

Sexual Orientation Discrimination and the Maruko Case

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(Swedish Ombudsman against Sexual Orientation Discrimination 1999-2009)

What is Sexual orientation?

Implicit definition in Directive 2000/78/EC

- ✓ Homosexuality
- ✓ Bisexuality
- ✓ Heterosexuality

No definition in the Directive nor in the Commission's explanatory memorandum (COM [1999] 565 final)

- Minority of MS have included explicit definition in their implementing legislation.
- In travaux préparatoires in many MS
- COM's explanatory memorandum refers to case-law of ECtHR

Sexual Orientation Discrimination under Union Law – after the Lisbon Treaty

Article 2 TEU

*“The Union is founded on the values of respect for human dignity, freedom, democracy, **equality**, the rule of law and **respect for human rights, including the rights of persons belonging to minorities**. These values are common to the Member States in **a society in which pluralism, non-discrimination, tolerance**, justice, solidarity and equality between women and men prevail.”*

Article 3(3) TEU

*[The Union] shall **combat social exclusion and discrimination**.*

Article 10 TFEU (Equality Mainstreaming)

*“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**”*

Sexual Orientation Discrimination under Union Law – after the Lisbon Treaty

Article 6(1) TEU

*”The Union recognises the rights, freedoms and principles set out in the **Charter of Fundamental Rights** of the European Union [...], which shall have the same legal value as the Treaties.”*

- Charter, art. 21(1)

*”**Any discrimination based on** any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or **sexual orientation shall be prohibited.**”*

Sexual Orientation Discrimination under Union Law – after the Lisbon Treaty

Article 6(3) TEU

*“Fundamental rights, as guaranteed by **the European Convention for the Protection of Human Rights and Fundamental Freedoms** and as they result from the constitutional traditions common to the Member States, **shall constitute general principles of the Union’s law.**”*

➤ *Article 14 ECHR*

*” The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination **on any ground such as** sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth **or other status.***

- ***Includes sexual orientation** (Salguiero v. Portugal 1999)*
- ***Strict scrutiny** for differences based on sexual orientation (Karner v. Austria 2003, Kozak v. Poland 2010)*

Sexual Orientation Discrimination under Union Law – after the Lisbon Treaty

Article 19(1) TFEU (former art. 13 TEC)

*Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and **after obtaining the consent of the European Parliament**, may take appropriate action to **combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**.*

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Article 1

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or **sexual orientation** as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2(1)

For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Article 3 – Scope

1. [...], this Directive shall apply [...] in relation to:
 - (a) [...]
 - (b) [...]
 - (c) employment and working conditions, **including** dismissals and **pay**;
2. [...]
3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protections schemes.

Maruko - ECJ's first sexual orientation case on the Directive (C-267/06, Judgment 1 April 2008)

- ✓ Mr. Maruko formally entered into a life partnership under German law with his partner (*'Eingetragene Lebenspartnerschaft'*) in 2001.
- ✓ Mr. Maruko's partner died in 2005.
- ✓ The partner had been a member of, and paid contributions to, an insurance provider for German theatre professionals since 1959, covering int.al. survivor's pensions.
- ✓ **Mr. Maruko was denied widower's pension** from the insurance, since it covered only married spouses and not life partners.
- ✓ Mr. Maruko sued the insurance provider on grounds of sexual orientation discrimination.
- ✓ The Bavarian Administrative Court in Munich, Germany, asked the ECJ for a preliminary ruling on the interpretation of the Directive's prohibition of sexual orientation discrimination.

Maruko - ECJ's first sexual orientation case on the Directive

Questions referred for a preliminary ruling:

1. Does a survivor's benefit paid under an occupational pension, like the one in question in this case, fall within the scope of the Directive?
 - ❖ *i.e.:* - Is it equivalent to a state social security scheme?
- Or is it equivalent to 'pay'?

'This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.' (Article 3(3) of Directive 2000/78/EC)

'This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.' (Recital 13)

Maruko - ECJ's first sexual orientation case on the Directive:

State social security scheme or 'pay'?

- ✓ State schemes which are equivalent to **'pay'**, within the meaning of art. 141 TEC, fall within the scope of the Directive (pp. 41-42).
- ✓ Pay = in cash or in kind, directly or indirectly from an employer (p. 43).
- ✓ Paid out after termination of employment can still be 'pay' (p. 44).
- ✓ Survivor's pension is paid by an employer to the surviving spouse by reason of the employment of the dead spouse → 'pay' (p. 45).
- ✓ Concerns only certain workers; directly related to time served; calculated by reference to the last salary paid and the contributions made (p.48, 55).
- ✓ **Supplements** state schemes of a general scope (p.49).
- ✓ Financed exclusively by the workers and the employers themselves (p. 50).
- ✓ Compulsory character makes no difference (p. 57).
→ ***'It follows that [...] the survivor's pension in the main proceedings is derived from the employment relationship of Mr. Maruko's life partner and must therefore be classified as 'pay' [...] and falls within the scope of the Directive' (pp. 56, 60).***

Maruko - ECJ's first sexual orientation case on the Directive:

Questions referred for a preliminary ruling:

2. If the benefit in question falls within the scope of the Directive, would a difference in treatment on grounds of sexual orientation nevertheless be permitted in light of recital 22 of the preamble to the Directive?

'This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.' (**Recital 22 of preamble to Directive 2000/78/EC**)

Maruko - ECJ's first sexual orientation case on the Directive:

*'Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination [...]. Since survivor's benefit such as that at issue in the main proceedings has been identified as 'pay' [...] and falls within the scope of Directive 2000/78 [...], **Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive**' (pp. 59-60).*

- *i.e.: Recital 22 does not provide for an exception to the provisions prohibiting discrimination. It only reiterates the separate areas of competence of national law (family law as such) and community law (discrimination in employment).*

Maruko - ECJ's first sexual orientation case on the Directive:

Questions referred for a preliminary ruling:

3. Does [the Directive] preclude regulations [...] under which a registered partner does not after the death of his partner receive survivor's benefits equivalent to those available to spouses, even though, like spouses, registered partners live in a union of mutual support and assistance formally entered into for life?

'If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, [such legislation] must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation [...] It follows [...] that Articles 1 and 2 of [the Directive] preclude legislation [...] under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the [insurance provider]' (pp. 72-73, OP 2).

Beyond Maruko – the need for further clarification?

*'Römer' (C-147/08), referred to Grand Chamber;
AG's opinion 3 June 2010*

**'It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse
,
....'**

- *Comparable situation ≠ Identical situation?*
- *Abstract / Concrete comparison?*
 - *All or most of the rights of spouses?*
 - *A significant number of the rights of spouses?*
 - *More than just a few of the rights of the spouses?*

- *?! The more generally 'discriminatory' national provisions, the less protection against discrimination from Union Law?!*

Beyond Maruko – the need for further clarification?

Has the ECJ not set any material criteria for the comparison?

Judgment's OP 2

- *'a situation comparable to that of spouses so far as concerns that survivor's benefit' = a **concrete comparison***

'The Court's reply' (p. 67)

- *'a union of mutual support and assistance'*
- *'formally constituted'*
- *'for life'*
- *'having chosen not to permit those persons to enter into marriage'*
- *'created a separate regime [....] gradually made equivalent to [...] marriage' ≠ **identical situation***

Maruko as applied by the *Federal Constitutional Court of Germany (Bundesverfassungsgericht)* 7 July 2009 in the case of "**Herr D...**" (1 BvR 1164/07)

- ✓ **Strict scrutiny for differences based on sexual orientation** (p.88)
– art. 19 TFEU (former art. 13 TEC), art. 21 Charter, ECJ (Maruko) and ECtHR (Karner)
- ✓ **Protection of marriage in itself cannot justify a difference in treatment** (p. 100) – cf. ECJ in Maruko re. recital 22
- ✓ **Concrete and not abstract comparison of spouses v. partners** (pp. 86, 93, 100, 112, 114, 115) - considerable difference between marriage and partnership laws in relation to the benefit in question required to justify different treatment of spouses v. partners
- **Conclusion of BVerfG: Difference in treatment is discriminatory**
 - Spouses and partners are in a comparable situation
 - legally binding union
 - for life (unlimited time)
 - mutual support and assistance
 - maintenance obligations / need for alimony
→ = survivor's pension after the death of a spouse or partner

Beyond Maruko - Indirect Sexual Orientation Discrimination?

“[...] the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] shall constitute general principles of the Union’s law.” - Article 6(3) TEU

In MS with no national law putting a life partner in a comparable situation to that of a spouse?

? Within the scope of the directive (art. 3: pay etc.)?

? Particularly disadvantaged by marriage requirement?

If yes → Prima facie case of indirect sexual orientation discrimination

? Can it be justified by a legitimate aim?

- ? Protecting 'marriage' or 'the family in the traditional sense'?
– Cf. BVerfG in **"Herr D..."**

? Is it appropriate and necessary?

- a 'rather abstract aim, and a broad variety of concrete measures may be used to implement it [...] It must [...] be shown that it was necessary.' (**ECtHR Karner v. Austria, 2003**)
- 'the State [...] must necessarily take into account the developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.' 18
(**ECtHR Kozak v. Poland, 2010**)