

**EU GENDER EQUALITY LAW
SEMINAR FOR MEMBERS OF
THE JUDICIARY**

**Vilnius, 2-3 June 2016
National Courts
Administration**



This training session is commissioned under the European Union's Programme for Employment and Social Solidarity – PROGRESS (2007-2013).

Assoc. Prof. Dr. Danutė Jočienė

Justice of the Constitutional Court of the Republic of Lithuania

Former Judge of the ECtHR (2004-2013)

**THE ROLE OF THE NATIONAL JUDGE IN APPLYING THE EU EQUALITY DIRECTIVES:
RELATIONSHIP WITH NATIONAL LEGAL ORDERS AND THE PRELIMINARY RULING**

PROCEDURE/EUROPEAN CONVENTION ON HUMAN RIGHTS STANDARDS

EU Fundamental Charter on Rights and Freedoms

- For a long time, the legal basis for fundamental rights at the European Union level consisted essentially of the reference made in the Treaties to the European Convention on Human Rights;
- The Charter of Fundamental Rights of the EU has now been legally binding and it is the main legal document for the Protection of Human Rights in the EU.

Treaty on European Union (TEU):

- **Article 2:**
- „The Union is based on the values of respect for human dignity, freedom, democracy, **equality**, the rule of law and respect for human rights [...]“.
- **Article 6 (ex Article 6 TEU):**
- The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], **which shall have the same legal value as the Treaties.**
- The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- **Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.**

EU Charter of Fundamental Rights

- **Article 20 — Equality before the law:**
 - - everyone is equal before the law;
 - - it is a general principle of law which is included in all European constitutions and
 - - has also been recognised by the CJEU as a basic principle of Union law.

EU Charter of Fundamental Rights

- **Article 21 — Non-discrimination:**
 - - any discrimination based on any grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or **sexual orientation** is prohibited;
 - - discrimination on grounds of nationality, within the scope of application of the Treaties [...] is also prohibited;
 - - **discrimination based on racial or ethnic origin is a violation of the principle of equal treatment and is prohibited in the workplace and outside the workplace** (Directive 2000/43/EC, OJ L 180/22).
 - - in the area of employment and occupation, EU legislation prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation (Directive 2000/78/EC, OJ L 303/16).

EU Charter of Fundamental Rights

- **Article 23 — Equality between women and men**
- - equality between women and men must be ensured in all areas, including employment, work and pay.
- - the principle of equality shall not prevent the maintenance or adoption of measures providing for **specific advantages in favour of the under-represented sex.**

The Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*/relationships between different legal systems/differences as regards the national courts' role:

- **Question:**
- whether a national judicial practice **is compatible with EU law if it makes the obligation for a national court to disapply** any provision [of domestic law] contrary to [the EU law *inter alia*], a fundamental right guaranteed by the European Convention on Human Rights (The Convention or the ECHR) and by the EU Charter [...]?

Priority of the EU law:

- It is settled case-law of the CJEU that:
- a national court (national judge) which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions,
- if necessary
- [even] refusing of its own motion to apply any conflicting provision of national legislation [...]
- (Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 43).

The Case C-617/10 Åklagaren v Hans Åkerberg Fransson/relationship between the ECHR and legal systems of Member States:

- European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the legal systems of the Member States,
- nor does it determine
- the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that Convention and a rule of national law
- (see, to this effect, Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62).

The RIGHT v. the OBLIGATION of a national court/tribunal to bring the matter before the CJEU for a preliminary ruling/from the perspectives of Article 6 of the ECHR

- *European Court of Human Rights (ECtHR), the case **Ullens de Schooten and Rezabek v. Belgium** (Appl. Nos. 3989/07 and 38353/07, judgment of 20.09.2011):*
- **the main question** - whether the refusal by the Court of Cassation and the Conseil d'Etat to respond to the applicants' request to refer to the CJEU for a preliminary ruling on the interpretation of Community law violated Art. 6 § 1 of the Convention;
- (*fair trial aspect/obligation of a national court to give reasons for its decisions*).

The case Ullens de Schooten and Rezabek v. Belgium

- **Facts of the case:**
- The applicants were directors of clinical biology laboratory Biorim, whose services were eligible for reimbursement through the National Institute for Sickness and Invalidity Insurance;
- Proceedings were brought against the applicants for offences related to the management of the laboratory, including forgery and failure to comply with Article 3 of Royal Decree no. 143 of 30 December 1982;
- **This Decree laid down the conditions to be met by medical laboratories so that the cost of their services could be reimbursed to users through the sickness insurance scheme.**
- **On 30 October 1998 the criminal court convicted the applicants for various offences that had been committed in connection with the management of Biorim.**

Complaints:

Alleged violation of the right to a *fair* hearing under Article 6 § 1 of the Convention:

As the courts had not taken account of the incompatibility of Article 3 of Royal Decree no. 143 with Community law;

The courts erroneously gave precedence to the authority of *res judicata* over the primacy of Community law;

and for refusing to uphold their request for a question to be referred to the Court of Justice for a preliminary ruling on the compatibility of Article 3 of Royal Decree no. 143 with Community law.

Article 267 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 234 TEC)

- (Article 234 of the Treaty establishing the European Community (former Article 177 and, since 1 December 2009, Article 267 of the Treaty on the Functioning of the European Union)
- **Provides for preliminary rulings of the Court of Justice of the European Union:**
- “The Court of Justice **shall have jurisdiction** to give preliminary rulings concerning:
- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, agencies of the Union;

Article 267 of the TFEU

- 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 of Justice 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 of Justice.”
- 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.

Ullens de Schooten and Rezabek v. Belgium

- 56. ([...] under the third paragraph of [...] Article 267 of the TFEU), **when a question concerning the interpretation of the Treaty is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law**
- – the Court of Cassation and the Conseil d’Etat [...] is required to bring the matter before the Court of Justice for a preliminary ruling.

Ullens de Schooten and Rezabek v. Belgium

- **However, this obligation is not absolute** (the Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling (*Coëme and Others v. Belgium*, § 114, ECHR 2000-VII);
- **The ECtHR referred to the Cilfit case-law of the Court of Justice that:**
- **it is for the national courts** against whose decisions there is no judicial remedy under national law, like other national courts, **to decide -**
- **“whether a decision on a question of Community law is necessary to enable them to give judgment”.**

S.r.l. CILFIT and Lanificio di Gavardo S.p.a. v. Ministry of Health (283/81, Rec. 1982)

- **The Court of Justice had received a request from the Italian Court of Cassation for a ruling**
- - as to whether the third paragraph of Article 234 of the Treaty establishing the European Community (former Article 177)
- **laid down**
- **an obligation**
- **to refer a matter** which precluded the national court from determining **whether the question raised was justified or whether it made that obligation conditional on the prior finding of a reasonable interpretative doubt.**

In its judgment the Court of Justice explained:

- “... 6. The second paragraph of that article [[former] Article 234] provides that any court or tribunal of a Member State may, if it considers that a decision on a question of interpretation [of the EU law] is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
- The third paragraph of that article provides that, where a question of interpretation 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 of Justice.

The Cilfit judgment/TEST/Role of national courts:

- National courts are not obliged to refer a question concerning the interpretation of Community law
- IF they establish:
 - - that **the question “is irrelevant”,**
 - - that **“the Community provision in question has already been interpreted by the Court [of Justice]”** or
 - - that **“the correct application of Community law is so obvious as to leave no scope for any reasonable doubt” [...].**
- The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.”

The purpose of implementing the third paragraph of [ex]Article 234 of the Treaty (now Article 267 of the TFEU)

- That obligation to refer a matter to the Court of Justice is based on cooperation between national courts and the Court of Justice in order to ensure:
 - - the proper application and uniform interpretation of Community law in all the Member States”, and
 - - “to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law” .

Scope of the obligation to refer:

- It must be assessed
- by reference to the powers of the national courts, on the one hand,
- and those of the Court of Justice, on the other.
- It is also necessary to define the meaning of the expression “where any such question is raised” in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.

Role of NATIONAL COURTS

- ECtHR stated:
- 62. [...] national courts in case of refusal to refer to the Court of Justice [...]
- are obliged
- to indicate reasons
- in the light of the *Cilfit case-law* [3] exceptions.

Ullens de Schooten and Rezabek v. Belgium case/Judgment of the ECtHR:

63. [...] obligation to give reasons [by national courts] has been fulfilled:
- The Court of Cassation rejected their request under one of the exceptions of the *Cilfit* case-law - the principle of the primacy of Community law over that of the authority of *res judicata* had already been settled by the Court of Justice;
 - 65. Before the Conseil d'Etat, the company Biorim and the applicant asserted that Article 3 of Royal Decree no. 143, on which the impugned decisions were based, was incompatible with Articles 43, 49 and 56 of the Treaty establishing the European Community and with Article 86, taken together with Articles 82, 43, 49 or 56.

Ullens de Schooten and Rezabek v. Belgium case,
ECtHR

- The Conseil d'Etat rejected that request under the Cilfit case-law as
- [...] **an answer by the Court of Justice “could not affect the outcome of the present dispute” (laboratory established in Belgium, not in the EU) .**
- 66. The Court acknowledges that the applicants challenged the interpretation of Community law adopted by the Court of Cassation and the Conseil d'Etat, which they regarded as erroneous.
- However, this **is an area that falls outside the Court's jurisdiction.**

Conclusions in Ullens de Schooten and Rezabek v. Belgium case, ECtHR judgment

- 67. **In conclusion, having regard to the reasons given by the Court of Cassation and the Conseil d'Etat**
- in support of their refusal to grant the applicants' requests to refer to the Court of Justice preliminary questions **on the interpretation of Community law** that they had submitted in the course of the proceedings before those courts,
- **and considering those proceedings as a whole,**
- the Court found
- **NO violation of the applicants' right to a fair hearing** under Art. 6 § 1 of the Convention.

ECtHR jurisprudence:

- National judge under the ECHR is free to decide whether to refer [on the application/interpretation of the EU law] to the Court of Justice or not;
- The Convention does not guarantee, as such, any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling;
- If a national court/tribunal decides NOT to refer to Court of Justice for a preliminary ruling, it must provide convincing reasons for such refusal based on the exceptions of the *Cilfit* case-law and ensure the *fair trial* under Art. 6 of the ECHR.

Some examples:

The *Kaltoft* case (judgment of 18.12.2014, C-354/13)

- The CJEU had received a request for a preliminary ruling from the Danish District Court of Kolding (*retten i Kolding*).
- - whether EU law itself prohibits discrimination on grounds of obesity;
- - **whether obesity can constitute a disability and therefore falls within the scope of the employment equality directive**
- (Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16).

The *Kaltoft* case

- The CJEU specified that in the area of employment and occupation, EU law does not lay down a general principle of non-discrimination on grounds of obesity as such.
- However, the obesity of the worker entails a limitation which [...] may hinder the full and effective participation of that person in professional life on an equal basis with other workers;
- and the limitation is a long-term one, such obesity can be covered by the concept of 'disability' within the meaning of the directive [...] [and] does not depend on the extent to which the person may or may not have contributed to the onset of his disability

The *Kaltoft* case

- Regarding the applicability of the EU Fundamental Rights Charter,
- the CJEU noted
- that the situation at issue in the main proceedings, insofar as it relates to a dismissal purportedly based on obesity, as such, would not fall within the scope of EU law, and
- that therefore the Charter does not apply.

***Grauel Rüffer case* (judgment of 27.3.2014,
C-322/13)**

- The CJEU also gave a preliminary ruling **on discrimination on the grounds of nationality** in the case *Grauel Rüffer*
- where it decided
- that reserving the option to use a certain language before civil courts only for resident nationals is contrary to Articles 18 and 21 of the TFEU.

The *Glatzel case* (judgment of 22 May 2014, Case C-356/12)

- Art.20 (equality before the law), 21(1) (non-discrimination against persons with disabilities) and 26 (the integration of persons with disabilities) of the EU Charter invoked;
- Referral made by the German court - whether the refusal of a driver's licence on the grounds of bad eyesight constituted a violation of the [...] Charter.
- Particularly, the German court asked whether point 6.4 of Annex III to Directive 2006/126/EC is compatible with Article 20, Article 21(1) and Article 26 of the Charter insofar as that provision requires — without permitting any derogation —
- that applicants for Category C1 and Category C1E driving licences have a minimum visual acuity of 0.1 in their worst eye, even if those persons use both eyes together and have a normal field of vision when using both eyes.

The *Glatzel* case

- **The CJEU - differential treatment** of a person with impaired eyesight **can be justified by a concern such as road safety,**
- **which fulfils an objective of public interest,**
- is necessary and
- is not a disproportionate burden.

Supreme Administrative Court of Lithuania/administrative case No. eAS-413-602/2015, Decision of 20 May 2015.

- Request to the SACL by the applicants (a private person and the Human Rights Monitoring Institute) to refer to the Court of Justice
- in the case concerning the application of the equality directives – not appointment of a person to the position of the Ombudsman of Equal Opportunities of Lithuania;
- The Seimas of Lithuania (Parliament) voted against the candidate; this fact was confirmed by „the Protocol decision“ (the Resolution based on the Minutes of the Sitting);
- **The SACL:** such „the Protocol decision“/Resolution taken by the Seimas is **not an administrative act;**
- Therefore, the administrative courts have no competence to deal with the case;
- **In such situation, the answer to the arguments as regards the Referral request to the CJEU request is not needed.**

**Lithuania/administrative case No. eAS-413-602/2015,
Decision of 20 May 2015**

- **Request for a preliminary Ruling:**
- Are the provisions of Directive 2000/78/EC applied in the situation where the parliament discusses about a candidate to the leading position in the national institution fostering the application of the equal treatment principle (Art. 13 of Directive 2000/43/EC), when it organises the selection of such a person and votes on him/her (regarding his/her suitability)?
- Does such a situation fall within the scope of Article 3 (1) of Directive 2000/78/EC and are the provisions of this Directive applicable to such legal relations?

**Civil claim for compensation v. NOT referral to the CJEU for a
preliminary ruling**

- **Civil claim for compensation of damage pending before the Vilnius City District Court**
- (the amount of damage claimed - 1.406.160 Eur);
- The claim is submitted against the State of Lithuania; the Supreme Administrative Court when adopting the final judgment (*No. A-146-1420/2008*), violated the EU law;
- **The administrative case** - non-registration by the Registrar office vehicles equipped with the steering wheel on the right-hand side; such prohibition is aimed at ensuring traffic safety.
- **The administrative courts of Lithuania approved the fact of non-registration of such vehicles and did not refer to the CJEU for a preliminary ruling (in 2008).**
- **To be seen in the context with:**
- Case C-61/12 European Commission/*the Republic of Lithuania*, 20 March 2014;
- *Constitutional Court Ruling of 6 February 2015 (different aspect, equality principle under Art. 29 of the Constitution).*

20 March 2014 in the case (C-61/12) *European Commission / the Republic of Lithuania*

- **The Court of Justice of the European Union:**
- [...] the position of the driver's seat, an integral part of the steering equipment of a vehicle, comes within the harmonisation established by Directives 2007/46 and 70/311,
- the Member States **may not require**, for reasons of safety,
- for registration purposes in their territory, the driver's seat to be moved to the side opposite;
- [such] **quantitative restrictions on imports** [...] **hinder access to the Lithuanian market** for vehicles with the driver's seat on the right, which are lawfully constructed and registered in Member States other than the Republic of Lithuania;

20 March 2014 in the case (C-61/12) *European Commission/the Republic of Lithuania*

- **The Court of Justice:**
- there exist means and measures less restrictive of the free movement of goods;
- the Member States enjoy [some] discretion of imposing measures of ensuring sufficient rear and forward visibility for the driver of a vehicle with the steering wheel situated on the same side as the direction of the traffic;
- **the measure at issue NOT necessary in order to attain the objective pursued; and NOT compatible with the principle of proportionality.**

Conclusions:

- When a question concerning the interpretation of the EU law (including the Charter) is raised in a case pending before a national court against whose decisions there is no judicial remedy under national law, a national court is required to bring the matter before the Court of Justice for a preliminary ruling;
- This obligation is not an absolute one;
- According to the *CILFIT* case-law national courts are NOT obliged to refer to the CJEU IF they establish:
 - - that **the question “is irrelevant”,**
 - - that **“the Community provision in question has already been interpreted by the Court [of Justice]”** or
 - - that **“the correct application of Community law is so obvious as to leave no scope for any reasonable doubt” [...].**
- National courts should ensure the *fair trial* guarantees under Art. 6 of the Convention (including the proper reasoning of their refusals) in the domestic proceedings and take also into account possible consequences of their refusals to refer to the CJEU for the preliminary rulings.

For your interest:

- Pending [before the GC of the ECtHR] case *Khamtokhu and Aksenchik v. Russia* (appl. nos. 60367/08 and 961/11);
- Legal aspect - allegedly discriminatory age and gender-related differences in life sentences.
- Both men were sentenced to life imprisonment [...] for particularly serious offences. Such a sentence cannot be imposed on women, persons under 18 when the offence was committed or over 65 when the verdict was delivered.
- Therefore as adult males serving life sentences for criminal offences, they are discriminated against as compared to other categories of convicts who are exempt from life imprisonment by operation of law.

***Konstantin Markin v. Russia*, appl. No. 30078/06,
judgment of 22 03 2012**

- **The case concerned the Russian authorities' refusal to grant the applicant parental leave, which represented a difference in treatment compared to female military personnel.**
- The Court held that the Convention did not stop at the gates of army barracks.
- As Mr Markin could easily have been replaced by servicewomen in his function in the army, there had been no justification for excluding him from the entitlement to parental leave.
- **He had, therefore, been subjected to discrimination on the grounds of sex.**

***Konstantin Markin v. Russia*, appl. No. 30078/06,
judgment of 22 03 2012**

- The majority of European countries, including Russia itself, allowed civilian men and women alike to take parental leave; in [some] States both servicemen and servicewomen were entitled to parental leave.
- **Consequently, that showed that contemporary European societies had moved towards a more equal sharing between men and women of the responsibility for the upbringing of their children.**
- Furthermore, the Court did not accept that the difference in treatment of servicemen and service women was explained by a positive discrimination in favour of women.
- [...] Nor was the Court persuaded that extending parental leave to servicemen would have a negative effect on the fighting power and operational effectiveness of the armed forces.