The Role of the National Judge and the Preliminary Ruling Procedure

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I. The fundamentals

The anti-discrimination directives of 2000 founded on Art. 13 TEC (*Directive 2000/43* of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and *2000/78* of 27 November 2000 establishing a general framework for equal treatment in employment and occupation), like *Directive 2004/113* of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, which was to be transposed by late December 2007, and *Directive 2006/54* of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, must – just as any other directive – be transposed into *national law* by the Member States.

Transposing Directive 2000/78 caused a few problems for Germany, Luxembourg and Austria, and Directive 2000/43 for Finland as well. In the case of Germany[1] and Austria[2], the infringement proceedings initiated by the Commission resulted in condemnation. Germany transposed the directives through the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, *AGG*) of 14 August 2006 (Federal Law Gazette I, 1897).

Following their transposition, then, directives are not applied directly. Public agencies and courts in the Member States apply the domestic legislation enacted to transpose them. The anti-discrimination directives are no exception.

Consequently, if the prohibition of discrimination has been violated, *legal remedy* is provided by the courts in the country concerned.

Nevertheless, in all Member States domestic law must be *interpreted* and *applied* in accordance with the directives. This applies not only to any legislation that has been enacted specifically to transpose them, but – as the case-law tells us – to any relevant domestic rule that falls within the scope of Community law.

Furthermore, if an act of secondary law (adopted by the Community legislator) infringes higher law (TEC or fundamental principles of Community law), only the ECJ can rule that this act shall be without effect.

When testing compliance with directives, a national judge may (Art. 234 (2) TEC) or possibly must (Art. 234 (3) TEC) refer any questions

[1] C-43/05, Commission/Germany, ECR 2006, I-33

[2] C-133/05, Commission/Austria, ECR. 2006, I-36

it has about the interpretation of specific directives to the ECJ if it considers a decision on this question to be necessary to enable it to give judgment in an action before it (**reference for interpretation**). It may also refer to the ECJ for judicial review of the validity of an act of secondary law (**reference on validity**).

References for a preliminary ruling on validity are rare; secondary Community law enjoys the *presumption of legality*.

II. References concerning the anti-discrimination directives

The predominant focus of case-law has been Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. The *Mangold* (C-144/04, ECR 2005, I-9981), *Palacios de la Villa* (C-411/05, ECR 2007, I-8513), *Age Concern England* (C-388/07, 5/3/2009) and *Hütter* (C-88/08, 18/6/2009) cases related to discrimination on the ground of age, the *Chacón Navas* (C-13/05, ECR 2006, I-6467) and *Coleman* (C-303/06, ECR 2008, I-5603) judgments concerned discrimination on the ground of disability. *Tadao Manuko (*C-267/06, ECR 2008, I-1757) and *Bartsch* (C-427/06, ECR 2008, I-7245) centred on survivor's pensions.

Bulicke (C-246/09) and *Georgiev* (C-250/09 and C-268/09) are still pending.

In the matter of *Centrum voor gelijkheid van kansen* (C-54/07, ECR 2008, I-5187), the ECJ essentially interpreted the concept of direct discrimination as defined in Art. 2 (2) (a) of Directive 2000/43 and the provision in its Art. 8 (1) for reversing the burden of proof.

III. The purpose and legal status of references

The prime purpose of the reference procedure is to **preserve legal unity** in all Member States, and in this respect it also serves **legal certainty**. Citizens must be able to have confidence that Community law is applied consistently in all Member States (cf. C-168/08, *Hadadi*, 16/7/2009, para. 38; C-32/08, *FEIA*, 2/7/2009, para. 63).

As far as its legal status is concerned, the reference is an interlocutory procedure for the national judge and a **cooperation procedure** for the ECJ and the national judge. Accordingly, the ECJ sees its task as assisting the national judge in a particular case without applying Community law itself. In interpretation procedures, the ECJ can and must only express its views on Community law, not apply it (C-54/07, *Centrum voor gelijkheid van kansen*, ECR 2008, I-5187, para. 19).

IV. Safeguarding legal unity

From the Community's perspective, the prime purpose of a reference procedure is to ensure that Community law is properly and consistently applied. Its priority, in other words, is *unity in the dispensation of justice* (166/3, *Rheinmühlen*, ECR 1974, 33, para. 2; 283/81, *Cilfit*, ECR 1982, 3415, para. 7). Safeguarding this falls to the Court of the European Communities, as it requires a judicial body whole ruling is "final" and equally binding on all Member States.

Both validity and interpretation references pursue that objective.

In the field of anti-discrimination, the emphasis in the case of Directives 2000/43 and 2000/78 has lain with *interpretation*, and more specifically with the interpretation of *secondary* Community law. We can probably forget for a moment about references on validity.

How vigorously the Court is able to fulfil its task of safeguarding consistent application depends *partly* on the extent to which the opportunity to submit a reference is taken up (where the national judge has a right) or the extent to which an obligation to submit arises (where the national judge has a duty).

Partly, however, achieving this objective of safeguarding legal unity will depend on the legal impact of judgments from the ECJ.

1. The duty to refer

The duty to refer is more likely to ensure the consistent application of Community law in all 27 Member States (C-99/00, *Lyckeskog*, ECR 2002, I-4839, para. 14). But one cannot oblige everyone to refer everything. The Court's capacities are limited. A balance has to be struck between what is desirable (as much mandatory referring as possible) and what is feasible (due to the Court's capacity). The TEC adopts the two-pronged approach: all courts are entitled to refer on a voluntary basis (Art. 234 (2) TEC), and some must because they have an obligation to do so (Art. 234 (3) TEC).

On the one hand, the duty to refer is limited *by treaty in Art. 234 (3)* to courts and tribunals *"against whose decisions there is no judicial remedy"*: this means *all* courts in this situation, and not only those high courts or supreme courts who are at the top of the ladder of instances. According to the case-law, the decisive criterion here is the availability of a judicial remedy or appeal body. In other words, a denial of leave to appeal does not mean that a higher administrative court in Germany is obliged to submit a reference. On the other hand, ECJ *case-law* has extended the obligation to refer in the interests of legal unity (314/85, *Foto Frost*, ECR 1987, 4199; C-461/03, *Gaston Schul*, ECR 2005, I-10513): *all* courts have an obligation to refer to the ECJ is they do not wish to apply secondary Community law because they believe it is invalid, perhaps because it violates the

Treaty or infringes fundamental principles of Community law. The ECJ, then, holds *sole powers to reject the remedy*.

However, this extension is a modest one in so far as *references on validity* are comparatively rare. If there are any doubts about the validity of a directive or regulation, they are usually asserted by means of an action for annulment taken by a Member State or another institution under Art. 230 TEC soon after the act has been published[3].

2. The right to refer

Every court has an essential **right to refer**, and can therefore consult the ECJ about the interpretation of a Community norm. However, it only do so if it meets the conditions detailed under V. 1.

There are two comments to make about references relating to the anti-discrimination directives.

Although the earlier anti-discrimination directives from the field of labour law may occasionally offer clues as to interpretation, these are (relatively) new legal instruments. In general, the principle for a national judge should be: the sooner you ask the ECJ, the better. Anyone who wants to have a hand in shaping ECJ case-law must refer. The legal scope of Directive 77/187 on safeguarding the rights of workers in a company that is transferred is a cautionary tale. The case-law was already highly advanced by the time the German courts (the labour tribunals in Bamberg and Hamburg) submitted their first references (C-132/91, C-138/91 and C-139/91, *Katsikas*, ECR 1992, I-6577).

On the other hand, not every question must automatically culminate in a reference. If it only a matter of *applying* provisions already interpreted by the ECJ *to a specific case*, the national judge is required to refrain from referring and is expected to proceed straight to its own ruling (Opinion of AG Jacobs in C-338/95, *Wiener*, ECR 1997, I-6495). This above all applies in areas of law where the ECJ has already chipped in from every conceivable angle, such as the above-mentioned protection of workers in transferred businesses under Directive 77/187, now 2001/23. However, this factor is not yet likely to make itself felt in anti-discrimination matters, even if a wave of judgments were passed down in 2008-2009, especially on Directive 2000/78.

As to the relationship between different rungs on the court hierarchy, an early reference might well save a long march through the instances.

[3] Another consideration with validity references is that if, after some years, the ECJ rules that the provisions of a Regulation or Directive are null and void, this can have unforeseen financial consequences. That lesson was learned from partially reversing the milk quota in 1988, the effects of which are still keeping the Court of First Instance and the Court of Justice busy in the form of claims for damages.

Of course, this has to be weighed up against the factor that ECJ proceedings take at least a year.

3. Refraining from a reference

The latter remark only applies to discretionary references. It is only relevant if the court has a *right* to make a reference, and consequently also to refrain from so doing. If the court has a *duty* to make the reference, the question to ask is whether any exceptions can be made to that duty.

No exceptions, or only extremely limited ones in the sense of interim relief (C-143/88, *Zuckerfabrik Süderdithmarschen*, ECR 1991, 415; C-432/05, *Unibet*, ECR 2007, I-2207), as far as *references on validity* are concerned.

As for those mandatory references on *interpretation*, very early on, in response to the "acte clair" theory put forward by the French Conseil d'Etat, the ECJ conceded narrow exceptions in the Cilfit judgment (283/81, ECR 1982, 3415), as long as the obligation to refer has been deprived of its *purpose*.

The criteria defined in the Cilfit judgment were subsequently assimilated into Art. 104 (3) of the Court's Rules of Procedure. Although this article does not describe cases when a reference need not be submitted, it does provide for three situations in which the Court may answer a reference in the form of a *reasoned order* rather than a judgment (in the situations described in the first paragraph of Art. 104 (3) without first informing the referring court or hearing the parties, and in the instance described in the second paragraph only after informing the court and hearing the parties). Art. 104 (3) of the Rules of Procedure provides for a reasoned order if

- the question referred to the Court is identical with a question on which the Court has already ruled (Art. 104 (3) para. 1, 1st alternative)
- the answer may be clearly deduced from exiting case-law (Art. 104 (3) para. 1, 2nd alternative)
- or the answer to the question referred to the Court for a preliminary ruling admits of no reasonable doubt (Art. 104 (3) para. 2).

This last option is formulated with even greater rigour in the Cilfit ruling, which says that a court which has a duty to refer may only refrain from so doing if it is convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice.

The power under Art. 104 (3) of the Rules of Procedure to give its decision by reasoned order is available to the Court not only when the national judge had a duty to refer, but also when the national judge was taking advantage of the right to refer. In this respect, the criteria applied in the Cilfit judgment have acquired general relevance.

It can be concluded from the Cilfit judgment in combination with Art. 104 (3) of the Rules of Procedure that in the three situations described a national judge with either a right or a duty to refer may refrain from submitting a question. In the case of the third option, however, there is a difficulty for courts which have a duty to refer, in that the Cilfit case-law formulated this criterion with greater stringency and, as more recent judgments illustrate (C-224/01, *Köble*r, ECR 2003 I-10239, para. 118, C-495/03, *Intermodal*, ECR 2005, I-8151, para. 37), the essence of that formulation still stands.

4. The effects of judgment

The preliminary ruling procedure is founded on cooperation between the referring national court and the ECJ. It follows directly that the ECJ's answer is binding on the referring court.

The procedure's purpose of safeguarding legal unity does not call merely for an effect *inter partes*:

- Decisions declaring Community rules to be unlawful following a validity reference apply ***inter omnes*;** once a Community rule has been qualified as invalid, it cannot continue to be effective in other Member States.

- But ECJ decisions on the interpretation of Community law also have an ***inter omnes*** effect. In practical terms, this is incontestable, even if the jurisprudence is still arguing over the right reasons. As I see it, the prevailing approach today is to ascribe it to the primacy of Community law. Some still cite Art. 10 TEC.

The case-law attributes *effect ex tunc* to rulings on interpretative questions. In practical terms this means that rulings of interpretation in response a question acquire *retroactive force*. In many cases that causes considerable problems, at least of it affects legal provisions that had financial consequences.

Only the ECJ can direct that an effect shall apply *ex nunc*. However, it has a limited ability to do so: its own case-law dictates that any temporal restriction must be included immediately in the judgment, debarring limitations on temporal effect in any later decision (C-292/04, *Meilicke*, ECR 2007, I-1835, para. 34 and elsewhere). Moreover, one of the parties to the procedure must have requested the restriction. If financial obligations are involved, this application will usually be made by a Member State.

An effect *ex tunc*, however, can only be debarred on grounds of legal certainty. That would apply if invoking the ECJ's interpretation undermined legal relations entered into in good faith.

The only leeway a Member State has to restrict the retroactive impact by means of legislation is, for example, by capping reimbursements to citizens of amounts unduly paid. Any such provision must, however, be of a general nature and may not be enacted as an exceptional rule

designed to curb the retroactive force of a specific ECJ ruling (309/85, *Barra*, ECR 1988, 355).

V. Preliminary ruling procedures in the spirit of cooperation

Within the framework of the *cooperation procedure* between a national judge and the European Court of Justice that characterises the preliminary ruling process, the ECJ insists that its mission is to contribute to the administration of justice in Member States and to provide useful answers that will enable the national judge to rule in a specific case.

However, it is the ECJ which determines unilaterally what rights and duties each party has in this scenario: its interpretation of Art. 234 TEC is definitive.

It is the Court's consistent practice to consider itself duty-bound to answer any question put to it. However, this only applies to submissions that have been properly constituted.

1. The proper constitution of a reference

Essentially, a reference has been properly constituted if:

- it is made by a *court*
- in a *case pending before it*
- the point in question *determines its ability to give judgment*
- the question refers to the interpretation (or validity) of an *act of Community law*
- the factual and legal context has been sufficiently set out and the substantive law has been sufficiently presented.

We cannot and need not address all the problems that might arise with regard to each of these conditions in the context of the anti-discrimination directives, so I shall confine myself to a few points.

The decisive issue here is to what extent the ECJ reviews or is able to review the proper constitution of each criterion, and what the consequences of that review may be.

2. Reviewing deficiencies in the reference

For the review to occur, one of the parties to the procedure must have raised an objection. Evidently these objections are always raised if there is any doubt about certain factors, such as the judicial status of the originating body or the facts of the case not falling within the scope of Community law.

The case-law is not always entirely clear on the matter of how far the Court should also be testing procedural quality *ex officio*. The ECJ vacillates between declaring that this lies outside its competence and rejecting references as inadmissible.

Ultimately this probably has something to do with Art. 92 of the Rules of Procedure: the first paragraph allows the Court, under certain circumstances, to give a reasoned decision on the action without taking any further steps where it *clearly has no jurisdiction* or where the *action is manifestly inadmissible*, while the second paragraph empowers it *ex officio* to determine the essential preconditions for the action. On first sight, this distinction in Art. 92 (1) seems crucial. If a reference is inadmissible, surely one may assume that the procedural obstacles might be overcome, whereas if the Court lacks jurisdiction the matter cannot be remedied. In preliminary ruling procedures, however, the ECJ has even disclaimed competence when the procedural obstacles could have been removed. In other words, it does not appear to go along with this distinction.

First of all, the Court assumes a clear division of labour in the preliminary ruling procedure: *"In the context of this procedure, the national judge, who alone has direct knowledge of the facts of the case, is in the best position to assess, with full knowledge of the matter before it, the need for a preliminary ruling to enable it to give judgment."*

There is, therefore, a *presumption of relevance* (C-210/06, *Cartesio*, 16/12/2008, para. 67; C-248/07, *Trespa International*, 6/11/2008, para. 33). That is why the Court does not usually test the quality of the reference *ex officio*, but reserves the right to examine certain circumstances, as:

"The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court for its part to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States…"

With regard to the relevance of the referred question to the facts of the case, the Court does *ex officio* examine certain *manifest* defects: "The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation which is sought of Community law *bears no relation to the actual facts of the main action or to its purpose* or where the problem is *hypothetical* or the Court *does not have before it the factual or legal material* necessary to give a useful answer to the questions submitted to it" (C-467/05, *Dell'Orto*, ECR 2007, I-5557, para. 40; C-248/07, *Trespa International*, 6/11/2008, para. 33; C-210/06, *Cartesio*, 16/12/2008, para. 67).

3. The exclusive competence of courts to refer

A bundle of criteria have evolved in case-law to determine which bodies may be assumed to qualify as courts and tribunals in the meaning of Art. 234 TEC (*establishment in law, permanence, compulsory jurisdiction, inter partes procedure, application of rules of law, independence*; cf. C- 210/06, *Cartesio*, 16/12/2008, para. 55; C-96/04, *Standesamt Stadt Niebüll*, ECR 2006, I-3561, para. 12).

Although the body for the promotion of equal treatment envisaged in Art. 13 of Directive 2000/43 is not a court or tribunal in terms of its origins or design, a Member State may, pursuant to the second sentence of Art. 13 (1), constitute it in such a manner as to raise a question about its judicial status in the sense of Art 234 TEC.

4. The nature of the dispute

Doubts have occasionally been cast, in past actions under labour law, as to whether a **dispute is fictitious** rather than genuine (cf. C-144/04, *Mangold*, ECR 2005, I-9981, para. 32). There is a similar implication in the claim made in *Centrum voor gelijkheid van kansen* (C-54/07, ECR 2008, I-5187, para. 21) refuting concrete discrimination on the grounds that nobody had (yet) been identified as having suffered from it and that the alleged discrimination was merely construed following an employer's public remarks about his recruitment policy.

In this instance, the question as to whether a dispute existed is seen in the light of Art. 7 (2) of Directive 2000/43, whereby "*associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive*."

The case-law on references in a fictitious national dispute would appear to date back to the ruling in *Foglia/Novello*, C-104/79, ECR 1980, 745. At the time the European Court was resisting having to interpret Community law in a preliminary ruling procedure from one Member State in the light of the rules of another Member State (C-318/00, *Bacardi-Martini*, ECR 2003, I-905). The dogma of fictitious disputes, therefore, has a quite different background.

Accusations of this kind are always examined, because the ECJ does not see itself as being there to provide an expert opinion on questions of a general or hypothetical nature. Usually, however, these objections lack merit. The fictitious nature must be *manifest*, and as long as the parties are in dispute about a genuine legal matter, even if they ultimately agree about the answer, that is unlikely.

As to the criterion of *procedure inter partes*, which we have already encountered in the definition of a court, the ECJ has clearly stated, when ruling on appeals against decisions by registry courts to refuse an entry, that essentially this is about whether the proceedings are intended to lead to a decision of a judicial nature (C-210/06, *Cartesio*, 16/12/2008, paras. 56, 58).

5. The legal status of the act to be interpreted

The ECJ only has the competence to rule on matters of Community law. It follows that only an act of Community law can be the subject of the question in the reference.

Formulating such questions about the interpretation of Community law is often difficult. National judges have a tendency to ask whether their legislation complies with Community law, or rather about a particular national rule and its interpretation in the light of Community law. In this type of procedure, the ECJ is not competent to deal with questions formulated in this manner. In such cases, the ECJ will therefore reformulate the question in abstract terms to ask about the interpretation of an underlying or relevant Community act in the light of the legal problem in the Member State. Once the ECJ has sent the national judge its reply, *interpreting national law* is solely a matter for the courts in the country concerned.

Although the national judge theoretically has leeway here, we should recognise that in practice the ECJ's answer ultimately *can* indicate how the dispute is to be resolved. That will probably always be the case when the Community act that has been subjected to interpretation leaves little or no room for discretion.

Community law can, in principle, only be interpreted if the national rule falls within its scope. In some cases, and that probably includes the German Act on Equal Treatment, Member States will have exceeded their obligation to transform directives by aligning their domestic law even where it falls outside the reach of Community law. When domestic law autonomously invokes provisions of Community law in this manner, the Court has accepted the reference for a preliminary ruling if the national rules largely reflect those of the directive in question (C-48/07, *Les Vergers du Vieux Tauves*, 22/12/2008, para. 27; C-297/88, *Dzodzi*, ECR 1990, 3763, para. 42; C-28/95, *Leur-Bloem*, 17/7/97, ECR 1997, I-4161, para. 24).

6. Sufficient presentation of the factual and legal context

Although the Court only has the competence to interpret Community law, it does need to have a precise understanding of the legal context in which the original proceedings are unfurling, along with the rules of the country concerned and the facts of the case. It is the task of the national judge to provide this information. If it does not meet that task adequately, the reference cannot be admitted. The case-law stresses here that otherwise the other parties to the proceedings, in particular the *Member States*, will not be properly able to exercise their right to express their views.

The Court is entitled to request clarification from the national judge (Art. 104 (5) Rules of Procedure). However, this procedure has proven to be fairly impracticable. In fact, the whole preliminary ruling procedure suffers from the passive role attributed to the referring court. Whereas the other parties can express their opinions in both *written* and *oral* form, the referring court is denied those options.

In many cases, of course, the national judge will have an interest in describing the issues, especially legal ones, in detail. This is especially likely if the referring court finds itself at odds with case-law from its supreme court (cf. C-442/00, *Rodríguez Caballero*, ECR 2002, I-

11915; C-520/03, *Olaso Valero*, ECR 2004, I-12065; C-177/05, *Guerrero Pecino*, ECR 2005, I-10887; C-81/05, *Cordero Alonso*, ECR, 2006, I-7569) or if it has reason to fear that its own government takes a different view. If there are different opinions within the national legal landscape, however, the referring court should on no account be tempted to provide a one-sided summary of its own position to the detriment of others.

It should be borne in mind here that the Member State concerned will frequently make its views on the national context known and that the Commission is a permanent party to procedures. Nevertheless, if there are conflicting views the submission of the referring court will exclusively prevail in any case of doubt.

The Court never considers the merits of domestic law. The principle *iura novit curia* does not apply in Community law. It follows that it can only pass judgment on questions put to it by a court or by parties to the procedure.