

Discrimination on Grounds of Sexual Orientation and the *Maruko* and *Römer* Cases



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Improved legal semantics



In legal language, it is necessary to consider the importance of using terms capable of expressing new categories of law and of distinguishing amongst:

- sex
- gender
- sexual orientation
- gender identity

The key sources of EU law: the Nice Charter



- *Article 21 (1) of the Charter of Fundamental Rights of the European Union*
- 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.

Treaty on the Functioning of the European Union



- TFEU – PART TWO
NON-DISCRIMINATION AND CITIZENSHIP
OF THE UNION

- *Article 19* (ex Article 13 TEC)
- 1. 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.

Directive 2000/78/EC



- **Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**
- Two important recitals :
- (13) → *See below*
- (22) “This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”

Directive 2000/78/CE:



- Art. 1 - Purpose
- 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.

The key distinction between direct and indirect discrimination

- *Art. 2 – Definition of discrimination*

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.*
2. *For the purposes of para. 1:*
 - a) *direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;*

- b) *indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age or a particular sexual orientation at a particular disadvantage compared with other persons unless:*
 - i) *that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*

Justification



Art. 4

[...] A difference of treatment [...] 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.

Scope



- Article 3 – Scope
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- 3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.
- Cf. Recital 13:
- 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.

The definition of “pay”



- *Article 157 TFEU*
(ex Article 141 TEC)
- 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
- 2. For the purpose of this Article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
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Partnerships between persons of the same gender



- Various models for recognising partnerships:
 1. *Inclusion within the institution of marriage*
 2. *Creation of a “strong” form of recognition*
 3. *Creation of a “weak” form of recognition*
 4. *Recognition of cohabitation – de facto partnership*
 5. *Absence of any legal recognition of the partnership*

The German registered civil partnership



- The *Lebenspartnerschaftsgesetz* (law on registered civil partnerships – *LPartG*) of 16 February 2001
- In order to be permitted to register a partnership of this type, Article 1 (1) lays down that there must be an expression of will to establish a lifelong communion. Throughout their relationship, the partners are required to provide one another with support and assistance (Art. 2); they must contribute to meeting the needs they have in common, whereas, as regards maintenance duties, the applicable provisions are those that the civil code lays down for married spouses (Art. 5); like married spouses, registered civil partners are subject by default to the regime of shared property rights, but it is permissible for them to opt for a different one (Art. 6); each partner, moreover, is considered to be part of the family of the other (Art. 11). In the event of separation – still by analogy with the provisions of the civil code – the maintenance duty continues to exist (Art. 16) and pension rights are shared out on a compensatory basis (Art. 20).
- Article 46 (4) of the social-security code places the statutory retirement-pension schemes for registered partners on the same footing as married spouses, assimilating the subjects of the two institutions.

The MARUKO case



TADAQ MARUKO
VERSUS
VERSORGUNGSANSTALT DER
DEUTSCHEN BÜHNEN

[MARUKO VERSUS VDDB]

CASE C-267/06

JUDGMENT OF THE COURT
(GRAND CHAMBER)

1 APRIL 2008

Precedent: the MARUKO case



The dispute: non-recognition of the pension claim of the survivor of a same-gender couple, who had not had a matrimonial contract (which was reserved by German law for partnerships between persons of different sexes).

Maruko's late partner had been a designer of theatrical costumes with 45 years membership of the Vddb's pension scheme, during which time he had paid contributions at the same level as his heterosexual colleagues. He had had a registered civil partnership with Tadao Maruko for 13 years until he died in 2005.

The questions referred to the Court of Justice (ECJ)



Is a compulsory professional pension scheme, such as the scheme at issue in this case administered by the Versorgungsanstalt der deutschen Bühnen, a scheme similar to state schemes as referred to in Article 3(3) of Directive 2000/78/EC? (...);

Are benefits paid by a compulsory professional pension institution to survivors in the form of widow's/widower's allowance to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78/EC?

Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78/EC preclude regulations governing a supplementary pension scheme of the kind at issue here, under which a registered partner does not receive a survivor's pension after the death of the partner like spouses do, even though he also lives in a caring and committed union formally entered into for life, like spouses?

If the preceding questions are answered in the affirmative, is discrimination on the grounds of sexual orientation permissible by virtue of recital 22 in the preamble to Directive 2000/78/EC?

The Court's considerations



The elements militating in favour of placing the benefit to the surviving spouse under the heading of “pay” (§§ 41-60):

1. The compulsory nature of membership of the VddB scheme before death.
2. The amount of the retirement pension used as the basis for calculating the benefit due to survivors is determined in relationship to the duration of the employee's membership of the scheme.
3. The amount of the retirement pension itself is not fixed by statute but calculated by reference to the sum of all the contributions paid throughout the whole period of the employee's membership of the scheme and to which an indexing factor is applied.

Recital 22 and the powers of the European Union



Civil status and the benefits flowing therefrom are matters that fall within the competence of the Member States, 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. [§ 59]

- Recital 22 of the preamble to Directive 2000/78 cannot affect the application of the Directive. [§ 60]
- *The theses put forward by the UK and the VddB are rejected.*

Analogous situation?



- The German courts began by rejecting the homogeneity of the two situations: *Bundesverwaltungsgericht (Federal Administrative Tribunal)*, 2 C 33.06, 15 November 2007 (differences existing in various fields, such as adoption, tax law, and so on).
- *Bundesverfassungsgericht (Federal Constitutional Court)*, 2 BvR 1830/06, 06 May 2008: the legislator had not intended a situation of equality
- Shift in the position of the German courts: first of all with the Bavarian Administrative Tribunal in Munich (30 October 2008) and then the German Constitutional Court, 1 BvR 1164/07, 7 July 2009.
- The adjudicating court declared that there had been a progressive narrowing of the gap between the scheme set up for registered civil partnerships and that applicable to marriage, going as far as a making them progressively equal, but that civil partnership had not become identical with marriage.
- The court that made the reference now feels that persons of the same sex are in an analogous position to married spouses as regards survivors' benefits.

A number of inputs from the ECtHR



- In the *Burden versus United Kingdom* [ECJ] judgment of 29 April 2008, the ECtHR uses the criterion of analogy to exclude the possibility of two sisters living together in an undivided house for more than thirty years being able to pursue a case for inequality of tax treatment on the grounds of Article 14 ECHR and Article 1 of Protocol 1 to that Convention, ruling that they are not in an analogous situation to that of spouses or registered life partners.
- In the *Manenc versus France* judgment of 21 September 2010 the ECtHR holds that the absence of the provision for a widower's pension benefiting a registered civil partner is legitimate, given that "PACS" ("registered solidarity partnership") is neither analogous nor comparable with marriage (as ruled by the *Conseil constitutionnel*). It does, however, appear willing to consider the hypothesis of indirect discrimination on grounds of sexual orientation when analysing the statistical data of "PACS" partnerships.

The Court recognises direct discrimination



Direct discrimination on grounds of sexual orientation whenever:

- 1) following the death of the partner with whom he/she had contracted a registered civil partnership the surviving partner does not draw a survivor's benefit equivalent to that granted to a surviving spouse;
- 2) in national law the registered life partnership were to place persons of the same sex in an analogous position to that of spouses as regards said survivors' benefit.

It is for the national court to examine whether or not the surviving partner of a registered life partnership is in an analogous position to that of a spouse benefitting from the survivor's benefit provided for in the occupational pension scheme (but the ECJ does go along with the appraisal of analogy expressed by the court making the reference).

Analysis: direct discrimination

- Parallel with the protection of pregnancy:

The Court has consistently affirmed that it constitutes direct discrimination on grounds of sex for the employer to consider pregnancy as a criterion for not taking on a woman, for dismissing her or for refusing to renew her fixed-term contract.

The problem of transsexual individuals: towards protection solely of the biological fact?

- Marriage is intrinsically heterosexual
→ less favourable treatment on grounds of sexual orientation

Question: is sexual orientation really a prerequisite for marriage?

Cf. the textual difference in the order for reference by the Italian constitutional court regarding marriage in Venice and Trento.

By contrast: the French case of a transsexual MtF compared with a transgender MtF

The position of the Commission and Advocate General Colomer



- There was no direct discrimination, but indirect discrimination
- Absence of justification
- Nonetheless discrimination only in the event of comparable situations.

→ When are the situations comparable?

- What ought to be compared? The institutions (marriage / registered civil partnership) or the heterosexual couple and the homosexual couple?
- What form of discrimination exists in cases where there is no form of recognition, for instance in Italy?

→ Need for clarity

The Römer case



JÜRGEN RÖMER
VERSUS
FREIE UND HANSESTADT HAMBURG

[RÖMER V. FHH]

CASE C-147/08

JUDGMENT PUBLISHED ON 10 MAY 2010

Substance of the appeal



Refusal to grant the benefit of a supplementary pension for the amount asked for by Mr Römer, on account of the fact that the calculation method applied by his former employer was more favourable for spouses in retirement than for those who, like Mr Römer, had contracted a registered life partnership in accordance with German law.

The questions referred for a preliminary ruling



- Do supplementary pensions fall outside of the scope of the Directive?
- If so, are they excluded because they are matters of marital status and the benefits dependent thereon (Recital 22)?
- Does the difference in computation of the pension constitute discrimination within the meaning of Articles 1(2) and 3(1)(c) of Directive 2000/78?
- Is there scope for violation of a general principle of Community law or Article 157 TFEU?
- Can the period of time to be considered extend to before the implementation of the Directive (*Barber* case)?
- Is it possible for the legal objectives of domestic law (constitutional protection of the family and marriage), for which there are no equivalents in Community law, to be considered as justifications for indirect discrimination?

The position of Advocate General Jääskinen



- Having accepted that the benefit is an element of “pay,” he then reaffirms that:
 - Even when a matter falls within the ambit of their reserved powers, the Member States cannot absolve themselves from the general duty imposed on them to respect the law of the Union, which includes respect of the provisions relating to the principle of non-discrimination.
 - The requirement is for SIMILAR TREATMENT, not identical treatment.
 - Not an abstract comparison with reference to the various legal institutions but a tangible one between the two categories of persons concerned with reference to the right at issue here (what is called for is effectiveness): rights and duties of the spouses and the registered civil partners in the light of the conditions to which the benefit concerned is subjected.
- His conclusion is one of analogy, and he thus finds that there is direct discrimination.

AG: as a fall-back position indirect discrimination



- As fall-back position, should it be felt that *LPart* and marriage are not analogous...
 - Marriage: neutral criterion, “particular disadvantage”
 - The approach must not be subjective, but objective (he does not pick out the psychological element).
 - Then, next comes the examination of the legitimate aim and whether the means used for achieving it are appropriate and necessary.
- The European Court of Human Rights has ruled that in cases of inequality of treatment on grounds of sexual orientation the margin of appreciation left to the States is narrow and that the measure must be not only proportionate but also necessary. Cf. (for example) *Karner versus Austria* (2003), *Kozak versus Poland* (2010) and *Schalk & Kopf versus Austria*, 2010.

General principle of the European Union



- In the light of the *Mangold* judgment and, in particular, the *Kücükdeveci* one concerning discrimination on grounds of age...
- the prohibition of discrimination on grounds of sexual orientation constitutes a general principle of the Union.
- Even if the facts of the case were not to fall within the scope of the Directive, it would still be necessary to recognise a violation of said principle.
- It is, moreover, also apt to reaffirm the primacy of European Union law over national law, including constitutional law.

The Court's judgment



– Live broadcasting from Luxembourg –

(The judgment is to be published on the Court's website in the morning of 10 May 2010.)