

Update on European Case Law: The most recent cases of the European Court of Justice

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Subject and overview

What will we discuss?

- Recent discrimination cases:
 - Sexual orientation: *Hay* (December 2013).
 - Sex: *C.D.* (March 2014), *Napoli* (March 2014), *Leone* (July 2014), *X.* (September 2014).
 - Sex/disability: *Z.* (March 2014).
 - Age: *Pohl* (January 2014), *Specht* (July 2014).
- ... keeping in mind the theme of enforcement of equality and anti-discrimination law.
- Rather brief, as we have only 15 minutes – and with a particular focus on **enforcement**.

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Briefly: substantive law (1)

Motherhood through surrogacy

- C.D.* (2014) and *Z.* (2014):
Commissioning mothers in the UK / Ireland, respectively, who had a baby through surrogacy (i.e. they were not themselves pregnant) and are refused maternity leave.
- Findings of the CJEU:
 - C.D.* (2014) on Directive 2006/54: no sex discrimination.
 - Z.* (2014) – idem, plus the additional argument of disability discrimination under Directive 2000/78 (mother had no uterus):
No discrimination, as the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment.

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Briefly: substantive law (2)

Hay on the delimitation direct – indirect discrimination

- Already *Nikoloudi* (2005), *Maruko* (2008), *Römer* (2011).
- *Hay* (2014), for the first time with an explanation:
 - Rules that restrict a benefit to employees who marry, to the exclusion of partners entering into a civil solidarity pact.
 - CJEU – *direct* discrimination on grounds of sexual orientation: “The fact that the PACS [...] is not restricted only to homosexual couples [...] does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts [...], legally enter into marriage. The difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still *direct* discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”

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Focus on enforcement

An important issue in practice

- May determine the effectiveness of the law.
- A particularly sophisticated aspect of EU law:
 - Specific requirements under the anti-discrimination Directives; e.g. on judicial access, the burden of proof, remedies and sanctions and protection against victimisation.
 - General requirements under CJEU case law; e.g. the principles of equivalence and effectiveness, direct effect of EU law provisions in national courts, the right to levelling up in individual discrimination cases, Member State liability.
 - Certain procedural possibilities before the CJEU.
- A number of the recent cases touch on such issues, though only one on specific requirements.

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Case law on enforcement (1)

Effective remedies and sanctions

- Art. 17 of Directive 2000/78:
Obligation of the Member States to take all measures necessary to ensure that the rules of the Directive are applied, and to provide for effective, proportionate and dissuasive sanctions.
- *Specht* (2014):
 - Mr Specht complains about the system in Germany in relation to the basic pay for civil servants, which perpetuates a difference in treatment on grounds of age by basing the new system partially on the old one.
 - Do the enforcement provisions of the Directive require that civil servants be retrospectively granted the difference between the pay actually received and that corresponding to the highest step in their grade?
 - CJEU: no. Levelling up requires a valid point of reference, i.e. an identifiable category of favoured civil servants which is missing here.

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Case law on enforcement (2)

Equivalence and effectiveness (1)

- For enforcement issues not regulated by the Directives.
- Principle (e.g. *Rewe Zentral*):
In the absence of specific EU law, national rules for cases based on EU law must not be less favourable than for cases based on national law (equivalence) and they must not make the exercise of EU rights impossible or excessively difficult in practice (effectiveness).
- The example of time bars - *Pohl* (2014):
 - Civil servant in Austria complains about the determination of the reference date, on the basis of the civil servant's age, for the purposes of advancement on the salary scale. The law establishes a time bar of 30 years.

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Case law on enforcement (3)

Equivalence and effectiveness (2)

- CJEU on substance:
Age discrimination under Directive 2000/78.
- CJEU on the time bar:
 - This specific issue is not regulated by Directive 2000/78.
 - Previous case law: reasonable time bars are acceptable in view of the principle of effectiveness.
 - 30 years are reasonable.
- See also *Specht* (2014):
 - German law requires that the civil servant takes steps before the end of the financial year in course to assert a financial claim of the type at issue in this case.
 - CJEU leaves the issue to the national.

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Case law on enforcement (4)

Direct effect before national courts

- *Napoli* (2014):
 - Employee in Italy is excluded from a training course necessary for acquiring the status of public official, because of absence due to maternity leave. Infringement of Directive 2006/54?
 - CJEU:
 - On direct effect: Art. 14(1)(c) (prohibition of discrimination with respect to employment conditions) and Art. 15 of Directive 2006/54 (return rights after maternity leave) are sufficiently clear, precise and unconditional to have direct effect.
 - On substance: Art. 14 does not apply; infringement of Art. 15.
- Compare also *Z.* (2014): no direct effect of the UN Convention on the Rights of Persons with Disabilities, as it is of a programmatic nature.

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Case law on enforcement (5)

Member State liability (1)

- Principle under EU case law (*Francovich*):
Requires a damage, a sufficiently serious breach of EU law that intends to confer rights on individuals and a causal link between the two.
- *Specht* (2014):
 - Art. 2(1) of Directive 2000/78 (prohibition of discrimination) is intended to confer on individuals enforceable rights.
 - Sufficiently serious breach: the nature and extent of the obligation on Member States under Arts. 2(2) and 6(1) of Directive 2000/78 (prohibition of age discrimination) were clarified and defined from the date of the *Hennigs and Mai* judgment (2011).
 - Causal link to be determined by the national court.

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Case law on enforcement (6)

Member State liability (2)

- *X* (2014):
 - A man injured in a work accident in Finland complains about the calculation of the amount of compensation which is based on the average life expectancy by sex of the recipient. Women in his situation get more.
 - CJEU on substance: sex discrimination under Directive 79/7 (finding in the absence of a specific provision on the matter; different from *Test-Achats*, regarding Directive 2004/113!).
 - CJEU on Member State liability:
 - It is for the national court to assess whether the conditions for the Member State to be deemed liable are met.
 - But: in doing so, the national court has to take a systematic approach (i.e. consider also other anti-discrimination directives), by taking the following into account: (see next sheet)

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Case law on enforcement (7)

Member State liability (2)

- CJEU in *X* on Member State liability – *continued*:
 - The fact that the CJEU has not yet ruled on the legality of relying on average life expectancy according to sex in the determination of a benefit paid under a statutory social security system falling within the scope of Directive 79/7.
 - The right granted to the Member States by the EU legislature to make differences between the sexes under Art. 9 of Directive 2006/54 and under Art. 5(2) of Directive 2004/113 - keeping in mind, however, that the latter has found to be invalid with effect of 21 December 2012.
- Here, the issue remains rather open ...
- See also *Pohl* (2014):
General statements on Member State liability.

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Case law on enforcement (8)

Finally: the preliminary ruling (1)

- National courts ask questions on interpretation or validity of EU law to the CJEU – actually in all of our cases..
- Procedural issue in *Leone* (2014):
 - Father complains about the calculation of his pension in France, based on a service credit that benefits mainly women (condition of having taken a career break in order to care for children).
 - Mr and Ms Leone go to a French court, which turns to the CJEU.
 - French Government contests the reference to the CJEU (inadmissibility of the request), arguing that the national court has not explained either the link between the national law at issue and Art. 157 TFEU or the reasons which have led it to doubt the compatibility of those national provisions with EU law.

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Case law on enforcement (9)

Finally: the preliminary ruling (2)

- CJEU in *Leone* on procedure - *continued*:
 - It is for the national court to determine in the light of the circumstances of the case the need for a preliminary ruling. Wide discretion.
 - The CJEU may refuse to rule only where it is quite clear that the interpretation of EU law sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. That is not the case here.
- CJEU on substance:
Indirect sex discrimination under Art. 157 TFEU. No justification through compensation for the disadvantages suffered in the course of workers' career in such a case.

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Thank you for your attention!

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