

The role of the national court in applying EU anti-discrimination directives and the preliminary ruling procedure

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Summary:

1. Interpretation consistent with the directives
 - a) General
 - b) Effectiveness
 - c) Interpretation methods, *contra legem* limits
 - d) Negative effect for the individual
2. Direct application of primary legislation/fundamental rights
3. Preliminary ruling procedure
 - a) Capacity to proceed – Obligation to refer
 - b) Conditions for the competence of the court
 - c) Formal requirements on the preliminary reference
 - d) Accelerated procedure

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Interpretation consistent with the directives – General

- Article 288 paragraph 3 TFEU – Obligation of the Member States as to the results to be achieved
- Article 4 paragraph 3 TEU – Obligation of loyalty
 - The obligation is directly intended for the national courts as well
 - Cf. *Colson and Kamann decision*, 14/83, EU:C:1984:153, Marginal note 26, *Kçükdeveci*, C-555/07, EU:C:2010:21, Marginal note 47, *DI*, C-441/14, EU:C:2016:278, Marginal note 30 (among many others)

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Interpretation consistent with the directives – General

- Obligation “arising from a directive to achieve the **result** envisaged [and] the duty to take all appropriate measures, whether general or particular” (e.g. *DI* Judgement, Marginal note 30)
- Comprises in any event the obligation to change (established) case law, where necessary, if it is incompatible – even if it is from the highest court (*DI* Judgement, Marginal note 33; *Ognyanov*, C-614/14, EU:C:2016:514, Marginal note 35, *Egenberger*, C-414/16, EU:C:2018:257, Marginal note 72)

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Effectiveness

Obligation to interpret harmonized law so that the

- Effective application of EU law, as well as in particular the
- Protection of the rights of individuals, and
- Effective legal protection (Article 47 Charter)

are guaranteed (Judgements *Pfeiffer and al.* C-397/01 to C-403/01, EU:C:2004:584, Marginal note 111; *Impact*, C-268/06, EU:C:2008:223, Marginal note 42, *Egenberger*, Marginal note 59).

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Interpretation methods, *Contra legem limits*

- Obligation to decide, with due consideration of all national legal standards and the interpretation methods recognized in national law, whether an interpretation consistent with the directives is possible
- No restriction of “interpretation” in the strict sense, also to check nationally admissible development of the law, e.g. analogy (in particular to make the equivalence with other national rules), teleological reduction (hM)

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Interpretation methods, *Contra legem* limits

- However, according to established case law of the ECJ, there is *no obligation* for an interpretation outside the limits of what is authorized under national law (*contra legem*)
- Whether an interpretation result according to national law can be permissibly attained, must also be assessed according to *national law* (*Egenberger* judgement, Marginal note 74; in the final analysis different, AG opinion in *DI*, nos. 52 ff).

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Interpretation methods, *Contra legem* limits

- But: Priority of interpretation consistent with directives (*Marleasing* Judgement, C-106/89; EU:C:1990:395, Marginal note 8), and in fact
- Even in the event of indications to the contrary in legal materials, *inter alia* (*Björnekulla Fruktindustrier* judgement, C-371/02, EU:C:2004:275, Marginal note 13)

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Onerous effects for the individual

- Interpretation consistent with the directives may have an impact also on the individual (party to a dispute between private individuals) as a result (hM)
- Principle of *ex tunc* effect of the preliminary rulings of the ECJ (e.g. *Gmina Wroclaw* Judgement, EU:C:2015:635, Marginal note 44)
- Restriction of temporal effects of a judgement only in rare exceptions (cf. in particular *Forposta and ABC Direct Contact*, C-465/11, EU:C:2012:801, Marginal note 45)

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Direct application of primary law / fundamental rights

- Anti-discrimination directives as “materialization” of fundamental rights/general legal principles (e.g. *DI* Judgement, Marginal note 23)
- If a national provision cannot possibly be interpreted in a way consistent with EU law, it must be left disapplied, if the direct claims of the individual pursuant to primary law so require (*Egenberger* judgement, Marginal note 70 ff., on Articles 21, 47 Charta)

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Preliminary ruling procedure

- Every court is also entitled to refer a matter against a diverging national law (e.g. Judgement A, C-112/13, EU:C:2014:2195, Marginal note 34 ff.)
- Court “against whose decisions there is no judicial remedy under national law” is obliged hereto (Exception: *acte clair*, *CILFIT Judgement*, C-283/81, EU:C:1982:335)
- It is not clear, whether lack of contestability is to be considered in abstract or concrete terms (for concrete terms, cf. the judgement in *Ferreira da Silva e Brito and others*, C-160/14, EU:C:2015:565, Marginal note 37)

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Preliminary ruling procedures

Preconditions for the jurisdiction of the court of justice:

- Interpretation or validity of EU law
 - not: questions of fact
 - not: compliance with EU law or interpretation (even consistent with directives or EU law) of national law
- Necessity of the requested interpretation to decide on the initial legal dispute

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Preliminary ruling procedure

- “Court of justice” according to Article 267 TFEU is an autonomous concept of EU law
- Typical consideration according to a variety of criteria (compulsory jurisdiction, independence, established character, legal basis, contentious proceedings, application of legal standards)
- The concept is generally interpreted broadly (cf. judgement *Consorti Sanitari del Maresme*, C-203/14, EU:C:2015:664, Marginal note 17 ff.)

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Preliminary ruling procedure

- Form of the request: subject to national procedural law
- Article 94, Rules of Procedure, ECJ:
 - Presentation of the subject matter of the dispute, relevant findings of fact
 - Tenor of any national provisions, case law
 - Doubt about the interpretation/ validity of European Union law and relevance for the main proceedings
- Clearly recognizable question(s) submitted (cf. Point 18, Recommendations)

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Preliminary ruling procedure

- Cross-border implication (no purely domestic matter)
 - Not required for the application of anti-discrimination directives, since the scope of application is also extended to purely domestic matters
 - Perhaps unclear by direct reference to Article 21, paragraph 1 or Article 23 of the Charter
 - Cases of so called “discrimination of nationals:” national prohibition to be clearly cited (cf. *Persidera judgement*, C-112/16, EU:C:2017:597, Marginal note 27ff., and the opinion of Advocate General Kokott in this case, numbers 28 ff).

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Preliminary ruling procedure

- Anonymization of the parties to the proceedings (Article 96, Rules of Procedure, ECJ):
 - Already by the national court (recommended)
 - By the court of justice, upon request or ex officio, not very effective under certain circumstances, since the request is rapidly relayed to a plethora of participants (initially internally, e.g. the translation departments, then externally, cf. Article 23, Statute of the Court of Justice)

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Preliminary ruling procedure

- Parties to the main proceedings (if need be, their representatives) – Article 97, Rules of procedure:
 - The parties to the main proceeding (and thus entitled to take part in the proceedings before the ECJ) are those who are determined as such by the referring court
 - When a party is admitted to the proceedings (probably also in case of loss of a party status), the court of justice must be informed

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Preliminary ruling procedure

- Withdrawal of the request (Article 100, Rules of Procedure):
 - When the request is withdrawn the proceedings are dropped by decision
 - The withdrawal of a request may be taken into account until notice of the date of delivery of the judgement has been served; it extends the judgement nonetheless

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Preliminary ruling procedure

- Expedited preliminary ruling procedure (Articles 105 ff., Rules of procedure):
 - Request must be accurately substantiated (impending risk in the ordinary procedure, which cannot be averted by temporary measures of the national court)
 - Request must be clearly indicated (not necessarily in a separate letter)
 - Decision-making practice of the ECJ restrictive (cf. Decision in *Weiss and others*, C-493/17, Marginal note 8 ff, etc.)

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Preliminary ruling procedure

Recommendations to the national courts concerning the referral of questions for a preliminary ruling, OJ 2016, C 439, S. 1.

(<http://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=OJ:C:2016:439:FULL>

or

https://curia.europa.eu/jcms/jcms/Jo2_7031/de/)

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Literature

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