

The role of the national judge in applying the EU
Equality Directives: relationship with national legal
orders and the preliminary ruling procedure

Goran Selanec, S.J.D.

Constitutional Court of the Republic of Croatia



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

EU Antidiscrimination Framework

- Primary Law
 - Founding Treaties
 - EU Charter on Fundamental Rights
- Secondary Law
 - Gender Equality Directives
 - Antidiscrimination Directives
- CJEU case law

TFEU

Antidiscrimination Provisions

- Art 8. – in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women
- Art 10. – In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
- Art 18. - any discrimination on grounds of nationality shall be prohibited;
- Art 19. - the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- Art 157. – ban on pay discrimination of women, explicit mandat for positive action measures to promote real equality of women.

Gender Equality Directives

- [Directive 2006/54/EC](#) equal treatment for men and women in employment and occupation, including social security schemes.
- [Directive 2010/41/EU](#) equal treatment for men and women engaged in an activity in a self-employed capacity.
- [Directive 92/85/EEC](#) protection of pregnant workers, workers who have recently given birth and women who are breastfeeding.
- [Directive 2004/113/EC](#) equal treatment between men and women in the access to and supply of goods and services.
- 2010/18/EU - implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC
- Directive 97/81/EC - the Part-time Work
- Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security

Art 19 Antidiscrimination Directives

- [Directive 2000/43/EC](#) against discrimination on grounds of race and ethnic origin.
- [Directive 2000/78/EC](#) against discrimination at work on grounds of religion or belief, disability, age or sexual orientation.

EU dependence on national implementation

- EU Antidiscrimination Law depends on the correct implementation of EU secondary law into national legal systems
- Example of National Implementation Framework
 - (Croatia – the latest MS; red references entail provisions implementing EU law, black references do not but are part of the national antidiscrimination framework):
 - [The Constitution of the Republic of Croatia](#)
 - ECHR
 - „Constitutional” Act on the Rights of National Minorities
 - [Gender Equality Act \(2003, 2008\)](#)
 - [Antidiscrimination Act \(2008\)](#)
 - International Treaties
 - [Labour Law Act](#)
 - [State Officials Act](#)
 - Family Law
 - [Same Sex Partnership Act](#)
 - „Secondary Acts” (banning discrimination through references to other Acts)
 - Criminal Law (1997, 2013)
 - Misdemeanour against Public Peace and Order Act
 - [Antidiscrimination misdemeanour provisions](#)
 - GEA & ADA misdemeanour provisions
 - [Protection against Family Violence Act](#)

The Relation Between the EU and National Antidiscrimination Laws

- EU ConLaw Basics
 - functional principles of EU legal order
 - Primacy (Supremacy)
 - Direct Effect
- If any provision of national law contravenes any provision of EU law, the EU trumps the national

The Primacy of EU Law

- *C-106/77 Simmenthal*

THE DIRECT APPLICABILITY OF COMMUNITY LAW MEANS THAT ITS **RULES MUST BE FULLY AND UNIFORMLY APPLIED IN ALL THE MEMBER STATES** FROM THE DATE OF THEIR ENTRY INTO FORCE AND FOR SO LONG AS THEY CONTINUE IN FORCE. **DIRECTLY APPLICABLE PROVISIONS ARE A DIRECT SOURCE OF RIGHTS AND DUTIES** FOR ALL THOSE AFFECTED THEREBY, WHETHER MEMBER STATES OR INDIVIDUALS; **THIS CONSEQUENCE ALSO CONCERNS ANY NATIONAL COURT** WHOSE TASK IT IS AS AN ORGAN OF A MEMBER TO PROTECT THE RIGHTS CONFERRED UPON INDIVIDUALS BY COMMUNITY LAW.

IN ACCORDANCE WITH **THE PRINCIPLE OF THE PRECEDENCE OF COMMUNITY LAW**, THE RELATIONSHIP BETWEEN PROVISIONS OF THE TREATY AND DIRECTLY APPLICABLE MEASURES OF THE INSTITUTIONS ON THE ONE HAND AND THE NATIONAL LAW OF THE MEMBER STATES ON THE OTHER IS SUCH THAT **THOSE PROVISIONS AND MEASURES NOT ONLY BY THEIR ENTRY INTO FORCE RENDER AUTOMATICALLY INAPPLICABLE ANY CONFLICTING PROVISION OF CURRENT NATIONAL LAW BUT** - IN SO FAR AS THEY ARE AN INTEGRAL PART OF, AND TAKE PRECEDENCE IN, THE LEGAL ORDER APPLICABLE IN THE TERRITORY OF EACH OF THE MEMBER STATES - ALSO PRECLUDE THE VALID ADOPTION OF NEW NATIONAL LEGISLATIVE MEASURES TO THE EXTENT TO WHICH THEY WOULD BE INCOMPATIBLE WITH COMMUNITY PROVISIONS.

Observing the Primacy of EU law

- Great majority of national Constitutional and Supreme Courts have not raised a direct challenge to the primacy of EU law
 - BVerV possible exception?
- Consequently, the Court of Justice of the EU is accepted to have exclusive jurisdiction to rule on the validity, applicability and the ultimate substantive meaning of the provisions of EU law, including the EU antidiscrimination law
- Consequences for national courts:
 - Duty of consistent interpretation of possibly conflicting provisions of national law
 - Duty to activate Art 267 TFEU mechanism of preliminary interpretation

Conflict between EU law and National law

- (Constitutional) **Judicial Duty of Loyalty**
 - Interpret conflicting national provision in a consistent („friendly”) manner implementing the EU provision
 - Case C-106/89 Marleasing
 - Joined cases 397-403/01 Pfeiffer
 - “Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive.”
 - If friendly interpretation not possible due to the explicit wording of the national provision remove the conflicting national provision out of application
 - Case C-282/10 Dominguez
 - “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.”
 - apply some other relevant provision of national law that would achieve the goal of the EU provision
 - if other „friendly” provision of national law not available *apply the EU provision directly*
 - If there is any dilemma regarding correct interpretation of the relevant EU provision or about possible conflict between provision of national law and the EU law activate Art 267 mechanism

Conform interpretation of national case law

- Case C-414/16 Egenberger:

“the requirement to interpret national law in conformity with EU law includes ***the obligation for national courts to change their established case-law***, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive....

Consequently, a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law ***merely because that provision has consistently been interpreted in a manner that is incompatible with EU law.***”

The Reference Procedure

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.

Duty to Refere

- CJEU Cilfit criteria (Case 283/81 Cilfit and Others, EU:C:1982:335, para 13)
 - The Court of last instance does not have to refer a preliminary reference question only if
 - a decision on the question is not necessary to enable it to give judgment
 - acte éclairé
 - the CJEU has *'already dealt with the point of law in question'*
 - acte clair
 - *'the correct application of EU law may be so obvious as to leave no scope for any reasonable doubt'*
- Case 314/85 Foto-Frost, EU:C:1987:452
 - Reference is also obligatory (even for a court of first instance) when a question on the validity of EU law arises as national courts have no jurisdiction to declare void measures taken by EU institutions

ECtHR Support

- The ECtHR's *Ullens de Schooten* judgment no. 3989/07 and 38353/07, 20 September 2011.,
 - Article 6(1) ECHR requires the highest national courts to give reasons for decisions not to refer a question for a preliminary ruling under Article 267 TFEU when 'there is no judicial remedy under national law'.
- The ECtHR determined that
 - the duty to provide reasons implies that judges must indicate which one of the three Cilfit-exceptions applies
 - Ullens de Schooten (para 68.)
 - Dhahbi v. Italy (dec.), no. 17120/09, 8 April 2014.
 - the ECHR found that it was not clear from the reasoning of the national court whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored.
 - the ECHR also insisted that the national court decision did not include not a single reference to the case-law of the CJEU
 - Vergauwen and Others v. Belgium, (dec.), no. 4832/04, 10 April 2012,
 - the ECtHR established that Article 6(1) requires the domestic courts to give reasons, in the light of the applicable law, for any decision refusing to refer a question for a preliminary ruling.
 - elaborate why the identified Cilfit exceptions apply
 - Schipani judgment no. 38369/09, 21 July 2015
 - Discussion of the case law of the CJEU serving the implicit inference that the issue at hand is acte clair, without however expressing this explicitly and without mentioning the complainants' request to refer is violation of Art 6

National Support Lawful Judge

- BVerfG - NJW, Case No. BvR 1036/99, Jan. 9, 2001
 - the refusal of the national court of last instance to refer the question of possible violation of the fundamental rights constitutes a breach of the right to a lawful judge
- Ústavní soud [Constitutional Court of the Czech Republic], Jan. 8, 2009, Pfizer, Case No. II. ÚS 1009/08
- French Cour de Cassation, Case No. 1002, Oct. 26, 2011
 - the omission to refer might constitute a denial of justice (French Cour de cassation,).
- Sweden, Lag (2006:502) med vissa bestämmelser om förhandsavgörande från Europeiska unionens domstol, 24 May 2006
 - the fact that the national legislation prescribes the obligation to refer the question to the CJEU implies that a national court has a duty to provide reasoned decision if it refuses to refer

National Support Fair Trial

- **Croatia, Ustavni sud, U-III-2521/2015 (Swiss Frank Credit Arrangements; 13 Dec 2016)**

Finally, the Constitutional Court finds that *the Supreme Court failed to provide reasoned answer to the motions filed by the Association "Consumer" as well as the defendant banks seeking preliminary reference* on the interpretation of Article 4 (2) of Directive 93/13 / EEC to the Court of Justice of the European Union....However, *as a "national court of the last instance", it was obliged to state or explain the reasons for which it considered that in the present case it was not obliged to initiate the preliminary reference procedure*, that is, submit a request to the EU Court for a preliminary interpretation of EU law within the meaning of Article 267 (3) of the Treaty on the Functioning of the EU.

Primacy of EU Antidiscrimination Law

- National legislative frameworks presumably more or less in compliance with the EU antidiscrimination law
 - hence, in principle the conflict between domestic and EU antidiscrimination provisions will be result of judicial interpretation and application
- if a discrimination dispute before national court FALLS WITHIN THE SCOPE of EU law:
 - duty of loyal interpretation of national law
 - **CJEU antidiscrimination case law**
 - Antidiscrimination guarantees must be in compliance with the meaning given by the Court
 - duty to refer a preliminary question via Art 267 mechanism

Regulatory Reach of EU Antidiscrimination Law

	Directive 2000/43 (race, ethnicity)	Directive 2006/54 Directive 86/613/EEC (gender)	Directive 2004/113 (gender)	Directive 2000/78 (age, disability, religion and other beliefs, sexual orientation)
Employment and Labour Conditions				
Social protection and insurance				
Access to Goods and Services				
Education				
Other regulatory areas				

Antidiscrimination issues in frequent need of the CJEU Interpretation

National courts can encounter significant number of interpretation dilemmas (in blue areas) in antidiscrimination disputes requiring Art 267 preliminary reference mechanism. More frequent examples:

- Precise meaning of a discriminatory ground (e.g. race, religious believe, disability)
- Precise meaning of antidiscrimination instruments
 - Direct discrimination
 - Harassment as a form of discrimination
 - Sexual harassment
 - Harassment on grounds of suspect ground
 - Indirect discrimination
 - Reasonable adjustment duty
- Scope of an exception from the discrimination ban
- Positive action measures conditions
- Precise meaning of the effective antidiscrimination protection guarantees
 - Burden of proof distribution
 - Dissuasive compensation
- Questions related to limitations implications of national procedural rules for effectiveness of antidiscrimination guarantees
 - Preclusive deadlines
 - Statute of limitation
 - Restrictions on introduction of new evidence
- Access to required evidence material

Challenges of Regulatory Demarcations

- National courts may find themselves in situations where the dispute before them is ***only seemingly not within*** the regulatory competence of the European Union.
- These are situations in which a right guaranteed by an EU regulation is closely related to the relationship or legal situation that, according to the EZ Treaties, has remained in the autonomous regulatory competence of the member states, ie. has not been transferred to the competence of the European Union.
- A paradigmatic example of such a situation is case C-267/06 Maruko.

The Far Reaching Shadow of the EU Law

C-267/06 Maruko

As regards the significance of Recital 22 of the preamble to Directive 2000/78, that recital states that the Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. **However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination** (see, by analogy, Case C-372/04 *Watts* [2006] ECR I-4325, paragraph 92, and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 23).

Since survivor's benefit such as that at issue in the main proceedings has been identified as 'pay' within the meaning of Article 141 EC and falls within the scope of Directive 2000/78, for the reasons set out in paragraphs 49 to 57 of this judgment, Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive.

The Gravity of the EU Equal Treatment Principle

- C-267/12 Hay

Accordingly, the question referred by the national court must be viewed, in essence, as asking whether Article 2(2)(a) and (b) of Directive 2000/78 must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry.

As a preliminary point, it should be observed that, as indicated in recital 22 in the preamble to Directive 2000/78, **legislation on the marital status of persons falls within the competence of the Member States. However, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination**, including discrimination on the ground of sexual orientation, **with a view to putting into effect in the Member States the principle of equal treatment** (see Case C-147/08 *Römer* [2011] ECR I-3591, paragraph 38)

Accordingly, it must be held that Directive 2000/78 is applicable to a situation such as that which gave rise to the main proceedings.

„Particularity” of the Antidiscrimination Protection

- **EU Fundamental nature of Equality/Antidiscrimination**
- The EU Charter of the Fundamental Rights
 - **Article 21 Non-discrimination**
 1. Any discrimination based on any ground 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 shall be prohibited.
 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.
 - **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 Effect of the Charter

- The Charter (indirectly and via CJEU case law) expands the scope of antidiscrimination protection
 - Art 51/1
 - The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity **and to the Member States only when they are implementing Union law**. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties
- Consequently, whenever a dispute before a national court relates to some issue that is somehow regulated by some provision of EU law (either implemented through national statutory law or directly through EU act) the antidiscrimination provisions of the Charter apply
 - Relevant to both „vertical” and „horizontal” disputes
 - C-414/16 Egenberger (76-79), C-68/17 IR (69-70), C-385/17 Hein (76-78), C-193/17 Cresco (76. i 77.)

„Witin the Scope of EU Law”

- C-617/10 Fransson

The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see *inter alia*, to this effect, Case C-260/89 ERT [1991] I-2925, paragraph 42; Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 15; Case C-309/96 Annibaldi [2007] ECR I-7493, paragraph 13; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-349/07 Sopropé [2008] ECR I-10369, paragraph 34; Case C-256/11 Dereci and Others [2011] ECR I-11315, paragraph 72; and Case C-27/11 Vinkov [2012] ECR, paragraph 58).

20 That definition of the field of application of the fundamental rights of the European Union is borne out by the explanations relating to Article 51 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the purpose of interpreting it (see, to this effect, Case C-279/09 DEB [2010] ECR I-13849, paragraph 32). According to those explanations, *'the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law'*.

21 Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. *The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.*

22 Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (see, to this effect, the order in Case C-466/11 Currà and Others [2012] ECR, paragraph 26).

Horizontal Effect of the CFREU Antidiscrimination provisions

- C-414/16 Egenberger – duty of consistent interpretation

It must be recalled that it is for the national courts, taking into account the whole body of rules of national law and applying methods of interpretation recognised by that law, to decide whether and to what extent a national provision such as Paragraph 9(1) of the AGG can be interpreted in conformity with Article 4(2) of Directive 2000/78, without having recourse to an interpretation *contra legem* of the national provision (see, to that effect, judgment of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraphs 31 and 32 and the case-law cited).

The Court has held, moreover, that the requirement to interpret national law in conformity with EU law includes the obligation for national courts to change their established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (judgment of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraph 33 and the case-law cited).

Consequently, a national court cannot validly consider that it is impossible for it to interpret a provision of national law in conformity with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law (see, to that effect, judgment of 19 April 2016, DI, C-441/14, EU:C:2016:278, paragraph 34).

Horizontal Effect of the CFREU

Antidiscrimination provisions

- C-414/16 Egenberger – duty to disapply

In the event that it is impossible to interpret the national provision at issue in the main proceedings in conformity with EU law, it must be pointed out, first, that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation, which originates in various international instruments and the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds, including religion and belief, as may be seen from its title and from Article 1 (see, to that effect, judgment of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 59 and the case-law cited).

76 **The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law.** That prohibition, which is laid down in Article 21(1) of the Charter, **is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law** (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).

‘Secondly, it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is **sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such**. Consequently, in the situation mentioned in paragraph 75 above, the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to **guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law**.