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PRELIMINARY RULING AND ADVISORY OPINION: ENCOUNTERED PROCEDURES

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1. INTRODUCTION

The aim of this paper is to analyse two European judicial procedures that have the same purpose: to strengthen the relationship between the European courts and the courts of the States parties and to facilitate the uniform application of European law. However, they are procedures that differ to the point of having more differences than similarities.

We will discuss preliminary rulings before the CJEU and the advisory opinion before the ECtHR, two well-known procedures, but sometimes the similarities mentioned can lead to confusion. For this reason, a comparison will be made in the following pages in order to understand the two procedures and to differentiate between them.

2. PRELIMINARY RULINGS

2.1. Introduction[1]

The preliminary ruling procedure is positioned as a Community procedure, as it is part of one of the procedures before the CJEU. In order to exercise this jurisdiction, the CJEU needs to have standing under Article 267 TFEU, which analyses the different situations in which a preliminary ruling may or must be made by a national court or tribunal. The characteristics of this procedure are set out below.

2.2. Objectives of the procedure

As the national courts are ordinary judges responsible for applying EU law, the CJEU collaborates with them in that application. In this way, through preliminary rulings, an effective and uniform application of the EU law is guaranteed, avoiding divergent interpretations[2]. This is why the procedure to be analysed is considered as a mechanism of communication between both courts, as well as an accessory mechanism to the main litigation[3].

2.3. Questions referred for a preliminary ruling in the national context

2.3.1. Role and standing[4]

Firstly, it is a procedure used when there are doubts as to the validity or interpretation of Community provisions, as well as when a court or tribunal at national level needs a decision of the CJEU in order to give a judgment. It should be added that preliminary rulings are also useful in cases where there is no existing national case law to address the legal situation at hand.

Secondly, and as has been made clear, the persons entitled to make a reference for a preliminary ruling are the national courts. Furthermore, a distinction must be made between two categories: on the one hand, cases in which there is scope for further judicial review of

[1] https://eur-lex.europa.eu/ES/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html
[2] https://curia.europa.eu/jcms/jcms/Jo2_7024/es/#procedures
[3] https://www.conceptosjuridicos.com/cuestion-prejudicial/#:~:text=%C2%BFQu%C3%A9%20es%20la%20cuesti%C3%B3n%20prejudicial,distintas%20de%20una%20misma%20norma.
[4] https://eur-lex.europa.eu/ES/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html

the decision taken by the body before which doubts arise as to the validity and interpretation of the EU Law, and, on the other hand, where there is no possibility of further review.

This difference leads to an obligation or suggestion for the court or tribunal to ask the question for a preliminary ruling[5]. This means that it is impossible for the parties to the main proceedings to ask a question, although they may request or encourage the national court to do so.

In any event, the national court has the possibility of refusing to raise such a question, but with a statement of reasons. In this way, the judge could argue the irrelevance of the question raised, the existence of an interpretation of the Community provision in question or the obviousness of the application of Community law, so that there is no doubt[6].

2.3.2. The approach to preliminary rulings[7]

First of all, the three conditions to be fulfilled in order to be able to make a reference for a preliminary ruling must be mentioned. First, a Community rule must be applicable in the main proceedings. Secondly, there must be doubts as to the interpretation or validity of the Community rule to be applied. Thirdly and lastly, the resolution of doubts by the CJEU must be essential to resolve the dispute[8]. With regard to the fulfilment of the aforementioned requirements, reference must be made to the requirements of the content of the consultation[9].

Pursuant to the above-mentioned Rules of Procedure, the request must contain a text setting out the questions to be put to the Court, the subject matter of the dispute on which the questions are based, the national provisions and case law applicable to the case and the reasons which led the national court or tribunal to raise the question, as well as the relationship between the provisions of EU Law to be interpreted and the national provisions to be applied in the main proceedings. The referral must also be accompanied by the documents necessary for the CJEU to deal with the case.

In addition, as the referral must be translated to allow other MS to submit observations, it must be drafted in a simple, clear and precise manner. The referring court may, in turn, indicate the arguments of the parties in the main proceedings, although these will not be translated. A useful possibility is the indication of its views on the answer it considers should be given to the question referred for a preliminary ruling.

As for the moment to raise the question, Art. 267 TFEU does not indicate when it should be raised, which would lead us to presume the discretion of the courts to consider the appropriate moment[10]. However, it is considered appropriate to do so as soon as it is clear that the CJEU's decision will be necessary to deliver the judgment. At the time when this approach is made, the national proceedings should be suspended until the CJEU's decision is received.

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[5] Article 267 TFEU
[6] Case CILFIT 283/81, para 21
[7] https://eur-lex.europa.eu/ES/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html
[8] https://vlex.es/vid/planteamiento-prejudicial-tribunal-395799858
[9] Article 94 of the Rules of Procedure of the CJEU
[10] J. Planas, Una Comparación Entre la Cuestión Prejudicial y la Opinión Consultiva, 2018, page 60

Moreover, the referring court must inform the CJEU of any procedural indecency that may lead to the termination of the proceedings, as well as of the existence of an appeal against the referred decision. An important point is that the factual doubts of the case must have been resolved, as the questions referred for a preliminary ruling are essentially of a legal nature.

2.4. Questions referred for a preliminary ruling in the context of the CJEU

2.4.1. Procedure

Once the referral decision has been drawn up in accordance with the requirements of Art. 94 of the Rules of Procedure of the ECJ, it must be transmitted electronically or by post to the Registry of the ECJ in Luxembourg, and all referrals must be dated and signed[11].

[12]Once the Registry is aware of the question raised, it must notify[13]the parties to the main proceedings, the MS, the Commission and the EU bodies or agencies that adopted the act in respect of which there are doubts. The parties must be represented by a lawyer[14]. After notification, a written procedure will be followed by an oral procedure, which will be used by the CJEU judge to reply to the national judge.

One point to underline is that the CJEU does not enter in any case to resolve the dispute, but its role is limited to helping to resolve it, being the role of the referring court to draw conclusions from the decision made by the CJEU[15].

2.4.2. Value of the judgment

In order to analyse the effects of a judgment which answers a question referred for a preliminary ruling, we must distinguish between questions of interpretation and those which refer to the validity of EU law.

On the one hand, interpretative judgments are *res judicata* for the court that referred the question for a preliminary ruling, as well as for all the national courts that will hear the same case[16].

On the other hand, in judgments on validity, there is the possibility of determining whether the legal act is valid or invalid[17]. Thus, if the CJEU considers the act to be valid, the national court must apply it, whereas if it is invalid, the judgment determines that the court that referred the question for a preliminary ruling will not apply the act and, by virtue of its *erga omnes* effect, neither will any court of the member states.

However, it is important to mention here that the invalid act may only be repealed or altered by the institution that adopted it. Moreover, these judgments have *ex tunc* effect, which means that the invalidity is declared from the moment the act was adopted.

3. ADVISORY OPINION

[11] Art. 57.6 of the Rules of Procedure of the ECJ
[12] J. Planas, Una Comparación Entre la Cuestión Prejudicial y la Opinión Consultiva, 2018, page 65
[13] Art. 20(1) of the Rules of Procedure
[14] Article 119 of the Rules of Procedure
[15]https://eur-lex.europa.eu/ES/legal-content/summary/preliminary-ruling-proceedings-recommendations-to-national-courts.html
[16] Judgment of the Court of Justice in Joined Cases C-260/91 and C-261/91 La Junquera
[17] S. Zaera Espinós, La cuestión prejudicial europea en la teoría y en la práctica, 2016

In this case, we are analysing a procedure that, although it involves EU Member States, goes beyond this, as we must place ourselves in the context of the Council of Europe, in which more States participate than in the EU. For this reason, the court with jurisdiction to hear these proceedings is the ECtHR. This competence is conferred mainly by the ECHR, but has recently been developed through the reform of the latter by means of Protocol 16.

3.1. Concept and objectives[18]

The main objective of the advisory opinion is to strengthen the protection of human rights carried out by the European system. In this way, it positions itself as a means of fluid communication between the ECtHR and national courts, enabling mutual understanding and a system of institutional cooperation.

Thus, the advisory procedure has several advantages, such as the uniform interpretation of the ECHR and facilitating the participation of national courts in international jurisdiction and the reduction of human rights violations, which means avoiding the increase of individual claims as the violated right can be safeguarded by national courts after consultation with the ECtHR. This procedure has recently been renewed through Protocol number 16 of the ECHR, constituting a different competence to that contained in Art. 47 ECHR.

3.2. ECHR Context

First of all, it should be mentioned that the main regulation of the advisory function is found in Articles 47 to 49 of the ECHR. Thus, the ECtHR is given the possibility to issue advisory opinions at the request of the Committee of Ministers on questions relating to the interpretation of the ECHR and its Protocols[19], with some exceptions[20]. More specifically, it is determined that it will be the Grand Chamber that will examine requests for advisory opinions[21].Furthermore, the ECtHR will have to give reasons for its advisory opinion[22], as well as communicate it to the Committee of Ministers[23].

By virtue of the competence conferred by Art. 47 ECHR, the ECtHR has only issued 2 opinions and made use of its competence a third time, refusing to issue an advisory opinion. The two advisory opinions issued by the ECtHR concern the list of candidates who stood for election as judges of the ECtHR.

3.3. Protocol 16 context

3.3.1. Introduction

Although the consultative function was already included in the ECHR after its incorporation with Protocol 2, it was subject to major restrictions. This is why Protocol 16, an optional text, represented a major step forward in the extension of the advisory competence. This text was drafted in a context of reflection on the future of the ECtHR and among its objectives is the reinforcement of the subsidiarity that characterises the protection given by the ECtHR, as

[18] https://recyt.fecyt.es/index.php/RDCE/article/view/86462/63061
[19] Article 47(1) ECHR
[20] Article 47(2) ECHR
[21] Art. 31(c) ECHR
[22] Art. 49 (1) ECHR
[23] Art. 49 (2) ECHR

well as the promotion of dialogue between the European Court and national courts and the deepening of the constitutional role of the ECtHR[24].

The aforementioned principle of subsidiarity implies that the national judge who tries to guarantee in the first place the exercise and enjoyment of rights can do so more effectively if he can first request an opinion from the ECtHR on the interpretation or application of the ECHR[25].

3.3.2. New procedure

In formulating the new procedure, account was taken of the preliminary ruling of the CJEU and of elements from other international jurisdictions, so that we are faced with a procedure with its own characteristics[26].

[27]This new procedure has two objectives. First, the application of the ECHR in accordance with the principle of subsidiarity and to reduce the workload, since the aim is to clarify doubts and avoid the ECtHR having to deal with several individual complaints for violation of human rights due to an erroneous application of the ECHR.

It should be noted that the new procedure authorises the highest national jurisdictions to refer to the ECtHR requests for advisory opinions on the interpretation or application of the rights and freedoms contained in the ECHR or its Protocols, as long as there is a connection with a case pending before the requesting court[28].

The point here is that there is discretion on the part of states to designate and modify the courts that will exercise the provisions of Article 1[29]. Once the national courts that may request an ECtHR advisory opinion have been designated, they have the discretion to decide whether or not to do so, without the need to state reasons in the event of a refusal.

Once it has been decided to request an advisory opinion, the national court must state the reasons for its request, as well as the legal and factual background[30], indicating to the ECtHR the provisions of domestic law to be applied, the rights at stake, the arguments of the parties on what is being consulted and, if possible, its opinion.

After the request has been made, 5 judges of the Grand Chamber decide whether or not to admit it, taking into account the requirements of Art. 1[31]. According to Art. 2.3 one of the members of the Grand Chamber must be a judge chosen by the High Contracting Party to which the court making the request is attached.

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[24] Miguel Ángel Sevilla Duro, El Protocolo núm. 16 del Convenio Europeo de Derechos Humanos: El diálogo entre tribunales para la configuración de un espacio europeo de derechos, 2022, page 3

[25] Yaelle Cacho Sánchez, Revista Española de Derecho internacional, El potencial desarrollo del nuevo procedimiento consultivo ante el tribunal europeo de derechos humanos: fortalezas, debilidades, oportunidades y amenazas, para 7

[26]*Idem,* para 18

[27] *Idem*, para 20

[28] Article 1 (2) Protocolo núm. 16

[29] Article 10 Protocolo num. 16

[30] Article 1 (3) Protocolo num. 16

[31] Article 2 (1) Protocolo num. 16

If the advisory opinion is finally granted, the ECtHR notifies the Council of Europe's Commissioner for Human Rights of the requested state so that they can submit observations and participate in the hearings[32].

3.3.3. Effects of the judgement

The ECtHR's advisory rulings are positioned as non-binding[33]. Furthermore, they must state the reasons[34]and be limited to the points that are relevant to the proceedings pending in the state party[35]. If there are different opinions of one or more judges, they may submit separate opinions, which will be communicated together with the advisory opinion decided by the other judges.

Furthermore, these judgments have an *erga omnes* effect reinforced by Protocol 16, because although the advisory opinions are not binding, the interpretation contained in them will have effects analogous to the interpretative elements of the ECtHR's case law. In this way, it is allowed to be extended to identical situations and even to other courts[36].

It should be added that the advisory opinion has no effect on subsequent applications, i.e. applications brought by parties outside the dispute, on the formal level, but will have an effect on the decision on the merits[37].

As for the role of states following the advisory judgment, the new system established by Protocol 16 has a circular nature, as states must adopt at the national level the measures deemed necessary to adapt to the judgments, thus putting an end to violations and avoiding the arrival of individual complaints at the ECtHR, as protection would be found at the national level[38].

4. COMPARISON ADVISORY OPINION AND PRELIMINARY RULING [39]

4.1. Similarities

As mentioned at the beginning of this paper, there are similarities between the procedures under analysis. Firstly, they ensure uniform application and interpretation of EU law and allow for the establishment of common interpretations. Secondly, they promote trust between national and European courts, as they aim at an effective application of European law.

Thirdly, the protagonist in the procedure is the referring court, with the parties to the dispute playing a secondary role. However, the latter have the possibility of being qualified

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[32] Miguel Ángel Sevilla Duro, El Protocolo núm. 16 del Convenio Europeo de Derechos Humanos: El diálogo entre tribunales para la configuración de un espacio europeo de derechos, 2022, page 7
[33] Article 5 Protocolo num. 16
[34] Article 4 (1) Protocolo num. 16
[35] Miguel Ángel Sevilla Duro, El Protocolo núm. 16 del Convenio Europeo de Derechos Humanos: El diálogo entre tribunales para la configuración de un espacio europeo de derechos, 2022, page 11
[36] Yaelle Cacho Sánchez, Revista Española de Derecho internacional, El potencial desarrollo del nuevo procedimiento consultivo ante el tribunal europeo de derechos humanos: fortalezas, debilidades, oportunidades y amenazas, para 9
[37] *Idem,* para 20
[38] Yaelle Cacho Sánchez, El potencial desarrollo del nuevo procedimiento consultivo ante el tribunal europeo de derechos humanos: fortalezas, debilidades, oportunidades y amenazas, para 10
[39] https://www.ibericonnect.blog/2021/04/simposio-el-protocolo-num-16-al-cedh-parte-iii-la-opinion-consultiva-y-la-cuestion-prejudicial-algo-mas-que-diez-diferencias/

participants in the procedure. Moreover, in both procedures the dialogue focuses on legal, not factual issues. Thus, the objective of both procedures is to clarify a point of law.

Fourthly and finally, both procedures are divided into 2 phases: written and oral, which together cannot last more than 15 months.

4.2. Differences

Although the preliminary ruling question has served as a model for the ECtHR's advisory function, there are major differences that allow us to compare two procedures with their own characteristics. In the following, six differences will be analysed.

1) OOII, Court and regulation

With regard to preliminary rulings, this is a procedure that is characteristic of the European Union, which is why it is brought before the CJEU, a court whose jurisdiction is accepted by the Member States when they ratify the EU treaties in which the Court's competences are recognised. In these treaties, reference is made to the possibility for the CJEU to hear preliminary rulings, so that they accept that the CJEU can rule on questions that may arise in the context of litigation at national level. An important point here is that accession to the EU is conditional on ratification of the EU treaties.

As for advisory opinions, they take place within the framework of the Council of Europe and on the basis of the ECHR, which confers competence to hear them on the ECtHR and has been rectified by all States parties.

However, what really matters is the recent reform introduced by Protocol 16, whose ratification is optional. Therefore, despite introducing important improvements, there is some reluctance on the part of States to ratify it[40], as it has only been ratified by 16 of the 46 States party to the Council of Europe. Its scope is therefore less far-reaching than that of the TFEU.

2) Persons entitled to refer questions for a preliminary ruling

Questions referred for a preliminary ruling are referred by the national courts of the members of the EU, in particular by any national court of a Member State[41]. An advisory opinion, on the other hand, is requested by the members of the Council of Europe and only by their highest courts[42]. The aim of this requirement is collaborative judicial cooperation based on dialogue, away from hierarchisation[43]. Protocol 16 therefore does not introduce a "judge-to-judge" dialogue, but rather a "supreme-to-supreme" dialogue.

In the context of preliminary rulings, there has sometimes been a revelation of the lower instances against the SC's criterion precisely through the use of the procedure to circumvent criteria imposed by the higher court. Protocol 16 does not respond at all to this trend and

[40] Yaelle Cacho Sánchez, Revista Española de Derecho internacional, El potencial desarrollo del nuevo procedimiento consultivo ante el tribunal europeo de derechos humanos: fortalezas, debilidades, oportunidades y amenazas

[41] Art. 267 TFEU

[42] Art. 1 Protocol num.16

[43] Yaelle Cacho Sánchez, Revista Española de Derecho internacional, El potencial desarrollo del nuevo procedimiento consultivo ante el tribunal europeo de derechos humanos: fortalezas, debilidades, oportunidades y amenazas, para 134

limits the dialogue to a much stricter institutional framework, without the lower instances being able to introduce shortcuts in the formation or revision of a jurisprudential criterion in the State.

3) Degree of mandatory nature

In relation to the referral to the European court, while Article 16 Protocol 16 imposes as a general rule the optional criterion in the decision to refer the advisory opinion, the preliminary ruling question is mandatory for courts whose decisions do not admit of further appeal (albeit subject to several generous exceptions provided for in the Cilfit and DaCosta case law).

As for the ratification of the text conferring jurisdiction on the European court, under Protocol 16, states can decide whether or not to ratify, and thus whether or not to allow the high courts to give advisory opinions. So there is a double optional character[44]. However, in the context of preliminary rulings, ratification of the TFEU and TEU is mandatory for accession to the EU.

4) Role of the parties

The parties may not challenge the legality of the Supreme Court's decision not to make a request for an advisory opinion, unlike in the case of a preliminary ruling.

5) Scope and rulings

One of the major differences between the procedures to be analysed is the binding nature of the judgments issued in the context of the consultation.

Thus, the opinions issued by the ECtHR are not binding on the referring judge or on the Member States (and much less, therefore, on individuals), unlike in the case of preliminary rulings, which are binding not only on all States and individuals, but also with a pseudo-retroactive temporal force that reaches the interpreted rule of the Union up to the moment of its entry into force.

However, it is unquestionable that a Supreme Court that departs from the criterion established by an advisory opinion may face a direct appeal by the affected party before the Strasbourg Court, which will not miss the opportunity to reaffirm the doctrine that it had previously established in the same advisory opinion.

However, the situation in which a state party departs from an advisory opinion is an unlikely scenario, but one that still raises doubts about the scope of the Court's opinions. Still, such a situation could also be remedied through a subsequent individual application to the ECtHR, although this possibility will slow down the guarantee of the right.

As to the scope of these procedures, there is also a big difference, since, as mentioned above, the doubly optional character of advisory opinions undermines their objectives.

[44] Idem, para 12

Thus, in the context of advisory opinions, only 2 have been resolved and a third has been rejected, under the new procedure based on Protocol 16. Among them, it is worth mentioning the advisory opinion submitted by the TC of Armenia, which sought to clarify doubts about the interpretation of Art. 7 ECHR. In this case, the Grand Chamber ruled that the content of the ECtHR's opinions in the context of the advisory opinion must be limited to issues that relate to the pending procedure at the national level.

In this way, the ECtHR is allowed to reformulate the questions raised by virtue of the factual and legal issues of the national procedure, and can even refuse to answer for non-compliance with the requirements set out in Article 1 of Protocol 16. In the case of Armenia, it refused to answer two questions because of the general and abstract nature of the questions. It is also worth mentioning the French Cour de Cassation, which, together with the Armenia case, made it possible to define the scope of the ECtHR's jurisdiction.

Therefore, it is possible to observe the relevance and impact that advisory opinions could have in the framework of HR if they were given with greater regularity.

In the case of preliminary rulings, a number of cases have been decided by the CJEU, contributing to greater uniformity in the application of EU law. These include the Torresi Judgment and the K and A Judgment.

The first one had a European and national impact, as it not only established the possibility for nationals of one Member State to benefit from the rules of another Member State if they consider them to be more favourable, but also had an impact on Spanish rules on access to the legal profession. In this way, the harmonisation of legislation with the other MS was achieved through the pressure to modify the Spanish system by the Judgment.

As for the second, the importance of defending family unity and facilitating the integration of third-country nationals was underlined, helping to ensure that integration with the culture of the country receiving immigrants is increasingly positive.

6) Procedural level and multilingualism

The language regime, which is highly pluralistic at the Court of Justice, is much more limited in Strasbourg (the only official languages are French and English). Thus, the multilingualism that characterises the Court of Justice facilitates communication with the national courts, which is more difficult in the case of the ECtHR, whose linguistic resources are much more limited.

Moreover, the intervention of third parties is more extensive in the preliminary ruling[45]than in the advisory opinion, because while in the preliminary ruling there is room for the Member States, the parties to the main dispute and EU bodies or organs, in the advisory opinion only the Council of Europe's Commissioner for Human Rights and the State that requested the advisory opinion can submit observations[46].

[45] Yaelle Cacho Sánchez, Revista Española de Derecho internacional, El potencial desarrollo del nuevo procedimiento consultivo ante el tribunal europeo de derechos humanos: fortalezas, debilidades, oportunidades y amenazas, para 31

[46] Miguel Ángel Sevilla Duro, El Protocolo núm. 16 del Convenio Europeo de Derechos Humanos: El diálogo entre tribunales para la configuración de un espacio europeo de derechos, 2022, page 7

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