

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

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Structure

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Art. 148 Romanian Constitution

"(2) Following accession, the provisions of the constituent treaties of the UnionEuropean Union, as well as other binding Community acts, **shall have priority** over contrary provisions of national laws, subject to compliance with provisions of the Act of Accession.

(...)

(4) The Parliament, the President of Romania, the Government and the **judicial authority** guarantee the fulfilment of the obligations arising from the Act of Accession and theprovisions of paragraph 2."

EU law

Council Directive 2000/78
establishing a general framework for
equal treatment in employment and
occupation

Council Directive 2000/43
implementing the principle of equal
treatment between persons
irrespective of racial or ethnic origin

Directive 2006/54/EC of the
European Parliament and of the
Council of 5 July 2006 on the
implementation of the principle of
equal opportunities and equal
treatment of men and women in
matters of employment and
occupation

Treaty of European Union

Articles 2, 3 par, 3, 9

**Treaty for the functioning
of EU**

Articles 10, 18

**Charter of fundamental
rights of EU**

Article 20 Equality before
the law

Article 21 Non-discrimination

Courts and Directives

The Directive, as an act of the European Union, does not, as a rule, have direct effect in national law, but account must be taken of the national court's obligation to interpret national law in conformity with European Union law (C-14/83 Von Colson and Kamann).



“the principle of consistent interpretation requires (...) that the national courts must do everything within their jurisdiction, taking into account the whole body of national law and applying the methods of interpretation recognised by that law in order to guarantee the full effectiveness of the directive in question and to identify a solution consistent with the aim pursued by it (...)” (C-282/10 Maribel Dominguez, par. 27)

Courts and Directives

By virtue of the principles of direct effect and the priority of European Union law over national laws, it is for the national courts to interpret the national law transposing the directive in the light of the text and purpose of that act.

References

This obligation to interpret national law in conformity with EU law is inherent in the TFEU system, as it allows national courts, for matters falling within their jurisdiction, to ensure the full effectiveness of EU law when resolving disputes brought before them. (C- 282/10, Dominguez, para. 24)

The obligation of consistent interpretation relates to the whole body of national law, including national case-law (C-456/98, Centrosteeel, para. 17)



Effective judicial protection

Article 19 Treaty on European Union

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

Article 47 Charter of fundamental rights of European Union

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.

Procedural autonomy

It is the responsibility of the MS to determine the procedural conditions under which EU rights are to be protected, where there are no relevant EU rules on the matter.



1. the rights arising from EU law be subject to the same procedures that apply to rights derived from national law (principle of equivalence)
2. national rules and procedures do not make it impossible in practice or excessively difficult to exercise deriving from EU law, but remedies must be such as to ensure that the effectiveness of EU rights (principle of effectiveness)

Procedural autonomy and the courts

Ensuring the appropriate balance, based on proportionality on a case-by-case basis, between the requirement of effective judicial protection of EU law rights and the application of legitimate national procedural and procedural rules.

Article 267 TFUE



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;

Article 267 TFUE

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.

Preliminary reference

"the procedure laid down in Article 267 TFEU is an instrument of cooperation between the Court and national courts with which the Court provides the latter with the interpretation of Union law which are necessary to resolve the dispute over on which it is to give judgment".

(C-470/12, Pohotovost)



Role of preliminary reference

- uniform interpretation and application of EU law;
- development of EU law;
- development of an EU standard for the protection of fundamental rights;

Shared responsibility

According to settled case-law, questions concerning the interpretation of Community law asked by the national court in the legal and factual context which it defines under its own responsibility and the accuracy of which the Court does not have jurisdiction to verify are presumed to be relevant (C-222/05, *Werd and Others*, order of 7.7.2007).

Steps

1. Is the EU law in question applicable?
2. Examination of jurisdiction, *ratione temporis* and *ratione materiae*
3. The dispute is not purely domestic/outside the scope of EU law

Attention - Charter

Article 51

- 1. The provisions of this Charter are addressed 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.

Explanations of the Charter

The provisions of the Charter on their own, without any other EU legal bases – inadmissible

....a shadow...



If human rights....then...

Automatic reflex

European Convention of Human Rights

Charter of fundamental rights of European
Union

Universal Declaration

Council of Europe
Resolutions/recommendations

Subject matters

Fundamental rights (BUT other instruments) Purely internal situations

Invoking provisions of the Charter without reference to other relevant provisions of EU law Matters

Discrimination

Unfair terms taxation effective judicial protection

(Art. 17, 20, 21, 47 Charter)

Principle of judicial independence

C-134/12, Corpul polițiștilor

Validity of national legislation imposing salary reductions on several categories of civil servants — Charter- ECHR - Failure to give effect to European Union law — Clear lack of jurisdiction

1. The provisions of Article 17(1), Article 20 and Article 21(1) of [the Charter] must be interpreted as precluding wage reductions such as those made by the Romanian State under Law No 118/2010 and Law No 285/2010[...]?.
2. The provisions of Article 15(3) of the [ECHR], under which the Romanian Government was required to notify the Secretary General of the Council of Europe of the intention to take the measure of salary reductions and to specify the period of time prescribed for its application, must be interpreted as being such as to render Law No 118/2010 and Law No 285/2010 invalid?

C-328/15, Andreea Corina Târșia

National regulation providing for the award of a bonus only to academics who obtained a doctorate before the entry into force of this regulation

The principles of equality and [non-discrimination] derived from Union law (Directive 76/207, Directive [2006]/54, Article 6 TEU and Articles 20, 21(1) and 52 of the Charter) can be interpreted as being opposed to regulations such as Law No 330/2009, Government Emergency Ordinance No [1]/2010, Law No. 285/2010, which provide for a difference in treatment between academics who acquired the scientific title of doctor prior to the entry into force of Law No 330/2009, who are in receipt of the doctoral increment of 15 %, and those who acquired that title subsequently, without any reasonable justification?"

C-328/15, Andreea Corina Târșia

The difference in treatment at issue in the main proceedings falls solely within the scope of national law, the interpretation of which is a matter for the national court alone.

Consequently, where a legal situation **does not fall within the scope of European Union law**, the Court does not have jurisdiction to examine it, and the provisions of the Charter which may be relied on cannot of themselves constitute the basis of that jurisdiction.

...many other examples ...

C-496/14, Tamara Văraru

Calculation of the amount of child allowance — Failure to implement EU law

"The provisions of Article 6 of the TEU, Articles 20, 21(l), 24(l), 34(l) [and] (2) [and] 52 of the Charter of Fundamental Rights of the European Union and Article 4 of Regulation (EC) No ... Must be interpreted as precluding national legislation such as GEO [No] 111/2010, which regulates differences in treatment between second, third, etc. children of multiple pregnancy, first children of multiple pregnancy and children of single pregnancy?"

Steps

Is European Union law applicable in this case?

NO => Directive + Charter not applicable

YES => Art. 51 Charter/Explanations of the Charter/

Content of the relevant fundamental right/

see Explanations of the Charter/ECHR to be compared with level of protection offered by EU law

Unclear - *preliminary question* (or NO, CILFIT + CILFIT 2 doctrine, but REASON the rejection - Art. 6 ECHR)

Practical tips for PR

Recommendations to national
courts and tribunals in relation to
the initiation of preliminary ruling
proceedings

2019/C 380/01)

Essential elements

State the relevant matters of fact and of law which lead it to consider that the provisions of European Union law are capable of applying in the present case.

Interpretation of the Charter of Fundamental Rights of the European Union - Art. 51 para. (1) MS implement EU law

Must be stated in a clear and unequivocal manner in the order for reference for PR that a rule of European Union law other than the Charter is applicable to the main proceedings

Romanian Template

8. ... (identification of the legal problem, e.g. how to interpret an EU rule or the existence of an apparent conflict between the national rule and the EU rule or how to apply the EU rule, etc.)
9. ... (concretely how the resolution of the dispute depends on the resolution of this legal issue)
10. ... (brief analysis of previous CJEU case law on the issue in question OR statement that the court has researched and has not identified relevant CJEU case law; if any, brief analysis of how national courts have dealt with the issue in question, possibly existence of divergent solutions)

Template

11. ... (identifying the different circumstances of the present case which make the application of EU law uncertain in the light of the previous CJEU case law described in paragraph 10)

12. ... (if applicable, the existence of a previous preliminary application(s) from Romania on the same issue, already decided by the CJEU or still pending, identification of the difference with it).

(under points 9-12, the parties' submissions as to the relevance of the question of law for the resolution of the dispute or as to the need for a preliminary reference OR the statement that "Although requested, none of the parties to the dispute has expressed a view on ..." may be included, if any).

CJEU's case law

the information contained in the decisions to refer is intended not only to enable the Court to give useful answers but also to give MS governments and other interested persons the opportunity to submit observations, in accordance with Article 23 of the Statute of the CJEU;

It is incumbent on the Court to ensure that this opportunity is provided, bearing in mind that, under that provision, only decisions to refer are notified to the parties concerned (order of 18.04.2013, Adiamix, C-368/12).

Formal aspects

Anonymisation of the case by replacing, for example by initials or a combination of letters, the names of the natural persons mentioned in the application and by concealing elements which could allow those persons to be identified.

2 versions of the Order

E-curia

Expedited/Urgent procedure

Articles 105 to 114 of the Rules of Procedure

1. reasoned request of the referring court - setting out the matters of fact or of law which justify the application of such procedure(s),

OR

2. On its own motion, where that appears to be required by the nature or the particular circumstances of the case.

Expedited/Urgent procedure

1. in the case of a detained/deprived person, when the answer to the question asked is decisive for the situation of that person;
2. in disputes concerning parental responsibility or the residence of young children, where the jurisdiction of the court seised under Union law depends on the answer to the question referred for a preliminary ruling;

Recommendations

„The request for the application of the expedited procedure or the urgent procedure must in any event be submitted in an **unambiguous form** that enables the Registry to establish immediately that the file has to be dealt with in a particular way.

Accordingly, the referring court or tribunal is requested to specify **which of the two** procedures is required in the particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be **included in a clearly identifiable place** in its order for reference or in a separate letter from the referring court or tribunal. 39.

As regards the order for reference itself, it is particularly important that it should be concise where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Case study

Directive 2000/78

C-301/21, Curtea de Apel Alba Iulia și alții, 22.10.2022

C- 644/19, Universitatea Lucian Blaga Sibiu, 8.10.2020

Pendinte

C-645/21, C.C.C., C.R.R., U.D.M. / Tribunalul Cluj

C-644/21, M.I.A., P.R.-M., V.-C.I-C, F.C.R., P (ex. T). Ș-B., D.R., P.E.E., F.I. / Tribunalul Cluj

C- 643/21, F.O.L

C-642/21, Parchetul de pe lângă Tribunalul Bihor,

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C- 643/21, F.O.L

C-642/21, Parchetul de pe lângă Tribunalul Bihor,

C- 301/21, Curtea de Apel Alba Iulia

1. The provisions contained in Article 9 para. (1) of Directive [2000/78] as regards ensuring a judicial procedure "available to all persons who consider themselves wronged by failure to respect the principle of equal treatment" and those contained in Article 47 [first paragraph] of [the Charter] as regards ensuring the right to "an effective remedy and a fair trial", be interpreted as precluding national legislation such as that contained in Article 211(c) of the [Law on social dialogue], which provides that the three-year period for bringing a claim for compensation runs 'from the date of the damage', irrespective of whether or not the claimants had knowledge of the damage (and its extent)?

C- 301/21, Curtea de Apel Alba Iulia

2. The provisions contained in Article 2(1) and (2) and in the final sentence of Article 3(1)(c) of Directive [2000/78] must be interpreted as precluding national legislation such as that contained in Article 1(2) of [Framework Law No. 330/2009], as interpreted [by the decision of the High Court of Cassation and Justice], in so far as [the magistrates concerned] did not have the legal opportunity to request an increase in their employment allowance when they were admitted to the judiciary after the entry into force of [Framework Law No. 2000/78]. 330/2009], which expressly provides that the salary rights are and remain exclusively those provided for in [that] law, thus discriminating against their colleagues in terms of remuneration, including on the basis of age, meaning in fact that only the older magistrates who were appointed to their posts before January 2010 (who obtained court judgments in the period 2006-2009, the provisions of which were clarified during 2019 on the basis of [the decision of the High Court of Cassation and Justice], were granted retroactive payment of the financial entitlements (similar to those claimed in the application in the present case) during December 2019/January 2020 for the period 2010-2015, even though during that period [the judges in question] were also judges and performed the same work under the same conditions and in the same institution?

C- 301/21, Curtea de Apel Alba Iulia

3. Are the provisions of Directive [2000/78] to be interpreted as precluding discrimination only where it is based on one of the criteria set out in Article 1 of that directive or, on the contrary, do those provisions, possibly supplemented by other provisions of European law, generally preclude one employee from being treated differently from another in respect of pay, on the ground that he performs the same work for the same employer, for the same period and under the same conditions?"

C- 301/21, Curtea de Apel Alba Iulia

Article 2(1) and (2) of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, must be interpreted as not applying to national legislation which – as interpreted in binding national case-law – leads to a situation in which the remuneration of certain judges appointed after that legislation entered into force is lower than that of judges appointed before that legislation entered into force, where there is no resulting direct or indirect discrimination on grounds of age.

Directive 2000/78 must be interpreted as precluding discrimination only where it is based on one of the criteria referred to expressly in Article 1 of that directive.

C- 644/19, Universitatea Lucian Blaga Sibiu,

1. Articles 1, 2(2)(b) and 3 of Directive 2000/781 [and] Clause 4 of the Framework Agreement on fixed-term work concluded between ETUC[,] UNICE [and] CEEP, implemented by Council Directive 1999/70/EC of 28 June 19992 , must be interpreted as meaning that a measure such as that at issue in the main proceedings, which allows an employer to provide that persons who have reached the age of 65 may be retained in their posts as employees with due regard for their pre-retirement rights, only if they are doctoral supervisors, thereby disadvantaging other persons in the same situation who would be doctoral supervisors if there were vacancies and they met the requirements of professional performance, and to impose on persons who are not doctoral supervisors, for the same academic activity, fixed-term employment contracts concluded successively, with a system of 'hourly pay' lower than that granted to the senior academic, constitutes discrimination within the meaning of those provisions?

C- 644/19, Universitatea Lucian Blaga Sibiu,

2. Can the overriding application of EU law (principle of supremacy of European law) be interpreted as allowing the national court to set aside the application of a final decision of the national court in which it has been established that Directive 2000/78/EC has been complied with in the factual situation in question and that there is no discrimination?"

C- 644/19, Universitatea Lucian Blaga Sibiu,

Articles 1 and 2 of Directive 2000/78/EC (...) must be interpreted as not applying to a national rule under which, as between teachers of an academic institution who continue to practise their profession after reaching legal retirement age, only teachers who are doctoral supervisors may retain their status as full professors, whereas teachers who are not doctoral supervisors may conclude with that institution only fixed-term contracts of employment which are less remunerative than those granted to full professors.

Clause 4(1) of the Framework Agreement on fixed-term work, contained in the Annex to Directive 1999/70/EC concerning the Framework Agreement on fixed-term work, must be interpreted as precluding the application of national legislation under which, among the teaching staff of an academic institution who continue to practise their profession after reaching the legal retirement age, only those teaching staff who are doctoral supervisors may retain their status as permanent teaching staff, whereas teachers who are not doctoral supervisors may conclude with that institution only fixed-term contracts of employment, which are remunerated at a lower rate than that granted to permanent teachers, in so far as the first category of teachers is composed of permanent staff comparable to those in the second category and the difference in treatment, which is manifested in particular by the remuneration system referred to, is not justified by an objective reason, which it is for the referring court to ascertain.

Pending

C-642/21, Parchetul de pe lângă
Tribunalul Bihor

C-643/21, F.O.L./Tribunalul Cluj

C-642/21, Parchetul de pe lângă Tribunalul Bihor

Must Article 9(1) of Council Directive 2000/78/[E]C(...) ¹ as regards the aspect of ensuring that judicial procedures are 'available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them', and the first paragraph of Article 47 of the Charter (...), as regards the aspect of guaranteeing the right to 'an effective remedy [and] a fair ... hearing', be interpreted as precluding national legislation, such as that laid down in Article 211(c) of Legea dialogului social nr. 62/2011 (Law No 62/2011 on social dialogue), which provides that the three-year time limit for bringing a claim for compensation runs 'from the date on which the damage occurred', irrespective of whether or not the claimant was aware of the occurrence of the damage (and the extent thereof)?

C-642/21, Parchetul de pe lângă Tribunalul Bihor

Must Article 2(1) and (2) of Council Directive 2000/78/[E]C(...) together with Article 3(1)(c), *in fine*, of that directive, be interpreted as precluding national legislation, such as that laid down in Article 1(2) of Legea-cadru nr. 330/2009 on the uniform remuneration of staff paid from the public purse), as interpreted by Decizia nr. 7/2019 (Decision No 7/2019) (published in Official Journal of Romania – No 343 of 6 May 2019), given by High Court of Cassation and Justice, Romania), ruling on an appeal on a point of law, in circumstances in which the claimant did not have the legal possibility of requesting an increase in his or her employment allowance on entering the judiciary at a date after the entry into force of [Framework Law No 330/2009], a legislative act which expressly provided that remuneration rights are to be and remain exclusively as provided in [that] law, thus creating remuneration discrimination as compared with his or her colleagues, including on the basis of the criterion of age, which means in fact that only older judges, who were appointed before January 2010 (who benefited from court rulings in the period from 2006 to 2009, the operative parts of which were subject to interpretation in 2019 pursuant to Decision [No 7/2019 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice)]), received retroactive payment of remuneration rights (similar to those sought in the action which forms the subject matter of the present proceedings) during December 2019 and January 2020, in respect of the period from 2010 to 2015, even though during that period the claimant also acted as a prosecutor and performed the same work, under the same conditions and in the same institution?

C-642/21, Parchetul de pe lângă Tribunalul Bihor

Must the provisions of Directive 2000/78/EC be interpreted as precluding discrimination only where it is based on one of the criteria referred to in Article 1 of that directive or, on the contrary, do those provisions, possibly supplemented by other provisions of EU law, generally preclude one employee from being treated differently from another, in respect of remuneration, where he or she performs the same work, for the same employer, [during the] same period, and under the same conditions?

Reject of the PR

Lack of proper reasoning

- Cilfit 1/**Cilfit 2**
- Art. 6 ECHR - BIO FARMLAND BETRIEBS S.R.L. v Romania
- 13.07.2021, Spasov v. Romania

Conclusions

- Object of the referral – NO – domestic law of other instruments for protecting HR
- NO – just the Charter provisions on their own
- Sufficient reasoning in the referral order
- Proper reasoning also for rejection of the referral to CJEU

