



UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW

The role of the national judge in applying the EU anti-discrimination Directives

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Overview

- Division of functions
- The application of national law
- Direct application of EU anti-discrimination directives
- The assessment of facts
- National procedures and remedies
- Requesting a preliminary ruling – when and how

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Article 267(1) TFEU

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

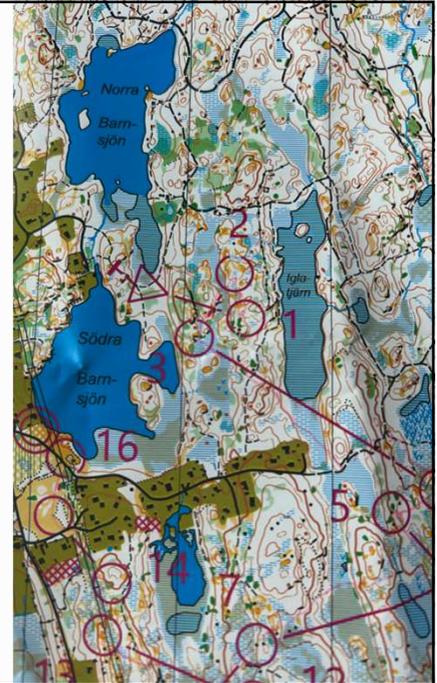
- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union

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Application of national law

- Correctly implemented directives
- The duty of harmonious interpretation
- *Contra legem*
- Setting aside national law?



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C-573/17 *Popławski II*

60 Thus, the principle of the primacy of EU law cannot have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and, consequently, of creating a single set of rules for the application of all of the provisions of EU law by the national courts.

61 In that regard, it should be pointed out that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation to disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it [...].

62 On the other hand, a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it.

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C-569/16 and C-570/16 *Bauer & Willmeroth*

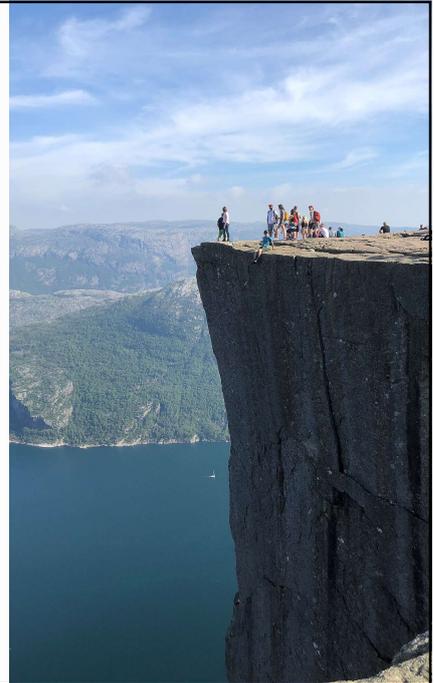
71 On the basis of those considerations, the Court has held that provisions of a directive that are unconditional and sufficiently precise may be relied upon by individuals, in particular against a Member State and all the organs of its administration, including decentralised authorities [...].

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Vertical disputes

- Directives are capable of taking direct effect
 - Provided sufficiently precise and unconditional
 - National law can fill gaps
- Verticality depends on actor



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Horizontal disputes

- Directives *in principle* not capable of taking direct effect
- Nevertheless:
 - ‘Incidental’ direct effect
 - Direct effect when ‘mere concrete expressions’ of general principles or fundamental rights



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Charter provisions and general principles

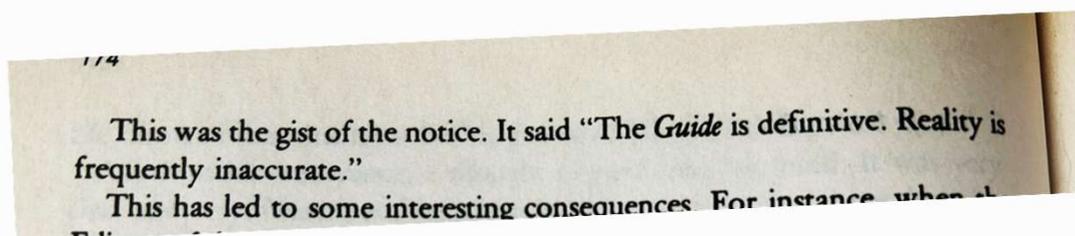
- Capable of being applied 'as such' even in horizontal disputes:
 - General principle of non-discrimination (on grounds of age)
 - Article 21 CFR
 - Article 47 CFR

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The EU burden of proof rule

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Assessment of facts

- Burden of allegation (*Behauptungslast*)?
- Burden of production (evidential burden/*Beweisführingslast*) or burden of persuasion (legal burden/*Beweislast*)?
- Standard of proof?

Pay Transparency Directive Art 18(2)

Member States shall ensure that, in administrative procedures or court proceedings regarding alleged direct or indirect discrimination in relation to pay, where an employer has not implemented the pay transparency obligations set out in Articles 5, 6, 7, 9 and 10, it is for the employer to prove that there has been no such discrimination.

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In the absence of EU rules on the matter, it is for the national legal order of each Member State to establish them...



Defense of rights

Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Standard of review for national provisions

- Directive provisions
- Article 47 CFR
- What role for *Rewe* effectiveness and equivalence?

Main implications for equality law

- Available sanctions must cover pecuniary *and* moral compensation
- Actions must be available for both types
 - Jointly?
- Pecuniary sanctions must be adequate (not merely symbolic)

Case law is more extensive on remedies than on procedures

	<i>Basis for harmonious interpretation</i>	<i>Aid for interpreting secondary law</i>	<i>Stand-alone standard of review</i>	<i>Possible justification</i>	<i>Exclusionary effect</i>	<i>Direct effect</i>
<i>Directive provisions</i>	Yes	–	Yes	As provided for	Yes, if direct effect	Vertical
<i>Article 47 CFR</i>	Yes	Yes	Yes	Article 5(1) CFR	Yes	Vertical + horizontal
<i>Rewe principle of effectiveness</i>	Yes	No	Yes	Procedural 'rule of reason'	Yes	No

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Article 267(2–3) TFEU

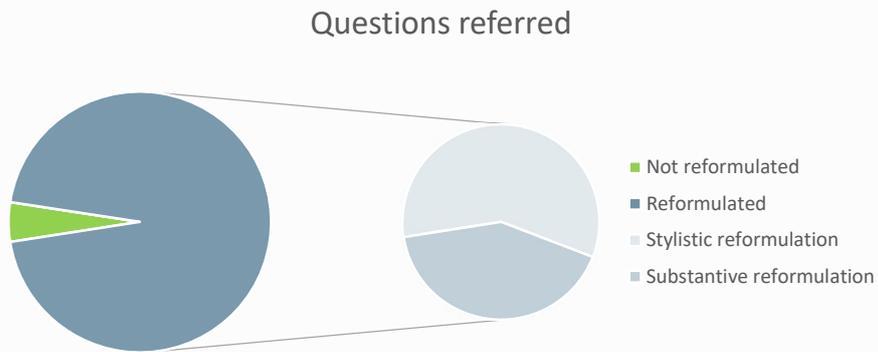
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

Article 94 Rules of Procedure of the ECJ

- In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:
- (a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
- (b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
- (c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

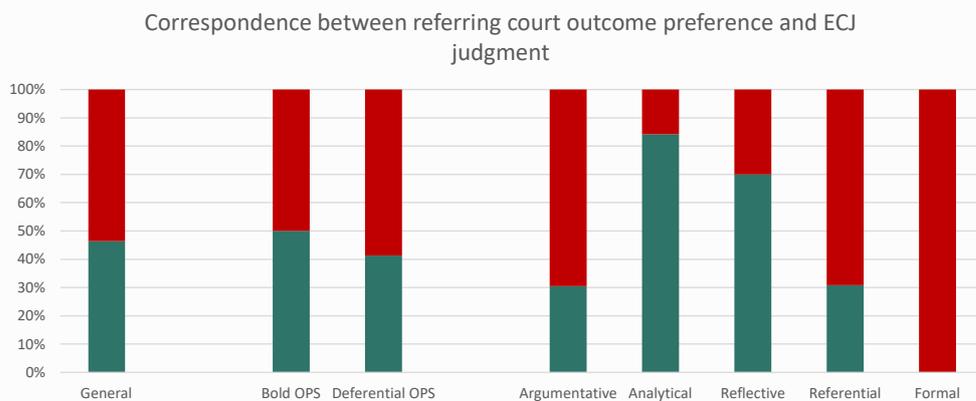
Reformulation of preliminary questions



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Can national courts persuade the ECJ?



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