of prevalence of the community law over the national law. According to the said constitutional text, "as a result of the accession, the provisions of all the constitutive treaties of the European Union, as well as the other obligatory community regulations, prevail over the contrary dispositions from the domestic laws, in observance of the provisions from the adhesion deed."

The impact of the community law in the case settlement by the Romanian law courts can be structured as follows: 1) cases in which the courts settle the cases without requesting a preliminary ruling and without enforcing the previous community case-law (theory of the clear act); 2) cases in which the court enforces the community law rules as they have already been construed by the Court (legal precedent consecrated by the Court case-law) and 3) request of a preliminary ruling by investing the Court of Justice.

Here is a brief presentation of these three situations.

1) situations in which the courts settle the cases without requesting a preliminary ruling and without enforcing the previous community case-law (theory of the clear act);

In the legal practice this problem arose in case of the litigations grounded on the provisions of Article 214 indexes 1-214 index 3 of the Fiscal Code, having the object the cancellation of the fiscal administrative deed and the repayment of the special registration fee for second hand vehicles purchased from other countries of the European Communities. In essence, the plaintiffs claimed that the payment of this fee contravenes to the provisions of Article 90 of the European Community Treaty according to which no member state charges, directly or indirectly, to the products of other member states direct taxes or any other taxes exceeding those which are charged, directly or indirectly, to similar national products. It was also shown

that in such cases the principle of non-discrimination of imported products as compared to domestic products is violated, because the fee is charged only for the vehicles registered in the European Community and re-registered in Romania, while for the vehicles already registered in Romania this fee is no longer charged on the occasion of a new registration.

The first Romanian law court to rule in such a case was the Arad Tribunal, which found the rights conferred by the treaty to be violated by the national law rules of a contrary nature and ordered, pursuant to Article 148 paragraph 2 of the Constitution, the direct enforcement of the provisions of Article 90 of the Treaty, which has become since January 1st, 2007 part of the Romanian legal system[198]. Therefore, it admitted the plaintiff's petition, establishing that the fee was illegally collected and set the obligation of the defendant – Arad Public Finance Administration – to give it back. After that, there were other similar cases registered on the roll of other law courts, which issued similar solutions. The arguments of the law courts were sometimes more detailed, when the competence of the national court to construe the treaty dispositions was questioned. Therefore, after analyzing an incident community provision, a law court retained the *clarity of the community disposition*: "In this case the interpretation of the dispositions of Article 90 of the Treaty establishing the European Community was not questioned, *as they are very clear*, but of the direct enforcement of the dispositions of the Treaty"[199], which supposes the invocation of one of the conditions exposed by *Cilfit* case-law by the Court of Justice.

2) situations in which the court enforces the community legal rules as they have already been construed by the Court (legal precedent consecrated by the Court case-law)

The cases having the object of repayment of the special registration fee for second hand vehicles purchased from other countries of the European Community have been settled by some law courts by invoking the legal precedent consisting in the case-law of the Court of Justice (Court decision dated July 13th, 2006 delivered in the case Akos Nadasdi/Vam-es Penzugyorseg Eszak-Alfoldi Regionalis Parancsnoksaga, C-290/05 and the Court decision dated December 11th, 1990 delivered in the case EC Commission against the Denmark Kingdom, C-47/88) and the compulsoriness of complying with the construction of the community law by the national courts[200].

These litigations, settled in conformity with the Adhesion treaty and the case-law of the European Court represent an example of unitary legal practice grounded on the direct enforcement of the community law by the national courts.

3) request of a preliminary ruling by investing the Court of Justice.

The first request to deliver a preliminary ruling addressed by a Romanian court to the Court of Justice of the European Communities was made by Dâmbovița Law Court in a litigation having the object of limitation of the circulation right abroad.

The litigations grounded on Law no. 248/2005 on the regime of free circulation of Romanian citizens abroad – having as object petitions of the National Passport Agency to forbid the access of Romanian citizens on the territory of an EU member state for a period of up to three years, state from where they have been expelled before January 1st, 2007 for illegal stay – in

[198] Arad Law Court, civil judgment no. 2563 from November 7th, 2007, not published.
[199] Cluj Court of Appeal, civil judgment no. 1145/2008 from May 14th, 2008, not published.
[200] Alba Law Court, civil judgment no. 1129/CAF/2008 from September 18th, 2008, Alba Iulia Court of Appeal judgment no. 974/CA/2008 from September 17th, 2008, Sibiu Law Court, civil judgment no. 415/CA from July 1st, 2008, unpublished.

practice raised for discussion answering the question to know in which extent the dispositions included in the domestic law (law no. 248/2005) are compatible with the community legislation in the field of free movement of persons, especially in relation with the European Parliament and Council Directive 2004/38/EC dated April 29th, 2004 on the right to free circulation and stay on the territory of member states for the citizens of the Union and the members of their families.

The examination of the community legal framework (Article 27 paragraph 1 of the said directive) outlines in a limitative way only 3 situations when the state might restrict the circulation freedom of persons: having an effect on the *public order, public safety or public health*, while the domestic legal rule (law no. 248/2005) establishes the possibility to restrict the right to free circulation *id the Romanian citizen was returned from a state based on an readmission agreement*, without making any distinction regarding the person of the said citizen, respectively whether or not it represents a danger for the public order, safety or health of the state from which he was returned.

The enforcement of this law caused the first petition from Romania for delivery of a preliminary ruling. The petition for preliminary ruling was filed by Dâmbovița Law Court, which asked the Court of Justice of the European Communities to deliver on the construction of Article 18 CE (European citizenship) and Article 27 of Directive 2004/38/CE dated April 29th, 2004 on the right to free circulation and stay on the territory of member states for the citizens of the Union and the members of their families.

This petition was filed within the litigation between the Ministry of Administration and Internal Affairs (Bucharest Passport Agency) and Mr. Gheorghe Jipa. Mr. Jipa left Romania in September 2006 in order to settle down in Belgium, but he was repatriated from there because of the fact that he did not meet the stay requirements applicable on the Belgian territory. The Ministry of Administration and Internal Affairs addressed Dâmbovița Law Court a petition asking, based on Law no. 248/2005, the limitation of Mr. Jipa's right to circulate abroad for a period of up to 3 years.

The petition for preliminary ruling entered by Dâmbovița Law Court on January 17th, 2007 comprises the following issues:

1) Should Article 18 CE be construed in the sense that it opposes to Articles 38 and 39 of Law no. 248/2005?

2) a) Do the said dispositions of Articles 38 and 39 represent an obstacle in the way of the free movement of persons established in Article 18 CE?
b) Can a member state of the EU limit the free circulation of its own citizens on the territory of another member state?

3) a) Does the term of « illegal stay » in the sense of the agreement celebrated between Romania and Benelux is circumscribed to the reason of «public order» and «public security» established by Article 27 of Directive 2004/38/EEC, so that the free circulation of a person can be limited?
b) In case of an affirmative answer to the last question, should Article 27 of Directive 2004/38/EC automatically be construed in the sense that the member states can restrict the freedom of circulation and stay of the citizens of the European Union for reasons of public order and public security, without analyzing the «behavior» of the person concerned?

The arguments of the Advocate General of the Court of Justice of the European Communities, Mr. J. Mazak, presented in the case C-33/07[201], were as follows:
- since January 1st, 2007, Mr. Jipa is a citizen of the European Union, which means that he can make use, even in relation with the state of which he is a citizen, of any rights deriving from this status (point 30).
- Article 18(1) CE is directly enforceable in the national legal order, so EU citizens have the right to leave the territory of a member state, including the member state of origin, in order to enter the territory of another member state (point 31).
- the fact that Mr. Jipa hasn't still exercised his right to free circulation does not mean that the situation should be assimilated to an internal situation (the case-law Chen et Zhu, C-200/02 is quoted). On the contrary, it has a direct connection with the community law (point 34).
- the right to free circulation on the territory of the member states, as guaranteed by Article 18 (1) EC, would be devoid of its substance if the member state of origin could, without any valid justification, forbid its own nationals to leave its territory in order to enter the territory of another member state (point 35). The Advocate General invokes the previous case-law of the Court regarding the free movement of persons (Pusa, C-224/02, Singh, C-370/90), but also the right to settle down (International Transport Workers' Federation et The Finnish Seamen's Union, C-438/05, Daily Mail and General Trust, 81/87, Bosman, C-415/93). Therefore such obstacles placed both in the state of origin and in the state of destination are forbidden.
- pursuant to Article 4 of Directive 2004/38/EC, any citizen of the Union has the right to leave the territory of a member state in order to enter another member state.

Based on these arguments the Advocate General of the Court of Justice of the European Communities claims that such national legislation (Law no. 248/2005) contravenes to the community law. Further on, Article 27 of Directive 2004/38/EC is analyzed in order to outline the conditions in which the right to leave the territory of a member state can be limited.

Although title VI, which includes Article 27, only refers to the right to enter and stay, the Advocate General considers that it results from the wording of the article itself the fact that it regards the limitation of the circulation freedom and that it also includes the right to leave a member state (point 40). It is further recalled the fact that any exception brought to the circulation freedom should have to be the object of a restrictive construction. Also, the notion of public order may vary from one country to another and from one period to another, so that the member states are acknowledged the competence to assess it (paragraph 41).

Based both on Article 27(2) of the Directive, and also on the previous case-law, there cannot be accepted motivations that are not directly related to the case or are related to considerations of general prevention. On the contrary, it is necessary "a real and sufficiently serious threat to a fundamental interest of the society" (point 42) (invoked case-law: Bouchereau, 30/77, Rutili, 36/75). Therefore, a member state cannot limit the right to leave the state of origin only for the reason that the person was repatriated from another member state for "illegal residence". The threat must exist against the state which adopts the measure of limitation of the free movement and not against the state from which the person was returned (Belgium). The measure has to be proportional and to be based on the personal behavior of the person concerned. So, the Advocate General of the Court of Justice of the European Communities considers that in case of Mr. Jipa there is no threat to the fundamental interests of the Romanian society that would make necessary the adoption by Romania of a measure of limitation of the free movement.

[201] http://curia.europa.eu/jurisp; http;//eurojurnal.eu/?p=48

Finally, the Advocate General of the Court of Justice of the European Communities recalls that the measure does not have to be automatically adopted, but only after due examination of the behavior of the person concerned.

After the exam of the case, the Court decided as follows: "Article 18 EC and Article 27 of Directive 2004/38/EC […] do not preclude national legislation that allows the right of a national of a Member State to travel to another Member State to be restricted, in particular on the ground that he has previously been repatriated from the latter Member State on account of his 'illegal residence' there, provided that the personal conduct of that national constitutes a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it. It is for the national court to establish whether that is so in the case before it."[202] The decision of the Court answers at the issue enounced at the beginning of the presentation in the following sense: the community legal provisions do not preclude national legislation to restrict the right of a national to travel to another Member State, provided that certain conditions are accomplished (the personal conduct of that national constitutes a threat and measure appropriate to achieve the pursued objective).

In fact, the domestic rule is partially incompatible with the community rule because it contains exceptions to the free movement of the persons others than those related to the public order, safety or health, established by the community rule.

Consequently, since Romania had the obligation to transpose until January 1st, 2007 the dispositions of the Directive into the internal law – but until now law no. 248/2005 hasn't been amended in order to be harmonized with the dispositions comprised in the Directive – as well as taking into account the principle of prevalence of the community law, the rule enforceable in the litigations in which the restriction of the right to free movement of a Romanian citizen is required, is the community rule, respectively Article 27 and following of Directive 2004/38/EE. In this sense are also the points of view expressed by the High Court of Cassation and Justice, based on which "the community law prevails the contrary national law, producing concrete effects in the domestic order of the member states, the national judge being the one called to sanction the contrary"[203].

2.3. Romanian Government Agent and his/her Role in Representing Romania within the Procedures Established in Article 234 of the Treaty of the European Union

In Romania, the coordination of the process of conceiving the policies and strategies in the field of European affairs, including the preparation of Romania position within the community structures is provided by the Department for European Affairs. It represents an administrative structure with legal status operating within the Government working machinery of the Government, directly subordinated to the prime minister. The activity of this administrative structure is based on the dispositions of the Emergency Ordinance no. 133/2006[204] where its responsibilities are listed. Among them there is the activity of representing Romania before the Court of Justice of the European Communities and of the

[202] CJEC, July 10 2008, Ministerul Administrației și Internelor - Direcția Generală de Pașapoarte București/Gheorghe Jipa.
[203] High Court of Cassation and Justice, decision no. 4403 from May 31st, 2007 http://www.iccj.ro/cautare.php.
[204] Amended and completed by Law no. 102/2007, published in the Romanian Official Gazette, Part I, no. 275 from April 25th, 2007

Court of First Instance as well as of the other community bodies. In this sense, in Article 3 paragraph 1 letter j) of the Emergency Ordinance no. 133/2006 there are specified the procedures from the Treaty establishing the European Community in which the Romanian state can be represented, among them also being the procedures established in Article 234 of the Treaty of the European Union regarding the petition for delivery of a preliminary ruling (point 4).

The Department for European Affairs represents Romania within the contentious procedures for delivery of a preliminary ruling by means of the government agent. He has a rank of under-secretary of state and has the mission to coordinate and supervise "the substantiation by the public authorities and bodies of the national positions to be […] transmitted and / or defended before the community courts."[205]. In its direct subordination there is the Community Contentious service[206], which plays its part to prepare Romania representation in the community procedures. The above-mentioned public bodies are organized in a working group called *Community Contentious working group*, which includes all the ministries and other authorities of the central and local public administration.

Within the procedures established in Article 234 of the Treaty of the European Union, the government agent has the task to represent the Romanian state in case that the petition for delivering a preliminary ruling in pending before the Court of Justice. The representation of the Romanian state and the substantiation and drawing up of its points of view take place according to a methodology adopted by the Romanian Government[207].

After a law court files a petition for delivering a preliminary ruling to the Court of Justice of the European Communities, it will notify then the clerk of the Court of the parties concerned, of the member states and the Commission, as well as the Council or the European Central Bank.[208]

After receiving the petition, if filed by a Romanian law court, the Department for European Affairs, according to the above-mentioned methodological dispositions, shall identify by consultations all the public authorities having competence over the communicated issues. They shall be convened to a working meeting in order to debate the preliminary points of view of the public authorities concerned, of the difficulties that they estimate and the working schedule for the substantiation and drawing up of the point of view of the Romanian state. Based on the answers received from the competent public authorities, the Department for European Affairs shall finalize the point of view of the Romanian state, to be transmitted to the Department for European Affairs, to the Permanent Representative Office and to the Court of Justice of the European Communities.

This right granted to the states to intervene within a previous procedure facilitates the integration of the Court case-law in the legal systems of the member states.

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[205] Article 6 index 2 of the Government Emergency Ordinance no. 133/2006

[206] According to the Prim-minister decision no. 231/2008 concerning the amendment of annexes 1 and 2 of the Prim-minister decision no. 15/2007 for the approval of the organization structure and personal establishment of the Department for European Affairs, published in the Romanian Official Gazette, Part I, no. 781 from November 21st, 2008.

[207] Methodology regarding Romanian representation in the procedures before the Court of Justice of the European Communities and the First Court as well as the other community institutions, not published.

[208] Article 23 paragraph 1 of the Statute of the Court of Justice; Article 104 paragraph 1 of the Rules of Procedure of the Court of Justice, www.curia.europa.eu

The opportunity of the intervention should be analyzed within the context in which any decision of the Court of Justice in the field of construction of the community law produces effects not only to the law court that asked the question but also to all the law courts and authorities involved in all the member states.

A potential intervention, by expressing observations, by part of a state in a previous procedure supposes the argumentation of the existence of possible effects upon the national legal system, even if the said case is placed in another member state. Therefore, the role of the Department for European Affairs must be to identify the elements of legal arguments that correspond to the purpose involved[209], to anticipate the effects[210] that the Court decision might cause on the legal system and to decide whether it is necessary to contribute by transmitting some ideas and arguments to the Court by which to inform the fact that the Romanian state tends to one or other possible constructions or anticipates a certain evolution in the construction and enforcement of the said community disposition.

The decision to exercise the intervention right by the Romanian state entails the consultation of the public authorities competent in the said issues. It is necessary that the institutions assume the responsibility of transmitting any necessary information in due time and being aware of the acknowledged construction of the enforceable principles of the community law. This consultation process supposes receptivity from these authorities because the examination of the information required by the Department for European Affairs involves a degree of complexity and a specialization of the structures from the ministries concerned. The reactions of the authorities may be various, the authorities either with difficulty, or a couple of authorities may react by different points of view liable to result in conflicts between the administrative structures. Even if there may appear divergences between the positions expressed by the public authorities (for example between two ministries), what really matters is that the Romanian state transmit an unique point of view. Following this line of thinking, it is natural for the last word to correspond to the Department for European Affairs, which is the structure expressing the state point of view and expresses its position before the Court.

On the one hand, the Department for European Affairs – having the mission to manage the state representation before the Court of Justice – is the only structure in the position to assess whether there are chances for a point of view to be accepted by the Court. On the other hand, the Department for European Affairs has the mission to avoid divergences appearing between the observations presented in a given case as compared to the observations presented in another case[211]. The monitoring of the conclusions filed in time and the drawing up of new conclusions in correlation with the previous conclusions shall correspond to the competence of the Department for European Affairs. As the Department for European Affairs is the one in the position to know the case-law evolution, the role to decide the guidelines of the position of the Romanian state has to correspond to it. Once decided the guidelines of the state position, the administrative authorities may be required to supply information, documents, explanations about the enforcement of certain legal rules based on which the legal argumentation can be structured and the content of the point of view of the Romanian state can be drawn up.

[209] Concretely, it can be considered that the agent of the government acts as a "layer" of the state.

[210] The prediction of a decision that might have benefic consequences by the legal, economical, social etc. points of view for the state expressing observations.

[211] Excepting the cases when, between the moment of expressing observations in a case and the moment of expressing observations in another case on the same subject, the CJEC settles by a decision that consists a sudden change for the better of the case-law, that is clear, obvious and in contradiction with the previous observations.

The complexity of the case-law of the Court of Justice makes this mission to be a difficult one, because it is important for the point of view expressed by one state not to be in flagrant disharmony with the previous case-law of the Court and with the potential points of view of other member states. On the one hand, it is desirable to have a common vision between the administrative authorities and the Department for European Affairs leading to a convergent pleading in the process of formation of the observations expressing the Romanian state position. On the other hand, the expression of a "unique pleading" would make efficient the understanding of the community regulation in a common vision and the strategy of the Department for European Affairs of integration of the community law.

The experience of the Department for European Affairs in the field of Romania representation as a result of a petition filed by a Romanian law court within a preliminary procedure before the Court of Justice of the European Communities materialized in the solution delivered in the case "Jipa against Romania". The parts of this case were the Ministry of Administration and Internal Affairs (Bucharest Passport Agency) and Mr. Gheorghe Jipa, Romanian citizen repatriated because of the fact that he did not meet the residence requirements applicable on the Belgian territory. Therefore, one of the parts of the litigation was a state authority (the Ministry of Administration and Internal Affairs - Bucharest Passport Agency) , subordinated to the government whose double quality (of part in the litigation and of administrative structure subordinated to the government) resulted in the expression of a point of view convergent with the Department for European Affairs, which claimed that the court should construe the invoked text in the light of the community law.

The logic of expression of a convergent point of view in the case of a national authority (of the government) is one of the parts of the litigation - by that state – is to guarantee the coherence of the position of the state in the respective case. In such a situation, as it was the case Jipa, the Court of Justice delivered a solution in agreement with the conclusions expressed by the Romanian government agent.
The state's participation strategy by expressing observations in the preliminary proceedings can be appreciated upon the statistic indicators[212] which reveal the number of observations expressed by each state and the nature of the cases in which they appreciated that is opportune to interfere. The exam of those data puts in evidence a selective strategy of participation based on the merits of the case.[213] In that sense, the professional literature underlined that some states can be considered "Repeat Players", taking into consideration the frequency of transmitting observation to the Court of Justice in the preliminary reference proceedings, and also pointed out that governmental participation in ECJ proceedings should be preserved and even encouraged, by both the Court and the governments themselves[214].

2.4 Procedural issues reflected in the draft of the Code of civil procedure

A. Adjournment of the case by the national court

In the practice of law courts the question is to know whether filing a petition for delivering a preliminary ruling by the Court of Justice entails the adjournment of the case until de delivery by the Court of the preliminary ruling regarding the construction of the community law.

In the texts on the procedure of settlement by the Court of preliminary rulings there are references regarding the adjournment of the "settlement procedure" of the case. In this sense

[212] http;//curia.eu.int/en/instit/presentationfr/index.htm, Annual Report, Statistics, page 101.
[213] Marie-Pierre Granger, States as successful litigants before the European Court of Justice: Lessons from the Repeat players of European litigation, European Law Review, No. 3, 2004, pag. 39, http://dialnet.unirioja.es
[214] Marie-Pierre Granger, op.cit., pag. 46.

are the dispositions of Article 23 of the Statute of the Court of Justice stipulating that "the decision of the *national court that adjourns the procedure* and informs the Court shall be notified to the Court by the said national court." And also of the information note[215] according to which "even if filing a petition for delivery of a preliminary ruling mainly leads to the adjournment of the national procedure until the Court delivers, waiting for its decision, the committal court remains competent to adopt conservation measures […]". In the same sense is the Court case-law showing that "the national court remains invested with the case, which continues to be pending for settlement on its roll. *Only the procedure before this court is adjourned* until the Court delivers regarding a preliminary question."[216] More than this, in case that, after investing the Court, a national court refused to acknowledge the agreement of one part with the claims of the other part, to find the litigation between them as extinguished and to withdraw the preliminary question addressed to the Court, assessing the conditions in which it was invested, the Court decided that, as long as the national court does not find whether the agreement produces effects in the ground of the national law, the Court is not competent to deliver in relation to the preliminary question invested in it.

Considering the above-mentioned facts, in the practical trial activity the national courts enforce the domestic procedural dispositions (permissive or imperative) related to the adjournment of the case judgment until the Court delivers its decision regarding the preliminary question.

But there are also cases containing distinct claims, only one generating a preliminary question. In this situation, it results from the examination of the trial systems from the member states of the European Union that most of them contain dispositions pursuant to which law courts may order both the adjournment of the case, on the one hand, and also the settlement of the claims of the service of notice that don't depend on the preliminary ruling delivered by the Court of Justice. Such regulations are found in the procedural laws from countries as the United Kingdom, Greece, France, Luxemburg, Scotland and Denmark. In this sense, for example, in the Netherlands the examination of the case is adjourned exclusively regarding the question about the construction of the community law. In Greece, a decision requesting the delivery of a preliminary ruling by the Court of Justice can be final for the issues that do not depend on the construction of the community law. In France, the French State Council adjourns the trial only in relation to that part of the service of notice that required the request of a petition for delivery of a preliminary ruling and delivers by a final decision in relation to the other claims invested in it. A similar situation is found in the practice of Luxemburg law courts. On Scotland, the request for delivery of a preliminary ruling does not automatically represent an obstacle for the trial measures not depending on the preliminary ruling delivered by the Court. In Denmark, procedural law allows the continuation of the examination of the case invested in the law court, regarding other legal issues. In Sweden, within administrative courts a partial judgment is not possible but it is possible within law courts.[217]

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[215] Internal note regarding the making of preliminary committals to the national courts SUPPLEMENT further to the entry into force of the preliminary emergency procedure applicable to preliminary committals related to the space of freedom, security and justice

[216] Court of Justice of the European Communities, Teresa Zabala s.a/Instituto Nacional de Empleo, C-422/93, C-423/93 and C-424/93, p.28.

[217] The information regarding the comparative law have as biographical source "Le Rapport général sur le theme du colloque "Le renvoi préjudiciel a la Cour de Justice des Communautés Européennes", Helsinki, 2002, p.4.10. which can be found at http://www.juradmin.eu/fr/colloquiums/colloq_fr.html

In conclusion, according to the provisions of the procedural law systems in most European countries, courts may order the adjournment of the case and the potential continuation of the judgment regarding issues that do not depend on the construction of the community law.

In the Romanian procedural law, the petition for delivery of a preliminary ruling by a law court can be ordered pursuant to Article 234 TCE. We are reserved about the Article 244 paragraph 1 point 1 of the Code of civil procedure according to which "(1) The court may adjourn the trial: 1) when the settlement of the case depends, in whole or in part, on the existence or non-existence of a right being the object of another trial; […]" The text regulates one of the cases of the facultative legal adjournment and refers to the previous issues, which may have a decisive influence on the rights deducted in justice. In order for the text to be enforceable, it is however necessary for the issue on whose settlement depends the solution in the trial to be the object of another trial, meaning to be "pending"[218], requirement that is not met in case of investing the Court of Justice by the session closing containing also the petition for delivery of a preliminary ruling.

For these reasons, the Code of Civil Procedure now contains a novel provision according to which "the trial of the cases shall be adjourned by law […] when, in a case *in last instance*, a petition was filed for the issue of a preliminary ruling addressed to the Court of Justice of the European Union, according to the dispositions of the treaties on which the European Union is grounded, even if the said petition was filed before a lower court;"[219] (Article 395 paragraph 1 point 7 of the draft of the Code of civil procedure). Besides, facultative adjournment is provided "when in a case not being in the last court was filed petition for delivery of a preliminary ruling addressed to the Court of Justice of the European Union, according to the dispositions of the treaties on which the European Union is grounded;" (Article 396 paragraph 1 point 3 of the draft of the Code of civil procedure).
Essentially, among these provisions the vesting of the community court as a legal ground for the adjournment of the case is expressly regulated, making the difference, depending on the court nature. Therefore, for cases in last instance the adjournment shall automatically operate, and for the other ones, the adjournment is facultative.

The introduction in the provisions of the Code of an express provision regarding the adjournment of the case is welcomed within the context in which the current regulation supposes the existence of another case pending for settlement; or, in the current regulation, the investment deed of the Court of Justice is represented by the same session closing by which the case adjournment is ordered. The facultative adjournment for the courts delivering non-final decisions is a judicious solution taking into account the application of the legal precedent and the settlement with celerity of the case.

Also, the automatic adjournment is justified in case of courts delivering final decisions, which have the obligation to provide a unitary construction of law at national level, which includes the enforcement of the community law in agreement with the legal systems from other states. In the specialized literature it was outlined that there have been cases in which the national courts delivered regarding the construction of some community law issues included in community dispositions numbered among the ones known to be the most difficult ones of the Treaty or have already been construed by the Court, the said courts choosing to outstrip from the said construction[220]. This is why the concern to enforce a competent construction, by automatically adjourning the case, is obviously justified. However, it is obvious that they will

[218] Gabriel Boroi, Code of civil procedure with commentaries and adnotations, All Beck, 2001, p.557.
[219] http://just.ro
[220] Sean van Raepenbusch, Droit institutionnel de l'Union Europeenne, Ed. Larcier, 2005, p. 435.

be able to apply *Cilfit* case-law whenever they consider it necessary. But, based on the Court case-law (the above-mentioned case *Teresa Zabala*), the automatic adjournment of the case must be construed as *automatic adjournment of the procedure requiring the construction of the community law* and not of the case deferred for trial in its integrality. Taking into account the above-mentioned case-law, the automatic adjournment of the case should not exclude the enforcement of other procedural dispositions of the domestic law (for example, the replacement on the roll of the case in order to find the potential amiable settlement, agreement, waiving to trial, etc.). Also, if the service of notice has several claims, and only one of them would require the construction of the community law, the desirable solution is the disjunction of the case and the distinct settlement of the claims not depending on the construction of the community law.

B. Remedies provided by the domestic law against the decisions of national courts asking or refusing to ask the delivery of a preliminary ruling

Based on the principle of procedural autonomy, the Court of Justice considered that the community law does not exclude the exercise of some remedies against procedural deeds of national courts by which they request to the Court of Justice to deliver a preliminary ruling[221]. In this sense, the Court expressed its point of view according to which it is not necessary for the decision asking the delivery of a decision to be final in order for the procedure before the Court to be able to follow its course[222].

It results from the examination of the procedural systems from the member states of the European Union that most of them contain dispositions based on which the appeal is the remedy that can be exercised against the decisions of national courts asking the delivery of a preliminary ruling. Generally, the appeal can be theoretically exercised in three cases which are: appeal against the incidental decision of a court to ask the delivery of a preliminary ruling; appeal against the incidental decision of a court to reject the petition for delivery of a preliminary ruling; appeal against the decision on the merits of the case, being admitted or rejected within the trial the petition for delivery of a preliminary ruling. In such cases, the Court adjourns the trial regarding the preliminary petition when informed by a competent legal authority that an appeal was entered – with adjourning effect – against the petition for delivery of a preliminary ruling[223]. In the practice of the Court, the procedure before the Court of Justice continues as long as the petition of the national court has not been withdrawn or canceled[224].

In fact, there are two hypotheses: the Court adjourns the trial when the appeal has adjourning effect in the domestic law; if, on the contrary, the appeal does not have a adjourning effect, the Court considers to be entitled to answer the questions asked by the national court without taking into account the objections which determined any of the parts to enter a remedy against the decision of the national court to ask for a preliminary ruling. This solution was criticized by a part of the doctrine[225], outlining the fact that the domestic law would condition this way the community court, and besides, it would be in the position to examine the effects of the appeal of the national law, on which it does not have the competence to deliver a decision, according to Article 234 of the Treaty of the European Communities. However, there are convincing arguments in its favor. This solution is in agreement with the principle of

[221] Court of Justice of the European Communities, February 12th, 1974, Rheinmulhen, C-146/73, Rec., p.147.
[222] Court of Justice of the European Communities, April 6th, 1962, Bosch, C-13/61.
[223] Sean van Raepenbusch, op.cit., , page 342.
[224] Court of Justice of the European Communities, January 30th, 1974, BRT/SABAM, C-127/73, Rec., p.51.
[225] R. Kovar, Recours prejudiciels en interpretation et en appreciation de validite - Examen de la question prejudicielle par la Cour de Justice, JurisClasseur Europe, fasc.360, no. 9-10.

procedural autonomy based on which, in absence of a community regulation, the procedural legal system of each member state will have the right to set regulations regarding the procedural remedies in justice. Also, the lack of effect of the decision delivered by the Court in the main litigation is therefore avoided[226], according to the constant concern of the Court not to formulate mere consultative opinions regarding the general or hypothetic questions, but to contribute to the justice administration in the member states[227]. In reality, the Court does not examine the effects that the remedy has in the national law, but only limits itself to take consequences from their existence regarding its own competence, based on the information communicated by the invested court or the court hierarchically superior to it regarding this issue.

The settlement of the above-mentioned remedy may have as a result its rejection and the maintenance of the decision regarding the petition for a preliminary ruling or, on the contrary, the admission of the remedy and the modification or cassation of the decision to ask for the delivery of a preliminary ruling. In case that the court invested with the remedy communicates to the Court that the petition decision was maintained, the Court orders the resuming of the judgment of the previous procedure. In case that the court that filed the petition (or the one invested with the remedy) communicates to the Court that the decision requesting the issue of a preliminary ruling was modified or cancelled, the Court shall deliver an ordinance declaring that the procedure was left without an object[228].

Generally, most procedural systems from the member states of the European Union contain dispositions pursuant to which *it is not possible* to file an appeal against an incidental decision asking the delivery of a preliminary ruling, before the judgment on the merits of the case, the appeal may be filed only after the delivery by the court of a decision regarding the merits of the case. But there are also legal procedural systems in which *it is possible* to file separately an appeal against an incidental decision to ask for the delivery of a preliminary ruling, as the legal systems from the United Kingdom, Wales, France, Portugal and Denmark[229].

In the Romanian procedural law, the appeal against previous closings can be filed only together with the merits, except for the case in which they interrupted or adjourned the course of the trial. Therefore, the session closing ordering the adjournment of the case can only be appealed separately pursuant to Article 244 index 1 of the Code of civil procedure, which stipulates as follows: "The court will rule on the adjournment of the trial in all cases by means of the closing, which can be separately appealed. The appeal can be filed during the adjournment of the trial judgment [...]"[230], does not suspend the execution and can be filed within 15 days from the communication of the decision, unless otherwise established in the law, according to Article 301 of the Code of civil procedure.

The draft of the code of civil procedure does not contain modifications regarding the exercise of the remedy of appeal against the closing regarding the adjournment of the case, maintaining the current regulation in a new wording: "The court will rule on the adjournment

[226] R. Joliet, Le droit institutionnel des Communautes europeennes. Le contentieux. Faculte de droit, d'economie et de sciences sociales, Liege, 1981, p. 199.
[227] Court of Justice of the European Communities, December 16th, 1981, Foglia-Novelli, C-244/80, Rec. p.3045.
[228] Court of Justice of the European Communities, ordinance, September 3rd, January 1969, Chanel, C-31/68, Rec., p.405.
[229] The information regarding the comparative law have as biographical source "Le Rapport général sur le theme du colloque "Le renvoi préjudiciel a la Cour de Justice des Communautés Européennes", Helsinki, 2002, p.3.4.
[230] An exception from the above-mentioned dispositions is the closings delivered in appeal, which, when referring to the adjournment of an appeal by a court of appeal, by virtue of Article 23 paragraph 2 of Law no. 304/2004, may be appealed before the High Court of Cassation and Justice.

of the trial judgment by closing that can be separately appealed, before the hierarchically superior court." The legislator's option to maintain the same dispositions as the ones currently in force can be explained by the fact that the appeal is not suspended in execution, so that the Court of Justice continues the procedure for settlement of the preliminary ruling independently of the appeal filed in the domestic law. Finally, the draft of the Code of civil procedure contains a disposition regarding the resuming of the judgment by the court after the delivery of the decision by the Court of Justice of the European Communities.

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The adjustment of the Romanian legislation to the priorities of the community order requires, in addition to the modernization of the codes of procedure, the adoption of some legislative rules that will allow the access to the preliminary procedure regarding the community deeds adopted pursuant to Article 34 of the Treaty of the European Union (common positions, decisions, framework decisions, conventions). These modifications are partially determined by the ratification of the treaty of Lisbon[231], but at the same time it represents a necessity regardless its entry into force.

The Treaty of Lisbon puts an end to the evolution of the adjustment to the community regulations of the space of freedom, safety and justice by introducing in the community law of the JAI domain in its whole[232] with the consequence of applying the control of the Court of Justice over this domain.

The Treaty of Lisbon brings modifications both to the Treaty establishing the European Union (TUE - Maastricht 1992) and also the Treaty of Rome (1957)[233].
In essence, the modifications brought to the dispositions of the two treaties, regarding the preliminary procedure, are the following:
1. *in the contents of the Treaty of the European Communities* a paragraph shall be added in Article 234, stipulating that: "If such case is invoked in a case pending before a national law court regarding a person submitted to a freedom privative measure, the Court shall decide as soon as possible." (by Article 2 paragraph 218) . The text refers to the protection of litigants being in a state of detention, for this purpose the Court adopted beginning with March 1, 2008 the previous urgent procedure.
2. *in the contents of the Treaty of the European Communities* a new title shall be inserted called "Space of freedom, security and justice"[234] which replaces title IV on visas, right to asylum, immigration and other policies regarding the free movement of persons. This title has several chapters, among which there are also the domains regarding legal cooperation in the criminal field and police cooperation, which *used to be regulated in title VI of the Treaty of the European Union* ("Dispositions on police and legal cooperation in the criminal field").

The evolution of this text has its origins in the treaties of Amsterdam and Nyssa by which the measures in the field of visas, asylum, immigration and free circulation entered the

[231] Romanian Parliament ratified the Treaty of Lisbon by Law no. 13 from February 7th, 2008, published in the Official Gazette no. 107 from February 12th, 2008.
[232] By Article 2 paragraph 63 and following of the Treaty of Lisbon – of Articles 61-68 TFUE (in the consolidated version of TFUE they are Articles 67-80).
[233] Regarding the amendments brought to the Treaty of Rome, they stipulate the competencies and intervention fields of the EU and will have the name of Treaty on the functioning of the European Union (TFUE). Regarding the treaty of the European Union, the amendments concern the institutions, the consolidated cooperation, the foreign and common security policy, as well as the defense policy.
[234] Title IV inserted by Article 2 paragraph 63.

community pillar (Title IV of the Treaty of the European Communities) and the legal cooperation in the criminal field and police cooperation had remained in the third pillar.

The Treaty of Lisbon ends this evolution by the insertion in the community law of JAI domain in its whole – by Article 2 paragraph 63 and following of the Treaty of Lisbon – of Articles 61-68 TFUE (in the consolidated version of TFUE they are Articles 67-80).

Therefore, the third pillar will fully disappear *at the end of a transitory period of 5 years* and the common policies in the domain of freedom, security and justice, including the Schengen Area, will correspond to the first pillar, that is to the community procedure[235], which entails the extension of the Court competences regarding the "space of freedom, security and justice." (Title IV TFUE). The consequence will be the application of the procedures, legal instruments and legal regime corresponding to the Court of Justice in the new domains. In this context please note that the new regulation presents in detail and increases the competences of the Court and Commission in terms of imposing sanctions in case of the state that failed to adopt the measures required by the execution of the Court decision[236]. In this context it is predictable an increase in the number of petitions for delivery of preliminary rulings within the national criminal procedures. But, *currently* only the courts from the states that made the statements established in Article 35 paragraph 2 of the Treaty of the European Union can address preliminary questions regarding the community deeds regulating the domain of the third pillar.

In future, to the extent in which the Treaty of Lisbon will enter into force, the dispositions of the current Article 35 of the Treaty of the European Union will be repealed and therefore it will not be necessary anymore to make a statement for acceptation of the competence of the Court of Justice of the European Communities. But Protocol no. 36 on transitory dispositions, enclosed to the Treaty of Lisbon establishes that the competences of the Court of Justice of the European Communities in terms of police and criminal cooperation shall remain unchanged for a term of 5 years from the entry into force of this treaty.

Therefore, the absence of a declaration of Romania for acceptation of the competences of the Court of Justice of the European Communities shall produce effects not only for the time being, but also for the future, for a period of 5 years from the entry into force of the Treaty of Lisbon.

In this sense, the Ministry of Justice initiated a law draft regarding the making by Romania of a statement pursuant to Article 35 paragraph (2) of the Treaty of the European Union, until the entry into force of the Treaty of Lisbon and regardless of its legal situation. The draft establishes the fact that it is necessary for Romania to make such statement, in order for the national law courts to have access to the preliminary procedure regarding the deeds or conventions concluded pursuant to the Treaty of the European Union, as it allows the law courts to benefit by the expertise of the Court of Justice of the European Communities regarding the construction and validity of the community rules, with the consequence of adjournment of the domestic procedure. Pursuant to this draft, any court will be able to use according to its own assessment the preliminary procedure, and Romania reserves its right to establish in its national legislation the fact that *the law courts have the obligation to resort to the preliminary procedure in the cases in which the decisions to be delivered cannot be appealed anymore.*

[235] Article 10 of the protocol on transitory dispositions.
[236] Article 228, paragraph 2-3 TFUE

Conclusions

The cohesion in the construction of the community law is provided by the Court of Justice of the European Communities by the mechanism of preliminary procedure, establishing the cooperation between the national law courts –community courts "of ordinary law"– and the "supreme" community court. The competence of the Court of Justice in the construction of the community law is regulated by the dispositions of Article 234 of the Treaty of the European Communities, by the preliminary procedure, procedure which established a cooperation mechanism between the national courts and the Court of Justice according to which *any court* may address to the Court of Justice a preliminary petition regarding the construction of the community law

The preliminary procedure meets two essential functions. First, this mechanism provides the unitary construction of the community law, resulting in its uniform enforcement by national law courts of the member states. The second function of the preliminary procedure is to protect the individuals' rights, by creating the settlement framework of the contradictions that might appear between the domestic legislation and the community law.

The legal regime of the competence of the Court of Justice in preliminary matter is made up of Article 234 of the Treaty of the European Communities, Article 68 of the Treaty of the European Communities and Article 35 of the Treaty of the European Communities, structured as follows: 1. legal regime "of ordinary law" established in Article 234 of the Treaty of the European Communities for the issues in the first pillar, the special regime established in Article 68 paragraph 1 of the Treaty of the European Communities for the domains adjusted to the community legislation (related to visas, asylum and other policies related to free movement of persons) and the special regime established in Article 35 of the Treaty of the European Communities for the domains regarding police and criminal cooperation. Article 68 of the Treaty of the European Communities establishes a restrictive enforcement of Article 234 of the Treaty of the European Communities regarding the national courts delivering decisions not submitted to any remedy. Article 35 of the Treaty of the European Communities establishes a facultative preliminary procedure allowing to states to accept the competence of the Court of Justice of the European Communities of preliminary ruling, by making an explicit statement.

The Court of Justice of the European Communities may be vested with a petition for delivery of a preliminary ruling only by a law court from a member state of the European Union. This legal notion of national court used in the community law is required to be construed and enforced in a uniform manner within the Community[237], which is why the Court defined characterizing a "court": the legal origin of the said authority, its permanence, the compulsory nature of the delivered decisions, the contradictory character of the procedure, the enforcement of the legal rules in the settlement of the case as well as its independence. The mechanism of the preliminary procedure regulated by Article 234 of the Treaty of the European Communities is facultative for law courts, the only ones in the position to assess the necessity to use it but it becomes compulsory when the preliminary question is addressed by a national court delivering decisions not submitted to any remedy in the domestic law. The compulsory nature entails certain attenuations in case of a question that has already been the object of a preliminary ruling or if the enforcement of the deed does not give way to any doubt (the theory of the deed is clear). The principle of procedural autonomy results in the enforcement of the procedural rules established by the national law in terms of drawing up and motivation of the petition for delivery of preliminary rulings. The requirements that a petition for delivery of a preliminary ruling has to meet are presented in the Informative note

[237] Court of Justice of the European Communities, May 21st, 1977, Haegen, C-107/76, Rec., p. 957.

on the drawing up of the petitions for delivery of a preliminary ruling by the national court bodies. Regarding the trial phase in which the petition for delivery of a preliminary ruling can be filed; its assessment is in the exclusive competence of the national court, which can decide the investment of the Court in any trial phase[238] of the case.

The object of a petition for issue of a preliminary ruling can be: *the construction* of community treaties, of the deeds of the community institutions, of the deeds of the Central European Bank, as well as, in certain conditions, of the statutes of the bodies established by a deed of the Council; *the validity* of the deeds adopted by the community bodies and by the Central European Bank. This study aims at presenting the construction of the community law regarding the construction of the treaty; the construction of the deeds adopted by the Community bodies and by the European Central Bank (ECB) and the construction of the statutes of the bodies established by a Council deed, if the said statutes provide it.

The procedure for settling the petition for issue of a preliminary ruling by the Court of Justice is regulated by legal rules expressly established either in the Treaty, or in the Statute of the Court of Justice[239] (Article 23), or in its procedural regulation[240] (Articles 103-104b). The national court adjourns the judgment of the case until the delivery of a preliminary ruling by the Court of Justice. The procedural regulation of the Court of Justice of the European Communities inserts by Article 104b a simplified procedure, called "urgent procedure". Therefore, upon request of the national court or, by way of exception, ex officio, a preliminary committal by means of which one or several questions are addressed related to the domains envisaged in title VI of the Treaty on the Union or title IV of the third part of the CE Treaty can be judged according to an urgent procedure.

The effects of preliminary rulings on national courts consist in their obligation to comply in the settlement of the cases with what the Court of Justice has decided regarding the construction of validity of the community law. The authority of a preliminary ruling consist in its binding force for the court that requested it and the courts that might judge the case in its remedies, and in the general enforceability for other courts. The preliminary rulings produce effects as from the date when the deed is issued and, by way of exception, as from the date indicated by the Court in the said decision.

The integration of the community law in the legal order of the member states of the European Union was possible by the essential contribution of the Court of Justice, which, by means of a law-making case-law, established the foundation principles of the community law. The integration of these principles and, by means of them, of the community rules in the domestic law of the member states *shall correspond to the law courts* from the member states. As procedural rules differ from one state to another, it is obvious that the enforcement of the principles of community law differs in terms procedural means used from one state to another. The Court understood to grant a principle value to these differences, establishing procedural autonomy of the national courts by its case-law. Although procedural harmonization by case-law seems a mission hard to achieve, the Court established in charge of national courts guide marks aiming in essence at ensuring in an "uniform way some minimal rules" that "ensures an effective jurisdictional control"[241]. Among them it's worth outlining the litigant's right to an effective appeal, provisional protection of the rights invoked by individuals and invoking ex officio of the enforcement of the community law. The impact of the preliminary rulings

[238] Court of Justice of the European Communities, November 19th, 1998, Berit Hoj Perdersen, C-66/96, Rec. 1998 I p. 7327.
[239] From March 2008
[240] From September 2008
[241] Camelia Toader, Judge's role in the European integration, http: //www.scj.ro/toader_art1.asp

delivered by the Court of Justice of the European Communities in the context of the activities of Romanian law courts can be structured as follows: 1) cases in which the courts settle the cases without requesting a preliminary ruling and without enforcing the previous community case-law (theory of the clear act); 2) cases in which the court enforces the community law rules as they have already been construed by the Court (legal precedent consecrated by the Court case-law) and 3) request of a preliminary ruling by investing the Court of Justice.

The activity of representing Romania before the Court of Justice of the European Communities and the First Law Court as well as before other community bodies is ensured by the Department for European Affairs (DEA), structure which coordinates the process of formation of the national position in the problematic of European affairs and guarantees the complying with the obligations for Romania arising from the statute of member state of the European Union.
The filing of a petition for delivery of a preliminary ruling with the Court of Justice entails the adjournment of by the Court of the preliminary ruling pursuant to Article 23 of the Statute of the Court of Justice and the Court case-law. *In the Romanian procedural law*, the petition for delivery of a preliminary ruling by a law court can be ordered pursuant to Article 244 paragraph 1 point 1 of the Code of civil procedure. In the new draft, a new disposition is inserted in the Code of civil procedure according to which "the judgment of the cases is adjourned in case that a petition for delivery of a preliminary ruling was filed with the Court of Justice (for the cases being in the last court the adjournment shall automatically operate, and for the other ones, the adjournment is facultative). Based on the principle of procedural autonomy, the Court of Justice considered that the community law does not exclude any remedies against the procedural deeds of national courts by which the delivery of a preliminary ruling is requested to the Court of Justice[242].

The draft of the code of civil procedure does not contain modifications regarding the exercise of the remedy of appeal against the closing regarding the adjournment of the case, maintaining the current regulation in a new wording: "The court will rule on the adjournment of the trial judgment by closing that can be separately appealed, before the hierarchically superior court." The legislator's option to maintain the same dispositions as the ones currently in force can be explained by the fact that the appeal does not suspend the enforcement, so that the Court of Justice continues the procedure for settlement of the preliminary ruling independently of the appeal filed in the domestic law. Finally, the draft of the Code of civil procedure contains a disposition regarding the resuming of the judgment by the court after the delivery of the decision by the Court of Justice of the European Communities.

The European legal space represents an old project that supposes in its achievement a continuous co-operation between the member states. Aiming to this purpose, the preliminary procedure mechanism contributes towards the harmonization of the legislations of the member states by the unitary enforcement of the community law within the Community space.

[242] Court of Justice of the European Communities, February 12th, 1974, Rheinmulhen, C-146/73, Rec., p.147.

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