

APPLYING EU
ANTI-DISCRIMINATION LAW
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**The role of the national judge
 in applying the EU anti-discrimination directives**

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Non-discrimination
 – law and fundamental principles
 Art. 21 e 51.1 of the Charter (CFREU)
 Art. 2, 3, 6 e 9 of EU Treaty
 Art. 8, 10, 18, 19 of TFEU

EU Institutions
 (European Parliament,
 Council, Commission)
 Foundation: Treaties

— **Create EU law
 (directives)**

Bind States
 (transposition)

National Judges

— **Apply EU law
 (part of national law)**

Interpretation in conformity with
 EU law (objectives,
 CJEU case law)

CJEU

— **Interprets EU law**

National Judges

— **Apply EU law**

In conformity with CJEU

— **Desaplicam direito nacional**

Incompatible with EU law

Preliminary hearing

Non-discrimination in EU law and the role of the national judge

- Legal framework and expressions of the principle of non-discrimination
 - Treaty on European Union
 - Treaty on the Functioning of the European Union
 - Non-discrimination – a fundamental right and principle of the European Union
 - Treaty on European union
 - Charter of Fundamental Rights of the European Union
 - Directives
- The directive as a source of EU law
- EU legal order and its relationship with national ones - fundamental principles, role of national judges
- Role of the national judge in the preliminary ruling procedure

3

Legal framework Treaty on European Union (1/2)

Preamble

- (...) INSPIRED by Europe's cultural, religious and humanistic legacies, from which the universal values of inviolable and inalienable human rights, freedom, democracy, **equality** and the rule of law have developed."
- **Art. 2**
 - The Union is founded on the values of respect for human dignity, freedom, democracy, **equality**, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States, in a society in which pluralism, **non-discrimination**, tolerance, justice, a solidarity and **equality between men and women prevail.**

4

Legal framework Treaty on European Union (2/2)

- **Art. 3**
 - It shall combat social exclusion and **discrimination**, and shall promote social justice and protection, **equality between women and men**, solidarity between generations and protection of the rights of the child
- **Art. 9**
 - In all its activities, the **Union shall observe the principle of the equality of its citizens**, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

5

Legal Framework: Treaty on the Functioning of the European Union (1/6)

- PART I - PRINCIPLES
- TITLE II – PROVISIONS HAVING GENERAL APPLICATION
- **Art. 8** (ex- Art. 3.2 TEC)
 - In all its activities, the Union shall **aim to eliminate inequalities, and to promote equality, between men and women.**
- **Art. 10**
 - In defining and implementing its policies and activities, the Union shall aim to **combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

6

Legal Framework: Treaty on the Functioning of the European Union (2/6)

- PART II – NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION
- **Art. 18** (ex-Art. 12 TEC)
 - Within the scope of application of the treaties, and without prejudice to any special provisions contained therein, **any discrimination on grounds of nationality** shall be **prohibited**.
- **Art. 19** (ex-Art. 13 TEC – in matters under the first pillar (EEC))
 - 1. Without prejudice to the other provisions of the treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to **combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**.

7

Legal Framework: Treaty on the Functioning of the European Union(3/6)

- PART III – UNION POLICIES AND INTERNAL ACTIONS
- TITLE I – THE INTERNAL MARKET
- **Art. 26** (ex-Art. 14 TEC)
 - 2. The internal market shall comprise an area without internal frontiers in which the **free movement** of goods, **persons**, services and capital is ensured in accordance with the provisions of the Treaties
- TITLE IV – FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL
- CHAPTER 1 -WORKERS
- **Art. 45** (ex-Art. 39 TEC)
 - 2. Such **freedom of movement** shall entail the **abolition of any discrimination based on nationality** between workers of the Member States as regards employment, remuneration and other conditions of work and employment. [*primary law – direct effect*]

8

Legal Framework: Treaty on the Functioning of the European Union(4/6)

- TITLE VII – COMMON RULES ON (...) APPROXIMATION OF LAWS
- CHAPTER 3 -APPROXIMATION OF LAWS
- Art. 114 (ex-Art. 95 TEC)
 - 1. Save where otherwise provided in treaties, the following provisions shall apply for the achievement of the objectives set out in **Article 26**. The European Parliament and the Council shall, acting in accordance with the **ordinary legislative procedure** and after consulting the Economic and Social Committee, adopt the **measures for the approximation of the provisions laid down by law, regulation or administrative action** in Member States which have as their object the establishment and functioning of the internal market. [*directives*]

9

Legal Framework: Treaty on the Functioning of the European Union(5/6)

- TITLE X – SOCIAL POLICY
- Art. 153 (ex-Art. 137 TEC)
 - 1. A With a view to achieving the objectives of Article 151, [*including the fight against exclusions*], the Union shall support and complement the activities of the Member States in the following field :
 - i) **equality between men and women** with regard to labour market opportunities and treatment at work;

10

Legal Framework: Treaty on the Functioning of the European Union(6/6)

- Art. 157 (ex-Art.141 TEC)
 - 1. Each Member State shall ensure that the principle of **equal pay for male and female workers** for equal work or work of equal value is applied.- [*primary law – direct effect*]
 - 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the **principle of equal opportunities and equal treatment of men and women in matters of employment and occupation**, including the principle of equal pay for equal work or work of equal value.
 - 4. With a view to ensuring **full equality in practice between men and women in working life**, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

11

Fundamental Rights Treaty on European Union

- Art. 6 (ex-Art. 6 TEU)
 - 1. The Union recognises the rights, freedoms and principles set out in **the Charter of Fundamental Rights of the European Union** (...) which shall have the same legal values as the treaties. (...)
 - The rights, freedoms and principles in the Charter shall be **interpreted in accordance with the general provisions in Title VII of the Charter** governing its interpretation and application and with due regard to the **explanations referred to in the Charter, that set out the sources of those provisions.**
 - 3. Fundamental rights, as guaranteed by **the European Convention for the Protection of Human Rights and Fundamental Freedoms** and as they result from the **constitutional traditions common** to the Member States, shall constitute general principles of the Union's law.

12

Fundamental Rights Treaty on European Union(1/6)

- TITLE III – EQUALITY
- Art. 20 (**Equality before the law**)
 - Everyone is equal before the law.
- Art. 21 (**Non-discrimination**)
 - 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
 - 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

13

Fundamental Rights EU Charter of Fundamental Rights (2/6)

- Art. 22 (**Cultural, religious and linguistic diversity**)
 - The Union shall respect cultural, religious and linguistic diversity.
- Art. 23 (**Equality between men and women**)
 - Equality between women and men must be ensured in all areas, including employment, work and pay.
 - The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

14

Fundamental Rights

EU Charter of Fundamental Rights (3/6)

- TITLE VI – JUSTICE
- Art. 47 (**Right to an effective remedy and fair trial**)
 - Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.
 - Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
 - Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

15

Fundamental Rights

EU Charter of Fundamental Rights (4/6)

- Art. 51 (Scope)
 - 1. The provisions of this Charter are **addressed to the institutions, bodies, offices and agencies of the Union** with due regard for the principle of subsidiarity and to the **Member States only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
 - 2. The Charter **does not extend the field of application of Union law** beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

16

Fundamental Rights

EU Charter of Fundamental Rights (5/6)

- Art. 52 (Scope and interpretation of rights and principles)
 - 2. Rights recognised by this Charter for which **provision is made in the Treaties** shall be exercised under the conditions and within the limits defined by those Treaties.
 - 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
 - 4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

17

Fundamental Rights

EU Charter of Fundamental Rights (6/6)

- Art. 52 (cont.)
 - 5. The provisions of this Charter which contain principles may be **implemented by legislative and executive acts** taken by institutions, bodies, offices and agencies **of the Union**, and **by acts of Member States when they are implementing Union law**, in the exercise of their respective powers. They shall be judicially cognisable **only in the interpretation of such acts and in the ruling on their legality.**
 - 6. Full account shall be taken of national laws and practices as specified in this Charter.
 - 7. **The explanations drawn up as a way of providing guidance in the interpretation** of this Charter shall be given due regard by the courts of the Union and of the Member States.

18

Directive

- Council Directive 2000/78/EC, of 27.11.2000
 - Establishing a general framework for equal treatment in employment and occupation - basis: art. 13 TEC
- Directive 2010/41/EU of the European Parliament and of the Council, of 7.7.2010
 - on the application of the principle on equal treatment between men and women engaged in an activity in a self-employed capacity – basis: art. 157.3 TFEU
- Directive 2006/54/EC of the European Parliament and of the Council, of 5.7. 2006
 - on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) – basis: art. 141.3 TEC
- Council Directive 2000/43/EC, of 29.6.2000
 - Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin – basis: art. 13 TEC
- Council Directive 2004/113/EC, of 13.12.2004
 - Implementing the principle of equal treatment between men and women in the access to and supply of goods – basis art. 13 TEC

19

The Directive as EU source of Law (1/2)

- **Art. 288 TFEU**– EU Sources of Law (for EU institutions to exercise the Union's competences, (art. 5 of TEU; arts. 2, 3, 4., of TFEU: exclusive competences and shared competences)
 - A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed
 - But shall leave to the national authorities the choice of form and methods.
 - Need for implementation by MS: all actions that must be taken to achieve the result set out in the Directive (national law)
 - Implementation: in the prescribed period; after expiry of the period, may be invoked before the courts by a person subject to rights (horizontal direct effect)
 - Directive: mandatory for the MS and in the MS

20

The Directive as EU source of Law (2/2)

- Transposition of EU Directives:
 - transposition of directives into national law
- Application of directives corresponds to the application of the national law which implements the directive correctly
- Directive not correctly implemented:
 - the competent authorities implement the directive directly
- Role of the national judge:
 - application of the national law - transposed directive - and the incorrectly transposed directive or the non-transposed directive

21

The legal order of the European Union and its relationship with national legal orders

22

Fundamental Principles

- **The principle of direct effect**
 - Provisions of Union law must be sufficiently clear, precise and unconditional and that they must not call for additional measures either national or European.
- **The principle of conforming interpretation**
 - Obliges a national judge to interpret, national provisions in conformity with the applicable provisions in order to avoid conflicting provisions of national law
- **The principle of the primacy of EU Law**
 - Imposes, in principle, that the national judges are obliged to disapply any conflicting provisions of national law, where the incompatibility between national law and EU law cannot be avoided or resolved by interpreting national law in conformity with Community law
- **The principle of effective judicial protection**
 - Guarantees the right to obtain an effective remedy possibilidade de fazer valer os direitos e obrigações resultantes dos Tratados por recurso aos tribunais nacionais (fundamental right to access courts)
- **Preliminary ruling system**
 - Allows a judicial dialogue between national courts and the CJEU on questions concerning the interpretation of EU law or the validity of acts adopted by the institutions

23

The national judge and the principle of the direct effect of the directive (1/2)

- **Direct source of EU law**
 - Following entry into force, the provisions of the Directive become part of the national legal systems (vertical direct effect)
 - A rule of Union law has direct effect when it becomes part of the legal order of a Member State, making it capable of governing legal relationships falling within its scope
 - If the conflict is between private individuals, the direct effect is horizontal
- **Direct effect – case 26/62 (Van Gend en Loos)**
 - Provisions of EU law can be an autonomous source of individual rights and obligations
 - Such provisions should be sufficiently clear and unconditional and should not require subsequent action by national or EU authorities

24

The national judge and the principle of the direct effect of the directive (2/2)

- Primary law (Treaties and Charter)
 - Horizontal direct effect (primary law + directive by which the private legal relationship is regulated)
 - Directives on fundamental freedoms (movement of persons, goods, services) (former 1st pillar)
- Example: autonomous appreciation of the principle of non-discrimination on grounds of nationality (C-281/98, *Angonese*); non-discrimination for equal work between men and women workers in terms of equal pay (C-43/75, *Defrenne*)
- Art 52.5 of the Charter – distinction between rights and principles
 - Principles: may be implemented by legislative and executive acts taken by institutions of the Union
- C-144/04 *Mangold* and C-555/07 *Kücükdeveci* (discrimination on the basis of age)

25

Primacy of Community Law – Declaration 17 annexed to TFEU

- The Conference recalls that, **in accordance with well settled case law of the Court of Justice** of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have **primacy over the law of Member States**, under the conditions laid down by the said case law.
- The Conference decided to attach as an annex to the Final Act **the opinion of the Council Legal Service** on the primacy of EC law as set out in 11197/07 (JUR 260):
 - *It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.*

26

The national judge and the principle of the direct effect of the directive (1/2)

- Case C-16/64 (*Costa v. Enel*)
- EU membership precludes Member States from giving primacy to national measures over EU Law
- National measures cannot take precedence on rights conferred upon in the Treaties
- EU law has primacy over national law.
 - In all decisions, even constitutional ones
- Not subject to constitutional scrutiny

27

The national judge and the principle of the direct effect of the directive (2/2)

- Conflicting provisions (national law and EU law)
- Primacy of applicability (C-106/77 *Simmenthal*)
- Primacy of EU law encompasses the principle of non-discrimination
 - National law must be disapplied (C-144/04 *Mangold*, 77)
- Incompatibility merely precludes its applicability (is restricted to areas outside the scope of EU law) – national courts must be able to disapply
 - It does not render national provision void
- It should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with European Union Law arises only if no compatible interpretation of that provision proves possible. (C-282/10 *Dominguez*)

28

The national judge and interpretation consistent with EU law (1/3)

- Legal concept aiming to ensure the effectiveness (useful effect) of EU law
- First used in a judgement concerning the directive on equal treatment for men and women in employment relationships (C-14/83 *Colson v Kamann*)
- Initially considered in the context of failed or incorrect transposition of directives, now applied to other sources of EU law, including primary law
- In the case *Inter-Environnement Wallonie*: Member States should refrain themselves from adopting provisions inconsistent with the aim of directives during periods provided for their transposition and during transition periods (C-463/10 *Aftodioskisi Aitoloakarnanias*)

29

The national judge and interpretation consistent with EU law (2/3)

- Scope of obligation to interpret national law in conformity with EU law
 - When national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it.
 - This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU, since it permits national courts, for matters within their jurisdiction, to ensure the full effectiveness of EU law when they determine the disputes before them
 - National courts require to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it

30

The national judge and interpretation consistent with EU law (3/3)

- Limits the principle
 - If no compatible interpretation proves possible, it has to be established whether provisions of a directive are directly effective, and if that is the case, whether a party may rely on them and in relation to whom (*C-97/11 Amia*)
 - Before disapplying national provisions that are incompatible with EU law, a national judge must establish whether it can arrive at a consistent interpretation

31

Role of the National Judge in the Preliminary Ruling Procedure

32

The Court of Justice of the European Union (CJEU) (1/2)

- **Art. 19 TUE**

- The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.
- The Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed.

3. The Court of Justice of the European Union shall (...)

- b) **give preliminary rulings, at the request of courts or tribunals** of the Member States, on the **interpretation** of Union law or the validity of acts adopted by the institutions;

33

The Court of Justice of the European Union (CJEU)(2/2)

- **Statute of the Court of Justice of the European Union**

- (Protocol no 3 of the TFEU amended by Regulations (EU, Euratom) 741/2012, 2015/2422, 2016/1192 2019/629 of the European Parliament and of the Council, of 17 april 2019 (consolidated version https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-pt-div-c-0000-2016-201606984-05_00.pdf)

- **Rules of Procedure of the Court of Justice of 25.9.2012**

- amended in 18.6.2013, in 19.7.2016, in 9.4.2019 and in 26.11.2019 (consolidated version https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_pt.pdf) (PR)

34

Preliminary ruling– Art. 267 of TFEU (ex Art. 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- a) the **interpretation of the Treaties**;
- b) the **validity and interpretation of acts of the institutions**, bodies, offices or agencies of the Union.

Where such a question is raised before **any court or tribunal of a Member State**, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a **court or tribunal** of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal **shall** bring the matter before the Court (...)

35

Preliminary ruling - Proceeding

- **Forms of Procedure**
 - Ordinary – art. 93 – 104 of the Regulation
 - Art. 94: Content of the preliminary ruling (important!)
 - Expedited procedure – art. 105 – 106 of the Regulation
 - Art. 105: where the nature of the case requires that it be dealt with within a short time
 - Urgent preliminary ruling procedure – art. 107 – 114 of the Regulation
 - Art. 107: questions in the areas covered by Title V of Part III of the Treaty on the Functioning of the European Union (space of freedom, security and justice)
- **Common Procedural Provisions**
 - Art. 43 – 92 of the Regulation

36

Preliminary ruling— Result and power of the national judge

- Result – request for a preliminary ruling must concern
 - Interpretation of the primary (Treaties and Charter) and secondary EU law (directives)
 - Control of the relationship between National Law and EU law
 - Control of validity of secondary law
- National Judge has the power / competence to
 - Implement concepts and principles of EU law
 - Interpret and apply EU law as previously interpreted by the CJEU
 - Grant legal remedies
 - Impose sanctions

37

Preliminary ruling – “court or tribunal”

- Categories to define national “court or tribunal” nacional (art. 267 TFEU)
 - A court or tribunal may submit a request for preliminary ruling
 - “Court or tribunal” – as an autonomous concept of EU law
 - A national court whose decisions there is no judicial remedy is required to bring a request for preliminary ruling before the Court
 - Objective: uniform interpretation of EU law (avoid divergences)
 - Trial courts (admissibility to appeal, according to national law) - optional referral
 - Can assess and accept the validity, but may not consider the legislative act invalid (C-314/85, Foto Frost)

38

Preliminary ruling

Concept of “court or tribunal”

- A body of a permanent nature, established by law
- With the capacity to take binding decisions
- Competence based on the law to resolve conflicts (“disputes”)
- To decide on the basis of the law, not on principles of equity
- Independent
- Disciplinary Courts (even –C-246/80 Broekmeulen)
- May not submit requests:
 - Non-court, legislative, administrative and advisory bodies
 - Arbitration tribunals (decision based on agreement of the parties) - unless national law allows review of the decision by a tribunal (C-126/97 Eco Swiss China Ltd)
- Discrimination: C-394/11 (Belov), C-268/08 (Impact), C-363/12 (Z)

39

Preliminary ruling— Purpose and scope of the request

- Subject: Interpretation and validity of EU law
- The CJEU rules only if EU law is applicable to the main proceedings
 - The national court must set out all the relevant matters of fact and law which lead it to consider that there are provisions of EU law capable of being applied
- As regards the interpretation of the Charter of Fundamental Rights:
 - It must be clear and unambiguous from the request for a preliminary ruling that a rule of law other than the Charter is applicable in the main proceedings. The Charter alone cannot provide a basis for the jurisdiction of the CJEU.
 - The CJEU does not apply EU law to the dispute.
- The CJEU does not apply EU law to the dispute
 - It is for the national referring court to draw the practical consequences of the CJEU's interpretation and, if necessary, to disapply the national rule found to be incompatible with EU law.

40

Preliminary ruling– – Adequate moment to make the request

- As soon as it finds that a ruling on the interpretation (or validity) is necessary to enable it to give judgment
 - It is the national court which is in fact in the best position to decide at what stage of the proceeding such a request should be made
- At a stage in the proceedings when it is able to define in sufficient detail
 - Factual and legal background in the main proceedings
 - The legal issues raised
- (While ensuring that the adversarial procedure is held in advance)

41

Preliminary ruling – Form and content of the request

- Art. 94 of the regulation
 - Any form allowed by national law (simple, clear, precise)
 - The request must contain
 - a summary of the subject **matter** of the dispute and the relevant findings of **fact** as determined by the referring court or tribunal (an account of the facts on which the questions referred are base)
 - the tenor (precise references) of any **national provisions** applicable in the case and, where appropriate, the relevant national case-law, and
 - **Provisions of EU law** where interpretation is requested (it cannot ask to interpret national law)
 - 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.
 - The request should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.
 - The questions referred to the Court for a preliminary ruling must appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, (without it being necessary to refer to the statement of the grounds) for the request. (C-14/86 Pretore di Salo)

42

Preliminary ruling – Rejection and improvement

- Absence of facts (as to content)
 - The CJEU may decline jurisdiction or dismiss the request as inadmissible
- In the event of questions having been improperly formulated
 - The CJEU will choose those elements that could be subject to a preliminary ruling on interpretation or validity (*C-83/78 Pigs Marketing Board*)
 - The CJEU may request clarification from the referring court or tribunal within a time-limit prescribed by the Court - Art 101 of the Regulation
 - Judge-Rapporteur or Advocate-General may request the parties to submit all information relating to the facts, documents or other particulars - Art. 62(1) of the Regulation
 - Judge-Rapporteur or Advocate-General may send to the parties questions to be answered at the hearing - Art. 62(2) of the Regulation

43

Preliminary ruling (some notes) (1/3)

- National courts are autonomous
 - Making a reference, courts not compelled by parties' contentions
- National law decides as to whether the order for reference may be challenged decision
- The National Court may withdraw the request at any moment before the CJEU delivers its ruling
 - (art. 100 Regulation)
- Request is submitted directly and expressly under Article 267 TFEU

44

Preliminary ruling (some notes) (2/3)

- Whereby there is an appeal to the superior court
 - Art. 267 TFUE does not preclude appeal (C- 210/06 *Cartesio*, 94)
- It is for the national court to assess according to national law, whether it is appropriate to maintain the reference for a preliminary ruling
- The questions must be necessary to the resolution of the dispute
 - (*ratio decidendi*, *não obiter dicta*) (caso C-104/79 *Foglia v Novello*)
- It is solely for the national court before which the dispute has been brought and which must assume, responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case 379/98 *Preussen Elektra*, 38, C-169/07 *Hartlauer*, 24, C-544/07 *Ruffler*, 36)

45

Preliminary ruling (some notes)(3/3)

- Admissibility of preliminary references – The Court may refuse to rule to a question referred by:
 - Where it is quite obvious the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose (*ratio decidendi*)
 - Where the problem is hypothetical
 - Where the Court does not have before it the factual or legal material necessary to give useful answer to the questions submitted to it
 - (C-379/98 *Preussen Elektra*, C-221/07 *Zabłocha-Weyhermuller*, C-222/05 and 225/05 *van der Weerd*)
 - No link to EU law or national measure outside the scope of EU law
 - (C-333/09 *Noel*)
- Art. 53 (2) of the regulation
 - Where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible), the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings

46

Preliminary ruling Types of decisions the CJEU may render

- Judgment (art. 87 Regulation)
- Reasoned order (art. 99 Regulation)
 - The question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled
 - Reply to such a question may be clearly deduced from existing case-law
 - The answer to the question referred for a preliminary ruling admits of no reasonable
- The scope of the answer given by the CJEU
 - Full interpretation
 - Leaving the final decision to the national court
 - (C-391/09 *Runevic – Wardyn*, C-276/06 *Maruko*)

47

Preliminary ruling – Effects of the decision of TJEU

- Bind the court in the case at hand
 - *Inter partes*
- *Ex tunc* (since the entry into force of a measure ruled upon)
- Bind other courts hearing that case on appeal
- Rulings which annul (validity)
 - Binding in other cases
- The interpretation of EU law is binding (precedent)

48

Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (JO C 380/1, of 8.11.2019)

- The preliminary ruling procedure is based on close cooperation between the Court and the courts and tribunals
- The originator of the request for a preliminary ruling (órgãos jurisdicionais nacionais)
- The subject matter and scope of the request for a preliminary ruling
- The appropriate stage at which to make a reference for a preliminary ruling
- Form and content of requests for a preliminary ruling
- Protection of personal data and anonymisation of the request for a preliminary ruling
- Transmission to the Court of the request for a preliminary ruling and of the case file in the national proceedings
- Interaction between the reference for a preliminary ruling and the national proceedings
- Costs and legal aid
- Conduct of the proceedings before the Court and the action taken by the referring court or tribunal upon the Court's decision
- Conditions for the application of the expedited procedure and the urgent procedure
- The essential elements of a request for a preliminary ruling (Annex)

49

Thank you!

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