

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

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Aplicarea directivelor anti-discriminare

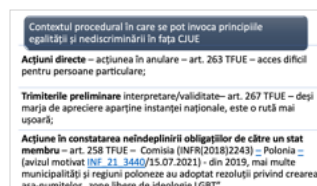


Aspecte practice privind trimiterea preliminară



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Application of anti-discrimination directives



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EU anti-discrimination legislation

- **Primary law:**
 - Article 20 (equality before the law) and Article 21 (non-discrimination) of the Charter of Fundamental Rights
 - Articles 2, 3(3), 9 TEU
 - Article 10 TFEU
 - Article 18 TFEU
- **Secondary law:**
 - Equal Treatment Directive (2000/78/EC)
 - Racial Equality Directive (2000/43/EC)
 - Gender Goods and Services Directive (2004/113/EC)
 - Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (2006/54/EC)
 - Directive on the right to family reunification (2003/86/EC)
 - Directive on the status of third-country nationals who are long-term residents (2003/109/EC)

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The procedural context in which the principles of equality and non-discrimination can be invoked before the CJEU

Direct actions - action for annulment - Article 263 TFEU - difficult access for individuals;

Preliminary references for interpretation/validity - Article 267 TFEU - although the margin of appreciation lies with the national court, this is an easier route;

Action for failure of a Member State to fulfil obligations - Article 258 TFEU - Commission (INFR(2018)2243) Poland (reasoned opinion [INF 21 3440/15](#).07.2021) - since 2019, several Polish municipalities and regions have adopted resolutions on the creation of so-called "LGBT-free zones"

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Application of EU anti-discrimination law by national courts

- **Principle of supremacy**
- **Direct effect** -
 - 1. on expiry of the deadline, if the Directive has not been transposed or has been transposed incorrectly
 - 2. the provision is sufficiently precise, clear and unconditional
- **Indirect effect – in keeping with the interpretation**

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DIRECT EFFECT 1.

Hypothesis	Parties	Qualities of the directive provision relevant to the dispute	What rules apply?
the national transposition rule is in keeping with the directive rule relevant to the dispute at issue	private individual against state; state against private individual; state against state; private individual against private individual		the private individual and the State will rely on the national transposing law, the national rules relevant to the case will be interpreted in the light of the corresponding rules in the Directive and the general purpose of the Directive, in line with previous CJEU case law. Preliminary questions may be referred to the CJEU for clarification of the meaning of the rules of the Directive, which will thus be extended to the national rules transposing them.

Source: EU Law Handbook, NIM

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DIRECT EFFECT 2.

Hypothesis	Parties	Qualities of the directive rule relevant to the dispute	What rules apply?
the transposition law is missing or the transposition law is partly nonconforming	private individual against state; state against private individual	1. the rule of the directive provides for a right in favour of the private individual 2. the directive rule is legally complete: clear, precise and unconditional on any subsequent EU or state action (the state has no discretion in transposition)	the directive rule will directly substantiate the claims of the private party (in criminal proceedings it can be used as defense against the State) (Van Duyn, 41/74; Ratti, 148/78) (the directive rule has direct effect); the State cannot rely on the rule of directness against the private individual (Marshall case, 152/84)
		1. the rule of the directive provides for a right in favour of the private individual; 2. the directive rule is legally incompetent : it is not clear and precise and/or is conditional	the directive rule cannot directly support the claims of the private party the national transposition rule contrary to the Directive rule cannot be applied either (it must be disapplied); the rest of the national rules must be interpreted as far as possible within the meaning of the rule of the Directive in question (Von Colson case, 14/83) ; national rules other than the particular transposition rule which is contrary to the Directive, if any, will therefore be the basis of the claims (the Directive has indirect effect); if it cannot be interpreted in that way because it would be completely contrary to all the applicable national rules, then the only way for the party to proceed is to bring an action against the State for compensation for the damage caused by non-transposition or incomplete or incorrect transposition of the directive (Francovich, C-6/90 and C-9/90; Brasserie du Pêcheur, C-46/93)

Source: EU Law Handbook, NIM

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DIRECT EFFECT 3.

Hypothesis	Parties	Qualities of the directive rule relevant to the dispute	What rules apply?
the transposition law is missing or the transposition law is partly nonconforming	private individual against individual private	1. the directive rule provides for a right in favour of the private individual; 2. it does not matter whether it is legally complete or incomplete	rule of the directive may not directly substantiate the claims of the private individual; the national transposition rule contrary to the directive rule cannot be applied either (must be removed from application) the rest of the national rules must be interpreted as far as possible within the meaning of the relevant rule of the Directive (von Colson, 14/83; Marleasing, C-106/89); national rules other than special transposition rules which are contrary to the Directive, if any, will substantiate the claims (rule of the Directive indirect effect); if it cannot be interpreted in this way because it would be completely contrary to all the applicable national rules, then the only option for the party is to invoke State liability seeking compensation for the damage caused by the incomplete or incorrect transposition or implementation of the directive (Francovich, C-6/90; Brasserie du Pecheur, C-46/93)

Source: EU Law Handbook, NIM

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Practical aspects of the preliminary reference

IMPORTANTĂ

- Calatorie
- Distananta
- Masing
- Comunitate

Obiectul trimerii

DREPTUL UE

Drept național – aplicabilitatea în timp a deciziilor Curții Constituționale (Răbanu, C-407/15)

↓

– nici chiar atunci când se invocă dispozițiile Cartei, fără a se pune în aplicare dreptul UE (EV, C-723/18; Corgul Național al Polijstilor, C-434/13)

Dreptul-TP – modalitate de contestare a unei HP anterioare (Wutsche, C-48/89)

– dacă este aplicabil litigiuul
– Nu este dreptul UE nu e aplicabil temporal (Eximbank SRL, C-386/16)

CINE? Respingerea cererii de sesizare

* Cerință obligatorie – MOTIVARE – art. 6 CEDO

11 Curții EDG, 13 februarie 2020, Ionescu Petruș c. Proșor
Nu înseamnă că CEDO garantează un drept la TP (11 Curții EDG, 24 aprilie 2018, Baydar c. Statele de Jos)

Nediscriminare

– pe motiv de cetățenie sau naționalitate - **Notă: din 15 iulie 2021, CG, C-259/20** – prestații de asistență socială acordate exclusiv celor care au drept de sedere în UK, cu excluderea resortisanților altor SM care au drept de sedere în temeiul Anexei UE la regulamentul de rezidență

* 63 Prin urmare, orice cetățean al Uniunii se poate prevala de interdicția de discriminare pe motiv de cetățenie prevăzută în articolul 18 TFUE, în toate situațiile care se încadrează în domeniul de aplicare rațională materiei al dreptului Uniunii. Aceste situații în cuprind pe cele care tin de exercitarea libertății de circulație și de sedere pe teritoriul statelor membre, conferită de articolul 20 alineatul (2) litera (a) TFUE și de articolul 21 TFUE.

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IMPORTANCE

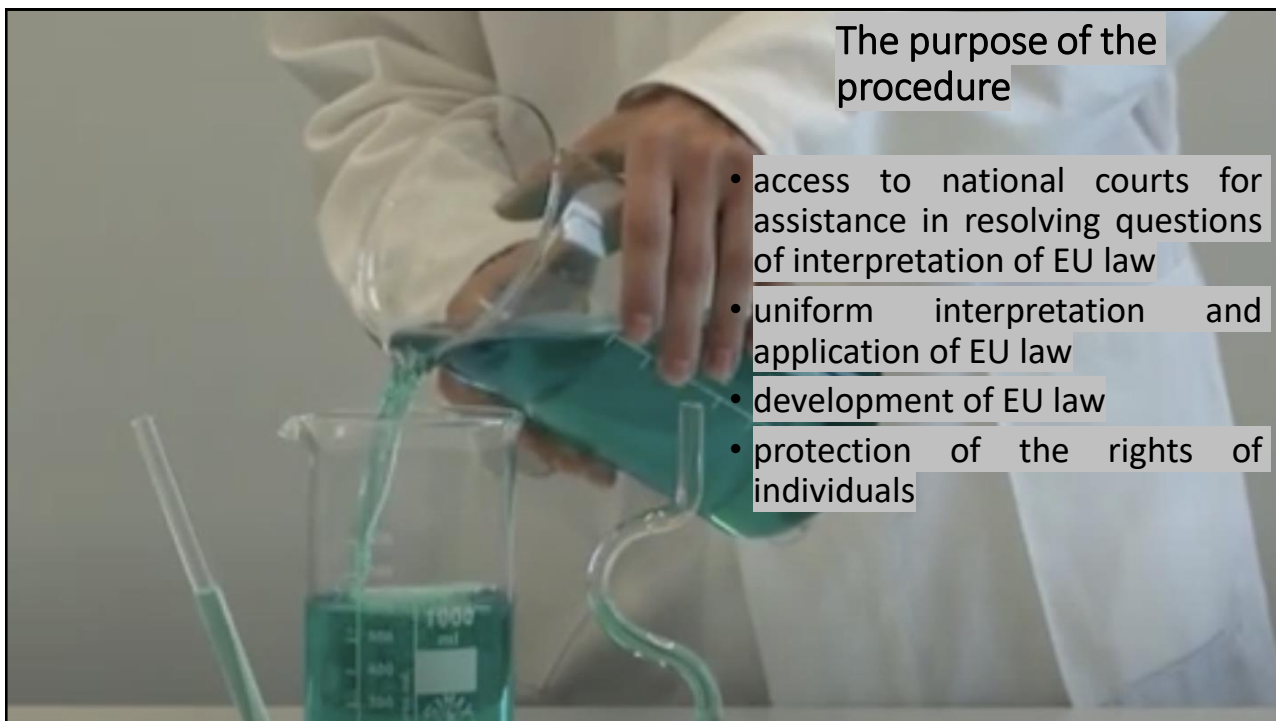
- Collaboration
- Cooperation
- Dialogue
- Communication



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The purpose of the procedure

- access to national courts for assistance in resolving questions of interpretation of EU law
- uniform interpretation and application of EU law
- development of EU law
- protection of the rights of individuals



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Article 19 TEU

"(3) The Court of Justice of the European Union shall act in accordance with the Treaties:

[....]

(b) on a preliminary basis, at the request of national courts, on the **interpretation** of Union law or the **validity** of acts adopted by the institutions;

[....]"

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Article 267 TFEU

(1) The CJEU has jurisdiction to give preliminary rulings on:

(a) the interpretation of treaties;

(b) the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the Union

(2) If such a question is raised before a court of a Member State, that court **may**, if it considers that a decision on the question is necessary to enable it to pass judgment, request the Court to give a ruling on the question.

(3) If such a question is raised in a case pending before a national court against whose decisions there is no appeal under national law, that court **is obliged** to bring the matter before the Court;

(4) Where such a question is raised in a case pending before a national court concerning a person subject to a measure involving deprivation of liberty, the Court shall give its decision as soon as possible.

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Subject of the reference



EU LAW

- if applicable to the dispute
- NOT if EU law is not applicable temporarily (*Exmitiani SRL*, C-286/16)

National law - applicability over time of Constitutional Court decisions (*Rîpanu*, C-407/15)



- not even when the provisions of the Charter are invoked without applying EU law (*EV*, C-723/18; *National Police Corps*, C-434/11)

CFI decision - way of challenging a previous HP (*Wunsche*, C-69/85)



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Cases concerning **national measures falling within the scope *ratione materiae and personae* of a directive** before the expiry of the transposition deadline (see *Mangold* judgment, C-144/04);

Specific cases of implementation of EU law

Cases concerning **national procedural law provisions affecting or regulating the exercise of (ordinary) rights guaranteed by EU law** (such as the right to require the Member State to make good damage caused to natural or legal persons by failure to implement a directive in time: see Case C-279/09 *DEB* [2010] ECR I-13849).

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Implementing EU law

POSITIVE IMPLEMENTATION

- The MS is fulfilling certain obligations under EU law

NEGATIVE IMPLEMENTATION

- derogation from EU application cannot be made in violation of EU law

Judgment of 30 April 2014 ,
Pfleger, C-390/12

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?

Article 7(1) of Directive 2003/88 states:

"Member States shall take the necessary measures to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, leave laid down by national legislation and practice.

Under the transposing legislation, 5 weeks are granted to workers. In a national dispute, it is claimed that the calculation of days in excess of the 4 weeks provided for in the Directive is discriminatory and the Charter is invoked (Article 31 - fair working conditions).

Is the Directive applicable? Is the Charter applicable? Can a preliminary reference be made to determine whether national law complies with EU law?

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Answer

The Directive is NOT applicable, nor is the charter

More favourable provisions granted by Member States - C-609/17 and C-610/17, Terveys and AKT

"53 However, where the provisions of Union law in the area in question do not regulate an issue and do not impose any specific obligation on the Member States in respect of a given situation, the national legislation which a Member State adopts in respect of that issue is outside the scope of the Charter and the situation in question cannot be assessed in the light of the provisions of the Charter.

54 Therefore, [...] Member States shall not implement this Directive within the meaning of Article 51(1) of the Charter'.



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Non-discrimination

- on grounds of citizenship or nationality - **Judgment of July 15, 2021, CG, C-709/20** - social welfare benefits granted exclusively to those who have a right to reside in the UK, excluding nationals of other MS who have a right to reside under the EU Annex to the settlement scheme

- 63 Any citizen of the Union may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of European Union law. These situations include those relating to the exercise of the freedom of movement and residence within the territory of the Member States conferred by Article 20(2)(a) TFEU and Article 21 TFEU.

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[C-709/20](#)

- The UK authorities granted CG a **right of residence** even though she did not have sufficient resources - **more favourable regime** than the EU;
- the right of a Member State national to freely reside on its territory, conferred upon Union citizens by Article 21(1) TFEU, without availing oneself of the conditions and limitations on this right laid down in Directive 2004/38;
- However, the provisions of the TFEU on EU citizenship apply;
- it is incumbent on the host MS, under Article 1 of the Charter, to ensure that a Union citizen who has exercised his or her freedom of movement and residence on the territory of the Member States, who holds a right of residence under national law and who is in a vulnerable situation, can nevertheless live in dignified conditions.

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Types of referral

INTERPRETATION

- TREATIES
- Secondary legislation (regulations, directives)
- Non-mandatory acts?

ESTABLISHING VALIDITY

- ~~TREATIES~~
- Secondary legislation (regulations, directives)
- Non-mandatory acts?

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WHO?

Rejection of the request for referral

- Mandatory requirement - REASON - Article 6 ECHR



- ECHR, 13 February 2020, *Sanofi Pasteur v. France*
- It does not mean that the ECHR guarantees a right to PT (H ECHR, 24 April 2018, *Baydar v. Netherlands*)

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WHO?

Need for referral. PR for interpretation



National court decisions that are susceptible to challenge - **a right**



National court of last resort - **obligation**

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WHO?

Are there any preferred courts?

- **NO**
- Need to refer to the internal hierarchy
(*Cartezio*, C-210/06; *Francisco Gutierrez Naranjo*, C-154/15, C-307/15, C-308/155)
- Importance of the case CJEU degree of the court
Chez, C-83/14 - Administrativen sad Sofia-grad (First Administrative Court)
Coman, C-673/16 - CCR (before the Court of S5 Bucharest)

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