

EU GENDER EQUALITY LAW

**“The role of the national judge in the application of EU law in gender equality :
Relation with national jurisdictions and
the procedure of request for a preliminary ruling”**

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2

PRESENTATION OUTLINE

Introductory remarks

I. The role of the national judge in general

α) Interpretation and application of primary EU law

β) Interpretation and application of EU directives

i) Prohibition of unfavorable discrimination

ii) Positive action

II. The procedure of preliminary ruling in regard to equality

III. Examples

Conclusions

3

INTRODUCTORY REMARKS

a. Principle of equality and principle of gender equality:
Primary EU law

The principle of equality is a fundamental constitutional principle in EU law.

Primary law:

- ✓ Article 2 TEU
- ✓ Articles 8, 19 and 157 TFEU
- ✓ Articles 20, 21 and 23 EU CFR

Gender equality: a particular aspect of the principle of equality.

4

INTRODUCTORY REMARKS

1. Economically-oriented initially
2. Gradually complemented with social parameters
 - **Defrenne III (149/77):** The principle of equal treatment of men and women belongs to the fundamental rights.
 - **Deutsche Telekom (C-50/96):** The economic objective of article 119 EECT (now 157 TFEU) is secondary to the concept of asserting a fundamental human right.
3. Today, gender equality is also enshrined in the Charter of Fundamental Rights.

INTRODUCTORY REMARKS

What is the scope of the gender equality safeguard?

- Same treatment between men and women of same circumstances
- Different treatment if in different circumstances.
- Not an absolute right. There are objective criteria for differentiating, e.g., certain activities, certain categories of persons, etc.

INTRODUCTORY REMARKS

Case Sirdar (C-273/1997)

- Authorities enjoy discretion when adopting external security defense measures (e.g., the “Royal Marines”, a small-size corps, total number of first line combatants – including cooks).
- Male-only staff in the UK unit compatible with the principle of proportionality.

7

INTRODUCTORY REMARKS

- In general, EU law has allowed member states to introduce exceptions to the principle of gender equality with regard to the composition of security forces.
- Greek Legislator: Articles 116 (2) and 4(2) of the Constitution -->
Prohibition of any deviation from the principle of gender equality.

8

INTRODUCTORY REMARKS

b. Gender equality: Secondary EU law

- The European Union has an advanced and comprehensive framework of legal protection against discrimination including several **directives**.
- **EU acts in the field date back to the 1970s:**
 - directive **75/117/EEC**, equal pay between men and women at work
 - directive **76/207/EEC** on access to employment
 - directive **79/7/EEC** on social security
 - directive **97/80/EC** on the burden of proof in sex discrimination disputes

INTRODUCTORY REMARKS

The currently applicable directive is directive **2006/54/EC** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Specific issues are governed by:

- **Directive 92/85/EEC** on the protection of pregnant workers
- **Directive 2010/18/EU** on parental leave

EU GENDER EQUALITY LAW

After the previous introductory remarks, I will discuss:

- (I)** The role of national judges in general
- (II)** The procedure of the request for a preliminary ruling in regard to equality issues
- (III)** Examples

I. The role of national judges in general

The national judge represents the “natural judge” in EU law - >
The national judge interprets and applies EU law.

Out of **203** cases related to equality issues:

- **191** regard requests for preliminary rulings
- **12** regard infringement procedures against member-states

In any given dispute, the judge has to deal with both national and EU legislation – organize the relations between the EU and national jurisdictions.

I. The role of national judges in general

Case Costa/ENEL (6/64)

- A.** The Court held that the distinct jurisdiction of the EU “became integral part of the legal systems of the member-states when the Treaty came into effect and is binding on national courts.”
- B.** When a national rule contrasts or deviates from an EU rule, the EU rule overrides (principle of supremacy).
- C.** Under the principle of supremacy of EU law, national judges are obliged to not apply the national provision (Case 106/77, Simmenthal).

I. The role of national judges in general

a) Interpretation and application of primary EU law

National judges have to interpret and apply EU primary and secondary legislation.

How?

1. Treaty rules which are clear, unconditional, unreserved and not depending on further implementing national acts **create obligations for member states** (Vertical Direct Effect).

Private individuals may invoke such rules before national authorities and courts or tribunals **in any claim against the state.**

I. The role of national judges in general

b) Interpretation and application of primary EU law

2. Such Treaty provisions also generate a “*horizontal direct effect*”.

Private individuals may invoke them against other individuals.

Example: **Ruling Defrenne II:** the ECJ recognized the horizontal direct effect of article 157 TFEU (article 119 TEEC at the time).

I. The role of national judges in general

What happens when these provisions are not complete, clear-cut or unconditional?

A different case-law mechanism:

The national judge has to interpret national law in a way that complies with EU Law.

I. The role of national judges in general

b) Interpretation and Application of directives

- Directives safeguard gender equality, in particular, with two methods:

- i) Legislative acts prohibiting unfavorable sex discrimination, and,

- ii) Provisions obliging member-states to adopt so-called “positive action” measures.

I. The role of national judges in general

i) Prohibition of unfavorable discrimination

1. Direct effect of directives (clear unconditional and unreserved provisions that were not transposed into national legislation or when transposition was delayed or was inappropriate)

However

2. No horizontal effect between individuals, only vertical effect, i.e. only in regard to member-states.
3. The direct effect in directives cannot operate “horizontally” even in case of clear unconditional and unreserved provisions in the directive.

In this case, however, there is the possibility of compatible interpretation.

I. The role of national judges in general

Example: Case Von Colson and Kamann (14/83)

1. Refusal to hire women incompatible with the directive – Sanctions did not include the obligation to hire.
2. Decreed the adoption of appropriate measures. Did not determine a specific outcome.
3. The ECJ held that nominal compensation was incompatible with the objective pursued by the directive. In the end, the national court had to grant full-fledged compensation.

Comment: Interpretation in compliance with EU law is not a method of interpretation of national law but a fulfillment of the state’s obligation to comply.

I. The role of national judges in general

1. The “hard core” of EU law on equality is found in **directive 2006/54/EC**.
2. The directive prohibits direct or indirect discrimination between men and women :
 - **Direct discrimination:** when someone is subject to less favorable treatment because of sex.
 - **Indirect discrimination:** A prima facie neutral provision. However, the relevant criterion or practice places individuals of the one sex at a particular disadvantage, **unless said provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.**

I. The role of national judges in general

Example of Direct discrimination : **Case Tanja Kreil (C-285/98)**

1. The national legislation on the promotion of military personnel allowed women to enlist only in sanitary or military music services.
2. The Court did not identify any special circumstances in the other officer-rank positions justifying the exclusion of women on objective grounds or in a way compatible with the principle of proportionality.
3. Moreover, no objective criteria were established such as might justify the exclusion of women from posts involving the use of arms, as in the Sidar case we discussed earlier.

I. The role of national judges in general

Example of Indirect discrimination: **Case Schnorbus (C-79/99)**

The Court ruled that such discrimination arises when national provisions assign priority of access to legal training to candidates who served a military or alternative service.

I. The role of national judges in general

When is the national judge to prohibit discrimination?

A. Direct or indirect sex discrimination is prohibited in regard to :

- hiring
- access to employment or to liberal professions
- dismissal
- vocational training and promotion
- membership in employers or employee organizations.

B. In the context of occupational social security systems, particularly as regards:

- the scope and the terms of subscribing to such systems
- social security contributions
- the calculation of benefits, including increases, requirements of duration and terms for maintaining such entitlements.

NB. The directive lays down appropriate legal remedies for workers who are injured by discrimination, like conciliation and judicial dispute-settlement procedures.

I. The role of national judges in general

Furthermore, the national judge applies the directive in case of:

- **Harassment:** Unwanted conduct associated with the sex of a person – violating a person’s dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Sexual harassment:** Unwanted verbal, non-verbal or physical conduct of a sexual nature. Violating a person’s dignity, especially by creating an intimidating, hostile, degrading, humiliating or offensive environment.

There is no case-law on sexual harassment.

I. The role of national judges in general

ii) Positive action

As a second method for safeguarding gender equality (positive action), secondary legislation enables member-states to adopt measures to combat discrimination (article 157 (4) TFEU).

A. Positive action can take a variety of forms:

- **Measures to improve vocational training or to promote professional integration**
- **Quantity criteria – quotas may also be adopted.**

B. Positive action measures are always concerned with a given group which falls victim to detrimental treatment:

- **correcting historical inequalities, and,**
- **eliminating structural social discrimination.**

I. The role of national judges in general

Abundant Case-law

Example: Case Kalanke (C-450/93)

The Landesgleichstellungsgesetz stipulated that when hiring, moving to another position or promoting public servants, **women with the same qualifications as their fellow male candidates should be given priority if under-represented.**

Two candidates with the same qualifications, Mr. Kalanke and Mrs. Glissmann, qualified for the post. In view of the above rule, Mrs. Glissmann was preferred. Mr. Kalanke applied for a "Revision" before the Bundesarbeitsgericht.

I. The role of national judges in general

Example: Case Kalanke (C-450/93)

The Court found that **a national provision which automatically gives preference to female over male candidates with the same qualifications (in areas where women are under-represented) constitutes discrimination** based on sex and is, therefore, prohibited under directive 76/207.

I. The role of national judges in general

Case Marschall (C-409/95)

1. Under the disputed national provision if women in senior positions are less numbered than men, they should take priority in promotion provided they have the same qualifications as their fellow male candidates unless there are overriding reasons in favor of a male candidate (“Offnungsklausel”).
2. Mr. Marschall and a female candidate had the same qualifications for promotion to a school post.
3. The female candidate was preferred.

I. The role of national judges in general

Case Marschall (C-409/95)

4. The national judge requested a preliminary ruling.
5. The Court ruled that when two candidates of different sex have the same qualifications, it does not necessarily ensue that they also enjoy equal opportunities.
6. There is a trend to prefer men as a result of certain prejudices and stereotypical ideas.
7. Therefore, the provision at issue **does not automatically assign preference** (due to the Offnungsklausel) to the female candidate (discretion to deviate) (**unlike in case Kalanke**).
8. The provision aims at ensuring equal opportunities between men and women; therefore, it lies within the directive.

I. The role of national judges in general

Case Marschall (C-409/95)

9. The qualification here consists in the national legislation ensuring, in each individual case, that male candidates with the same qualifications as female candidates are evaluated objectively taking into account all the criteria pertaining to the person of the candidate.

I. The role of national judges in general

Comment no 1: It may be concluded from the above case-law on positive action that measures are compatible with directive 76/207 provided that:

First, they do not automatically and unreservedly confer priority to female candidates with the same qualifications as their fellow male candidates (should such priority be upheld, it would create unfavorable discrimination against men).

Second, such measures allow for an objective and individualized evaluation of all candidates.

Comment no 2: The ECJ has not changed the Kalanke case-law in later rulings. It merely distinguished from Kalanke.

I. The role of national judges in general

At the core of basic directives lies also **directive 2010/18/EU** on parental leave.

- 1) Male and female workers have an individual right to parental leave on having or on adopting a child.
- 2) At the end of parental leave, workers have the right to return to the same or equivalent or similar employment according to their contracts or employment relations.
- 3) They are entitled to request changes to their working schedule for a limited period of time.

I. The role of national judges in general

Example: **Case Zoe Hatzi (C-149/10)**

At issue was whether in case of twins the mother, a public servant, may apply for parental leave double the length of normal time (then directive 96/34/EK).

1. First, the Court considered whether directive 96/34 applies also on public servants. The ECJ answered in the affirmative.
2. In considering the teleological and grammatical interpretation of relevant provisions, the Court concluded that the directive enables parents to interrupt their professional activity.

I. The role of national judges in general

Example: **Case Zoe Hatzi (C-149/10)**

3. It ensured that parents can return to their employment at the end of leave.
4. The ECJ held that the increased burden falling on the parents of twins is quantitative, in the sense that they must cater for the needs of two children simultaneously; but this extra effort is not extended in time since, in principle, twins go through the same stages of development at the same time.

I. The role of national judges in general

5. **Comment:** To double the duration of parental leave is not necessarily the only appropriate measure member states may adopt.
6. According to the ECJ, it is up to the national judge to assess whether national legislation provides sufficient means to deal with the particular needs of parents of twins in their professional and family lives.

I. The role of national judges in general

Parental leave

Example no2:

Greek case-law has held that a University's refusal to grant a 9-month parental leave to a male Member of Faculty because the university's by-laws do not stipulate this right for men is a case of direct discrimination.

I. The role of national judges in general

Bundle of specialized directives on gender equality:

1. Directive **92/85/EEC** on the employment of pregnant and breastfeeding workers :

- ✓ They are not obliged to work night shifts during pregnancy and for some time after birth.
- ✓ Maternity leave must be at least 14 consecutive weeks prior to or/and after giving birth.
- ✓ They may apply for paid leave to undergo prenatal testing during working hours.
- ✓ They cannot be dismissed for reasons associated with their situation from the onset of pregnancy to the end of maternity leave.

2. Directive **2010/41/EE** lays down favorable provisions for self-employed workers.

I. The role of national judges in general

Conclusions

- A. EU law on gender equality is transposed in the national jurisdictions of member-states.
- B. The national judge is entrusted with the important role of interpreting and applying EU law.
- C. The national judge may encounter difficulties during interpretation.
- D. For that purpose, the Treaty adopts the “legal tool” of preliminary ruling.

II. The procedure of preliminary ruling in regard to equality

Article 267 TFEU

The Court of the European Union issues preliminary rulings on :

- α) the interpretation of the Treaties,
- β) the validity and interpretation of the acts of the institutions or other bodies or agencies of the Union.

National courts or tribunals may, if such an issue is raised, request a preliminary ruling if they believe that a ruling is necessary to enable them to issue their own decision.

In case such an issue is raised in a case pending before a national court or tribunal against which domestic law provides no legal remedies, the court shall request a preliminary ruling.

In case such an issue is raised in a case pending before a national court of tribunal involving a person in custody, the Court shall act with the minimum of delay.

II. The procedure of preliminary ruling in regard to equality

- ✓ The request for a preliminary ruling is a process of co-operation between the national judge and the Court (**Meilicke, C-83/91**).
- ✓ As a rule, the “courts or tribunals of the member-states” **may** request the Court to issue a preliminary ruling.
- ✓ Exceptionally, they **have a duty to** request a preliminary ruling.

II. The procedure of preliminary ruling in regard to equality

The institutional importance of national courts is paramount since indirectly they review the acts or omissions of member-states

Just as courts review the legislative and other acts of states under national law

So in preliminary rulings at issue is the fulfillment of the obligations of member-states under EU law. - - >

This task cannot be left to administrative bodies, for instance, for they are essentially one and the same with the state.

II. The procedure of preliminary ruling in regard to equality

National courts are responsible for deciding:

- 1) Whether they need to request a preliminary ruling or not.
- 2) The stage of the procedure before the court at which it makes such a request.
- 3) The content and wording of the request.

II. The procedure of preliminary ruling in regard to equality

There are **four** conditions for requesting a preliminary ruling :

1. *First* the national judge entertains doubts as to the interpretation or the validity of an EU rule.
2. *Second* the issue must be raised in a trial pending before the national judge.

II. The procedure of preliminary ruling in regard to equality

3. *Third* the trial must be about the settlement of a dispute.

4. *Fourth* the national judge must consider if a ruling by the Court is indeed necessary.

II. The procedure of preliminary ruling in regard to equality

If the Court interprets the EU provision in a way that implies its incompatibility with the national provision, it is then up to the national court to decide not to apply the provision in the case at hand or to interpret the national provision in a way compatible with the EU provision or to instruct the member-state to grant compensation.

III. Examples

a) Content of the principle of equality

How is equality of pay and equal treatment between the sexes to be restored when national provisions are found incompatible with EU law?

The answer of the ECJ: Until the adoption of new national regulations, EU law prevents employers from extending the retirement age for women **retroactively** (from 60 to 65 years) in order to comply with the principle of equality (Ellen Smith, C-408/92).

III. Examples

α) Content of the principle of equality

At any rate, each member state enjoys wide discretion on how to reinstate gender equality when removing certain privileges from the favored sex (e.g. women) provided such removal is justified on objective grounds, i.e. the protection of citizens who lose their jobs regardless of sex (Posthuma-van Damme, C-280/94).

III. Examples

b) The concept of worker

The persons who qualify for the protective clauses include :

1. Part-time workers, even those working minimum hours per month (**Rinner-Kühn, 171/88**)
2. Persons earning a very low income from employment (**Nolte, C-317/93**).

III. Παραδείγματα

c) The concept of remuneration

The following qualify as remuneration:

- ✓ **public transport facilitation and discounts** (Garland, 12/81 and Grant, C-249/96),
- ✓ a worker's **health benefits** (Rinner-Kühn, 171/88),
- ✓ indemnification for **participating in training programs** (Arbeiterwohlfahrt der Stadt Berlin, C-360/90),
- ✓ **benefits during maternity leave** (Gillespie, C-342/93),
- ✓ indemnification for statutory staff representation (Freers, C-278/93),
- ✓ **Christmas benefits** (Lewen v. Denda, C-333/97),
- ✓ **family and marriage benefits** (Commission/Greece, C-187/98).

III. Examples

d) Criteria of sex discrimination

It was held that two people performing the same tasks at different times qualify as doing the same work (Macarthys Ltd, 129/79).

The Court has developed case-law criteria. However, the task of applying these criteria on the merits of each individual case belongs with the national judge (Angestelltenbetriebsrat der Wiener Gebietskrankenkasse, C-309/97).

III. Examples

e) Direct and indirect discrimination

The Court has distinguished between direct and indirect discrimination.

Direct discrimination:

- The employer refuses to hire a pregnant worker and this because of the candidate's sex (Dekker, C-177/88)
- A woman was laid off because she was pregnant (Webb, C-32/93) although she was employed under a fixed-time contract (Tele Danmark A/S, C-109/00).

III. Examples

e) Direct and Indirect discrimination

Indirect discrimination:

- A national provision adopting a criterion that places at a disadvantage a **far greater number** of persons belonging to one sex as compared with persons of the other sex.
- Example: national legislation on unfair dismissal requires a minimum duration when a significantly larger number of women are not covered because of short term employment (Regina, C-167/97).
- The Court found that a measure excluding part-time workers from an occupational retirement system constitutes “indirect discrimination” and, as such, is incompatible with the Treaty if it affects a much higher number of women than men unless it can be established that such exclusion is justified on objective grounds unrelated to any differentiation due to sex (Bilka, 170/84).

III. Examples

f) Burden of proof

Example: **Case Nikoloudis v. OTE (C-196/02)**

1. The claimant was a part-time cleaner
2. She was excluded from becoming an established member of OTE's staff.
3. Collective agreements enabled only temporary workers who **had worked full-time for at least two years** to apply.
4. The claimant was excluded from becoming a member of the established staff because of the requirement that temporary workers had to be working full-time and this, regardless of the candidate's professional field or sex.

III. Examples

5. The ECJ replied that categories of workers comprised exclusively of representatives of the one sex, and so, a category of workers comprised only of women, do not as such constitute direct discrimination against women.
6. However, any subsequent detrimental treatment of such categories either in terms of equal treatment or of equal pay could be an instance of such discrimination, i.e. direct discrimination.

III. Examples

7. **On the burden of proof:** The ECJ reiterated that when an employee complains of a breach of the principle of equal treatment and establishes **facts from which it may be presumed that there has been direct or indirect discrimination**, in EU law **this means that it falls on the respondent to prove that there was no breach of this principle.**

III. Examples

g) Sanctions

1. A genuine dissuasive effect must be ensured against employers in case of violation of the principle of non-discrimination due to sex (Colson and Kamann, 14/83)
2. Appropriate compensation must be provided in case member states choose a system of employer civil liability (Draehmpaehl, C-180/95)
3. Real and effective judicial protection must be ensured to those claiming to be victims of sex discrimination (Preston, C-78/98).

General Conclusions

1. The majority of the Court's decisions correspond to requests for preliminary rulings in regard to the precise content of a provision – The national judge plays a significant role.
2. Current national legislation on gender equality originates from EU law, mainly the relevant EU directives.

General Conclusions

3. That is why co-operation between national and EU judges through the tool of the “request for a preliminary ruling” is of vital importance (article 267 TFEU).
4. There is already solid case-law in regard to several issues.
5. It is desirable to request a preliminary ruling in regard to particular issues that have not been clarified.

Thank you for your attention