How to interpret the concept of genuine occupational requirements?

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1. Introduction

The notion of genuine occupational requirements is a dynamic concept. The views about occupational activities that should be performed exclusively by men or by women, for instance, have certainly evolved in the past few decades. Until the beginning of the 1980s, for example, the occupation and the training of midwives were excluded from the provisions relating to equal treatment for men and women in the United Kingdom. This exclusion prompted the European Commission to institute infringement proceedings. In 1983, the European Court of Justice was still sensitive to arguments that reflected ossified ideas about the role of men and women in this field. The Court stated that "at the present time personal sensitivities may play an important role in relations between midwife and patient.[1] The Court judged/held that the United Kingdom had not exceeded the limits of the power granted to Member States by Directive 76/207/EEC and that this exclusion from the scope of application of the Directive was justified. Fifteen years later, the European Commission stated that the occupation of midwives was fully accessible to men in all the Member States.[2] This example aptly illustrates the dynamic evolution of the concept of genuine occupational requirements. The exceptions in connection with discrimination on the grounds of sex are often related to occupations traditionally dominated by men such as police work, as well as work in certain penal institutions and in certain parts of the army. However, such exceptions are also related to artistic activities, religious functions, the occupation of models, etc.

The jurisprudence of the European Court of Justice and the legislation have also undergone an evolution. To some extent, recent legislation reflects the ECJ's jurisprudence related to date to exemptions from the principle of equality between men and women. Often two different fundamental rights are in conflict with each other. In the example mentioned above, there is a conflict between the protection of private life on the one hand, and the fundamental principle of equal treatment for men and women on the other. Often it is necessary to find an equilibrium between the respect for religious beliefs and the prohibition of discrimination based on sexual orientation. An example of legislation that illustrates this is the Framework Directive 2000/78/EC (Art. 4 (2)). Public security considerations may sometimes also conflict with the application of the principle of equal treatment. Various judgments of the Court of Justice are related to this issue.

I would now like to review the legal provisions on genuine occupational requirements in connection with various forms of discrimination and the relevant jurisprudence of the ECJ.

[1] Judgment of 8 November 1983, C-165/82 *Commission v United Kingdom* [1983] ECR I-3431, para. 20.
[2] COM (2000) 334 final, p. 8.

2. Community legislation

2.1 Equal treatment for men and women

The first provision on occupational requirements introduced in Community legislation was Art. 2(2) of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This Article prohibits any discrimination whatsoever on grounds of sex, either directly or indirectly. However, an exemption from the principle of equal treatment is possible if the conditions of the second paragraph are met: "The Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor." This provision was amended by Directive 2002/73/EC, and Art. 2(6) of the consolidated version of the Directive on the implementation of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, now reads as follows:
"Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

It is noteworthy that the new provision no longer applies to occupational activities in general, but only to the access to employment and training for particular occupational activities. The context in which these activities are carried out may be taken into account. As far as the occupational requirements are concerned, these must now be genuine and determining occupational requirements. In addition, the objective must be legitimate, and the principle of proportionality must be applied. This means that the exception must be appropriate and necessary in order to achieve the desired objective. Each case must be examined on its own merits.

Furthermore, Art. 9(2) of Directive 76/207/EEC obliges the Member States to periodically assess the exclusions as regards occupational requirements in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. Member States must notify the Commission of the results of this assessment. This clause was not amended by Directive 2002/73/EC and was only slightly modified by Directive 2006/54 (as amended). Art. 31(3) of the latter Directive stipulates that Member States must notify the Commission of the results of their assessment every eight years.

Exemptions relative to genuine occupational requirements are also permitted by Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin as well as by the Framework Directive 2000/78/EC. The provisions on genuine occupational requirements are largely worded in the same way; however, there are certain differences, especially in the Framework Directive. The ECJ's jurisprudence on this subject to date has only dealt with exceptions to the principle of equal treatment for men and women.

2.2 Equal treatment of persons irrespective of racial or ethnic origin

According to recital 18 of Directive 2000/43/EC, the exception relative to occupational requirements applies only in very limited circumstances. The examples cited by the European Commission are cases where a person of a particular racial or ethnic origin is required for reasons of authenticity in a dramatic performance, or where the holder of a particular job provides persons of a particular ethnic group with personal services promoting their welfare and those services can most effectively be provided by a person of that ethnic group.[3]

Art. 4 of the Directive stipulates that "Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate." The wording of this Article largely resembles that of the amended Directive on the implementation of the principle of equal treatment for men and women (2002/73/EC). However, the scope of application of the exception is broader than that in Directive 2002/73/EC. In addition, Directive 2000/43/EC does not contain any specific obligation to periodically assess the exemptions relative to this Article, but only a general reporting duty every five years in accordance with Art. 17.

2.3 Genuine occupational requirements in the Framework Directive

The wording of the exemption as regards genuine occupational requirements in the Framework Directive is to some extent almost identical to that in Directive 2000/43/EC. In principle, it applies to discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. However, it must be pointed out that Member States have the right to exclude the armed forces from the scope of application of the Framework Directive in so far as it relates to discrimination on the grounds of disability and age (Art. 3(4)). This means that an entire sector may be excluded without any need for justification. This provision considerably restricts the protection which the Framework Directive can provide against discrimination on the grounds of disability or age.

The first paragraph of Art. 4 of the Framework Directive, which deals with occupational requirements, reads as follows:

"1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

The second paragraph of Art. 4 stipulates a specific exemption that relates to religious organisations which are granted more freedom to choose persons who share the same

[3] COM (1999) 566, p. 8.

religious beliefs for certain activities or occupations. It is clear that this possibility may conflict with the anti-discrimination provisions contained in the Framework Directive. This applies in particular to discrimination based on sexual orientation because certain churches, sects or religious organisations condemn homosexuality. The second paragraph of Art. 4 reads as follows:

"2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

This paragraph, which was introduced in the last phase of the negotiations on the Framework Directive, is particularly unclear.[4] With Ellis, one may first of all wonder what added value this paragraph provides in comparison with the first paragraph.[5] The relationship between these two paragraphs also deserves attention. The test to be applied under the first paragraph of Art. 4 is stricter than that described in the second paragraph. However, a difference of treatment mentioned in the second paragraph could not justify discrimination on other grounds.[6]

Moreover, the Framework Directive does not include any specific obligation for a periodic assessment of the exclusions relative to Art. 4 but only a general reporting duty every five years in accordance with Art. 19.

3. Jurisprudence of the Court of Justice on genuine occupational requirements

The ECJ's jurisprudence to date has dealt with the interpretation of Art. 2(2) of Directive 76/207/EEC. Certain principles to be applied have emerged in the approach adopted by the Court of Justice in various judgments, some of which concerned infringement proceedings and others preliminary rulings.[7]It is likely that this jurisprudence, which to

[4] For an analysis of the various criteria to be applied under this paragraph see: C. Waaldijk und M. Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive,* The Hague: T.M.C. Asser Press 2006, pp. 126-128.

[5] E. Ellis, *EU Anti-Discrimination Law,* Oxford: Oxford University Press 2005, p. 283.

[6] Ellis gives examples of possible justifications in accordance with the two paragraphs: E. Ellis, *EU Anti-Discrimination Law,* Oxford: Oxford University Press 2005, p. 284.

[7] The judgments concerned are as follows: Judgment of 8 November 1983, C-165/82 *Commission v United Kingdom* [1983] ECR I-3431*;* Judgment of 21 May 1985, C-248/83 *Commission v Germany* [1985] ECR,

some extent has already been integrated into the new provisions of Directives 2000/43/EC, 2000/78/EC, 2002/73/EC and 2006/54/EC, will also be used to interpret these clauses. Below I will only address the most important judgments and the aspects that appear to be most essential.

Member States have a certain scope of discretion to exclude certain occupational activities from the scope of application of the Directive on equal treatment for men and women. Nevertheless, derogations are subject to strict criteria. The Court of Justice underlined, *inter alia*, in *Johnston* (C-222/84) that a derogation from an individual right to equal treatment must be interpreted strictly. What was at issue in the *Johnston* case was the carrying of fire-arms exclusively by male police officers in the performance of their police duties in Northern Ireland. Policewomen were not equipped with fire-arms, did not receive any training in the handling and use of fire-arms and were therefore excluded from these duties. The Chief Constable considered, among other things, that if women were armed they might become a more frequent target for assassination. The reasons which he gave for his policy were related to the special conditions in which the police must work in Northern Ireland in a context of serious internal disturbances. Under these particular conditions, the Court of Justice allowed a derogation from the principle of equal treatment.

The *Johnston* judgment (C-222/84) shows that each situation has to be examined on its own merits because a general exception to the principle of equal treatment is not admissible. In addition, Member States are obliged to periodically assess the exclusions in national law. In the *Commission v United Kingdom* judgment (C-165/82), the ECJ held that an exclusion of all kinds of employment in private households or in small undertakings with more than five employees was not justified by reason of the generality of the exclusion. Furthermore, the Court of Justice underlined in the *Commission v France* judgment (C-318/86) that the derogation could relate only to specific occupational activities. It added that the derogations had to be sufficiently transparent so as to permit effective supervision by the Commission and, in principle, they had to be capable of being adapted to social developments. The ECJ therefore considered that a system in which the percentages of posts to be allotted to men and women in a competition held to recruit officials to a "corps" was contrary to the Directive. In the *Kreil* judgment (C-285/98), which concerned the exclusion of women from almost all military posts of the *Bundeswehr* in the Federal Republic of Germany, the ECJ adopted the same approach. Such an exclusion, the Court explained, could only be justified by the specific nature of the posts in questions or by the particular context in which the activities in question were carried out. By the same token, the ECJ does not accept a general exception covering all measures taken by a Member State for reasons of public security (judgments *Johnston* C-222/84, *Kreil* C-285/98, *Sirdar* C-273/97 and *Dory* C-186/01).

In numerous judgments – however, in particular in *Johnston* (C-222/84) – the ECJ underlines that the principle of proportionality, one of the general principles in Community law, has to be respected. In *Johnston*, the ECJ pointed out: "This principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as

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I-1459*;* Judgment of 15 May 1986, C-222/84 *Johnston* [1986] ECR I-1682*;* Judgment of 30 June 1988, C-318/86 *Commission v France* [1988] ECR, I-3559*;* Judgment of 26 October 1999, C-273/97 *Sirdar* [1999] ECR I-7403*;* Judgment of 11 January 2000, C-285/98 *Kreil* [2000] ECR I-69*;* and Judgment of 11 March 2003, C-186/01 *Dory* [2003] ECR I-2479.

far as possible with the requirements of public security, which constitutes the decisive factor as regards the context of the activity in question."

As in the *Johnston* judgment (C-222/84), particular circumstances also justify a derogation in the *Sirdar* judgment (C-273/97). The United Kingdom had excluded the combat units of the Royal Marines from the scope of application of Directive 76/207/EEC. The ECJ ruled that the specific conditions for deployment of such units justified their composition remaining exclusively male.

The issue in the *Dory* judgment (C-186/01) was compulsory military service in Germany. Mr Dory saw himself as a victim of discrimination on grounds of sex because during his compulsory military service he did not have the right to exercise an occupation and because the service delayed his access to employment. The ECJ pointed out that decisions taken by Member States concerning the organisation of their armed forces could not be completely excluded from the application of Community law. However, the ECJ stated that it did not follow that Community law governed the Member States' choices of military organisation for the defence of their territory or of their essential interests. The Court held that Community law was not applicable to Germany's decision to secure its defence by means of compulsory military service. Furthermore, the ECJ argued that the existence of adverse consequences as regards access to employment could not have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service.

4. Conclusions

It is clear that the exception as regards genuine occupational requirements is related to exceptional situations. The ECJ's jurisprudence on this exception in the case of discrimination on the grounds of sex has shown that this exception must be very strictly interpreted, that it must be related to specific occupational activities, and that it requires an examination of each specific case. The principles of proportionality and transparency must be applied. The principle of transparency means that it must be possible to periodically assess the exclusions in order to be able to adapt them to social developments. The ideas with regard to the respective roles of men and women are changing, which also has an impact on jurisprudence. As far as the armed forces are concerned, persons who are victims of discrimination on the grounds of disability or age enjoy less protection. In this particular context, persons who see themselves as victims of discrimination on the grounds of sex enjoy a certain degree of protection, as the *Kreil* judgment (C-285/98) demonstrates, but this protection remains limited.