

**EU GENDER EQUALITY LAW  
SEMINAR FOR MEMBERS  
OF THE JUDICIARY**

**The role of the national judge in applying  
the EU anti-discrimination directives:  
relationship with national legal orders  
and the preliminary ruling procedure**

Cracow, 29 November 2013

**The role of national courts**

- A national judge = an EU judge, when adjudicating in an EU matter

Tasks:

- for the unit - ensuring the protection of rights granted under EU law
- for the EU - ensuring the effectiveness of EU law

## Instruments for pursuing the tasks of national courts – EU court

- Determination of the scope of EU law
- Compatibility review of national law with Union law
- Union-oriented interpretation
- Setting aside national rules incompatible with UE law
- Decisions based on directly applicable EU rules
- Applying sanctions
- Providing access to court

## EU dimension

- Proceedings concerning disputes falling within the scope of EU law (subject, object-related, temporal – C-614/11 Kuso)
- Problems with determining the material scope of EU law (C-394/11 Belov)

## Example of determination of the scope of EU law

- Issue: is the acquisition of pension rights by a woman at an earlier age than in the case of a man a justified cause of termination of an employment agreement concluded for an unlimited period of time in the meaning of Article 45(1) of the Labour law? (discrimination on the grounds of sex)

Supreme Court Resolution of 19.11.2008, I PZP 4/08

- the directive 2000/78 is not applicable, because it pertains to "combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation..."
- the directive 2006/54 cannot be taken into account, because it came into force after termination of the employment contract and after acquisition of pension rights
- directive 2002/73 does not include any directly enforceable provisions "but the Polish legislator had implemented the directive before the lapse of the transposition deadline"
- directive 2002/73 "amended Article 3 of the directive 76/207", but failed to introduce any qualitative change as to the content and scope of the discrimination prohibition
- the prohibition of discrimination under Article 18(3)b § 1(1) of the Labour Code implements Article 3(1)(c) of the directive 76/2007 prohibiting any discrimination with respect to employment and labour conditions under Polish law, including dismissals = "it is desirable to determine whether in view of the community law the behaviour of the employer the question of law pertains to [...] is of a discriminatory nature and what does the potential discrimination involve".

## An EU case and the discrimination law

- the case is settled on the basis of national provisions implementing EU law (directives) – C-7/12 Rieznice
- the case is settled on the basis of national provisions that fall within the scope of TFEU, general rules of EU law or fundamental rights recognized in CHFR (it is not certain whether rights in CHFR are still general rules) – C-555/07 Kucukdeveci
- national provisions are used to pursue claims based on EU law – C-451/10 Meister

## Settling an EU issue while settling a question of law concerning national law

- whether the acquisition of the right to a pension for female railway industry employees [...] is a justified cause of terminating an employment contract concluded for an unspecified period of time in the meaning of the Labour Code?
- may the national legislator extend the earlier pension system to actresses and female conductors only?

## Methodology of operation of a national court

C-282/10 Dominguez, item 23

- "the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible"
- = determination of 1) the scope of regulation, 2) significance of the provision, 3) assessment of compliance, 4) pro-EU interpretation, 5) refusal of application, 6) direct effect

## Determination of the scope of application of the EU law

SC judgement of 4.1.2008, I UK 182/07  
(earlier pension for a conductor)

- "in the CJ judgement in the case C-139/95 *Balestra* [...] it has been assumed that the earlier pension falls within the scope of protection against the risk of old age"

## Determination whether the provision is directly applicable

- "The provision of Article 4(1) of directive 79/7 is directly effective" (C-139/95 Balestra, item 32)
- potential independent assessment

## Determination of the effects of application of a directly effective provision

- "a sufficiently precise and unconditional provision may be relied on by individuals before national courts in order to preclude the application of any national provision inconsistent with that article" (C-154/92 Remi van Cant, item 18).
- the issue of applying directives to disputes between individuals (C-555/07 Küçükdeveci)

## Refusal to apply a national provision inconsistent with the anti-discrimination directive

- Independent assessment of compliance (" the national court, hearing proceedings between individuals, is not obliged but is entitled to make a reference to the Court for a preliminary ruling on the interpretation of the principle of non-discrimination on grounds of age, as given expression by Directive 2000/78, before disappling a provision of national law which it considers to be contrary to that principle" - C-555/07 Küçükdeveci, item 55)

## Refusal of application = disregarding a provision

- "where it is found that the requirement of being employed under a contract of employment as a precondition for participation in a pension scheme is not in conformity with Article 141(1) EC, **the condition concerned must be disapplied**, in view of the primacy of Community law" (C-256/01 Allonby, item 77)

## Effects of refusal

- the judgement is issued on the basis of EU law. Such law substitutes for national law, which would "typically" be used as a legal basis for resolution
- issuing a settlement on the basis of other provisions of national law (disregarding provisions which would "typically" be used as a legal basis for resolution)
- issuing a settlement on the basis of national law provisions applied in concurrence with directly enforceable provisions of EU law
- modification of the content of the national law provisions applicable to the case

## Refusal of application in cases concerning discrimination

Problem - directives

- According to the judgement C-555/07 Küçükdeveci, if a national provision cannot be interpreted in compliance with the directive, the national court **cannot** refuse in a dispute between entities to apply the provision of the national law incompatible with the directive, even if following this procedure it would continue to adjudicate on the basis of other provisions of the national law and not the EU law

Exception:

- In a dispute between entities a national court must refuse to apply a provision of the national law which, being incompatible with the directive, is also incompatible with the general rule of the EU law specified by the provisions of the directive (C-555/07 Küçükdeveci, item 50-51).

## Ensuring effective protection of rights arising of the EU law

- "in situations of discrimination contrary to Community law, for as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category" (CJ judgement of 21.6.2007 issued in cases C-231-233/06 Yonkman, item 39)

## Functions of preliminary rulings - CJ perspective

- ensuring homogenous interpretation of EU law (166/73 Rheinmühlen)
- enabling a national court to settle a case (16/65 Schwarze)
- protection of rights vested to individuals under EU law (26/62 Van Gend)

## Aims of preliminary reference procedure

### - national courts' perspective

- (formally) Help in providing interpretation of EU law
- (de facto) Decision on the compatibility of national rules with EU law
- Eliminating burdens based on national rules or practice
- Supporting a decision of a lower instance court with the CJEU's authority (Wencel)

-Determining the material scope of directives (C-267/06 Maruko; C-427/06 Bartsch)

-Review of the proper transposition of directives (C-144/04 Mangold)

-Review of the compatibility of national rules with directives (C-229/08 Wolf; C-45/09 Rosenblatt; C-356/09 Kleist)

-Interpreting the meaning of certain provisions of the directive (C-31/05 Chacon Navas; C-447/09 Prigge)

-Determining direct effect (C-268/06 Impact; C-341/08 Petersen) and possible application (C-555/07 Küçükdeveci; C-250/09 Georgiev; C-297/10 Hennigs)

-Determining requirements under the principle of effectiveness (C-268/06 Impact; C-246/09 Bulicke)

## How to form a reference?

- **(1)** Whether **(2)** a given rule of EU law **(3)** must be interpreted as meaning that **(4)** [how the national court understands a given provision of EU law]?
- Additionally **(5)** in so far as [...] OR in circumstances such as [...]
- **(1)** Does **(2)** [a given rule of national law or a given fact] **(3)** mean [...] as provided in [a given UE law rule]?
- General and more specific questions (C-159/10 Fuchs)

## References on the interpretation

**(1)** Does **(2)** Directive 2000/78, in so far as Article 1 thereof lays down a general framework for combating discrimination on the grounds of disability, **(3-4)** include within its protective scope a worker who has been dismissed by her employer **(5)** solely because she is sick?

C-315/05 Chacon Navas

## Reference on the compatibility

**(1)** Must **(2)** Article 2(5), Article 2(4) and/or Article 6(1), first sentence, of Directive 2000/78 and/or the general Community-law principle which prohibits discrimination on grounds of age **(3)** be interpreted as **(4)** precluding rules of national law which recognise an age-limit of 60 for pilots, **(5)** established by collective agreement for the purposes of air safety?

C-447/09 Prigge

## Effects of preliminary rulings

- The referring court is bound by the ruling (166/73 Rheinmühlen)
- The interpretation binds other courts (C-8/08 T-Mobile Netherlands)
- Ruling effective ex tunc (the day of entry into force of the interpreted rule), unless the CJEU restricts its temporal effects
- Any decision inconsistent with the CJEU interpretation is defective and thus invalid (Polish Supreme Court 8.12.2009, I BU 6/09)