

## **The role of the national judge in applying the EU anti-discrimination directives:**

### **The relationship with the national legal orders and preliminary ruling procedure**

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The establishment of the European Communities called for a transfer of competences formerly assumed by sovereign states.

This transfer provided the European Communities with their own legal order:

- “independently of the legislation of Member States” (ECJ Judgment of 5 February 1963, Van Gend and Loos).
- “an integral part of the legal system of the Member States” (ECJ judgment of 15 July 1964, Costa/Enel).

Sources of EU law:

- Original or primary law
- Derived or secondary law
- Supplementary law

Original or primary law:

- Treaty of the European Union: sets the general framework for a division of competences between the EU and the Member States and for the system of institutions
- Treaty on the Functioning of the European Union (replacing the TEC): develops the TEU and provides the detail on matters relating to these competences and institutions.

Derived or secondary law:

- Binding instruments:

- Regulation (general application, compulsory in all aspects and for all Member States)
- Directive (general application, sets a compulsory objective, and applies to one, several or all Member States)
- Decision (more or less specific application, compulsory in all aspects for those to whom it is addressed – physical or legal persons and/or Member States)

- Non-binding instruments:

- Recommendations
- Opinions

Supplementary law:

- Agreements and conventions of the Union
- General principles of law
- Case-law from the Court of Justice

## The hierarchy principle:

1. Legislative acts (Article 289 TFUE).
2. Delegated acts (Article 290 TFUE).
3. Implementing acts (Article 291 TFUE).

## Consequences of transferring competences to the EU:

- Member States lose the ability to legislate on matters for which the EU is competent.
- The rules adopted by the EU in exercising its competence become part of the law of each Member State:
  - without the need for domestic legislation (Treaties, Regulations and Decisions),
  - by means of domestic legislation (Directives).

- EU law coexists with the specific law of Member States and is aimed at the same legal subjects.

- This coexistence does not assume that EU law is domestic law in the Member States – it is not Spanish, English, German or French law:

- It is not subject to national principles.
- It does not observe the law-making procedures laid down in each State.
- It does not produce the legal effects enshrined in the various Constitutions and domestic provisions.

Directives are the European legislative instrument for governing matters of equality between men and women:

- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204 of 26/7/2006).

- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, de 21/12/2004).

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303/16 of 2/12/2000).

- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
- Council Directive 2010/18/EU of 8 March 2010 implementing the revised framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.
- Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC

The Directives establish minimum standards: they do not prevent Member States going beyond these.

In Spain, Constitutional Law 3/2007 of 22 March on effective equality between men and women:

- implements Directives 2004/113/EC and 2002/73/EEC;
- passes over other Directives;
- goes further than the Directives, also extending provisions to other fields (e.g. electoral representation);
- applies concepts used in the Directives, but not always one-to-one;
- missed an opportunity to incorporate Directive 2006/54/EC, which predates it.

This implementation may be dysfunctional in some respects:

- fields not covered by the European instrument,
- dissimilar use of concepts,
- failure to implement the Directive on time.

These dysfunctions can be rectified by applying:

- Mechanisms of domestic law:
  - Questions of unconstitutionality
  - Non-application of lower-ranking rules which are contrary to the higher-ranking
  - Others
- EU law mechanisms:
  - the principle of direct effect,
  - the principle of supremacy.

The principle of direct effect:

- refers to the ability of individuals to invoke rights and duties before the courts by virtue of the European provisions themselves;
- is justified by the need for EU laws to be applied universally, uniformly and unconditionally.

The direct effect of Directives:

- In principle it is the national implementing laws that have direct effect, but these solutions are unsatisfactory if States do not comply with the Directive (failure to transpose on time or incorrect transposition).
- Directives are recognised as having direct effect (ECJ judgments of 5 April 1979, Ratti, 19 January 1982, Becker, and 19 November 1991, Francovich and Bonifaci) when:
  - transposition has not been completed by the deadline set out or the transposition has not been performed correctly, and
  - the provision in the Directive is sufficiently clear and precise.

The principle of precedence (ECJ judgment of 9 March 1978, Simmenthal):

- means that EU instruments take precedence over national law, whatever the status of that law and even if they were adopted at a later date.
- It is a consequence of direct effect: an EU provision cannot be subject to a national provision that contradicts it.
- If there is a clash between the EU provision and the national provision, the latter must be set aside.

The application of these principles requires national courts to be familiar with EU law (legislation and case-law), enabling them to:

- interpret national provisions in the light of European provisions;
- assess and, if necessary, disapply national provisions;
- evaluate European provisions and, where appropriate, ask the CJEU to review their lawfulness;
- adopt interim measures in relation to European provisions;
- submit correctly framed references for preliminary rulings to the CJEU.

The Treaties have created a hybrid system to guarantee consistency in the interpretation and application of EU law:

- The courts of the Union exert sole jurisdiction with regard to the more important matters; they are community courts par excellence.
- The national courts have the task of interpreting and applying Union law in relation to the proceedings before them: they are the “ordinary judges”.

Preliminary rulings are the collaborative mechanism between the national court and the court of the Union:

- The national court must settle the case before it on the basis of Union law.
- The court of the Union must reply to any questions from a national court about the interpretation or validity of the EU provisions to be applied:
  - These may stem from any instrument enacted by the Union institutions,
  - but not national law,
  - or questions relating to the facts of the case.

References for a preliminary ruling:

1. Before the national court
  - Duty/Option to refer: issue of “acte clair”.
  - Form: Order after hearing the parties and prosecutor:
    - facts
    - applicable law: national and Union
    - legal foundations: questions and possible interpretations
    - questions for preliminary ruling.
  - Time: after the hearing.

2. Before the CJEU:

- Written proceedings: pleas by the parties, Member States and Institutions.
- Oral proceedings (not compulsory).
- Opinion of the Advocate General (also not compulsory).
- Judgment:
  - Binding:
    - on the referring court,
    - on all other courts.
  - Does not prevent subsequent references for a preliminary ruling.

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- Court of Justice of the European Union  
(Court of Justice, General Court, Civil Service Tribunal)
  - Procedures
    - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings
  - Jurisprudence