

## Role of a Member State judge in the application of the EU Anti-Discrimination Directives: relationship with the national legal systems; the preliminary ruling proceeding

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Independent interpretation and application

Request for a preliminary ruling

## Independent interpretation and application

- ▶ Acte claire: the interpretation of the EU law is absolutely clear  
Acte éclairé: the CJEU has already interpreted the EU law  
*(C-283/81. CILFIT)*
- ▶ Particular caution: highest judicial forum
- ▶ Principles and mechanisms that may be applied by a national judge:
  - Loyalty – full and effective enforcement of the EU law
  - Primacy of EU law
  - Direct effect

## Independent interpretation and application

- ▶ Loyalty – effective enforcement of the EU law ('effet utile')
  - Article 4(3) of the TEU '[...] The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union [...]'].
  - It is also binding on national courts.
- National law (not only harmonised law) must be interpreted in accordance with the EU law  
*(C-397/98. and C-410/98. Metallgesellschaft, C-446/03. Marks&Spencer, C-246/89. Commission v United Kingdom, C-279/93. Schumacker, C-397/01. Pfeiffer)*
- Special case: indirect effect of directives (see later)
- Member State liability in relation to non-transposed directives (see later)

## Independent interpretation and application

### ▶ Supremacy of EU law

- The principle created by the CJEU
- The EU law has supremacy over the national law
  - irrespective of the time of its origin
  - even contrary to Member State Constitutions

### → Discarding national law that is contrary to EU legislation

- It does not render such a national legal act invalid yet it cannot be applied in such cases
- There is no need for any invalidating act

*(C-6/64. Costa; C-1/70. International Handelsgesellschaft, C-106/77. Simmenthal II, C-99/87. Dow Chemical Ibérica, C-285/98. Kreil)*

## Independent interpretation and application

### ▶ Direct effect

- Meaning: natural persons can refer directly to the provisions of the Union law in their national courts
- It applies differently to different sources of EU law
  - Primary law (including: Charter of Fundamental Rights)
  - Secondary law – Anti-Discrimination Directives
- If there is no direct effect
  - Indirect effect
  - Exclusionary effect

## Independent interpretation and application

- ▶ Primary law
  - Vertical direct effect
    - (*C-26/62. Van Gend*, *C-57/65. Lütticke*, *C-339/89. Alsthom Atlantique*)
    - Towards the state
    - Conditions:
      - Unconditional (*C-2/74. Reyners*)
      - Sufficiently precise
      - (The other conditions have eroded)
  - Horizontal direct effect:
    - *Defrenne I. and II. (C-43/75., C-149/77.)*: Article 157 of TFEU (equal pay for male and female workers)
    - *Walrave and Koch (C-36/74.)*: Articles 18, 45, 56 of the TFEU, no discrimination on the grounds of citizenship)

## Independent interpretation and application

- Charter of Fundamental Rights
  - Field of application pursuant to Article 51:
    - Binding on institutions, bodies, offices and agencies of the Union
    - Binding on the Member States only when they are implementing Union law
    - The Charter does not extend the field of application of Union law
  - *C-414/16. Egenberger*:
    - The non-discrimination stated in Article 21 (1) of the Charter is sufficient in itself for granting a right to natural persons to which they can refer in legal disputes conducted in the territory governed by the Union law. (paragraph 71)

## Independent interpretation and application

### ▶ Directives:

- Problems relating to the direct effect of directives
- Vertical direct effect
  - Conditions  
(*C-41/74. Van Duyn, C-148/78. Ratti, C-8/81. Becker*)
    - Unconditional, sufficiently precise
    - The transposition deadline has expired
      - There is a certain loyalty obligation even until the deadline  
(*C-129/96. Inter-Environnement Wallonie*)
    - Towards the state
      - Extensive interpretation of the concept of the state (*C-188/89. Foster, C-103/88. Constanzo*)
      - The state also as an employer (*C-152/84. Marshall*)

## Independent interpretation and application

- Horizontal direct effect:
  - Precluded (*Marshall, Foster, C-91/92. Dori*)
  - Non-discrimination as a general principle of the Union law a priori has a horizontal direct effect.
    - Not based on the Anti-Discrimination Directives! – common constitutional traditions + Article 21(1) of the Charter
    - Obligations of a judge:
      - Not to apply any national legislation that is contrary to the Union law
      - Depart from wrong judicial practice (even to the detriment of the principle of legitimate expectations)
      - Consider the competing fundamental rights (Egenberger)
      - Limit: no need for *contra legem* interpretation of the national law

(*C-144/04. Mangold, C-555/07. Küçükdeveci, C-441/14. Dansk Industri, Egenberger, C-147/08. Römer, C-176/12. Association de médiation sociale*)

## Independent interpretation and application

- ▶ If the directive has no direct effect:
  - Indirect effect:
    - the court of the Member State must interpret the national law by taking into account the text and objective of the respective directive to the highest extent required to achieve the result of the directive
    - Limit: no need for *contra legem* interpretation  
(*Von Colson, Marleasing, Miret, Dori, Pfeiffer*)
  - [Liability for damages of the Member State]  
(*Francovich*)
  - Exclusionary effect:
    - In a horizontal legal dispute a directive that has no direct effect also precludes the application of a contrary internal legal regulation without imposing any obligation on any party (*Pafitis*)

## Preliminary Ruling Procedure

- ▶ Article 267 of the TFEU
- ▶ ‘the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and national courts and tribunals, by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate’ (*C-614/14. Ognyanov*)

## Preliminary Ruling Procedure

- ▶ What is considered a court?
  - Conditions:
    - Established by law
      - Permanent
      - Compulsory jurisdiction
      - Adversarial procedure
      - Independent
      - Decides on the basis of legal regulations
  - (*C-61/65. Vaasen-Göbbels*)
  - The right of a lower court cannot be withdrawn (*C-210/06. Cartesio*)
  - Mandatory for the highest forum (except: *acte claire/éclaire*)
  - The court is bound by the motions of the parties

## Preliminary Ruling Procedure

- ▶ In what cases?
  - Interpretation of the Union law
    - NO:
      - Interpretation of the national law
        - Instead of 'is ..... conform to....?': 'Should it [Union law] be interpreted as it [national law] is contrary to it?'
        - It does not relate to the main case, it is only a hypothetical issue (*C-53/03. Syfait!*)
    - Validity of the Union law
      - Only the CJEU may declare invalidity
      - E.g. *Pl. C-363/12. Z.* – issue of the validity of the Union law in the light of UNCRPD

## Preliminary Ruling Procedure

- ▶ Form of reference
  - As defined in the national procedural law, but even that cannot be contrary to the Union law
  - Suspension of the main case
  - Submission:
    - Simple, free of superfluous facts and data
    - National language
    - Content: see the Annex to the Recommendation
      - Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ C 439., 25.11.2016, pp. 1-8)
      - Relevant and national legal regulations (with explanations of terms), case-law, EU relevance (reasons; relationship)
        - + questions (separately)
    - Data protection (national court or CJEU – as soon as possible)
    - Sent to CJEU Office as registered mail

## Preliminary Ruling Proceeding

- ▶ Interruption in the proceeding:
  - The application can be withdrawn
  - If the legal dispute in a national court stops (e.g. cancellation, agreement)
- ▶ Cost
  - Free of charge
  - Costs incurred by the parties: according to the national regulations the court or CJEU
- ▶ Expedited or urgent procedures (Articles 105–107 of the Rules of Procedure)

# Preliminary Ruling Proceeding

## ▶ To be studied:

- Article 267 of the TFEU
- Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ C 439., 25.11.2016, pp. 1–8)  
<https://eur-lex.europa.eu/legal-content/HU/ALL/?uri=celex%3A32012H1106%2801%29>
- Rules of Procedure of the Court of Justice (CJEU) (OJ L 265., 29.09.2012., pp. 1–42)  
Amendment of the Rules of Procedure of the Court of Justice (OJ L 173, 26.6.2013, p. 65)  
<https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=legissum%3Aai0049>
- Accepted applications ([www.curia.eu](http://www.curia.eu))

