

THE ROLE OF THE NATIONAL JUDGE IN THE APPLICATION OF EU ANTI-DISCRIMINATION LAW

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National Judges

- Role in applying EU Anti-Discrimination Law:
 - **Respecting the primacy of EU Law** (Costa - C-6/64)
 - Setting aside all national law conflicting with EU Law
 - **Consistent interpretation of national law** (Pfeifer - C-397/01)
 - Construct national law so as to give effect to the primacy of EU Law
 - Very important in national laws transposing EU Directives

Preliminary reference procedure art. 267° TFEU

- The preliminary reference procedure has a pivotal role in this issue:
 - *National judges may refer the question to the CJEU on matters related to the **interpretation** and **validity** of EU Law.*
 - *There is no «appeal» to the CJEU; mechanism of cooperation between the CJEU and national courts*
 - *Only courts whose decisions cannot be appealed are under a duty to refer; others have the possibility but not the duty*
 - **Syfait I (C-53/03)** – *there has to be a pending case waiting for a decision; no «hypothetical» references.*

EU Anti-Discrimination Law

- **Primary Law**
 - *Art. 157° TFEU (form. Art. 141° and art. 119°);*
 - *Art. 21° CFREU + art. 52, n.° 3;*
- **Secondary Law**
 - *Directive 2000/43 – Race Directive*
 - *Directive 2000/78 – Framework Directive*
 - *Directives 2006/54, 2004/113 – Sex Equality Directives*

- National Judges and the CJEU have had a pivotal role in the development of EU Anti-Discrimination law because
 - *EU Directives are in themselves a codification of pre-existing case law in matters of Discrimination*
 - E.g: **Defrenne 2 (C-43/75)** – direct effect of art. 157° TFEU;
 - E.g: **Jenkins (C-96/80)** and **Bilka Kaufhaus (C-170/84)** – concept of indirect discrimination;
 - **Danfoss (C-109/88)** – burden of proof in discrimination cases
 - *EU Case law and EU Directives were heavily influenced by anglo-american case law on discrimination*
 - *EU Directives make use of several open concepts which require judicial construction*
 - E.g: *genuine occupational requirements*

Two distinct trends:

■ Strict interpretation

- *The interpretation of the CJEU is very concise and closed and confers absolutely no margin of maneuver to the national courts;*

■ Open interpretation

- *The interpretation of the CJEU is more open and provides guidelines for the national court to decide, delegating the decision to the national Judge;*

Strict interpretation - examples

■ Concept of «disability» for the purposes of D. 2000/78

- *Chacón Navas (c-13/05)*
- *HK Denmark (C-335/11 and C-337/11)*

The CJEU provided for a very strict definition of «disability» and the means of interpreting the Directive at the light of UN Convention on the Rights of Persons with Disabilities;

■ Discrimination by association

- *Coleman (C-303/06)*

The CJEU decided that the concept of «*direct discrimination*» also covered the concept of «*discrimination by association*»

It is a jurisprudential creation (it is not apparent from the wording of the Directive and it is solely the result of judicial construction) which is binding upon national courts.

■ **If «Judges» are a professional group protected by Directive 2000/78**

- *The CJEU ruled that Judges are a professional covered by the substantive scope of the Directive*

- *Although the ruling strictly refers to the «conditions of pay», the wording of the judgement is such to suggest that Judges benefit from the protection of the Directive as a whole;*

- *the most consistent interpretation of the judgement as a whole points that Judges are to benefit from the protection of the Directive as a whole.*

■ **Concept of «genuine occupational requirement»**

- *Collin Wolf (C-229/08)*
- *Prigge (C-447/09)*
- *Vital Pérez (C-416/13)*
- *Salaberria Sorondo (C-258/15)*
- *Asma Bougnaoui (C-188/15)*

The CJEU provided for a very strict interpretation of the concept of «*occupational requirement*» especially as regards age discrimination, leaving no discretion for the national courts.

Open interpretation - examples

- In these cases, the CJEU opted to devolve the final answer to the national courts, providing the Judge with criteria for decision but refraining to adopt it itself.

- In most cases the justification was that the facts of the case did not allow for the CJEU to decide but - in reality - it appears that it opted to recognise some discretionarity to the national courts in some subject matters

- **Age discrimination**

- *Age concern England (C-388/07)*
- *Domnica Petersen (C-341/08)*
- *Georgiev (C-250/09)*

The CJEU admitted that the social policy objective of sharing employment opportunities among generations amounted to a legitimate justification to age discrimination; it delegated to national courts the task of determining if contested national measures had that purpose and if employees affected had sufficient protection.

■ Sexual orientation discrimination

- Römer (C-17/08)
- Tadao Maruko (C-267/06)

It rules of the rights of surviving partners of registered partnerships vis-a-vis marriages.

Given that it is for national laws to determine if registered partnerships enjoy the same rights as marriages, the CJEU left for the national court to infer if there was a comparability of situations in order to determine the existence of a discrimination.

■ Religion discrimination

- *Samira Achbita (C-188/15)*
- *Asma Bougnaoui (C-157/15)*

As regards the justification of indirect discrimination, the CJEU left for the national court to determine if there was a less restrictive means of ensuring an employer's policy of neutrality vis-a-vis its customers.

- **Enforcement of the rights in the Directive**

- *Bulicke (C-246/09)*

Time limits (deadlines) to file claims for enforcement of the rights provided for in the Directive are not contrary to the Directive if they do not put the claimant in a burdensome position, which is for the national court to ascertain.

Conclusions

- National Judges have a particular responsibility to ensure the primacy of EU Law, setting aside conflicting national rules and interpreting national law consistently to ensure the effectiveness of EU Law.
- Case Law is extremely important in discrimination cases because the Directives are a codification of pre-existing case law and, given the use of open concepts, the judicial construction of the CJEU is of pivotal importance in their application.
- The CJEU has varied in the interpretation of the Directives between
 - Strict interpretation of key concepts
 - Open interpretation of problematic issues, providing guidelines for the solution and delegating the final decision to the national courts