



The role of the national judge in the application of EU anti-discrimination directives: the relationship with national legal systems; the preliminary ruling procedure

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Why the national judge?

- ▶ Decentralised enforcement:
 - EU law does not have its own implementation mechanism → focus on national enforcement bodies

▶

National law complies with EU law	National law can be interpreted to comply with EU law, but it can also be interpreted differently	National law does not comply with EU law
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- ▶ The relationship between judicial forums:
 - Dialogue or sharp words?

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The national judge's two types of activities



Independent interpretation and application

Initiation of a preliminary ruling procedure

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Independent interpretation and application

- ▶ Acte claire: the interpretation of EU law is entirely clear
Acte éclairé: the CJEU has already interpreted EU law
(C-283/81 CILFIT → "CILFIT criteria")
- ▶ Extra caution: supreme judicial forum
- ▶ Principles and mechanisms of interpretation that can be applied by the national judge:
 - Loyalty – full and effective application of EU law + the equivalence principle
 - The primacy of EU law
 - Direct scope

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Independent interpretation and application

- ▶ Loyalty – effective enforcement of EU law (“effet utile”)
 - Article 4(3) TEU: “[...] Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. [...]”
 - This is binding on national courts as well

(C-33/76 Rewe)

 - National law (and not only harmonised law) must be interpreted in line with Union law

(C-397/98 and C-410/98 Metallgesellschaft, C-446/03 Marks & Spencer, C-246/89 Commission v United Kingdom, C-279/93 Schumacker, C-397/01 Pfeiffer)

Special case: indirect scope of directives (see later)

 - Member State liability for non-transposed directives (see later)
- ▶ Equivalence principle: the conditions for enforcing rights under EU law cannot be less favourable than those for claims under national law (C-33/76 Rewe, later e.g. C-261/95 Palmisani; C-118/08 Transportes Urbanos)

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Independent interpretation and application

- ▶ The primacy of EU law
 - The principle created by the CJEU
 - EU law takes precedence over national law where a Member State has limited its own sovereignty
 - irrespective of when it was created
 - as opposed to national constitutions as well?
 - Setting aside national law that conflicts with EU provisions
 - Such national legislation is not invalidated, it is simply not applicable in such cases
 - No act of annulment is required
 - Condition: EU legal standard with direct effect

(C-6/64 Costa; C-1/70 International Handelsgesellschaft, C-106/77 Simmenthal II, C-99/87 Dow Chemical Ibérica, C-285/98 Kreil)

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Independent interpretation and application

- ▶ Direct scope
 - Significance: private individuals can directly invoke EU law before their national courts.
 - Validated in different ways in case of different sources of EU law
 - Primary legislation (including: Charter of Fundamental Rights)
 - Secondary legislation – anti-discrimination directives?

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Independent interpretation and application

- ▶ Primary legislation
 - Direct vertical scope
 - (*C-26/62 Van Gend*, *C-57/65 Lütticke*, *C-339/89 Alsthom Atlantique*)
 - Exercise of rights against the State (*C-341/05 Laval*)
 - Conditions:
 - Unconditional (*C-2/74 Reyners*)
 - Sufficiently accurate
 - (The other conditions have eroded)
 - Direct horizontal scope:
 - *Defrenne I and II*. (*C-43/75*, *C-149/77*): Article 157 TFEU (equal pay for men and women)
 - *Walrave and Koch* (*C-36/74*): Articles 18, 45, and 56 TFEU (prohibition of discrimination on grounds of nationality)

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Independent interpretation and application

- Charter of Fundamental Rights
 - The scope of the Charter under Article 51:
 - Binding on EU institutions and bodies
 - Binding on Member States only if they implement EU law
 - *C-414/16 Egenberger*:
 - The prohibition of discrimination under Article 21(1) of the Charter is in itself sufficient to confer on individuals a right on which they can rely in a dispute between themselves in an area covered by EU law. (point 71)

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Independent interpretation and application

- ▶ Directives:
 - The problem of the direct applicability of directives
 - Direct vertical scope
 - Conditions
(*C-41/74 Van Duyn*, *C-148/78 Ratti*, *C-8/81 Becker*)
 - Unconditional, sufficiently precise
 - The deadline for transposition has passed
 - There is also a kind of duty of loyalty until the deadline (*C-129/96 Inter-Environnement Wallonie*)
 - Against the State
 - An extended interpretation of the concept of the State (*C-188/89 Foster*, *C-103/88 Constanzo*)
 - The State as employer as well (*C-152/84 Marshall*)

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Independent interpretation and application

- Direct horizontal scope:
 - Excluded in principle (*Marshall, Foster, C-91/92 Dori*)
 - As a general principle of EU law, non-discrimination has a direct horizontal effect!
 - Not under anti-discrimination directives! – common constitutional traditions + Article 21(1) of the Charter.
 - The obligation of the judge:
 - Refrain from applying conflicting national law (but where appropriate, consider competing fundamental rights also protected by EU law/*Egenberger: non-discrimination versus religious autonomy*). The same benefits should be granted as for beneficiaries where a valid referral system exists (*C-501/12 – C-506/12 Specht; C-406/15 Milkova, C-193/17 Cresco*)
 - There is also a need to deviate from bad case law (even at the expense of the principle of legitimate expectations)
 - Boundary:
 - *contra legem* interpretation; general principles of law (legal certainty, non-retroactivity)
 - judicial legislation (e.g. additional sanctions – *C-407/14 Camacho*)

(*C-144/04 Mangold, C-555/07 Küçükdeveci, C-441/14 Dansk Industri, Egenberger, C-147/08 Römer, C-176/12 Association de médiation sociale, C-80/86 Kolpinghuis Nijmegen, C-105/03 Pupino*)

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Independent interpretation and application

- ▶ In the absence of the direct scope of the Directive:
 - Indirect scope:
 - the national court is required to interpret national law in such a way as to take the fullest possible account of the wording and purpose of the directive in question in order to achieve the result of the directive
 - Boundary: no need to interpret *contra legem*
(*Von Colson, Marleasing, Miret, Dori, Pfeiffer, Pupino, Dansk Industri, Kolpinghuis Nijmegen*)
 - Liability of the Member State for damages
(*Francovich*)

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Preliminary ruling procedure

- ▶ Article 267 TFEU
- ▶ “the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court and the national courts, by means of which the former provides the latter with the points of interpretation of European Union law which they need in order to decide the disputes before them” (*C-614/14 Ognyanov*)

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Preliminary ruling procedure

- ▶ What counts as a court?
 - Conditions:
 - Created by law
 - Permanent
 - Mandatory competence
 - Adversarial procedure
 - Independent
 - Decisions based on legislation
 - (*C-61/65 Vaasen-Göbbels*)
 - The right of a lower court cannot be withdrawn (*C-210/06 Cartesio*)
 - Binding on the supreme forum (except: acte claire/éclairé) (*C-416/17 European Commission v French Republic*. Failure of a Member State to fulfil obligations)
 - The court is not bound by the parties' submissions

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Preliminary ruling procedure

▶ In what cases?

- Interpretation of EU Law applicable to the case
 - NO:
 - Factual questions
 - Interpretation of national law
 - Instead of "Is it consistent with...?": "Is [national law] to be interpreted as conflicting with [EU law]?"
 - It is not related to the substance of the case, but is only a hypothetical question (*C-53/03 Syfait!*)
- The validity of EU law
 - Only the CJEU can declare invalidity
 - E.g. *C-363/12 Case Z.* – the validity of EU law in the light of the UNCRPD

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Preliminary ruling procedure

▶ Form of the reference

- As defined in national procedural law, but this cannot be in conflict with EU rules either
- Suspension of the main proceedings
- At which stage of the procedure? – depends on individual circumstances
- By registered mail to the Office of the CJEU or via e-Curia; also by email in an editable format (including the documentary material)

▶ Content of the application:

- Simple and free of unnecessary facts and figures (recommended to be summarised in no more than 10 pages)
- National language (annexes are not translated!)
- Content: see the Recommendation and its Annex
 - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ C 380, 8.11.2019, p. 1–9.)
 - Relevant facts and national law (with definitions), case-law, EU relevance (reasons; relationship) (arguments of the parties, position of the referring court)
 - + questions (separate, to be intelligible on their own)
- Data protection (personal data of individuals will be scrubbed ["XY"] + also submit a non-anonymised version)

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Preliminary ruling procedure

- ▶ Cost
 - Free of charge
 - Costs incurred by the parties: under national rules, the court or the CJEU may grant legal aid (e.g. for legal representation)
- ▶ Fast-track or urgency procedures (Recommendation; Articles 105–114 of the Rules of Procedure)

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Preliminary ruling procedure

- ▶ To be studied:
 - Article 267 TFEU
 - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ C 380, 8.11.2019, p. 1–9.)
(<https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=celex%3A32019H1108%2801%29>)
 - Rules of Procedure of the CJEU (OJ L 265, 29.9.2012, p. 1–42)
Amendment of the Rules of Procedure of the Court of Justice (OJ L 173, 26.6.2013, p. 65)
(<https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=legissum%3Aai0049>)
 - Applications received (www.curia.eu)

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Taking EU law into account: on request or ex officio?

- ▶ Right of the parties to dispose vs. primacy of EU law, effective and efficient enforcement, effective judicial protection
- ▶ Binding character as a general principle in procedural law.
 - Bound to legal title?
- ▶ Main rule: principle of procedural autonomy for Member States
 - Exceptions (e.g. burden of proof – *C-222/84 Johnston*)
- ▶ Case-law of the EUB
 - Assessment depending on the specific characteristics of the case
 - *C-430/93 and C-431/93 Van Schijndel; C-312/93 Peterbroeck*
 - Applicable ex officio to protect the weaker party (consumer protection cases)
 - *C-137/08 VB Pénzügyi Lízing; C-240/98 Océano Grupo*

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Thank you for your attention!

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