

The role of the national judge in applying EU equality law

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Application of EU law in national proceedings

- Protected grounds under Article 4 of the Bulgarian Protection Against Discrimination Act
- sex, race, nationality, ethnic origin, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status or any other ground established by law or by an international treaty to which the Republic of Bulgaria is a party.

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Application of EU law in national proceedings

- Manifestations of discrimination:
- Direct discrimination
- Indirect discrimination
- Harassment
- Hate speech
- Sexual harassment
- Victimisation
- Incitement to discrimination
- Discrimination at work
- Architectural environment

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Application of EU law in national proceedings

- Harassment
- Any unwanted conduct related to a protected ground, and manifested physically, verbally or in any other manner, having the purpose or effect of violating the dignity of a person and creating a hostile, degrading, humiliating, offensive or intimidating environment.
- ADM. 11591/2020 of the Supreme Administrative Court - with. Voivodinovo, Deputy Prime Minister

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Application of EU law in national proceedings

- Sexual harassment:
- Any unwanted conduct of a sexual nature, manifested physically, verbally or in any other manner, which violates dignity and honour and creates a hostile, degrading, humiliating, degrading or intimidating environment and, in particular, where the refusal to accept such conduct or the coercion of such conduct may influence decision-making affecting the person.
- ADM. 9288/2018 of the SAC - ballet dancer/colleague
- ADM. 10645/2017 of the Supreme Administrative Court - Head of Department / Employee

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Application of EU law in national proceedings

- Victimisation:
- (a) less favourable treatment of a person who has taken or is presumed to have taken or will presumably take action against discrimination;
- (b) less favourable treatment of a person where a person associated with them has taken, is presumed to have taken, or will presumably take any action against discrimination;
- (c) less favourable treatment of a person who refused to discriminate.
- Administrative case 3177/2022 of the SAC - non-admission to the workplace after complaints

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Application of EU law in national proceedings

- Incitement to discrimination: Direct and intentional encouragement of discrimination, including giving an instruction to discriminate.
- Administrative case 2747/2022 of the SAC - billboards with couples embracing
- Accessible architectural environment:
- Administrative case 12073/2021 of the SAC - guest house
- Administrative case 3553/2022 of the SAC - Probation Service
- ADM. 7627/2021 of the Supreme Administrative Court - "Bulgarian Post" EAD
- ADM. 1685/2022 of the SAC - public services

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Application of EU law in national proceedings

- Prohibition of discrimination in the workplace: Equal working conditions without regard to any protected characteristic - C-824/19, TC and UB, ECLI:EU:C:2021:862
- Equal pay for equal or work of equal value - Adm. 9907/2020 of the SAC
- Access to education without regard to a protected GROUND
- Disability - C-406/15, Milkova, EU:C:2017:198
- Military service- gender

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Application of EU law in national proceedings

- Decision of 14.12.2021 in Case C-490/20 CJEU - in respect of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is national is obliged (i) to issue an identity card or a passport, without requiring a birth certificate to be drawn beforehand by its national authorities, and (ii) to recognise, as in any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.
- Decision No. 3251/13.05.2022 in case No. 3654/2020 of the Supreme Administrative Court and Decision No. 2185/01.03.2023 in case No. 6746/2022 of the Supreme Administrative Court

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Application of EU law in national proceedings

- Burden of proof:
- administrative case 6502/2022 of the Supreme Administrative Court - insurance of a foreigner
- Administrative case 4543/2022 of the Supreme Administrative Court - Lidl discounts
- Administrative case 6528/2020 of the SAC - dismissal of all trade union members after the establishment of the trade union
- Importance of subjective attitude:
- Judgment of 8 November 1990, Dekker, C-177/88, ECR I-3941, paragraph 22,
- Judgment of 22 April 1997 in Case C-180/95 Nils Draehmpaehl, paragraph 19.
- Art. 8 of the Bulgarian Protection Against Discrimination Act
- ADM. 11803/2017 of the Supreme Administrative Court, Admin. 12401/2015 of the SAC - administrator of website, hate speech comment

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Practical tips for making a preliminary reference

- Requests for preliminary rulings are specific to EU law.
- Proceedings in which a national judge asks a EU judge to help resolve a problem relating to EU law.
- Cooperation mechanism (1)
 - The Court of Justice is by its very nature the supreme interpreter of EU acts...,
 - ...but it is not the only judicial body empowered to apply EU law.
 - This task is also entrusted to the national courts!!!
 - National courts = first guarantors of EU law

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Practical tips for making a preliminary reference

- Three conditions for production
Common system: Article 267 TFEU

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, 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.

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Practical tips for making a preliminary reference

- When can a national court make a request?
 - When a question of EU law is before it;
 - an answer to this question is necessary (according to the national court);
 - there is a right of appeal / Judgment of 26 July 2017 in Case C-112/16 CJEU/

(When is EU law answer (according to the national court) necessary?)

- where it is material to the outcome of the case;
- no previous CJEU ruling;
- for other procedural reasons)

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Practical tips for making a preliminary reference

- When is a national court obliged to make a request?
 - when a question of EU law is put before it;
 - NO possibility of appeal;
 - possible exceptions:
 - the question is irrelevant;
 - there is a previous judgment of the CJEU (on an issue which is identical in substance) or the answer can be deduced from a previous CJEU decision, regardless of the type of proceedings in which it was rendered;
 - the answer is obvious (the so-called “acte clair”).

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Practical tips for making a preliminary reference

Acte clair (Case 283/81, *Sylphite*)

- referral is not required if there is no reasonable doubt about the answer.
- the national court is obliged to check whether the same is obvious to all courts (including the CJEU) in all Member States and in all language versions
- the question must be asked in the context of EU law (not national law).

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Practical tips for making a preliminary reference

- Preliminary inference proceedings are a "dialogue between judges"; therefore:
 - the national judge enjoys independence and discretion when deciding whether to refer a case to the CJEU
 - the parties are not entitled to oblige the judge to make a reference
- The request must not meet any particularly formal condition. But
 - it must be justified, and
 - illustrate the grounds on which the CJEU should respond
 - The questions must be clear, concise, specific and avoid unnecessary details. The interpretation of the EU law provision should be necessary for the effective resolution of the legal dispute/ Judgment of 13.12.2018 in case C-492/17/
 - Formally, the request should not exceed 10 pages, should contain a separate and clearly distinct part of the questions posed, and should name the parties with personal data deleted.

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Practical tips for making a preliminary reference

- At which stage of the national proceedings should the request be addressed?
 - the contract does not contain an instruction.
 - The CJEU prefers:
 - where adversarial proceedings have been established;
 - where the facts and the national law are clear.
 - Where an interpretation of a provision of the HOPEC is sought, it must necessarily be linked to a provision of primary or secondary EU law - Article 51(1) HOPEC.

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Practical tips for making a preliminary reference

Parties to the national case

- They cannot ask questions of the CJEU and they cannot oblige the national judge to make a request
- But
 - the parties must be heard by the national court, and
 - make written and oral submissions to the CJEU

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Practical tips for making a preliminary reference

Judgment of 06.10.2021/ Grand Chamber/ in Case C-561/19- Cilfit 2

- **Article 267 TFEU must be interpreted as meaning that a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to bring before the Court of Justice a question concerning the interpretation of EU law that has been raised before it, unless it finds that that question is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct interpretation of EU 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 characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union.**
- **Such a court or tribunal cannot be relieved of that obligation merely because it has already made a reference to the Court for a preliminary ruling in the same national proceedings. However, it may refrain from referring to the Court a question for a preliminary ruling on grounds of inadmissibility specific to the procedure before that court or tribunal, subject to compliance with the principles of equivalence and effectiveness.**

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Practical tips for making a preliminary reference

- There is, in any event, a broader obligation, or even a fourth condition: whichever of these three conditions is relied on by the national court of last instance, it must give *adequate reasons* for its conclusion that the case before it does not give rise to a preliminary ruling under the third paragraph of Article 267 TFEU.
- Naturally, there is no universal criterion for what is an adequate and therefore sufficient degree of motivation. It all depends on the nature of the case, its complexity and, above all, on the arguments raised before the determining court and those contained in the pleadings. However, and in any event, provided that a relevant question of European Union law has indeed been raised before a national court of last instance, it must clearly indicate specifically which of the three conditions (exceptions) is to be applied to that case and provide at least a summary explanation of why that is so.

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Practical tips for making a preliminary reference

- Thank you for your attention!