

**THE ANTI-DISCRIMINATION DIRECTIVES
2000/43/EC AND 2000/78/EC
IN PRACTICE**

**The role of national judge and
preliminary references**

Trier, 14 November 2011

The role of national judge

- National judge = Union judge
- To ensure the protection of rights provided for in EU law
- To ensure the effectiveness of EU law

EU dimension

- Proceedings concerning disputes falling within the scope *ratione materiae* of EU law
- Problems with determining the material scope of EU law (C-273/97 Sirdar; C-285/98 Tanja Kreil)

EU dimension

Cross-border element

- Internal market freedoms
- EU citizenship
- Return to home country

No cross-border element

- National rules implementing EU law (esp. directives)
- General principles of EU law
- National rules on asserting claims based on Union law

Instruments for pursuing the tasks of national courts – EU court

- Compatibility review of national law with Union law and setting aside national rules incompatible with UE law
- Decisions based on directly applicable EU rules
- Directive-oriented interpretation
- Union-oriented interpretation
- Applying sanctions
- Providing access to court

Aims of preliminary reference procedure

- CJEU perspective

- Providing uniform interpretation of Union law (166/73 Rheinmühlen)
- Making it possible for national courts to decide a case (16/65 Schwarze)
- Protecting individual rights based on EU law (26/62 Van Gend)

Aims of preliminary reference procedure

- national courts' perspective

- (formally) Help in providing interpretation of EU law
- (de facto) Decision on the compatibility of national rules with EU law
- Eliminating burdens based on national rules or practice
- Supporting a decision of a lower instance court with the CJEU's authority

- Review of the proper transposition of directives (C-144/04 Mangold; C-388/07 Age Concern England)
- Review of the compatibility of national rules with directives (C-415/05 Palacios de la Villa; C-88/08 Huetter; C-229/08 Wolf; C-499/08 Ingeniørforeningen; C-45/09 Rosenblatt; C-356/09 Kleist)
- Interpreting the meaning of certain provisions of the directive (C-31/05 Chacon Navas; C-109/09 Kumpan; C-147/08 Roemer; C-159/10 Fuchs; C-447/09 Prigge)

- Determining the material scope of directives (C-267/06 Maruko; C-427/06 Bartsch; C-391/09 Vardyn/Wardyn)
- Determining direct effect (C-268/06 Impact; C-341/08 Petersen) and possible application (C-555/07 Küçükdeveci; C-250/09 Georgiev; C-297/10 Hennigs)
- Determining requirements under the principle of effectiveness (C-268/06 Impact; C-246/09 Bulicke)

Division of tasks between national court and the CJEU

- Determination of facts – national court
- Preliminary identification of the problem – national court (CJEU can reformulate the question)
- Assessment of the need to refer – national court (CJEU in exceptional circumstances)
- Interpretation of EU law – CJEU (national court can only propose a possible solution)
- Application of the interpretation in the main proceedings – national court (5/77 Tedeschi/Denkavit)

Subject of the reference

- According to Article 267 TFUE – interpretation and validity of EU law
- Practically – interpretation of EU law and review of compatibility between national rules and EU law
- Interpretation (compatibility review) of rules essential for the case to be decided (C-310/10 Agafitei)

Form of the reference

- National court determines the content, number and subject of questions
- Questions have to be as clear and precise as possible
- Must be reasoned, concise, and complete, so as to allow the CJEU and those, who will be notified about the ruling (member states, the Commission, and in certain cases, the Council and the EP), to understand the factual and legal background of the case

How to form a reference?

- **(1)** Whether **(2)** a given rule of EU law **(3)** must be interpreted as meaning that **(4)** [how the national court understands a given provision of EU law]?
- Additionally **(5)** in so far as [...] OR in circumstances such as [...]
- **(1)** Does **(2)** [a given rule of national law or a given fact] **(3)** mean [...] as provided in [a given UE law rule]?
- General and more specific questions (C-159/10 Fuchs)

References on the interpretation

(1) Does **(2)** Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, **(3-4)** include within its protective scope a worker who has been dismissed by her employer **(5)** solely because she is sick?

C-31/05 Chacon Navas

Reference on the compatibility

(1) Must **(2)** Article 2(5), Article 2(4) and/or Article 6(1), first sentence, of Directive 2000/78 and/or the general Community-law principle which prohibits discrimination on grounds of age **(3)** be interpreted as **(4)** precluding rules of national law which recognise an age-limit of 60 for pilots, **(5)** established by collective agreement for the purposes of air safety?

C-447/09 Prigge

Types of preliminary rulings

- Interpreting EU rules that are applied directly by national courts
- Explaining the meaning of notions used in acts of EU law
- Deciding on the admissibility of a given application of national rules
- Providing national courts with guidelines on the compatibility review of national rules with EU law
- Demanding EU-oriented interpretation
- On the principle of effectiveness

Effects of preliminary rulings

- The referring court is bound by the ruling (166/73 Rheinmühlen)
- The interpretation binds other courts (C-8/08 T-Mobile Netherlands)
- Ruling effective *ex tunc* (the day of entry into force of the interpreted rule), unless the CJEU restricts its temporal effects
- Any decision inconsistent with the CJEU interpretation is defective and thus invalid (Polish Supreme Court 8.12.2009, I BU 6/09)