

# The role of the Member State judge in the implementation of EU anti-discrimination directives

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- Right to equal treatment: is violated if a person is treated unjustifiably unequally, i.e. is discriminated against
- Typical case: claim of unequal treatment to the court (a person has been unjustifiably treated less favorably when receiving or using a benefit due to some of his/her characteristics)
- Unequal treatment: factual question, although special rules may apply to identification
- A legal basis that prohibits such treatment/ that allows the claim to be satisfied/ that also affects the special rules of the procedure

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## Norms requiring equal treatment / prohibiting discrimination

- **EU [Charter of Fundamental Rights](#)** title III “Equality“ (primarily Article 21)
- **European Convention of Human Rights** (is relevant also according to Article 52 (3) on the Charter and EC article 6 (3)), Article 14, Protocol No. 12 (Estonia has not joined)
- **TFEU articles, specifying the rights related to equal treatment:** Article 18 (discrimination on grounds of nationality), Article 45 (2) (abolition of any discrimination based on nationality in employment for securing the free movement of people), Article 157 (1) (equal pay to men and women)
- **Other instruments of international law** (e.g. the United Nations Convention on the Rights of Persons with Disabilities) – will be set aside in order to keep things simple

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## Norms requiring equal treatment / prohibiting discrimination, 2

- **EU secondary law: directives on equal treatment (extract):**
  - [2000/78](#) (general framework for equal treatment in employment and occupation)
  - [2006/54](#) (equal opportunities and equal treatment of men and women in matters of employment and occupation)
  - [2010/41](#) (equal treatment between men and women engaged in an activity in a self-employed capacity)
  - [2019/1158](#) (directive of work-life balance, which had to be transposed by August 2, 2022)

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## Norms requiring equal treatment / prohibiting discrimination, 3

### • **National law:**

- Constitution: right to equal treatment (§ 12)
- (general) Equal Treatment Act
- (general) Gender Equality Act
- Specific norms: law governing work relations ([Employment Contracts Act](#) § 3 principle of equal treatment; § 89 (4) equal treatment on extraordinary cancellation of employment contract)

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## X vs. Tartu Vangla (hearing disability), court proceedings

- **Administrative court:** resolved on the basis of constitution and Equal Treatment Act: in essence, the unequal treatment is justified to ensure the fulfillment of prison duties, correction with a hearing aid is not sufficient
- **Circuit court:** resolved on the basis of constitution, treatment of the applicant when remaining in the position compared to the visually impaired violates the right to equal treatment § 12 (1) of the constitution, there is no reasonable or relevant reason for this, because the hearing aid allows to effectively compensate for weaker hearing; initiated constitutional review proceedings in the Supreme Court

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## X vs. Tartu Vangla (hearing disability), court proceedings

- **Constitutional Review Chamber, the Supreme Court:** found, based on the opinion of Chancellor of Justice, the directive 2000/78 for equal treatment in employment and occupation and Article 21 of the Charter; if the regulation contradicts the directive, it should not be implemented and there is no reason to assess compliance with the constitution; although the circuit court did not assess this, the Constitutional Review Chamber may do it; the case is not quite clear, a preliminary ruling must be requested, in order to decide, whether and how to continue with constitutional review proceedings
- **Court of Justice:** resolved the case based on the directive only; national norms (i.e. the Estonian regulation) contradict with the directive, impossible to assess, whether a person with a hearing disability could, with reasonable adjustments (other position, hearing aid), continue working

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## X vs. Tartu Vangla (hearing disability), court proceedings

- **Supreme Court en banc:** resolved the case based on constitution; the control of compliance with EU law (or the inconsistency of some norms with EU law) does not exclude constitutional review; contentwise, both can lead to the same result; the purpose is to ensure the primacy, coherency and efficiency of EU law, and constitutional review proceedings do not jeopardise these goals, but may even help to achieve them, as the result can be the annulment of the norm
- **Result:** Estonian courts can freely choose, whether to take the road of assessing the inconsistency with EU law and use the accompanying legal remedies; or, choose constitutional review; or, as a third option, ask, whether such choice is free according to EU law.

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## The effect of a directive in a national court case

- Direct effect
- Fills the void (if a directive has not been transposed)
- Replaces the national norm (if a directive has not been properly transposed; norm in the scope of application, but contrary to the directive)
- Affects the choices between different interpretation alternatives of national legislation (provisions have been transposed and are applied, but it is unclear, which interpretation would be a best solution in taking account the directive)

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## What is the effect of the directive?

- Due to direct effect, the non-application of a national norm
- Consistent interpretation: interpreting the national law in the light of the purpose and text of the directive
- At the final stage, possible state liability for not transposing the directive (separate administrative matter)

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## If the directive is applicable, but its content is unclear?

- Requesting a preliminary ruling from CJEU for clarity
- Requesting a preliminary ruling is the right/obligation of the court
- Request of a party to the proceedings for a preliminary ruling?
- A preliminary ruling does not result in a settlement of the case: the interpretation or decision on validity/invalidity must be applied nationally to circumstances

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## The form/style, etc. of a preliminary ruling

- 10 pages should be sufficient
- The request of a preliminary ruling will be translated to all EU languages, annexes will not be translated
- Facts (unnecessary requisite elements should be avoided; the copy or extracts of the file must be added), national law must be explained clearly (EU judges are probably not familiar with MS' law): some CJEU decision as an example (e.g. the hearing impairment case)
- Explain, why is the interpretation of EU law necessary: what is unclear, contradiction concerning the specific case; offer answers to questions
- If the result is unsatisfactory (CJEU may rephrase questions according to their understanding), an explanation of the preliminary ruling can be requested, new questions may be asked
- CJEU's [recommendations to the courts of Member States for requesting a preliminary ruling](#)

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