



Discrimination between women and men: Post-Brexit application of a rule of UK law adopted in application of a European directive

Friday 3 May 2024 – Plenary Assembly - Appeal no. 21-21.615

In order to ensure equal treatment within the European Union of disputes to which a UK law adopted before Brexit is applied, the Cour de cassation asks the Court of Justice of the European Union about:

- the status of rules of UK law made in application of European standards that judges in EU Member States must apply after Brexit;
- the obligations incumbent on a judge who is called upon to apply a rule of law of another Member State adopted in application of a European standard.

Disclaimer: This press release is not intended to set out the full content of the rulings delivered. It aims to summarise their main legal contributions..

Facts

In 2007, a French bank hired a woman on a permanent contract governed by UK law. The employee held several positions of responsibility within the bank.

Following a change in her duties, the employee complained to her employer that she had been discriminated against on the grounds of sex and demoted.

Proceedings

In 2013, the employee asked the French courts to order her repositioning within the bank and to order the bank to pay her damages for discrimination and psychological harassment.

In 2021, the Court of Appeal rejected her claims. The employee then appealed to the French Cour de cassation.

Why does the employee object to the Court of Appeal's ruling?

The employee objected to the ruling, arguing that it had not interpreted the UK law applicable to her case in a way that complied with the 2006 European Directive on equal opportunities and equal treatment of men and women at work.

This rule of British law (*the Equality Act 2010*) was enacted in application of this European directive.

Reference: Application of a foreign law by a French court

When can it be applied?

- When the parties so wish (for example, when signing a contract, the parties may decide that the foreign law will be applied);
- When the rules of private international law require the national court to apply a foreign law.

How can this be done?

The French court must apply the foreign law as it could be interpreted by the foreign court. However, the Cour de cassation does not review the way in which appeal courts apply foreign law. Apart from a few exceptions, it does not censure a court of appeal even if it considers that the French judge has not correctly applied the foreign law. This interpretation is left to the sovereign discretion of the courts and courts of appeal.

What is the issue before the Cour de cassation?

This case led the Cour de cassation to ask whether the Court of Appeal had to interpret the UK law applicable to the dispute in a way that complied with the 2006 European Directive on equal opportunities and equal treatment of men and women at work.

Reference: Principles of European law to be respected by national courts
Primacy of EU law: *The law of the Member States cannot stand in the way of the application of EU law.*
Interpretation of national law in conformity with EU law: *In order to guarantee the effectiveness of European law, the national court must interpret, as far as possible, the law of its country in such a way as to bring it into line with EU law.*
This means that the national court must:

- change the interpretation of a national rule if it does not comply with EU law;
- disapply a national rule if it appears impossible to apply it in accordance with EU law;
- apply national law in the light of a European directive.

The decision of the Cour de cassation: request for a preliminary ruling to the CJEU

The Cour de cassation decided that before ruling on this case, it should seek guidance from the Court of Justice of the European Union (CJEU).

This insight can only be obtained by interpreting European treaties. The CJEU is the only court competent to interpret the European treaties if there is any doubt as to their scope. Moreover, this clarification is of interest to all the other States of the European Union.

1st request for a preliminary ruling: The status of UK law post-Brexit

Now that the United Kingdom has left the EU, on what date must a British law that was enacted in application of EU law cease to be regarded as a rule of European law?

The answer to this question, which involves interpreting the Agreement on the United Kingdom's Withdrawal from the European Union, will enable the French courts to determine the date on which they are no longer required to interpret UK law in accordance with EU law.

Reference: Brexit
The United Kingdom's withdrawal agreement from the European Union (EU) covers three periods:
Until 31.12.2020 > *EU law remains applicable.*
From 01.01.2021 to 31.12.2023 > *Part of EU law remains in force, but loses its status as law resulting from the application of the European treaties.*
After 01.01.2024 > *EU law that remains in force is no longer subject to the principle of primacy of EU law.*

2nd request for a preliminary ruling: Application of the law of another EU Member State

With regard to the rules governing the functioning of the EU, **what are the obligations of a court in one Member State when it is called upon to apply the laws of another Member State and those laws have been adopted in application of European directives?**

The question arises in particular when the court considers that it is impossible to interpret the law of the other State in accordance with EU law. In such cases, can the court go so far as not to apply this rule of law?

By asking these questions, the Cour de cassation admits that it will have to develop its case law on the control it exercises over the application and interpretation of foreign law by the courts of appeal if the Court of Justice of the European Union holds that the national judge must assess the conformity of a law with Union law even when it emanates from another Member State.

The answers expected from the CJEU will ensure:

- uniform treatment of this type of dispute within the European Union by setting out the status of UK laws derived from EU law but applied after Brexit,
- an "instruction manual" for the application by judges in EU countries of the law of other Member States, where that law has been enacted in application of EU law.

This case is therefore of major institutional interest, since it highlights in a concrete way the challenges of European integration at the jurisdictional level.