

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

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Outline

- **Introduction: national courts as EU courts**
- **Fundamental principles: direct effect, primacy, indirect effect, state liability**
- **The preliminary ruling procedure**
- **Tips for drafting an order for reference**

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Introduction: national courts as EU courts

- **The role of the CJEU in the EU legal system**
 - [Article 19 TEU](#)
- **Relationship between the CJEU and national courts**
 - [Article 267 TFEU](#)
 - Questions of interpretation and validity
 - Cooperation and dialogue
 - Application v interpretation of EU law

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Fundamental principles: direct effect

- **Direct effect**
 - Key judgment: 26/62, Van Gend en Loos
 - Possibility to directly invoke EU law provisions before national courts
 - Not necessary for the Member State to adopt particular provisions or implement the EU provision in its internal legal system
 - To have direct effect, EU provisions must be precise, clear and unconditional; no need for additional measures
 - Treaty provisions, international agreements, regulations and (under certain conditions) directives
 - Vertical and horizontal direct effect of directives
 - E.g. C-397/01, Pfeiffer; C-144/04, Mangold, C-555/07, Küçükdeveci; C-282/10, Dominguez
 - The EU Charter
 - Distinction between rights and principles
 - C-176/12, AMS

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Fundamental principles: primacy

- **Primacy**
 - Key judgments: 6/64, Costa v ENEL and 106/77, Simmenthal
 - EU provisions take precedence over national law (including national constitutional law)
 - Application not validity
 - National courts are not to apply conflicting national law (irrespective of whether that national provision was adopted before or after the EU provision in question)

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Fundamental principles: indirect effect

- **Indirect effect**
 - Key judgments: 14/83, Von Colson; C-106/89, Marleasing; C-32/93, Webb; C-397/01, Pfeiffer
 - Obligation to interpret national law in conformity with EU law
 - National law must be interpreted (as far as possible) in light of the wording and purpose of the EU provisions concerned to achieve the result sought by those provisions
 - Necessary to ensure effectiveness of EU law
 - NB: No interpretation contra legem required

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Fundamental principles: state liability

- **State liability**
 - Key judgments: C-6 and 9/90, Francovich and Bonifaci; C-46 and 48/93, Brasserie du Pêcheur and Factortame; C-224/01, Köbler
 - Member States are responsible vis-à-vis the individual for breaches of EU law committed by its organs (including national courts)
 - Conditions for reparation: (1) the EU rule infringed confers rights on individuals; (2) the breach is sufficiently serious; and (3) there is a direct causal link between breach and damage

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The preliminary ruling procedure: basics

- **Ratio**
 - Uniform implementation of EU law throughout the EU
 - Protection of the rights of individuals
- **Questions that can be referred (substance)**
 - E.g. interpretation of EU Treaties, interpretation or validity of EU acts such as regulations, directives, decisions, international agreements entered into by the EU, other EU acts having legal effects and so on
- **But not (substance)**
 - E.g. validity or interpretation of national law, principles of public international law, acts of private persons, application of the law in a specific case

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The preliminary ruling procedure: actors and roles

- **Jurisdiction to give preliminary rulings: the CJEU**
 - Changes after the Lisbon Treaty
 - Lack of jurisdiction / inadmissibility
 - For a discussion, see e.g. Opinion of AG Wahl in Case C-497/12, Gullotta
- **Who can refer questions to the CJEU?**
 - Courts and tribunals of Member States
 - Elements taken into consideration: permanent body, independence, compulsory or voluntary jurisdiction, decisions taken on the basis of legal rules, body includes lawyers, settling disputes
 - E.g. C-53/03, Syfait; C-58/13, Torresi

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The preliminary ruling procedure: actors and roles

- **Right and/or duty to refer**
 - All courts **may** decide to refer, but a national court **must** refer the question if it is a court of last instance or if the question concerns the validity of an EU act (314/85, Foto-Frost)
 - Exceptions: acte clair (283/81, CILFIT) and acte éclairé (66/80, ICC)
 - See also Opinion of AG Wahl in Case C-72/14, X
- **Effects of a preliminary ruling**
 - The interpretation given in the CJEU judgment binds the referring court
 - Also binding on other national courts before which the same problem is raised
 - Further references are not excluded

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Tips for drafting an order for reference

- **For requirements and procedure**
 - CJEU Information Note (OJ 2012 C 338, p. 1)
 - Rules of Procedure (OJ 2012 L 265, p. 1, as amended)
 - Statute of the Court of Justice (annexed to the Treaties)
 - For more information: <http://eur-lex.europa.eu> and <http://curia.europa.eu>
- **Keep it short and simple, but:**
 - Explain legal (national and EU) and factual context
 - Try to identify the relevant EU law provisions and refer to them in the questions
 - Explain why the questions are relevant for the outcome of the case
 - Inadmissibility of hypothetical questions
 - The CJEU does not deal with artificial disputes

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Tips for drafting an order for reference

- **Different ways in which questions can be drafted**
 - Direct application of EU law in the dispute before the referring court: [C-167/12, CD](#) and [C-354/13, Kaltoft](#)
 - Incompatibility of national legislation with EU law: [C-530/13, Schmitzer](#); [C-318/13, X](#); [C-5/12, Betriu Montull](#); [C-173/13, Leone](#)
 - Transposition of a directive into national law: [C-398/11, Hogan and others](#)
 - Interpretation of EU secondary law in conformity with EU primary law: [C-363/12, Z](#)
 - The validity of EU legislation: [C-236/09, Test-Achats](#); [C-363/12, Z](#)
- **How does the CJEU answer?**
 - In principle on the interpretation of EU law only; possibility to reformulate questions

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Suggested reading

- Broberg and Fenger, *Preliminary References to the European Court of Justice*, 2nd ed., OUP, 2014.
- Craig and de Búrca, *EU Law – Texts, Cases and Materials*, OUP, 2009, 5th ed., ch. 9 and 13.
- De la Mare and Donnelly, ‘Preliminary rulings and EU legal integration: Evolution and Stasis’, in Craig and de Búrca (eds.), *The Evolution of EU Law*, 2nd ed., OUP, 2011, ch. 13.
- Groussot, ‘Spirit, are you there?: reinforced judicial dialogue and the preliminary ruling procedure’, *Eric Stein Working Paper*, 4/2008.
- Lenaerts, Maselis and Gutman, *EU Procedural Law*, OUP, 2014, ch. 6 and 10.
- Tridimas, ‘Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction’, *ICON*, 2011, vol. 9, p. 737 to 756.
- Weiler (2001), ‘Epilogue: the Judicial Après Nice’, in de Búrca and Weiler (eds.), *The European Court of Justice*, p. 215 to 226.

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Thank you!

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