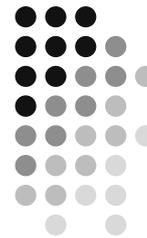


The Role of the National Judge in Applying the EU Equality Directives: Relationship with National Legal Order and the Preliminary Ruling Procedure

**National Institute for Magistrates
Bucharest, Romania, 29 April 2014**

**Dragoş Călin,
Judge,
Bucharest Court of Appeals**



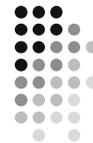
Principles of preliminary ruling referral procedure

Purpose of preliminary ruling referral

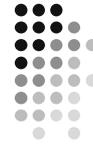
Art. 267, the first paragraph of TFEU establishes jurisdiction of the Court of Justice by stating:

„The Court of Justice of the European Union 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;”.



Scope (*ratione materiae* and *ratione temporis*) of preliminary ruling referral procedure



Ratione materiae

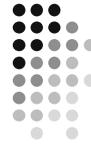
The scope of preliminary ruling referral is European Union Law (either “primary legislation” – the treaties, or derived/secondary legislation – judicial acts defined by Art. 288 TFEU, having a legislative or non-legislative nature – regulations, directives, decisions, recommendations and opinions, having mandatory or non-mandatory judicial power), irrespective of whether they are/are not directly applicable, or have/have not direct effect. In other words, by virtue of Art. 267 TFEU, the Court of Justice has jurisdiction to rule on the interpretation of the treaties and acts adopted by the institutions, bodies, offices or agencies of the Union without exception.

Scope (*ratione materiae* and *ratione temporis*) of preliminary ruling referral procedure



- ECJ firstly interprets the European Union treaties. It has jurisdiction to rule on the interpretation of the treaties, as well as on the validity and interpretation of the Union institutions acts. ECJ jurisdiction is limited to examining the provisions of Union law.
- After the coming into force of the Lisbon Treaty, when the European Union Charter of Fundamental Rights acquired a legal value similar to the treaties (Art. 6 par. (1) UET), the ECJ has jurisdiction to interpret the Charter provisions as well.

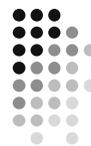
Scope (*ratione materiae* and *ratione temporis*) of preliminary ruling referral procedure



Ratione temporis

As for the time when the facts of the internal litigation occurred, facts that form the objects of a preliminary question, one should note that after the accession of the 10 states in 2004, the Court modified its own option. Previously the Court, *ratione temporis* had stated it had jurisdiction with respect to post-*Ynos* rulings, i.e. its jurisdiction covered only those preliminary questions referring to facts in the main litigation that occurred after the respective state acceded to the European Union.

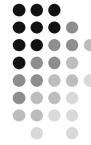
Mandatory character of the referral for a preliminary ruling and the “clear act” theory



General provisions

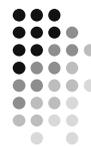
- The provisions of Art. 267 TFEU define the situations where national courts can request a preliminary ruling and when this procedure shall be used. In all cases, the option/obligation to request a preliminary ruling shall not be interpreted in an abstract manner, but one shall rather consider the other conditions of the request. *CILFIT* defines the power of national courts to assess the situation: „the relation between the second and the third paragraph in Article 267 leads to the idea that the courts stipulated in the third paragraph enjoy the same discretion of assessment as all the other national courts in deciding whether a preliminary ruling on a specific aspect of EU law is necessary for them to give a ruling. These national courts are under no obligation to send a request for a preliminary ruling in case the respective question is not relevant, i.e. in case irrespective of the answer to that question, it could not in any way influence the solution of the litigation”.

Mandatory character of the referral for a preliminary ruling and the “clear act” theory



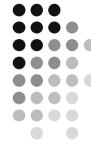
- In the *Foto-Frost* case, the Union Court gave details on the mandatory character of requesting a preliminary ruling with respect to the validity of the European Union acts: “national courts have no jurisdiction to declare invalid the acts adopted by the [Union] institutions. As it has been emphasized in the ruling of 13 May, 1981 (*International Chemical Corporation*, 66/80), the recognized jurisdiction of the Court according to Art. [267 TFEU] is mainly aimed at ensuring uniform application of [Union] law by all national courts. This condition of uniformity is absolutely necessary when dealing with the validity of a [Union] act. Diverging opinions of Member States national courts as to the validity of [Union] acts would be likely to spoil the very unity of the [Union] legal order and would impair the fundamental need for judicial security.”

Mandatory character of the referral for a preliminary ruling and the “clear act” theory



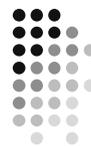
- In the *Köbler* case ruling, the Court states the principle of the mandatory character of the request irrespective of whether the national court ruling is subject to judicial remedy or not; we are dealing with the subjective mandatory character (where the court states there might be violations of individuals’ rights), unlike the objective mandatory character (established according to the type of court/stage in the course of solving the litigation); the European court stresses that “particularly in order to avoid situations where rights bestowed on individuals by Union law might be ignored, a court whose rulings cannot be challenged in national law shall seise the Court in accordance with Art. 267, par. 3 of the TFEU.

Mandatory character of the referral for a preliminary ruling and the “clear act” theory



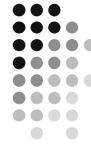
- As for the “*clear/interpreted act*” („*acte éclairé*”), the ruling in the *CILFIT* case is the fundamental benchmark, a ruling complementing a previous ruling: „[...] in the ruling of 27 March, 1963 (in the connected cases 28-30/62, *Da Costa*) the Court stated that “although Art.[267] paragraph 3 makes it mandatory without restrictions for national courts whose rulings are not subject to judicial remedy in national law to refer to the Court any question on the interpretation invoked before them, the authority of the interpretation given by the Court according to Art. [267] can nevertheless deprive that obligation of its cause and thus may render it void of content; this is particularly the situation where the question referred is identical in substance with a question that has already formed the object of a request for preliminary ruling in a similar case”. The same effect may result from a consecrated jurisprudence of the Court that has solved the respective aspect of law, irrespective of the nature of procedures that generated the jurisprudence, even in the absence of a strict identity of the questions in litigation.”

Mandatory character of the referral for a preliminary ruling and the “clear act” theory



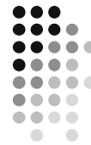
- One should however take into consideration two limitations of the clear act, stated in the *CILFIT* ruling:
 - One should note that Union law uses a terminology of its own, even then when there is full concordance of linguistic versions. Moreover, one should point out legal notions do not necessarily have the same content in the European Union law and in the national law of the various Member States.
 - Every provision of Union law needs to be placed in its context and interpreted in the light of all the other provisions in that body of laws, of its purpose and stage of evolution at the time the respective provision is to be enforced.

ECJ solution: judgment or order



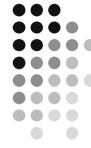
- After going through its own procedure, ECJ issues a judgment or an order.
- The Court of Justice Rules of Procedure is the own act of the court by means of which “one enforces and complements, if necessary, the relevant provisions of the EUT, TFEU and EEA, as well as the Statutes” (Art.2)
- According to Art. 53 paragraph (2) in the new Rules of Procedure, “then when the Court has obviously no jurisdiction to try a case, or when a request or an introductory request is obviously inadmissible, the Court may at any time decide, after hearing the advocate-general, with no continuation of procedure, to rule by means of a reasoned order.”

ECJ solution: judgment or order



In Title II of the Rules of Procedure (“Common Procedure Provisions”), Chapter 9 regulates judgments and orders (Art. 86 through 92). According to Art. 94 “in addition to the text of the preliminary questions referred to the Court, the request for a preliminary ruling shall also include:

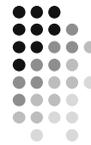
- (a) A brief presentation of the object of litigation as well as of relevant facts, as they have been ascertained by the court sending the request, or at least a presentation of the factual circumstances on which the questions are based;
- (b) The content of the national provisions that might be applied in the case and, if the case, the relevant national jurisprudence;
- (c) A presentation of the reasons that have determined the court referring the question to have doubts about the interpretation or validity of certain provisions in Union law, as well as the link the court referring the question establishes between such provisions and the national legislation applicable to the main litigation.”



ECJ solution: judgment or order

This article has been developed by means of the Recommendations to national courts with respect to referrals for preliminary rulings.

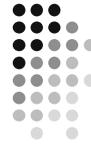
According to Art.99 in the Rules of procedure, the Court may at any time rule by a reasoned order “then when a preliminary question is identical with a question in which the Court has already ruled, when the answer to such a question can be clearly inferred from jurisprudence, or when the answer to the preliminary question leaves no room for reasonable doubt, the Court, on the proposal of the reporting judge and after hearing the advocate-general, may at any time decide to rule by a reasoned order.” From Art. 99 in the Rules of procedure we may infer the Court prefers a reasoned order then when a referral for a preliminary ruling concerns a clear/clarified act – the respective request is admissible.



Mandatory character of ECJ rulings

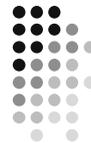
- The Court ruling is mandatory and does not have a purely consultative effect; such a situation could spoil the jurisdictional function of the Court of Justice, as designed in the Treaty.
- For the national court, the role of a “partner” in “cooperation” with the Luxembourg court seems to have come to an end: “a preliminary ruling of the Court on the interpretation or validity of an act adopted by an institution of the [Union] is solving, with the authority of a judged thing, one or several issues of [Union] law and makes it mandatory for the national court to rule in the main case”.

Mandatory character of ECJ rulings



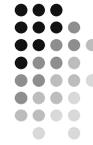
- The Court's judgment has the authority of a judged thing. A preliminary ruling of the Court is not among the acts of the Union institutions whose validity can be assessed by means of a case referred for preliminary ruling, according to Art. 267 TFEU. The authority of a preliminary ruling does not prevent the national court the ruling is addressed to from deeming it necessary to seise the Court again before solving the main case. Such an action can be justified then when the national court encounters difficulties in understanding or enforcing the ruling, when it is referring a new question of law to the Court or when it presents the Court with new elements that may determine the Court to give a different answer to a question already referred.

Mandatory character of ECJ rulings



- The ECJ ruling is binding not only for the referring court, it is also mandatory for all national courts. Also, ECJ rulings are binding for the national authorities: "following a ruling given in respect of a referral for a preliminary ruling according to which a national regulation is incompatible with [Union] law, the authorities of the Member State in question are under the obligation to take the appropriate general or specific measures to ensure compliance with community law in their territory. While preserving the right to choose the measures to be taken, the respective authorities shall make sure national law is harmonized with [Union] law as soon as possible and the rights the subjects of justice possess based on [Union] law acquire full effect".

Mandatory character of ECJ rulings

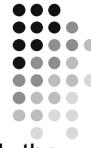


- An interpreting preliminary ruling has a retroactive effect. “The interpretation given by the Court of Justice, in the exercise of its jurisdiction according to Art. [267 TFEU], to a piece of [Union] legislation shall clarify and specify, if necessary, the meaning and scope of that piece of legislation, such as it must or must have been understood and applied since its coming into force. One may conclude the piece of legislation thus interpreted must be applied by the courts even in the case of judicial relations that were generated or established before the ruling on the request for interpretation was given, provided, in other respects, the conditions have been met to seise the competent courts with a litigation referring to the application of that piece of legislation.”

Mandatory character of ECJ rulings

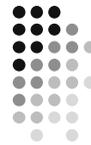


- Under certain (restrictive) conditions, the Court may admit limitation in time of the effects of a ruling it has issued. With respect to referrals for preliminary rulings coming from courts in Romania, in the case C-263/10, *Nisipeanu*, where the Court ruled on 7 July, 2011, the Romanian government had asked the Court, in its session, to limit in time the effects of the judgment it was about to issue, if it established Art. 110 TFEU opposed the charging of a pollution tax on the first registration of a car; the Union Court dismissed that request: “33 [...] it is only by exception, in application of the general principle of judicial security, [...] that the Court may be determined to limit the possibility to invoke a provision it has interpreted. In order to impose such a limitation, two essential criteria must be met, i.e. good faith of the interested parties and the risk of serious disruptions[...]



Mandatory character of ECJ rulings

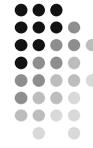
- 34. As for the risk of major disruptions, one should recall the existence of financial consequences that may result for a Member State from a preliminary ruling does not justify, by itself, the limitation in time of the effects of that ruling [...]. The Member State requesting such a limitation has the obligation to present before the Court data in the form of figures establishing the risk of major economic repercussions [...]. 35. While, as for the economic repercussions that may result from a ruling by which the Court states Article 110 TFEU is contrary to a taxation regime like the one established by OUG no. 50/2008, the government of Romania has basically mentioned the large number of refunding requests, that is close to 40,000, and the economic crisis Romania is affected by. 36. One should realize that, in the absence of more precise figures that could lead to the conclusion the Romanian economy is at risk of being seriously affected by the repercussions of this ruling, the condition concerning the existence of serious disruptions cannot be considered as established.



Initiation of a referral for preliminary ruling

- A referral for preliminary ruling may be initiated while a case is pending before a (national) court. The referral is performed by the court at the request of the parties or ex officio. According to statistics, most of the referrals from Romania were performed at the request of the parties (31 referrals – of which 30 at the request of the plaintiff). One should, however, not forget the responsibility of enforcing European Union law lies with the courts.
- The role of the court is also reflected by its exclusive competence to seize the Court of Justice, to modify the questions in the request for preliminary ruling and to formulate the request to withdraw the preliminary question.

The courts in Romania and Art. 267 TFEU



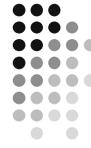
The notion of a “court’ in Art. 267 TFEU has been interpreted in an autonomous manner by the Court of Justice.

- More recently, advocate-general Kokott has pointed out and summarized these criteria: “in order to determine whether the referring body [Komisia za zashtita ot diskriminatsia (The Commission for Protection against Discrimination in Bulgaria, „KZD”) is a court in the meaning of Article 267 TFEU one should consider a set of elements such as the legal origin of the body, its permanent character, the mandatory character of its jurisdiction, the contradictory nature of procedure, application of legal norms by the body, as well as its independence [...]”

The courts in Romania and Art. 267 TFEU

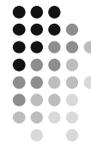


- Actually, the advocate-general has summarized the existing situation by referring to European realities: “considering the many independent authorities created by the Member States in recent years – often for the purpose of transposing Union legislation – it is no wonder that, regularly, the Court is faced with the problem whether such authorities may request preliminary rulings”; in this case, the advocate-general has proposed to the Court of Justice the Commission for Protection against Discrimination in Bulgaria could qualify as a “court” (analysis performed under points 27-50) in the meaning of Article 267 TFEU. Had the Court of Justice followed the suggestion of its advocate-general, we would have witnessed a reconsideration of the criteria in jurisprudence concerning a “court of law”, in the meaning of Art. 267 TFEU; however, in its ruling issued on 31 January, 2013, the Court of Justice dismissed the suggestions of its advocate-general.



The courts in Romania and Art. 267 TFEU

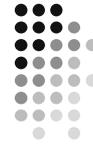
- Until now, referrals for preliminary rulings from Romania have been formulated only by the *courts of law*. On the other hand, the practice of Romanian courts also includes judgments where (strangely enough) seised with a request to seise the Court of Justice (later dismissed by the respective court), the former checked whether it met the criteria to qualify as a “court of law” in the meaning of Art. 267 TFEU, thus listing the criteria of Union jurisprudence; and this is present even in judgments of the High Court of Cassation and Justice



The (main) action should be real, not imaginary

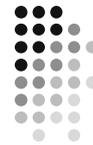
- Imaginary actions would not be entirely impossible or devoid of interest. First, the Court of Justice has dismissed several requests for preliminary rulings as the national cases seemed to be imaginary. The justification of a request for preliminary ruling does not lie in the formulation of a consultative opinion on some general or hypothetical problems, but rather in the inherent need to effectively solve a litigation. Unlike the Union court that can refuse to answer a request for preliminary ruling on account of its imaginary nature, a national court cannot avoid solving the case – as this would mean denial of justice. Therefore, when producing a request for preliminary ruling, the national judge must exercise full responsibility in drawing up the document in order to convince the Union court about the existence of the litigation and the reality whose solving is requested. So far, no case referred by a Romanian court has been dismissed on account of this reason, of the hypothetical question.

The (main) action should be real, not imaginary



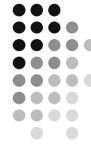
- As long as the requirements in the Recommendations formulated by the Court of Justice to the attention of the national courts with respect to requests for preliminary rulings are complied with, the Court of Justice will not deny a request for preliminary ruling. National courts are often divergent in applying and interpreting European Union law, so the Court of Justice may seem to some as a regulator of competence or a substitute for an appeal on a point of law. An example of a failed request for a preliminary ruling for reasons of incompatibility of interpretation is the *Agafitei and Others* case.

The national procedural act ordering a preliminary ruling request to be sent to the Court of Justice



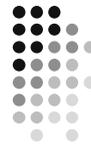
- “Recommendations to the attention of national courts on requests for preliminary rulings” contain important elements on their form in general. Actually, the judicial form of the request can be of any kind – either sending the judgment as it is, or a separate document (the request for a preliminary ruling); par. 20 in the “Recommendations” indicates that the “decision by which a Member State court refers one or more preliminary ruling requests to the Court may take any form admitted by the national law in matter of procedural incidents.”

The national procedural act ordering a preliminary ruling request to be referred to the Court of Justice.



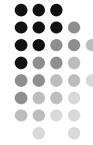
- The procedure used by national courts to draw up a request for a preliminary ruling is the one specific to national law. Its content should take into account several details in the recommendations that have in the meantime replaced the “Information note on the sending of requests for preliminary rulings by the national courts”. From the point of view of the TFEU (Art. 267) provisions and of those of the Court of Justice, national norms of procedure have no direct pertinence, since checking on the regularity of the seising does not lie with the Court (first, the latter does not check the national act – its regularity in national law, or the jurisdiction of the court referring the request – e.g. whether it is an administrative court or a civil court). This is a consequence of functions distribution among the courts in the system of preliminary rulings referral that we have dealt with previously. According to the terminology of the Court of Justice, the act of the referring court seising the Union court is generically identified as a “decision” (alternatively “referral decision”) or “order”.

The national procedural act ordering a preliminary ruling request to be referred to the Court of Justice.



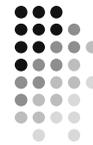
- The courts shall formulate and take the responsibility for the preliminary questions referred and not simply “admit” them at the request of one of the parties, even if this actually happens in real life. The court shall pass through its own filter the request of one or both parties, since the court, as a state authority, is responsible for referring a request for preliminary ruling or not. The active role of the parties is essential, but not all the requests for preliminary rulings should be taken as such from the requests of the parties, as they have their own interests that do not first and foremost refer to the interpretation and validation of EU law. As for the practical consequences, one should consider the *Köbler* jurisprudence – and the subsequent one.

Reason of seising the Court of Justice and explanations provided by the referring court. A few examples from the recent practice of the Court of Justice



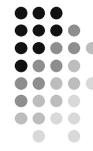
- In the “Recommendations to the attention of national courts on requests for preliminary rulings” according to paragraph 22, in its request for a preliminary ruling the national court “shall present the reasons determining the referring court to have doubts about the interpretation or validity of specific provisions of Union law as well as the relation the referring court has established between such provisions and the national legislation applicable in the main litigation”. In fact, the explanation for the importance of presenting such reasons lies, among other things, in the fact that “[...] in case the questions have not been properly formulated or they exceed the powers of the Court contained in Art. 267 TFEU, the Court can extract from all the elements supplied by the national court, particularly from the reasons for referral, the elements of Union law that require interpretation, considering the object of the litigation [...]”.

Reason of seising the Court of Justice and explanations provided by the referring court. A few examples from the recent practice of the Court of Justice



- In an explanation on the need to refer a request for preliminary ruling, explanation included in the conclusion by which the national court ordered seising of the Court of Justice, a Romanian court refrained from presenting its own position with respect to that question and only raised reasons of a procedural nature: “One last aspect to be mentioned in this context refers to the fact that the court cannot at the moment express their view on the answer to the question to be referred. According the provisions of Art. 27 point.7 in the former Romanian Code of Civil Procedure, judges may be challenged if they have expressed their opinion on the litigation under trial. Expressing such an opinion could be interpreted as making a decision in advance of the ruling in appeal which would make it impossible for the judges who sit in appeal to participate in solving the case after the Court issues its preliminary ruling.”

Reason of seising the Court of Justice and explanations provided by the referring court. A few examples from the recent practice of the Court of Justice



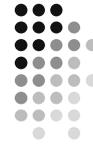
- Another Romanian court explained, for instance, that in the respective stage they could not express an opinion: “According to point 23 in the “Information note on the sending of requests for preliminary rulings” the Giurgiu court, acting as an appeal court, believe it is not for them to express an opinion at this stage in the procedure. The Giurgiu court believe they could express an opinion at a later stage, according to Art. 23 in the Statutes of the Court of Justice, in the course of the written and oral procedure before the ECJ.”

Denial by a national court to approve a referral for a preliminary ruling



- Seising the ECJ with a request for a preliminary ruling may originate in the request of one of the parties in the litigation on the roll of the national court. On the other hand, the national court may ex officio order a preliminary ruling request be referred the Court of Justice. In both situations however, it is only the court that may seise the Court, and not the parties in the litigation, as the system described in Art. 267 TFEU involves a direct dialogue between the courts of justice – the national courts and the Court of Justice. The first hypothesis is identified as *denial* to seise the ECJ.

Denial by a national court to approve a referral for a preliminary ruling



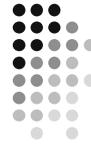
- Art. 267 TFEU involves two assumptions: a *possibility* of approving a request for preliminary ruling to be sent in the case of courts whose rulings can be challenged according to national law (paragraph 2), and an *obligation* to seise the Court of Justice in the case of national courts whose rulings cannot be challenged in national law (paragraph 3). This obligation is attenuated, relativized through the “*CILFIT*” doctrine. We are not going to present here the reasons for this ruling; a significant part of the judicial practice included in this chapter is based on the above mentioned doctrine which is constantly referred to.

Denial by a national court to approve a referral for a preliminary ruling



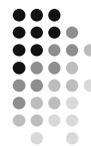
- In the system of Art. 267 TFEU, the boundary between the two paragraphs of this article, i.e. between the possibility to seise for a preliminary ruling and the obligation to do so, is not so much aimed at the national courts but rather at the procedure in a specific case and the ruling given by that court: more precisely, the challengeable nature of that ruling in accordance with national law.
- We are observing this separation between the possibility and the obligation to seise the Court without however making it absolute: sometimes even courts that were not under obligation to seise the Court motivated their denial to seise by explicitly referring to the *CILFIT* doctrine. The division we operated between the rulings included in this chapter is conventional. It is indeed necessary to set up categories and classes while mentioning, however, that some of the rulings we comment upon here may fall into a typology that includes more than one category: there are, for instance, rulings that have referred both to the “clear act” theory and to that of the “clarified act”.

Denial by a national court to approve a referral for a preliminary ruling



- In the ruling given on 29 April, 2011, the High Court of Cassation and Justice denied the request to seise the ECJ with six preliminary questions as shown below: „1. Considering that [...], in accordance with Art. 189 TCEE and the constant ECJ jurisprudence, directly applicable community provisions must come into force fully, completely and in a uniform manner in the legal systems of the same and be uniformly applied, especially in order to guarantee the subjective legal rights created in favor of persons of private law, the scope of the above mentioned provisions is to be interpreted in the sense that any rulings of the Constitutional Court given at a later date and contrary to those mentioned must be declared directly inapplicable, without waiting for the intervention of the legislators or for the modification of jurisprudence of the Constitutional Court, especially when we consider that in the case of this latter hypothesis, until this occurs, the national law remains fully applicable, community provisions cannot take effect and, therefore their full, entire, equal and uniform application is not guaranteed,

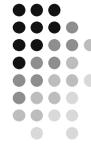
Denial by a national court to approve a referral for a preliminary ruling



just as the legal subjective rights created in favor private persons are no longer guaranteed?

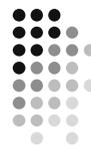
2. If Art. 17 in Directive 2000/78/CE of the Council of 27 November 2001 to create a general framework in favor of equal treatment with respect to access to employment and employment – transposed in national law by G.D 137/2000 republished and amended, is contrary to further decisions of the Constitutional Court forbidding the national courts to order reparation of discrimination produced by law, or to grant discriminated plaintiffs material and/or moral compensation for damage as deemed appropriate in situations where the damage produced by discrimination is the result of a national law?

Denial by a national court to approve a referral for a preliminary ruling



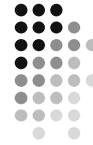
3. In case the answer to this question is in the affirmative, please specify whether the national judge should wait for the modification of national legal provisions and/or changing of Constitutional Court jurisprudence, which are hypothetically in contradiction with community norms, or is the judge to directly and immediately apply in the case awaiting solution the community norms as they may have been interpreted by the Court of Justice of the European Community and not apply any national legal provision or any ruling of the Constitutional Court that are contrary to community norms?

Denial by a national court to approve a referral for a preliminary ruling



4. If the provisions of Art. 47 in the Charter of Fundamental Rights of the European Union – the right to efficient remedy in law and to a fair trial: Any person whose rights and freedoms guaranteed by Union law are violated has the right to efficient remedy before a court of law, in accordance with the conditions established by this article, and the ruling of the Constitutional Court of Romania 820/2008 has explicitly prohibited the court of jurisdiction to take any measure in order to remedy the unfair situation created by enacting Art. 44 par. 2, does the court have the right to remove this paragraph of the ruling from application and instead directly and immediately apply the provisions of Art. 47 in the case under trial?

Denial by a national court to approve a referral for a preliminary ruling



5. If the interdiction to discriminate also includes discrimination perpetrated by the state by means of laws and if, considering the fact it is impossible for the state to repair a discrimination already produced, before unconstitutionality has been established, as it cannot enact a retroactive law in civil matter or in administrative litigation matter, and the court has been prohibited by the Constitutional Court to order the discrimination be repaired, it results the discrimination already produced by law cannot be repaired, in this situation the court should overrule the decision of the Constitutional Court and order the discrimination to be repaired, applying the prevailing European law, as the discrimination cannot be repaired in any other way?

Denial by a national court to approve a referral for a preliminary ruling



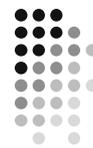
6. If the ruling of the Constitutional Court 820/2008 represents a constitutional mechanism, as defined by the Simmenthal ruling, a mechanism that prevents the immediate and full application of the provisions of community law, i.e. Art. 47 in the Charter of Fundamental Rights of the European Union – the right to efficient remedy in law and to a fair trial: Any person whose rights and freedoms guaranteed by Union law are violated has the right to efficient remedy in law before a court of justice, in the conditions established by this article, and if, given the fact that such a mechanism is not allowed by community law, is the national court bound to ignore ruling 820/2008 of the Constitutional Court?”

Denial by a national court to approve a referral for a preliminary ruling



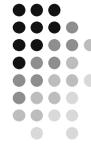
Basically, the plaintiff in appeal in motivating her request has shown her candidacy for the promotion to the position of a judge with the Constanta Court was rejected on account of the fact she was not meeting the condition of a minimum length of service in magistracy (5 years) stipulated by Art. 44 par. 1 in Law 303/2004, as the interval of 2 years and 4 months she had served as a legal council was not taken into account. She has also shown that by ruling 785/2009 of the Constitutional Court, Art. 44 par. (2) in Law 303/2004 was found to be unconstitutional as it was instituting a discrimination between lawyers and legal councils, as the length of service of the former was taken into account in calculating length of service necessary for participation in a promotion contest for an executive position, and therefore, at that moment solely depended on the effective length of service in the magistracy.

Denial by a national court to approve a referral for a preliminary ruling



The plaintiff in appeal stated the ruling of the Constitutional Court 785/2009 had, basically, established the existence of discrimination produced by the law while also expressly prohibiting the court to order reparation of the discrimination produced by law, as that was deemed to be the attribution of legislators exclusively. She also stated G.D. 137/2000 created the possibility for the courts to put right such discrimination in accordance with the provisions of the Council Directives 2000/43/CE and 2000/78/CE, while ruling 820/2009 of the Constitutional Court admitted the exception of unconstitutionality of the provisions in Art. 1, Art. 2 par. 3 and Art. 27 par. 1 in G.D. 137/2000 and retained those provisions are unconstitutional, to the extent one can derive from them the idea that the courts have the jurisdiction to cancel or deny application of laws considered to be discriminatory and replace them with norms created by the courts or with provisions in other laws.

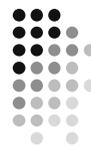
Denial by a national court to approve a referral for a preliminary ruling



Specifically, “preliminary questions are not useful and pertinent. [...] The High Court retains that by the manner of formulating the question, the plaintiff in appeal actually tends to obtain a “guiding ruling” for the solving of the case by the national court, from the Court of Justice of the European Union, a fact which is inadmissible as this is beyond its jurisdiction. [...] The problem of law has already been solved by the High Court in similar cases, establishment of conditions of access to a profession being a matter of legislative autonomy of the member states and, on the other hand, interpretation of national law or of the effects of rulings issued by the Constitutional Court is not part of the mechanism provided in Art. 267 in the Treaty for the Functioning of the European Union.”

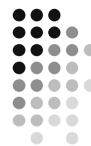
- We note the questions proposed by the plaintiff in appeal are basically inspired from the considerations in the *Simmenthal* ruling.

Denial by a national court to approve a referral for a preliminary ruling



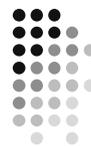
There is however an example where the request to seise the Court of Justice – in matter of salary discrimination of judges (in the direction of the *Agafitei and Others* case) and again referring to Directives 2000/43 and 2000/78 – was convincingly denied, also by referring to the clarified act theory (referring specifically to that ruling of the Court); the Romanian court retained the directives were not applicable either directly or indirectly to the circumstances of the case.

Denial by a national court to approve a referral for a preliminary ruling



Absence of usefulness of an answer from the Court of Justice was also the basis for motivating denial of a request by the plaintiff in appeal for special pensions to be characterized as occupational or professional pensions. The appellate court retained, on the one hand, that “concerning the interpretation of Community law, specifically Art. 157 TFEU, Art. 2, point f in Directive 2006/54/CE and Art. 2 point 1 in Directive 96/97/CE on the notion of professional pensions, the Court retained the national regulation applicable in the case was sufficiently clear and could be interpreted by the national court both as such as well as in corroboration with community regulations”. Therefore, the appellate court made reference to the criterion of clarity of national law, and not of EU law. Court of Appeals of Bucharest, Section IX civil law and intellectual property law, labor conflicts and social security, case 47713/3/2010, ruling of 11 November, 2011.

Denial by a national court to approve a referral for a preliminary ruling

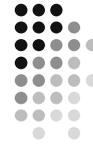


On the other hand, the court has also retained other questions had a general character, and the interpretation of EU law by the Court of Justice would have been rather theoretical: “As for the last two questions the plaintiff requests to be referred to the ECJ, the court retains that, specifically, one cannot retain their relation with the present case and the solution they would provide about the legal framework applicable in the case.

Both questions have a rather general character, questioning concordance between observance of principles by the national laws and by the community laws.

The preliminary ruling procedure concerns, however, strictly the situation where interpretation of national law through the filter of community laws would directly apply in the case, and not theoretical situations whose relevance for the case cannot be established.”

Denial by a national court to approve a referral for a preliminary ruling



In the procedure of extraordinary appeal against a ruling of the High Court of Cassation and Justice, the plaintiff formulated a request to seise the Court of Justice, raising, among other things, a strange question referring to an alleged discrimination on account of race (!) directed at a “legal person (business)” and, therefore the interpretation of Directive 2000/43/CE. In its ruling, the High Court of Cassation and Justice retained: “According to his (plaintiff’s) opinion, the solving of the case essentially depends on the interpretation of the Treaty Establishing the European Community, the Charter of Fundamental Rights of the European Union and the Council Directive 2000/43/CE [...], a context in which he demands the case be put on hold and the ECJ be seised with the following preliminary questions”.

The court quoted the text of Art. 267 TFEU and the references made in the *CILFIT* and the *Da Costa* rulings with respect to attenuating the obligation of a national court to seise the Court in paragraph three of that article, and then it retained as follows:

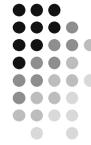
Denial by a national court to approve a referral for a preliminary ruling



„In order to seise the European Union Court of Justice with a request for a preliminary ruling it is necessary for the national court to justify why it needs the interpretation of a provision in community law. Therefore, the court needs to identify in the community norm a problem of interpretation requiring the intervention of the European Court of Justice. Resorting to the preliminary ruling procedure is possible only then when the national court has doubts about the correct interpretation of Union laws applicable in the case.

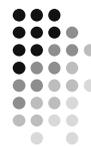
Therefore, as long as there is no problem of interpretation of Union laws applicable in the case that would require the intervention of the European Court of Justice, the mere request of the plaintiff to seise the Court of Justice of the European Union with preliminary questions cannot automatically result in staying the trial of the respective litigation and seising of the European court. This is the reason why the request for seising the Court of Justice of the European Union formulated in the case shall be denied.”

Denial of request to seise the Court of Justice in the procedure of injunction



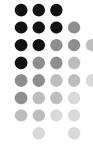
In a ruling of January 2011, the Bucharest Court of Appeals denied a request to seise the Court of Justice with a preliminary question in the case of an injunction. The injunction had been given in an appeal against a civil ruling whose object was to obtain an injunction. The plaintiff in appeal had asked the court to seise the Court of Justice with a preliminary question whose object was “to establish whether the provisions of Art. 119 in the European Union Treaty, Art. 17, par. 1 and Art. 21 in the Charter of Fundamental Rights of the European Union as well as the provisions of Directive 79/7/CEE [...] on the principle of equal treatment of men and women, Directive 86/378/CEE, amended by Directive 96/97/CE on the application of the principle of equality in occupational social security schemes, that also cover special laws on occupational pensions, are contrary to Art. 1 letter c. in Law 119 of 2010 on measures in the field of pensions published in the Official Journal of Romania 441 of 30 June, 2010 [...]”.

Denial of request to seise the Court of Justice in the procedure of injunction



In analyzing the request to seise the Court of Justice, the Romanian court reiterated the principles of Art. 267 TFEU; then, it retained that “[...] the national judge has the right not to seise the European court when they believe the question is irrelevant for the solving of the case; there is a precedent of the ECJ with respect to the interpretation of European law (the “éclairé” act theory); the manner of applying European Union law is so obvious it leaves no room for any doubt (the clear act theory)”. Several cases from the jurisprudence of the Court of Justice have been quoted as “precedents”: 104/79, *Pasquale Foglia/Mariella Novello*; C-320/90, C-321/90 and C-322/90, *Telemarsicabruzzo*; 283/81, *CILFIT*; C-343/90, *Manuel José Lourenço Dias*.

Denial of request to seise the Court of Justice in the procedure of injunction



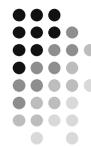
Reference to case 107/76, *Hoffmann-La Roche AG/Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse GmbH* was decisive in denying the request of the plaintiff in appeal: „[...] Art. 267 [third paragraph TFEU [...] shall be interpreted to the effect that a national court is not bound to seise the Court with a question on the interpretation or validity provided in this article if the question is requested in a procedure for an injunction („einstweilige Verfügung“), even if the ruling that must be given in that procedure can no longer be challenged, provided each of the parties could open or demand opening of a procedure on the merits, during which the question that has been provisionally solved in the summary procedure could be re-examined and make the object of a referral according to [Art. 267 TFEU].

Need and usefulness of referring a request for a preliminary ruling to the Court of Justice



A relatively common typology of rulings by which Romanian courts have denied requests to seise the Court of Justice by assessing the need and usefulness of such a referral is the ample quoting of rules from the jurisprudence of the Court of Justice – frequently considerations from the *CILFIT* judgment. In a case challenging a decision of recalculation of the amount of pension, where the plaintiff had raised the question of the conformity of national legislation [Art. 1 letter c) in Law 119/2010 on establishing measures in the area of pensions] with Union law [Art. 17 par. (1) and Art. 21 in the Charter of Fundamental Rights of the European Union; Directive 79/7/CEE on the principle of equal treatment of women and men, Directive 86/378/CEE amended by Directive 96/97/CEE, on application of the equality principle in social security occupational schemes], the Romanian court, while denying the request of the party to seise the Court of Justice, referring to the “specific features” of the case it had been seised with, which led to the absence of the need for a ruling by the Court, retained, however, that “interpretation and application of the laws invoked by the plaintiff can be correctly performed by the national courts, leaving no room for reasonable doubt that could justify pertinence of a preliminary question with respect to

Need and usefulness of referring a request for a preliminary ruling to the Court of Justice



Or, in the case, the court did not examine the pertinence for the case of the provisions in the Charter or the directives. However, in other cases on pensions, Romanian courts have found the absence of pertinence of Union law in such a situation: “With respect to this request [to seise the Court of Justice], the Court [of Appeal] believe such an interpretation of community texts (sic!) mentioned [Directives 2006/54 and 96/97] has no relevance for trying the case pending, as they do not regulate the legal regime of occupational pensions as such and do not institute provisions of legal protection thereof, so that, by a possible assimilation with employment pensions in the Romanian legislation, they could be protected by applying these provisions.” “As a result, analyzing the provisions of the community texts invoked, the Court retains their provisions could have been invoked only if the plaintiff in appeal had indicated in the appeal a discrimination on grounds of gender.” In the same direction, judgments of certain courts have retained the answer from the Court of Justice was not useful to the court.

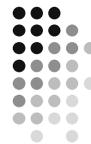
CJEU, case C-81/12, ACCEPT ASSOCIATION

Bucharest Court of Appeals, Section VIII administrative and fiscal litigations, Judgment of 7 September, 2011



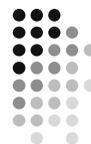
1. The provisions of Art. 2, par. (2) letter (a) in *Directive 2000/78/CE of the Council of 27 November 2000 establishing a general framework for equal treatment in access to employment and employment* are applicable in the case where a shareholder of a football club that represents himself and is perceived by the media and by society as the main manager of that football club makes the following statement in the mass media: “*I am not going to hire a homosexual for the team even if Steaua were to be closed down. Rumors will be rumors, but writing something like that, if it is not true and also put it on the front page ... Maybe it’s a lie he is a homosexual (the Bulgarian football player I.I.Ilici). But what if it is true? I once told an uncle of mine who did not believe in Satan and in Christ. I told him : <<Let’s assume there is no God. But what if there is? What do you stand to lose if you take communion? Wouldn’t it be good for you to go to heaven?>> And he told me I was right. One month before he died he went and took communion. May The Lord rest his soul! A gay person has no place in my family, ever, and Steaua is my family. Rather than hiring a gay person, we would play with a junior player in the team. There is no discrimination in my case. No one can force me*

CJEU, case C-81/12, ACCEPT ASSOCIATION



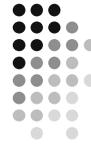
to work with a specific person. I have the right to work with the people I like, just as they have rights." "I am not going to hire a homosexual for the team even if Steaua were to be closed down! Maybe it's a lie he is a homosexual, but what if it is true? A gay person has no place in my family, ever, and Steaua is my family. Rather than having a homosexual in the team, we would play with a junior player. There is no discrimination in my case. No one can force me to work with a specific person. I have the right to work with the people I like, just as they have rights. Even if The Lord would tell me this night he is a hundred per cent not a homosexual, I still would not have him on the team! There has been a lot in the newspapers about him being a homosexual. Even if TSKA were to give him to me for free, I still would not have him! He could be the worst bully and the worst drunkard ... if he is a homosexual, I don't want to hear of him any more, ever."

CJEU, case C-81/12, ACCEPT ASSOCIATION



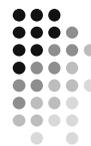
- **2.** To what extent can the statements above be qualified as "facts based on which one can presume the existence of direct or indirect discrimination" according to Art.10 par. (1) in *Directive 2000/78/CE of the Council of 27 November 2000 establishing a general framework for equal treatment in access to employment and employment*, with respect to the defendant, S.C. Fotbal Club Steaua București S.A.?
- **3.** To what extent are we dealing or not with a *probatio diabolica* in case there is a reversal of onus according to Art. 10 par. (1) in *Directive 2000/78/CE of the Council of 27 November 2000 establishing a general framework for equal treatment in access to employment and employment*, and the defendant, S.C. Fotbal Club Steaua București S.A., is requested to prove the fact there was no violation of the principle of equal treatment, in particular to prove the fact that hiring does not interfere with sexual orientation?

CJEU, case C-81/12, ACCEPT ASSOCIATION



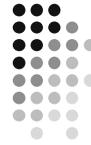
- 4. If the impossibility of fining in cases of discrimination after the lapse of the statute of limitation of 6 months from the date the act of discrimination was committed, according to Art. 13 par. (l) in Government Ordinance 2/2001 on the legal regime of misdemeanors, is in contradiction with Art. 17 in *Directive 2000/78/CE of the Council of 27 November 2000 establishing a general framework for equal treatment in access to employment and employment* considering the fact that penalties in cases of discrimination must be effective, proportionate and dissuasive?

CJEU, case C-81/12, ACCEPT ASSOCIATION



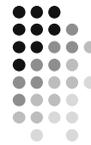
1) Article 2 par. (2) in Directive 2000/78/CE of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation need to be interpreted in the sense that acts of the kind the main litigation originates in can be qualified as “acts that allow the presumption a discrimination exists” in the case involving a professional football club if the statements concerned are made by a person who present themselves and are perceived by the media and by society as being the main manager of the club, although they do not necessarily have the legal competence to commit the club or to represent it in matter of recruitment.

CJEU, case C-81/12, ACCEPT ASSOCIATION

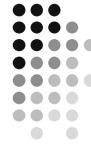


2) Article 10 par. (1) in Directive 2000/78 needs to be interpreted in the sense that, if the acts of the kind the main litigation originates in could be qualified as “acts that allow the conclusion an alleged discrimination occurred” on account of sexual orientation, acts committed on the occasion of recruiting players by the a football club, the burden of proof, as designed in Article 10 par. (1) in Directive 2000/78, does not lead to demanding proof which is impossible to produce without affecting the right to respect of private life.

CJEU, case C-81/12, ACCEPT ASSOCIATION



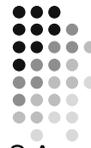
3) Article 17 in Directive 2000/78 needs to be interpreted in the sense that it is opposed to a national regulation according to which, in case a discrimination on grounds of sexual orientation is found, in the meaning of this directive, it is not possible to apply a mere reprimand, such as the one under discussion in the main litigation, when such a finding occurs after the lapse of a statute of limitation of 6 months since the date the act was committed if, according to that same regulation, such a discrimination is not sanctioned in point of substance and procedure in a way that makes the sanction effective, proportionate and dissuasive. The referring court is to assess whether this is the situation of the regulation involved in the main litigation and, in case this is so, to interpret national law, to the largest extent possible, in the light of the text and purpose of the mentioned directive in order to reach the outcome expected by the directive.



CJEU, case C-81/12, ACCEPT ASSOCIATION

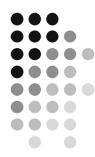
Bucharest Court of Appeals, Section VIII administrative and fiscal litigations, Civil Judgment 4180/23.12.2013

In case, the plaintiff did not prove the existence of an actual refusal of the football club to contract sport services from player Ivan Ivanovo, refusal alleged to be caused by a discrimination criterion, so that, according to CJEU argumentation, the person charged with discrimination in employment could be in the position to prove that was not the reason for the refusal to employ. Thus, Fotbal Club Steaua București S.A. stated they have never intended to get football player Ivan Ivanovo transferred, neither have they ever initiated any concrete actions of negotiation with the club in possession of the player's federative rights. In this respect, the NCCD retained that in the case of professional football players, the recruitment process is special, in the sense that it does not involve a public offering, or a direct negotiation (except in the case where the player has no contractual obligations, which was not the case), but rather involves a specific process of negotiation between the contracting sports clubs.



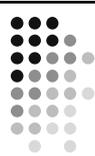
CJEU, case C-81/12, ACCEPT ASSOCIATION

Also, the plaintiff did not prove that Fotbal Club Steaua București S.A. Had at any time identified itself with the statements of the defendant G.B. or that, as an employer, it had practiced a policy of discrimination on sexual orientation grounds. The statements under discussion were made in the context of a journalistic process where it was the journalist, and not the defendant, G.B., that raised the issue of the sexual orientation of the respective player. Those statements express the personal views of the defendant and were placed in a context associated with his religious beliefs and have never been taken on board by the football club. As for the notoriety as a an "owner" of the defendant G.B., documents submitted in the case do not result in the conclusion he was, at the time of the respective statements, the legal representative of the football club. According to the document issued by the Registrar of Companies, G.B. cedes his 858 shares to G.C. , who is in possession of 1848 shares. Therefore, the defendant G.B. did not have a position or a capacity that could give him the legal authority to make decisions in Fotbal Club Steaua București S.A. or to commit the respective club in relations with third parties, with respect to the



CJEU, case C-81/12, ACCEPT ASSOCIATION

The CJEU ruling in case C-81/12 confirms the legal value of the sanction of reprimand, with respect to meeting the requirements of effectiveness, proportionality and dissuasiveness and states it is for the national court to check whether that sanction is appropriate in the litigation brought for trial. Specifically, considering the actual circumstances retained by the challenged decision, the Court believes NCCD correctly individualized the sanction for misdemeanor. Thus, the sanction by reprimand was applied in a distinct manner from the aspect of limitation statute having effect on the sanction by fine. When applying the fine, the authority brought before the court as a defendant had considered the circumstances in which the act was committed, i.e. in the context of a purely journalistic process, The journalist prompted that statement with the obvious reason of getting the personal position of the interviewee on a topic placed in an abstract relation with the area of employment. Also, there had been no further effects since no actual refusal of employment on grounds of discrimination actually occurred.



CASE C-310/10, Agafitei and Others. Discrimination concerning salary rights of judges

CJEU Judgment 7 July, 2011

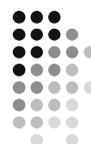
Primarily, the referral decision contains no sufficiently precise indication for one to assume that, by the fact the national legislator included under the same regime of compensation for the harm suffered both the violations of nondiscrimination rules in Directives 2000/43 and 2000/78 and the violation of nondiscrimination rules resulting solely from the national legislation, they would have meant to refer, with respect to the latter violations, to the content of provisions in Union law or to abide by the solutions retained by them. A sanctioning regime like the one the member states are called upon to apply by virtue of Article 15 in Directive 2000/43 and Article 17 in Directive 2000/78 is the accessory to substantial nondiscrimination norms stipulated by the said directives and whose effectiveness they should ensure. Or, as emphasized under points 31-36 in this judgment, the respective directives do not contain any nondiscrimination norm which is based on an occupational category, such as the one referred to in the main litigation.

CASE C-310/10, Agafitei and Others.
Discrimination concerning salary rights for judges



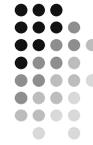
On the other hand, Article 15 in Directive 2000/43 and Article 17 in Directive 2000/78 merely impose on the member states the obligation to institute a regime of sanctions applicable in case of violation of national provisions adopted for the application of the mentioned directives, showing, in this respect, that the respective sanctions shall be effective, proportionate and dissuasive and that they may consist in compensation. Therefore, when they are to be applied with respect to situations not covered by the scope of the respective provisions of Union law, the various concrete measures involved in the application of the latter can be perceived with difficulty as referring to notions contained in the same provisions or as being in conformity with the solutions retained in them, that should be given a uniform interpretation irrespective of the circumstances where they are to be applied.

CASE C-310/10, Agafitei and Others.
Discrimination concerning salary rights for judges



Finally, one should emphasize that, in case, preliminary questions basically concern not so much having an interpretation of the content of Article 15 in Directive 2000/43 and Article 17 in Directive 2000/78, but rather the issue whether the principle of Union law prevalence is opposed to a national norm having a constitutional rank, as interpreted by the constitutional court of the member state in question, which, in the presence of a situation not covered by the scope of these provisions in Union law, orders that the national norm that is actually ensuring transposition of the respective provisions of Union law be left unapplied or that the national norm be interpreted in a manner that would be contrary to those provisions if the mentioned situation were to be covered by their scope.

Case of the Union of laid off, reservist and retired military personnel



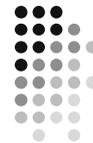
Neamt Court, Civil Section I, Judgment of 18 July, 2012
One more failed referral?

The Court of Justice of the European Union was seised for a preliminary ruling as follows:

If Article 2 par. 2 in Directive 2000/78 can be interpreted to the effect that the notion of discrimination it refers to also includes creating a situation of unequal treatment on the grounds of the fact the person in employment or seeking employment is also a retired person..

If Article 3 par. 1 in Directive 2000/78 can be interpreted to the effect that the notions conditions of access to employment, selection criteria, lay off conditions also include the notion of retired person among the criteria and the conditions.

Case of the Union of laid off, reservist and retired military personnel



If Article 6 in Directive 2000/78 can be interpreted to the effect that it is allowed for a member state that has transposed this provision in national law to proceed, in the exercise of the judicial power, to checking the inappropriate/incomplete transposition of European directives in the national legislation with respect to assessing the “justification of the objective and reasonable manner” of applying a differentiated treatment, as well as “the legitimate objective” the legislator took into consideration on issuing the piece of legislation that includes a differentiated treatment.

Retirement age

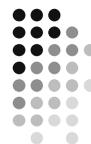
Bucharest Court of Appeals, Section VII for civil cases and litigations in labor and social security judgment 2838 of 10 April, 2011

The plaintiff was an employee of the Spiru Haret High school as a teacher of social-humanistic sciences. As on 1 September, 2010 she was meeting the conditions of retirement she requested the defendant, the School Inspectorate of Bucharest Municipality to continue and maintain her as a senior teacher in the school year 2010-2011. Her request was denied as she was not meeting the conditions in Art. 10, par. (1) in the Methodology for the moving of teachers in pre-university education. It was established that her individual work contract with the Spiru Haret High school was terminated in accordance with the law as a result of the fact she had reached retirement age.

Retirement age

According to Art. 56 par. (1) letter d) in the Labor Code, the individual work contract is terminated in accordance with the law on the cumulative meeting of two conditions i.e. the standard retirement age has been reached and the minimum stage of contribution to the pension fund has been covered. Art. 41 par. (5) in Law 19/2000 provide that personnel in meeting the conditions provided by that law in order to obtain a pension as they have reached retirement age can continue in employment solely with the agreement of the employer. Also, teaching staff in the pre-university state education system who have reached teaching grade I or who have a PhD and who prove to have special professional skills, can be maintained in the teaching position for an interval of three years beyond retirement age, on their request, with the approval of the teachers' council in the respective school expressed by casting an open nominal vote and with the annual consent of the school inspectorate, according to Art. 128 in Law 128/1997.

Retirement age



In September 2010, when the defendant found the plaintiff was meeting the conditions for retirement in point of age limit, according to annex 3 in Law 19/2000 on the system of public pensions and other social security rights that provides on the standard retirement ages and the full stages of contribution, the standard retirement age for the opening of the right to a pension on grounds of reaching the retirement age, in the case of the plaintiff was 58 years and 11 months, while in the case of a male that was 63 years and 11 months. As she had been born in July 1951, at the time of terminating her work contract the plaintiff was meeting the condition of retirement age for women, but she challenged the measure on grounds of discrimination in view of the retirement age the law provides in the case of men. She invoked Directive 76/207/CEE and Directive 2002/73/CE as grounds for her challenge.

Retirement age



Bucharest Court of Appeals:

Essential in the matter are the provisions of Art. 1 par. 1(a) in Directive 2002/73/CE of 23 September 2002 to amend Directive 76/207/CEE of the Council on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions according to which “Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.”. Article 49 in Law 202/2002 specifically provides that law transposes Council Directive 76/207/CEE, as amended by the European Parliament and Council Directive 2002/73/CE.

Retirement age

CJEU has established that, in principle, it is not contrary to the directives incident in matters of legally setting a retirement age for obtaining a pension, retirement age that is different for men and women, it is only the general policy of personnel laying off (interpreted in an ample sense, including any decision to terminate a work contract with the respective employee) whose single grounds is reaching of retirement age by the person entitled to a state pension and that is different for men and women according to national legislation, that is prohibited by the directive analyzed. Therefore, on the grounds of the European legislation mentioned above and of the interpretation by the CJEU in the case above, the fact that a woman may request a pension earlier (as allowed by the national legislation) does not mean it is mandatory the woman be retired (in any way) earlier than a man. Therefore, a woman may acquire earlier than a man the right to obtaining a pension, but this right may be used or not by the respective person, as she wishes, without the right obtained earlier be transformed into the opposite of the purpose intended, by instituting an obligation to retire earlier than a man.

Retirement age

Bucharest Court of Appeals:

Instituting by law an earlier retirement age for women versus men is just an option women are offered to get a pension for reaching retirement age at a younger age than men can get the same pension. Female employees may exercise that option or not along the way until they reach retirement age provided for males. The Court will deny as ungrounded the request formulated by the plaintiff in appeal of establishing her standard retirement age is the same as the one provided for males.

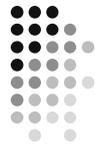


Recent ECJ jurisprudence

Directive 2000/78/CE – Equal treatment – Collective agreement reserving an advantage in matter of compensation and working conditions for employees that go into marriage – Exclusion of partners who conclude a civil pact of solidarity – Discriminations on grounds of sexual orientation

CJEE, judgment of 12 December, 2013, case C-267/12, *Frédéric Hay/Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*

Art. 2 par. (2) letter (a) Directive 2000/78 should be interpreted to the effect that it is contrary to a provision in a collective agreement such as the one in the main litigation, on whose grounds an employee who concludes a PACS with a person of similar sex is excluded from obtaining benefits such as a special leave and a bonus, granted to employees on the occasion of their marriage, when the national regulations of the member state does not allow marriage of persons of the same sex, to the extent to which, considering the conditions for the granting of those benefits, they are in a situation comparable with that of a worker who gets married.



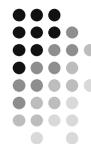
Recent ECJ jurisprudence

Directive 2006/54/CE – Equality of treatment of male workers and female workers – Benefitting mother who had a child by a surrogate mother as a result of a contract for assisted human reproduction – Denial to grant her paid leave equivalent with maternity leave or an adoption leave.

CJEU, judgment of 18 March, 2014, case C-363/12, Z.

1) Directive 2006/54/CE of the European Parliament and the Council of 5 July, 2006 on the application of the principle equal chances and equal treatment of men and women in matters of employment and work, especially articles 4 and 14 thereof, shall be interpreted to the effect it is not a discrimination on grounds of sex to deny a woman worker, as a benefiting mother who had a child by a surrogate mother as a result of a contract for assisted human reproduction the granting of a paid leave equivalent with maternity leave.

Recent ECJ jurisprudence



The situation of such a benefitting mother with respect to granting an adoption leave does not come under the scope of this directive.

2) Directive 2000/78/CE of the Council of 27 November 2000 for setting up a general framework in favor of equal treatment for men and women as regards access to employment shall be interpreted to the effect there is no discrimination on grounds of disability to deny granting of paid leave equivalent to maternity leave or adoption leave to a woman worker who is unable to carry a pregnancy and who resorted to a contract of assisted human reproduction by a surrogate mother.

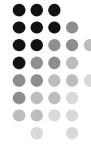
Recent ECJ jurisprudence



Equal treatment as regards access to employment and employment - Prohibiting discrimination on grounds of age — Directive 2000/78/CE – Article 6 pars. (1) and (2) – Refusal to pay lay off compensation to clerical staff that is 65 years of age and can benefit by a retirement age pension.

CJEU, judgment of 26 September, 2013, case C-546/11, *Dansk Jurist- og Økonomforbund*

1) Art. 6 par. (2) in Directive 2000/78/CE of the Council of 27 November 2000, on creating a general framework in favor of equal treatment as regards access to employment and employment shall be interpreted to the effect that it is applicable only to pensions and invalidity benefits within an occupational regime of social security. 2) Art. 2 and Art. 6 par.(1) in Directive 2000/78 shall be interpreted to the effect they are contrary to a national regulation according to which clerical staff who have reached the age of retirement and can benefit by a retirement pension may not benefit, on account of this reason alone, by the lay off salary meant for clerical staff that is made redundant as a result of their positions being removed.



Thank you for your attention!

HAPPY LABOUR DAY !



NURSE



ENGINEER



WORKER



YOUNG ROMANIAN JUDGE

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