Consistent interpretation

Typically, national judges must strive to interpret national law in compliance with their constitution. In addition, they are under the obligation to interpret domestic laws in such manner so as not to breach EU and ECHR law obligations. This duty results from the principle of primacy of EU law over national law, and from the obligation of the High Contracting Parties to ensure that the Convention is implemented within the domestic legal order. According to the doctrine of consistent interpretation, a national judge has to choose among the different possible interpretations of a domestic norm one that does not lead to a conflict with EU norms or the ECHR. In particular, as far as EU law is concerned, consistent interpretation is a technique through which national judges can sometimes overcome the lack of implementation of EU legislation by the domestic legislator, eventually limiting the implications of the lack of horizontal effect of certain EU secondary sources (notably, directives). In order to perform conform interpretation with EU law, national judges must use the room available under national law (as a whole) in order to achieve the purpose of the EU act.

Proportionality test

This technique requires national judges to appreciate whether the domestic measure that interferes with a supranational/international norm (that grants a European fundamental right) pursues a legitimate aim, actually contributes to that aim and it is the least restrictive measure that can achieve it. This technique is possible only in relation to derogable fundamental rights, and for the purpose of balancing fundamental rights guarantees against national public policies or among different fundamental rights guarantees.

Preliminary ruling

Art. 267 TFEU provides a mechanism of direct cooperation between national judges and the CJEU. It allows any national court to refer questions directly to the CJEU on the interpretation or validity of EU law. In principle, courts against whose decisions there is no domestic judicial remedy are under an obligation to refer a preliminary question whenever they have doubt on the interpretation or the validity of EU provisions, whereas other courts are under an obligation to refer only if they consider that the provision of EU law applicable to their case is not valid.

Margin of appreciation

In order to preserve member states’ regulatory autonomy and constitutional identity, the ECHR is keen to afford them some margin of discretion when implementing Convention obligations. This is particularly true with respect to fundamental rights in two hypotheses. First, when there is no European consensus as to the interpretation and application of a certain right. Second, when rights must be balanced with one another, in which case the choice of the correct balance is entrusted to the State. The doctrine of margin of appreciation implies that the application of the ECHR is not necessarily uniform across all members, whereas, at least in principle, the application of the EU Charter of Fundamental Rights is less concerned with local peculiarities and advocates an unconditional compliance with the uniform standards of protection set therein (the CJEU in Melloni expressly states that ‘the primacy, unity and effectiveness of EU law’ should not be compromised by the adoption of domestic standards).

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Vertical (domestic appellate court – CJEU)
Through the use of preliminary questions the national court wants to understand the exact scope of previous CJEU’s judgments with respect to equivalent, but not identical, facts and EU non-discrimination norms. The national court also questions the allocation of the burden of proof in discriminatory conduct cases, inviting the CJEU to narrow down the scope of application.

**Conflict**

Conflict of interpretation

**Judicial interaction techniques**

- Interpretative technique: Consistent interpretation (failed)
- Interaction between courts: Preliminary reference
- Interaction between rights: Proportionality test

**Judicial interaction type**

Vertical external interaction at supra-national level

The Court of Appeal of Bucharest interprets the *Bosman* and *Feryn* judgments of the CJEU and finds that these judgments are not sufficient and that the case-law of CJEU needs further clarification to guide the national court. For each of the four preliminary questions addressed to the CJEU the referring court discusses the necessity of having an interpretation from the CJEU.

**Parties**

NGO ACCEPT (claimant) and the National Council for Combating Discrimination (respondent)

**Deciding Body and decision**

Court of Appeal of Bucharest, judgment 4180 of 23 December 2013 - Court of Justice of European Union, Case C- 81/12, Judgment of 25 April 2013

**Issues Covered**

Equal treatment in employment and occupation - Discriminatory statements made by someone else than the employer - allocation of the burden of proof - Prohibition of discrimination on grounds of sexual orientation - probatio diabolica

**Sources - EU Law**

- Art. 267 TFEU
These legal bases have been invoked by the Court of Appeal to justify the necessity of a preliminary reference.

First, the Court of Appeal found that the request for a preliminary ruling was in conformity with the requirements of Article 267 TFEU. In finding so, the Court of Appeal rejected NCCD’s claim as irrelevant. NCCD - the respondent - contested the claimant’s request for a preliminary ruling as inadmissible and argued that, inter alia, the national court was not obliged to refer a preliminary question to the CJEU, because the Court of Appeal was not a last resort court.

Second, the Court invoked the Directives to analyse the pertinence of the four preliminary questions in solving the case. The Court found that it was not assured whether:

- the notion of direct discrimination as provided by the Equal Employment Directive was applicable in the case,
- the interpretation given by the Court in Feryn judgment to Art. 8 (2) of the Racial Equality Directive could be applied to Art. 10 of the Equal Employment Directive,
- the reverse burden of proof provided by the Equal Employment Directive constituted a probatio diabolica in case of discrimination on ground of sexual orientation,
- the warning sanction imposed by the national law transposing the Equal Employment Directive corresponded to the exigencies of Art. 17 thereof on sanctions applicable to infringements.

Sources - ECHR

Sources - National Law

- Government Ordinance No. 2/2001 concerning the legal regime of administrative offences

Sources - CJEU Case Law

Case C-54/07 Firma Feryn NV (2008)

First, the Court of Appeal of Bucharest invoked Firma Feryn case, notably paragraph 19 thereof, to clarify the scope of Article 267 TFEU provisions. Second, Firma Feryn case is used as justification for the necessity of a preliminary reference and in support of the admissibility of referral. The referring court asked the CJEU whether the interpretation CJEU gave to Art. 8(2) of the Racial Equality Directive in Firma Feryn can be applied by analogy to Art. 10 of the Equal Employment Directive. In concreto, the Court of Appeal asks if discriminatory statements could create a presumption of discriminatory employment policy of the Football Club. The Court of Appeal disagreed with the respondent’s claim that the preliminary questions were fact-specific and did not raise a question of interpretation of the EU norm of general interest. After citing the exact content of para. 19 of Firma Feryn, the referring court stated that: “Formulating the preliminary questions in concrete terms does not have the significance of requesting the application of EU norms to a particular case, but is meant to provide necessary information to the European Court so that its interpretation will be useful to the national court. Formulating the preliminary questions in imprecise terms could well lead to provide an answer too general and that cannot be used by the national court for solving the case.”

Case C- 415/93 Bosman and Case Firma Feryn NV
The referring court cited the two judgments as the most relevant CJEU jurisprudence to indicate on the interpretation of EU norms to the specific circumstances of the case before it. However, the referring court found that the facts of the present case were different from those of the Bosman and Firma Feryn. Namely, the author of the discriminatory statements, A.B., could not be considered an employer under the Equal Employment Directive, as he was no longer a shareholder of the Football Club. Therefore, the referring court appreciated that the existing CJEU jurisprudence did not fully clarify the interpretation of EU norms in regard to the specific circumstances of the case at hand: “[t]he invoked jurisprudence is not enough for the national court to clarify the exact scope of the notion of direct discrimination in labour given that discriminatory statements coming from a person who, by law, cannot bind the company that is recruiting staff but, due to the close relationships it has with the company, could decisively influence its decision or, at least, could be perceived as a person who can decisively influence the decision.” [...] 

Sources - ECtHR Case Law

Sources - Internal or external national courts case law

Summary Facts Of The Case

The dispute arose from the homophobic public statements issued by A.B., a former shareholder of the Football Club. The statements regarded the sexual orientation of a Bulgarian football player whom the Football Club was considering signing. Mr. A.B. declared that, as there were rumours that the player was homosexual, he would not have the player in his future team, as he would prefer that the team be shut down or made up of junior players rather than including homosexual footballers. The Football Club never distanced itself from A.B.’s statements. On the contrary, the representative lawyer publicly admitted that the Football Club shares A.B.’s view. The Romanian National Council for Combating Discrimination (NCCD) sanctioned the discriminatory statements of A.B. with a warning by Decision no. 276 of 13 October 2010. In December 2010, Asociația ACCEPT, a Romanian NGO defending and promoting the rights of LGBT persons, instituted proceedings in front of the Bucharest Court of Appeal to partly repeal Decision no. 276 of 13 October 2010. A.B., transferred his shares in the Football Club five days prior to the statements, but he still possessed considerable power and influence over the decisions taken in the Club.

The NGO ACCEPT claimed in front of the NCCD that A.B.’s statements:

- directly discriminated on the basis of sexual orientation, and
- violated the principle of equality regarding the hiring policy and brought an offense to the dignity of persons having a homosexual orientation.

NCCD decided that A.B.’s statements:

- fell outside the scope of work relations, as referred to by Art. 5 and 7 of Government Ordinance 137/2000 regarding the prevention and sanctioning of all forms of discrimination (GO 137/2000), but
- fell under the scope of Art. 15 of GO 137/2000, as these represented a behaviour which purpose was to touch upon the human dignity of a certain group of persons or to create a degrading or humiliating environment for them, based on their sexual orientation.

NCCD sanctioned A.B. with a warning, and not a fine as requested by NGO ACCEPT, due to the expiry of the 6 months period for liability punishable by fine.

The Court of Appeal, seized of the challenge of this decision, raised a question for a preliminary
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http://judcoop.eui.eu/data/?p=data&idPermanent=6

The CJEU delivered the preliminary ruling in the ACCEPT case (Case C-81/12) on 25 April 2013. The CJEU confirmed at the outset that it is only for the national court to make the finding on the alleged discrimination, without prejudice to the CJEU’s power to provide national courts with helpful guidelines on how to reach such finding. On the questions raised by the Court of Appeal, CJEU held the following:

Discriminatory statements from a person not formally related to the F.C.S. Football Club

CJEU found that Firma Feryn judgment does not establish a rule that discriminatory statements must come from persons who hold the legal power to implement recruitment policies. The Football Club is not spared from the burden of rebutting the presumption of having acted discriminatorily merely because the prima facie evidence (the statement) does not come from someone who can act on the Club’s behalf. The CJEU underlined that the nature of the statement must be assessed bearing in mind its impact on society at large. CJEU noted in this sense that, at the date of the statement, A.B. still appeared as a shareholder since the sale of shares had not been registered. Moreover, B.G. did not change his attitude in his public appearances after the sale and continued to describe himself as the ‘banker’ of the Football Club. In those circumstances, at least in the mind of the public, he maintained the same relationship with Football Club.

Reverse burden of proof – prima facie evidence (statement) - probatio diabolica

The CJEU held that the acceptance of prima facie evidence (the statement), pursuant to Equal Employment Directive (2000/78/EC), does not have a disproportionate effect on the defendant [F.C.S. Football Club]. The defendant can refute the prima facie evidence through reasonably available evidence, for instance by proving that the employer had distanced itself from the homophobic statement.

Proportionate, effective and dissuasive sanction

Finally, the CJEU recognized the Member States’ autonomy in setting the sanctions connected to discriminatory acts, but pointed out that merely symbolic sanctions cannot be deemed to satisfy the requirement of effectiveness, proportionality and dissuasiveness in the light of the wording and purpose of Equal Employment Directive (2000/78/EC). In addition, the duty of
national courts to interpret domestic legislation in conformity with the Directive might lead to the conclusion that the time-limit for the imposition of the fine frustrates the purpose of the Directive and, therefore, must be interpreted out (set aside) in the main proceedings.

Follow-up decision of the referring court

The Court of Appeal of Bucharest delivered its final judgment following the preliminary ruling of the CJEU (Civil sentence no 4180) on 23 December 2013. The Court first reproduced the interpretation given by CJEU to all the four questions raised by the preliminary referral. The Court of Appeal understood that the CJEU has recognised the legal value of the warning, which may constitute an effective, proportionate and dissuasive sanction. Subsequently, the Court of Appeal noted that it was for the national court to assess the adequacy of the measure in the case at hand (sic!). Departing from the interpretation of the CJEU, the Court of Appeal found that in concreto the warning was an adequate measure, which fulfilled the exigencies of effectiveness, proportionality and dissuasiveness. The judgement of the Court of Appeal was challenged before the High Court of Cassation and Justice. The first hearing is scheduled on 06/03/2015.

Impact on Jurisprudence

Impact on Legislation/Policy

Comments

1. The Court of Appeal raised a preliminary question to obtain from the CJEU reassurance that the principles laid down in the EU law and CJEU jurisprudence would hold in the circumstances of the instant case. The Bucharest Court of Appeal was convinced that the interpretation of Art. 2(2)(a) of Racial Equality Directive (2000/43/EC) would hold true also with Art. 2(2) of Equal Employment Directive (2000/78/EC). Consequently, public declarations accounting for the discriminatory hiring policies of an employer constitute direct discrimination, even if a victim is not identifiable. However, the national court decided to leave no space for doubts. To this end, the court included in its preliminary question the full transcription of Mr. A.B.’s statement, to allow for the CJEU’s exact review of its discriminatory elements. The national court was convinced that the correct interpretation of the Government Ordinance transposing the Equal Employment Directive 2000/78 needed to adhere to the judgments of Bosman (C-415/93) and Firma Feryn, but raised a preliminary question to obtain the answer of CJEU with regards to the circumstances of the instant case.

2. CJEU deferred the necessary findings to the national court. The CJEU was cautious in its ruling. It confirmed that discriminatory statements can be attributed to an employer even in a situation akin to the one in the main proceedings, but deferred the necessary findings to the national court. As such, CJEU held that it was for the national court to assess on the relevance of the evidentiary burdens are discharged by the parties and the appropriateness of the national law remedies.

3. The Court of Appeal advanced a genuine doubt as to whether the interpretation of Art.8 of the Racial Equality Directive on the reversed burden of proof (as provided in Firma Feryn) could extend to the equivalent provision of Directive 2000/78.

Art. 8 of Directive 2000/43, like Art. 10 of Directive 2000/78, provides for a reversed burden of proof in case of presumption of discrimination. In Firma Feryn the CJEU had concluded that public statements by the employer confirming its unwillingness to hire employees from a specific group
would qualify as facts giving rise to such presumption. The Court of Appeal reasoned that this approach would impose a burden that is impossible to discharge on the defendant (probatio diabolica). In the view of the national court, the only possible way to rebut such presumption, would be to show that a homosexual player was hired. This, besides being unreasonable, is in itself problematic as it implicates that the employer is aware of, and looking into their players’ private life.

The CJEU finally clarified how to circumvent this dilemma: the defendant proof consisting in refutation of a prima facie discrimination must not necessarily consist in the demonstration that a gay player was signed or considered for hiring. The act of the Football Club of immediately distancing itself from A.B's statement would have constituted a sufficient proof. The CJEU suggested to the national court that a consistent interpretation of the domestic legislation with the wording and purpose of Directive 2000/78, would render the time-limit for the imposition of a fine inapplicable.


Unlike the Croatian case (Zdravko Mamic), the Court of Appeal has not made any reference to the principle of freedom of expression for the benefit of the defendant, or the issue of the private life of the alleged discriminated football player. The ECHR, or constitutional rights were not raised.

Download the original decision(s) - 📄 PDF in original language [please scroll down the PDF to see all the decision documents]

Suggested Case(s)

Internal

Roca Alvarez Spanish Tribunal
Zdravko Mamic Croatia

Cited

C-54/07 Firma Feryn CJEU
C- 415/93 Bosman CJEU

Relevant

C-44/12, Kulikaoskas v Macduff Shellfish Ltd CJEU
C-167/12, CD v ST CJEU