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Symposium 29-30 October 2018: European Union law on gender equality

The role of the national judge in the application of European Union directives on equality: relationship with the national legal systems and preliminary ruling requests

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ECJ (Grand Chamber), 27 February 2018, Associação Sindical dos Juízes Portugueses [Union of Portuguese Judges], C-64/16, EU:C:2018:117 (points 30 to 37):

31 The European Union is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act (see, to that effect, judgment of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraphs 91 and 94 and the case-law cited).

32 Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 66; judgments of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 90, and of 28 April 2015, T & L Sugars and Sidul Açúcares v Commission, C-456/13 P, EU:C:2015:284, paragraph 45].

33 Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed (see, to that effect, Opinion 1/09 (Agreement creating a Unified Patent Litigation System), of 8 March 2011, EU:C:2011:123, paragraph 69, and judgment of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, paragraph 99].

Primacy of Union Law

- ECJ, 15 July 1964, Costa v. Enel, C-6/64

- ECJ, 6 March 1978, Simmenthal, C-106/77

- CJEU (Grand Chamber), 19 April 2016, DI, C-441/14, EU:C:2016:278 :

29 In the first place, it should be noted in that regard that, according to settled case-law, where national courts are called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it is for those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective (see, to that effect, Pfeiffer and Others, C-397/01 to C-403/01, EU:C:2004:584, paragraph 111, and Kücükdeveci, C-555/07, EU:C:2010:21, paragraph 45).

- ECJ, 19 June 1990, Factortame et al., C-213/89

Ex officio review of the provisions of Union law

ECJ (Grand Chamber), 25 November 2008, Heemskerk and Schaap, C-455/06, EU:C:2008:650

Direct effect (Treaties and Regulations)

ECJ, 5 February 1963, Van Gend en Loos, C-26/62

Horizontal direct effect of the provisions of TEU Article 157 (former Article 141 EC and Article 119 EEC): ECJ, 8 April 1976, Defrenne, C-43/75

Principle of interpretation in conformity (directives)

- **ECJ (grand chamber), 7 August 2018, Smith, C-122/17, EU:C:2018:631**

- ECJ (Grand Chamber), 19 April 2016, DI, C-441/14, EU:C:2016:278

32 It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law contra legem (see judgments in Impact, C-268/06, EU:C:2008:223, paragraph 100; Dominguez, C-282/10, EU:C:2012:33, paragraph 25; and Association de médiation sociale, C-176/12, EU:C:2014:2, paragraph 39)

33 It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (see, to that effect, judgment in Centrosteel, C-456/98, EU:C:2000:402, paragraph 17).

34 Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.

Partial exceptions to the prohibition on contra legem interpretations of national law

- Directive invoked against a Member State or by agencies or bodies subject to the authority or control thereof, or which have been assigned a public interest mandate by a Member State and for such purpose have been granted powers exceeding those provided under the regulations governing relations among private individuals.

- ECJ, 10 October 2017, Farrell, C-413/15, EU:C:2017:745, points 32 to 42

- Soc., 22 June 2016, appeal No. 15-20.111, published in the Bulletin, FR:CCASS:2016:SO01289

Subjective right conferred upon a private individual under a provision of the Charter with horizontal direct effect

- Article 21 of the Charter of Fundamental Rights of the European Union

- **ECJ, Grand chamber, 15 January 2014, Association de médiation sociale, C-176/12, EU:C:2014:2**

47 In this connection, the facts of the case may be distinguished from those which gave rise to Kücükdeveci in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.

- ECJ (grand chamber), 26 February 2013, Akerberg Fransson, C-617/10, EU:C:2013:105

- **ECJ, 19 July 2017, Abercrombie & Fitch Italia, C-143/16, EU:C:2017:566**

17 As a preliminary point, it must be noted that, where they adopt measures which come within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, now enshrined in Article 21 of the Charter, the Member States and the social partners must respect that directive (judgments of 13 September 2011, Prigge and Others, C-447/09, EU:C:2011:573, point 48; of 11 November 2014, Schmitzer, C-530/13, EU:C:2014:2359, paragraph 23; and of 21 December 2016, Bowman, C-539/15, EU:C:2016:977, paragraph 19).

Member State Liability

- Possibility for individuals to bring actions seeking compensation for damages caused due to the non-conformity of national law with Union law (ECJ, 19 November 1991, Francovich, C-6/90 and C-9/90).

Judges tackle the plurality of norms

- A conflict between fundamental standards?

The principle of equality is enshrined in the Constitution, Article 21 of the Charter of Fundamental Rights, and in secondary law under Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

- Reconciliation of principles

Might the principle of equality of the sexes conflict with trade union rights?

Soc., 9 May 2018, appeal no. 17-14.088, PBRI, FR:CCASS:2018:SO00714 :

It has been found to be a violation of the provisions of Articles L.2324-22-1 and L.2324-23 of the Labour Code as applicable contemporaneously, for a local court to reject the application to void the election of a male candidate appearing on a list containing only his name, when two positions were vacant on a board consisting of 77% women and 23% men, and the trade union had been required to submit a list compliant with Article L. 2324-22-1, interpreted in accordance with preliminary constitutionality ruling (QPC) no. 2017-686 of 19 January 2018 of the Constitutional Council, namely a list that would necessarily include both a female and a male, the latter being the underrepresented sex on the board in question.

Procedure for collabouration between the Court of Justice and the national court: preliminary ruling requests

- Oversight of the proceedings by the national judge:

Referral to the Court of Justice by a judge

Compliance with the inter-partes principle

Obligation to provide grounds for the decision to refer or refuse to refer the case

Substantive conditions for preliminary ruling requests

ECJ, 4 October 2018, Commission / France (dividend tax prepayment), C-416/17, EU:C:2018:811 :

108 Second, it must also be noted that, where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a reference to the Court within the meaning of the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it (judgment of 15 March 2017, Aquino, C-3/16, EU:C:2017:209, paragraph 42).

109 Moreover, the obligation to make a reference laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States (judgment of 15 March 2017, Aquino, C-3/16, EU:C:2017:209, paragraph 33 and the case-law cited).

110 Indeed, that court is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, and the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union (see, to that effect, judgments of 6 October 1982, Cilfit and Others, 283/81, EU:C:1982:335, paragraph 21; of 9 September 2015, Ferreira da Silva e Brito and Others, C-160/14, EU:C:2015:565, paragraphs 38 and 39; and of 28 July 2016, Association France Nature Environnement, C-379/15, EU:C:2016:603, paragraph 50).

Content of preliminary decision requests

- Statement of relevant factual elements

- Statement of the provisions of national law (text and case law) applicable to the dispute

- Statement of reasons leading the Court of Justice to challenge the interpretation of specific provisions of EU law

Illustration: preliminary challenge on the framework agreement on parental leave

Soc., 11 July 2018, appeal No. 16-27,825, pending publication, FR:CCASS:2018:SO01290 :

REFERS the following questions to the Court of Justice of the European Union:

1°) Should clause 2, §4 and §6 of the framework agreement on parental leave appended to Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave entered by UNICE, CEEP and the CES, be interpreted as precluding the application of parental leave rights to an employee who was part-time when dismissed according to a provision of national law such as Article L. 3123-13 of the labour Code as applicable contemporaneously, according to which "The severance pay and retirement package granted to employees who have been employed both full-time and part-time at the same company shall be calculated in proportion to the periods of employment conducted under both of these conditions, counted from their hire date at the company"?

2°) Should clause 2, §4 and §6 of the framework agreement on parental leave appended to Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave entered by UNICE, CEEP and the CES, be interpreted as precluding the application of parental leave rights to an employee who was part-time when dismissed according to a provision of national law such as Article L. 1233-32 of the labour Code according to which during a redeployment leave period exceeding the advance notice period the employee is to continue to receive monthly remuneration paid by the employer of an amount equal to at least 65% of said employee's average gross monthly pay, subject to the contributions stipulated in Article L. 5422-9, for the last 12 months prior to the notice of dismissal?

3°) If either of the two preceding questions are answered in the affirmative, should Article 157 of the Treaty on the Functioning of the European Union be interpreted in a sense contrary to the provisions of national law such as those set forth under Articles L. 3123-13 of the labour Code, as contemporaneously applicable, and R. 1233-32 of the same code, insofar as no objective factors unrelated to discrimination justify the fact that indirect discrimination exists with regard to the granting of severance pay and redeployment leave allowances, which are reduced compared to employees who have not taken part-time parental leave, due to the fact that a considerably greater number of women than men choose to take parental leave when holding part-time positions?

Useful online resources

- Recommendations addressed to national courts concerning the introduction of preliminary ruling proceedings (2016/C 439/01), published in the OJEU of 25 November 2016

- Case Law of the Court of Justice (url: Curia.europa.eu), in particular 4.14.01.02: Equality of male and female workers

- Handbook of European Law on Non-Discrimination (March 2011), available at the website of the European Union Agency for Fundamental Rights

Thanks for your attention!