REFERENCES FOR PRELIMINARY RULINGS: EXPERIENCE OF A SPANISH JUDGE

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What is a preliminary ruling?

A preliminary ruling is a procedure provided for in article 234 of the Treaty establishing the European Community. To paraphrase this article, it states that, if a national court dealing with a matter within its jurisdiction, which involves applying a principle of community law, feels that a clarification of community law is necessary first, it may refer the matter to the European Court of Justice with a request:

- for an interpretation of primary or secondary community law, or
- a ruling on the validity of secondary community law.

The preliminary-ruling procedure results inevitably from the provision that interpretation of community law is the exclusive competence of the European Court of Justice.[1]

What are the reasons for obtaining a preliminary ruling?

A. Because there is doubt as regards the application of community law:

- concerning the founding treating and regulations:
  Here, it is a question of the direct effect of community law, i.e. whether or not community law impinges upon the parties involved in a lawsuit, in that it places explicit and unrestricted duties on them or grants them rights. In such cases, the national court obtains a decision as to whether or not a particular community provision has to be applied directly and without reservation to the matter which it has to judge.
- concerning directives:
  Here, it is a question as to whether or not national legislators have correctly transposed community law and whether they have done so adequately. In both types of case, the national court obtains a decision as to whether or not inadequately transposed directives are to be applied to the matter before it. The terms used are “vertical effect” and “horizontal effect”. The direct, vertical effect occurs when citizens enforce community law against member states, who have failed in their duty. This gives the right to claim compensation on account of the failure to fulfil this duty through the corresponding provisions of national law. That is not the case with horizontal effect; it is not possible to enforce directives as directly applicable law to solve litigation between two private persons.

[1] Article 220 of the Treaty establishing the European Community states: “*The Court of Justice […] shall ensure that in the interpretation and application of this Treaty the law is observed*”.

B. Because there are provisions in national law (or the way the courts use those provisions) that conflict with community law.

The question here is the precedence of one of the two sources of law – national law or community law. In this case, the question put to the ECJ must be formulated in such as way as to inquire whether community law is in contradiction with national law.

If the answer to this question is yes, then the national legal provision at stake must not be applied to the case before the national court, since the national court, because it belongs to a member state, is bound to comply with the principle of the supremacy of community law. This is a principle which a national court is not permitted to disregard in deciding on a case before it.

What this procedure achieves is that community law is applied to the specific case. When a national court proceeds in this way as part of the sovereign power of a member state, it enforces the application of community law to the relationships between private persons. (De facto, it creates a direct, horizontal effect in applying the provisions of secondary community law, especially directives.)

C. Because community law is in need of interpretation before it can be applied to a specific case:

What this sort of situation essentially involves are questions concerning the interpretation of community law in the light of doubt as regards its content, its scope and its application in a specific case. Regardless of whether it is a matter of directly applicable community law or community law needing to be transposed by national legislators, the problem here is not the relationship between national law and community law, but rather the need to know the true meaning and intention of community law.

Preconditions for submitting a reference for a preliminary ruling

A. Litigation must be pending.

The question put before the European Court is not hypothetical or doctrinal in nature, but is intended to resolve a real case before a court. That being so, the question asked is inexorably linked to the existence of such a case. Any type of procedure that will lead to a final outcome that is not a court judgment (agreement between the parties, withdrawal of the lawsuit, etc.) is not admissible for the submission of a reference for a preliminary ruling.

B. There must be doubt as regards the interpretation of community law:

What this means is that there must as yet be no judgment by the European Court of Justice that could be used to resolve the case or that the corresponding provision of community law is not sufficiently clear as to dispel justified doubt as regards the case on which the national court has to decide.

C. The preliminary ruling must be indispensable for the case:

- For the interpretation of community law that is to be obtained from the European Court of Justice to be able to resolve the case, it is absolutely essential for there to be a connection between the contested provision and the matter to be decided on[2]. National courts are ordinary courts as far as the application of community law is concerned and are thus limited to judging only those cases brought before them.
- Before submitting a reference for a preliminary ruling, the national court must first have sorted out all the other substantive and legal issues that are not affected by community law, so that its decision will depend solely on the interpretation of the corresponding provision of community law.
- A further precondition is that it must be feasible for domestic law to be interpreted in a manner not corresponding to community law[3]. That means that the national court must have found it impossible to integrate the provision of national law into the provision of community law and must thus have arrived at the conclusion that the two are incompatible. This idea presupposes that the national court proceeds to make its own interpretation of community law, which would, however, have no validity, since the European Court of Justice enjoys a monopoly when it comes to the interpretation of community law. So, in the final analysis, the question that the national court would submit to the European Court of Justice would be to ask whether its own individual interpretation of community law tallied with that of the sole authoritative interpreter thereof.
- In the subjective view of the court, the preliminary ruling must appear essential at the time of the procedure[4]. It is possible at any time for the national court to become convinced, contrary to its original persuasion, that the preliminary ruling is, after all, not essential. It might also happen that other judgments of the European Court of Justice or national courts or new laws offer the court grounds that contribute to resolving the incompatibility between national law and community law that it had originally ascertained.

Procedure for submitting a reference for a preliminary ruling

The reference for a preliminary ruling is submitted by a court in a procedure conducted in accordance with its own rules of procedure, respecting the following considerations:

- The reference should not be submitted until all doubt has been dispelled as regards the substance of the dispute, i.e. after the oral proceedings have been completed and all evidence has been taken, but before the court pronounces its judgment; and
- It should not be submitted until such time as the national court is intellectually in the position to arrive at the conclusion that the submission of a

[2] Cf. footnote 6

[3] The judgment in case C-106/89 (Marleasing) contains the following passage: "*It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret this law is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty* [subsequently renumbered Article 249 TEC]."

[4] The European Court of Justice has already conceded that the national court is able to withdraw the reference for a preliminary ruling at any time...

reference for a preliminary ruling is absolutely essential for deciding the case;
- It is appropriate and makes sense for the court to inform the parties to the action of its intention to obtain a preliminary ruling and to give them the opportunity of expressing their views as regards the suitability and contents of the reference for a preliminary ruling;
- The case pending before the national court is stayed until the European Court of Justice hands down its judgment;
- Nevertheless, subject to the provisions of national law, it is possible for the parties to the action to petition the national court to grant interim relief and/or interim judicial remedies[5], with a view to ensuring the full effectiveness of the future judgment and to preventing this effectiveness from being prejudiced through the time taken by the European Court of Justice in arriving at its judgment.

Contents of the reference for a preliminary ruling

The reference for a preliminary ruling must be decided on by a reasoned court order in accordance with the rules for dealing with ancillary matters as laid down in the national laws on procedure. It must contain the following components:
- a description of the case[6] (from the point of view of the court, having appreciated the evidence gathered in the procedure);
- the applicable national laws and relevant court judgments (if any); these may be appended in the form of an annex;
- the community provision requiring interpretation;
- the considerations that led the court to submit its reference for a preliminary ruling; this is where the national court explains its own individual interpretation of the community provision;

[5] Cf. cases C-465/93 (Atlanta) and C-213/89 (Factortame).
In the first of these cases, the European Court of Justice already accepts the possibility for the national court to suspend the execution of a community regulation pending the decision on its validity.
In the second case, the European Court of Justice acknowledges that the national court has the right to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under community law.

[6] In case C-320/90 (Telemarsicabruzzo) the European Court of Justice declines to give a ruling on the question referred to it for the following reason: "*The need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based.*"
In a later case, C-462/03 (Strabag AG), the European Court of Justice declares: "*It ought to be borne in mind that, in accordance with settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-390/99 Canal Satélite Digital [2002] ECR I-607, paragraphs 18 and 19; Case C-373/00 Adolf Truley [2003] ECR I-1931, paragraphs 21 and 22, and Case C-380/01 Schneider [2004] ECR I-1389, paragraphs 21 and 22).*"

- the specific question or questions to be submitted to the European Court of Justice.

The question to the European Court of Justice

This is without doubt the central element of the court order, since it is here that the act of exchange takes place between the national court and the European Court of Justice.
There are no rules as to how the question is to be formulated. However, it would appear to be evident that this would have to be different depending on whether the question was asking about the meaning or validity of a community legal instrument or about the compatibility of a national legal provision with community law (noting that here "provision" is to be understood as any decision with a potentially compulsory effect).
In the first of these cases, the question makes a direct reference to the community provision for which the interpretation is being sought.[7]
In the second case, the ruling of the European Court of Justice will be based on the principle of the supremacy of community law over national law. It does not fall within the jurisdiction of the European Court of Justice to interpret national law; that is the task of the court making the reference for the preliminary ruling.
In practice, this contradiction is resolved by the way in which the question is worded, namely whether community law is in contraction with the national legal provision (and that therefore its supremacy must be brought into play)[8].

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[7] One case chosen purely at random might be C-104/03 (St. Paul Dairy Industries). The question submitted by the national court is: "*Does the provision in Article 186 et seq. of the [Wetboek van Burgerlijke Rechtsvordering (Netherlands Code of Civil Procedure)] concerning the 'preliminary hearing of witnesses prior to the bringing of proceedings' come within the scope of the Brussels Convention in light of the fact also that, as provided for in that legislation, it seeks not only to enable material evidence to be taken from witnesses shortly after the facts in dispute and to prevent evidence from being lost but also, and in particular, to provide an opportunity for persons involved in an action subsequently brought before the civil courts – those considering bringing such an action, those who anticipate that the action will be brought against them, or third parties otherwise concerned by such an action – to obtain advance clarification of the facts (with which they are perhaps not entirely familiar), so as to enable them better to assess their position, particularly also with regard to the issue of identification of the party against whom proceedings must be instituted?*"
The European Court of Justice gives the following answer: "*Article 24 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, by the Convention of 25 October 1982 on the Accession of the Hellenic Republic, by the Convention of 26 May 1989 on the Accession of the Kingdom of Spain and the Portuguese Republic and by the Convention of 29 November 1996 on the Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, must be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard is not covered by the notion of 'provisional, including protective, measures'*."

[8] Another case chosen at random is C-239/02 (Douwe Egberts).
The national court asks: "*Must Article 18(1) and Article 18(2) of Directive 2000/13/EC be interpreted as meaning that non-harmonised national provisions on the labelling and presentation of foodstuffs and on advertising for them which prohibit certain statements such as "references to slimming" and "references to medical recommendations, attestations, declarations or statements of approval" in the labelling and/or presentation of foodstuffs and/or advertising for them, even though such statements are not prohibited by the Directive, constitute infringements of the*

Correspondence between the national court and the European Court of Justice

The procedure is simple. Correspondence in both directions is by means of registered post. Correspondence to the European Court of Justice must be addressed to its Registry in L-2925 Luxembourg.

The procedure is initiated by the national court, which transmits its order in accordance with its national law along with the question(s) on European law on which the European Court of Justice is to give its ruling(s). Optionally, it can include as annexes the actual texts of any legal provisions applicable to the case and/or any relevant jurisprudence.
As the procedure progresses, the European Court of Justice sends the national court copies of the documents concerning the most important procedural stages:

- institution of proceedings,
- written submissions from individual member states and community institutions during the preparatory phase,
- submissions by the advocate general,
- its judgment,
- a copy of its decision, once it has pronounced its judgment. With this, it calls on the national court, in turn, to send it a copy of its decision in which it will have considered the interpretation of community law given by the European Court of Justice.

Effects of the preliminary ruling obtained

The judgment of the European Court of Justice contains the answer to the question referred to it by the national court. The national court must now decide on the case before it, applying community law in accordance with the wording of the ECJ judgment, which is final and absolute.
Moreover, the judgment by the European Court of Justice has an affect going beyond the case that originally led to it.
If it is a judgment dealing with the interpretation of one of the Community's legal instruments, its effect extends to all courts of all member states, which must decide cases in line with the doctrine laid down in the judgment.
If it is a judgment in a case in which the validity of a community provision is contested, its effect also extends beyond the specific case, so that the legal provi-

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Directive in view of the fact that the eighth recital of the Directive states that the most appropriate labelling is the one which creates fewest obstacles to free trade and that therefore these national provisions cannot be applied?"
The European Court of Justice replies: "*Article 18(1) and (2) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs must be interpreted as precluding national legislation such as that at issue, which prohibits references to 'slimming' and to 'medical recommendations, attestations, declarations or statements of approval' in the labelling and presentation of foodstuffs*."
Here it is evident that the European Court of Justice reverses the question. The question as to whether the national provision conflicts with the community provision is answered in the form that the community provision precludes the national rules.

sion contested loses its effect, even if the powers for actually repealing it lie with the body that enacted it.

First-hand experience:

Case C-342/01 Merino Gómez v. Continental

Case C-13/05 Chacón Navas v. Eurest Colectividades

Case Palacios v. Cortefiel