

The role of the national judge in applying the EU anti-discrimination directives

APPLYING EU ANTI-DISCRIMINATION LAW. ONLINE COURSE FOR JUDGES AND PROSECUTORS (26-28 APRIL 2021)

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The application of EU law in national proceedings. Survey

- How often do you apply EU law in your work?
 - a) Every week
 - b) Twice a month
 - c) 4 or 5 times a year
 - d) Almost never

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1- Application of EU law. Interdisciplinary law (I)

- There are many different areas of EU competence. In addition to primary law, we directly apply Regulations and national legislation implementing EU directives.
- Interdisciplinary subjects
 - Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data
- Civil law
 - Control of unfair terms in order-for-payment procedures → Directive 93/13/EEC on unfair terms in consumer contracts
 - Motor vehicle accidents → Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability
- Commercial law
 - Regulation (EU) 2017/1001 on the European Union trade mark

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1- Application of EU law. Interdisciplinary law (II)

- Criminal law
 - Directive 2008/99/EC on the protection of the environment through criminal law
 - Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime
- Labour law
 - Directive 2019/1152/EU on transparent and predictable working conditions in the European Union
 - Directive 98/391/EC on the introduction of measures to encourage improvements in the safety and health of workers at work.
- Administrative law
 - Directive 2013/32/EU on common procedures for granting and withdrawing international protection
 - Directive 2014/23 on the award of concession contracts

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1- Application of EU law. Non-discrimination legislation

- **Charter of Fundamental Rights of the EU** (Articles 20-26 CFREU)
- **EU anti-discrimination directives:**
 - Directive 76/207/EC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (9 February 1976)
 - Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (19 December 1978).
 - Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (27 November 2000).
 - Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000).
 - Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) (5 July 2006)
 - Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (13 December 2004)
 - (...)

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1- Applying EU law. Concrete elements for its application

- National judge → judge of the EU (national judge cooperates with the CJEU to build EU law and to ensure compliance in all Member States)
- How does this cooperation take place?
 - **Application of EU law within its scope of application**
 - **Primacy of EU law** → Costa v. Enel judgment of 15 July 1964.
 - **Direct effect** → Van Gend en Loos judgment of 5 February 1963: European law does not only create obligations for EU countries, but also rights for individuals. Consequently, individuals can assert these rights and directly invoke EU rules before national and EU courts.
 - **Vertical direct effect** → intervenes in the relations between individuals and the country, which means that individuals can rely on a EU rule vis-à-vis the country.
 - **Horizontal direct effect** → in relations between private individuals, which means that a private individual can rely on a EU rule against another private individual.
 - Effect according to regulations:
 - **Regulation** → full direct effect, **directly applicable** (Art. 288 TFEU)
 - **Directive** → a directive will have direct effect if its **provisions are unconditional and sufficiently clear and precise** and if the EU member state **has not transposed the directive before the relevant deadline** (judgment of 4 December 1974, Van Duyn). However, direct effect can only be **vertical in nature**: (judgment of 5 April 1979, Ratti).
 - **Preliminary ruling** → The most important tool available to the national judge to ensure the proper application of EU law in its own Member State

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2- Preliminary rulings. Concept and regulation

- ▶ Rules to be taken into account
 - ▶ Art. 267 TFEU
 - ▶ Arts. 93 et seq. of the Rules of Procedure of the CJEU
 - ▶ Recommendations of the CJEU to national courts and tribunals concerning preliminary rulings procedures (<https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=CELEX%3A32019H1108%2801%29&qid=1618037813667>)
- ▶ 2 types of preliminary ruling (Art. 267 TFEU)
 - ▶ Interpretation → doubts about the interpretation of an EU rule or act, not about national law.
 - ▶ Validity → Doubt about the validity of an EU rule or act.
- ▶ Importance → ensure correct application of EU law + that EU legislation respects basic rules of the system (non-discrimination, in particular Art. 20-26 CFREU)
 - ▶ E.g.: CJEU Case C-385/11 Elbal Moreno of 22 November 2012. National contribution rules for part-time workers. It required more working time to retire for part-time workers compared to full-time workers. (Art. 4 Directive 79/7)
 - ▶ E.g.: CJEU Case C-236/09 of 1 March 2011 (brought by the Belgian Constitutional Court) Invalidation of Article 5(2) of Directive 2004/13 allowing discrimination in insurance premiums on grounds of sex as contrary to Articles 21 (non-discrimination) and 23 (equality between women and men) CFREU.

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CJEU ruling in Elbal Moreno (Case C-385/11) of 22 November 2012.

- ▶ " Article 4 of 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 must be interpreted as precluding, in circumstances such as those of the case before the referring court, legislation of a Member State which requires a proportionally greater contribution period from part-time workers, the vast majority of whom are women, than from full-time workers for the former to qualify, if appropriate, for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work. "

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Original content of Article 5 of Directive 2004/13 implementing the principle of equal treatment between men and women in the access to and supply of goods and services which was declared invalid by CJEU C-236/09, 1 March 2011.

■ Article 5 Actuarial factors

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits..
2. **Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.**
3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits. Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.

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2 - Preliminary ruling. Analysis and practical advice on how to submit it (I)

- Requirement → doubt about the validity of an EU provision/ about the interpretation of an EU provision we are going to apply
- Obligation to refer → If it is a Tribunal whose decisions are not subject to further judicial review under national law. If not, optional
- Exception to the approach → doctrine of the Clift Judgment, Case C-238/81 of 6 October 1982
 - Acte claire → the correct application of EU law can be so clearly established as to leave no room for reasonable doubt as to the solution of the question at issue.
 - Acte éclairé → materially identical issue / established case law
- Check that a similar question has not been raised or that it can answer our question or if it is a "acte éclairé" (ecuria / EUR-Lex + document information).
 - Not raised → if no appeal: mandatory // If appeal: advisable (Judgment Commission v. France Case C-416/17, 4 October 2018 violation of EU law not to raise a question the French Council of State // STC 37/2019, 26 March 2019, violates Art. 24.2 EC to apply national law without raising a preliminary question if there are doubts of being contrary to EU
 - Raised
 - Resolved → Acte eclaire
 - Not resolved
 - There is one aspect not contemplated → raise it and ask for accumulation.
 - Doubt already raised → Raise again? + then withdraw // Suspension + App. 36 judgment C-344/98, 14 December 2000 recognises the possibility but not the obligation to suspend

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2- Preliminary rulings. Analysis and practical advice on how to submit it (II)

- Procedure (not regulated in the EU, domestic legislation is required)
 - **Timing:** when you have to apply the rule whose compatibility with EU law is in doubt
 - **Hearing of the parties** (in Spain, Public Prosecutor's Office intervenes if it is a party: Instruction 1/2016 on the intervention of the Public Prosecutor in preliminary rulings).
 - **Order:** Content of Art. 94 of the Treaty of Procedure of the CJEU (subject matter of the dispute and facts / national law and applicable case law / reasons for doubt as to the interpretation or validity of EU law) (e.g. of an order drawn up by the REDUE https://www.poderjudicial.es/stfls/CGPJ/RELACIONES%20INTERNACIONALES/CUESTIONES%20PREJUDICIALES%20REDUE/FICHERO/Modelo%202019%20auto%20planteam-C_Prejud.pdf)
 - Anonymise the order
 - Forward it to the CJEU with relevant and useful documents to enable the Court to give its ruling, in particular contact details of the parties.
 - (In Spain, it is advisable to send a copy to the International Relations Service of the CGPJ).
- When the CJEU judgement is received, the judge applies its content to the national procedure.

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OUTLINE OF A PRELIMINARY QUESTION (I)

ORDER

Place, date, Judge

FACTS

FIRST. Subject matter of the dispute + relevant facts

- 1.
- 2.
- (...)

SECOND. Observations of the parties

- 4.

LEGAL GROUNDS

FIRST: Reasons for the need to refer the preliminary question (Brief, one paragraph)

- 8.

SECOND: EU legislation

- 9.
- (..-)

THIRD. National legislations + if applicable case law (link to official journals)

- 14.

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OUTLINE OF A PRELIMINARY QUESTION (II)

LEGAL GROUNDS

(...)

FOURTH. Interpretative or validity doubts + note questions

FIFTH. Relevance to the case in question

SIXTH (Optional) Possible interpretation

DECISION

I have decided to refer the following questions to the CJEU for a preliminary ruling:

1....

2...

Refer to the CJEU

Send a copy to the International Relations Service of the Spanish Council of the Judiciary.

This Order shall be notified to the parties, who shall be informed that it is final and that no appeal may be lodged against it.

I so agree and sign

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Example of a difficult to understand preliminary question

- ▶ **Should Article 47 of the Charter of Fundamental Rights of the European Union, in conjunction with Article 9(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, (OJ 2000 L 303, p. 16.) be interpreted as meaning that, where an appeal is brought before a court of final instance in a Member State against an alleged infringement of the prohibition of discrimination on grounds of age in respect of a judge of that court, together with a motion for suspension of execution of the contested measure, that court — in order to protect the rights arising from EU law by ordering an interim measure provided for under national law — must refuse to apply national provisions which confer jurisdiction, in the case in which the appeal was lodged, on an organisational unit of that court which is not operational by reason of a failure to appoint the judges adjudicating within it?**
- ▶ **(Reference for a preliminary ruling from the Polish Supreme Court 1-8-2018, Case C-537/18)**

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Survey: understanding the question posed

- How many times have you had to read the preliminary ruling to understand it?
 - a) once
 - b) twice
 - c) 3 times
 - d) 4 times or more
 - e) I don't quite understand it

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E.g. Unclear preliminary question

Original: (Question referred by a Madrid Labour Court, Case C-841/19)

(A) refer the following question to the Court of Justice of the European Union for a preliminary ruling:

'[Must] Article 4(1) of Directive 79/7 and Article 2(1) of Directive [2006/54] [...] be interpreted as precluding a legislative provision of a Member State ... such as that at issue in the main proceedings, under which, as regards the amount which [Fogasa] is liable to pay a part-time worker, the worker's base wages, which are reduced due to the part-time nature of the employment, are reduced again when calculating [Fogasa's] liability under Article 33 of the Workers' Statute, because the part-time factor is applied for a second time, as compared with a comparable full-time worker, in so far as that provision disadvantages female workers as compared with male workers[?]'

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Proposed clearer question

- Clearer proposal:

"Article 33 of the Workers' Statute provides that FOGASA will pay part of the wages of workers who have not been paid because of the employer's insolvency, up to a certain limit, but where the worker is a part-time worker that limit is reduced in proportion to that part-time status. Is that difference in treatment compatible with a proper interpretation of the prohibition of discrimination laid down in Article 4(1) of Directive 79/7 and Article 2(1) of Directive 2006/54/EC?"



THANK YOU FOR
YOUR ATTENTION