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# The role of the national judge in applying the EU equality law

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## The role of the national judge in the application of EU law and the principle of primacy of EU law

- The CJEU cannot guarantee the effective application of EU law by itself, but **depends on national courts** and individuals to do so. /.../ Van Gend&Loos: „/.../ the task of the Court under Article 177, which aims to ensure that national courts interpret the Treaty in a uniform manner, confirms that the Member States recognised the power of Community law which their citizens can enforce before national courts.“
- The national judge **must apply EU law**, which takes precedence over national law (Costa v ENEL: „...the inclusion of provisions deriving from a Community source in the law of each Member State /.../ is associated with the inability of Member States to recognise the priority of a unilateral and subsequent measure against the legal order they adopted based on reciprocity, which therefore shall not be in conflict with.“ )

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## The principle of direct effect

- Gabrielle Defrenne worked as a flight attendant for the Belgian airline company Sabena. Under Belgian law, female flight attendants (unlike their male counterparts) were forced to retire at the age of 40. Defrenne claimed that the lower pension rights this entailed violated her right to equal pay (Article 119 of TEC, now Article of 157 of TFEU) on grounds of gender.
- The CJEU: Provision of the TEC has **direct effect**, not only in the vertical relationship between the authority and private law entity, but also in the horizontal relationship (Case 43-75).
- Primary and secondary law (regulations): provided this law is sufficiently clear and unconditional

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## The principle of loyal interpretation of law

By giving precedence to EU law, the principle extends the scope of directives to individuals in a sophisticated way.

### Case:

Sede Küçükdeveci had been employed by Swedex since the age of 18. The company terminated her employment and calculated the notice period as if she had three years' length of service, even though she had worked for it for ten years. It referred to a provision in the German Civil Code BGB according to which no account is taken of the periods of employment completed before the age of 25.

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- The Directive does not have horizontal direct effect, but the obligation of the MS arising from the Directive to achieve the result laid down by the Directive, and the duty to take all appropriate measures, whether general or specific, to ensure compliance with that obligation, applies to all authorities of these Member States, including judicial authorities within the sphere of their competence. /.../. This means that when applying national law, **the national court, which is obliged to provide an interpretation of these provisions, is bound to do everything possible, having regard to the wording itself and purpose of this Directive, to ensure that the result is consistent with the objective pursued by the Directive** and consequently with Article 288/3 of TFEU.“
  - **Exclusionary effect** based on the **general** principle of non-discrimination on grounds of age: A national court, to which a dispute relating to the principle of non-discrimination on grounds of age, as specified in Directive 2000/78, is submitted for decision, should within the scope of its powers, protect rights granted to individuals by EU law and ensure the full effect of that law **by not applying, when necessary, any provision of national law which is contrary to it.**
- C-555/07

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The principle does not always apply: if an obligation is imposed on an entity as a result of a (non)transposed directive which is not foreseen by national law

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Case

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The termination of the employment relationship of indefinite duration of a worker who, after entering into employment finds she is pregnant, regardless of the fact that the employer hired her to replace a worker on maternity leave, is contrary to Directive 76/207. (Webb v EMO Air Cargo, C-32/93).

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## Equality law - cases before the CJEU

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Action brought by Commission for non-fulfillment of obligations pursuant to Articles 258-260 of TFEU

Case:

- Hungary adopted national legislation providing for the retirement of all judges (including prosecutors and notaries) aged 62-70, within a maximum of one year, while for younger individuals who have not yet reached the age of 62, a general retirement scheme applied, progressively increasing the retirement age to 65.
- The system establishes different treatment of persons who are in these professions and have reached the age of 62, and younger persons in the same profession, because the former must automatically retire first. (Commission v Hungary, C-286/12)

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## Preliminary ruling proceedings – Article 267 of TFEU

- In the EU's decentralised judicial system, the question of interpretation of EU law is reserved for the CJEU.
- It is a form of dialogue, not a hierarchical relationship.
- The CJEU aims to help national judges in resolving the dispute, not to resolve it on their behalf or control them:
  - ✓ Language of the proceedings is the language of the national court
  - ✓ Possibility of informal communication
  - ✓ Recommendations to national courts regarding the initiation of the preliminary ruling proceedings

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019H1108%2801%29>

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## Preliminary ruling proceedings – Article 267 of TFEU

The CJEU shall have jurisdiction to give preliminary rulings concerning:

(a) interpretation of the Treaties;

(b) validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union

- The CJEU is not competent to interpret national law or international treaties of MS
- EU law must be applied in the case (Charter of Fundamental Rights of the EU??)

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### **Acte clair** (CILFIT, Case 283/81)

- The question of interpretation of European law is so clear that it leaves no reasonable doubt – clear rules do not need to be interpreted.

### • **Acte éclairé** (Da Costa, Cases 28, 29 and 30/62)

- The question referred is identical in substance to the one that had already been subject to a preliminary ruling – the national court **may** still refer a question if it wishes.

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Obligatory content of the request – Art. 94 of the Rules of Procedure and Art. 15 of Recommendations

In addition to the text of the question, the request for a preliminary ruling **must** contain

a summary of the subject matter of the dispute in the main proceedings and the relevant findings of **fact** as determined by the referring court or tribunal, or, at the very least, an account of the facts on which the questions referred to are based;

the **tenor** of any national provisions applicable in the case and, where appropriate, the relevant national case-law (ECLI);

a **statement of the reason** which prompted the referring court or tribunal to inquire about the **interpretation or validity of certain provisions of EU law**, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Optional content of the request – Articles 17-18 of Recommendations

The request **may** contain

Summary claims of the parties

Annexes to the request (are not translated)

Opinion of the national court

## Formal requirements

Typed and numbered paragraphs and pages

Official version of the request and the version allowing text editing

Anonymised and non-anonymised version

Transmit the file (or transcript) and details about the parties

Style and scope of the request

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## Inadmissible request

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Unless it is unambiguously clear from the file, the national court must explain why the answer to the question is relevant to the decision, and the reasons for applying EU law and relationship with national law (e.g. *Bacardi-Martini*, C-318/00, point 43)

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The question must be legally relevant to the final decision, not merely hypothetical or based on facts not established in the proceedings (e.g. *Bosman*, C 415/93, point 61).

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## Decision by reasoned order – Art. 99 of the Rules of Procedure

- Where the question referred to the Court for a preliminary ruling **is identical to a question** on which the Court has already ruled, **where the reply** to such a question **may be clearly deduced from existing case-law**, or where the **answer to the question referred for a preliminary ruling admits of no reasonable doubt**, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

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## Formulating the question

- As a rule, specific questions are better than very abstract ones: e.g. if the interpretation of the term „scope“ specified in Art. 3 of Directive 2000/78 is disputed, it is not a reasonable question whether the conduct amounts to discrimination.
- The question must be based on the finding of fact

### Example

„Is a worker undergoing in vitro fertilisation a ‚pregnant worker‘ within the meaning of the first part of Article 2(a) of Directive 92/85, if, at the time she was dismissed, her ova had already been fertilised with her partner’s semen and therefore there were already in vitro embryos that had not yet been transferred to her uterus“

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## Reformulating the question

„Does Council Directive 79/7/EEC preclude the imposition of a requirement in national law that in order to be entitled to the state old-age pension, a person must, in addition to meeting psychological, social and psychological criteria for recognition of gender reassignment, also be unmarried?“



**The CJEU:** In essence, the referring court is asking whether Directive 79/7 /.../ must be interpreted in such a way as to preclude national legislation which provides that a person who has changed gender, should meet not only physical, social and psychological criteria, but also the condition that he/she is not married to the person of the gender he/she adopted after this reassignment in order to be entitled to the state old-age pension from the statutory retirement age for persons of this acquired gender.

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At what stage of the proceedings is it most appropriate to put a question

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It **may** do so as soon as the national court finds that a ruling on the interpretation (or validity) of EU law is necessary to enable it to deliver its judgement

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**However, it is best to** do so in a phase when the production of evidence has already been carried out and therefore all legally relevant facts have been established. Then it can best define the legal and actual framework of the dispute and the questions it wishes to raise

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## Proceedings

- Formulation of the question and its submission to the CJEU, preferably via the e-curia application, with the file or its transcript (Articles 23-24 of Recommendations)
- Registrar notifies parties, the Commission and MS (Article 23 of Statute)
- Submission of statements by parties, the Commission and MS within two months
- Oral hearing
- Opinion of the Advocate General
- Judgement
- The CJEU must be informed about the final decision

e-Curia

e-Curia

e-Curia is an application of the Court of Justice of the European Union that enables the representatives of parties in cases brought before the Court of Justice and the General Court, as well as national courts and tribunals in the context of a reference to the Court of Justice for a preliminary ruling, to exchange procedural documents with the Registries by exclusively electronic means.

- [Decision of the Court of Justice of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia](#)
- [Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia](#)
- [Conditions of Use of e-Curia](#)
- [User Guide](#)

### Requesting an account

In order to use e-Curia, a request to open an account must be submitted using an account request form.

The procedure for opening an account varies depending on whether the user follows the standard procedure or the special procedure.

The standard procedure enables an account to be opened in order for procedural documents to be exchanged with the Court of Justice or the General Court. It is available to a party's representative ('representative' account), or, in the context of a request for a preliminary ruling before the Court of Justice, to a person acting on behalf of a court or tribunal of a Member State ('court' account) or to a person who does not have the status of agent or lawyer but who, under national procedural rules, is authorised to represent a party before the courts of his Member State ('authorised person' account). It takes several days to process the request and you will be informed by email of its progress.

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## Who can submit a question (Abrahamsson, C 407/98)

Katerokoli sodišče


Kadar je takšno vprašanje postavljeno v postopku, ki teče pred sodiščem DC, zoper odločitev katerega po nacionalnem pravu ni pravnega sredstva, je to sodišče dolžno predložiti zadevo SEU.

Zavrnitev predloga strank, da se vprašanje predloži v postopek predhodnega odločanja, mora biti obrazložena (ESČP; Dhanha v Italiji, 17120/09; Komisija v Franciji, C-416/17)

## Who is not entitled to submit a question

- „The court“ with only administrative powers
- Arbitration
- State prosecutor's office

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A court or tribunal against whose decision there is no judicial remedy under national law

- Criterion *in abstracto*: When its decisions may be open to review before the Supreme Court, the national court is not obliged to refer a question to the preliminary ruling proceedings, even though the decision on the merits before the Supreme Court depends on prior admission.  
(Lyckeskog, C-99/00, points 16 and 19.)