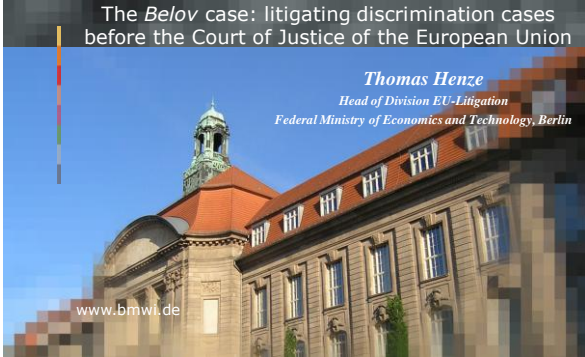


The *Belov* case: litigating discrimination cases before the Court of Justice of the European Union

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Structure of the presentation

- ▶ introduction to preliminary references
- ▶ the request for a preliminary ruling in the *Belov* case
- ▶ preliminary references from the perspective of the individual / equality bodies
 - ▶ How can individuals (= equality bodies) obtain a preliminary reference?
 - ▶ What are the consequences for equality bodies?

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Introduction to preliminary references

- ▶ What are the objectives of preliminary references?
 - ▶ **uniform interpretation and application** of EU law in all Member States
 - ▶ **legal protection** for the individual
 - ▶ procedure between two courts: „instrument of **cooperation**“
 - ▶ interim procedure

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Introduction to preliminary references

Article 267 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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Introduction to preliminary references

Article 267 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.

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Introduction to preliminary references

Article 267 para. 1 TFEU

- ▶ two types of references:
 - ▶ **interpretation** of primary or of secondary law **EU law**
 - ▶ validity of a European instrument
- ▶ no interpretation or application of national law

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Introduction to preliminary references

Article 267 para. 1 TFEU

- ▶ effect of the Court's ruling:
 - ▶ **binding** on the referring national court (*inter partes*) as well as on all national courts of the Member States
 - ▶ however, another reference of the same question is always possible

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Introduction to preliminary references

Article 267 TFEU

In what way can preliminary references contribute to prevent discriminatory measures?

- ▶ again: no review of national law
- ▶ however: the national courts must apply the national law conforming with the interpretation given by the Court, or – if this is not possible – the national law must not be applied

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Introduction to preliminary references

Article 267 para. 2 TFEU

Who can request for a preliminary ruling?

- ▶ **right** of reference:
 - ▶ „court or tribunal of a Member State“
 - ▶ not the parties themselves
 - ▶ referred question must not be hypothetical
- ▶ also **obligation** to refer to the Court?

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Introduction to preliminary references

Article 267 para. 2 TFEU

- ▶ lower courts generally enjoy **discretion**
- ▶ reference is obligatory if the court considers relevant EU law to be invalid
- ▶ court of last instance **must** refer relevant questions of EU law, unless
 - ▶ the question raised is irrelevant
 - ▶ *acte clair* (no reasonable doubt)
 - ▶ *acte éclairé* (existing jurisprudence)

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Introduction to preliminary references

Article 267 para. 2 TFEU

Admissibility of the question referred:

- ▶ Is the body in question a 'court or tribunal' within the meaning of Article 267 TFEU'?
- ▶ question governed by EU law alone
- ▶ broad understanding (not institutional but functional)
- ▶ settled case-law

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Introduction to preliminary references

Court or tribunal within the meaning of Article 267 TFEU – relevant criteria

- ▶ Is the body **established by law**?
- ▶ Is the body **permanent**?
- ▶ Is its **jurisdiction compulsory**?
- ▶ Does it combine an *inter partes*-**procedure**?
- ▶ Does it apply **rules of law**?
- ▶ Is it **independent**?
- ▶ Is the decision of a **judicial nature**?

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Introduction to preliminary references

Extract from cases in which the Court had to characterize the referring body (**judicial nature**):

- ▶ positive:
 - ▶ *Dorsch*, C-54/96
 - ▶ *Österreichischer Gewerkschaftsbund*, C-195/98
 - ▶ *Gabalfrisa*, C-110/98 and C-147/98
 - ▶ *Goiocoechea*, C-296/08
 - ▶ *Umweltanwalt von Kärnten*, C-205/08

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Introduction to preliminary references

- ▶ negative:
 - ▶ *Job Centre*, C-111/94
 - ▶ *Lutz*, C-182/00
 - ▶ *Syfait*, C-53/03
 - ▶ *Victoria Film A/S*, C-134/07
 - ▶ *Epitropos tou Elegktikou Sinedriou (...)*, C-363/11
 - ▶ arbitration tribunals in general

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The *Belov* case

The dispute in the main proceedings I:

- ▶ request for a preliminary ruling submitted by the *Komisia za zashita ot diskriminatsia* (= „Commission for Protection against Discrimination“), abbr.: KZD
- ▶ the KZD had brought proceedings against a company and a state authority in the following case

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The *Belov* case

The dispute in the main proceedings II:

- ▶ in 1999/1998 the state electricity distribution companies adopted the measure to place meters to measure electricity consumption at a height of seven meters above ground on posts outside the houses
- ▶ this measure was particularly adopted in urban districts **primarily inhabited by members of the Roman community**

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The *Belov* case

The dispute in the main proceedings III:

- ▶ Mr. Belov, member of the Roman community himself, brought a claim to the KZD, which brought proceedings against the owner of the electricity meters (CRB) and the state energy and water regulation commission
- ▶ Mr. Belov submitted: This measure constitutes a **discrimination on grounds of ethnicity**

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The *Belov* case

The request for a preliminary ruling I:

- ▶ according to the KZD: measure at issue constitutes indirect discrimination on grounds of ethnicity within the meaning of the ZZD (= Bulgarian law on protection against discrimination)
- ▶ the ZZD had been adopted, inter alia, to transpose Directive 2000/43 (equal treatment between persons irrespective of racial or ethnic origin)

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The *Belov* case

The request for a preliminary ruling II:

- ▶ the KZD took the view that it required the interpretation of this directive to give judgment
- ▶ request for a preliminary ruling to the Court:
 1. „Does the case (...) fall within the scope of Council Directive 2004/43? (...) etc.

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The *Belov* case

The jurisdiction of the Court I:

„The Court of Justice of the European Union does **not have jurisdiction** to answer the questions referred by the KZD.“

„(...) the **decision** that the KZD is called on to give (...) is **similar in substance to an administrative decision** and **does not have judicial nature** within the meaning of (...) ,court or tribunal‘ in Article 267 TFEU.“

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The *Belov* case

,Court or tribunal within the meaning of Article 267 TFEU – relevant criteria

- ▶ Is the body **established by law**?
- ▶ Is the body **permanent**?
- ▶ Is its **jurisdiction compulsory**?
- ▶ Does it combine an **inter partes-procedure**?
- ▶ Does it apply **rules of law**?
- ▶ Is it **independent**?
- ▶ Is the decision of a **judicial nature**?

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The *Belov* case

The jurisdiction of the Court II:

- ▶ the Court reviewed the provisions of the ZZD on, inter alia, the purpose, composition, duties, mode of functioning of the KZD
- ▶ the Court acknowledged that a national equality body exercises various functions which are not in any way of judicial nature

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The *Belov* case

The jurisdiction of the Court III:

- ▶ decisive question: **In what specific capacity** does the body in question act within the particular legal context in which it seeks a ruling from the court?
 - ▶ proceedings leading to a decision of a **judicial nature?** or
 - ▶ exercise of functions of **an administrative nature?**

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The *Belov* case

The jurisdiction of the Court IV:

Rationale of the Court (main reasoning):

1. Initiation of proceedings before the KZD:
 - ▶ on application of the person concerned
 - ▶ by complaints from natural/legal persons/State and local authority bodies
 - ▶ **on the initiative of the KZD**

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The *Belov* case

The jurisdiction of the Court V:

2. The KZD may join to the proceedings, **of its own motion**, other persons
3. Where an action is brought **against the decision** of the KZD
 - ▶ the case is brought before the administrative court
 - ▶ KZD may appeal if the administrative court annuls its decision.
 - ▶ KZD may revoke its decision if the party to whom the decision is addressed is favourable.

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The jurisdiction of the Court VI:

Analysis of these reasons:

1. Entitled to initiate proceedings on its own motion, the KZD is **no independent body** with respect to the parties
2. As the KZD's **decision** may be subject to appeal before an administrative court and also may revoke its decision it is **not binding**

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The *Belov* case

The jurisdiction of the Court VII:

Supplemental reasons of the Court:

3. the “effectiveness of the mechanism of the request for a preliminary ruling” is ensured by these judicial appeals:
 - ▶ decision of the KZD: subject to appeal before administrative court
 - ▶ decision of administrative court: also subject to appeal before supreme administrative court

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The *Belov* case

The jurisdiction of the Court VII:

Supplemental reasons of the Court:

4. Alternative to bringing an action before the KZD:
bringing an action before the **district court**

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The *Belov* case

According to the Court: relevant criteria, inter alia,
for a decision to be of judicial nature:

- ▶ Is the body **independent** in relation to the parties?
- ▶ Does it give **binding decisions**?
- ▶ From a comparative perspective: Are its functions **entrusted to administrative authorities in other Member States**?
- ▶ Does it decide on a **dispute**?

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Consequences from *Belov*

The equality body must – **under national law** –
exhibit all the features necessary in order to be
classified as a ‘court or tribunal’ (Article 267
TFEU)

- ▶ strict requirements
- ▶ particularly: **binding/compulsory decisions**

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Consequences from Below

Can equality bodies (≠ courts) request for a preliminary ruling?

- ▶ the **parties** to a procedure before a national court are **not entitled** to request for a preliminary ruling (*Lütticke*, C-33/62; *Fratelli Grani*, C-5/12)
- ▶ they can only **try to convince** the national court to request for a preliminary ruling (e.g. *Feryn*, C-54/07)

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Preliminary references and the individual

Does the individual have access to effective remedies against the national court's failure to request?

- ▶ before the **Court of Justice of the European Union?** (European level)
 - ▶ **the Commission** can commence proceedings (infringement procedure, Article 258, 260 TFEU)
 - ▶ the **individual** (=equality body) can induce the Commission to do so

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Preliminary references and the individual

Does the individual have access to effective remedies against the national court's failure to request?

- ▶ before the **courts of the Member States?** (national level)
 - ▶ particularly: state liability (*Köbler*, C-224/01)
 - ▶ further remedies: depends on national law of the Member State

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Legal protection

Infringement procedure I:

- ▶ the **Commission monitors** the application of EU law
- ▶ anyone (= also equality bodies) can **lodge a complaint** with the Commission
- ▶ irrespective of personal involvement
- ▶ the Commission is **not obliged** to commence proceedings following a complaint
- ▶ **but:** the Commission has established **internal rules** with which it undertakes to comply

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Legal protection

Infringement procedure II:

- ▶ the Commission provides applicants with a – non obligatory – ‚complaint form‘
- ▶ requested information:
 - ▶ account of facts giving rise to complain (= *failure to request the Court to give a preliminary ruling*)
 - ▶ provisions of EU law considered to be infringed by the Member State (= *Article 267 TFEU*)
 - ▶ etc.

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Legal protection

Infringement procedure III:

- ▶ legal basis: Articles 258, 259, 260 TFEU
- ▶ action of the **Commission** or a Member State against a(nother) Member State
- ▶ objective: to obtain a **declaration** that **EU law** has been **infringed** (no annulment of act in question)
- ▶ initiation and continuation are discretionary

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Legal protection

Infringement procedure IV:

▶ *Star Fruit Company, C-24/87:*

The Commission is **not bound to commence the proceedings** but in this regard **has a discretion** which excludes the right for individuals to require that institution to adopt a specific position.

The Commission has in any event the **right, but not the duty**, to apply to the Court for a declaration that the alleged breach of obligations has occurred.

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Legal protection

Infringement procedure IV:

▶ Protection of the interests of the **individual** / procedural safeguards

- ▶ the Commission has to abide by internal administrative measures
- ▶ complainants can lodge a further complaint regarding the Commission's failure with the European Ombudsman

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Legal protection

Infringement procedure V:

- ▶ the Commission provides applicants with a – non obligatory – ,complaint form':
 - ▶ account of facts giving rise to complain (= failure to request the Court to give a preliminary ruling)
 - ▶ provisions of EU law considered to be infringed by the Member State (= Article 267 TFEU)
 - ▶ etc.

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Legal protection

Infringement procedure VI:

Internal rules of the Commission: administrative measures for the benefit of the complainant:

- ▶ complaints recorded in the central registry of complaints
- ▶ acknowledgement of receipt within 15 working days
- ▶ acknowledgement of registration as a complaint: 1 month
- ▶ communication with complainants
- ▶ time limit for investigation: 1 year
- ▶ etc.

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Conclusion

Consequences for equality bodies II:

1. To be entitled to request for a preliminary ruling equality bodies need to be considered a **'court or tribunal'** according to Article 267 TFEU
 - ▶ the Court stipulates strict criteria
 - ▶ decisive criterion: Does the equality body give a **decision of a judicial nature**?
 - ▶ binding decision in a dispute? independent body? etc.

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Conclusion

Consequences for equality bodies III:

2. Provided that the equality body is a **party** in the main proceedings
 - ▶ it can urge the national court to request for a preliminary ruling
 - ▶ under German law: it can bring an action before the Constitutional Court (infringement of basic rights)
 - ▶ it can claim State liability before a national court (strict requirements)

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Conclusion

Consequences for equality bodies IV:

3. If the equality body is neither court nor party in the main proceedings
 - ▶ in general: limited possibilities
 - ▶ but: it can complain to the Commission which – in dealing with this complaint – has to abide by administrative rules

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