

Further Extension of Protection against Discrimination on Grounds of Sexual Orientation under Directive 2000/78/EC

Court of Justice (Second Chamber) 12 January 2023,
Case C-356/21, *J.K. v TP S.A.*, ECLI:EU:C:2023:9

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INTRODUCTION

In Case C-356/21, *J.K. v TP S.A.*¹ the Court of Justice assessed the Employment Equality Directive.² This Directive protects against discrimination on the grounds of religion or belief, disability, age or sexual orientation in the field of employment and occupation. In principle, the work can be carried out in one of the following two ways. First, under an employment contract to which the employee and the employer are parties. Under this contract, the employee is obliged to perform specific work under the employer's supervision, at a place and time determined by the employer. The employer bears the economic risk of the work performed by the employee and is obliged to pay the employee's salary, and social security contributions. The employment contract binds the parties to a large extent. Secondly, work may be performed under civil law contracts. Such contracts include, *inter alia*, a contract for specific work, analysed in the Court of Justice

¹ECJ 12 January 2023, Case C-356/21, *J.K. v TP S.A.*

²Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303.

judgment in question, i.e. a contract obliging the contractor to achieve a specific, verifiable result for the benefit of the principal.

In *J.K. v TP S.A.* the European Court of Justice analysed whether Directive 2000/78/EC provides protection against discrimination only to workers with an employment contract, or whether its scope is broader and applies to all workers regardless of the legal form of their work, including people – like the complainant in this case – working under civil law contracts. The Court chose the latter option, thereby extending the scope of anti-discrimination protection to all types of employment and occupation. This judgment confirms the fundamental influence of the European Court of Justice on the ongoing development of EU anti-discrimination law. This is where the European Court of Justice has traditionally played an active role, known for its teleological interpretation of EU law aimed at effective protection against discrimination and for striking a risky balance between interpreting and applying EU anti-discrimination law on the one hand, and creating it on the other.³ This judgment is welcome, although some elements of its reasoning could be developed in the interests of clarity and consistency in EU anti-discrimination law.

This case note begins with a presentation of the factual and legal background of the case, followed by summaries of the Opinion of the Advocate General and the judgment of the Court of Justice. In commenting on this judgment, we focus on the European Court of Justice's extension of the scope of Directive 2000/78/EC. To this end, we examine the previous case law of the European Court of Justice extending anti-discrimination protection in the field of employment based on Directive 2000/78/EC. We also discuss the Court's position on the lack of anti-discrimination protection for providers of goods and services based on this Directive and look for sources of such protection in other EU provisions. The implications of the judgment are set out in the conclusion.

FACTUAL AND LEGAL BACKGROUND

The need to determine the scope of Directive 2000/78/EC arose in a dispute between J.K. (hereafter the applicant) and the Polish public broadcaster *Telewizja Polska S.A.* (hereafter TP). In this case, the applicant sought compensation for the damage caused to him by TP because of its refusal to conclude a new contract with him for specific work (a civil law contract), based on the grounds of his sexual orientation. Between 2010 and 2017, the applicant entered into several short-term contracts for specific work with TP, based on which he edited TP's television programmes as part of his economic activity. He carried out this work in two

³U. Belavusau and K. Henrard, 'A Bird's Eye View on EU Anti-Discrimination Law: The Impact of the 2000 Equality Directives', 20 *German Law Journal* (2019) p. 624-625.

one-week shifts per month, as assigned by his supervisor, W.S. In October 2017, following the change in TP's organisational structure two months earlier, the applicant was informed that he would be able to continue to work in TP's new structure. In November 2017, the applicant and TP entered into a new contract for specific work for December 2017, in which, according to the schedule provided, he was to work two one-week shifts. On 4 December 2017, the applicant and his partner published on their YouTube channel a clip of a Christmas song entitled 'Love us at Christmas time',⁴ which was intended to promote tolerance towards same-sex couples. Two days later, the applicant received an email from W.S. informing him that his week's shift, due to start the following day, had been cancelled. Subsequently, on 20 December 2017, W.S. once again informed the applicant of the cancellation of a further week's shift. As a result, the applicant did not carry out any shift in December 2017 and TP did not enter a new contract with him for specific work.

The complainant brought an action before the District Court in Warsaw, seeking an order against TP to pay damages for its discrimination on the grounds of sexual orientation in the performance of a civil law contract. The applicant claimed that he had been the victim of such discrimination since the probable cause of the cancellation of his shifts and the termination of his cooperation with TP was the publication on You Tube of the aforementioned clip. TP sought dismissal of the action, arguing that the law did not guarantee the extension of a contract for specific work. The national court doubted whether the Polish legislation transposing Directive 2000/78/EC, as applied in the dispute, was compatible with the Directive. It therefore referred the question to the European Court of Justice for a preliminary ruling. An examination of the European Court of Justice's response will be preceded by a presentation of Directive 2000/78/EC and the Polish transposition legislation.

Directive 2000/78/EC lays down a general framework for combating discrimination based on religion or belief, disability, age or sexual orientation in employment and occupation, with a view to implementing the principle of equal treatment in the member states.⁵ It applies to all persons, both in the public and private sectors, including public bodies, in relation to the conditions for access to employment or self-employment or to occupation, as well as employment and working conditions, including dismissals and pay.⁶ This Directive is without prejudice to national provisions which are necessary in a democratic society for public security, for the maintenance of public order, for the prevention of criminal offences, for the protection of health, and for the

⁴<https://www.youtube.com/watch?v=b7fpUj9zxfS>, visited 31 August 2023.

⁵Art. 1 of Directive 2000/78/EC.

⁶Art. 3(1)(a) and Art. 3(1)(c) of Directive 2000/78/EC.

protection of the rights and freedoms of others.⁷ Member states are required to impose sanctions for infringements of the national provisions transposing the Directive. These penalties may include the payment of compensation to the victim.⁸

Directive 2000/78/EC was implemented in Poland by the Act of 3 December 2010 on the implementation of certain provisions of EU law on equal treatment⁹ (hereafter the Equality Act). This Act prohibits unequal treatment of individuals based on sex, race, ethnic origin, nationality, religion, denomination, belief, disability, age, and sexual orientation.¹⁰ It regulates the taking up and pursuit of an economic or professional activity, including employment or work.¹¹ However, according to Article 5(3) of the Equality Act, it does not apply to the contracting party's freedom of choice, provided that this choice is not based on sex, race, ethnic origin or nationality. Anyone who has suffered a breach of the principle of equal treatment is entitled to compensation.¹²

The referring court considered whether Article 5(3) of the Equality Act correctly transposed Directive 2000/78/EC by excluding its application to a party's freedom to choose a contracting party, insofar as that choice is not based on sex, race, ethnic origin, or nationality, and not including sexual orientation as a prohibited ground. The referring court asked the European Court of Justice to rule on this question. The European Court of Justice stated that, to answer that question, it had to determine whether the dispute between the applicant and TP fell within the scope of Directive 2000/78/EC. It also had to establish whether, in the light of Article 3(1)(a) and (c) of this Directive, it was permissible for Polish law to exclude from the scope of the protection against discrimination provided for by that Directive the freedom of choice of a contracting party based on sexual orientation.

SUMMARY OF THE OPINION OF THE ADVOCATE GENERAL

Advocate General Tamara Čápetá opened her Opinion by analysing whether Article 3(1)(a) of Directive 2000/78/EC covers situations such as the one in the case at hand. In that regard, she explained how the term 'self-employment', as used in that provision, is to be understood. The Advocate General noted that the purpose of Directive 2000/78/EC can be interpreted as being aimed at

⁷Art. 2(5) of Directive 2000/78/EC.

⁸Art. 17 of Directive 2000/78/EC.

⁹Journal of Laws 2016, item 1219.

¹⁰Art. 8(1) (2) of the Equality Act.

¹¹Art. 4(2) of the Equality Act.

¹²Art. 13 of the Equality Act.

prohibiting discrimination based on, *inter alia*, sexual orientation in the working life of a person. By covering the areas of 'employment and occupation', its aim is to enable citizens to realise their potential and earn their living by providing their work.¹³ In the Advocate General's view, Directive 2000/78/EC aims at paving access to all work free from discrimination, performed as a way of making one's living, in all the different forms in which work can be offered. Within such a meaning of the purpose of Directive 2000/78/EC, self-employed work organised in whatever legally available form cannot be excluded from its scope.¹⁴ According to the Advocate General, the implementation of this Directive should lead to a result in which any person or company seeking to acquire work becomes 'blind' to the characteristics of a potential work provider with respect to which it is prohibited to discriminate, including his or her sexual orientation.¹⁵ On that basis, she observed that the term 'self-employment', as used in Directive 2000/78/EC, covers the provision of goods and services when the provider engages in personal work. In such a situation, a potential recipient of goods or services cannot refuse to sign a contract on the basis of the sexual orientation of the provider.¹⁶

Advocate General Čapeta then examined whether concluding an individual contract is a 'condition for access to (...) self-employment' within the meaning of Article 3(1)(a) of Directive 2000/78/EC. In this regard, she pointed out that a self-employed worker enters into a job by concluding a contract for services or a similar civil law contract. If the potential recipient of a self-employed worker's services restricts access to a job by insisting that the person providing it is not homosexual, it is clear that a person of that sexual orientation cannot obtain that particular work. Therefore if, in a situation of conventional employment, a refusal to enter into a contract of employment with a person because of sexual orientation is prohibited by Article 3(1)(a) of Directive 2000/78/EC, then a refusal to conclude a contract for services or a similar contract with a self-employed worker because of sexual orientation must also be prohibited by that provision, which refers to both employment and self-employment.¹⁷

Subsequently, the Advocate General briefly explored the question of whether Article 3(1)(c) of Directive 2000/78/EC is applicable to the case at hand. In her view, in a situation in which a self-employed worker already had established working relations with the recipient of services, and said recipient refused to

¹³Opinion of AG Čapeta, *J.K. v TP S.A.*, para. 55.

¹⁴*Ibid.*, para. 61.

¹⁵*Ibid.*, para. 72.

¹⁶*Ibid.*, para. 88.

¹⁷*Ibid.*, paras. 93 and 94.

conclude the contract solely by reason of his or her sexual orientation, such a case falls within the scope of Article 3(1)(c) of Directive 2000/78/EC.

Finally, the Advocate General analysed whether freedom of contract, as implemented by Article 5(3) of the Equality Act, might allow for the application of Directive 2000/78/EC to be excluded. To this end, she examined whether this article should be understood as a measure necessary for the protection, in a democratic society, of the freedoms of others, as laid down in Article 2(5) of Directive 2000/78/EC. The Advocate General noted that the right offered as a justification, being here the freedom of contract, may be limited by law to achieve socially acceptable goals, provided that the very essence of that right is not affected, and the limitation is proportionate to the goal(s) pursued. The goal of Directive 2000/78/EC is to make equality in the field of 'employment and occupation' a reality in all EU member states. Therefore, this Directive limits freedom of contract in order to achieve equality and other legitimate EU goals. What is more, the Directive only limits the freedom to choose contractors by excluding the possibility that such choice is based on one of the prohibited grounds. It does not prevent employers or others in a similar position from choosing the most suitable person for the job, which according to the Advocate General is the essence of freedom of contract. A decision not to hire or to dismiss can be based on different reasons, which however must be relevant to the job at issue. Consequently, the prohibition to discriminate on the enumerated grounds when making a choice with whom to enter into contract does not affect the essence of freedom of contract. Lastly, if a limitation to the freedom of contract exists, it is necessary to demonstrate that such a limitation is appropriate and necessary to achieve the legitimate goal(s) of Directive 2000/78/EC.¹⁸ On that ground, Advocate General Capeta concluded that Article 5(3) of the Equality Act is not necessary for the protection of the freedom to choose a contracting party in a democratic society, and therefore cannot justify excluding the application of Directive 2000/78/EC on the basis of Article 2(5) thereof.

SUMMARY OF THE COURT'S JUDGMENT

Protection against Discrimination in All Forms of Labour

The European Court of Justice ruled that Directive 2000/78/EC does not define the concept of 'conditions for access to employment, self-employment or an occupation' and does not refer to the laws of the member states for that purpose. These concepts must therefore be interpreted independently and uniformly in the EU, according to the ordinary meaning of the words, considering the context in

¹⁸Ibid., paras. 113-118.

which they occur and the objectives of the legislation of which they form part.¹⁹ The European Court of Justice held that it follows from the combined use of the terms ‘employment’, ‘self-employment’ and ‘profession’ that the conditions for access to any professional activity, whatever its nature and characteristics, are covered by Article 3(1)(a) of Directive 2000/78/EC and therefore fall within the scope of that Directive. A comparison of the different language versions of this provision and the general terms used in them led the European Court of Justice to the conclusion that these terms must be interpreted broadly.²⁰ This means that, according to the European Court of Justice, the EU legislator did not intend to limit the scope of Directive 2000/78/EC exclusively to posts occupied by ‘workers’ within the meaning of Article 45 TFEU, which provides for the free movement of workers.²¹ The European Court of Justice also noted that Directive 2000/78/EC was adopted based on Article 13 of the Treaty on European Community (now Article 19(1) TFEU), which empowers the EU to take appropriate action to combat discrimination. Recitals 9 and 11 of Directive 2000/78/EC state that discrimination on grounds of sexual orientation may impede the achievement of the TFEU’s objectives of a high level of employment, social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity, and the free movement of persons. Furthermore, the European Court of Justice explained that it is clear from the title, content, and purpose of this Directive that it aims to combat all forms of discrimination in the field of employment and occupation.²² This means that Directive 2000/78/EC is not an act of secondary EU law, such as those based on Article 153(2) TFEU, which seek to protect only employees working under employment contracts as the weaker party in an employment relationship. It aims to eliminate, on grounds of social and public interest, all discriminatory obstacles to access to a livelihood and to the ability to contribute to society through work, regardless of the legal form in which it is provided.²³ This means that the protection afforded by Directive 2000/78/EC cannot depend on the formal classification of the employment relationship under national law, or on the individual’s choice of type of contract.²⁴

¹⁹*J.K. v TP S.A.*, para. 34. Cf ECJ 2 June 2022, Case C-587/20, *HK/Danmark and HK/Privat*, para. 25.

²⁰*J.K. v TP S.A.*, para. 36.

²¹According to the well-established case law of the ECJ, an ‘employee’ within the meaning of Art. 45 TFEU is a person who performs, for a certain period of time, for and under the direction of another person, work in return for remuneration (see e.g. ECJ 15 July 2021, Case C-742/19, *Ministrstvo za obrambo*, para. 49).

²²*J.K. v TP S.A.*, paras. 40–42.

²³*Ibid.*, para. 43. Cf ECJ 2 June 2022, Case C-587/20, *HK/Danmark and HK/Privat*, para. 34.

²⁴*J.K. v TP S.A.*, paras. 54 and 55. Cf ECJ 11 November 2010, Case C-232/09, *Danosia*, para. 69.

The European Court of Justice declared that, although Directive 2000/78/EC covers a wide range of professional activities, including self-employment, these activities must be genuine and carried out in the context of a legal relationship characterised by a certain stability.²⁵

It should be noted that the European Court of Justice adopted a stricter approach than Advocate General Čapeta. She stated that Directive 2000/78/EC provides protection against discrimination irrespective of the legal nature of the contract entered into. Any restriction on the selection of contractor can only be based on the suitability of this person for the job. Like the Advocate General, the European Court of Justice concluded that Directive 2000/78/EC provides protection against discrimination irrespective of the type of contract between the parties. However, it established a more far-reaching requirement, as it added that the relationship between the parties under such contracts must be characterised by 'a degree of stability'. This can be understood to mean that protection under Directive 2000/78/EC is not afforded to contracts entered into once or a few times, as their parties are unlikely to have a stable relationship. However, each situation must be assessed *a casu ad casum*.

Anti-discrimination Protection against Non-renewal of Contract

The European Court of Justice stated that since Directive 2000/78/EC ensures non-discriminatory conditions for starting a self-employed activity,²⁶ its purpose could not be achieved if the protection it provides did not guarantee the principle of equal treatment during and after the exercise of that activity. This interpretation reflects the purpose of Directive 2000/78/EC, which is to establish a general framework for combating discrimination in employment and occupation on the grounds of, *inter alia*, sexual orientation. Consequently Article 3, which defines the scope of that Directive, cannot be interpreted restrictively.²⁷ This means that the concept of 'terms and conditions of employment' referred to in Article 3(1)(c) of Directive 2000/78/EC refers, in a broad sense, to the conditions applicable to any type of employment or self-employment, irrespective of the legal form in which it is carried out.²⁸

The European Court of Justice considered whether TP's decision not to honour and not to renew the contract for specific work which it had concluded with the applicant, thereby terminating their professional relationship for reasons allegedly linked to the applicant's sexual orientation, fell within the concept of 'employment

²⁵*J.K. v TP S.A.*, paras. 44 and 45.

²⁶Art. 3(1)(a) of Directive 2000/78/EC.

²⁷*J.K. v TP S.A.*, paras. 56 and 57. Cf. ECJ 2 June 2022, Case C-587/20, *HK/Danmark and HK/Privat*, para. 51.

²⁸*J.K. v TP S.A.*, para. 58.

and working conditions' within the meaning of Article 3(1)(c) of Directive 2000/78/EC. The Polish government agreed that a self-employed person is not, in his relations with the contracting party, bound by an employment relationship in which one party can 'dismiss' the other. The European Court of Justice disagreed, stating that the term 'dismissal' – used in Article 3(1)(c) of Directive 2000/78/EC as an example of 'employment and working conditions' – refers to the unilateral termination of any professional activity. Just as an employee may lose his job involuntarily, e.g. following a 'dismissal', a self-employed person may also be forced to stop working by the other party to the contract and thus find himself in a situation of vulnerability comparable to that of an employee who has been dismissed.²⁹ The fact that the applicant was unable to complete any of the one-week shifts provided for in the contract for specific work which he had concluded with TP constituted an involuntary termination of the activity of a self-employed person, which is equal to the dismissal of an employee. This means that TP's decision not to renew that contract for specific work on the grounds of the sexual orientation of the applicant, thus terminating the professional relationship between them, falls within the scope of Directive 2000/78/EC.³⁰

Legitimate Grounds for Discrimination in the Field of Employment

Article 2(5) of Directive 2000/78/EC contains a closed list of grounds justifying the possibility of discrimination in the field of employment and occupation, namely when it is necessary to ensure public security and the prevention of criminal offences; the protection of health; and the protection of the rights and freedoms of others. The European Court of Justice explained that by adopting this provision, the EU legislator intended to prevent conflicts between the principle of equal treatment and the need to achieve the above objectives. It therefore decided that Directive 2000/78/EC does not apply to certain actions necessary for the attainment of these objectives, provided that the national provisions implementing them are indeed necessary for their attainment.³¹

In relation to the Equality Act, which transposes Directive 2000/78/EC, the European Court of Justice held that Article 5(3) of the Equality Act constitutes a measure laid down by national law within the meaning of Article 2(5) of Directive 2000/78/EC. Article 5(3) of the Equality Act excludes the application of that Act to the detriment of a contractor's freedom of choice, where that choice is not based on sex, race, ethnic origin, or nationality. However, as already mentioned, this provision does not include sexual orientation, which is covered by Directive 2000/78/EC. The European Court of Justice pointed out that Article 16 of the

²⁹*J.K. v TP S.A.*, paras. 62 and 63. Cf ECJ 20 December 2017, Case C-442/16, *Gusa*, para. 43.

³⁰*J.K. v TP S.A.*, paras. 65 and 66.

³¹*Ibid.*, paras. 67-70. Cf ECJ 7 November 2019, Case C-396/18, *Cafaro*, para. 41.

Charter enshrines the freedom to conduct business and trade and to enter into contracts, and in particular the freedom to choose with whom to do business and enter into contracts.³² This protection is not absolute, however, and must be seen in the light of its social function.³³

The European Court of Justice stressed that to assume that freedom of contract allows a person to refuse to enter into a contract with someone on the grounds of his or her sexual orientation would deprive Article 3(1)(a) of Directive 2000/78/EC of any practical effect. This provision explicitly prohibits any discrimination on grounds of sexual orientation insofar as regards access to, *inter alia*, self-employment. According to the European Court of Justice, Article 5(3) of the Equality Act cannot exclude the protection against discrimination on a ground provided for by Directive 2000/78/EC, if such exclusion is not necessary for the protection of the rights and freedoms of persons in a democratic society.³⁴ It follows that Article 5(3) of the Equality Act has incorrectly implemented Article 3 of Directive 2000/78/EC. The judgment is a continuation of the European Court of Justice's case law affirming that the provisions of Directive 2000/78/EC establishing the legitimate grounds for discrimination must be interpreted strictly.³⁵ These judgments will be presented in the next section of this article.

To conclude, the European Court of Justice replied to the national court that Article 3(1)(a) and (c) of Directive 2000/78/EC preclude the application of a national provision which – in the context of the freedom of a contractor to choose – excludes from the scope of protection against discrimination a refusal to conclude or renew a contract for self-employed activities on the grounds of the sexual orientation of the person offering the service.

COMMENTS

European Court of Justice Case Law Extending Anti-discrimination Protection under Directive 2000/78/EC

There have been several cases concerning equality and discrimination based on sexual orientation in the case law of the European Court of Justice, most of which

³²*J.K. v TP S.A.*, paras. 72-74. Cf ECJ 21 December 2021, Case C-124/20, *Bank Melli Iran*, para. 79.

³³*J.K. v TP S.A.*, para. 75. Cf ECJ 22 January 2013, Case C-283/11, *Sky Österreich*, para. 45.

³⁴*J.K. v TP S.A.*, paras. 77 and 78.

³⁵See e.g. ECJ 12 January 2010, Case C-341/08, *Petersen*. For more, see A.-L. Bauer, 'Case Note – Case C-229/08 Domnica Peterson v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Judgement of 12 January 2010. Case C-341/08 Colin Wolf v Frankfurt am Main, Judgment of 12 January, 2010', 17 *Maastricht Journal of European and Comparative Law* (2010) p. 200.

have focused on employment. This section presents the landmark judgments of the Court in this area.

Case C-267/06, *Maruko*,³⁶ concerned a theatre costume designer, Tadao Maruko, who was in a civil partnership with a man. His partner was insured by the German theatres' pension fund, to which he had contributed for more than 40 years. Following his partner's death in 2005, Mr Maruko applied to the fund for his survivor's pension. The fund refused to pay it, stating that only spouses were entitled to it. In Mr Maruko's view, the refusal to grant him this pension for his deceased partner on the same terms as for a deceased spouse constituted discrimination based on sexual orientation. The European Court of Justice ruled that in cases falling within the scope of Directive 2000/78/EC, member states are obliged to treat married persons and persons in a registered partnership in the same way if they are in a comparable situation. This means that if the partner in a registered partnership is in a situation comparable to that of a spouse, restricting the partner's access to the survivor's pension of the deceased partner constitutes direct discrimination on grounds of sexual orientation, which is prohibited by Directive 2000/78/EC.

Another German case, C-147/08, *Römer*,³⁷ also concerned discrimination on grounds of sexual orientation in a pension provision. Mr Römer worked for the Hamburg City Council from 1950 to 1990 and had been living with his partner since 1969, with whom he entered into a registered partnership in 2001. After his retirement, he requested that the supplementary pension paid to him be recalculated using a favourable tax category. His request was rejected on the grounds that German legislation does not provide for the possibility of applying the favourable tax category to partners in registered partnerships. The German court hearing the case asked the European Court of Justice whether this situation constituted direct discrimination on the grounds of sexual orientation, prohibited by Directive 2000/78/EC. The European Court of Justice ruled that there had been direct discrimination against Mr Römer and left the final assessment of this issue to the national court. In doing so, it pointed out that the assessment of the comparability of the situation of spouses and registered partners must be carried out in a concrete manner and be based on a comparison of the rights and obligations of these two groups, and not on a formal legal equalisation of their situation.

³⁶ECJ 1 April 2008, Case C-267/06, *Maruko*. See A. Bodnar, 'Prohibition of Discrimination against Homosexual Couples – Gloss on the Judgment of the ECJ of 1.04.2008 in case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen', 10 *European Judicial Review* (2008) p. 43; G.N. Toggenburg, 'LGBT" go Luxembourg: on the Stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice', *European Law Reporter* (2008) p. 174.

³⁷ECJ 10 May 2011, Case C-147/08, *Römer*.

Another case, C-267/12, *Hay*,³⁸ also concerned discrimination in working conditions on the grounds of sexual orientation. Frédéric Hay had worked for the Crédit Agricole bank since 1998. In 2007, on the conclusion of a civil solidarity pact (PACS) with his partner, Mr Hay asked the bank to grant him special leave and the cash benefit granted to spouses in such circumstances under the bank's collective agreement. The bank refused, pointing out that the collective agreement provided for the granting of these benefits only to married employees. In this case, the French court's doubts related to the status of the PACS, which can be entered into by both heterosexual and homosexual persons. These doubts were clarified by the European Court of Justice, which stated that the fact that PACS are not exclusively reserved for homosexual couples is irrelevant. It does not alter the nature of the discrimination against homosexual couples who, unlike heterosexual couples, were unable to marry at the time of the dispute. In this case, however, the European Court of Justice assessed the comparability of the situation of married persons and those who had a PACS. It ruled that the two categories of persons were in comparable situations regarding the advantages concerning pay and working conditions granted upon entering marriage and entering into a PACS. The denial of benefits to those who enter into a PACS therefore constituted direct discrimination, prohibited by Directive 2000/78/EC.

A different finale was reached in Case C-443/15, *Parris*.³⁹ It concerned David Parris, who had been a lecturer at Trinity College Dublin and a member of an occupational pension scheme operated by the college. He filed an application with the College requesting that his survivor's pension be given to his partner, with whom he had a long-term civil partnership registered in the United Kingdom in 2011. The College refused, pointing out that Mr Parris had not met the requirement that a survivor's pension be payable if he married or entered into a registered civil partnership before the age of 60. He entered into a registered relationship with his partner after that age. Mr Parris disagreed, arguing that the ability to enter into a registered partnership or recognise an existing relationship was not available under Irish law until 2011. Therefore, as he stated, the failure to recognise that he had previously been in such a relationship – which resulted in the inability to pay a survivor's pension to his partner – constituted direct discrimination on the grounds of sexual orientation. The European Court of Justice did not share that view, pointing out that right to a survivor's pension is

³⁸ECJ 12 December 2013, Case C-267/12, *Hay*.

³⁹ECJ 24 November 2016, Case C-443/15, *Parris*. See A. Tryfonidou, 'Another Failed Opportunity for the Effective Protection of the Rights of Same-sex Couples under EU Law: Parris v Trinity College Dublin and Others', 2 *Anti-Discrimination Law Review* (2017) p. 83; S. Atrey, 'Illuminating the ECJ's Blind Spot of Intersectional Discrimination in Parris v Trinity College Dublin', 2 *Industrial Law Journal* (2018) p. 278.

subject to the same condition of marriage or registered partnership before the member of an occupational pension scheme reaches the age of 60.

Directive 2000/78/EC also provides protection against discrimination in the area of employment where the group of persons affected cannot be identified (i.e. hypothetical discrimination). This was decided in the Italian case C-507/18, *Associazione Avvocatura per i diritti LGBTI*,⁴⁰ in which the well-known lawyer N.H. stated on a popular radio programme that he would neither employ nor use the services of a homosexual person in his law firm. In response, the Italian Association of Lawyers for the Defence of LGBTI Persons brought an anti-discrimination claim for damages against N.H. The lawyer denied the discriminatory nature of his statement, claiming that it was an opinion he was expressing as a private individual, not as an employer, and that there were no opened or planned recruitment procedures in his law firm. The Italian court deciding the case expressed doubts as to whether a discriminatory statement broadcast on a radio programme fell within the scope of Directive 2000/78/EC. The European Court of Justice ruled that in the case in question they did, pointing out that discrimination can consist of discriminatory statements made by a non-employer if they are not hypothetical, but related to the recruitment policy of the employer concerned. The European Court of Justice also set out three requirements for proof: (1) the person making the statements has, or is perceived to have, a significant influence over the employer's recruitment policy; (2) the statements have a discriminatory content; and (3) they are public. If these conditions are met, it is irrelevant that the circle of persons affected by the discriminatory statements cannot be identified. Compensation can be claimed by organisations defending the rights of victims, such as the association, which brought a claim for compensation against N.H.

In the cited European Court of Justice judgments, the protection against discrimination provided by Directive 2000/78/EC was directed at natural persons. This raises the question whether the personal scope of its protection is wider, covering legal persons and other organisational entities with legal capacity. This concerns the situation where an entity is discriminated against – for example in the taking up and pursuit of an economic activity – on the basis of certain characteristics of the individuals who make up that entity (e.g. LGBT members of an association). Directive 2000/78/EC does not explicitly pre-empt this issue, as

⁴⁰ECJ 23 April 2020, Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*. For more on this topic see V. Passalacqua, 'Homophobic Statements and Hypothetical Discrimination: Expanding the Scope of Directive 2000/78/EC: ECJ 23 April 2020, Case C-507/18, *Associazione Avvocatura per i diritti LGBTI*', 3 *EuConst* (2020) p. 513, A. Tryfonidou, 'Case C-507/18 NH v Associazione Avvocatura per i diritti LGBTI – Rete Lenford: Homophobic Speech and EU Anti-discrimination Law', 4 *Maastricht Journal of European and Comparative Law* (2020) p. 513.

is the case with the Race and Ethnicity Directive.⁴¹ Despite the lack of regulation, the introduction of the protection of legal persons *via* national legislation cannot be excluded, as Directive 2000/78/EC sets a minimum standard of protection and provides for the possibility to adopt and maintain more favourable provisions in national law.

To conclude, in the presented cases, the homosexual orientation of people was the reason for their worse treatment in the field of employment, compared to heteronormative persons. The granting of indicated entitlements would not have been problematic and would not have had to be decided by the European Court of Justice, had those persons been heteronormative. What is more, protection against discrimination does not necessarily apply to the specific individuals affected. It also precludes the public expression, by those influencing or deemed to influence employment in the entity concerned, of discriminatory statements excluding the employment or use of services or goods provided by homosexuals, even when there is no recruitment procedure or search for a supplier of goods or services in the entity concerned.

The above review of judgments indicates that the European Court of Justice has consequently been interpreting Directive 2000/78/EC in a manner favourable to its anti-discriminatory purpose in employment and occupation, just as it also upheld this in *J.K. v TP S.A.* The added value of the *J.K. v TP S.A.* judgment is that it broadens this protection (to some extent) for self-employed persons working on the basis of civil law contracts, as presented below.

Anti-discrimination Protection for Suppliers of Goods and Services – Where to Seek Legal Protection?

In *J.K. v TP S.A.*, the European Court of Justice held that Directive 2000/78/EC provides protection against discrimination on the grounds of religion, belief, disability, age or sexual orientation, irrespective of the form of employment. In the present case, this meant that a self-employed applicant could benefit from its protection. While recognising the broad scope of application of Directive 2000/78/EC to all forms of professional activities, regardless of their legal form, the European Court of Justice did, however, state that it did not apply to activities consisting ‘in the mere provision of goods or services’. According to the European

⁴¹Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180). In accordance with recital 16 of the preamble to that Directive, it is important to protect all individuals against discrimination on grounds of racial or ethnic origin. Member states should also provide, as appropriate and in accordance with their national traditions and practice, protection for legal persons where they are victims of discrimination on grounds of the racial or ethnic origin of their members.

Court of Justice, protection is only afforded for occupational activities pursued in the context of a legal relationship characterised by a degree of stability. Unfortunately, the European Court of Justice did not justify or explain this essential requirement. Regardless of this, it can be presumed that the continuous exercise of a professional activity is covered by the anti-discrimination protection of Directive 2000/78/EC, whereas the mere – e.g. single or short-term – provision of goods or services is not. This raises the question of whether a person providing goods or services is deprived of anti-discrimination protection, which seems rather difficult to imagine, or whether such protection is provided by other EU legislation. This problem is of practical importance because, as the EU Agency for Fundamental Rights (FRA) survey results show, in 2019 39% of lesbians and 32% of gay men across the EU felt discriminated against because of their LGBTI status in areas other than employment. During that same period, 41% of lesbians and 38% of gay men experienced harassment due to being LGBT.⁴² As Advocate General Ćapeta rightly observed, Directive 2000/78 aims at protecting all persons who participate in society by providing their work. Therefore, the anti-discrimination protection should be provided for not only in employment and occupation but also in the provision of goods or services.

Sources of the anti-discrimination protection can be found in several EU provisions. First, Article 10 of the TFEU states that in defining and implementing its policies and activities, the EU shall aim to combat discrimination based on, *inter alia*, sexual orientation. The internal market, which ensures the free movement of goods and services, is undoubtedly one of the EU's most important policies. Therefore, within the framework of the free movement of goods and services, the EU must provide protection against discrimination on the grounds of sexual orientation. Second, the prohibition of discrimination on this ground is explicitly provided for in Article 21(1) of the Charter. Third, Article 19(1) TFEU clearly empowers the Council to take appropriate action to combat discrimination based on sexual orientation. It was on this legal basis that Directive 2000/78/EC, discussed in this article, was adopted, banning discrimination in employment and occupation. Unlike race, ethnicity, and gender, where protection against discrimination is provided by the Race Equality Directive (2000)⁴³ and the Gender Equality Directive (2006),⁴⁴ no EU secondary legislation provides for protection against discrimination on grounds of sexual orientation outside the

⁴²Survey of the EU Agency for Fundamental Rights of LGBTI people in the EU, <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>, visited 31 August 2023.

⁴³Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180).

⁴⁴Directive 2006/54/EC of the European Parliament and of the Council 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 (recast) (OJ L 204).

labour market. This would support the finding that EU law has created a hierarchy of grounds for discrimination, with protection against discrimination on some grounds (race, gender) being stronger than on others (sexual orientation).⁴⁵ In 2008, the Commission presented a draft Directive on Equal Treatment.⁴⁶ This draft would extend the material scope of the prohibition of discrimination based on religion or belief, disability, age or sexual orientation to education, social protection (including health care and social security), and access to goods and services. This draft has sparked an intense debate over the practicality and desirability of such legislation. Although many member states have cautiously welcomed the draft, concerns remain in some member states about the potential unintended or unforeseen consequences of such law. Some member states – including influential players such as Germany – saw this draft as an encroachment on national competences, in breach of the principle of subsidiarity. Other member states did not want to include social protection and education in the scope of this draft. Given the unanimity requirement in the Council for the adoption of a directive under Article 19 TFEU, its adoption seems rather unlikely.

The absence of secondary EU legislation providing protection against discrimination on grounds of sexual orientation means that the legal basis for such protection must now be sought in Article 10 TFEU and Article 21(1) of the Charter.⁴⁷ The jurisprudence of the European Court of Justice is another essential source of protection.

An example of this type of case law is the judgment that is the subject of this article, which extended the scope of anti-discrimination protection in the field of employment to all forms of stable work, regardless of the type of contract concluded.

Protection against discrimination on the grounds of sexual orientation is also provided for in the legislation of some member states. Currently, 20 EU member states and the UK prohibit discrimination on the grounds of sexual orientation in the access to and supply of goods and services.⁴⁸ There is also a growing body of national case law, albeit sporadic, which identifies and challenges cases of discrimination based on sexual orientation in areas such as the rental and purchase

⁴⁵E. Howard, 'EU Anti-Discrimination Law: Has the CJEU Stopped Moving Forward?', 2-3 *International Journal of Discrimination and the Law* (2018) p. 74.

⁴⁶Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

⁴⁷See A. Ward, 'The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?', *Cambridge Yearbook of European Legal Studies* (2018) p. 32.

⁴⁸See the overview of national legislation contained in P. Dunne, *Sexual Orientation Discrimination Law outside the Labour Market* (European Commission, Directorate-General for Justice and Consumers, Publications Office 2020), <https://data.europa.eu/doi/10.2838/70902>, visited 31 August 2023.

of property, sport and leisure, and hospitality services. This case law is also emerging in jurisdictions where there are not yet explicit protections against discrimination based on sexual orientation. One example is the high-profile 'printer case' decided by the Polish courts. This case arose from the refusal of an employee of a printing company (printer) in city of Łódź to produce posters promoting LGBT ideas because of his beliefs. This has been recognised by Polish common courts as a minor offence of refusal to provide a service without a legitimate reason, punishable under the Misdemeanours Code. In 2019, the Constitutional Tribunal ruled that this Code provision under which the printer was convicted was unconstitutional.⁴⁹ As a result of this ruling, the ordinary court ruling convicting the printer was overturned and the case dropped.⁵⁰ The Constitutional Tribunal judgment was criticised for, *inter alia*, failing to consider the preventive and anti-discrimination objective pursued by the provision of the Misdemeanour Code prohibiting the refusal of a service without a legitimate reason.

CONCLUSION

Directive 2000/78/EC prohibits discrimination on the grounds of sexual orientation, including in relation to access to employment, terms and conditions of employment, membership of or involvement in workers' organisations, and access to vocational training and guidance. In *J.K. v TP S.A.*, the European Court of Justice extended the protection against sexual discrimination under Directive 2000/78/EC to self-employed workers providing goods and services but under the condition that their occupational activities are pursued in a stable relationship. It held that the legal form in which the work is provided is irrelevant to the protection afforded. This judgment may have important consequences for the EU labour market, where many professions are disadvantaged by the restriction of the possibility to conclude employment contracts and the need to conclude civil law contracts instead. It means that persons carrying out activities under such contracts may also benefit from the anti-discrimination protection provided by Directive 2000/78/EC.

J.K. v TP S.A. is another signal from Luxembourg that EU anti-discrimination law is gradually broadening its scope of protection. This does not mean, however, that the trend is exclusively towards increasing the scope of protection. This is illustrated by the European Court of Justice's approach to occasional or sporadic contracts for the provision of goods and services, the parties to which are not protected by Directive 2000/78/EC. Although, unfortunately, the European

⁴⁹See Constitutional Tribunal 26 June 2019, Case K 16/17.

⁵⁰See Supreme Court 8 December 2020, Case II KA 1/20.

Court of Justice did not expand on this important statement, the sources of anti-discrimination protection in such cases should be sought in other provisions of EU law, in particular Article 10 TFEU and Article 19(1) of the Charter. However, legal certainty would require a clearly defined legal framework of anti-discrimination protection. The most effective and appropriate means of ensuring equality for persons irrespective of their sexual orientation would probably be the adoption of EU legislation explicitly guaranteeing it, like the Race Equality Directive and the Gender Equality Directive ensuring equality for all persons irrespective of race, ethnicity, and gender. The results of the FRA and Eurobarometer surveys also support the need for EU legislation to provide minimum protection against discrimination on the grounds of sexual orientation. The surveys show that in 2019 76% of Europeans agreed that gay and lesbian people should have the same rights as heterosexual people. Just over half (53%) of Europeans believed that discrimination based on sexual orientation was widespread in their country.⁵¹ In 2000, 20 member states and the UK banned discrimination on the basis of sexual orientation. Also, in 20 member states there is protection against discrimination on the grounds of sexual orientation in access to and supply of goods and services. Their laws therefore provide a higher level of anti-discrimination protection than EU law. Although protection against discrimination on grounds of sexual orientation is undoubtedly increasing, there remains a significant minority of member states where such protections are either absent or unclear. This means that that in some member states there are no safeguards to prevent unequal treatment on the grounds of sexual orientation, nor do individuals have access to minimum remedies when such discrimination occurs.⁵²

EU anti-discrimination law proves that the EU is not just looking after the economic interests of its member states, but is also concerned with the ethos of equality enshrined in EU law. In *J.K. v TP S.A.*, EU law was held to provide protection against discrimination based on sexual orientation committed against the applicant by TP, the Polish public broadcasting station. The case ended favourably for applicant. On 24 April 2023 the District Court in Warsaw, following the preliminary ruling of the European Court of Justice, stated that TP had discriminated against J.K. by not renewing its cooperation with him. The District Court ordered TP to pay him damages for two months of his unemployment and compensation equivalent to one month of his salary. In

⁵¹Eurobarometer on the social acceptance of LGBTIQ people in the EU, 2019, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/eurobarometer-social-acceptance-lgbtq-people-eu-2019_en, visited 31 August 2023.

⁵²Dunne, *supra* n. 48, p. 77 and 83.

awarding these entitlements the District Court considered the applicant's mental state, the seriousness of the violation suffered, the suddenness of TP's decision, and the fact that he was the best employee in the team. The District Court also emphasised the special status of TP, which as a public company has a particular mission and therefore a special obligation of equal treatment and non-discrimination.⁵³

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⁵³G. Leśniak, 'Sąd: Ochrona przed dyskryminacją ze względu na orientację seksualną nie tylko na etacie', <https://www.prawo.pl/kadry/dyskryminacja-ze-wzgledu-na-orientacje-seksualna-a-forma,521000.html>, visited 31 August 2023.