

# Prohibition of Discrimination on the grounds of Sexual Orientation from the EU Law Perspective

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## 1. General background

The present article analyses certain aspects of legal regulation of equality of treatment and prohibition of discrimination based on sexual orientation from the European Union (hereinafter EU) law perspective. This prohibited ground of discrimination is quite particular. First, in comparison with other characteristics as gender, race, or ethnicity, the right to equal treatment with persons irrespective of their sexual orientation was recognised much later. Second, there is no international instrument dealing, in particular, with the group of persons having different sexual orientation. In comparison with gender, race or disability, international standards in the form of international conventions have been adopted. In relation to women the Convention on Prohibition of Discrimination against Women was adopted in 1979, with respect to race, the Convention on Elimination of All Forms of Racial Discrimination was adopted in 1965 and equal treatment with persons with disabilities is guaranteed by the Convention of Rights of Persons with Disabilities adopted in 2006. Third, sexual orientation does not include only the right not to be treated unequally on the grounds of sexual orientation but is very closely connected with the right to family life and the right to privacy. “Sexual orientation not only refers to a characteristic of a person but also to his or her relationships with another person.”<sup>1</sup>

The concept of sexual orientation as grounds of discrimination may cover a variety of situations. “In addition to homosexuality, it could be interpreted as extending to heterosexual or bisexual persons, there is no reason why it should be confined to homosexuality.”<sup>2</sup> The principle of equal treatment between persons irrespective of their sexual orientation thus may not be restricted that there shall be no discrimination of homosexuals but covers any distinctions based on sexual orientation.

## 2. Development of legal regulation in the EU

The aim of three European Communities (the European Steel and Coal Industry Community, the European Economic Community and the European Atomic Energy Community) at the moment of their establishment in 1950<sup>s</sup>

<sup>1</sup> Tobler, Ch., Waaldijk, K.: Case C-267/06, Tadea Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported, *Common Market Law Review* Vol. 46, Kluwer Law International, Netherlands, 2009, p. 735.

<sup>2</sup> Watson, P.: *EU Social and Employment Law – Policy and Practice in an Enlarged Europe*, Oxford University Press, Oxford, New York, 2009, p. 497.

was economic integration. The original version of the Establishing Treaties regulated neither equal treatment, nor human rights-related issues. It only guaranteed prohibition of discrimination based on nationality with respect to free movement of workers and prohibition of discrimination based on sex in relation to pay. The principle of equal treatment developed later in the field of equal treatment and equal opportunities for men and women in employment and occupation in 1070<sup>6</sup>. However, neither the European Charter of Fundamental Social Rights of Workers adopted in 1989 by all Member States, with the exception of the Great Britain expressly included sexual orientation in the enumeration of grounds of discrimination. Sexual orientation was recognised as prohibited grounds of discrimination for the first time by the Treaty amending the Treaty Establishing the European Community (so called Amsterdam Treaty) adopted in 1997.<sup>3</sup> This Treaty introduced new power for the EU institutions to take measures to combat discrimination on the grounds of sex, religion or belief, race or ethnic origin, disability, age and sexual orientation.

Before the adoption of legal instruments dealing with combating discrimination based on sexual orientation, the European Court of Justice (hereinafter ECJ) was asked several times whether the discrimination on the grounds of sexual orientation fell within the scope of application of sex equality directives. For instance, in the Case C-249/96 Lisa Jacqueline Grant v. South West Trade Ltd concerning refusal to provide a travel concession by Ms Grant's employer to her female partner. The employer provided such concession only to partners of the opposite sex. The national court asked the ECJ inter alia whether for the purpose of equal pay for men and women the discrimination based on sex included discrimination based on the employee's sexual orientation. However, the ECJ decided that with respect to equal pay, discrimination was to be prohibited just as was discrimination based on the fact that a person belonged to a particular sex, was limited to the case of a worker's gender reassignment and did not therefore apply to difference of treatment based on a person's sexual orientation.<sup>4</sup>

The Amsterdam Treaty inserted new Article 13 into the text of the Treaty Establishing the European Community. After the amendments adopted by the Treaty of Lisbon this provision became article 19 of the Treaty on the Functioning of the European Union (hereinafter the Treaty) and reads as follow:

“Without prejudice to 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 special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, race, ethnic origin, religion, belief, age, disability and sexual orientation.”

The opening phrase of Article 19 of the Treaty “*without prejudice to the other provisions of the Treaties*” may appear as all other provisions of the Treaty take precedence over it. “However, the formula used in Article 13 of the Treaty Establishing the European Community (now Article 19 of Treaty) may be intended to allow non-discrimination clauses to be inserted in legal instruments

<sup>3</sup> It entered into force in 1999.

<sup>4</sup> See the judgment of the ECJ of 17 February 1998 in Case C-249/96 Lisa Jacqueline Grant v. South West Trade Ltd, par. 42.

adopted on the basis of other Treaty provisions whose subject-matter, while relevant in the pursuit of equality, does not have this goal as their objective.”<sup>5</sup>

Moreover, this provision itself may not be understood as prohibition of discrimination on the mentioned grounds, it only established new competences for the EU institutions to take measures to “*combat discrimination*”. This means that there is no direct prohibition of discrimination on stated grounds in the primary law like there is with respect to nationality.<sup>6</sup> The wording of the article uses the formula “*appropriate measures*” without specifying the type of measure that could be taken. “Because it does not expressly exclude any measures, the term must include not merely all instruments referred to in Article 249 of the Treaty Establishing the European Community (now Article 288 of the Treaty) but also the other measures which the Community employs, such as guidelines, action programmes and communications.”<sup>7</sup> “But it should be noted that its ambit is restricted to the prohibition of discrimination and that it does not extend to measures to promote equality of opportunity on the wider scale.”<sup>8</sup>

### 3. Current regulation in the EU law

From aforementioned it follows that article 13 of the Treaty on Establishing of the European Community introduced by the Amsterdam treaty (article 19 of the Treaty) became a legal basis for adoption of instruments concerning fight against discrimination on the grounds of inter alia sexual orientation. On the basis of this provision, the Council took measure to combat discrimination by adopting of the directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter Framework Employment Directive). In addition to sexual orientation, it relates to other grounds of discrimination, namely religion or belief, age and disability.

The purpose of the Framework Employment Directive is stipulated as “*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.*”<sup>9</sup> For the purposes of the Framework Employment Directive the principle of equal treatment is defined as “*there shall be no direct or indirect discrimination whatsoever of any of the grounds referred to in the directive.*”<sup>10</sup> With respect to sexual orientation, the principle of equal treat-

<sup>5</sup> See. Flynn, L.: The implications of article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others? Common Market Law Review Vol. 36 Issue 6, Kluwer Law International, Netherlands, 1999, p. 1134.

<sup>6</sup> See Article 18 of the Treaty stating that within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

<sup>7</sup> See. Flynn, L.: The implications of article 13 EC - after Amsterdam, will some forms of discrimination be more equal than others? Common Market Law Review Vol. 36 Issue 6, Kluwer Law International, Netherlands, 1999, p.1136.

<sup>8</sup> Ellis, E.: EU Anti-Discrimination Law, Oxford, Oxford University Press, 2005, p. 14.

<sup>9</sup> See Article 1 of the Framework Employment Directive.

<sup>10</sup> See Article 2 (1) of the Framework Employment Directive.

ment within the meaning of this directive would mean that there shall be no direct or indirect discrimination on the grounds of sexual orientation.

However, it is necessary to highlight the fact that no definition of such key concepts as particular grounds of discrimination, including sexual orientation, is laid down by the EU law. "This is somewhat regrettable as it leaves a wide margin of discretion to the Member States in adopting transposition measures and ultimately, much to the hazards of litigation. The result may be a widely differing application of the Directive throughout the Community."<sup>11</sup>

The Framework Employment Directive defines the key concepts of direct and indirect discrimination that in relation to sexual orientation are specified. Direct discrimination on the base of sexual orientation 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 the grounds of sexual orientation.<sup>12</sup> Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put person having a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>13</sup>

The Framework Employment Directive recognises as a form of discrimination also harassment and an instruction to discrimination. In relation to sexual orientation harassment would be defined as unwanted conduct related to a sexual orientation that takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. The Framework Employment Directive enables to define the concept of harassment in accordance with the national laws and practice of the Member States.<sup>14</sup> In contrary, an instruction to discriminate is not defined in the Directive. It shall be defined according to national law or practice.

It is noteworthy that the Framework Employment Directive does not define sexual harassment as a form of discrimination like the Directive of Council and European Parliament 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (so called Sex Discrimination Directive). In practice, sexual harassment with respect to persons of different sexual orientation may occur. However, within the meaning of the Framework Employment Directive an unwanted conduct of sexual characteristic would be considered as harassment.

The scope of application of the Framework Employment Directive covers only the field of employment and occupation. The personal scope of application includes all persons, as regards both the public and private sectors, including public bodies.

<sup>11</sup> Watson, P.: *EU Social and Employment Law - Policy and Practice in an Enlarged Europe*, Oxford University Press, Oxford, New York, 2009, p. 493.

<sup>12</sup> See Article 2 (2) (a) of the Framework Employment Directive.

<sup>13</sup> See Article 2 (2) (b) of the Framework Employment Directive.

<sup>14</sup> See Article 2 (3) of the Framework Employment Directive.

The material scope of application includes:

- Conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- Access to all types and all levels of vocational guidance, vocational training advanced vocational training and retraining, including practical work experience;
- Employment and working conditions, including dismissals and pay,
- Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.<sup>15</sup>

The Framework Employment Directive expressly excludes from its scope of application differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of the Member States, and any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.<sup>16</sup> The Framework Employment Directive also does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.<sup>17</sup> Partial explanation to this exception may be found in the Recital 13 of the Preamble to this directive that reads as follow:

“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<sup>18</sup>, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.”

Distinguish the payments made by state schemes or similar, including state social security or social protection schemes excluded from the scope of application of the Framework Employment Directive and pay falling within its scope of application appears somewhat complicated with respect to rather extensive interpretation given to the concept of pay by the ECJ. Some aspects of this concept are analysed below.

With respect to sexual orientation it is necessary to remember the Recital 22 of the Preamble to the Framework Employment Directive stating that this directive is without prejudice to national laws on marital status and the benefits depended thereon. The role of this Recital for the scope of applications of the Framework Employment Directive was described in the opinion of Advocate General in the Case C-267/06, Tadea Maruko v. Versorgungsamt der deutschen Bühnen. According to this opinion, legislative provisions describe facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule. But the explanatory memorandum, the preamble or the

<sup>15</sup> See Article 3 (1) of the Framework Employment Directive.

<sup>16</sup> See Article 3 (2) of the Framework Employment Directive.

<sup>17</sup> See Article (3) of the Framework Employment Directive.

<sup>18</sup> Now Article 157 of the Treaty on Functioning of the European Union.

introductory recitals, which merely seek to illustrate, state the reasons for or explain, do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no binding force, notwithstanding their usefulness as criteria for interpretation, a role which the Court has frequently cited. Accordingly, like the rest of the preamble, recital 22 to Directive 2000/78 merely assists with the interpretation of the provisions of the Directive and its significance must not be overstated.<sup>19</sup>

#### 4. Discrimination based on sexual orientation before the ECJ

The only case concerning discrimination on the grounds of sexual orientation decided by the ECJ was the abovementioned Case C-267/06, Tadea Maruko v. Versorgungsanstalt der deutschen Bühnen. “The case is important in the context of the division of competences between the EC and the Member States, in particular in relation to civil status, as well as regarding to distinction between direct and indirect discrimination even beyond the field of discrimination on grounds of sexual orientation.”<sup>20</sup>

The dispute in the main proceedings before German courts concerned providing of widower’s pension for surviving partner of the same sex. Under German law marriage was reserved to the opposite-sex couples. The same-sex couples could only establish registered partnership. Mr. Maruko’s partner used to work as designer of theatrical costumes and from title of the employment relationship had been the member of Versorgungsanstalt der deutschen Bühnen (German Theatre Pension Institution) governed by the Collective Agreement for Germany’s Theatres. The regulations of this pension institution guaranteed the widower’s pension only to “*the spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter’s death.*” The same was for insured man or retired man. After his partner’s death, Mr. Maruko asked for widower’s pension from this scheme but was refused. The German court stopped the main proceedings and asked the ECJ several questions the essence of which was, whether a survivor’s benefit paid under an occupational pension scheme such as that managed by this pension institution fell within the scope of the Framework Employment Directive. Consequently the national court asked whether Article 1 in conjunction with Article 2(2)(a) of the Framework Employment Directive precluded regulations governing a supplementary pension scheme under which a registered partner did not after the death of his partner receive survivor’s benefits equivalent to those available to spouses, even though, like spouses, registered partners had lived in a union of mutual support and assistance formally entered into for life.

<sup>19</sup> Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-267/06, Tadea Maruko v. Versorgungsanstalt der deutschen Bühnen, par. 78.

<sup>20</sup> Tobler, Ch., Waalldijk, K.: Case C-267/06, Tadea Maruko v. Versorgungsanstalt der deutschen Bühnen, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported, Common Market Law Review Vol. 46, p. 723–746, Kluwer Law International, Netherlands, 2009, p. 723.

The ECJ first analysed whether a survivor's benefit granted under an occupational pension scheme such as that German Theatre Pension Institution could be treated as equivalent to 'pay' within the meaning of Article 141 EC.<sup>21</sup> The ECJ identified survivor's benefit provided under such scheme as pay taking into account first its origination in the Collective Agreement which, was designed to supplement the social security benefits payable under national legislation of general scope, second, the fact that this scheme was financed exclusively by the workers and employers of the sector concerned, without any financial involvement by the State, third, the fact that the scheme was aimed, at theatrical professionals employed in theatres operated in Germany.<sup>22</sup> However, the ECJ left to the referring court to determine whether a surviving life partner was in a situation comparable to that of a spouse who was entitled to the survivor's benefit provided for under the occupational pension scheme in the main proceedings.<sup>23</sup>

## 5. Conclusions

In the EU law, the secondary legislation adopted with the aim to combat discrimination on the grounds of sexual orientation applies only to the field of employment and occupation. The EU institutions have not adopted legislative measures regulating this issue for other areas such as for instance social security, social advantages, education, providing of healthcare, or access to and supply of goods and services, which are available to the public, like they did so in the case of race and ethnic origin. Different laws of the Member States concerning legal status of the same-sex couples appear as another burning problem relating to equal treatment in employment and occupation as well. It is to be noted that the competence to regulate the civil status is retained to the Member States. In some of them, the marriage of same-sex couples is allowed, in some of them the specific civil status of registered partnership is governed by law. However, laws of some Member States even do not enable the official partnership of persons of the same sex.

<sup>21</sup> Now it is Article 157 of the Treaty.

<sup>22</sup> See Judgment of the ECJ of 1 April 2008 in the case n Case C-267/06, Tadea Maruko v. Versorgungsanstalt der deutschen Bühnen, par. 49–51.

<sup>23</sup> Op. Cit., par. 72.

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