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2:0 for registered partnership
Sexual orientation discrimination and the ECJ

1. Introduction

Sexual orientation could not be claimed to have been a specific concern in EU law to date. When in May this year the ECJ delivered its judgement in case *Römer*[1], this constituted only the second instance of the Court interpreting directive 2000/78[2] regarding this reason for discrimination – which compares to a virtually incessant flux of preliminary requests in the area of age discrimination.[3] Before these two rulings, discrimination of individuals on grounds of their sexual orientation had figured in European case law only in two judgements[4], in which – to the surprise of many[5] – the ECJ refused to see such discrimination as unequal treatment on grounds of sex.

Together with its predecessor ruling in case *Maruko*[6], the *Römer* judgement provides guidance on the impact the framework directive can have on the legal position of homosexual couples. For the time being, this is restricted to situations where national law allows these couples to enter into some kind of officially recognised partnership status, but denies them rights granted to heterosexual married couples. The present contribution discusses the pivotal findings of the cases in the context of the general transnational development of rights provided to those whose sexual orientation deviates from what is perceived as the norm. On this basis, the potential of EU law to further equality in an area where it would have been unthinkable until very recently will be assessed.

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1 Judgement of 10.5.2011, C-147/08.

2 Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter: "framework directive").

3 For an overview of decided and still pending cases on alleged discrimination on grounds of age see Schiek, *Age discrimination before the ECJ – Conceptual and Theoretical Issues,* Common Market Law Review 48(3)/2011, 777–799.

4 ECJ, *Grant*, 17.2.1998, C-249/96; ECJ, *D and Sweden v Council*, 31.5.2001, C-122/99, 125/99.

5 See eg McInnes, *Annotation to the Grant case*, Common Market Law Review 1999/36, 1043 et seq. Cf the seemingly more lenient approach of the ECJ to the case of a transsexual in *P. v S. and Cornwall County Council*, 13.4.1996, C-13/94.

6 *Maruko v Versorgungsanstalt der deutschen Bühnen* (VddB), 1.4.2008, C-267/06.

2. Sexual orientation: the legal framework

2.1 International standards on equal treatment

The mentioned focus of case law around the framework directive on age discrimination comes as no surprise, considering that age-related differentiation may concern everyone at a given point in time. As opposed to this, discrimination on grounds of sexual orientation goes much more to the heart of equal treatment law, as it seeks to protect a minority which has traditionally faced less favourable treatment all across Europe. As for this particular group, the need of protection is further accentuated by the exceptional degree of social stigma attached to "non-standard" sexual orientation. The Parliamentary Assembly of the Council of Europe has accordingly declared discrimination on this reason to be "one of the most odious forms of discrimination".[7] This statement was followed by a number of resolutions and recommendations dealing with the rights notably of homosexuals in Europe from different bodies of the Council of Europe.[8]

As of today, sexual orientation figures – expressly or by interpretation – in a number of international human rights standards, including the ECHR as the certainly most significant instrument establishing a floor of fundamental rights binding the EU member states. By virtue of art 14 of the Convention, all member states are obliged to apply the rights set out in the preceding articles in a non-discriminatory way. This includes notably art 8 on the right to private and family life in the broad interpretation given to this provision by the Court, as well as art 12 on the right to marry and found a family. Those EU member states which have also ratified Protocol 12 to the Convention have thereby committed themselves to refrain from discrimination in a more general manner (ie without a restriction to areas dealt with by other articles of the Convention). Departing from these general requirements of non-discrimination, the ECtHR has found sexual self-determination to be one of the central values of the Convention, so that any different treatment must be subject to particularly strict scrutiny on whether it can be considered "necessary in a democratic society".[9]

The Convention and the ECtHR's case law have thereby established a minimum level of rights that must be granted to individuals of different sexual orientation. To begin with, it is clearly inadmissible to sweepingly prohibit sexual contact between persons of the same sex or establish specific age limits for their admissibility; further to exclude homosexuals from service in the armed forces, to forbid the organisation of

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[7] Council of Europe, *Recommendation 1474 (2000): Situation of lesbians and gays in Council of Europe member States.*

[8] For an overview, see Holzhacker, *'Gay Rights are Human Rights', : The framing of new interpretations of international human rights norms*, Paper for presentation at the American Political Science Association, Annual Meeting, Seattle, Washington, September 1-4, 2011, 15 et seq.

[9] See the rulings in *L. & V. v Austria*, par 45; *S.L. v Austria*, par 37; *Woditschka & Wilfling v Austria*, 21.10.2004, 69756/01, 6306/02, par 29 et seq; *Ladner v Austria*, 03.02. 2005, 18297/03, par 24 et seq; *E.B. v France*.

Gay Pride Parades or of homosexual pornography.[10] As concerns factual life partnerships between individuals of the same sex, case law has held on several occasions that these must receive access to the same rights that are granted to unmarried heterosexual couples, which implies equal entitlements to take over a rental contract after the death of the renter by their partner and the admission to the adoption of a child.[11]

Bottom line of the case law just cited is that the binding European standard of non-discrimination is rather unambiguous with reference to *unmarried couples*: any difference in treatment is prohibited unless justified a by a "weighty and legitimate reason", which according to the ECtHR may even include "the protection of the traditional family".[12] The restriction of a fundamental right must however in any case be necessary and proportional. In this respect, the Court has not accepted in any of the cases brought before it that it should constitute a danger to traditional family relations if same-sex partners were given additional rights.

The situation is less clear, though, as regards preferential treatment of *married couples* in countries where marriage is not permissible for homosexual couples. In case *Schalk & Kopf v Austria*[13], the ECtHR was asked if it could be compatible with the ECHR as it stands if a state grants homosexual couples access neither to marriage nor to any other form of legal recognition of their relationship.[14] While it was largely expected that the Court would answer this question in the affirmative, a definite statement of the ruling was pre-empted by a change of the legal situation in Austria (adoption of a Registered Partnership Act, in force since January 2010), so that the applicants in the case were no longer subject to such a legal situation.[15]

Nevertheless, the judgement just cited gives valuable insight into the Convention's significance for registered partnerships regarding their relation to marital status. In this respect, the Court stresses that it "cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples".[16] Notwithstanding this fact, the ECtHR is aware that at present a majority of countries know a number of legal privileges only available to spouses while preventing homosexual couples from attaining that legal status. Consequently, and in line with constant case law, the ECtHR allowed for the member states to invoke their *margin of appreciation* when keeping up

10 See judgements *Dudgeon v UK*, 22. 10. 1981, 7525/76; *Norris v Ireland*, 26. 10. 1988, 10581/83; *Modinos v Cyprus*, 22.4.1993, 15070/89 ; *A.D.T. v UK*, 31.7.2000, 35765/97; *L. & V. v Austria*, 9.1.2003, 39392/98, 39829/98; *S.L. v Austria*, 9. 1. 2003, 45330/99; *Lustig-Prean & Beckett v UK*, 27.09.1999, 31417/96; 32377/96; *Smith & Grady v UK*, 96 27.9.1999, 33985/96; 33986; *Baczkowski v Poland*, 3.5.2007; *European Commission for Human Rights, S. v Switzerland*, 14.1.1993.

11 See judgements *Karner v Austria*, 24.7.2003, 40016/98; *E.B. v France*, 22.1.2008.

12 *Karner v Austria*, par 40.

13 Judgement of 24.6.2010, 30141/04.

14 Cf Waaldijk, *Same-Sex Partnership, International Protection, Max Planck Encyclopaedia of Public International Law* (2010), margin no 11 et seq; Graupner, *Sexuelle Orientierung im europäischen Recht*, Österreichische Richterzeitung 09/09, 179 et seq.

15 See par 102 of the judgement.

16 Par 105 of the ruling.

differences in treatment in a number of areas, as this was the case in the Austrian law under scrutiny. Conversely, it has to be noted that the Court speaks of "a margin of appreciation in the timing of the introduction of legislative changes". This confirms the frequently held view of observers in this field that "there are reasons to expect that international bodies will apply the prohibition of indirect discrimination to situations where same-sex partners are being excluded from certain legal benefits, because these are only available to married partners."[17] In the end, the judgment makes it clear that the member states are not given more than a period of grace until the ECtHR will consider the common floor of human rights sufficiently developed to require fully-fledged equality of treatment.

Calls for developing standards above those set by the ECHR and similar mandatory human rights documents can be found in a range of non-binding instruments on the European and international level. A prominent example are the *Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Identity* drafted by international human rights experts in 2007. The promotion of embracing these standards in national legislation is frequently associated with the activities of international NGOs and pressure groups, such as the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC).[18]

2.2 Domestic law: forcing the pace

European and international non-binding standards[19] as a supplement to the mandatory minimum standards flowing from the ECHR and other human rights instruments have furthered the development of more equality at national level. When the EP issued its first resolution in the area of sexual orientation discrimination, merely four member states had regulated equal treatment in this area in their domestic law at least to a certain degree.[20] By contrast, in 2004 at least 15 member states granted protection exceeding the compulsory standards of the EU framework directive, which currently gives over two thirds of EU citizens access to such equal treatment legislation.[21] This development has been designated as "one of the most remarkable cases of convergent policy change in recent times".[22]

The schemes applicable in individual member states are commonly classified with a view to the legal institutions available to homo- and heterosexual partnerships. The most

17 Cf Waaldijk, *Same-Sex Partnership*, margin no 31.

18 Cf Holzhacker, '*Gay Rights are Human Rights*', 2 et seq; 11 et seq; Kollman, *European institutions, transnational networks and national same-sex unions policy: when soft law hits harder*, Contemporary Politics 15(1)/2009, 41 et seq.

19 Including those stemming from EU institutions: see next subsection.

20 These states were Denmark, the Netherlands, Spain and Sweden.

21 This includes even three member states (Hungary, Slovenia and the Czech Republic) which had only entered the EU in that very year. Cf Graupner, *Keine Liebe zweiter Klasse – Diskriminierungsschutz und Partnerschaft für gleichgeschlechtlich L(i)ebende* (2004), 35.

22 Kollman, *European institutions, transnational networks and national same-sex unions policy*, 50.

widespread approach is the *Scandinavian model*, in which the possibility of registering as a partnership is open only to homosexual couples and its legal consequences may deviate from those of a marriage in several aspects. It has been noted that those differences have tendentially been on the decline over the last decade.[23] By contrast, the *French model* (as applied also in Luxembourg) offers registered partnership as an alternative to marriage to couples irrespective of their sex. Finally, the institution of marriage has been opened to homosexuals by the legislation of the Netherlands, Belgium, Spain and Sweden.[24]

For the individual countries, the pace at which LGBT rights are introduced and the extent to which they are granted have been stated to depend on aspects such as religious traditions, the prevalence of conservative or liberal parties on the political scene, the strength of civil society movements and organisations and EU affiliation. For instance, the exceptionally prolonged hesitation of Austria to regulate this issue even when faced with a number of decisions of the ECtHR (see *supra*) has been associated with the opposition of the Christian Democrat-led government in power until 2007, the early collapse of the subsequent government, the comparatively weak coverage of the issue by national media and, importantly, the relatively low identification of the general public with the EU and European rules. This is compared to Germany as a founding member of the EU with a substantially higher degree of identification in this respect: although departing from similar preconditions and traditions as Austria, it was indeed the fourth EU country to enact a law on registered partnerships under the Social Democrat/Green coalition.[25]

2.3 The emerging relevance of EU norms

EU institutions have begun to include discrimination on grounds of sexual orientation into their agenda in the mid-1990s. In 1994, the European Parliament (EP) issued a recommendation on the abolition of all forms of sexual orientation discrimination, and subsequently a *Resolution on equal rights for homosexuals and lesbians*.[26] Among the Parliament's follow-up activities, especially the *Resolution on homophobia in Europe*[27] is worth mentioning. The Council has recently issued a *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People*.[28]

Contrary to such early expression of political commitment, discrimination of homosexuals continued even within the schemes for the European institutions' own employees. This was exemplified vividly in case *D & Sweden v Council*[29], in which the ECJ

23 Cf Waaldijk, *Same-Sex Partnership, International Protection*, margin no 8.
24 Graupner, *Keine Liebe zweiter Klasse*, 62 et seq.
25 See Kollman, *European institutions, transnational networks and national same-sex unions policy*, 39, 43 et seq, 48 et seq: it is also stressed that the German Green party had strong ties to its European counterparts, which had LGBT rights high on their agenda.
26 OJ 1994 C 61/40, A3-0028/94.
27 European Parliament, 18.1.2006, *P6_TA(2006)0018*.
28 COHOM 162/PESC 804, 11179/10, 17.6.2010.
29 As cited above, par 36.

confirmed that as EU law stood at that time there was no legal basis for challenging a rule that denied specific household supplements granted to married employees of the Council to employees in a registered partnership. It was only this judgement that gave the impetus for a revision of the respective provisions for Council servants.[30]

It was not until the entry into force of the Treaty of Amsterdam that the EU was endowed with the competence to adopt legislation on equal treatment in fields other than free movement (nationality discrimination) and equal pay of men and women. Art 13 of the treaty (now Art 19 of the TFEU) gives the Council the power to enact rules of equal treatment unanimously and with the consent of the EP. On this basis, the framework directive 2000/78/EC was passed, which *lays down* standards for equal treatment regarding, inter alia, sexual orientation. The emphasis set here should serve as a reference to the fact that, as will be discussed in greater detail below, the ECJ has made it clear that the directive does not "establish" itself the rights contained in it.[31] Accordingly, any assessment of EU standards of non-discrimination has to look beyond the framework directive into the fundamental rights standards that must guide EU action according to art 6 of the TEU. In this respect, a considerable step in the direction of a consolidation of the applicable floor of rights has been made in the framework of the Lisbon treaty, which sets the legal value of the EU Charter of Fundamental Rights as equivalent to that of the TEU and TFEU. As a result, art 21 of the Charter, stipulating that "[a]ny discrimination based on [...] sexual orientation shall be prohibited" currently has the status of binding primary EU law.

3. The facts of Maruko and Römer in their national context

Both *Maruko* and *Römer* concern male-male registered partnerships in Germany who were denied financial benefits envisaged for married couples. Under domestic law, registered partnerships have been given a clear legal status by the introduction of the Lebenspartnerschaftsgesetz in 2000 and its subsequent amendment in 2004. The essence of this legal framework is the establishment of mutual rights and obligations of the partners assimilated to those between spouses. By contrast, the left-wing government that adopted the law did not succeed in assimilating the treatment of marriage and registered partnerships also in areas such as financial and tax benefits: for this, consent of the right-wing dominated second chamber of parliament (*Bundesrat*) would have been needed.[32]

As a result, homosexual partnerships are still excluded from a number of benefits that are reserved for married couples under German law. Most of these cases of unequal treatment could not readily be considered relevant under EU law as it stands, which addresses the issue of sexual orientation discrimination only in the framework

30 See Graupner, *Sexuelle Orientierung im europäischen Recht*, 180.
31 Cf par 74 of the ECJ's judgement in *Mangold*, 24.112005, C-144/04.
32 Cf Kollman, *European institutions, transnational networks and national same-sex unions policy*, 46 et seq.

of a directive on employment and occupation. Nevertheless, both *Maruko* and *Römer* successfully claimed the applicability of the framework directive to pension benefit schemes: The ECJ declared Mr Maruko to be entitled to a survivors' benefit after the death of his registered partner just as a married spouse would have been; Mr Römer could claim a more favourable calculation of his own supplementary retirement pension just as former employees who live in (not permanently separated) marriage.

The following subsections will outline the key points of the two rulings and their implications for the compatibility of national frameworks for registered partnerships with EU law.

4. Questions of scope

4.1 The boundaries of "employment and occupation"

The fact that the ECJ qualified the pension benefits at issue in both cases as elements of pay for work (and consequently "working conditions" within the meaning of art 3.1.c of the directive) can hardly be considered a surprising novelty. Much rather, this assessment is based on settled case law in the area of sex discrimination[33], which has been applied unchangedly in cases of discrimination on other grounds.[34] Nevertheless, this characterisation of the benefit makes up the major part of the Court's reasoning in *Maruko*, where it extends over more than 20 paragraphs.

The difficulty with pension schemes of various kinds is that in many cases their nature is ambiguous to a certain degree: they may contain elements both of a "postponed reward" for the work the employee performed for their employer and of a benefit granted to them by the welfare system of the state for social policy considerations (income security as a remedy for the social risks of old age and death). The latter category of benefits does not come within the scope of EU non-discrimination provisions in most areas: currently, only race[35] and gender discrimination[36] are prohibited in principle, and even those provisions are subject to far-reaching exceptions (see notably art 7 of Directive 79/7/EEC). Against this backdrop, it is hardly astonishing that the ECJ follows its longstanding general approach to construe exceptions to the applicability of a principle of EU law (non-discrimination) strictly and defines social security (as

33 Most instructively in case *Beune*, 28.9.1994, C-7/93, par 21 et seq. As stressed by Advocate General Ruiz-Jarabo Colomer in par 54 of his Opinion on Case C-267/06 (*Maruko*), 6.9.2007, the applicability of the definition of pay for purposes of equal pay in the sense of (now) art 157 of the TFEU is confirmed by the reference in recital 13 to the framework directive.

34 Eg ECJ, *Impact*, 15.4.2008, C-268/06; ECJ, *Bruno and Pettini*, 10.6.2010, C-395/08 and C-396/08.

35 See Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

36 See Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

the exempt area) as narrowly as reasonably possible. Accordingly, a characterisation of a benefit in this sense is excluded wherever a sufficient link with a (prior) contract of employment in a specific area can be established. This reasoning is backed up by the broad concept of pay contained in the wording of art 157 TFEU, which includes "any [...] consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer".

More precisely, the Court has come up with three criteria, the cumulative satisfaction of which implies that a specific scheme cannot be considered as one of general social security. These criteria, as set out more precisely in the *Beune* judgment cited above, are: the scheme's restriction to a specific group of employees, the dependence of the grant on periods of employment, and its computation in relation to the employee's last salary.[37] If all these conditions are fulfilled, the pension is considered a benefit provided by an employer for its own (former) employees and therefore a consideration for the performed work in the broader sense. Thereby such pension systems can be distinguished from social security pensions, which are provided upon "considerations of social policy, of State organisation, of ethics, or even the budgetary concerns".[38]

By contrast, the administration of a system by public organs or related institutions (which held true for all the cases just cited) is of no prejudice to its classification as an occupational scheme; neither is the obligatory nature of affiliation and payment of contributions.[39] Consequently, in *Maruko* the ECJ ascribed no importance to the fact that the scheme at issue was administered by the German Theatre Pension Institution (VddB), a public-law body with legal personality under the administrative control of the State,[40] membership in which had been made obligatory for a designer of theatrical costumes such as the life partner of Mr Maruko by a collective agreement.[41]

This jurisdiction would appear to clear up the remaining doubts in respect of the system at issue in *Römer*, which concerned a scheme administered by the City of Hamburg for its employees and clearly fulfilled the three criteria of the ECJ (specific group of employees, calculation upon periods of employment and upon prior salary).[42] The reason why the coverage of the schemes was again a matter of debate is obviously rooted in the wording of art 3.3 of the framework directive. This provision stipulates that the directive "does not apply to payments of any kind made by *state schemes* or similar, *including* state social security

37 In his Opinion on Case C 147/08 (*Römer*), 15.7.2010, Advocate General Jääskinen voices the oft-heard – and certainly warranted – suggestion that the Court refrain from referring to the employee's *last salary*, since many of the schemes meant by the formula use a calculation mechanism that takes account of changes in the amount of salary over time (see footnote 32 to the opinion).

38 *Beune*, par 45. Cf also par 58 et seq of the Opinion of Advocate General Ruiz-Jarabo Colomer on Case *Maruko*.

39 See ECJ, *Garland*, 9.2.1982, 12/81, par 10; *Barber*, 17.5.1990, C-262/88, par 20; and *Lewen*, 21.10.1999, C-333/97, par 21.

40 See Opinion of Advocate General Ruiz-Jarabo Colomer on Case *Maruko*, par 34.

41 Cf par 19 et seq, 49 et seq of the judgement.

42 See Opinion of Advocate General Jääskinen on Case *Römer*, par 59.

or social protection schemes" (emphasis added). This wording basically defies an interpretation in the sense that it would refer *exclusively* to social security. Accordingly, it could be argued that the formulation is meant to include also publicly administered benefits which fall outside "social security" as defined by the ECJ in the mentioned case law.

Not surprisingly, the ECJ did not follow this kind of reasoning, which would have led to a substantially smaller scope of protection compared to other EU regulation on non-discrimination. Much rather, the Court maintains that art 3.3 simply expresses the exclusion of benefits which it has always recognised to be "not equivalent to pay",[43] without even referring to the fact that the exception is formulated in a broader manner than in comparable provisions. A more in-depth analysis of the wording is provided by Advocate General Jääskinen. He argues that indeed social security constitutes only a part of the category of "state scheme or similar". Much rather, there is a number of other benefits and advantages that show characteristics similar to the specifically mentioned case of social security in the sense that a clear link to an employment contract is missing. As examples for such schemes he adduces maintenance payments to victims of war or of persecution, to individuals who suffered a durable detriment to their health during military or civil service, or to eminent artists.[44] The ECJ implicitly extends this enumeration when it juxtaposes its concept of "pay" in opposition to "social security or social protection schemes [...] and payments of any kind made by the State with the aim of providing access to employment or maintaining employment".[45]

Bottom line: the directive imposes an obligation of equal treatment also on occupational pension schemes providing benefits for surviving spouses (*Maruko*) or calculate the employee's pension entitlement on basis of, inter alia, marital status (*Römer*). This part of the Court's findings is in fact rather a clarification of the application of its concept of equal pay also in the context of a framework directive and does not reveal any particularities for the issue of sexual orientation discrimination. The opposite is true for the second issue relating to the scope of the directive: the ECJ's interpretation of recital 22.

4.2 The (ir)relevance of recital 22

Already in the drafting process of the framework directive, several member states were aware of the "danger" that the directive could force them to extensively eliminate differences between marital status and forms of partnership open to homosexual couples. On these grounds, the preamble of the directive was furnished with recital 22, which states that the provisions of the Directive are "without prejudice to national laws on marital status and the benefits dependent thereon". Before the *Maruko* decision, privileges that depend on marital status have therefore largely been considered entirely outside the scope of the directive.[46]

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43 Par 32 of the *Römer* judgement.
44 Par 65 of the opinion.
45 Par 32 of the judgement.
46 For German jurisdiction see Bruns, *Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung*, NJW 2008, 1929.

This assumption proved to be short-sighted, especially because, as stressed by Advocate General Ruiz-Jarabo Colomer,[47] it relies on a non-binding explanation in the preamble as a basis for an exception to a principle as fundamental as non-discrimination on grounds of sexual orientation. The ECJ rejected the idea of such a far-reaching exception to the obligation of equal treatment in merely four sentences,[48] holding that the recital only emphasises the sovereignty states enjoy in the design of family law, where the EU has no competence to interfere. Nevertheless, as any other competence attributed to the member states by primary EU law, it has to be exercised within the boundaries set by common EU standards in other areas[49] – notably the principle of non-discrimination as "the most long-standing and well established principle of the Community legal system".[50] As a result, any member state can assign to the institution of marriage the content it deems appropriate and define the partners eligible for it. If now the state chooses a selective approach, however, it cannot make the entry into such a relationship a precondition for enjoying rights which, according to EU law, have to be granted without discrimination on grounds such as sexual orientation.

The importance of this aspect of the *Maruko* judgement can hardly be overestimated. Actually, it is only by this step of overcoming the often presumed "immunity" of marriage from challenges on grounds of equal treatment that EU law receives the potential of establishing a standard superior to international minimum requirements – ie the obligations of the member states under human rights instruments such as the ECHR. As set out above, the ECtHR's case law stipulates a clear prohibition of less favourable treatment only in comparison to *unmarried* homosexual couples, whereas the preferential treatment of marriage is still permissible at least in several crucial areas of rights and benefits.

5. Comparability – resolving a German case law controversy

The dilemma of any rule of non-discrimination is that it demands equal treatment of individuals in *comparable situations*, while opinions on what is to be considered comparable may diverge substantially. The question of comparability has been the object of many debated decisions in the area of discrimination on grounds of sex (cf the cases *Wiener Gebietskrankenkasse* and *Royal Copenhagen*[51]) or fixed-term work (cf case *Wippel*[52]).

For assessing whether an individual living in a registered partnership is in a situation comparable to that of a married person (and should therefore be granted equivalent em-

47 Par 73 et seq of his opinion on *Maruko*.
48 Par 58 et seq of the *Maruko* judgement. The *Römer* ruling (see par 34) does not provide more than a reference to these considerations in *Maruko*.
49 Cf in this respect the ruling in *Watts*, 16.5.2006, C-372/04, par 92, and *Stamatelaki*, 19.4.2007, C-444/05, par 23.
50 Opinion of Advocate General Ruiz-Jarabo Colomer on Case *Maruko*, par 83.
51 Judgements of 11.5.1999, C-309/97, and of 31.5.1995, C-400/93.
52 Judgment of 12.10.2004, C-313/02.

ployment-related benefits), the ECJ considers the national legal framework for the respective forms of partnership *in the light of the purpose of the benefit* at issue. As regards monetary benefits granted only to former employees living in a specific form of partnerships (just as benefits granted directly to the partner), they obviously find their rationale in the obligation of mutual support between the partners: the monetary grant ensures this support also after the employee's retirement, or even after the employee's death. Accordingly, with regard to a pension benefit, an individual living in a registered partnership is in a comparable situation to the married employees identified as beneficiaries of the rule if they are subject to comparable obligations of maintenance vis- -vis their partner.

Thereby, the Court's approach differs from the stance taken by German courts, which have in the past considered comparability given only in cases where situations are essentially the same. This was consequently denied for German registered partnerships in a sweeping manner because of the mentioned differences in various areas of law. To a substantial degree, this practice persisted even after the ruling in *Maruko*,[53] in which the ECJ largely restricted itself to referring to the German court requesting the preliminary ruling.[54] By contrast to the stance of the Federal Administrative Court just cited, that requesting court had already indicated that it departed from a comparability of situations because of the assimilation of maintenance duties between spouses and registered partners. Consequently, the ECJ contented itself by holding that it was indeed for the national court to determine whether German law as it stood put an individual like Mr Maruko into a situation comparable to that of a surviving spouse of a married employee. Critics of subsequent German court decisions have stressed that these courts should have recognised that by not contradicting the criteria applied by the requesting court[55] the ECJ implicitly confirmed this method of examination, which considers relevant only those legal rules which relate to the purpose of the benefit in question.[56]

The confusion caused by the contradictory case law of different German courts necessitated a more extensive discussion of the comparability aspect in case *Römer*, which was completed by the ECJ's own unambiguous qualification of Mr Römer's situation. The judgment starts by maintaining that comparability does not require complete iden-

53 See esp par 22 et seq of a judgement by the Federal Administrative Court (BVerwG, 15.11.2007, 2 C 33/06), in which comparability is denied with express reference to the ECJ's jurisdiction on the mere grounds that there are still considerable differences between the legal provisions regulating marriage and registered partnership. There is no reference to the question whether those differences are really apt to explain why only one of these categories should merit a specific benefit. To the contrary, the ECJ's approach has been genuinely embraced by the Federal Labour Court (BAG, 29.4.2004, 6 AZR 101/03). Cf Bruns, *Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung,* 1931; Stüber, *Was folgt aus „Maruko"?,* NVwZ 2008, 751; Mahlmann, *Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC: Country report – Germany* (2008), 211; Gruenberger, *The Principle of Equal Treatment in Triangular Relationships* (2009) 21 et seq.

54 Cf par 69 et seq of the judgement.

55 See par 74 of the *Maruko* ruling.

56 Cf Graupner, *Sexuelle Orientierung im europäischen Recht*, 181; Moschel, *Germany's Life Partnerships: Separte and Unequal?*, Columbia Journal of European Law 16(1)/2009-10, 37-66 and Krieger, *EuGH: Ausschluss gleichgeschlechtlicher Lebenspartner von einer Hinterbliebenenversorgung verstößt gegen das Diskriminierungsverbot,* Beck Fachdienst Arbeitsrecht 2008, 257669.

tity.[57] This amounts to a clear rejection of the described approach of national jurisdiction based on an overall comparison of all legal consequences of entering into either a marriage or a registered partnership. The ECJ continues to confirm – explicitly this time – the approach of the referring court in the *Maruko* case, holding that the decisive question for assuming comparability with regard to a pension benefit as the one at issue concerns the respective mutual rights and obligations of the partners.

As stressed also by the Advocate General in his opinion[58], this outcome is in fact required by the *effet-utile* principle: otherwise keeping up some differences between the two forms of partnership in any completely unrelated area would enable states to discriminate without restrictions in the area of employment and occupation. To illustrate this, a parallel could again be drawn to sex discrimination: pregnant women, for instance, are undisputedly subject to a different legal regime than other employees in several areas such as health and safety regulations. As evidenced by an impressive body of case law in this field, this difference could in no way prevent these women's situation from being viewed as comparable to that of other employees when they claim equal pay or access to employment.

It follows that indeed mutual obligations of support and maintenance between partners are the only aspect relevant for the receipt of specific pension benefits. On the basis of the submissions made in that case the ECJ concluded – unsurprisingly – that in this area the regime applicable to registered partnerships "has been gradually made equivalent to that of marriage"[59], which evidenced the comparability of situations.

The Court also exemplified the kind of provisions that could have led to a different conclusion in this regard: Eg if the benefit was dependent on the existence of children, the lack of sufficient income of the partner or the payment of increased contributions for this partner, Mr Römer might have been considered in a different situation with respect to the benefit.[60] *In casu*, though, the mere existence of a spouse was sufficient to grant access to a more favourable calculation of the supplementary pension. Under these circumstances, European law requires that an employee who by law has precisely the same obligations of maintenance and support vis-à-vis his registered partner be granted the same amount of benefits.

By maintaining that, at least in a specific state in a specific situation, registered partnership has to be viewed as comparable to marriage (notwithstanding any specific guarantees the constitution of that state might stipulate for marriage only[61]), the ECJ is clearly ahead of the ECtHR. Although in recent case law there are signs that the Human Rights Court is likely to curtail member states' margin of appreciation in this area in the near future, clear guidelines are still missing. Nevertheless, the mentioned judgment in *Schalk & Kopf* is complemented by other rulings where spouses and registered

57 Par 42 of the ruling.
58 Opinion of Advocate General Jääskinen on Case *Römer*, par 93.
59 Par 44 of the judgement.
60 Par 50 et seq of the judgment.
61 Cf art 6.1 of the German Basic Law.

partners are mentioned in the same breath. This was the case for instance where the Court denied equal treatment in housing matters to two sisters on the grounds that their form of cohabitation could not be considered equal to that of *spouses or registered partners*. Departing from the oft-cited assumption of a mutual inspiration of the two European Courts,[62] the ECJ's case law might well give an incentive to the ECtHR to identify at least some areas in which European human rights law as it stands requires equal treatment of marriage and registered partnership.

6. Direct discrimination: confirmed but not explained

Another point on which the ECJ comes to a conclusion diametrically opposed to that of established case law of German courts[63] concerns the question whether a less favourable treatment of registered partnerships is to be regarded as direct or merely indirect discrimination of homosexuals. This differentiation is crucial for establishing whether different treatment can nevertheless be justified by an overriding policy aim pursued in a proportional manner. In this respect, it must be regretted from the point of view of clarity that the Court failed to adduce any reasons for its decision to consider Mr Maruko a victim of *direct* discrimination (under the precondition of comparability of the situations).[64] This is all the more true considering that this conclusion contradicts also the assessment of the case by the Advocate General.[65] The ECJ also missed the opportunity to substantiate its position in more detail in *Römer*, where in fact the discrimination at issue is characterised as a direct one only *en passant*.[66]

Independent of this lack of solid argumentation, which makes the rulings difficult to apply in other cases, the result of judging the preferential treatment of marriage directly discriminatory is not objectionable, for it amounts to a coherent pursuit of a long-standing approach in case law. First of all, this case law reveals that the mere terminology of a provision cannot turn a case of direct discrimination into an indirect one. This is evidenced by the Court's decision in *Kleist*, in which – again without any explanatory remark – it found the provisions in an Austrian collective agreement to *directly* differentiate on grounds of sex,[67] while in fact that provision merely referred to the attainment of pensionable age (which is, as a matter of fact, still different for men and women in Austria).

More importantly, the ECJ has stated in numerous cases that pregnancy-related discrimination is to be considered direct discrimination on grounds of sex.[68] This is despite the fact that a majority of women in general does not currently fall into that

62 Cf Holzhacker, '*Gay Rights are Human Rights*', 22.
63 See BVerfG 20.9.2007, 2 BvR 855/06, 211 and Stüber, *Was folgt aus „Maruko"?*, 751.
64 Par 72 of the ruling.
65 Opinion of Advocate General Ruiz-Jarabo Colomer on Case *Maruko*, par 96.
66 Par 52, second indent of the judgement.
67 ECJ, *Kleist*, 18.9.2010, C-356/09, par 42.
68 ECJ, *Dekker*, 8.11.1990, C-177/88; *Webb*, 14.7.1994, C-32/93; *Tele Danmark*, 4.10.2001, C-109/00.

category. It follows that it suffices for discrimination to be direct that *all persons subject to less favourable treatment* necessarily belong to one specific sex. Since German legislation on registered partnership follows the Scandinavian model, which knows this institution only for same-sex couples, all individuals discriminated by the differentiation will presumably be homosexual. Consequently, the less favourable treatment of these partnerships must be considered directly discriminatory.

The Court's failure to lay out more precisely its criteria for the delineation of direct and indirect forms of discrimination leaves it unclear whether less favourable treatment of non-married registered partners would constitute (only) indirect discrimination in other countries. The question arises in relation to countries adhering to the French model, where registered partnerships can be entered into by couples of any sexual orientation. The examples from ECJ case law adduced above (retirement age, pregnancy) do not provide sufficient guidance here, because not all of the individuals subject to less favourable treatment are necessarily homosexual. This could imply that in these countries differences between the treatment of married and registered partners are only indirectly discriminatory – and may consequently be justified by a legitimate aim. On the other hand, the ECJ might well attribute importance to the fact that homosexual partners will necessarily belong to the second category, while heterosexuals are given the option to chose. From a teleological point of view, it would seem more likely that the Court would deny access to the possibility of justifying a differentiation also to the governments of these states, as long as they grant and refuse access to the privileged group on the basis of sexual orientation.

The remarks of the Advocate General, who at least dedicates two paragraphs to the question, are not conclusive in their reasoning either; eventually, he states that "it would be contrary to the dominant reality to refuse to admit that in a country like Germany, where marriage is excluded for persons of the same sex and where registered partnership is the form of legal union reserved for them, a difference of treatment exercised to the detriment of persons united by such partnership constitutes discrimination on grounds of sexual orientation".[69]

7. A principle beyond the directive

It was only a question of time until the ECJ would be given an occasion to transfer its famous case law on age discrimination as a general principle[70] to one of the other characteristics covered by the framework directive. The *Römer* case provided for such an occasion, since the question whether the principle of non-discrimination on grounds of sexual orientation had been laid down (only) by the directive was of relevance for the concrete consequences of the ruling (see infra). Considering that all the arguments

69 Opinion of Advocate General Jääskinen on Case *Römer*, par 89. The direct quote is based on my own translation from the original French version, since no official English version is available.

70 See Cases *Mangold*, as cited *supra*, and *Kücükdeveci*, 9.11.2010, C-555/07.

which the Court has brought forward to substantiate the assumption of a general principle prohibiting age discrimination are equally valid with reference to sexual orientation, the confirmation of a corresponding general principle does not come unexpectedly. As the Advocate General states in par 129 of his opinion on the *Römer* case, there would be no conceivable justification for applying the principle of equality in a less vigorous way than this was done in *Mangold* and *Kücükdeveci*.

The cited case law on age discrimination has been subject to a wave of criticism,[71] notwithstanding the fact that it shows a high degree of coherence with earlier jurisdiction in gender discrimination cases: in that area, the ECJ had repeatedly held that equal treatment of the sexes was "simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law."[72] Without going into details on individual aspects of the debate, a central controversy concerns the weak argumentative foundation of the general principle: after all, general principles are derived from already existing obligations of member states under their own constitutional law and/or international human rights standards. However, just as it was the case with age discrimination, the prohibition of discrimination on grounds of sexual orientation was not contained in the domestic law of a number of member states before the entry into force of the framework directive.[73] Accordingly, as has been emphasised on numerous occasions with reference to the *Mangold* case, the ECJ can be reproached for rather *inventing* than finding a general principle of EU law.[74]

While it is not the aim of this contribution to discuss whether, in general, the ECJ's approach is defendable nevertheless, it has to be mentioned that it is confronted with additional difficulties of coherence in the area of sexual orientation. More specifically, the Court has been very clear in its judgement in the *Grant* case[75] delivered in 1998 that EU law did not, for the time being, require equality of treatment for homosexual couples.

A relatively workable resolution of the contradiction thereby arising within European case law could be found departing from the remark made by Advocate General Jääskinen[76] that the *Grant* case was actually decided before the ECtHR pronounced its first decision requiring equal treatment of (unmarried) couples irrespective of their sexual orientation in early 1999.[77] It can therefore be argued that, in line with the well-established understanding of the ECHR as a "living instrument",[78] this content of the

71 Cf Papadopoulos, *Criticizing the horizontal direct effect of the EU general principle of equality*, European Human Rights Law Review Issue 4/2011, 437-447, and the literature cited therein.
72 *P. v S. and Cornwall County Council*, par 18.
73 See Wilets, *The Human Rights of Sexual Minorities: A Comparative and International Law Perspective*, Human Rights No 22/1995, 22 et seq.
74 Cf Micklitz, *Judicial Activism of the European Court of Justice and the Development of the European Social Model in Anti-Discrimination and Consumer Law*, EUI (European University Institute) Working paper (Law) 2009/19, 15.
75 As cited above, par 35 et seq.
76 Opinion of Advocate General Jääskinen on Case *Römer*, par 130.
77 See ECtHR, *Salgueiro Da Silva Mouta v Portugal*, 21.12.1999, par 28, 36.
78 Cf ECtHR, *Tyrer v UK*, 25.4.1978, par 31.

Convention has only developed over time and was still absent at times of the *Grant* judgement. As from 1999, there can be no doubt that EU law contained a principle of non-discrimination on the basis of sexual orientation at least to the extent determined by the ECtHR, since the ECHR is a preeminent source of the Union's general principles (see art 6 of the TFEU). Less than two years later, The EU Charter of fundamental rights was proclaimed, art 21 of which specifically referred to the prohibition of discrimination on grounds of sexual orientation. The fact that the Charter was expressly conceptualised as a visualisation of fundamental rights already present in the form of constitutional traditions and international obligations[79] allows for inferences on the existence of a common standard in this area as from late 2000 at the latest.

Of course, these considerations are of limited practical value when trying to establish the precise date as from which a general principle has prescribed equal treatment to an extent equivalent to that of the framework directive (which, as mentioned, goes further than the ECHR in some aspects, especially when requiring equal treatment with *married* couples). This may give rise to substantial legal uncertainty regarding the temporal dimension of discrimination cases (see *infra*).

After expiry of the deadline for implementation of the framework directive, the main significance of the recognition of non-discrimination as a general principle lies in its horizontal application: general principles form part of primary EU law, which – unlike directives – has the potential of creating rights to be relied on even against other individuals.[80]

8. Direct applicability

In line with constant case law on non-discrimination provisions in diverse areas of EU law,[81] the ECJ considered the obligation of equal treatment to be sufficiently precise and unconditional in order to be relied on directly by a victim of discrimination.[82] Whereas the (semi-)public nature of the funds at issue in both cases was not sufficient to prevent their benefits from falling under "pay" according to art 3.1.c, this same public nature meant that they were in any case covered by the direct effect of the directive,[83] without there being a need for the Court to embark on examining the possible horizontal applicability of the right to non-discrimination.

Pro futuro, horizontal applicability might well be an issue in cases where the discriminatory scheme is an entirely private one. Departing from the principles developed in case law, there can be no question of horizontal effect of rights merely established by means of a direc-

79 See the preamble to the Charter.
80 Cf ECJ, *Defrenne*, 8.4.1976, 43/75.
81 As for sex discrimination, this can be traced back to the *Defrenne* case just cited.
82 Cf par 30 of the *Maruko* and par 54 of the *Römer* judgement.
83 See Opinion of Advocate General Ruiz-Jarabo Colomer on Case *Maruko*, par 30 et seq.

tive. However, with reference to what has been stated above, it can hardly be doubted that the *Mangold* jurisprudence applies also in this area – the result being that equal treatment with reference to sexual orientation as a general principle of community law is valid among private individuals just as much as it can be relied on against the state.

In *Römer*, additional doubts arose with respect to the time frame for which the direct effect of the principle of non-discrimination could be relied on. With a view to well-established jurisdiction, it could not be disputed that the provisions of the *directive* were valid as from the date on which they should have been transposed into national law – *in concreto* 2 December 2003. However, self-evidently, a transposition deadline stated in secondary law can in principle not have a bearing on the application of a general principle of EU law. This has become very clear in the *Mangold* judgment, in which the ECJ required the prohibition of discrimination on grounds of age to be applied at a time when the respective provisions of the directive did not yet have to be transposed.

Advocate General Jääskinen again referred to the ECtHR's 1999 decision and effectively proposed this as the date from which the general principle can be assumed to have existed.[84] He did not refer to the fact that as an element of the ECHR the principle does not (yet) contain an obligation of full equal treatment vis--vis married couples. Although the mentioned *Schalk and Kopf* judgement (issues just several weeks before the opinion was presented) is not conclusive in the area of employment and occupation, the ECtHR's acceptance of the restrictions existing in Austria suggests that limits are possible also in that field. This may have been all the more true more than a decade earlier, in 1999. The Advocate General's reasoning is therefore not entirely persuading, although the stipulation of a precise date would in any case be desirable for the sake of legal certainty.

For Mr Römer, the solution of the Advocate General would have meant a recalculation of his pension as from the entry into a registered partnership in 2001. The Court did not follow that reasoning, though. This was based on the lack of one essential precondition for the application of EU general principles to a specific case: the requirement that the facts of the case be governed by EU law in the first place. Otherwise, essentially any human rights violation occurring in a member state could successfully be brought before the ECJ, without there being any connection whatsoever to the application of EU norms. In *Mangold*, the (heavily disputed) ruling of the Court considered a sufficient link to be established by the fact that the legal provision at issue constituted an exception to equal treatment of fixed-term employees, as envisaged by the directive on fixed-term work[85], and could therefore be regarded as a measure of implementation of the said directive. By contrast, in the *Römer* case (just as in the *Bartsch* case[86] decided two years earlier) such a linking element was missing in total, since "[p]argraph 10(6) of

84 Opinion of Advocate General Jääskinen on Case *Römer*, par 147 et seq.
85 Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.
86 ECJ, *Bartsch*, 23.9.2008, C-427/06.

the First RGG is not a measure implementing Directive 2000/78 or other provisions of European Union law".[87]

Although this conclusion is certainly warranted in the case at issue, it may be regretted that as a result the temporal dimension of the general principle of equal treatment remains entirely unclear.

9. Conclusion and outlook

Summarising all aspects of the *Maruko* and *Römer* judgements discussed *supra*, it can be held that the ECJ has chosen for the interpretation that is more favourable for the applicants in all crucial points: it refused to exclude the applicability of the directive on the basis of either art 3.3 or recital 22, it confirmed the comparability of the situations of spouses and registered partners, found the discrimination to be direct and unjustifiable, and it required the direct and retroactive application of the principle of non-discrimination. Several of these points can probably be viewed as a mere confirmation or specification of early case law on equal treatment. However, notably the rejection of ascribing any decisive meaning to recital 22 (case *Maruko*) and the decision in favour of comparability with married partners (case *Römer*) can be considered an unambiguous sign that discrimination on grounds of sexual orientation is taken seriously on the European level.

In the light of these decisions, it is most likely that a number of current regulations in national law, collective agreements or private schemes will soon be subject to scrutiny on their compliance with the framework directive. As for the ECJ, additional clarification might be asked for especially in the delimitation of direct and indirect discrimination, as has been indicated above. Presumably, though, even the qualification of unequal treatment as only indirect in some countries would not lead to a significant difference in the outcome: it can be expected that the Court will not readily accept differentiations based merely on the legal form of the partnership to be appropriate and necessary. As regards the nearer future, difficulties of interpretation may arise regarding discrimination arising before 2003, as it is unclear when precisely the general principle of non-discrimination on grounds of sexual orientation emerged in EU law.

Viewing the decisions in a broader context, a highly effective form of interaction between the influence of international and European soft law and case law of the European Courts could lead to a considerable acceleration of the move towards more equality between individuals of different sexual orientation. On the one hand, those states which still do not address the issue in their domestic legislation or grant only very restrictive rights are under an increasing pressure to adapt to European standards; they may be forced to grant a minimum level of rights by the ECtHR, as it was the case in

87 Par 63 of the judgment.

Austria. Now, once a basic set of rules is in place that assimilates the position of partnerships between individuals of the same and of different genders, the ECJ will find such partnerships to be in a comparable situation with respect to a number of issues. As a consequence, the framework directive comes into play and demands full equality of treatment with respects to the rights covered by its scope.

The greatest obstacle to a genuine assimilation of the legal position of individuals irrespective of their sexual orientation doubtlessly is the exclusive focus of the directive on the field of employment and occupation. There are boundaries to the possibility of achieving broad applicability by the extensive interpretation of "working conditions" by the ECJ. As the two cases delivered in this area have shown, a range of pension and care systems can be brought under the ambit of the obligation to refrain from discrimination by virtue of the Court's three-criteria test. Yet, as soon as a sufficient link to an employment relationship cannot be established any longer, the language of the directive is clear in leaving regulation to the national level in its entirety. It is opined that this would be the case notably for pensions organised as a pay-as-you-go system (ie not based on capitalisation), even if they are set up for a specific groups of employees only – as in the schemes for freelance occupations in Germany.[88] However, the ECJ has yet to deliver a judgement on whether or not those schemes may still be covered by its wide conception of "pay".[89] With a view to the criteria described above, the mere organisation as a pay-as-you-go scheme cannot be detrimental to a qualification as pay, as long as the amount is dependent on periods of employment and salary received.

Independent from such matters of detail, the development of a common European standard of equal treatment which genuinely corresponds to the EU's commitments in the area of fundamental rights cannot be expected on the basis of current secondary legislation. The logical point of reference for considerations of this kind would be the 2008 Commission proposal on an extended framework directive.[90] This promising prospect of an expansion of non-discrimination to matters of social security, education and access to goods and services is to embrace the concept of all-encompassing protection, which is currently found only in respect to discrimination on grounds of sex or race. And indeed, there could hardly be a plausible reason why discrimination on grounds of belief, disability, age or sexual orientation would be any more legitimate than sex or racial discrimination in vital matters such as the provision of social security. This holds especially true with a view to the possibility of stating exceptions for cases where the nature of one characteristic warrants a different assessment.

The mentioned proposal has only two flaws: one is the indeed extensive list of exceptions that has been inserted into the proposal to safeguard the member states' legal status

88 Cf Stüber, *Was folgt aus „Maruko"?*, 752.
89 See Bruns, *Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung*, 1931.
90 European Commission, Proposal 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.

quo.[91] The other is the manifest lack of political support currently bestowed on the directive in the Council: it has been stressed repeatedly that *de facto* the current framework directive could only pass as a sort of appendage to the race directive, for which there was broad political support in 2000.[92] No equivalent "drawing card" seems available at this moment to ensure the necessary unanimity for an adoption of the extended standards.[93]

The ECJ's case law discussed in this contribution might influence the development of equal treatment of homosexual partners in other areas, though – if the above-mentioned interplay between this Court and the ECtHR is taken into consideration. The fact that all EU member states (ie a substantial part of Council of Europe member states) are obliged to conditionally treat partnerships equally in the area of employment and occupation may serve as an argument for the ECtHR: referring to this standard, it may find discrimination of comparable situations contrary to the current stage of development of human rights under the ECHR – also in other areas such as housing, social security or taxation. Consequently, non-discrimination *as a general principle of EU law* (which includes the ECHR as interpreted by the Strasbourg Court) may soon exceed the narrow limits set in the context of the framework directive. Wherever a case is generally covered by EU legislation, it will be for the ECJ to ensure that these standards are respected.

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Christina Hießl: 2:0 a bejegyzett élettársi viszony javára. A szexuális irányultságon alapuló megkülönböztetés az Európai Bíróság előtt

A Maruko és Römer eseteket megelőzően az európai jog kevés figyelmet szentelt a szexuális irányultságon alapuló megkülönböztetésnek. E két döntés több szempontból jelentős. Az Európai Bíróság visszautasította az irányelv alkalmazhatóságának kizárását a 2000/78/EK irányelv 3.3 cikk vagy a 22. preambulumbekezdés alapján, továbbá megerősítette, hogy a házastársak és a bejegyzett élettársak helyzete összehasonlítható. A Bíróság megállapította, közvetlen és indokolatlan megkülönböztetés történt, és kimondta, a diszkrimináció tilalma közvetlenül és visszamenőleg is alkalmazható. E két, várhatóan az EJEB ítélkezési gyakorlatára is hatással lévő, eset rávilágít arra, hogy az Európai Bíróság komolyan veszi a szexuális irányultságon alapuló diszkriminációt. Az egyes tagállamok törvényei, kollektív szerződései stb. hamarosan ki kell, álljják a keretirányelvnek való megfelelés próbáját. A közvetlen megkülönböztetés, a 2003. előtti diszkrimináció megítélése, illetve a nem foglalkoztatás területén jelentkező megkülönböztetés várhatóan több problémát is felszínre hoz majd. Az új irányelv tervezet tekintetében nehézséget jelent a tagállamok status quo-jának megőrzését célzó kivételek igen terjedelmes listája és az, hogy hiányzik az egyhangú szavazáshoz szükséges politikai akarat.

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91 Cf Bell, *Advancing EU Anti-Discrimination Law: the European Commission's 2008 Proposal for a New Directive*, The Equal Rights Review, Vol 3 (2009), 12.

92 This was related to the entry into the Austrian governing coalition of the right-wing FPÖ, which had a record of a hostile stance against immigrants. Cf Howard, *The Case for a Considered Hierarchy of Discrimination Grounds in EU Law*, 13 MJ 4 (2006), 451.

93 Cf Bell, *Advancing EU Anti-Discrimination Law*, 11.