THE PRELIMINARY DECISIONS ISSUED BY THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE JUDGMENTS FOR RESOLVING LEGAL ISSUES OF THE HIGH COURT OF CASSATION AND JUSTICE. COMPARATIVE STUDY ON THE ADMISSIBILITY CONDITIONS

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Abstract

The study intends to discover resemblances and differences between the judicial institutions of preliminary decisions in EU law and decisions on unlocking matters of law delivered by the Romanian SCJ, both in civil and criminal fields. Our interest is to clarify the deep significance of these resemblances and differences from the perspective of law systems and the jurisprudence of the ECJ and SCJ. In the third place, we intend to evaluate the utility of these mechanisms of interpreting law and unifying practice from a general perspective, hoping that a system can become a source of inspiration for the other system. The research is descriptive, explanatory and comparative, being accompanied by relevant doctrine and jurisprudence.

Keywords: *preliminary decision, preliminary ruling, conditions of admissibility, unification of judicial practice, novelty of the legal issue.*

JEL Classification: K33, K41

1. Introduction

This article aims to discover the similarities and differences between the legal institutions of the preliminary reference specific to the law of the European Union (*section 2*), respectively the judgments for the resolution of legal issues pronounced by the High Court of Cassation and Justice both in civil matters in a broad sense and in matters criminal (*section 3*). Our interest is to discern the deep significance of these similarities and differences from the perspective of the legal systems and the jurisprudence of the Court of Justice of the European Union and the High Court of Cassation and Justice. Third, we aim to assess the usefulness of these mechanisms of uniform interpretation and unification of judicial practice as a whole, with the belief that one system can become a source of inspiration for the other mechanism (*section 4*).

The preliminary decisions were of major importance for European integration. Through them, the Court of Justice not only interpreted European law and preserved its unity, but also created it to a good extent. The Court's decisions filled the gaps in the written law and ensured its continuous development. "(...) It is about, following the expression of the attorney general J.P. Warner, of a „jurisprudential legislation" that complements the written law and gives it its true significance"[3]. Particularly encouraging the national courts to use the preliminary references, the Court of Justice has developed admissibility conditions extremely favorable to the dialogue with the judges of the member states. The general conditions that the preliminary questions must meet in order to be admissible assume that the question is asked by a court in the European sense of the term and that it is necessary for the national judge to resolve the dispute. Preliminary decisions are binding for the referring court, as well as for all courts in the EU member states, and they have ex-temporary effects.

The mechanism for the unification of judicial practice represented by the prior judgments issued by the High Court of Cassation and Justice was introduced both in civil matters and in criminal matters, through the new procedural codes that entered into force on February 15, 2013 (the Code of civil procedure), respectively February 1, 2014 (Criminal Procedure Code). "The rationale of this institution is similar to that of the appeal in the interest of the law, the former operating a priori, while

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[3] Jean Boulouis, *Droit institutionnel de l'Union Européenne*, 6th edition, Ed. Montchrestien, 1997, p. 234.

the latter represents an *a posteriori* remedy for the unification of judicial practice. (...) The mechanism of the preliminary ruling establishes a genuine judicial dialogue between the supreme court and the other courts whose aim is to prevent the emergence of divergent interpretations, which would later require the pronouncement of an appeal in the interest of the law"[4].

In civil matters, the admissibility conditions of notifications regarding the pronouncement of preliminary rulings presuppose the existence of a legal issue whose clarification depends on the merits of the case and which presents a novelty. The issue of novelty remains ambiguous and has seen different interpretations in both doctrine and jurisprudence. In such a context, we support the proposal that the interpretation of the novelty of the legal issue should be related only to the non-existence of a ruling by the High Court of Cassation and Justice (HCCJ) and an appeal in the interest of the law pending resolution.

Unlike the regulation of referrals for the pronouncement of preliminary judgments in civil matters, the Code of Criminal Procedure does not provide for the condition of novelty of the legal issue. On the other hand, the admissibility of the notification in criminal matters is conditioned by the existence of a genuine legal problem, which makes it necessary to resolve it in principle by pronouncing a preliminary decision by the High Court of Cassation and Justice. The supreme court has consistently ruled that, in order to be admissible, the referral must concern legal provisions that are unclear, equivocal and that may lead to the pronouncement of different solutions, not being allowed to use this mechanism to unify judicial practice when the correct application of the law it is imposed so obviously that it leaves no room for doubt.

A second difference in relation to the civil matter is represented by the possibility of suspending the judgment in the case in which the request for a preliminary ruling was formulated. In civil matters, the panel that notifies the HCCJ in this way suspends the trial by law until the date of the preliminary ruling.

2. Preliminary referrals – the dialogue framework between the judges of the member states and the Court of Justice of the European Union

According to art. 267 of the Treaty on the Functioning of the European Union, "The Court of Justice of the European Union is competent to rule, on a preliminary basis, on: (a) the interpretation of treaties; (b) the validity and interpretation of the acts adopted by the institutions, bodies, offices or agencies of the Union. If such a question is raised before a court of a Member State, that court may, if it considers that a decision on the matter is necessary for it to give judgment, ask the Court to rule with regarding this matter. If such a question is raised in a case pending before a national court whose decisions are not subject to any appeal under domestic law, that court is obliged to refer the matter to the Court. (...)"[5]. This text of the treaty represents the seat of the matter of references and preliminary decisions, often described as representing the institutional framework of the dialogue between the judges of the Member States of the Union and the Court of Justice. The meaning and purpose of this dialogue aims at the correct and uniform interpretation of Union law, the premise of its unitary application at the European level, as well as the preservation of the Union's normative pyramid. In exercising this power, the Court of Justice manifests itself both as a supreme court (the official interpreter of Union law) and as a constitutional court (guaranteeing compliance with treaties, legislation adopted by the institutions, bodies, offices and agencies of the Union).

Particularly encouraging the national courts to use preliminary references in the early period of community building, the Court elaborated conditions of admissibility of permissive preliminary references. Although in the face of the multiplication of referrals, a net consolidation of these conditions was found, they remain extremely favorable to the judicial dialogue. The general conditions that the preliminary questions must meet in order to be admissible assume that the question

[4] Daniel Grădinaru, *Pronunțarea unei hotărâri prealabile pentru dezlegarea unor chestiuni de drept – condiții de admisibilitate*, available at https://revista.universuljuridic.ro/pronuntarea-unei-hotarari-prealabile-pentru-dezlegarea-unor-chestiuni-de-drept-conditii-de-admisibilitate/ (consulted on 28. 05. 2022).

[5] In previous European treaties, this article was numbered art. 234 TCE, respectively art. 177 TCEE. Its essence remained unchanged.

is asked by a court in the European sense of the term and that it is necessary for the national judge to resolve the dispute.

A preliminary question can be declared inadmissible when it is obviously not related to the reality or the object of the main dispute, but also in situations where it would lead the CJEU to answer general or hypothetical questions, which are not related to a real internal dispute or which would distort the preliminary referral procedure from the purpose for which the treaty provided it. With these exceptions, the national judge enjoys a great power of appreciation since, referred to with preliminary references, the Court states that it is in principle bound to answer.

The final assessment of the necessary character of the question is made by the Court of Justice[6]. Asked by the same magistrate, after he had refused to respond to a preliminary referral on the grounds that the internal litigation was an artificial one, what are the powers of the national courts and what are the powers of the Court of Justice regarding the assessment of the need for preliminary questions, the European court stated that the preliminary rulings presuppose cooperation and distribution of functions between the European and the national judge. The internal courts, as they know the dispute closely and assume responsibility for its resolution, have the competence to assess the need for a preliminary ruling. In order to allow the CJEU to fulfill its role in accordance with the treaty, to respect its own competence and to contribute to the administration of justice in the Member States, and for the governments of the Member States and interested parties to submit their observations, the national courts must explain the reasons why they consider it necessary the preliminary ruling. "The important idea that emerges from *Foglia II* is that the ECJ has the final competence to decide in relation to its own competence"[7].

The preliminary submission must include a sufficiently clear presentation of the substantive dispute and define the domestic and European legislative context in which it falls. It is desirable that the questions be formulated clearly and precisely, so that the European judge can give a useful answer to the national judge. The Court decided that it can reformulate the questions asked by the national judge, which it does quite often, and even answer some questions not explicitly addressed by the referring court, if they are relevant for the resolution of the domestic dispute[8]. The Court declared that it is not competent to issue a preliminary ruling, if the trial procedure has been completed before the referring court. On the role of the referring court there must be a pending litigation, which is to be resolved by the pronouncement of a jurisdictional decision, taking into account the preliminary decision. The national courts can formulate a new preliminary reference during the same process, if they consider that the referral is necessary.

In the interest of a useful decision, the European Court of Justice has indicated that it is preferable that, at the time of its referral, the domestic law issues have already been resolved. The referring court will explain the reasons why it considered that the Court's response is necessary to resolve the dispute with which it was entrusted and will not limit itself to repeating the arguments of the party that requested the referral. An exhaustive presentation of these reasons is not required, but the basis for the application of the European rules and their relationship with the national rules must be stated, especially if there is also a problem of compliance of the domestic law with the European one.

The Court considered that it is competent to answer a preliminary question even if the referral decision was appealed. It was shown that the treaty conditions its competence only on the existence of a request, without it having acquired the authority of a res judicata according to the norms of national law. Conversely, if the referring court informs the Court of the exercise of an appeal against its decision to refer it, at the request of this court, the Court may suspend the procedure[9]. To the extent that the preliminary referral decision was annulled by the higher court, the Court will declare the

[6] *Foglia*, Case 244/80, Judgment of December 16, 1981, EU:C:1981:302.
[7] Paul Craig, Graine de Búrca, *EU Law. Text, Cases, and Materials*, 7 revised edition, Paperback, Oxford University Press, 2020, p. 609.
[8] *OTO*, Case C-130/92, Judgment of July 13, 1994, EU:C:1994:288.
[9] *Chanel*, Case 31/68, Ordinance of June 3, 1969, EU:C:1969:21.

procedure to be without object[10]. In *Cartesio*, the Court of Justice decided that "the resolution of an appeal cannot restrict the competence that Article [267 TFEU] confers on the respective court to refer the Court to the extent that it considers that a pending case raises problems regarding the interpretation of the provisions of community law that requires a decision to be issued by the latter"[11]. Therefore, a decision of the control court that would restrict the right of the first court to use the instrument provided for in art. 267 TFEU, by reforming or abolishing the referral decision and obliging the court of first instance to continue the trial procedure, is not allowed. The decision to withdraw or modify the preliminary question must come from the court that sent the question, after analyzing the decision of the judicial review court and the effects of this decision. The trial court is free to formulate a new preliminary question regarding the same legal issue, on the occasion of resuming the trial after the annulment of the first appeal decision.

The admissibility of a preliminary question cannot be conditioned by the provisions of domestic law. The Court ruled in this sense on the occasion of a referral from a lower German court, whose decision had been overturned by the Federal Finance Court sent for retrial, and the interpretation that the higher court had given to the legal issues, which were also the reasons for the overturning, it was binding on the lower court. The preliminary referral aimed precisely at the compatibility with European law of the reasons that led to the annulment, given that the German Fiscal Procedure Code linked the lower court, in retrial, to the decision of the higher court regarding the legal issue. The Court decided that "a rule of national law that binds the courts that do not rule in the last instance, in matters of law, to the solution of the higher court, cannot deprive the lower courts of the possibility to refer to the Court of Justice questions regarding the interpretation of Community law that is related to these legal issues"[12].

The European Court of Justice is not competent to rule on national law. Its jurisdiction is limited to European law. However, often preliminary questions are based on the incompatibility of national law with European law, and the CJEU pronounces on this matter. Indeed, the Court expresses its opinion indirectly or implicitly. Professor Jean Boulois explains the evolution through the importance of European law for the settlement of the dispute. "In an ordinary preliminary reference, the judge who solves it is only an auxiliary whose interpretation became necessary through a division of competences. Here, the judge who resolves the referral is no longer an auxiliary but, in reality, is the main judge, because only he and only he is competent in the matter of community law endowed with supremacy. Because of this, there is an inversion of the relations between the two judges, which illustrates precisely this alteration of the usual rules"[13].

A second limit of the Court's powers is the resolution of the substantive dispute. In fact, however, the Union judge, in many preliminary rulings, provides clues and sometimes even the implicit solution of the internal law dispute. The context in which the preliminary references operate causes the Court to give answers not abstractly, but based on a reasoning that is inevitably related to the factual elements and the legal norms according to which the substantive dispute is resolved. At the same time, she must justify the reasons why she chooses one interpretation and not another. These considerations do not challenge and, even less, do not refute the two limits of the competence of the CJEU. Their purpose is to draw attention to the fact that the national judge must not be formalistic and that the preliminary references requested by the parties can be reformulated so that they are admissible. In the last resort, it is desirable for the judge to reject a preliminary request on the grounds that it is not necessary, if this is the case, than to invoke additionally or exclusively the limits of a real debatable competence. In the event that they decide that a preliminary referral is not necessary to resolve the case, the courts must justify the lack of usefulness, which implies the interpretation of the European law norm.

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[10] *SABAM*, Case 127/73, Judgment of March 21, 1974, EU:C:1974:25.
[11] Case C-210/06, Judgment of December 16, 2008, EU:C:2008:723, point 93.
[12] *Rheinmühlen-Düsseldorf/Einfuhr-undVorratsstellefürGetreideundFuttermittel*, Case 166/73, Judgment of January 16, 1974, EU:C:1974:3, point 4.
[13] Jean Boulouis, *op. cit.*, p. 328.

The courts have, in principle, the faculty to address preliminary referrals. The exception is the courts whose decisions are not subject to any appeal in domestic law. Interestingly, it is precisely the courts that do not have the obligation to refer to the CJEU in advance, that do so most often. The courts that settle the last instance are not obliged to refer the CJEU if the referral is not necessary for the settlement of the dispute; The Court has already ruled in an identical or similar case, or does the "*acte clair*" theory apply. If a national court questions the validity of a rule of European law, referral to the CJEU is mandatory regardless of the level at which that court judges.

The "*acte clair*" theory was subjected to a restrictive conception by the CJEU and assumes that the provision in question has already been the subject of an interpretation by the Court or that its correct application is imposed with such evidence that it no longer leaves room for any reasonable doubt ; the existence of such a possibility must be evaluated according to the specific characteristics of Union law, the specific difficulties presented by its interpretation and the risk of jurisprudence divergences within the Union[14]. The meaning that the court retains regarding the European law rule that it applies must be imposed with the same evidence on the courts of the other member states and the CJEU; the judge should take into account several linguistic versions of the norm and the proper meaning of the legal notions with which Union law operates. Recourse to the "*acte clair*" theory must include the reasoning regarding the above requirements, and not just its statement.

3. Preliminary judgments – the dialogue framework with the High Court of Cassation and Justice

3.1. Preliminary judgments in civil matters

The mechanism for the unification of judicial practice represented by the prior judgments issued by the High Court of Cassation and Justice (hereafter HP) was introduced by Law no. 134/2010 regarding the Code of Civil Procedure, entered into force on February 15, 2013 (art. 519 – 521 Code of Civil Procedure - C. pr. civ.)[15]. It is regulated immediately after the presentation of the appeal in the interest of the law, both institutions having the goal of ensuring a unified judicial practice.

The High Court of Cassation and Justice (hereafter HCCJ) can be referred to panels of the supreme court, courts of appeal or tribunals, when they are entrusted with the resolution of a case in the last instance. The use of the mechanism of prior rulings is always a faculty for the courts. The admissibility conditions of notifications regarding the pronouncement of HPs are the existence of a legal issue whose clarification depends on the substantive resolution of the case and which presents novelty. "In order to be the subject of the referral to the supreme court, the legal issue must be genuine, being able to materialize in the existence of different ways of interpreting a legal text, the text is incomplete (it does not cover all de facto situations), there is syncopation in the correlation with the other legal provisions in force or has become obsolete".[16]

It is requested that the clarification of the question of law be decisive in terms of the substantive resolution of the case in which it was raised. "This condition is very restrictive and will greatly limit the unifying role of the advance ruling mechanism"[17]. In the doctrine, it was emphasized that this mechanism cannot be used in situations where the substance of the right is not in question, being a procedural exception. Secondly, preliminary rulings seem to be reserved only for the HCCJ's

[14]Case 283/81, *CILFIT*, Judgment of October 6, 1982, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0283-1981-200802159-05_00.pdf.

[15] The Romanian legislator was inspired by the Judicial Organization Code from France, according to which "before ruling on a new legal issue, presenting a serious difficulty and arising in numerous litigations, the courts of the judicial order may, by a decision not susceptible to appeal, to request the opinion of the Court of Cassation" (see Ioan Leș (coord.), *Tratat de Drept Procesual Civil*, vol. II, Ed. Universul Juridic, Bucharest, 2015, p. 202; Ion Deleanu, *Tratat de Procedură Civilă*, Ed. Universul Juridic, Bucharest, 2013, p. 385). There are several differences between the two regulations, and the most important one seems to be the optional nature of the opinion of the Court of Cassation for the court that made the referral, having rather a "doctrinal authority".

[16] Viorel Mihai Ciobanu, Marian Nicolae (coord.), *Noul Cod de procedura civila. Comentat si adnotat*, vol. I, Ed. Universul Juridic, Bucharest, 2013, p. 1214.

[17] Gabriel Boroi (coord.), *Noul Cod de procedură civilă, Comentariu pe articole*, 2nd ed. revised and added, Ed. Hamangiu, Bucharest, 2016, p. 519.

principled resolution of matters of substantive law, and not of procedural law. Although it is not possible to reject out of hand the referral to the HCCJ with a matter of procedural law, a statistical analysis of the pronounced HPs shows that they concerned, "overwhelmingly", matters of substantive law.[18]

The issue of novelty remains rather ambiguous. "The text gives no clue as to what it must mean to us: recently appeared, but how recently?; generated by a newly enacted legal regulation?; newly emerged in relation to an old legal provision?; which has not been solved yet?, etc. (...) Regarding the fulfillment of the novelty condition, there is a diversity of interpretations, not only doctrinal, but even at the level of the supreme court"[19]. The novelty of the legal issue is lost to the extent that it has been the subject of an adequate interpretation by the national courts, embodied in established judicial practice, even if there are also different, but isolated, jurisprudential opinions[20]. However, if both a majority and a minority opinion are outlined (therefore, we have more than isolated jurisprudential opinions), the request for a HP is admissible[21]. The question of law is no longer new when it is the subject of a constant practice of the HCCJ. Instead, the matter remains novel to the extent that the HCCJ has ruled only through case decisions that are either few in number or different in solution.

The novelty of the legal issue is the main characteristic that differentiates the preliminary rulings from the appeal in the interest of the law[22]. To the extent that contradictory court decisions have already been issued on the matter and a non-uniform practice has been formed, the novelty disappears along with it and the admissibility of the prior decision, giving way to the appeal in the interest of the law. If the judicial practice (containing both the majority opinion and minority opinions) is of recent date, regardless of the entry into force of the normative act that generated it, requests for the pronouncement of HPs may be admissible. The HCCJ also deemed admissible requests formulated under the conditions where the judicial practice was too poorly defined[23] or there was a revival of the administrative and judicial practice[24].

In such a context, we support the proposal that the interpretation of the novelty of the legal issue should be related only to the non-existence of a ruling by the High Court of Cassation and Justice and an appeal in the interest of the law pending resolution[25]. If the Supreme Court were to consistently implement this jurisprudence, the ambiguity of the statutory text would be remedied and litigants and potential litigants would benefit from clarity and certainty. The logistical and time possibilities that the courts (not) benefit from in order to carry out an analysis of the existence of a judicial practice at the national level regarding the legal issue and to individualize all the interpretations that would be found at the level of a existing practices. Limiting the analysis to the HCCJ jurisprudence would make the task, both of the parties and the courts, easier.

The request for referral to the High Court with the resolution of a legal issue is placed in the adversarial discussion of the parties. The same adversarial debate will take place when the referral proposal comes from the court. The supreme court is vested with a conclusion that will include the reasons in support of the admissibility of the referral and the point of view of the court and the parties; the conclusion not being subject to any appeal. "It is not possible for the court to formulate a simple question regarding how a certain legal provision should be interpreted, but it must demonstrate why

[18] Ibid, p. 227. The HCCJ also issued HPs regarding procedural rules (Decision no. 28/21.09.2015; Decision no. 4/14.04.2014).
[19] Gabriel Boroi, *op, cit.*, p. 230. "In the initial version of the new Civil Procedure Code, the text did not impose the condition that the legal issue be a new one, as the French Judicial Organization Code does. Law no. 76/2012 reverted to the mentioned solution and established the condition that the legal issue be a new one" (Ioan Leș (coord.), *op. cit*., p. 203).
[20] HCCJ, Decisions no. 3 and 4 of 14.04.2014.
[21] HCCJ, Decision no. 1/19.01.2015, Decision no. 2/19.01.2015.
[22] For other differences, see Daniel Ghiță, *Drept procesual civil, Partea specială,* Ed. C.H. Beck, Bucharest, 2017, p. 269-270.
[23] HCCJ, Decision no. 10/20.10.2014.
[24] HCCJ, Decision no. 9/13.10.2014.
[25] Gabriel Boroi, *op. cit.*, p. 229, 230. Octavia Spineanu-Matei, the author of the part of the treaty regarding the preliminary ruling, shows that the HCCJ gave a literal and grammatical interpretation of art. 519 C. pr.civ. and analyzed distinctly the conditions of novelty, respectively the lack of ruling of the supreme court or the existence of an Appeal in the interest of the law pending resolution regarding the legal issue.

this provision becomes problematic when it is to be applied in practice"[26]. Pronouncing this conclusion results in a de jure suspension of the trial of the case, and in similar cases before the courts, the suspension is optional.

According to art. 520 para. 12 C. pr. civil., the High Court will resolve the referral without summoning the parties, within a maximum period of 3 months from the date of vesting. The decision is binding for the court that vested the HCCJ from the date of its pronouncement, and for the other courts, from the date of publication in the Official Gazette. It ceases to be applicable on the date of modification, repeal or finding of unconstitutionality of the legal provision that was the subject of the interpretation.

3.2. Preliminary judgments in criminal matters

Through the provisions contained in Law no. 135/2010[27] regarding the Code of Criminal Procedure (C. pr. pen.), the Romanian legislator introduced, also in criminal matters, a new procedural means of unifying judicial practice, namely the preliminary ruling (hereafter HP) that the High Court of Cassation and Justice is about to pronounce for solving some legal problems that were not solved unitarily by the judicial courts.

The system of preliminary rulings, in criminal matters, as well as in civil matters, represents a mechanism intended to provide the necessary means to ensure a uniform interpretation and application of Romanian law at the level of Romanian courts, thus giving them the possibility of preventing non-unitary judicial practice.

Like appeals in the interest of the law, preliminary rulings in criminal matters have the purpose of ensuring a unified judicial practice, both of which are decisions of principle that are above the particularities of the factual situation due to the case brought to trial, the judges of the supreme court having to refer to all factual situations which may appear in judicial practice[28].

Unlike appeals in the interest of the law, which presuppose the pre-existence of contradictory court decisions at the level of several courts, the procedure of prior decisions involves a principled resolution of a legal issue arising in a case currently being resolved in the last instance.

At the same time, the procedure of preliminary rulings is a faster and easier procedural means than appeals in the interest of the law, the notification to the HCCJ being made ex officio or at the request of the parties or the Public Ministry by the panel of judges charged with resolving the case in the last instance, after contradictory debates, by conclusion that is not subject to any appeal.

According to the provisions of art. 475 C.pr.pen., if during the trial, a trial panel of the HCCJ, the court of appeal or the tribunal entrusted with the resolution of the case in the last instance finds that a legal issue on which the resolution of the respective case depends has not been untied in judicial practice and has not been the subject of an appeal in the interest of the law or has not been ruled on by a prior ruling or is not the subject of an appeal in the interest of the law currently being resolved, will be able to request the HCCJ to issue a preliminary ruling by which give a solution in principle to the legal issue with which it was referred.

Having been referred to the exception of the unconstitutionality of these legal provisions, the Constitutional Court rejected the exception as inadmissible, noting that the procedure of notifying the High Court of Cassation and Justice in order to issue a preliminary ruling to resolve some legal issues does not have the value of an appeal, but the value of a procedural incident by which a legal problem arising in an ongoing process is solved. Moreover, the introduction by the legislator of the mention "during the trial" in the content of art. 475 of the Code of Criminal Procedure denotes his intention to exclude the judge of rights and liberties and the judge of the preliminary chamber from the scope of the holders of the request related to the pronouncement of a preliminary decision[29].

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[26] Gabriel Boroi, *op. cit.,* p. 236.

[27] Law no. 135/2010 was published in the Official Gazette no. 485/15.07.2010 and entered into force on 01.02.2014.

[28] Mihail Udroiu (coord.), *Noul Cod de procedură penală. Comentariu pe articole*, Ed. C.H. Beck, Bucharest, 2015, p. 1203.

[29] Decision no. 270/2016 regarding the rejection of the exception of unconstitutionality of the provisions of art. 475 of the Criminal Procedure Code, published in the Official Gazette, Part I no. 519 of July 11, 2016.

Regulating the conditions for the admissibility of referral to the HCCJ in order to pronounce a preliminary decision for resolving a question of law, the legislator established the possibility of panels that resolve cases in the last instance and that find that a legal issue on which the resolution of the respective case depends has not been resolved unitarily in judicial practice and has not been the subject of an appeal in the interest of the law or has not been ruled on by a prior ruling or is not the subject of an appeal in the interest of the law currently being resolved, to refer the HCCJ in order to issue a preliminary ruling by which to give a principled solution to that legal problem.

Thus, in order for such a notification to be admissible, the following requirements must be cumulatively met: the existence of a case pending at the last level of jurisdiction before one of the courts expressly provided for by the mentioned law[30] (the High Court of Cassation and Justice, the court of appeal or the tribunal), the substantive resolution of the respective case depends on the clarification of the legal issue that forms the subject of the referral, and the legal issue has not yet been resolved by the High Court of Cassation and Justice through the legal mechanisms that ensure the uniform interpretation and application of the law by the judicial courts or not currently be the subject of an appeal in the interest of the law, so to present a topical character.

The admissibility of the referral in order to issue a preliminary ruling is conditional, both in the case that it concerns a rule of substantive law, and when it concerns a provision of procedural law, by the circumstance that the interpretation given by the supreme court has legal consequences on the way of resolution of the substance of the case. In other words, there must be a dependency relationship between the legal issue whose clarification is requested and the solution given to the criminal and/or civil action by the court before which the case is at the last level of jurisdiction, in the sense that the decision of the High Courts pronounced in the procedure provided by art. 476 and 477 of the Code of Criminal Procedure to be of a nature to produce a concrete effect on the content of the judgment in the main trial, the requirement of relevance being the expression of the utility that the principled resolution of the invoked legal issue has within the substantive resolution of the litigation.

By the phrase "solution on the merits of the case" used by the legislator in the content of art. 475 of the Code of Criminal Procedure in order to designate the objective connection between the legal issue subject to interpretation and the ongoing criminal process, it must be understood as the unraveling of the criminal legal relationship born as a result of the violation of social relations protected by the norm of incrimination, including in terms of the consequences of nature civil, and not the resolution of an incidental request invoked during the trial of the case in the last instance[31].

Last but not least, the admissibility of the notification is conditioned, essentially, as it results from the economy of the invoked legal provisions, by the existence of a genuine legal problem, which makes it necessary to solve it in principle by pronouncing a preliminary decision by the High Court of Cassation and Justice, this constituting, in fact, the fundamental premise that justifies the intervention of the supreme court through the mechanism of unification of judicial practice established by art. 475 et seq. of the Criminal Procedure Code.

The purpose of this procedure is to resolve genuine and difficult legal issues. Referral to the High Court of Cassation and Justice according to art. 475 of the Code of Criminal Procedure must be carried out only in the situation where, during the resolution of a criminal case, the question arises of the interpretation and application of unclear, equivocal legal provisions, which could give rise to several solutions. The interpretation aims at knowing the exact meaning of the norm, clarifying its meaning and purpose (...). Preliminary rulings must be pronounced only in the interpretation and application of the legal provisions, constituting a principle resolution of a legal issue. Equally, the notification must exclusively concern problems of interpretation of the law, and not particular elements of the case brought to judgment[32].

[30] The court of first instance cannot refer the High Court of Cassation and Justice to issue a preliminary ruling, regardless of the subject matter of the case at hand.

[31] HCCJ, Panel for resolving legal issues in criminal matters, Decision no. 11 of 02.06.2014, published in the Official Gazette of Romania, Part I, no. 503 of 07.07.2014.

[32] HCCJ, Panel for resolving legal issues in criminal matters, Decision no. 5 of 10.02.2016, published in the Official Gazette of Romania, Part I, no. 183 of 11.03.2016.

The supreme court has consistently ruled that, in order to be admissible, the referral must concern legal provisions that are unclear, equivocal and that may lead to the pronouncement of different solutions, not being allowed to use this mechanism to unify judicial practice when the correct application of the law it is imposed so obviously that it leaves no room for doubt[33].

The referral to the HCCJ is made ex officio, at the request of the parties or the representative of the Public Ministry, after it has been discussed with them and is ordered by a conclusion that is not subject to any appeal. It will state the reasons supporting the admissibility of the referral, as well as the point of view of the panel and the parties.

The judgment can be suspended by the same conclusion until the preliminary judgment is pronounced; if the suspension was not ordered and the judicial investigation is completed before the HCCJ has ruled on the referral, the court will suspend the debates until that moment. After the registration of the notification, the conclusion of the notification is published on the website of the HCCJ; similar cases pending before the courts may be suspended until the referral is resolved.

After the composition of the panel, the president of the panel will appoint one or more judges from the panel, depending on the legal question raised within the scope of activity of a single section/multiple sections, to draw up a report on the question of law. The reporting judges do not become incompatible to participate in the judgment of the referral. The report will be communicated to the parties who have the right to formulate and submit points of view, in writing and exclusively through a lawyer/legal advisor, within no more than 15 days from the communication.

The meeting is convened by the president of the panel at least 20 days before the date set for the respective term - with the convening, each member of the panel will receive a copy of the report and the draft solution proposed by the rapporteur. The notification is resolved without summoning the parties, in no more than 3 months from the date of investiture of the HCCJ. The panel renders a decision adopted by at least two-thirds of the panel's judges (abstentions are not allowed), only with regard to the legal issue subject to resolution.

Preliminary rulings must be pronounced only in the interpretation and application of legal provisions, constituting a resolution of a legal issue in principle. The answer to the issue raised by the referring court may be different, depending on the particular circumstances of a case. At the same time, if the solution of the legal problem were conditioned by the analysis of the concrete data of the case, the question would lose its purely theoretical character, tending to a solution of the substance[34].

According to art. 477 para. 1 C.pr.pen, the resolution given to the legal issues by the HCCJ, by decision, is binding for the courts from the date of its publication in the Official Gazette of Romania Part I. For the court that formulated the referral, we appreciate that the decision regarding the resolution of the legal issue it can be applied from the moment of the pronouncement, considering the fact that the possible suspension of the debates is foreseen only until the pronouncement of the decision by the HCCJ.

The preliminary ruling will decide only on the legal issue with which the supreme court was vested, not on the application of the mandatory interpretation in the case in which the referral was made. Therefore, the solution that the supreme court pronounces is of principle and does not prejudge the merits of the case, the judge of the case being the only one entitled to establish the factual situation and assess the solution to be pronounced based on the evidence provided[35].

If the legal provision that generated different interpretations is abrogated, declared unconstitutional, totally modified or the legislative deficiency removed, the effects of the decision issued by the HCCJ cease by law.

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[33] HCCJ, Panel for resolving legal issues in criminal matters, Decision no. 17 of 31.03.2022, published in the Official Gazette of Romania, Part I, no. 511 of 24.05.2022.

[34] HCCJ, Panel for resolving legal issues in criminal matters, Decision no. 14 of 11.03.2022, published in the Official Gazette of Romania, Part I, no. 507 of 24.05.2022.

[35] Corina Voicu, Andreea Simona Uzlău, Georgiana Tudor, Victor Văduva, *Noul Cod de procedură penală*, Ed. Hamangiu, Bucharest, 2014, p. 565.

4. Law-making decisions: comparative view

Through preliminary rulings, the CJEU interprets Union law and verifies the validity of the acts adopted by the European institutions in relation to sources with superior legal force. Through preliminary rulings, the HCCJ is called upon to resolve legal issues, which signifies the indication of the correct interpretation and application of the legal rule subject to its analysis. Therefore, these courts perform similar functions. The national supreme court will not carry out the validity control of the legal norms, this being given to the common law courts or the Constitutional Court.

Preliminary referrals and preliminary rulings pursue the same goal: the uniform application of European Union law, respectively of national law by the courts. Court decisions pronounced in this way are binding *erga omnes*, like the interpreted legal norm. They do not resolve the substance of the case, which remains in both situations the responsibility of the judge who notified the European court or the national supreme court. Irrespective of the matter in which it pronounces, civil, criminal or administrative litigation, the HCCJ through the preliminary rulings for resolving the legal issues does not replace the referring court, the adoption of the solutions in question remaining in the exclusive attribute of the judge. The regulated preliminary rulings procedure only provides the possibility of preventing non-unitary judicial practice and assumes a principled resolution of a legal issue arising in a case currently being resolved.

Both legal institutions presuppose the existence of disputes pending resolution by the courts. The formulation of requests for a preliminary decision/preliminary ruling in civil matters is a justified case of temporary interruption of the course of the trial, in the form of the suspension of the trial procedure, following which it will be resumed ex officio by the court that notified the CJEU or, as the case may be, the HCCJ on the date of the judgment of these latter courts regarding the object of the investment. The suspension of the judgment is optional for the courts before which there are cases identical or similar to those in respect of which the CJEU and the HCCJ have been referred on a preliminary basis or for resolving legal issues. In criminal matters, the trial can be suspended until the preliminary ruling is pronounced. If the suspension was not ordered and the judicial investigation is completed before the HCCJ has ruled on the referral, the court will suspend the debates until that time. After the referral is registered, the referral decision is published on the website of the HCCJ, and similar cases pending before the criminal courts may be suspended until the referral is resolved.

Both in the case of preliminary references and preliminary rulings, the CJEU and the HCCJ have the final say on the admissibility of referrals. Comparatively, the jurisprudence of the European court is much more permissive, in relation to the approach of the High Court. The necessary or useful character of the preliminary ruling gave rise to an interesting jurisprudence of the Court of Justice regarding the court called to appreciate this character. Wanting to encourage the use of this instrument by national courts, but also to answer some preliminary questions starting from domestic disputes that did not present a factor of connection with European law, the Court of Justice attached particular importance to the assessment of domestic courts: "indeed , according to a constant jurisprudence [...], it is only up to the national courts that are referred to the litigation and must assume the responsibility of the judicial decision to assess, depending on the particularities of each case, both the need for a preliminary decision in order to be able to resolve the litigation, as well as the relevance of the questions addressed to the Court"[36]. Therefore, the rejection of a preliminary question as inadmissible could only be done if it is obvious that it has no connection with the reality or the object of the main dispute.

The High Court of Cassation and Justice can only be referred to panels of the supreme court, appeal courts or tribunals. The courts that judge in the first degree of jurisdiction or on appeal (to the extent that the appeal path is also regulated), as well as the courts, cannot formulate requests for the resolution of legal issues, in the context of art. 519-521 C. pr. civil. Instead, they can refer the Court of Justice of the European Union with preliminary references. Neither rights and liberties judges nor preliminary chamber judges can resort to this mechanism. In contrast, the European court can also be

[36] *Crispoltoni*, Case C-368/89, Judgment of 11 July 1991, EU:C:1991:307, point. 10.

approached by authorities outside the judicial power of a member state, if it falls within the autonomous notion of "court" elaborated by it. Union law therefore recognizes a significantly wider access to the use of preliminary references.

National law also establishes a second limitation in terms of holders of requests for the issuance of preliminary rulings, consisting in the resolution of the dispute in the last instance. In the case of preliminary references, the courts that issue judgments that can no longer be appealed in domestic law, have the obligation to refer to the CJEU, except for the presence in question of the CILFIT criteria. In the case of prior rulings, their use is always a possibility for the courts and not an obligation.

An essential condition for the admissibility of preliminary rulings, but also a limitation of their scope, is that relating to the determining nature of the legal issue that is sought to be clarified for the merits of the litigation. Such a limitation is not met with regard to preliminary references, which can also be raised in connection with situations that precede the substance (for example, a procedural exception). It is only required that the referral is necessary for the judge to resolve the dispute.

A second major limitation in terms of admissibility relates to the novelty of the legal issue, in civil matters. This is not found in Union law, nor in criminal matters. According to art. 99 of the Rules of Procedure of the Court of Justice, "when a question formulated as a preliminary is identical to a question on which the Court has already ruled, when the answer to such a question can be clearly deduced from the jurisprudence or when the answer to the preliminary question does not leave room for any reasonable doubt, the Court, at the proposal of the reporting judge and after listening to the advocate general, may at any time decide to issue a reasoned order". Orders are binding from the date of their notification to the referring court.

In both cases, the referral to the competent courts can be made at the request of the parties or ex officio. The judicial document through which, in particular, the notification is made, presents a different content. In the case of requests for a preliminary ruling[37], it must contain a summary statement of the subject matter of the main dispute and the relevant facts or at least a statement of the factual circumstances on which the preliminary questions are based. Secondly, the national provisions applicable in the case and, if applicable, the relevant national jurisprudence must be shown, as well as the reasons that led the referring court to have doubts about the interpretation or validity of certain provisions of Union law, as well as the connection which the referring court determines between these provisions and the national law applicable to the main dispute. In the content of the referral decision of the ÎCCJ, the court must carry out an analysis of the conditions of admissibility and express its point of view on the legal issue, as well as the point of view of the parties[38]. We appreciate that these elements are minimal and nothing prevents the courts from adding other considerations that they find useful.

In the procedure for resolving the request for a preliminary decision, the Court may, after hearing the advocate general, request clarifications from the referring court, setting a deadline for this purpose[39]. The possibility of requesting clarifications, which we do not find in the case of prior judgments in domestic law, amplifies the judicial dialogue between national courts and the CJEU.

Competent courts issue judgments that are limited to the interpretation, analysis of validity, respectively the resolution of the legal issue. By means of these rulings, creating law, no guidance can be given to the court that carried out the referral in relation to the settlement of the fund, the judicial review of the rulings previously pronounced in the case or other legal matters that exceed the subject of the investment.

The effects produced by the two types of judgments regarding, essentially, the interpretation of the law, are partly different. The judgments handed down on a preliminary basis are binding for

[37] See the document Recommendations for the attention of national courts, regarding the making of preliminary referrals, available at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001, as well as the Rules of Procedure of the Court of Justice, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_ro.pdf (consulted on 11. 06. 2022).

[38] Although art. 520 para. 1 final thesis C. pr. civ. is precisely formulated, we appreciate that the point of view of the court and the parties can only aim at resolving the question of law, since this is distinct from the analysis of admissibility.

[39] Art. 101 of the Regulation.

the court that referred the Court, as well as for all other courts in the member states, and have retroactive effect, from the moment the interpreted legal rule enters into force. The previous judgments of the HCCJ also produce the same *erga omnes* effect, but in this case, the retroactive effect cannot be retained.

Comparatively analyzing the regulation of referrals for the pronouncement of preliminary judgments in civil matters and in criminal matters, it is found that the legislator provided for the same court procedure, the content and effects of the decision pronounced by the HCCJ being the same in the case of both matters.

And with regard to the admissibility conditions of the referral to the HCCJ for the pronouncement of preliminary judgments in civil matters and in criminal matters, the regulation is identical, the only notable difference being that in criminal matters there is no longer the condition that the legal issue that is the subject of the referral is a new one. As I have shown in the considerations set out above, the condition of the novelty of the legal issue subject to resolution in civil matters is susceptible to different interpretations, being difficult to define what would be understood, concretely, by this[40].

In criminal matters, the legislator no longer provided for the phrase "new", but only the fact that on the legal issue whose clarification is requested the HCCJ "has not ruled through a prior decision or through an appeal in the interest of the law and neither or does it the subject of an appeal in the interest of the law pending resolution". In the jurisprudence of the HCCJ, this condition for the admissibility of the referral refers to the topicality of the legal issue invoked in the case[41].

The novelty of the legal issue provided for by the legislator in the provisions of art. 519 of the Civil Procedure Code constituted the object of an exception of unconstitutionality. The authors of the exception saw the fact that a serious discrimination is created between litigants in a civil trial and litigants in a criminal trial, since in civil matters the supreme court must also analyze the novelty of the legal issue, the clarification of which depends on the solution on merits of the respective case, and in criminal matters the legislator did not establish such a condition. Next, the authors of the exception considered the fact that both the Code of Civil Procedure and the Code of Criminal Procedure regulate the procedural mechanism of the pronouncement of a preliminary decision to resolve some legal issues as an alternative/parallel means, to ensure a unified judicial practice, alongside by the procedural mechanism of the appeal in the interest of the law, and not as a mechanism distinct from the appeal in the interest of the law, which has the sole purpose of preventing the emergence of non-uniform practice in the application and interpretation of the law by the courts (*a priori* control).

Considering that the examination of the constitutionality of a text of law takes into account the conformity of this text with the constitutional provisions and principles, and not the comparison of the provisions of several laws with each other, the Constitutional Court rejected, as inadmissible, the exception of unconstitutionality of the provisions of art. 519 of the Civil Procedure Code[42].

An even more important aspect of the jurisprudence of the CJEU is that relating to the importance attached to the analysis of the need for the preliminary decision made by the national judge. It is already a classic expression of the Court according to which, being referred to by a national court, it is obliged, in principle, to respond. This opening of the European court has decisively contributed to the success of preliminary references and implicitly, to the development of European Union law. The Court did not build obstacles to the dialogue with national courts, by establishing admissibility conditions that are more difficult to meet, but sought to remove the obstacles. We believe that such openness in relation to the lower courts of the HCCJ, would be beneficial to national law and litigants.

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[40] Nicolae Volonciu, Andreea Simona Uzlău (coord.), *Noul Cod de procedură penală comentat*, Ed. Hamangiu, Bucharest, 2014, p. 1183. Cristinel Ghigheci, the author of the part of the treaty regarding the preliminary decision, shows that, in addition, there is no reason to remove the possibility of referral with the pronouncement of preliminary decisions for the interpretation of a legal text that has been in force for a long time, but which has not been applied in judicial practice.

[41] HCCJ, Panel for resolving legal issues in criminal matters, Decision no. 20 of 13.04.2022, published in the Official Gazette of Romania, Part I, no. 526 of 27.05.2022.

[42] The Constitutional Court of Romania, Decision no. 701 of 27.10.2015, published in the Official Gazette of Romania, Part I, no. 906 of 08.12.2015.

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