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# **Case study**

Preliminary reference

## **Litigating European Union Law**

**ADVANCED TRAINING FOR LAWYERS IN PRIVATE PRACTICE**

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Miss X, a part-time employee, works more hours than the contractual weekly hours. The employer pays her at the same rate as for normal working hours. The collective agreement provides that overtime worked beyond the normal weekly working time for full-time workers (i.e., 39 hours) is subject to an increase of 15-25% of the hourly wage.

Miss X claimed the right to this additional pay for all hours worked beyond the contractual duration, without however reaching the normal weekly working time, and, in the face of her employer's refusal, challenged this decision, which, in her view, was contrary to Article 157 TFEU and Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Miss X chooses you as her lawyer to assist her in her legal claim. She wants you to use all the potential of European Union law. In particular, she suggests that you bring an action for failure to fulfil obligations against France and a reference for a preliminary ruling to the Court of Justice.

Miss X wants to win her case quickly before the national court. She also wants her employer to be condemned by the Court of Justice.

The defendant strongly opposes a reference for a preliminary ruling. In particular, it argues that 'the reference for a preliminary ruling would be inadmissible on the ground that the annulment by the court of provisions of the collective agreement would create a legal vacuum which the Court could not fill'. It also points out that Article 157 TFEU and, *a fortiori*, the Directive cannot be invoked against a private person. Furthermore, the defendant contests the relevance of the EU law arguments, on the grounds that the employer's interpretation of the collective agreement does not establish discrimination on the grounds of sex. For all these reasons, the defendant considered that the case could not be validly referred to the Court.

## Questions:

1. Do you think you would be able to make a reference for a preliminary ruling and an action for failure to fulfil obligations in such a case?
2. What advice would you give to Miss X who wants her employer to be "condemned by the Court of Justice"?
3. Do you consider the reference for a preliminary ruling inadmissible for the reasons given by Miss X's employer?

4. If a reference for a preliminary ruling is made to the Court of Justice, what role will Miss X's lawyer play in the proceedings?
5. How long would the case be suspended during the reference for a preliminary ruling?

## Method:

Identify the relevant legal issues.

Identify the texts applicable to the relevant legal issues.

Identify the relevant case law of the Court of Justice.

Propose legally sound and realistic solutions.

## Extracts from the applicable texts:

DIRECTIVE 2006/54/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 5 July 2006

on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(4) Article 141(3) of the Treaty now provides a specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and

equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

(5) Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

## TITLE I

### GENERAL PROVISIONS

#### Article 1

##### Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

- (a) access to employment, including promotion, and to vocational training;
- (b) working conditions, including pay;
- (c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

#### Article 2

##### Definitions

1. For the purposes of this Directive, the following definitions shall apply:

- (a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;
- (b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) 'pay': the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

(f) 'occupational social security schemes': schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (16) whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

### Article 3

#### Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

## TITLE II

### SPECIFIC PROVISIONS

#### CHAPTER 1

##### Equal pay

###### *Article 4*

###### Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct or indirect discrimination on grounds of sex shall be eliminated in all elements and conditions of remuneration.

In particular, where an occupational classification system is used to determine pay, it shall be based on criteria common to male and female workers and shall be established in such a way as to exclude discrimination on grounds of sex.

#### CHAPTER 2

##### Equal treatment in occupational social security schemes

###### Article 5

###### Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

- (a) the scope of such schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions;
- (c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

###### Article 6

###### Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

## Article 7

### Material scope

1. This Chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

- (i) sickness,
- (ii) invalidity,
- (iii) old age, including early retirement,
- (iv) industrial accidents and occupational diseases,
- (v) unemployment;

(b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

## Model answers:

1. As a lawyer, your task should be to assist and represent your client before the competent courts.

In this case, the question is which court has jurisdiction to examine a reference for a preliminary ruling and an action for failure to fulfil obligations, in order to submit to them the alleged violations of European Union law described above, consisting of a breach of Article 157 TFEU and Directive 2006/54/EC.

It is therefore necessary to examine successively the theory of an action for failure to fulfil obligations and that of a reference for a preliminary ruling.

**Theory of an action for failure to fulfil obligations.** Under Articles 258 and 259 TFEU, an action may be brought before the Court of Justice for a declaration that a Member State “has failed to fulfil an obligation under the Treaties”. This reference to a breach of the Treaties is to be understood in a broad sense, in that it refers to breaches of all sources of European Union law which have binding effect.

Assuming that a collective agreement, given its binding nature, its method of entry into force and the control exercised by the public authorities, is to be regarded as a text falling within the competence of the Member States, an action for failure to fulfil obligations could be brought before the Court of Justice at the end of a pre-litigation procedure, seeking a declaration that the Member State in question had infringed Article 157 TFEU and Article 4 of Directive 2006/54/EC, both of which prohibit indirect discrimination between male and female workers.

However, an action for failure to fulfil obligations may only be brought by the European Commission on the basis of Article 258 TFEU or by any Member State on the basis of Article 259 TFEU. There is no room for natural or legal persons to bring an action before the Court of Justice.

Only a complaint could be made to the European Commission with a view to prompting it to initiate proceedings under Article 258 TFEU.



**Theory of a preliminary ruling.** Under Article 267 TFEU, the Court of Justice has jurisdiction to give preliminary rulings, in particular on the interpretation of the Treaties and of acts adopted by the institutions of the European Union. In this respect, the Court of Justice would have jurisdiction to rule on the interpretation of Article 157 TFEU and Directive 2006/54/EC, in particular Article 4 of the latter, which is at issue in this case. The Court of Justice has also had to rule on these provisions on numerous occasions.

The interpretation given by the Court of Justice must address the question of whether or not the applicable national law is compatible with EU law as interpreted by the Court of Justice.

The preliminary ruling procedure is an indirect way of assessing violations of European Union law. However, it is not a matter for individuals to initiate, as the preliminary ruling procedure can only be initiated by a court in one of the Member States.

Referral to the Court of Justice is reserved for the national court, as the parties to the proceedings before the national court can neither apply directly to the Court for such a request nor oblige the national court to suspend the proceedings (ECJ, 14 Dec. 1962, *Milchwerke Wöhrmann v. Commission*, joined cases 31 and 33/62, ECR p. 965, spec. 980).

The national court may refer a matter to the Court of Justice of its own motion (ECJ, 16 June 1981, *Salonia v Poidomani and Giglio*, Case 126/80, ECR p. 1563, para. 7; ECJ, 6 Oct. 1982, *CILFIT v Ministry of Health*, Case 283/81, ECR p. 3415, para. 9). This power to raise a question of EU law of its own motion presupposes that, in the view of the national court, either EU law should be applied, leaving national law unapplied if necessary, or national law should be interpreted in a way that is consistent with EU law (ECJ, 14 Dec. 2000, *Fazenda Pública*, Case C-446/98, ECR p. I-11435, para. 48).

In most cases, the national court will refer the matter to the Court of Justice at the request of the parties; the parties cannot, however, compel it to do so. In the present case, it would therefore be a matter of referring the matter to the competent national court and encouraging it to refer questions to the Court of Justice for a preliminary ruling with a view to obtaining a declaration that Article 157 TFEU and Directive 2006/54/EC are to be interpreted as prohibiting the discrimination found.

2. The question of the Court of Justice's conviction of the employer is irrelevant as the Court of Justice of the European Union has not been given any competence under the founding

treaties to convict natural or legal persons of Member States or third States. The Court of Justice of the European Union is not an international criminal court.

Some employees have complained about violations of EU law by their employers and have suggested that the national court in question should make a reference for a preliminary ruling in order to give their problems greater prominence. This has sometimes led to the use of the preliminary reference procedure.

However, it is not advisable to use the preliminary reference procedure to publicise a problem before the Court of Justice. A reference for a preliminary ruling must serve only the interests of law and justice.

3. The grounds for the 'inadmissibility' of the reference for a preliminary ruling put forward by Miss X's employer are threefold: firstly, the reference qualified as a 'preliminary ruling' would be inadmissible on the grounds that the annulment by the court of the provisions of the collective agreement would create a legal vacuum that the Court of Justice could not fill. Secondly, Article 157 TFEU and, *a fortiori*, Directive 2006/54/EC could not be invoked against a private person. Thirdly, the relevance of the EU law arguments would be questionable on the grounds that the employer's interpretation of the collective agreement does not establish discrimination on the grounds of sex.

First of all, it should be noted that the preliminary ruling procedure is a judge-to-judge procedure and does not constitute a legal remedy of a contentious nature (see an explicit reminder of the Court in this sense in CJEU, 19 Jan. 1994, *SAT Fluggesellschaft*, Case C-364/92, ECR p. I-43, para. 9; CJEU, 26 Feb. 1996, *Biogen*, Case C-181/95, ECR p. I-717, para. 5). Thus, one cannot speak of a "preliminary ruling", as the expression is only used by certain less rigorous authors. Although it is not an action in the procedural sense of the term, a reference for a preliminary ruling lends itself to an examination of admissibility by the Court of Justice, which may take place of its own motion or at the request of one of the parties to the main proceedings or of one of the persons who submitted observations to the Court of Justice.

Firstly, the prospect of a legal vacuum cannot be an obstacle to the initiation of a reference for a preliminary ruling. If the Court of Justice were to declare that European Union law as interpreted precludes the application of a collective agreement which leads to discrimination between male and female workers to the detriment of the latter, it would be

for the national court to set aside the provisions of that agreement so as to put an end to such discrimination.

Secondly, the argument that the provisions relied on do not create obligations for private persons is partly incorrect and, in any event, insufficient to declare a reference for a preliminary ruling inadmissible. Article 157 TFEU has long been recognised in case law (ECJ, 8 April 1976, *Defrenne*, Case 43/75, ECR p. 476) as being capable of creating obligations for public and private persons. Directives do not in themselves create obligations on individuals and companies, but national courts are required, as far as possible, to interpret the applicable national law in the light of the purpose of the Directive (ECJ, 14 July 1994, *Faccini Dori*, Case C-91/92, ECR p. I-3325). It follows that both Article 157 TFEU and Directive 2006/54/EC are sources which the court may have to apply and in relation to which it may question the meaning to be given to them. Such a question may logically be followed up by a reference to the Court of Justice for a preliminary ruling.

Thirdly, it should be noted that the Court of Justice cannot refuse to give a ruling on the grounds put forward by Miss X's employer. The Court thus recalls, in a synthetic formula, that 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" (CJEU, 13 March 2001, *PreussenElektra*, Case C-379/98, ECR p. I-2099, para. 39; ECJ, 5 February 2004, *Schneider*, Case C-380/01, ECR p. I-1389, para. 22). The Court will assert its competence to provide the national court with the elements of interpretation under European Union law enabling it to judge this compatibility and to resolve the legal problem before it (see, for example, ECJ, 18 May 1977, *Officier van Justitie v Van den Hazel*, Case 111/76, ECR p. 901, para. 4; ECJ, 23 January 2003, *Makedoniko Metro and Michaniki*, Case C-57/01, ECR p. I-1091, para. 55). In the present case, the invocation of European Union law is in no way artificial and cannot be declared irrelevant to the dispute. It should be recalled that the Court of Justice ruled as early as 1990 that differences in treatment between full-time and part-time contracts were likely to result in discrimination against women in so far as the latter were more likely than men to hold part-time jobs.

4. The role of the lawyer in the preliminary ruling procedure is fundamental. It is not limited to suggesting a reference for a preliminary ruling and proposing questions to the competent national court. Once a reference for a preliminary ruling has been submitted by the national

court, the lawyer of the interested party in the main proceedings will have to follow the entire preliminary ruling procedure before the Court of Justice.

Under Article 23 of the Statute of the Court of Justice of the European Union, the decision of the national court or tribunal which suspends the proceedings and refers the case to the Court of Justice is to be notified by the Registrar of the Court to the parties concerned. Such notification shall have the effect of making known the reference for a preliminary ruling thus made and shall enable the parties to the main proceedings to submit observations to the Court of Justice within a period of two months. Observations may also be submitted by the Member States, the European Commission and the institutions of the Union which are the authors of the act in question, in this case the Parliament and the Council in the case of Directive 2006/54/EC. This shows the importance of such written observations.

Subsequently, if a hearing is held, in particular because the lawyer has requested it and his or her request has been deemed relevant, the lawyer's intervention will take the form of participation in the hearing by means of oral observations and answers to questions put by the members of the Court.

Failure to participate in the written procedure does not preclude participation in the oral procedure (Rules of Procedure, art. 96, § 2). The modalities of the application for participation have changed considerably over the last 25 years. In the previous version of the Rules of Procedure, it was provided that if, after having been informed, none of these persons submitted a request within one month setting out the reasons why they wished to be heard, the Court of Justice could decide, under the former Article 104(4) of the Rules of Procedure, to give judgment without holding a hearing. Now, under the new Article 76 of the Rules of Procedure, any reasoned requests for a hearing must be submitted within three weeks of service of the closure of the written procedure and it is the Court of Justice which decides, on a proposal from the Judge-Rapporteur, after hearing the Advocate General, whether to grant the request or whether to continue with the written procedure only if it is sufficiently well informed in the light of the written observations; this discretion is lost if the request for a hearing is made by a person who did not participate in the written procedure.

5. The effect of a reference for a preliminary ruling is to suspend the proceedings before the national court while the reference for a preliminary ruling is being processed. This

suspension begins when the reference for a preliminary ruling is notified to the Court of Justice and ends when the national court receives the judgment of the Court of Justice.

The period of suspension necessarily varies according to a number of parameters: the importance of the issues raised, the sensitivity of the problem, the bench selected, the conclusions of the Advocate General, measures of organisation of the procedure, the slowing down of the case due to a pilot case or other circumstances, etc.

It may also happen that the decision to refer a matter for a preliminary ruling is challenged before a higher national court. If the Court of Justice is not informed of a suspensive appeal, it considers that it is still validly seized to deal with the case. On the other hand, if the national court informs it of such an appeal against its decision, the Court will decide to stay the proceedings (Order, 3 June 1969, *Chanel v. Cepeha*, Case 31/68, ECR 1970, p. 403). It will take over the preliminary ruling if the order for reference is confirmed by the higher court. On the other hand, it will strike out the preliminary ruling if the order for reference is annulled.

After increasing steadily until the 1990s, the time taken to deal with preliminary ruling cases before the Court of Justice has decreased in recent years. The average time taken is between 15 and 16 months and has remained relatively stable over the last five years (see CJEU Judicial Statistics 2020, para. 228).