Case C-163/24

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

1 March 2024

Referring court:

Curtea de Apel București (Romania)

Date of the decision to refer:

21 December 2023

Appellant-applicant:

BX

Respondent-defendant:

Statul Român – Ministerul Finanțelor Publice

Curtea de Apel București

Subject matter of the main proceedings

Appeal proceedings in which the appellant-applicant is challenging the civil judgment issued by the Tribunalul București (Regional Court, Bucharest, Romania) on 1 July 2016, which dismissed the applicant's action for tortious liability as unfounded. That action was brought following the dismissal of an initial action for annulment brought in relation to the decision of the Agenția de Plăți și Intervenție pentru Agricultură (Agency for Payments and Interventions in Agriculture, Romania, 'APIA') to exclude the applicant from payment of financial grants under certain payment schemes for 2007. The applicant's extraordinary appeals against the irrevocable decision dismissing that action were dismissed as inadmissible.

Subject matter and legal basis of the request

An interpretation of Article 20(1) of Council Regulation (EC) No 1782/2003 and Article 68(1) of Commission Regulation (EC) No 796/2004 is requested, in accordance with Article 267 TFEU.

Questions referred for a preliminary ruling

1. Does Article 20(1) of [Council Regulation (EC) No 1782/2003] of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers (in the version applicable prior to its repeal by [Regulation (EC) No 73/2009]) constitute a provision of EU law conferring specific rights on individuals, where infringement of those rights could give rise to State liability as a result of a decision of a national court of last instance?

2. Should the concept of 'factually correct information' in Article 68(1) [of Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system provided for in Regulation (EC) No 1782/2003] be interpreted as including both the correct declaration of land areas by the farmer and the correct identification of the parcel of land used and its boundaries?

3. Given the circumstances of the case, does the failure of the national court of last instance to refer the matter to the Court of Justice of the European Union for a ruling on the interpretation of Article 68 of Regulation No 796/2004 constitute a manifest and sufficiently serious breach such as to render the State liable for the damage allegedly caused by that court's judgment?

Provisions of European Union law and case-law relied on

Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001,(EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 – *recitals 14, 15 and 16 and Article 20(1)*

Commission Regulation (EC) No 1973/2004 of 29 October 2004 laying down detailed rules for the application of Council Regulation (EC) No 1782/2003 as regards the support schemes provided for in Titles IV and IVa of that Regulation and the use of land set aside for the production of raw materials – *Article 138(1)*

Commission Regulation (EC) No 796/2004 of 21 April 2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated

administration and control system provided for in of Council Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers – *recitals 36, 37, 55-58 and 67, Article 6 and Article 68(1) and (2), second subparagraph*

Judgments of the Court of Justice of 6 October 1982, *CILFIT*, C-283/81, EU:C:1982:335, paragraph 16; of 19 November 1991, *Francovich and Bonifaci*, C-6/90 and C-9/90, EU:C:1991:428, paragraphs 41-43; of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU: C:1996:79, paragraph 51; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraph 51; of 15 September 2005, *Intermodal Transports*, C-495/03, EU: C:2005:552, paragraph 37; of 28 July 2016, *Tomásová*, C-168/15, EU:C:2016:602, paragraph 22; of 4 October 2018, *Kantarev*, C-571/16, EU:C:2018:807, paragraph 95; and of 29 July 2019, *Hochtief Solutions Magyarországi Fióktelepe*, C-620/17, EU:C:2019:630

Provisions of national law relied on

Civil Code [Legea nr. 287/2009 (Law No 287/2009)], in force from 1 October 2011 – *Article 1349 on liability in tort and Article 1357 on the conditions required for liability to exist*

Legea nr. 303/2004 (Law No 303/2004) on the status of judges and prosecutors (in force until 16 December 2022) – *Article 96, which regulates the liability of the State for damages caused by miscarriages of justice, and Article 99a, which defines bad faith and gross negligence of judges*

Legea nr. 554/2004 (Law No 554/2004) on administrative disputes, in its current form, after the date of filing of the administrative action in question – *Article 21, which establishes that the handing down of final judgments that infringe the principle of the primacy of EU law, as enshrined in the Romanian Constitution, constitutes grounds for revision, in addition to those provided for in the Code of Civil Procedure*

Ordonanța de urgență a Guvernului [OUG] nr. 125/2006 (Decree-Law No 125/2006), approving direct payment schemes and complementary national direct payments granted in the agriculture sector from 2007 onwards, and amending Article 2 of Legea nr. 36/1991 (Law No 36/1991) on agricultural companies and other forms of agricultural associations (in force until 23 March 2015) – *which governs the approval of direct payment schemes and complementary national direct payments granted in the agriculture sector from 2007 onwards*

Article 7(1)

‘To be eligible for payments under the single area payment schemes, applicants must be registered in the register of farmers managed by APIA, apply for payments within the deadline, and meet the following general conditions:

a) agricultural land with an area of at least 1 hectare must be used, whereby the area of the agricultural parcel must be at least 0.3 hectares and, in the case of vineyards, orchards, hop orchards, apple orchards, vine nurseries and fruit bushes, the minimum area of the agricultural parcel must be 0.1 hectares;

b) all the agricultural parcels must be declared;

c) subject to criminal penalties being imposed, true, complete and fully valid data in the single area payment application form and attached documents must be provided, including the list of areas;

f) documents demonstrating lawful use of the land in respect of which the application has been submitted must be presented;

g) all the information requested by APIA must be provided within the deadline;

h) checks carried out by APIA or other authorised bodies must be permitted;

i) the boundaries of the parcel used must be indicated when it is planted with the same crop as neighbouring parcels;

j) APIA must be notified in writing within 10 days of any change in the data declared in the application for payment that occurred between the date of submission of the application and the date payment was granted. Such changes concern the utilised agricultural area of the holding, the transfer of ownership of the holding to another agricultural user, the approval of a life farming annuity, or other changes to the information contained in the application form’.

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant filed an application with the Agenția de Plăți și Intervenție pentru Agricultură – Centrul Județean Argeș (the APIA office for the Argeș district, ‘APIA Argeș’) on 14 May 2007 relating to the single area payment scheme (SAPS), the complementary national direct payments scheme (CNDP) and the less favoured area scheme (LFA) for the year 2007, through which it requested support for a total agricultural area of 264.71 hectares.

2 Following an administrative check carried out by APIA Argeș, it emerged that other persons had also submitted applications for some of the areas declared by the applicant and a request for clarification was issued on 20 October 2007 in order to clarify this situation. On 28 November 2007, the applicant and representatives of the other interested parties clarified the issues concerning the declaration of the same areas, establishing the areas used by each of the farmers.

On the same date, the applicant filed Form M1.1 'Amendment of an area declaration' with APIA Argeș. This form corrected the initial declaration, stating an area for a given physical block of 45 hectares instead of 129.09 hectares, as declared in the initial application.

3 The applicant explained that the difference stemmed from two errors: an error of 52 hectares due to the misidentification of the boundaries of a mountain, since there were no reference points (names of valleys, rivers, altitudes, etc.) on the APIA map, and another error of approximately 33 hectares resulting from the difference between the surface area referred to in the lease and the sum of the surface areas of the two physical blocks making up the mountain in question.

4 In the light of the amendment to the area declaration, APIA Argeș found that the applicant had been guilty of over-declaration of areas, with a percentage discrepancy of 46.56%, and it therefore issued the decision of 28 May 2008 excluding the applicant's claim for payment, in accordance with Article 138(1) of Regulation (EC) No 1973/2004.

5 The applicant brought an action against APIA before the Tribunalul București – Secția de contencios administrativ și fiscal (the Division for Administrative and Tax Matters of the Regional Court, Bucharest, Romania) by Case No 44537/3/2008, requesting that the court declare that it was entitled to receive the grant for 2007, order APIA to review its decision of 28 May 2008, and determine the amount of the payment due to the applicant in accordance with the law (EUR 28 168.82) for the 263.26 hectares of grazing land utilised, with that amount being updated to the date of payment. The applicant filed a supplementary claim seeking an order requiring APIA Argeș to pay compensation for the material and non-material damage suffered as a result of the unlawful rejection of its application for the grant of assistance under the payment schemes in 2007.

6 The applicant sought the annulment of APIA's decision excluding it from payment of the grant for 2007, on the grounds that the amendment to the original application for the grant in respect of the area utilised and the existence, therefore, of an over-declaration of area that led to the application of the penalty provided for in Article 138(1) of Regulation (EC) No 1973/2004, was attributable solely to the fault of the defendant APIA, which had made available, for the purposes of identifying the physical blocks of grazing land used, incorrect topographical maps that did not comply with the requirements of European legislation (Article 20 of Regulation (EC) No 1782/2003), in that sufficient cartographic accuracy was not guaranteed.

7 The applicant also cited the provisions of Article 68 of Regulation (EC) No 796/2004 laying down detailed rules for the implementation of cross-compliance, modulation and the integrated administration and control system, concerning exceptional situations in which the reductions and exclusions provided for in the regulation do not apply. The applicant asserted that it had submitted factually correct information, and there was therefore no over-declaration of the

area but rather merely a misidentification, and that it could demonstrate its innocence by any means of proof, in the sense that, if there was an over-declaration, it was not due to its fault but to inaccuracies and errors in the APIA maps.

8 In support of its action, the applicant requested the right to submit documentary evidence, witness testimony and a topographical expert analysis report. The Division for Administrative and Tax Matters of the Regional Court of Bucharest accepted the documentary evidence but rejected the witness testimony and expert evidence in the field of topography as not of value in the case.

9 By civil judgment No 220 of 20 January 2011, the Division for Administrative and Tax Matters of the Regional Court of Bucharest dismissed the applicant's action, finding, in essence, that its plea based on Article 68 of Regulation (EC) No 796/2004 alleging a lack of fault on its part with regard to the over-declaration of the surface area was without foundation, since the applicant was aware from the lease document and the sale and purchase agreement that the surface area of the land in those documents was 211.06 hectares and not 264.71 hectares, as it had declared. The important factor in assessing the applicant's fault at the time when the application was submitted was the over-declaration in relation to the surface area in the applicant's title to the land.

10 The applicant appealed that judgment, asking the Curtea de Apel București – Secția a VII a contencios administrativ și fiscal (Bucharest Court of Appeal, Seventh Division for Administrative and Tax Matters) to set the judgment aside and to re-try the case, obtaining conclusive evidence, namely topographical expert evidence and witness testimony.

11 The applicant argued that there was no over-declaration in the present case, but rather a misidentification of the boundaries of the mountain, which is not punishable under either European or national law, especially since the farmer was not responsible for that situation. It further asserted that the court could only determine whether it was the applicant or APIA that was responsible by reference to the actual facts and that in order to ascertain the actual surface area it would be necessary to carry out either a topographical survey or an on-site inspection by APIA. However, such an inspection was carried out on part of the surface area of the mountain in question and no irregularities were identified.

12 The applicant also argued that the boundaries of the mountain in question are expressly stated in its lease contract and that those boundaries are the same as those stated in the title deed held by the landowner from whom the applicant leased the land. The stated area is 261.76 hectares.

13 The applicant also stated that it had mistakenly requested the set-aside of the 84.09 hectares by means of a set-aside form, as it was not aware at the time that some data had been incorrectly entered in the APIA maps. The applicant disclosed this factual situation in the document submitted to APIA Argeș on 15 May 2008,

and APIA should therefore have withdrawn set-aside form M.1.1, in particular because the payment procedure commenced five days later and APIA was required – according to its own procedures and the European legislation – to verify the farmer's statements, where necessary by means of an on-site inspection.

14 Before the appeal court [the Bucharest Court of Appeal, the court of last instance in this case], the applicant requested that the matter be referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 68(1) and (2) of Regulation (EC) No 796/2004.

15 On 2 April 2012, the Division for Administrative and Tax Matters of the Bucharest Court of Appeal rejected the applicant's request to refer the matter to the Court of Justice, on the grounds that the issues that the applicant wished to raise did not require a preliminary ruling from the Court of Justice.

16 By (irrevocable) Civil Decision No 1606 of 9 April 2012, the Division for Administrative and Tax Matters of the Bucharest Court of Appeal dismissed the applicant's appeal as unfounded.

17 The Bucharest Court of Appeal essentially held that the conditions laid down in Article 138(1) of Regulation (EC) No 1973/2004 for imposing the penalty of a refusal to grant the aid for the applicant for 2007 had been met, because the applicant had over-declared the area used in respect of which it had applied for support, as established following the administrative checks carried out by the defendant APIA Argeș, as a result of which the applicant acknowledged that the area initially declared did not correspond to the actual area and amended its declaration.

18 With regard to the area to be declared in the application for support, the court held that the area to be declared was the actual net agricultural area resulting from the measurements made by the holder of the parcel, which could be different from the area stated in the title deed. In the present case, however, it was established by the two farmers that, in fact, the applicant had not leased 129.09 hectares, as stated in the initial application, but rather only 45 hectares. By submitting the form through which it corrected the initial declaration, the applicant acknowledged that the error was contained in that initial declaration.

19 Both the initial declaration and the declaration of change of area were made on the basis of the same APIA maps, so the justification for over-declaration based on errors in the APIA maps is unfounded. As these maps did not contain sufficient information to enable the correct identification of the areas concerned, the applicant should have taken further action to establish the precise area it was using in order to avoid over-declaration, especially since there was a significant difference between the area it initially determined and the area recorded in the lease contract, such as to cast doubt on the accuracy of the area determined in the APIA maps.

20 The inaccuracy of the APIA maps cannot be used to justify the applicant's over-declaration of the areas it uses, in view also of the obligations under Article 7(1)(c) and (f) of [Romanian Decree-Law] OUG 125/2006. The applicant was required to ensure that the area declared was the area actually used and for which it had documents proving its right of use, and was not permitted to justify a declaration of an area greater than that used on the basis of 'inaccuracies' in the maps provided by APIA, which can only justify a misidentification of the areas as to their position on the map. Under no circumstances can any such 'inaccuracies' be used to justify an error of 46.56% in the declaration of that area.

21 The applicant's argument that it had withdrawn the set-aside declaration in its document of 15 May 2008 was also not accepted, since Regulation (EC) No 796/2004 does not permit the withdrawal of an application to set-aside a parcel, but rather only the withdrawal of areas.

22 The court also considered that the applicant's situation did not fall within the cases referred to in Article 68(1) of Regulation (EC) No 796/2004, which governs exceptions to the application of reductions and exclusions.

23 With regard to the evidence requested by the applicant, the Bucharest Court of Appeal held that the witness testimony was not relevant to the case, as the material damage could be proven by the documents in the file, and that the rejection of the claim for damages was due to the rejection of the main argument of the action and not the failure to prove the material damage. In terms of the topographical expert evidence, it was held that this was not valuable for the purposes of the case, in view of the grounds on which the contested decision was based (the finding of an over-declaration based on the applicant's set-aside of land areas) and the fact that the inaccuracy or irregularity of the APIA maps could not be used to justify the applicant's misrepresentation of the land areas it used and for which it had requested support.

24 The extraordinary appeals (reviews, actions for annulment) brought by the applicant against Civil Judgment No 1606 of 9 April 2012 given by the Division for Administrative and Tax Matters of the Bucharest Court of Appeal were dismissed as inadmissible.

25 On 8 April 2013, by application lodged at the Tribunalul București, Secția a IV-a Civilă (Fourth Division for Civil Matters of the Regional Court of Bucharest) against the defendants the statul român (Romanian State) through the Ministerul Finanțelor Publice (Ministry of Public Finance) and the Bucharest Court of Appeal, the applicant sought a declaration of failure to apply (infringement of) European Union law by the Division for Administrative and Tax Matters of the Bucharest Court of Appeal and of financial liability on the part of the Romanian State, in the form of an award of compensation for the material and non-material damage caused.

26 The applicant submits that the two courts (the Regional Court of Bucharest and the Division for Administrative and Tax Matters of the Bucharest Court of Appeal) did not apply Article 20 of Regulation (EC) No 1782/2003 in conjunction with Article 68 of Regulation (EC) No 796/2004, and that the combined provisions of Article 267 TFEU and Article 148(2) and (4) of the Romanian Constitution were not complied with, in that the appeal court unjustifiably refused the request for a preliminary reference to the Court of Justice of the European Union.

27 Among other provisions, the applicant invoked Article 267 TFEU and the case-law of the Court of Justice in the cases of *Köbler*, *CILFIT*, *Francovich and Bonifaci*, *Brasserie du Pêcheur* and *Factortame*.

28 The defendant Romanian State, through the Ministry of Public Finance, raised a defence arguing, in essence, that it is not possible to review all aspects that have been irrevocably decided by the court ruling on the case, invoking those elements in the context of a new action, and that the manner in which the case has been decided by an irrevocable decision can only be reviewed by the court ruling on the case by exercising extraordinary judicial remedies, under the conditions laid down by law. It submitted that the State's liability is a direct liability, but is limited to damages caused by judicial errors committed in criminal proceedings, and that the conditions for the Ministry of Finance to incur civil liability for its own acts are not met.

29 The Regional Court of Bucharest upheld the plea of lack of locus standi asserted by the Bucharest Court of Appeal of its own motion, taking the view that the Romanian State through the Ministry of Finance is the only party that can be a defendant in such civil liability actions.

30 By Civil Judgment No 960 of 1 July 2016, the Fourth Division for Civil Matters of the Regional Court of Bucharest dismissed the action brought against the defendant Romanian State through the Ministry of Public Finance as unfounded.

31 It is not apparent from the provisions of European Union law raised that any rights are conferred on individuals, whereas the right to information referred to by the applicant – in the sense of having access to appropriate information for the process of obtaining the requested financial aid and correctly identifying the parcel of land – is a general right that could be recognised in relation to most of the provisions laying down the conditions for the operation of a given mechanism. However, in the context of analysing the conditions necessary for establishing State liability, the Court of Justice's settled case-law refers to those provisions of European Union law that are intended to confer specific rights on individuals, which they may rely on before the national courts, and not to general rights that may be inferred from the interpretation of legislative provisions.

32 In asserting that the principle of State liability for damage caused by a failure to apply EU law was recognised by the Court of Justice in the *Francovich and*

Bonifaci, *Brasserie du Pêcheur* and *Factortame* judgments, and referring extensively to the conditions laid down in the *Köbler* and *Traghetti del Mediterraneo* judgments, the Regional Court of Bucharest found that Romania did not have specific legislation on State liability for cases arising from the *Köbler* case-law, and that the provisions of Article 96 of Law No 303/2004 on the status of judges and prosecutors would therefore need to be applied.

33 Analysing Article 96 of Law No 303/2004, the Regional Court of Bucharest held that the State is financially liable for the damage caused by judicial errors and that the injured party's right to compensation for material damage caused by judicial errors committed in proceedings other than criminal proceedings may be exercised only if the criminal or disciplinary liability, as the case may be, of the judge or prosecutor for an act committed in the course of the trial has been previously established by a final judgment and if that act is capable of giving rise to a judicial error.

34 The applicant appealed this judgment before the referring court, the Bucharest Court of Appeal.

The essential arguments of the parties in the main proceedings

35 The applicant contends that the trial court's determination that the provisions of Article 20(1) of Regulation (EC) No 1782/2003 do not confer rights on individuals is erroneous and contrary to the case-law of the Union and the positions of the Union institutions. The applicant refers to the judgment of the Court of Justice of 14 July 1967, *Kampffmeyer and Others*, the judgment of the General Court of 10 April 2002, *Lamberts* v *Ombudsman* (paragraph 87), and the judgment of the General Court of 23 November 2011, *Sison* v *Council*.

36 The trial court's determination is at odds with the position of the European Commission reflected in its survey AA/2008/24, which shows that an erroneous mapping system does not fulfil the function of ensuring the effectiveness of administrative cross-checks (a general interest), but also leads to the often erroneous positioning of agricultural parcels in the Land Parcel Identification System and the Geographic Information System (LPIS-GIS) by farmers, who thus end up being penalised or not receiving grants or compensation for expenses.

37 According to the case-law of the Court of Justice, the determination of irregularities may trigger the liability of the offending institution and require it to make reparation for the damage caused, in accordance with Article 41(3) in conjunction with Article 51(1) of the Charter of Fundamental Rights of the European Union, which of course includes the recognition of rights of individuals, as a result of an infringement of Article 20(1) of Regulation (EC) No 1782/2003.

38 With regard to the requirement for the national court to have manifestly infringed the applicable legal provisions, the applicant submits that the prudence and diligence required from the appeal court (the Division for Administrative and Tax

Matters of the Bucharest Court of Appeal) was not manifested in any way, first, because that court had the opportunity to refer a question to the Court of Justice for a preliminary ruling and, second, because it failed to apply the obvious provisions of the relevant European rules, namely those provisions that gave the applicant the opportunity to prove its innocence by any means of proof, while it took into consideration only the declarations from the authority and not the applicant's evidence. From this point of view, the lack of prudence and diligence on the part of the Division for Administrative and Tax Matters of the Bucharest Court of Appeal appears to be a violation of the right to a fair trial.

39 The applicant submits that the appeal court (the Division for Administrative and Tax Matters of the Bucharest Court of Appeal) disregarded the clear meaning of the provisions of Article 68 of Regulation (EC) No 796/2004, which imposed a number of obligations on the court (to carry out a judicial investigation, to obtain conclusive, appropriate and relevant evidence and to give reasons for the rejection of evidence), and in practice infringed the applicant's right to a fair trial. It claims that the violation of the right to a fair trial demonstrates the intentional nature of this action, and the refusal to submit a request for a preliminary ruling reinforces this conclusion.

Succinct presentation of the reasoning in the request for a preliminary ruling

40 The first question concerns the interpretation of Article 20(1) of Regulation No 1782/2003, and in particular whether that article constitutes a provision of EU law conferring specific rights on individuals, where infringement of those rights could give rise to State liability as a result of a decision of a national court of last instance. When analysing the claims submitted by the applicant, the Fourth Division for Civil Matters of the Regional Court of Bucharest stated that the infringement of this provision cannot be considered a civil tort, as it does not confer rights on individuals.

41 The applicant contested this conclusion by the court, referring to the European Commission's decisions from 2010 and 2011, which sanctioned Romania for the deficiencies of the LPIS-GIS system, the administrative checks and the manner in which penalties were applied for communicating inaccurate information to farmers and for the ineffectiveness of on-the-spot checks on area aid. It argued that this conclusion by the court is at odds with the Commission's position, as reflected in the Commission's survey AA/2008/24, which shows that an incorrect mapping system does not fulfil its role of ensuring effective administrative cross-checks (a general interest), but also results in the often incorrect positioning of agricultural parcels, which penalises farmers, since a private interest – that of the farmer – is also at stake.

42 By its second question, the referring court is asking the Court of Justice to interpret the concept of 'factually correct information' used in Article 68(1) of Regulation (EC) No 796/2004, in the sense of determining whether this concept

includes both the correct declaration of areas by the farmer and the correct identification of the parcel of land used and its boundaries. The question is relevant because there is a need to assess whether the conditions laid down in the case-law of the Court of Justice for the State to incur liability are met.

43 By the referring court's third question, the Court of Justice is being asked to establish whether, given the circumstances of the case, the failure of the national court of last instance to refer the matter to the Court of Justice of the European Union for a ruling on the interpretation of Article 68 of Regulation No 796/2004 constitutes a clear and sufficiently serious breach such as to render the State liable for the damage allegedly caused by that court's judgment.

44 According to the case-law of the Court of Justice, a Member State may be held liable for damage caused by a judgment of a national court of last instance that infringes a rule of Union law only in exceptional cases where the national court of last instance has manifestly infringed the applicable law. Moreover, in order to determine whether there is a sufficiently serious breach of Union law, the national court before which a claim for damages is brought must take account of all the factors characterising the situation before it, including the failure of the national court concerned to fulfil its obligation to refer any necessary questions for a preliminary ruling under the third paragraph of Article 267 TFEU (judgments of 5 March 1996, *Brasserie du Pêcheur* and *Factortame* v *Commission*, Cases C-46/93 and C-48/93, EU:C:1996:79, paragraph 56; of 30 September 2003, *Köbler*, C-224/01, EU:C:2003:513, paragraphs 54 and 55; and of 28 July 2016, *Tomásová*, C-168/15, EU:C:2016:602, paragraph 25).

45 In the present case, although the administrative court that decided the case, as the court of last instance, was required to request the Court of Justice's interpretation of Article 68 of Regulation (EC) No 796/2004 – and a failure to do so would require that court to provide the reasons for that decision in the light of the criteria listed by the Court of Justice in the CILFIT case – it simply held that the questions raised by the applicant did not require a preliminary interpretation by the Court of Justice, without giving any detailed reasons for adopting that procedural position.

46 In the light of all these considerations, this court considers it necessary to refer the three questions to the Court of Justice.