

LEGAL RECOGNITION OF  
SAME-SEX RELATIONSHIPS  
IN EUROPE

National, Cross-Border and  
European Perspectives

Fully revised 2<sup>nd</sup> edition

*Edited by*

Katharina BOELE-WOELKI  
Angelika FUCHS



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# COMPARING PEOPLE OR INSTITUTIONS?

## Sexual Orientation Discrimination and the Court of Justice of the European Union

Helmut GRAUPNER

### 1. HUMAN RIGHTS BACKGROUND

#### 1.1. AUTONOMY AND NON-DISCRIMINATION

According to the European Court of Human Rights (ECtHR), the very essence of the European Convention of Human Rights (ECHR) is respect for human dignity and freedom and the notion of personal autonomy is an important principle underlying the interpretation of the right to respect for private life.<sup>1</sup> Safe-guarding that respect has to be based upon present-day conditions and obligations arising therefrom have to be satisfied at all times.<sup>2</sup> Previously dominant attitudes may, therefore, not serve as justification for a lack of such respect today. What is more, States must actively remove the negative effects which may materialise today as a result of such former attitudes.<sup>3</sup>

The ECtHR accepts that sexual autonomy is central to the concept of private life<sup>4</sup> and it considers discrimination on the basis of sexual orientation to be unacceptable.<sup>5</sup> Moreover, it deems such discrimination to be equally serious

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<sup>1</sup> *Christine Goodwin v United Kingdom* para. 90; *I v United Kingdom* para. 70.

<sup>2</sup> *L and V v Austria* para. 47; *SL v Austria* para. 39; *Wessels-Bergervoet v Netherlands* para. 52–4.

<sup>3</sup> *Wessels-Bergervoet v Netherlands* para. 52–4.

<sup>4</sup> *L and V v Austria* para. 36; *SL v Austria* para. 29; *Woditschka and Wilfling v Austria* para. 26–29; *Ladner v Austria* para. 22–24; *Dudgeon v United Kingdom* para. 41, 52; *Norris v Ireland* para. 35–8; *Modinos v Cyprus* para. 17–24; *Laskey Jaggard and Brown v United Kingdom* para. 36; *Lustig-Prean and Beckett v United Kingdom* para. 82; *Smith and Grady v United Kingdom* para. 90; *ADT v UK* para. 21; *Fretté v France* para. 32; *Sutherland v UK* para. 57.

<sup>5</sup> *Salgueiro da Silva Mouta v Portugal* para. 36; *EB v France*.

as discrimination on the basis of race, colour, religion and sex.<sup>6</sup> In the case of distinctions based upon sex or sexual orientation, the margin of appreciation is narrow and the Court requires particularly striking reasons for such distinctions to be justified.<sup>7</sup> Measures whereby a difference in treatment is based upon considerations of sex or sexual orientation can only be justified if they are necessary for the fulfilment of a legitimate aim. In addition, ‘necessary’ in this context does not have the flexibility of expressions such as ‘useful’, ‘reasonable’, or ‘desirable’.<sup>8</sup> If reasons based solely on considerations pertaining to sexual orientation are advanced in defence of a disparate treatment, this constitutes discrimination.<sup>9</sup>

Predisposed bias on the part of a heterosexual majority against a homosexual minority cannot, as the ECtHR has repeatedly held, amount to sufficient justification for interference with the rights of homosexual or bisexual people, any more than similar negative attitudes towards those of a different race, origin or colour.<sup>10</sup> Society can be expected to tolerate a certain inconvenience to enable individuals to live in dignity ‘in accordance with the sexual identity chosen by them’.<sup>11</sup>

The ECtHR held that the right to private life protects self-determination as such and that sexuality and sexual life are at the core of the fundamental right to protection of private life.<sup>12</sup> State regulation of sexual behaviour constitutes an interference with the right to private life and such interference can be justified only if they are demonstrably necessary to avert damage being caused to others, namely if there is a pressing social need for the restriction of the right and if proportionality between the aims pursued and the means employed is ensured. The attitudes and moral convictions of a majority cannot, as such, justify interference with the right to private life, or with other human rights.<sup>13</sup> It would be incompatible with the underlying values of the Convention if the

<sup>6</sup> *Lustig-Prean and Beckett v UK* para. 90; *Smith and Grady v UK* para. 97; *Salgueiro da Silva Mouta v Portugal* para. 36; *L and V v Austria* paras. 45, 52; *SL v Austria* paras. 37, 44; *Woditschka and Wilfling v Austria* para. 29; *Ladner v Austria* para. 24; *Karner v Austria* para. 37.

<sup>7</sup> *L and V v Austria* para. 45; *SL v Austria* para. 37; *Woditschka and Wilfling v Austria* para. 29; *Ladner v Austria* para. 24; *EB v France*; *Kozak v Poland*; *P.B. & J.S. v Austria* para. 38; *Schalk & Kopf v Austria* para 97; *J.M. v UK*.

<sup>8</sup> *P.B. & J.S. v Austria* para. 42; *Karner v Austria* para. 41; *Dudgeon v UK* para. 51; *Norris v Ireland* paras. 41–6; *Modinos v Cyprus* para. 25.

<sup>9</sup> *Kozak v Poland* para. 92; *Alekseyev v RUS* para. 108; *Kiyutin v RUS* paras. 63, 73.

<sup>10</sup> *Lustig-Prean and Beckett v UK* para. 90; *Smith and Grady v UK* para. 97; *L and V v Austria* para. 52; *SL v Austria* para. 44; *Woditschka and Wilfling v Austria* para. 29; *Ladner v Austria* para. 24.

<sup>11</sup> *Christine Goodwin v UK* para. 91; *I v UK* para. 71.

<sup>12</sup> *Schüth v Germany* para. 53; *Obst v Germany* para. 39.

<sup>13</sup> *Dudgeon v UK*; *Norris v Ireland*; *Modinos v Cyprus*; *ADT v UK*; *L and V v Austria*; *SL v Austria*.



exercise of Convention rights by a minority group were made conditional on these rights being accepted by the majority.<sup>14</sup>

## 1.2. A DUTY TO PROTECT

The Convention guarantees not just negative rights to freedom from state intervention but also positive rights ensuring (active) protection of these rights against the State as well as in relation to other individuals. States have the duty to act in cases of interference with the right to (sexual) self-determination and to personal development, including the right to establish and maintain relations with other human beings.<sup>15</sup>

## 2. PRE-MARUKO ECJ-CASE-LAW

The *Court of Justice of the European Communities (ECJ)*<sup>16</sup>, however, in two cases had rejected the claims of same-sex couples to equal treatment. In *Grant v South West Trains Ltd* (1998), a lesbian employee of a railway company claimed that she was refused free tickets for her female partner despite the fact that her male colleagues received a certain allocation of tickets for their unmarried female partners. The ECJ did not find any discrimination on the basis of sex or sexual orientation. Art. 13 EC Treaty as amended by the Treaty of Amsterdam<sup>17</sup> prohibiting discrimination on the basis of sexual orientation had not yet entered into force at the time. In *D and Kingdom of Sweden v Council of the European Union* (2001) an employee of the Council of Ministers of the European Union complained that he was refused the 'household allowance' for his registered partner (under Swedish law), a payment which employees with a married partner received. The ECJ found that this amounted neither to discrimination on the basis of sex nor on the basis of sexual orientation. A registered partnership would be fundamentally different from marriage, it said.

The EU legislator reacted quite quickly to both judgments. After *Grant* it enacted Directive 2000/78/EC banning discrimination on the basis of sexual orientation in employment situations. Furthermore, as a consequence of *D and Kingdom of Sweden* the EU staff regulations have been amended with a prohibition against discrimination based on considerations relating to sexual orientation. In addition, registered partnerships have been put on the same footing as marriage

<sup>14</sup> *Alekseyev v RUS* para. 81.

<sup>15</sup> *Zehnalová & Zehnal v CZ; Schüth v Germany; Obst v Germany*.

<sup>16</sup> This Court has been succeeded by the *Court of Justice of the European Union* as part of the reforms introduced in the aftermath to the Treaty of Lisbon.

<sup>17</sup> Signed 2 October 1997, entered into force 1 May 1999, (1997) OJ C 340/308.

with one notable exception, namely if the specific partners are not able to enter into marriage only. If they are in a position where marriage is an option, then that option must be taken in order to avail of full protection.<sup>18</sup>

### 3. THE CASE *TADAO MARUKO*

Mr *Hans Hettinger* was a costume designer. For 45 years he was member of Vddb, an organisation responsible for the regulation of the pension scheme of employees of German theatres. For 45 years he had paid fees to Vddb, as had his heterosexual colleagues. For 13 years prior to the initiation of proceedings, he lived in a loving and stable intimate partnership with Mr *Tadao Maruko*. When Germany introduced the possibility to register such partnerships in 2001, they were among the first couples to do so. Mr Hettinger died in 2005. The Vddb, according to its statutes, granted benefits to surviving partners of deceased members to married partners only and refused to pay a widower's pension to Tadao Maruko. Mr Maruko took legal action in the Bavarian Administrative Court of Munich<sup>19</sup> and this court referred the case for a preliminary ruling to the ECJ. It posed two questions: Is there a direct discrimination? And if yes, would it be justified by recital 22 of Directive 2000/78/EC?

Recital 22 states: "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon." The Vddb & the government of the United Kingdom in their written submission argued that, due to the terms of recital 22, unequal treatment of married couples and registered couples would fall outside the scope of the Directive.

#### 3.1. TADAO MARUKO'S ARGUMENT

Mr Maruko however advanced an argument to the effect that recital 22 is not reflected in the operative part of the Directive and therefore cannot restrict its scope. It merely underlines that the EU has no competence to legislate on matters of family law.

Furthermore, Mr Maruko argued that provisions allowing for the payment of such benefits that are exclusively restricted to married couples always constitute a *direct* discrimination. He thereby sought to rely on to the ECJ's case law on sex discrimination which established the rule that distinctions based on pregnancy

<sup>18</sup> Art. 1 (d) (1) and Appendix VII Art. 1 (2) lit c Staff Regulations of Officials of the European Communities [http://ec.europa.eu/civil\\_service/docs/toc100\\_en.pdf](http://ec.europa.eu/civil_service/docs/toc100_en.pdf), 25 August 2010.

<sup>19</sup> BayrVG München M 3 K 05.1595.

are always distinctions based on sex and therefore constitute a direct discrimination because only women (and no man) can get pregnant.<sup>20</sup> Analogously, under German law, only different-sex couples (as opposed to same-sex couples) can marry.

In addition, Mr Maruko argued that he was the subject of an *indirect* discrimination. As long as marriage is forbidden for same-sex partners, the criterion of marriage always is just “apparently neutral“, and puts homosexuals “at a particular disadvantage.”<sup>21</sup> If pay is made contingent upon a condition which same-sex couples can never fulfil, that is to say 100% of non blood-related opposite-sex couples can marry whereas no non blood-related same-sex couples can marry, the condition of marriage must be dropped for same-sex couples. This is the case as long as marriage is not available as an option for same-sex couples, a decision which rests utterly within the competence of the Member State. Thus Mr Maruko asked the Court to follow its previous jurisprudence in *K.B.* (2004). In *K.B.* an opposite-sex couple could not qualify for a survivor’s pension as the British law at the time did not allow opposite-sex couples with a post-operative transgender partner to marry. The ECJ held that such couples have to be exempted from the marriage requirement as long as marriage is not available.

### 3.2. THE SUBMISSIONS MADE BY THE EUROPEAN COMMISSION AND THE ADVOCATE GENERAL

The European Commission and Advocate General Dámaso Ruiz-Jarabo Colomer denied the existence of a direct discrimination arguing that the statutes of Vddb made a distinction on the basis of marital status and not sexual orientation.

They qualified the refusal to grant a widower’s pension to Mr Maruko as an indirect discrimination with no apparent justification. This conclusion was, however, made under the assumption that, under national law, a registered partnership is equivalent to a marriage meaning that it has substantially the same effects.

Accepting such an assumption would lead to the strange, and perhaps even somewhat absurd, result that the lesser discrimination exhibited in Member States

<sup>20</sup> *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (1990). Likewise the ECJ has held that distinctions based upon the criterion of “being entitled to a retirement pension” constitutes direct discrimination on the basis of age (*Ole Andersen* 2010) and, if pension ages are different for women and men, also on the basis of sex (*Christine Kleist* 2010) as this criterion cannot be separated from age (*Ole Andersen* para. 23) or sex (*Christine Kleist* paras. 30f).

<sup>21</sup> See the definition of indirect discrimination in Art. 2 para. 2 lit. b of Directive 2000/78/EC.

with a marriage-equivalent registered partnership would be outlawed, whereas the (arguably) more serious discrimination (prevalent in Member States without registered partnership or with a form of registered partnership inferior to marriage) would remain admissible. This would be the result notwithstanding that in both cases the parties involved were subjected to the same kind of unequal treatment.

The difference between the arguments of Mr Maruko on the one hand and of the Commission and the Advocate General on the other is grounded in the use of different comparative parameters. It ultimately boils down to what constitutes the comparative parameters. Marriage vs. registered partnership or opposite-sex couples vs. same-sex couples? Should abstract legal institutions be compared or actual individuals in their specific situations of life in which they are subject to disadvantageous treatment?

### 3.3. THE JUDGMENT

On 1 April 2008, the Grand Chamber of the ECJ delivered its judgment. The Court ruled that *Recital 22* cannot affect the application of the Directive as it is not reflected in the operative part of the Directive and therefore cannot restrict its scope. This recital should merely serve to underline that the EU has no competence to legislate on matters of family law.<sup>22</sup>

What is more, the ECJ held that the treatment amounted to a *direct* discrimination to the extent that registered partners can be said to be "in a comparable situation" to married partners.<sup>23</sup> This ruling of the Court reflects the definition of direct discrimination in Art. 2 para. 1 lit. a Directive 2000/78/EC where direct discrimination is described as a situation "...where one person is treated less favourably than another ... in a comparable situation". Direct discrimination can only be justified under Art. 4 para. 1 ("genuine and determining occupational requirement").

The key-issue is the *comparable situation*. When is there a comparable situation and therefore a direct discrimination? Formally the ECJ held that the determination of a "comparable situation" is the task of the national court and it referred this matter back to the national court.<sup>24</sup>

Nevertheless, the Maruko judgment contains substantive criteria relevant to the application of the comparability-test by national judges. The issue to be assessed

<sup>22</sup> Paras. 59f.

<sup>23</sup> Paras. 70–73.

<sup>24</sup> Paras. 72f.

is “comparability“, not “identity“.<sup>25</sup> Such “comparability” has to be assessed “so far as concerns that survivor’s benefit“.<sup>26</sup> Not all differences between registered and married couples can be said to be decisive, but only those which concern the benefit at issue before the judge. The ECJ established an *individual-specific comparison* with the “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 VdB“.<sup>27</sup> Individual employees under the specific pension scheme must be compared, not abstract institutions.

In its reference to the ECJ, the national court used the following two criteria for the comparison of marriage and registered partnership: both partnerships are (a) formally entered into for life and (b) constitute a union of mutual support and assistance. The ECJ in its judgment repeatedly and explicitly quoted these criteria<sup>28</sup> and at no stage throughout the course of its judgment did the Court indicate an objection to them.

Indeed, the operative part of the judgment states: “The combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation *such as that at issue in the main proceedings* ... [following the description of the legislation at issue]“ (emphasis added). This is worthy of comparison to the operative part of the judgment in *Palacios* (2007): “The prohibition of any discrimination on grounds of age ... must be interpreted as not precluding national legislation *such as that at issue in the main proceedings*, ... [following the description of the legislation at issue], *where* ... [follow criteria which the national court has to apply in determining compatibility with community law]” (emphasis added). Whereas in *Palacios* the preclusion of legislation such as that at issue is made contingent upon further criteria, this was not the case in *Maruko*.

#### 4. THE REACTION OF GERMAN HIGH COURTS

Since the decision in *Maruko* was handed down, German higher courts have not been particularly receptive of the holdings of the ECJ. In one decision following the delivery of the opinion of the Advocate General and one even after the judgment of the ECJ, the Federal Administrative Court (Bundesverwaltungsgericht)<sup>29</sup> and the Federal Constitutional Court (Bundesverfassungsgericht)<sup>30</sup> found no discrimination in a situation where civil servants with a registered partner were

<sup>25</sup> Para. 69.

<sup>26</sup> Para. 73.

<sup>27</sup> Ibid.

<sup>28</sup> Paras. 62, 69.

<sup>29</sup> 2 C 33.06, 15 November 2007.

<sup>30</sup> 2 BvR 1830/06, 6 May 2008.

excluded from receiving a family allowance for civil servants<sup>31</sup>, although such a payment was made available to married civil servants. This is the case even in situations where the civil servant in a registered partnership had to maintain their partner and even when they raised children in the partnership whereas married civil servants were entitled to the payment of the allowance even when their spouse earned more than them and even when the couple was childless.

Both courts rejected the concept of comparability between registered partnership and marriage, and reasoned that (a) registered partnerships and marriage were not identical (relying, for instance, on differences regarding social benefits for civil servants, in tax legislation and joint adoption), (b) that complete or general equalisation of the two institutions was neither created nor intended by the legislator and (c) that it would be irrelevant that civil law maintenance-obligations in marriage and registered partnership are identical. The Federal Constitutional Court even added that (female?) spouses typically were in need of alimony by their partner, while registered partners were not.

## 5. THE SOLUTION

Only one year later the Federal Constitutional Court (Bundesverfassungsgericht)<sup>32</sup> reversed its own (and the Federal Administrative Court's) prior case-law<sup>33</sup> and established a principle of strict scrutiny for distinctions based on sexual orientation.<sup>34</sup> "Protection of marriage" alone, the court now said, is no justification for such distinctions and "promotion of the family" is a legitimate aim but is not restricted to married partners.<sup>35</sup> The number of children (2,200) in registered partnerships (13,000) the Court recognised as not "negligible"<sup>36</sup> and it postulated that there must be "serious differences" between marriage and registered partnership.<sup>37</sup> In addition, such differences must be related to the social benefit in question and to its aim and purpose.<sup>38</sup> Finally, the assessment of differences must not be based upon abstract considerations but upon the concrete reality of everyday life.<sup>39</sup>

<sup>31</sup> According to §40 para. 1 n. 1 BBesG.

<sup>32</sup> 1 BvR 1164/07, 7 July 2009; available at: [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de).

<sup>33</sup> Para. 112.

<sup>34</sup> Paras. 85, 88.

<sup>35</sup> Para. 100, 103.

<sup>36</sup> Para. 113.

<sup>37</sup> Para. 93.

<sup>38</sup> Paras. 86, 100.

<sup>39</sup> Paras. 112, 114, 115.

The Court explicitly makes clear<sup>40</sup> that marriage and registered partnerships do not differ regarding (a) the existence of an unlimited legally binding union of mutual support and assistance, (b) maintenance obligations and (c) the need for alimony. As the payment of benefits to surviving partners constitute a substitute for alimony,<sup>41</sup> the Court concluded that registered partners are entitled to the same survivor's pension as married partners.

After this decision of the Federal Constitutional Court, the VdB withdrew its appeal against the judgment of the Bavarian Administrative Court, which, prior to the decision of the Constitutional Court, had already granted the pension on the basis that it is a substitute for alimony and that there are no differences between married and registered partners and the necessity of receiving an alimony. Hence, Tadao Maruko received the surviving partner's pension.

## 6. THE CASE *JÜRGEN RÖMER*

After Maruko a new case on employment (pension) discrimination on the basis of sexual orientation arose for decision by the CJEU: *Römer v City of Hamburg*.

*Mr Römer* has a registered partner and was in receipt of a lower retirement pension than (former) employees of the city of Hamburg who were married. Married pensioners received the higher pension even if their spouse had a higher income and even if the couple never raised children. Moreover, in a similar factual constellation to Maruko, registered partners received the lower pension even if they had to maintain their partner and even if the couple raise(d) children.

This case provided the ECJ with the opportunity to react quickly to the resistance of German higher courts against its Maruko judgment and to specify or even extend the scope of the Maruko-judgment (and rule beyond comparability, on indirect discrimination).

### 6.1. THE OPINION OF THE ADVOCATE GENERAL

Advocate General Niilo Jääskinen, in his opinion of 15 July 2010, confirmed the interpretation of *Maruko* as outlined above (3.1.). Legislation on marriage and family-law rests in the competence of the Member States, but if a Member State excludes same-sex couples from marriage, employment benefits must not be

<sup>40</sup> Paras. 102, 111–113.

<sup>41</sup> Paras. 116, 119.

restricted to married couples. This would otherwise constitute a *direct* discrimination, as long as the legal position of married couples and registered couples is comparable and it would amount to an *indirect* discrimination, if (a) the legal position of married couples and registered couples is not comparable, or (b) no registration is available at all (for same-sex couples).

Protection of marriage and the family as such is not a valid justification for discrimination,<sup>42</sup> the Advocate General underlined. This is also not the case if (as in Germany) such protection is enshrined in a national constitution, as Union law supersedes also national constitutional law.

The Advocate General stressed that the prohibition of discrimination on the basis of sexual orientation is a *general principle of Union law*<sup>43</sup> and therefore this prohibition is not restricted to periods subsequent to the entry into force of Directive 2000/78/EC, rather it takes full effect before this date. Equal treatment and compensation can therefore be claimed with retroactive effect to the point at which the particular discrimination began.

## 6.2. THE JUDGMENT

The Grand Chamber of the CJEU delivered its judgment on 10 May 2011. It confirmed the interpretation of *Maruko* as outlined above (3.3.). Legislation on marriage and family-law rests in the competence of the Member States, but if a Member State excludes same-sex couples from marriage, employment benefits must not be restricted to married couples. This would otherwise constitute a *direct* discrimination so long as the legal position of married couples and registered couples is comparable.

As in *Maruko*, the Grand Chamber ruled that the test of comparability is the task of the national judge, that the criteria *must* be *comparable* (not identical) situations and the comparison has to be *specific and concrete* (not global and abstract).<sup>44</sup> The Court added that comparability has to be established in light of the *benefit concerned*, that the focus has to be on *relevant* rights and obligations and that such relevance has to be determined according to the *purpose* and *conditions* for the benefit at issue. The Court made clear that comparison “must not” consist of an overall comparison between marriage and registered

<sup>42</sup> Paras. 106–111.

<sup>43</sup> Paras. 129–133.

<sup>44</sup> Para. 42.



partnership.<sup>45</sup> *People (couples) are to be compared, not abstract legal institutions.*

The relevant rights and obligations for a partner-supplement to a retirement pension, the Court continued, are mutual *care and support*<sup>46</sup> and those obligations are incumbent both on life partners and on married spouses since the creation of registered partnership.<sup>47</sup>

The Grand Chamber confirmed that the goal of the protection of marriage and the family in a national constitution as such is not a valid justification for discrimination, as Union law supersedes also national constitutional law.<sup>48</sup> The *principle of equal treatment*, the Court said, derives from international instruments and from the constitutional traditions common to the Member States. In making this statement the Court referred to Directive 2000/78/EC, recitals 3 and 4: “right of all persons to equality before the law and protection against discrimination”.<sup>49</sup> Directive 2000/78/EC did not create this principle of equal treatment but has the sole purpose of laying down, in that field, a general framework (legal remedies, burden of proof, affirmative action etc.)<sup>50</sup> for combating such discrimination.<sup>51</sup> In this context, it is implicit in the judgment<sup>52</sup> that the prohibition of discrimination on the basis of sexual orientation is a *general principle of Union law*.<sup>53</sup>

The ECJ made clear that victims of discrimination, like Mr Römer, need not wait for consistency of national law with European law.<sup>54</sup> They can claim their right to equal treatment and courts have to set aside any conflicting provision of national law.<sup>55</sup>

### 6.2.1. *Retroactive Effect*

The Grand Chamber, however, stressed that this is the case only if the discrimination at issue falls within the scope of Union law.<sup>56</sup>

<sup>45</sup> Paras. 42–43.

<sup>46</sup> Paras. 46–51.

<sup>47</sup> Para. 48.

<sup>48</sup> Paras. 37, 51.

<sup>49</sup> Para. 59, also *Mangold* para. 74; *Küçükdeveci* para. 20; *Sayn-Wittgenstein* para. 89.

<sup>50</sup> See *Mangold* para. 76.

<sup>51</sup> See Art. 1; paras. 38, 59.

<sup>52</sup> Para. 59; see *Mangold* para. 75 (arg. “thus”).

<sup>53</sup> Explicit for age in *Mangold* para. 75, & *Küçükdeveci* para. 21.

<sup>54</sup> Para. 64.

<sup>55</sup> Para. 64; also *Mangold* para. 77.

<sup>56</sup> Para. 60.

A discrimination falls within the scope of Union law under the following conditions:

- (a) with the *expiry of the transposition-period* for (here) Directive 2000/78/EC (Art. 13 EC, now Art. 19 TFEU, and the general principle alone cannot result in a discrimination within the scope of Union law).<sup>57</sup>
- (b) *voluntary* (partial or general) *implementation* of (here) Directive 2000/78/EC (before the end of the transposition-period).<sup>58</sup>
- (c) the creation of *new discriminatory regulations* after entry into force of the Directive. Even prior to the expiry of the transposition-period Member States must refrain from any measures seriously compromising the result prescribed by a directive,<sup>59</sup> or
- (d) the discrimination takes place *in an area (already) within the scope of application of Union law* (due to other Union acts then Directive 2000/78/EC).<sup>60</sup> This also applies to discrimination outside the realm of employment (for example areas such as asylum, criminal law etc., which are regulated by Union-law). Then again in these areas there is no framework such as the one established by Directive 2000/78/EC. Only the general principle of prohibition of discrimination (on sexual orientation) applies to sexual-orientation discrimination in such areas outside employment.

In *Römer* only (a) applied. So it was only with the expiration of the transition period of Directive 2000/78/EC that the discrimination at issue (regarding partner-supplements to retirement pensions) came within the scope of Union law. Union law therefore entitles Mr Römer to assert his right to equal treatment and hence to receive compensation only dating back to 3 December 2003.<sup>61</sup>

#### 6.2.2. Indirect Discrimination

The ECJ also in *Römer* (contrary to the opinion given by the Advocate General) remained silent on the issue of *indirect discrimination*. So the prohibition of discrimination of same-sex couples outside the area of comparability remains an issue for future judgments. This may be an issue, for example, in Member States without a registered partnership for same-sex couples or with a form of registered partnership inferior to marriage). In the meanwhile challenges to such discrimination can rely on the persuasive opinion of the Advocate General in *Römer* when seeking to advance their claims.

<sup>57</sup> Paras. 61, 62; *Bartsch* paras. 16, 18; *Küçükdeveci* para. 25.

<sup>58</sup> Para. 63; *Bartsch* para. 17.

<sup>59</sup> *Mangold* para. 67; *Inter-Environnement Wallonie* para. 45.

<sup>60</sup> See *Mangold* paras. 51, 64, 75, “fixed-term work” according to Directive 1999/70.

<sup>61</sup> Para. 64.

## 7. ANNEX

### **Court of Justice of the European Union**

- Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* C-427/06 (2010)
- Christine Kleist v Pensionsversicherungsanstalt* C-356/09 (2010)
- D and Kingdom of Sweden v Council of the European Union* C-122/99P and C-125/99P, ECR I-4319 (2001)
- Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* C-177/88 (1990)
- Félix Palacios de la Villa v Cortefiel Servicios SA* C-411/05 (2007)
- Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* C-208/09 (2010)
- Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark* C-499/08 (2010)
- Inter-Environnement Wallonie* C-129/96 (1997)
- Jürgen Römer v Freie und Hansestadt Hamburg* C-147/08 (2011)
- K.B. v National Health Service Pensions Agency* C-117/01 (2004)
- Lisa Grant v South-West Trains Ltd* C-249/96 ECR I-621 (1998)
- Ole Andersen v Region Syddanmark* C-499/08 (2010)
- Seda Küçükdeveci v Swedex GmbH & Co KG* C-555/07, OJ C63/4 (2010)
- Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* C-267/06, ECR I-1757 (2008)
- Werner Mangold v Rüdiger Helm* C-144/04 (2005)

### **European Court of Human Rights**

- ADT v United Kingdom* (ECtHR) Reports 2000-IX 295 (judgment of 31 July 2000)
- Alekseyev v Russia* (ECtHR), App 4916/07; 25924/08; 14599/09 (judgment of 21 October 2010)
- Bączkowski v Poland* (ECtHR) App 1543/06 (judgment of 3 May 2007)
- BB v United Kingdom* (ECtHR) App 53760/00 (judgment of 10 February 2004)
- Beck Copp and Bazeley v United Kingdom* (ECtHR) App 48535/99, 48536/99 and 48537/99 (judgment of 22 October 2002)
- Christine Goodwin v United Kingdom* (ECtHR) Reports 2002-VI 1 (judgment of 11 July 2002)
- Dudgeon v United Kingdom* (ECtHR) Series A No 45 (judgment of 22 October 1981)
- EB v France* (ECtHR) Reports 2008-III 509 (judgment of 22 January 2008)
- Fretté v France* (ECtHR) Reports 2002-I 345 (26 February 2002)
- HG and GB v Austria* (ECtHR) App 11084/02 and 15306/02 (judgment of 2 June 2005)
- I v United Kingdom* (ECtHR) App 25680/94 (judgment of 11 July 2002)
- J.M. v United Kingdom* (ECtHR), App 37060/06 (judgment of 28 September 2010)
- Karner v Austria* (ECtHR) Reports 2003-IX 199 (24 July 2003)
- Kiyutin v Russia* (ECtHR), App 2700/10 (judgment of 10 March 2011)
- Kozak v Poland* (ECtHR) App 13102/02 (judgment of 2 March 2010)
- L and V v Austria* (ECtHR) App 39392/98 and 39829/98 (judgment of 9 January 2003)
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