



The role of the national judge in applying the EU anti-discrimination directives: relationship with national legal orders and the preliminary ruling procedure

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*The views expressed in this presentation
are strictly personal*

Focus of the presentation

1. Intro: national courts and the EU Court of Justice
2. The key concepts: direct effect, primacy, indirect effect, State liability.
3. The preliminary ruling procedure: (i) the fundamental principles; (ii) the use of the procedure
4. *Conclusions + QQ&AA*

I. Intro:

National courts and the Court of Justice of the EU

- **ECJ, Opinion 1/09, paras. 65-69**
 - '[T]he founding treaties of the EU, unlike ordinary international treaties, established a *new legal order*, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals The essential characteristics of the EU legal order thus constituted are in particular its *primacy* over the laws of the Member States and the *direct effect* of a whole series of provisions which are applicable to their nationals and to the Member States themselves
 - As is evident from Article 19(1) TEU, the *guardians of that legal order* and the judicial system of the EU are the Court of Justice and the courts and tribunals of the Member States. ...
 - [T]he Member States are obliged, ... to ensure, in their respective territories, the application of and respect for EU law In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law
 - The national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed'
- **GC, Tetra Pak II(T-51/89), para. 42:** '... when applying [EU law] ... the national courts are acting as EU courts of general jurisdiction.'

The principle of procedural autonomy

- See, e.g., Unibet (C-432/05), paras. 38-43
 - Under the principle of cooperation laid down in [Article 4(3) TEU], it is for the Member States to ensure judicial protection of an individual's rights under EU law
 - [I]n the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to ***designate the courts*** and tribunals having jurisdiction and ***to lay down the detailed procedural rules*** governing actions for safeguarding rights which individuals derive from EU law ...
 - In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (***principle of equivalence***) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (***principle of effectiveness***).
- See., also, Factortame I (C-213/89): a national court has ***a duty to grant interim relief*** to safeguard alleged EU rights of individuals until the decision of the ECJ on the interpretation of EU law is available, and where a rule of national law would deny such relief, to set aside that rule

II. The key concepts:

(a) Direct effect

- Fundamental ruling: **Van Gend en Loos (26/62)**:
 - The possibility to directly invoke rights conferred by EU law before national courts. (it is not necessary for the Member State to adopt or implement the EU provision into its internal legal system).
 - To have direct effect, EU provisions must be precise, clear and unconditional and that they do not call for additional measures.

- Provisions which may have direct effect: in primis, Treaty provisions, Regulations ... and, under certain conditions, Directives:
 - When not transposed, deadline for transposition has expired and, in principle, only against Member States' authorities (See, Van Duyn (41/74), Ratti (148/78), Foster (C-188/89).) [s.c. *vertical* direct effect]
 - In principle, no s.c. *horizontal* direct effect of non-transposed directives [individual vs individual] (See, Marshall (152/84), Faccini Dori (C-91/92).)
 - *BUT*, see Küçükdeveci (C-555/07): horizontal direct effect of the principle of non-discrimination on grounds of age, which constitutes a specific application of the general principle of equal treatment, which is given expression in Directive 2000/78.
 - See also ASM (C-176/12)

(b) Primacy

- Fundamental rulings: **Costa v ENEL (6/64)**, **Simmenthal (106/77)**:
 - EU provisions have precedence over national laws.
 - If a national rule is contrary to a EU provision, Member States' authorities (including national courts) must apply the EU provision, disapplying in case any contrary national provision (irrespectively of whether that national provision was adopted before or after the EU provision in question).

(c) Indirect effect

(or interpretation in conformity)

- Fundamental rulings: **Von Colson (14/83)**, **Marleasing (C-106/89)**, **Webb (C-32/93)**, **Pfeiffer (C-397/01)**
- National law must be interpreted, as far as possible, in the light of the wording and purpose of the EU provisions concerned (usually, an unimplemented or wrongly implemented directive), so as to achieve the result sought by those provisions
- Limit: no interpretation *contra legem*

(d) State liability

- Fundamental rulings: **Francovich and Bonifaci (C-6 and 9/90)**, **Brasserie du Pêcheur and Factortame (C-46 and 48/93)**, **Köbler (C-224/01)**
- Member States are responsible vis-à-vis individuals for breaches of EU law committed by its organs (including national courts)
- Conditions for reparation: (1) the EU rule infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious; and (3) there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the individual.
- As to the second condition, a decisive test for finding a breach sufficiently serious is whether the Member State manifestly and gravely disregarded the limits on its discretion. In order to determine whether this condition is satisfied, factors to be taken into consideration include: clarity and precision of the rule breached, the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by the EU institution may have contributed towards the omission and the adoption or retention of national measures or practices contrary to EU law.

The preliminary ruling procedure: **(i) the fundamental principles**

- To ensure the effective and uniform application of Union legislation and to prevent divergent interpretations, the national courts may refer to the ECJ and ask it to clarify a point concerning the interpretation of Union law or the validity of an act of the Union

- Which bodies can refer? *courts or tribunals of Member States*
 - EU notion. Elements taken into consideration: permanent body, independence, compulsory or voluntary jurisdiction, decisions taken on the basis of legal rules, body includes lawyers, settling disputes, etc.

 - See e.g. *Syfait* (C-53/03); *Torresi* (C-58 and 59/13)

- Object of the reference: interpretation of EU Treaties, interpretation or validity of EU acts (e.g. regulations, directives, decisions, international agreements entered into by the Union, other Union acts having legal effects, etc)
 - **NO**: acts of the Member States, principles of public international law, acts of private persons
 - See Case C-370/12, *Pringle*

- The answer to the question(s) referred by the national court to the ECJ must be **necessary** for solving the case before the national court.

- National courts **may** refer (margin of discretion of domestic courts).
 - Parties to the proceedings may ask or suggest the domestic court to refer, but it is the domestic court's decision whether and what to refer
- However, a national court **must** refer the question
 - if it is a court of last instance (Art. 267 TFEU), except:
 - When the correct interpretation is so obvious as to leave no scope for any reasonable doubt: *acte clair* (Case 283/81, CILFIT); or
 - When there is already a clear Union jurisprudence: *acte éclairé* (Case 66/80, ICC)
 - if the question concerns the validity of a Union act (Case 314/85, Foto-Frost)
- National litigation is suspended until the ECJ has given its preliminary ruling
- The national court to which the judgement is addressed is, in deciding the dispute before it, **bound** by the interpretation given in the ECJ judgement. The ECJ judgment likewise binds other national courts before which the same problem is raised.

■ Some modifications in the Treaty of Lisbon

- **Fusion of the pillars:** full jurisdiction on JLS (with one exception, and temporary mechanism) /// CFSP still largely excluded
- **EU Charter of fundamental rights** becomes binding (Article 51(1) of the Charter: provisions are applicable to “*the Member States only when they are implementing Union law*”)
 - See Case C-617/10, Åkerberg Fransson and Case C-399/11, Melloni
 - See Order of the Court in Case C-206/13, Siragusa:

the concept of ‘implementing Union law’, as referred to in Art. 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other (...)

In order to determine whether national legislation involves the implementation of EU law for the purposes of Art. 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it (...)

In particular, the Court has found that fundamental EU rights could not be applied in relation to national legislation because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings

The preliminary ruling procedure:

(ii) the use of the procedure

- Seeking interpretation of EU provision...
 - to apply directly that provision in the main proceedings (e.g. 149/77, Defrenne, and C-167/12, CD)
 - to set aside national rules incompatible with EU rules (e.g. C-530/13, Schmitzer)
 - to interpret and apply national law, where possible, in conformity with EU law (e.g. C-282/10, Dominguez)
 - to check whether a given EU directive has been properly transposed (e.g. C-144/04, Mangold, and C-246/09, Bulicke)
 - to interpret EU secondary law in conformity with EU primary law (e.g. C-432/07, Sturgeon)
 - to clarify the consequences of an eventual finding of incompatibility between a national measure and a provision of EU law (e.g. C-378 to 380/07, Angelidaki) or clarify the principles according which it should assess a case before it (e.g. C-159/10, Fuchs)
- ... or inquiring on the validity of EU legislation (e.g. C-236/09, Test-Achats, and C-363/12, Z)

■ Typical questions from national courts, among others

- whether [EU provision] is sufficiently clear, precise and unconditional to have direct effect (e.g. C-595/12, Napoli)
- whether [EU provision or principle] must be interpreted as precluding national legislation which [description of the national provisions] (e.g. C-595/12, Napoli; C-45/09, Rosenblatt)
- whether national rules such as those at issue in the main proceedings fall within the scope of [EU directive] (e.g. C-388/07, Age Concern)
- whether national rules which [description] constitute discrimination on the grounds of [...] prohibited by [directive/treaty provision] (e.g. C-356/09, Kleist)
- whether [EU provision] must be interpreted as requiring Member States to ... (e.g. C-388/07, Age Concern)
- whether [EU directive] is applicable to a situation such as that in the main proceedings (C-411/05, Palacios de la Villa) ... and, if so, whether the national measure [e.g. discriminatory measure] may be justified (e.g. C-88/08, Hütter) or whether it is proportioned (e.g. C-229/08, Wolf)

- The ECJ may, inter alia,
 - simply provide the requested interpretation of EU law (e.g. C-149/10, Chatzi);
 - (de facto) decide on the compatibility of national law with EU law (e.g. C-571/10, Kamberaj);
 - provide guidance so that it is the national court that ultimately takes a decision on the compatibility of national law with EU law (e.g., C-73/08, Bressol; C-267/06, Maruko; and C-147/08 Römer).

■ How to draft an order for reference

→ See **Recommendations from the Court of Justice to national courts and tribunals in relation to the initiation of preliminary ruling proceeding**

- Revised in **2012** (OJ 2012 C 338, p. 1 /// Court's web-site)
- Keep in mind:
 - Only order for reference (not the annexes!) translated into all official languages and notified to interested parties.
 - Keep order simple, clear and precise. Include all relevant and helpful information for the Court but avoid superfluous detail.

■ Recent developments regarding admissibility

■ *Purely internal situations*

- V. Opinion of A.G. Wahl in Venturini, Joined cases C-159/12, C-160/12 and C-161/12;
- Order of the Court in Case Paola C., C-122/13;
- Order of the Court in Case Tudoran, C-92/14.

Conclusions

QQ & AA