



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.



# The role of the national judge in applying the EU antidiscrimination law

**Applying EU Anti-discrimination Law**  
**ERA, Scandicci, 2019**

*The views expressed in this presentation are strictly personal*

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## Focus of the presentation

1. Introduction: national courts and the EU Court of Justice
2. Judicial protection before national courts: direct effect, primacy, indirect effect, State liability
3. The preliminary ruling procedure:
  - (i) the fundamental principles
  - (ii) the use of the procedure
4. Conclusions + QQ&AA / Further reading

## I. Introduction: National courts and the Court of Justice of the EU

- ECJ, Opinion 1/09, paras 65-69
  - As is evident from **Article 19(1) TEU**, the *guardians of that legal order* and the judicial system of the EU are the Court of Justice and the courts and tribunals of the Member States.
  - [T]he Member States are obliged, ... to ensure, in their respective territories, the application of and respect for EU law ... . In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law ....
  - The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed.
- GC, T-51/89, **Tetra Pak II**, para. 42: '... when applying [EU law] ... the national courts are acting as EU courts of general jurisdiction.'

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## The principle of procedural autonomy

- See, e.g., C-432/05, **Unibet**, paras 38-43
  - Under the principle of cooperation laid down in [Article 4(3) TEU], it is for the Member States to ensure judicial protection of an individual's rights under EU law
  - [I]n the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to *designate the courts* and tribunals having jurisdiction and *to lay down the detailed procedural rules* governing actions for safeguarding rights which individuals derive from EU law ...
  - In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (*principle of equivalence*) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (*principle of effectiveness*).
- See C-213/89, **Factortame I**: a national court has *a duty to grant interim relief* to safeguard alleged EU rights of individuals until the decision of the ECJ on the interpretation of EU law is available, and where a rule of national law would deny such relief, to set aside that rule

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## II. Judicial protection before national courts:

### (a) Direct effect

- Fundamental ruling: 26/62, **Van Gend en Loos**
  - The possibility to directly invoke rights conferred by EU law before national courts.
  - It is not necessary for the Member State to adopt or implement the EU provision into its internal legal system: the national court will apply the relevant EU provisions directly.
  - To have direct effect, EU provisions must be precise, clear and unconditional and need no implementing measures.

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- Provisions which may have direct effect: in primis, Treaty provisions, Regulations ...
  - ... and, under certain conditions, Directives:
    - When not transposed, deadline for transposition has expired and, in principle, only against Member States' authorities (See Cases 41/74, *Van Duyn*; 148/78, *Ratti*; and C-188/89, *Foster*) [s.c. vertical direct effect]
    - In principle, no s.c. horizontal direct effect of non-transposed directives [individual vs individual] (See Cases 152/84, *Marshall*; and C-91/92, *Faccini Dori*.)
    - **BUT** see C-555/07, *Kücükdeveci*; C-176/12, *ASM*; C-414/16, *Egenberger*; and C-68/17, *IR*: *horizontal direct effect of the principle of non-discrimination* (e.g. on grounds of age, or of religion and belief) as constituting a specific application of the general principle of equal treatment deriving from the common traditions of the MMSS and international conventions / or of the prohibition discrimination enshrined in Art. 21 of the Charter, which are given expression in Directive 2000/78.

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## (b) Primacy

- Fundamental rulings: Cases 6/64, *Costa v ENEL*; and 106/77, *Simmenthal*
- EU provisions have precedence over national laws
- If a national rule is contrary to a EU provision, Member States' authorities (including national courts) must apply the EU provision, **disapplying any contrary national provision**
  - That **does not mean** that the national court is to **strike down** the national provision (that would have more far reaching effects → provision no longer valid for any purpose) (See C-378/17, *Minister for Justice and Equality and Commissioner of the Garda Síochána*, paras 33-35)
- If necessary, national courts must do so on their own motion
- That is so irrespective of whether that national provision was adopted before or after the EU provision in question

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## (c) Indirect effect (or conform interpretation)

- Fundamental rulings: Cases 14/83, *Von Colson*; C-106/89, *Marleasing*; C-32/93, *Webb*; C-397/01, *Pfeiffer*; and C-105/03, *Pupino*
- National law must be interpreted, as far as possible, **in the light of the wording and purpose** of the EU provisions concerned (usually, an unimplemented or wrongly implemented directive), **so as to achieve the result** sought by those provisions
- Limit: **no interpretation *contra legem***
- C-441/14, *DI*, paras 31-34: 'the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary ... Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law'

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## (d) State liability

- **Fundamental rulings:** C-6 and 9/90, *Francovich and Bonifaci*; C-46 and 48/93, *Brasserie du Pêcheur and Factortame*; and C-224/01, *Köbler*
- Member States are responsible vis-à-vis individuals for breaches of EU law committed by its organs (including national courts)
- Conditions for reparation: (1) the EU rule infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious; and (3) there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the individual.
- As to the second condition, a decisive test for finding a breach sufficiently serious is whether the Member State manifestly and gravely disregarded the limits on its discretion. In order to determine whether this condition is satisfied, factors to be taken into consideration include: clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by the EU institution may have contributed towards the omission and the adoption or retention of national measures or practices contrary to EU law

## The preliminary ruling procedure:

### (i) the fundamental principles

- To ensure the effective and uniform application of Union legislation and to prevent divergent interpretations, the national courts may refer to the ECJ and ask it to clarify a point concerning the interpretation of Union law or the validity of an act of the Union (**Article 267 TFEU**)
- National courts **may** refer (margin of discretion of domestic courts)
  - Parties to the proceedings may ask or suggest the domestic court to refer, but it is the **domestic court's decision** whether and what to refer
- However, a national court **must** refer the question
  - if it is a court of last instance (Art. 267 TFEU), except:
    - When the correct interpretation is so obvious as to leave no scope for any reasonable doubt: *acte clair* (Case 283/81, *CILFIT*); or
    - When there is already a clear Union jurisprudence: *acte éclairé* (Case 66/80, *ICC*)
  - if the question concerns the validity of a Union act (Case 314/85, *Foto-Frost*)

- National litigation is suspended until the ECJ has given its preliminary ruling
- Parties to the main proceedings may submit written and oral observations before the Court. So may the EU institutions (Commission, Council, Parliament etc.) and the Member States
- Court will answer the reference by way of a judgment or order
  - Order under **Art. 53(2)** of the RoP: ‘where it is clear that the Court has **no jurisdiction** to hear and determine a case or where a request or an application is **manifestly inadmissible**’. (e.g. C-665/13, *Sindicato Nacional*; C-19/14, *Talasca*; C-50/16, *Grodecka*)
  - Order under **Art. 99** of the RoP: ‘where a question referred ... is **identical** to a question on which the Court has already ruled, where the reply to such a question **may be clearly deduced** from existing case-law or where the answer to the question referred for a preliminary ruling **admits of no reasonable doubt**’. (e.g. C-137/15, *Plaza Bravo*; C-443/16, *Rodrigo Sanz*)
- The national court to which the judgement is addressed is, in deciding the dispute before it, **bound** by the interpretation given in the ECJ judgement. The ECJ judgment likewise binds other national courts before which the same problem is raised (effects *erga omnes*)

### ‘Jurisdiction’ vs ‘Admissibility’ vs ‘Procedure devoid of purpose’

- **Jurisdiction**: Art. 267 TFEU makes the jurisdiction of the Court subject to a number of cumulative conditions
  - [1] The questions referred must concern **provisions of EU law**
    - Object of the reference: interpretation of EU Treaties, interpretation or validity of EU acts (e.g. regulations, directives, decisions, international agreements entered into by the EU, other EU acts having legal effects). It cannot concern acts of the Member States, principles of public international law, acts of private persons
  - [2] The body making the reference must be a **court or tribunal of a Member State**
    - It is a **EU concept** (i.e. does not depend on national law). Elements taken into consideration by the Court: permanent body, independence, compulsory or voluntary jurisdiction, decisions taken on the basis of legal rules, body includes lawyers, settling disputes, etc. (See e.g. C-53/03, *Syfait*; C-58 and 59/13, *Torres*; C-377/13, *Ascendi*; and C-203/14, *Consorci del Maresme*)
  - [3] A decision on the question referred must be **necessary** in order to enable it to give judgment in the main proceedings
    - It implies, in particular, that there must be a **genuine** dispute pending before the referring court, and that the answer to be provided by the Court has to be **relevant** for the resolution of that dispute. In other words, the Court’s answers must be capable of **affecting the outcome** of the case. Questions cannot be **hypothetical**

The **EU Charter of fundamental rights** is applicable to *the Member States*, under Article 51(1) thereof, **‘only when they are implementing Union law’**

- See C-617/10, *Åkerberg Fransson*, and C-399/11, *Melloni*

A provision of EU law other than the Charter must be applicable to the case

Charter is the ‘shadow’ of EU law

- See Order of the Court in C-206/13, *Siragusa*

The concept of ‘implementing Union law’, as referred to in Art. 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other (...)

In order to determine whether national legislation involves the implementation of EU law for the purposes of Art. 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it (...)

In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings

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■ **Admissibility:** when the information provided by the referring court is **unclear or insufficient** for the Court to positively establish its jurisdiction or to provide an answer that may be useful to the referring court, the reference is inadmissible.

- Art. 94 of the RoP: in addition to the text of the questions referred, the request for a preliminary ruling must contain: ‘(a) a summary of the subject-matter of the dispute and the relevant findings of fact ... or, at least, an account of the facts on which the questions are based; (b) the tenor of any national provisions applicable in the case and ... the relevant national case law; and (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of [EU] law, and the relationship between those provisions and the national legislation applicable to the main proceedings’.

- Consistent case-law: ‘the requirements concerning the content of a request for a preliminary ruling are explicitly set out in Article 94 of the Rules of Procedure of which the referring court is supposed ... to be aware and which it is bound scrupulously to observe. (See e.g. C-692 to 694/15, *Security Service*, para 18; and C-325/15, *S’ and Others*, para. 29).

- In the last years, the Court has made an increasingly intensive use of that provision, handing down numerous decisions declaring requests from national courts partly or completely inadmissible because the relevant legal and factual background had not been clearly illustrated, or lacked coherence (See e.g. C-21/11, *Volturno Trasporti*; C-368/12, *Adiamix*; C-187/17, *Alandžak*; and C-321/17, *Canazza*).

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- **Procedure devoid of purpose:** when, in the course of a procedure, the main proceedings lose their purpose, the Court is to dismiss the request and declare that there is no need to reply. For example: applicant withdraws its application, parties settled, the relevant national or EU rules are amended and the legal issues raised are no longer actual, etc.
  - The decision of the Court to declare that there is no need to reply is **not** conditional on a formal withdrawal of the reference by the national court
  - The mere **wish** of a referring court to maintain one or more questions, in spite of the fact that the main proceedings had become devoid of purpose, is of no importance (C-155/11 PPU, *Imran*)
  - It is irrelevant that an answer from the Court might be useful for the referring court, or for other national courts, in the context of other pending cases which raise **similar issues**, or of future cases which may be connected to the main proceedings (see e.g. C-350/13, *Antonio Gramsci Shipping*; C-197/10, *Unió de Pagesos de Catalunya*; and C-175/13, *Linnamaa Libaveis MTÜ*)
  - **Limited exception:** Article 100(1) RoP, according to which ‘The Court shall remain seized of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. *The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons referred to in Article 23 of the Statute*’ (emphasis added)

## The preliminary ruling procedure: (ii) the use of the procedure

- Seeking interpretation of EU provision...
  - to apply directly that provision in the main proceedings (e.g. 149/77, *Defrenne*, and C-167/12, *CD*)
  - to set aside national rules incompatible with EU rules (e.g. C-530/13, *Schmitzer*)
  - to interpret and apply national law, where possible, in conformity with EU law (e.g. C-282/10, *Dominguez*)
  - to interpret EU secondary law in conformity with EU primary law (e.g. C-432/07, *Sturgeon*)
  - to check whether a EU directive has been properly transposed (e.g. C-144/04, *Mangold*, and C-246/09, *Bulcke*)
  - to clarify the consequences of an eventual finding of incompatibility between a national measure and a provision of EU law (e.g. C-378 to 380/07, *Angelidaki*) or clarify the principles according which it should assess a case before it (e.g. C-159/10, *Fuchs*)
- ... or inquiring on the validity of EU legislation (e.g. C-236/09, *Test-Achats*, and C-363/12, *Z*)

## ■ Typical questions from national courts, among others

- whether [EU provision or principle] must be interpreted as **precluding** national legislation which [description of the national provisions] (C-595/12, *Napoli*; C-45/09, *Rosenblatt*)
- whether [EU provision] must be interpreted as **requiring** Member States to [do something or abstain from doing something] (C-388/07, *Age Concern*; C-258/17, *E.B.*; C-247/17, *Raugevicius*)
- whether the facts at issue in the main proceedings fall within the scope of EU law (C-191/16, *Pisciotti*); or whether national rules such as those at issue in the main proceedings fall within the scope of [an EU directive] (C-388/07, *Age Concern*); or whether [EU directive] is applicable (*ratione materiae* or *ratione temporis*) to a situation such as that in the main proceedings (C-411/05, *Palacios de la Villa*; C-258/17, *E.B.*)
- whether [EU provision] is sufficiently clear, precise and unconditional to have direct effect (C-595/12, *Napoli*)
- to clarify (in abstract) the meaning and scope of specific provisions of EU law (e.g. Art. 4(2) of Dir. 2000/78) (C-68/17, *IR*)
- whether national rules which [description] constitute discrimination on the grounds of [...] prohibited by [directive/treaty provision] (C-356/09, *Kleist*; C-193/17, *Cresco Investigations*)
- ... and, if so, whether the national measure [e.g. discriminatory measure] may be justified (C-88/08, *Hütter*), or necessary (C-193/17, *Cresco Investigations*), or proportioned (C-229/08, *Woff*)

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## ■ The ECJ may, inter alia,

- simply provide the requested interpretation of EU law, in a more or less abstract manner (C-149/10, *Chatzi*; C-188/15, *Boungaoui*; C-395/15, *Daouidi*; C-68/17, *IR*)
- clarify whether a given measure constitutes (direct or indirect) discrimination (C-157/15, *Achbita*; C-443/15, *Parris*; C-154/18, *Horgan*)
- clarify whether a national measure falls within the scope of a EU provision (C-548/15, *J.J. De Lange*)
- (de facto) decide on the compatibility of national law with EU law (C-571/10, *Kamberaj*; C-409/16, *Kalliri*; C-4521/16, *MB*; C-673/16, *Coman*)
- provide guidance so that it is the national court that ultimately takes a decision on the compatibility of national law with EU law (C-73/08, *Bressol*; C-267/06, *Maruko*; C-147/08 *Römer*, C-41/17, *Gonzalez Castro*)
- provide guidance to the national court on its powers or duties, following from the Court's findings (C-441/14, *DI*; C-68/17, *IR*; C-24/17, *Österreichischer Gewerkschaftsbund*; and C-396/17, *Leitner*)

(Delivered yesterday)

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## How to draft an order for reference

→ Court of Justice – Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [Revised in 2018: see Court's web-site]

- **Questions referred** must be clearly identifiable and self-standing
- Specify all **elements** set out in **Art. 94** of the **RoP**
- Keep order **simple, clear and precise**. Include all relevant and helpful information for the Court but avoid superfluous detail
- Bear in mind that it will be **translated**: Court's staff / interested parties (i.e. EU institutions and other MMSS) will mainly read it in FR
- Bear in mind that only the order for reference (not the **annexes!**) will be translated and notified to interested parties
- If relevant, include a brief summary of the parties' arguments
- If possible, include your own views

→ Court of Justice – Anonymity in judicial proceedings before the Court of Justice [see Court's web-site]

## *Conclusions*

### *QQ & AA*

## Further reading

- N. Wahl, L. Prete, *The gatekeepers of Article 267 TFEU: On jurisdiction and admissibility of references for preliminary rulings* (2018) CML Rev 511-548 (EN)
- K.P.E. Lasok, *Lasok's European Court Practice and Procedure*, 3<sup>rd</sup> ed. (Bloomsbury, 2017) (EN)
- R. Barents, *Remedies and Procedures before the EU Courts* (Kluwer, 2016) (EN)
- P. Biavati, *Diritto processuale dell'Unione europea*, 5th ed. (Giuffrè, 2015) (IT)
- M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, 2<sup>nd</sup> ed. (OUP, 2014) (EN)
- K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law* (OUP, 2014)
- S. Prechal, *Communication within the preliminary ruling procedure* (2014) MJ 754–762 (EN)
- D.P. Domenicucci, *Il meccanismo del rinvio pregiudiziale: istruzioni per l'uso* (2014) Academia.edu (IT); and ID, *Circa il meccanismo del rinvio pregiudiziale alla Corte di giustizia* (2011) Foro It, n. 10, IV, 487 (IT)
- G. Vandersanden, *La procédure préjudicielle devant la Cour de justice de l'Union européenne* (Bruylant, 2011) (FR)
- C. Soulard, A. Rigaux, R. Muñoz, R., *Contentieux de l'Union européenne / 3*, (Lamy, 2011) (FR)
- C. Naômé, *Le renvoi préjudiciel en droit européen – Guide pratique*, 2<sup>nd</sup> ed. (Larcier, 2010) (FR)
- M. Condinanzi, R. Mastroianni, *Il contenzioso dell'Unione europea* (Giappichelli, 2009) (IT)
- T. Tridimas, *Knocking on heaven's door: Fragmentation, efficiency and defiance in the preliminary reference procedure*, CML Rev (2003) CML Rev 9-50 (EN)
- H.G. Schermers, D.F. Waelbroeck, *Judicial Protection in the European Union*, 6th ed. (Kluwer, 2001) (EN)
- C. Barnard, E. Sharpston, *The changing face of Article 177 references* (1997) CML Rev 1113–1171 (EN)
- K. Lenaerts, *Form and substance of the preliminary ruling procedure*, in Curtin, Heukels (eds.), *Essays in Honour of H.G. Schermers*, vol. II (MN, 1994) (EN)