The Role of the National Judge in Applying EU Anti-Discrimination Law

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Part 1

The role of national courts in applying EU law – an outline
1.1 A directive as a source of EU law

- A directive is binding, as to the result to be achieved, upon each Member State to which it is addressed (Art. 288 TFEU – sources of law)

- However, a directive leaves to the national authorities the choice of form and methods

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1.1 A directive as a source of EU law

- Implementation (broad meaning): all actions that must be taken by Member States to achieve the result defined in the directive
  - Implementation time: left to the Member States
  - When the implementation time has expired, the directive is addressed to all subjects of the national legal system
  - Directives become binding not FOR but IN Member States

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1.1 A directive as a source of EU law

- Transposition of directives: transfer or transformation of directive provisions into rules of national law through the legislation of normative acts (e.g. LC)
  - Application of directives = application of national law correctly implementing the directive
  - In the absence of correct implementation: application means that national bodies apply a directive directly

1.2. The national judge and the principle of direct effect - outline

- Direct source of EU law
  - With their entry into force, EU law provisions become an integral part of the Member States' legal systems

- Direct applicability
  - EU law provisions provide a legal basis for actions of national authorities (EU law in its entirety)

- Direct effect (case 26/62 van Gend)
  - Provisions of EU law may constitute an autonomous source of individual rights and obligations (legal entities and individuals)
  - Such provisions must be sufficiently precise and unconditional and must not require any subsequent action on the part of national or EU authorities
  - Vertical and horizontal situation
1.2. The national judge and the principle of direct effect - outline

- Provisions of the Treaty e.g. Article 157 TFEU – equal rights for men and women in respect of working conditions and pay (case 43/75 Defrenne II)
- Provisions of the Charter of Fundamental Rights – Article 52(5) – distinction between rights (freedoms) and principles
  - The Charter provisions, 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.
  - A contrario rights and freedoms can be directly effective

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1.2. The national judge and the principle of direct effect - outline

- Provisions of directives
  - Provisions of a directive may be relied upon by an individual in a vertical relationship where they impose precise obligations on Member States (case C-41/74 van Duyn), but not otherwise [penalty for failure to implement]
  - Relying on such provisions in relations between individuals is impossible – horizontal situation (case C-152/84 Marshall), but the CJEU interprets the notion of State broadly in its case-law (case C-103/88 Fratelli Constanzo; case C-243/09 Fuss)
1.3. The national judge and the application of the principle of primacy of EU law - outline

- Hammered out in the case-law of the Court of Justice (case C-16/64 Costa v Enel)
  - EU membership precludes Member States from giving primacy to national measures over EU law. No national measures can prevail over rights stemming from the Treaty.
- Principle of unrestricted scope. All rules of EU law have primacy. The consequences of this principle apply to all rules of national law, even constitutional ones.
- Rules of EU law cannot be subject to constitutional scrutiny.
- All rules of EU law have primacy, regardless of whether they were enacted before or after conflicting provisions of national law.

1.3. The national judge and the application of the principle of supremacy of EU law - outline

- Conflicting provisions:
  - Primacy in validity = must the national provision be repealed?
  - Primacy in applicability = confirmed in case-law (case C-106/77 Simmenthal)
- Incompatibility does not render national provision void, but merely precludes its application in specific cases (this does not mean that the provision is entirely inapplicable – its applicability is restricted to areas outside the scope of EU law)
1.3. The national judge and the application of the principle of supremacy of EU law - outline

- National courts are obliged to disapply any conflicting provisions of national law. They are not obliged to seek opinion of higher courts, and making a reference to the CJEU under Article 267 TFEU for the interpretation of provisions of EU law is optional in nature (case C-555/07 Kęcükdeveci, para 55)
  - NB: national legislation does not always provide national courts with such powers in case of conflicting rules, in particular in case of unconstitutionality of legislation

- Limits to the principle of primacy: principles of legal certainty and respect of decisions rendered by national authorities
  - Issues concerning the possibility of review of final administrative decisions (case C-453/00 Kühne & Heitz) and judicial decisions (case C-234/04 Kapferer)

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1.3. The national judge and the application of the principle of supremacy of EU law - outline

- By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be set aside.
  - (case C-144/04 Mangold, para 77)
1.3. The national judge and the application of the principle of supremacy of EU law - outline

- 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.
  - (case C-282/10 Dominguez, para. 23).

1.4. The national judge and interpretation consistent with EU law

- Legal concept designed to ensure the effectiveness (effet utile) of EU law
- First used in a judgement concerning the directive on equal treatment for men and women in employment relationships (case 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
  - NB: case-law Inter-Environnement Wallonie – Member States should refrain from adopting provisions inconsistent with the aim of directives during periods provided for their transposition and during transition periods (case C-463/10 Aftodioikisi Aitolosakarnanias)
1.4. The national judge and interpretation consistent with EU law

- **Scope of obligation:**
  - When national courts apply domestic law, they are bound to interpret it, as far as possible, in the light of the wording and the purpose of the directive 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 rule on the disputes before them.
  - National courts must 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.

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1.4. The national judge and interpretation consistent with EU law

- **Limits to the principle of compatible interpretation:**
  - 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. (case 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.
The national judge and application of primacy principle – conflict of rules

- Can a direct reference be made to primary law, stipulated by the Charter of Fundamental Rights, fine-tuned by provisions of the directive in the case of a dispute between individuals (horizontal dispute)?
  - Reference for preliminary ruling in case C-176/12, AMS (pending)
- What will the judge do if national law is incompatible with the directive, backed up by provisions of the Charter, and if no compatible interpretation is possible?

Scope of Charter of Fundamental Rights – recent case-law

- Article 51 CFR - The provisions of the Charter are addressed to the Member States only when they are implementing EU law
- CJ Judgment in case C-617/10, Åkerberg Fransson:
  - Because of the fact that the national legislation upon which obligations of individuals are based have not been passed for the purpose of transposition of the directive, but their application is a sanction for the infringement of the directive, such provisions therefore should be considered as application of EU law.
Part 2

- The role of national courts under the preliminary ruling procedure

2.1. The Court of Justice of the EU – introductory remarks

- Article 19 TEU:
  - CJEU includes Court of Justice, the General Court and specialised courts
  - CJEU ensures that, in the interpretation and application of the Treaties, the law is observed
  - The Court of Justice 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
2.1. The Court of Justice of the EU – introductory remarks

- Legal framework:
  - Reform of procedure in 2012 r.:

- CJ – composition and structure
  - 27 Judges (including the president and vice-president of the CJEU)
  - 8 Advocates General (including First Advocate General)
  - Chambers of five Judges (composition: 5 judges, chambers I-V)
  - Chambers of three Judges (composition: 4 judges, chambers VI-X)

- CJ – formations of the Court
  - Full Court - (27 judges; 0.19% cases)
  - Grand Chamber - (15 judges, 8.99% cases) [since 1 November 2012]
  - Chambers of five Judges - (55.11% cases)
  - Chambers of three Judges - (34.42% cases)
  - President of the Court – (2.29% cases)
2.2. Preliminary ruling procedure – introductory remarks

- **Article 267 TFEU**

  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.

  If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

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2.2. Preliminary ruling procedure – introductory remarks

- **Categories of references for preliminary ruling under the Treaty:**
  
  - Preliminary ruling on the interpretation of EU law

- **Judgment in van Gend:**
  
  - Preliminary ruling on direct impact of EU law
  
  - Preliminary ruling on the relation between national law and EU law
2.2. Preliminary ruling procedure – introductory remarks

- Procedures for dealing with preliminary references:
  - Ordinary preliminary ruling procedure (Arts. 93-104 RoP)
  - Expedited preliminary ruling procedure (Arts. 105-106 RoP)
  - Urgent preliminary ruling procedure (PPU) (Arts. 107-114 RoP)

- Common procedural provisions (Arts. 43-92 RoP)

2.3. The dynamics of the role of the national judge under the preliminary ruling procedure

- Request for a preliminary ruling results in
  - Interpretation of the primary and secondary EU law
  - Control of the relationship between national law and EU law
  - Control of validity of secondary EU law

- The national judge has the power to:
  - Implement concepts and principles of EU law
  - Grant legal remedies
  - Impose sanctions
2.3. The dynamics of the role of the national judge under the preliminary ruling procedure

- National court categories under Article 267 TFEU
  - Any court or tribunal may request a preliminary ruling
  - Courts or tribunals against whose decisions there is no judicial remedy under national law are obliged to bring the matter before the CJEU – basis of the preliminary rulings system – aims at uniform interpretation of Union law in all Member States and avoiding its wrong application
  - Lower instance courts or tribunals – facultative nature
    - cf. case Foto-Frost – they cannot rule on the validity of secondary acts – must bring the matter before the CJEU

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2.3. The dynamics of the role of the national judge under the preliminary ruling procedure

- National courts against whose decisions there is a judicial remedy under national law may consider the validity of a community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure.

- On the other hand, those courts do not have the power to declare acts of the Community institutions invalid [...] (case C-314/85, Foto Frost)
The concept of court

- Bodies implementing judicial decisions
- Adjudicate under an act and not agreement of parties
- Resolve disputes between parties
- Work on a permanent basis
- Adjudicate on the basis of law and not only principles of equity
- Independent while adjudicating
- Disciplinary courts – permitted (C-246/80 Broekmeulen)
- The following cannot make references for a preliminary ruling:
  - non-court, legislative, administrative, advisory bodies,
  - arbitration courts, which adjudicate under agreement between the parties
  - unless the law of Member States permits control of common courts over decisions of arbitration courts. In such situations, a court hearing a claim can make a reference for a preliminary ruling (C-126/97, Eco Swiss China Ltd)
- Quid bodies established to combat discrimination?
  - Judgment in Belov, C-394/11, Komisia za zashtita ot diskriminatsia - NO
  - Judgment in Impact, C-268/08, Labour Court - OK
  - Case Z, C-363/12, pending, Equality Tribunal - ?

2.4. How to word a question?

- It is essential that questions referred by national courts allow for an answer to be given (case C-14/86 Pretore di Salo)
- In its reference, a national court may not ask for the interpretation of national law
- In its reference, a national court may not ask about the compatibility of a national provision with EU law
- Article 94 RoP – Content of the reference for a preliminary ruling
2.4. How to word a question?

- **In the event of questions having been improperly formulated:**
  - CJEU will choose those elements that could be subject to a preliminary ruling:
  - “The court is free to extract from all the factors the elements of Union law which, having regard to the subject-matter of the dispute, require an interpretation or an assessment of validity” (case C-83/78 Pigs Marketing Board)
  - Article 101 RoP – Request for clarification: CJEU may request clarification from the referring court or tribunal within a time-limit prescribed by the Court (!)
  - Article 62(1) RoP – The Judge-Rapporteur or the Advocate-General may request the parties to submit all information relating to the facts, documents or other particulars
  - Article 62(2) RoP - The Judge-Rapporteur or the Advocate General may send to the parties questions to be answered at the hearing

2.5. Procedural aspects of national law and proceedings before the CJ

- Making a reference – sole competence of national courts (cf. case C-137/08).
- National courts are autonomous – courts are not compelled by parties’ contentions (case C-283/81 CILFIT)
- National law decides as to whether the order for reference may be challenged and as to the time of referral (i.e. before or after such order becomes final)
- Referring court can withdraw the question at any time before the CJEU delivers its ruling
- **Article 100 RoP:** The Court shall remain seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served.
- National law provides for a legal basis to stay the proceedings
- References by national courts are made directly under Article 267 TFEU
2.5. Procedural aspects of national law and proceedings before the CJ

- Decision against which there is a judicial remedy under national law:
  - Article 267 TFEU does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law.
- In a situation where a case is pending, for the second time, before a court sitting at first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 267 TFEU, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court (case C-210/06 Cartesio, para. 94).

- It is for this court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

2.6. The admissibility of preliminary references

- “The duty of the Court of Justice is to supply all courts in the Community with the information on the interpretation of Community law which is necessary to enable them to settle genuine disputes which are brought before them. Jurisdiction of the ECJ does not involve answering questions […] which are not necessary to resolve the dispute.”
  - (case 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 C-379/98 Preussen Elektra, para. 38; case C-169/07 Hartlauer, para. 24; case C-544/07 Rüffler, para. 36)
2.6. The admissibility of preliminary references

- The Court may refuse to rule on a question referred by a national court only:
  - where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose,
  - where the problem is hypothetical
  - where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.”

  (case C-379/98 Preussen Elektra, para. 39; C-221/07 Zablocka-Weyhermüller, para. 20; joined cases C-222/05 and C-225/05 van der Weerd, para. 22)

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2.6. The admissibility of preliminary references

- In the light of Article 53(2) RoP, where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.
2.6. Absence of CJEU competence to answer the questions referred

- Boundary between the scope of national and EU law – no link to EU law or national measure outside the scope of EU law
  - Case C-299/95 Kremzow – freedom of movement
  - Case C-328/04 Vajnani – use of totalitarian symbols
  - Case C-434/11 Corpul Național – legality of national provisions introducing pay reductions for numerous categories of civil servants in the light of the Charter of Fundamental Rights or the European Convention on Human Rights
  - Case C-333/09 Noël – different treatment of workers under the system of redundancies for economic reasons

2.7. Rulings in the preliminary reference procedure

- Types of decisions the Court may render:
  - Judgement
  - Reasoned order – Article 99 RoP
    - A 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 doubt
- The scope of the answer given by the Court
  - Full interpretation
  - Leaving the final decision or interpretation to the national court
    - Case C-276/06 Maruko
    - Case C-391/09 Runevič – Vardyn, Wardyn
2.7. Rulings in the preliminary reference procedure

- Effects of preliminary rulings:
  - Bind the court in the case at hand, *inter partes*, *ex tunc*, i.e. since the entry into force of a measure ruled upon
  - Bind other courts hearing that case on appeal
  - Rulings which annul a secondary act of EU law are binding in other cases
  - The interpretation of EU law is binding *erga omnes*

2.8. Varia

- Practical aspects of making a request for a preliminary ruling
  - Text of the question referred (order for reference and the case file)
  - Court Registry confirms the lodgement of a request (national court – confirmation of information about the case – information about the parties and their representatives is especially important)
  - Copies of written observations are communicated to the courts
  - Information about the date of the hearing (or AG’s opinion)
  - Communication of the report of the hearing [these reports have been abolished under the recent changes of the CJEU Statute and RoP]

- Information about the delivery of the judgement
- Service of the copy of the judgement (in the language of procedure)
- Decisions on costs of preliminary procedure are left to national courts (CJEU – may rule on the costs of appearance or representation)
- National courts are requested to send information on the action taken upon the ruling in the main proceedings, and to communicate the referring court’s or tribunal’s final decision
- //NB: Documents are lodged and serviced electronically: decision on the e-curia application//