LÁSZLÓ BLUTMAN

European Court of Justice: a shamefaced system of precedent?

In view of the forthcoming accession of Hungary to the European Union, Act XXX of 2003 amended both Act III of 1952 (Code of Civil Procedure) and Act XIX of 1998 (Code of Criminal Procedure). Among others, the amendment incorporates the preliminary ruling procedure into our law of procedure and establishes the procedural conditions of preliminary reference. The legal effect of the decisions of the European Court of Justice is also dwelt upon in the Explanation attached to the proposal for this amendment. The Explanation makes two references to the fact that preliminary rulings by the European Court of Justice have a binding force beyond the concrete case:[1]

> "Therefore the legal interpretation of the Court shall be binding not only on the court proceeding in the given case but it shall also be governing in future cases which have similar facts of the case and legal questions...
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> All the elements of the ruling made by the European Court of Justice shall be binding, its force shall cover not only the legal relationship concerned in the procedure but also the legal relationships established before the decision. Consequently, preliminary ruling has a retroactive force."

The Explanation intended to support these statements by citing the *Da Costa* and *CILFIT* cases.[2]

It is a widely disputed question to what extent the preliminary rulings of the Court of Justice containing legal interpretation are binding beyond the case from which the reference was made. As far as I know the Court has never declared anywhere that preliminary rulings containing legal interpretation are binding for everybody, and the examples quoted in the Explanation are not

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[1] Explanation, General part, points I.3.3 and I.6.

[2] Case 28-30/62. Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration. [1963] ECR 0061., Case 283/81. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. [1982] ECR 3415.

suitable for supporting this view. In the quoted cases the Court only stated that its decisions have a legal effect beyond the concrete case, but it did not state that this legal effect entails the obligation to follow these decisions in general. The content of the legal effect is rather that in similar cases national courts can base their decisions on the previous statements of the European Court of Justice, and that they are exempt from the duty to refer if the Court has already made a preliminary ruling in a similar case.

On the other hand, the domestic law can prescribe that the judgments of the Court are to be followed by the national courts. This was essentially done in the United Kingdom in Section 3(1) of the European Communities Act (1972):[3]

> "For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto). "

In other Member States not the legal rules but superior national courts allude that the decisions of the European Court of Justice have a binding force beyond the concrete case. Such statements were made, for example, by the French *Cour de Cassation,* the German *Bundesgerichtshof* (federal supreme court), *Bundesverfassungsgericht* (constitutional court) and *Bundesverwaltungsgericht* (federal administrative court), and the Belgian *Cour de Cassation.*[4]

The question arises whether the contents of the Explanation can be regarded as implying that the Hungarian law-maker considers it compulsory for the Hungarian courts to follow preliminary rulings with legal interpretation beyond the concrete case? This question will be answered only by the practice after the accession, but in this context the practice of the European Union is worth examining.

Nature of preliminary ruling

Community legal rules are also applied in national courts, and the requirement of the uniform application and interpretation of these rules has to be ensured and met under these circumstances, too. The basic means for promoting the uniform application of Community law is the preliminary ruling procedure, which is a specific procedure for the co-operation between the European Court of Justice and national courts in order to ensure the uniform interpretation and application of Community legal rules. Although several provisions of the

[3] See also section 3(1) of the Contracts (Applicable Law) Act (1990)

[4] LASOK, K.P.E.: *Law and Institutions of the European Union.* Reed Elsevir 2001. p. 356.

European Union regulate preliminary ruling, Article 234 of the EC Treaty is of the greatest importance. The essence of the procedure is that after the reference made by a national court, in light of the concrete case to be decided, the European Court of Justice may make a preliminary ruling about the interpretation of EC Treaty and also about the validity and interpretation of secondary Community acts.

The emphasis is laid on uniform interpretation and application as well as on the co-operation between national courts and the Court of Justice as it has been pointed out by the European Court of Justice on countless occasions since the *Schwarze* case in 1965.[5] The preliminary ruling procedure embodies a continuous dialogue between the European Court of Justice and the national courts with respect to delimiting the scope of Community law.

In this context the question arises: to what extent the preliminary ruling made by the European Court of Justice is binding in the cases heard by national courts. This question may come up because Community law does not regulate this issue, and the European Court of Justice has also made only few unambiguous statements. At any rate, a few distinctions have to be made in order to delimit the subject. It is essential whether preliminary ruling is about interpretation or invalidity. It is similarly vital whether the we speak about the effect exerted on the concrete case leading to preliminary ruling or about its influence on other cases.

Based on the case law of the Court some general statements can already be made.

– Rulings both on interpretation and invalidity are binding on the referring court – but it has the possibility to make a new reference in the same case. This proposition was made unequivocal by the Court quite early.[6]

– Rulings both on interpretation and invalidity are also binding on other courts proceeding in the given case – but they have the possibility to make a new reference in the same case.

Preliminary ruling is binding not only on the referring court but also on the court of appeal proceeding in the same case. This can be inferred from the Court's statements and reasons made in connection with the binding force of the preliminary ruling on the referring court.[7] The legal practice of national courts shares this opinion in several Member States.[8]

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[5] Case 16/65. Schwarze v Einfuhr- und Vorratsstelle Getreide. [1965] ECR 0877.

[6] E.g. Case 29/68. Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken. [1969] ECR 165. par. 2., followed in Case 52/76. Luigi Benedetti v Munari F.lli s.a.s. [1977] ECR 0163. par. 26., Case 69/85. Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany. [1986] ECR 0947. par. 13.

[7] Joined Cases C-143/88 and C-92/89. Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn. [1991] ECR 0477., par. 52.

[8] ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* London 2002. p. 326.

– A preliminary ruling has to be followed by everybody in case the Court states the invalidity of a Community legal norm.

If these decisions did not have an objective nature and normative force, an absurd situation would arise. In spite of this the Court has not expressly stated the absolute force of these decisions. The reason for this could be that the annulment of the norm may be the consequence of the action for annulment (Article 230 of the EC Treaty). This removes the norm from the Community legal order. On the other hand, the preliminary ruling declaring a rule invalid (Article 234 of the EC Treaty) does not annul the norm but prevents the application thereof – in the concrete case by all means.[9] However, there is no doubt that the Court of Justice expects the following of the preliminary ruling declaring a rule invalid in other cases, too, provided that the court does not take the possibility of deciding to refer.[10]

– The Court has not stated *expressis verbis* that it is compulsory to follow its preliminary rulings on interpretation in other cases. There are significant differences between preliminary rulings on interpretation or invalidity with respect to the nature of their legal effect. It is due to this fact that they cannot necessarily be considered in the same manner.

It is not duly elucidated whether the interpretation constitutes part of the interpreted rule and as such has to be followed similarly to the rule itself.[11] If so, the interpreting decision has an objective, normative force, if not, its force can only be relative. On the other hand, this problem is not encountered in the case of decisions declaring invalidity as such decisions deprive the rule of law itself of its legal effect, thus, as an absurd consequence, the contesting of the objective nature would ruin the principle of legal certainty.

The national court does not have the right to declare a Community legal rule invalid. Therefore it cannot but rely on the decisions of the European Court of Justice in this respect. However, the national court can interpret and apply Community law on its own right, thus it does not necessarily have to rely on the interpreting decisions of Community courts (it can follow these decisions without it being evident). As a consequence, the legal practice of Community courts may remain latent in questions of interpretation, while in the case of decisions declaring invalidity this may not happen.

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[9] See e.g. Case C-127/94. The Queen v Ministry of Agriculture, Fisheries and Food, ex parte H. & R. Ecroyd Holdings Ltd and John Rupert Ecroyd. [1996] ECR I-2731. per AG Léger par. 74.

[10] Case 66/80. SpA International Chemical Corporation v Amministrazione delle finanze dello Stato. [1981] ECR 1191. paras. 12-18., confirmed in Case 112/83. Société des produits de maïs SA v Administration des douanes et droits indirects. [1985] ECR 0719. par. 16., Case 314/85. Foto-Frost v Hauptzollamt Lübeck-Ost. [1987] ECR 4199. par. 15.

[11] Several author holding this viewpoint are referred to by SMIT, H. – HERZOG, P.: *The Law of the European Community.* New York 1999. 177.22(b)

Declaring a rule invalid deprives the Community legal regulation of its legal effect (whereas in some cases the Court may sustain certain legal effect). The legal effect ensuing from the text of the legal rule is described more precisely and concretely by the interpretation – thus the interference is much gentler. It may be tolerable by a legal system without giving up its basic principles if the interpretation of certain legal rules is not entirely the same in different courts. However, legal certainty will have to face catastrophic consequences if a certain (invalid) regulation or rule of law is once applied, then it is not. It follows that much more powerful interests and principles lie behind the recognition of the normative force of decisions declaring a rule invalid than in the case of decisions on interpretation, and it is also more compelling from the aspect of Community legal order.

The possible nature of departing from the decision of the Court is also different. In the case of preliminary ruling declaring a rule invalid the national court itself either considers the Community legal act invalid and thus follows the decision, or not. On the other hand, the preliminary ruling on interpretation itself also demands interpretation in many cases in the course of its application to the given case, thus the borderline between following or not following the decision is much wider because of the possible difficulties of interpretation. In other words sometimes it may be difficult to say whether the national court actually follows the interpretation of the Court by applying the statements contained in the preliminary ruling to the concrete case.

In view of (and as a consequence of) the above it may seem that the European Court of Justice takes even more caution in defining the legal force of its rulings on interpretation than in the case of preliminary rulings declaring a rule invalid. Thus in the following the question is what can be said about the legal effect of preliminary rulings on interpretation – first of all from the viewpoint of national courts.

Problems of the legal effect of preliminary ruling

A question concerning the bases of the given legal system is whether the force of the decision of a court covers only the parties involved in the case (relative force), or whether the decision has a normative force and covers others or everybody within the given legal system, including the court making the decision and other courts as well as other persons and entities (*erga omnes* effect). The statutes of international courts do not generally acknowledge the normative force of the decisions of courts, their effect beyond the case in question. Neither does Community law. This may cause uncertainty in the application of law.

The advocates in favour of the general binding force of preliminary ruling have serious arguments, although some of them may be problematic. Today the

majority of commentators conclude that the practice of the Court covers everybody and support binding force.[12] Similarly, in enforcement actions (Articles 226 and 227 of the EC Treaty) concerning judgments with respect to defendant Member States views supporting *erga omnes* and binding force are also encountered.[13]

Undoubtedly, preliminary ruling is meant to ensure the uniform application of the law of the European Community in the national courts of the Member States. This goal could not be achieved if these decisions did not have a normative force, a generally binding effect.[14] Moreover, Article 10 of the EC Treaty incorporates the principle of solidarity. In accordance with this, Member States are obliged to facilitate the fulfilment of Community tasks and may not engage in activities which endanger the realisation of the goals of integration. This obligation is extended to the national courts as state organs. Some authors maintain that from this obligation the following of the decisions of the Community courts can be deduced, in which these obligations are manifested concretely.[15]

The Court may limit the temporal effect of its preliminary rulings. This possibility may suggest a more general, objective effect.[16] It would hardly be sustainable that a Community legal act or a provision thereof is to be applied in one sense in a procedure (in a national court) and in another sense in another procedure. This would be opposed to the principles of legal certainty and uniform application of law.[17] If the conclusions ensuing from the viewpoint of objective force were drawn, a national court could disregard the application of an interpretation given in a preliminary ruling only if this court itself would also decide to refer and the Court would re-interpret the Community legal norm in the given case.

There are several statements made by the European Court of Justice which, in one form or another, refer to the effect of preliminary ruling beyond the concrete case (even if no binding force is attributed to this effect by all means).

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[12] E. g. JACOBS,F.G.: *The Effect of Preliminary Rulings in the National Legal Order.* In: Article 177 References to the European Court. (Ed.: Andenas, M.) London 1994. p. 30., ISAAC, G.: *Droit communautaire général.* Paris 1996. p. 299., ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* London 2002. p. 332., CRAIG, P. – DE BÚRCA, G.: *EU Law.* New York 1998. p. 424.

[13] Commentaire Megret. (Louis, J-V. – Vandersanden, G. – Waelbroeck, D. – Waelbroeck, M.). Vol 10. Bruxelles 1993. p. 86.

[14] ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* London 2002. p. 332., SMIT, H. – HERZOG: *The Law of the European Community.* New York 1999. 177.22(b).

[15] SHAW, J.: *Law of the European Union.* London 2000. p. 245.

[16] SMIT, H. – HERZOG: *The Law of the European Community.* New York 1999. 177.22(b), see Case 112/83. Société des produits de maïs SA v Administration des douanes et droits indirects. [1985] ECR 0719. par. 17.

[17] Case 66/80. SpA International Chemical Corporation v Amministrazione delle finanze dello Stato. [1981] ECR 1191. par. 12.

At the same time it is questionable whether such statements made by the Court are binding in themselves.

However, there are several arguments against the effect of preliminary rulings beyond the concrete case. The Court of Justice is not bound by its previous decisions either. This maintains the possibility that the Court may diverge from its statements made in an identical legal question. If the national court does not agree with the previous decision, it will rather decide to refer than follow the previous decision hoping that the Court will diverge from case law. Now and then the Court actually and expressly diverges from its previous decisions.[18]

The Court itself declared the limited legal effect of its decisions made not in preliminary ruling procedures. Thus, for example, in the early *Kalkuhl* case, which was a personnel case, the Court remarked: "The only persons concerned by the legal effects of a judgment of the Court annulling a measure taken by an institution are the parties to the action and those persons directly affected by the measure which is annulled. Such a judgment can only constitute a new factor and cause the periods for bringing appeals to start run afresh as regards those parties and persons. "[19]

As regards the following of preliminary rulings made in other cases, national courts may find it difficult to identify which part of the decision is binding and in what form (in other words what the content of binding force is).

May preliminary ruling have a normative effect?

Preliminary ruling as a court decision is suitable for having a normative force and objective nature. Court decisions are generally decisions on cases, they are related to the given factual background of the case and a legal dispute. However, the decision in individual cases and its basis normally points beyond the individual nature of the decision. The decision may be based on principles, rules, definitions or interpretations of rules which do not or may not ensue unambiguously from the positive legal rule or rules applied. In this sense a particular decision may be rule-forming, generalising and may become a model of decision to be followed beyond the individuality of the case. Individual decisions also have a normative character.[20]

This statement especially applies to preliminary rulings made by Community courts. Here, in principle, the Court interprets Community legal

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[18] See e.g. Joined Cases C-267/91 and C-268/91. Bernard Keck and Daniel Mithouard. [1993] ECR I-6097. par. 16.

[19] Case 47/65. Edith Kalkuhl v European Parliament. [1965] ECR 1251.

[20] BLUTMAN L.: A bírósági határozatok közzététele és az Alkotmány. (The publication of judicial decisions and the Constitution). *Jura*, 2001/2. p. 83.

rules more or less independently of the facts of the case referred. Thus the opinion manifested in preliminary rulings is less bound by the concrete facts of the case and can be much more general than typical court decisions. Therefore it can form rules and become a decision model. This is proved by the fact that the Court regularly makes references to its previous decisions (not only to preliminary rulings), and the parties or interveners, including the Member States, do the same in the Court.[21]

In its case law the Court unequivocally states that preliminary rulings on interpretation also have a normative force and objective nature. In the *Da Costa* case the Commission proposed to dismiss the reference made by the Dutch *Tariefcommissie* for the reason that a decision had already been made by the Court in a similar case in an identical legal question (direct effect of Article 12 of the EC Treaty).[22] Although the Court dismissed the motion of the Commission as in accordance with Article 20 of the Statute it is up to the national court to decide whether it is desirable to make a reference for preliminary ruling, it pointed out:

> "Although the third paragraph of Article [234] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law – like the Tariefcommissie – to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article [234] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."

This statement means that preliminary ruling has a normative force as legal effect is attributed to it by the court in other cases, too. This legal effect means that the national court may be exempted from the obligation based on the EC Treaty of referring the case to the Court of Justice. It is essential that this legal effect is conditional in such a case, too ("may deprive"), but at that time the full-scale definition of these conditions was not given by the Court.

This was only done in the *CILFIT* case, in which the above were confirmed and specified by the Court.[23] These conditions were expounded primarily in

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[21] Joined Cases C-46/93 and C-48/93. Brasserie du Pecheur SA v Germany and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1996] ECR I-1029. par. 40.

[22] Case 28-30/62. Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration. [1963] ECR 0061.

[23] Case 283/81. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. [1982] ECR 3415. par. 13. Confirmed in Case C-337/95. Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV. [1997] ECR 6013. par. 29.

relation to compulsory reference. In this case the Court specified the conditions of the legal effect described in the *Da Costa* case.

At the same time in the *CILFIT* case the Court extended the range of cases in which compulsory reference loses its purpose in consequence of the previous decision of the Court on the same legal question. The following statement made in the case on the one hand attributes such a legal effect to decisions reached in another procedure, and on the other hand such a legal effect is attributed to decisions in which the arising legal question is not strictly identical to the legal question constituting the subject of the future reference:

> "The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article [234], may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical. "[24]

Thus a legal effect is attributed by the Court not only to preliminary rulings raising a "materially identical" legal question but also to preliminary rulings raising a "not strictly identical" legal question. (It must be pointed out here that the Court never failed to emphasize that the national court will retain its right to refer in such cases, too, only its duty to refer will cease as a result of a previous preliminary ruling with an identical subject.)

The normative force of preliminary rulings can be deduced from section 3 of Article 104 of the Procedural Rules of the Court, according to which the Court can decide in the preliminary ruling procedure not by judgment but by reasoned order when "a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the answer to such a question may be clearly deduced from existing case law or where the answer to the question admits of no reasonable doubt".

At the same time it has to be remarked that in addition to these statements the legal practice of the Court also includes terms which seem to contradict the objective nature of preliminary ruling. For example, in addition to ascertaining the binding force of preliminary ruling, the Court declared in the *Wünsche* case that (italics by the author):

> "It follows that a judgment in which the Court gives a preliminary ruling on the interpretation or validity of an act of a Community institution conclusively determines a question or questions of Community law and is binding on the national court *for the purposes of the decision to be given by it in the main proceedings.* "[25]

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[24] Case 283/81. Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health. [1982] ECR 3415. par. 14.

[25] Case 69/85. Wünsche Handelsgesellschaft GmbH & Co. v Germany. [1986] ECR 0947. par. 13.

I do not think, however, that such an assertion would invalidate the statements the Court of Justice has regularly made since the *Da Costa* case. Although it is obvious from the above practice of the Court that preliminary rulings have some force on the courts proceeding in other cases, the nature of this legal effect has remained open.

Is it compulsory to follow preliminary rulings on interpretation?

As concerns the content of the legal effect, the vital question is whether the national court has to follow the preliminary ruling made in another, similar case or it may diverge from it. After all the European Court of Justice does not give a definite answer to this. In my opinion, however, sustainable conclusions can be drawn concerning this issue based on the legal practice of the Court and on the arguments set forth in literature.

As a starting point, I regard one of the assertions of the Court very important. Here the general effect of preliminary rulings covering national courts was traced back to higher principles, and at the same time this statement can indirectly constitute the grounds for opinions in favour of the binding force of such decisions:

> "Article [234] is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community. Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States. Consequently any gap in the system so organized could undermine the effectiveness of the provisions of the Treaty and of the secondary Community law. The provisions of Article [234], which enable every national court or tribunal without distinction to refer a case to the Court for a preliminary ruling when it considers that a decision on the question is necessary to enable it to give a judgment, must be seen in this light. "[26]

The reference to higher principles fulfils a major role in cases when the Treaty does not regulate a question and the Court has to explore and fit possible solutions into the Community legal system according to the generally accepted methods of interpretation. An essential form of this is invoking the basic

[26] Case 166/73. Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1974] ECR 0033. par. 2.

principles of the Community legal system and drawing the conclusions from them.[27]

Thus, the above decision has to be considered together with the great number of statements in which the Court emphasizes the importance of the uniform application of Community law and associates its own task, the function of Article 234, with the principle of solidarity and co-operation incorporated in Article 10 of the EC Treaty.

In accordance with Article 220 of the EC Treaty the task of the Court is to ensure that the Community law is observed in the interpretation and application of the Treaty.[28] In several of its decisions the Court set forth the fundamental requirement of the uniform application of Community law in the Member States – in association with legal certainty, too – without which Community law cannot fulfil its purposes appropriately.[29] For example, this was referred to by the Court when it concluded that state responsibility for violating Community law at the expense of a private party cannot be based exclusively on legal rules of the Member State containing different solutions.[30] Anyway, the most important function of Article 234 of the EC Treaty is to ensure the uniform application of Community law in the Member States.[31] This is also confirmed by the fact that according to Article 10 of the EC Treaty the obligation of solidarity and co-operation to be applied to the Member States generally – among others in order to protect the rights of individuals – also

[27] Joined Cases C-46/93 and C-48/93. Brasserie du Pecheur SA v Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1996] ECR I-1029. par. 27., see also the opinion of AG Cosmas in Joined Cases 94-95/95. Danila Bonifaci and others and Wanda Berto and others v Istituto nazionale della previdenza sociale (INPS). [1997] ECR I-3969. per AG Cosmas par. 43.

[28] E.g. Joined Cases C-46/93 and C-48/93. Brasserie du Pecheur SA v Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1996] ECR I-1029. par. 27.

[29] Case 9/65. Acciaierie San Michele SpA f.a. v High Authority of the ECSC. [1967] ECR 0035., Case 26/66. Koninklijke Nederlandsche Hoogovens en Staalfabrieken NV v High Authority of the ECSC. [1967] ECR 0149., Case 106/77. Amministrazione delle Finanze dello Stato v Simmenthal SpA. [1978] ECR 0629. par. 14., Joined Cases C-143/88 and C-92/89. Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn. [1991] ECR 0415. par. 26.

[30] Joined Cases C-46/93 and C-48/93. Brasserie du Pecheur SA v Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1996] ECR I-1029. par. 33.

[31] Case 112/83. Société des produits de maïs SA v Administration des douanes et droits indirects. [1985] ECR 0719., par. 17., Case 33/84. SpA Fragd v Amministrazione delle finanze dello Stato. [1985] ECR 1605. par. 17., Case C-228/92. Roquette Frères SA v Hauptzollamt Geldern. [1994] ECR 1445. par. 20., Case 96/71. R. & V. Haegeman v Commission. [1972] ECR 1005. par. 8., Case C-192/89. S. Z. Sevince v Staatssecretaris van Justitie. [1990] ECR 3461. par. 11., Case T-5/93. Roger Tremblay, Francois Lucazeau and Harry Kestenberg v Commission. [1995] ECR 0185. par. 81.

applies to the procedure of national courts.[32] Similarly, a fundamental requirement of Community legal order is the full and efficient enforcement of Community law and the efficient protection of rights provided in it.[33]

In other cases these higher principles served as the basis for the Court to make statements and decisions in questions of constitutional importance of the Community legal system (e.g. the priority of Community law, the direct effect of Community law). Consequently, they are suitable for constituting the grounds of conclusions according to which the preliminary rulings of Community courts are generally binding on national courts. Such a solution would ensue from the requirement of the efficient enforcement and uniform application of Community law, which would be supported by the obligation of solidarity and co-operation also imposed on the activity of national courts.

There were two cases in which the Court claimed that all in all its interpretation becomes part of Community law:

> "The interpretation which, in the exercise of the jurisdiction conferred upon it by Article [234], the Court of Justice gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rules as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted must be applied by the courts even to legal relationships arising and established before the ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied. "[34]

The temporal effect can be limited by the Court in matters of interpretation in preliminary rulings only in an individual case, on the bases of special reasons, at the same time following the principle of legal certainty. The fact that the

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[32] Case 33/76. Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland. [1976] ECR 1989. par. 5., Case C-106/89. Marleasing SA v La Comercial Internacional de Alimentacion SA. [1990] ECR 4135. par. 8., Case C-213/89. The Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1990] ECR I-2433. par. 19., Joines Cases C-6/90 and C-9/90. Andrea Francovich and Danila Bonifaci and others v Italy. [1991] ECR I-5357. par.36.

[33] Case 106/77. Amministrazione delle Finanze dello Stato v Simmenthal SpA. [1978] ECR 0629. paras. 18-21., Case C-213/89. The Queen v Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1990] ECR I-2433. par. 20., Joined Cases C-46/93 and C-48/93. Brasserie du Pecheur SA v Germany and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and others. [1996] ECR I-1029. par 39., Joined Cases C-143/88 and C-92/89. Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn. [1991] ECR 0415. par. 30., Joined Cases C-6/90 and C-9/90. Andrea Francovich and Danila Bonifaci and others v Italy. [1991] ECR I-5357. paras.32-33.

[34] Case 811/79. Amministrazione delle finanze dello Stato v Ariete SpA. [1980] ECR 2545. par. 6., likewise 826/79. Amministrazione delle finanze dello Stato v Sas Mediterranea importazione, rappresentanze, esportazione, commercio (MIRECO). [1980] ECR 2559. par. 7.

interpretation becomes part of law and is to be applied together with it is an essential aspect in considering the general, binding force of preliminary rulings. Once again, it follows directly from this opinion of the Court that the decision in preliminary rulings has to be followed by national courts.

The two judgments, in which this statement appears, were promulgated on the same day by the same chamber of the Court. This statement is not referred to later, which may weaken the validity of the statement and may raise the question to what extent this statement is valid. The Court of First Instance has a statement which attributes an objective nature to preliminary ruling: according to this preliminary ruling "states the law".[35] This suggests that the interpretation given in preliminary rulings becomes part of the law and as such it is generally binding.

Several Advocates General worded the opinion that preliminary rulings may actually be binding on national courts proceeding in other cases.[36] In literature the obvious majority considers it a fact that preliminary rulings have to be followed by national courts proceeding in other cases – or, in the absence of this, they have to refer the case to the Court of Justice.[37]

However, binding force does not restrict the national courts' right to refer even in legal questions already decided. Going back to the statement made in the *Da Costa* case, preliminary ruling made in an identical legal question renders the national courts' duty to refer formal, it is deprived of its content. A previous decision can have such an effect only because it dispels the doubts of the national court as concerns the answer to be given to a legal question ensuing from Community law. However, this postulates a decision on the part of the national court which is in harmony with the decision of the Court and does not differ from it. If the opinion of the national court is different from the preliminary ruling previously made in a similar case, this can hardly be without reasonable doubt in view of the contrary opinion of Community courts. This is when the duty or possibility to refer is considered.

The Court did not give the slightest indication of wanting to restrict the national courts' right to refer for the reason that Community courts had already made a decision in a certain legal question. The court statements quoted above

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[35] Case T-83/96. Gerard van der Wal v Commission. [1998] ECR II-0545. par. 37.

[36] Case C-145/88. Torfaen Borough Council v B & Q plc. [1989] ECR 3851. per AG Van Gerven par. 8., Case 103/88. Fratelli Costanzo SpA v Comune di Milano. [1989] ECR 1839. per AG Lenz par. 39., Case 228/92. Roquette Frères SA v Hauptzollamt Geldern. [1994] ECR I-1445. per AG Darmon par. 14.

[37] BROWN, L.N. – KENNEDY, T.: *The Court of Justice of the European Communities*. London 2000. p. 378., KENT, P.: *Law of the European Union*. Harlow 2001. p. 113., COMBREXELLE, J. D.: *L'impact de l'arret de la Cour; étendues et limites des pouvoirs de juge national*. In: Evolution récente du droit communautaire. Maastricht 1995. Vol. I. p. 115., WATHELET – VAN RAEPENBUSCH: 12. p., SCHOCKWEILER, F.: *Le renvoi préjudiciel au sens de l'article 177 du Traité CEE*. In: Bulletin du Cercle Francois Laurent IV. 1992. p. 35., but Hartley is more cautious, see HARTLEY, T.C.: *The Foundations of European Community Law*. Oxford 1994. p. 313.

(also with respect to preliminary ruling in a question of invalidity) and the great number of other statements always emphasize the right of national courts to refer.

All this means that in the case of preliminary rulings the Court does not necessarily assume unconditional binding force. Thus the national court does not necessarily have to follow a preliminary ruling made in another case, its right to refer is maintained in this case, too. The maintaining of the right to refer serves another purpose: it prevents Community law from becoming rigid, and under new circumstances the European Court of Justice is given the possibility to adjust the interpretation of Community law to the new circumstances.[38]

Shamefaced system of precedent and its causes

Based on the above it may seem that there is no obstacle to the Court declaring the general binding force of preliminary rulings. However, such a *dictum* would raise serious problems. There is no system of precedent in the legal system of the majority of Member States, thus there are no methods for the uniform interpretation of the binding preliminary ruling of another court. This would lead to a very mixed practice as on account of the different methods or individual solutions preliminary rulings would not be followed in a uniform manner.[39]

If the binding force of a decision made in another case was prescribed, it would result in immediate uncertainty at least concerning what this binding force means. Which part of the preliminary ruling is binding – the operative part or the reasoning as well? Under what conditions is the national court obliged to apply the preliminary ruling made in a different case, especially if it is closely connected to the facts of the given case? When can the national court diverge from the preliminary ruling for the reason that other facts have come to light in the concrete case, that is what are the grounds of distinction of the cases?

Declaring the binding force of preliminary ruling would formulate a concrete legal obligation on national courts. (Although this legal obligation lies hidden in the fundamental principles of Community legal order, it is not worded concretely – at least not in this respect.) However, preliminary ruling on interpretation as a rule-forming act might necessitate interpretation itself – especially in the light of the different factual background of another case. This

[38] OJANEN, T.: Between Precedent and the Present. *Turku Law Journal* Vol. 3 2001/1. pp.112–115., WATHELET – VAN RAEPENBUSCH: 12. p.

[39] ANDERSON, D.W.K. – DEMETRIOU, M.: *References to the European Court.* London 2002. p. 337.

gives room for the national court with respect to following preliminary ruling and to its extent. If there are no uniform methods and procedural rules for following a decision of a Community court, in many cases it would be hard – due to the uncertainties of interpretation – to state whether the national court has followed the relevant preliminary ruling in a given case or not. Thus in many cases the requirement of following a preliminary ruling on interpretation would necessarily be soft obligation.

A possible strategy to surmount these obstacles could be to dispense with the wording of concrete obligations as regards binding force. Instead, the Court may use soft concepts or references which are suitable for founding or outlining such an obligation without its concrete formulation. Such could be for example that national courts "take into attention" or "respect" preliminary rulings.[40] Then the practice of the Member States can form the conditions of applying these soft requirements. When the conscious practice and methods of following preliminary rulings are formed in the judicial practice of the Member States, it is time to definitely formulate the obligation.

Community courts are not bound by their previous decisions. At the same time the courts cannot disregard their previous decisions. The chain of judgments should be unbroken and consistent when the facts of the case are similar. The lack of similar judgments in similar cases would undermine legal certainty and would question confidence in courts. Every court strives to build up coherent case law with the smallest number of breaks possible, and to define and reason such breaks appropriately. This, however, has led to a rather schizophrenic situation. Thus Community courts "rely on their previous decisions" but they are not obliged to do so. A "shamefaced system of precedent" has evolved.

[40] See e.g. Case C-465/93. Atlanta Fruchthandellsgesellschaft mbh and others v Bundesamt Fuernaehrung und Forstwirtschaft. [1995] ECR 3761. par. 46.

BLUTMAN LÁSZLÓ

AZ EURÓPAI BÍRÓSÁG: SZÉGYENLŐS PRECEDENSJOG?

(Összefoglalás)

Igen vitatott kérdés, hogy az Európai Bíróság jogértelmezést tartalmazó előzetes döntései mennyiben kötelezőek az előterjesztésre okot adó ügyön túl. A tanulmány arra keres választ, hogy a közösségi bíróságok a joggyakorlatukban mennyiben tekintik általánosan kötelezőnek ezeket az ítéleteket. A szerző számbaveszi a különböző érveket, és következtetése szerint jóval több érv szól az általánosan kötelező jelleg mellett, mint ellene.

Ugyanakkor a közösségi bíróságokat formálisan nem kötik a megelőző döntéseik. Azonban a bíróságok nem tehetik meg, hogy nincsnek figyelemmel megelőző döntéseikre. Az ítélkezés láncolatának következetesnek, töretlennek kell lennie hasonló tényállások mellett. A közösségi bíróságok természetes módon törekszenek olyan összefüggő esetjogot felépíteni, melyben minél kevesebb törés van, és az ilyen töréseket megfelelően elhatárolni és indokolni. Így a közösségi bíróságok ugyan „támaszkodnak megelőző döntéseikre", de erre nem kötelesek. Kialakult a „szégyenlős precedensjog".