

## SUMMARY

# **ECJ 10 May 2011 (Grand Chamber), case C-147/08 (Jürgen Römer & v & Freie und Hansestadt Hamburg), Sexual orientation discrimination**

***&p&The supplementary pensions at issue constitute &ldquo;pay&rdquo; within the meaning of Article 157 TFEU and do not fall outside the material scope of the Directive.&/p&The Directive precludes national law such as the Tax Provision if certain conditions are satisfied (see above).&/p&If the Tax Provision is discriminatory, Mr Römer can claim equal treatment under the Directive, but not for the period before 3 December 2003.&/p&***

## **Facts**

This case concerns Mr Römer, a former employee of the City of Hamburg. Following his retirement in 1990, he received an old-age pension based on contributions that his employer (“Hamburg”) and he had made in the course of his employment. On 15 October 2001, Mr Römer, who was homosexual, entered into a civil (“registered”) partnership with another man. He informed Hamburg of this fact and asked Hamburg to reduce the amount of income tax that it deducted from his pension. This request was based on the fact that, in accordance with a provision of German tax law (the “Tax Provision”), Hamburg deducted tax according to tax bracket I, the more favourable tax bracket III being reserved for married couples or persons with family responsibility. Mr Römer demanded to be reclassified into tax bracket III, which would increase his monthly pension by over € 300. He based his claim on Framework

Directive 2000/78 (the “Directive”), which outlaws discrimination on the basis of, inter alia, sexual orientation. Hamburg denied his request, arguing that the different treatment of married retirees and retirees with a civil partnership was justified by the fact that the former can have children and that the German Constitution declares that marriage and family deserve special protection by the government. Mr Römer countered that civil partners can also have children.

### **National proceedings**

The court to which Mr Römer applied referred seven questions to the ECJ. In brief, the questions were:

1. whether the pension in question qualifies as a “state scheme” as provided in Article 3(3) of the Directive, under which “payments of any kind made by state schemes or similar, including state social security or social protection schemes” are excluded from the Directive’s scope;
2. if not, whether the pension is exempted from the scope of the Directive pursuant to its recital clause 22, which provides that the Directive “is without prejudice to national laws on marital status and the benefits dependent thereon”;
3. if not, whether the distinction between married couples and civil partners pursuant to the Tax Provision is compatible with the Directive;
4. if not, whether that distinction violates Article 141 EC (now Article 157 TFEU) or another fundamental principle of EU law;
5. whether, in the event the distinction is incompatible with the Directive or with other EU law, a person such as Mr Römer has the right to be treated in the same way as a married person and, if so, whether this right goes back further than 2 December 2003, the Directive’s transposition deadline;
6. if so, whether this applies only to that portion of his pension rights accrued after 17 May 1990 (the date of the ECJ’s ruling in the Barber case);
7. whether the German Constitution can justify discrimination.

### **ECJ’s ruling**

*Questions 1 and 2*

1. The ECJ referred to its ruling in Maruko (case C-267/06), in which it held that only social benefits that do not qualify as “pay” within the meaning of Article 157 TFEU are excluded from the Directive’s scope. A supplementary pension scheme qualifies as “pay”, notwithstanding recital clause 22 (§ 29-36).

*Questions 3 and 7*

2. The ECJ begins by pointing out that, although legislation on marital status falls within the competence of the Member States, the purpose of the Directive is to combat discrimination (§ 38).

3. Direct discrimination occurs where one person is treated less favourably than another who is in a comparable situation. This presupposes, first, that the situations being weighed up are comparable. As noted in Maruko, it is required not that the situations be identical, but only that they be comparable, and the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. In Maruko, the ECJ held that registered life partnership under German law is to be treated as equivalent to marriage as regards the widow’s or widower’s pension (§ 39-42).

4. According to the referring court, there is no significant legal difference between marriage and registered life partnership as understood in German law. The main remaining difference is the fact that marriage presupposes that the spouses are of different gender, whereas registered life partnership presupposes that the partners are of the same gender (§ 43-45).

5. The benefit at issue in Maruko was a survivor’s pension. The benefit at issue in this case is a supplementary retirement pension. The Hamburg City’s pension scheme aims to provide, on retirement, a replacement income which is deemed to benefit the recipient, but also, indirectly, the persons who live with him. Both married couples and life partners have duties towards each other to support and care for one another and to contribute adequately to the common needs of the partnership. In light of these circumstances, the situations at issue could be comparable (§ 46-48).

6. Mr Römer’s retirement pension would have been increased if he had married instead of entering into a registered life partnership with a man. That more favourable treatment would not have been linked to his wife’s income or to the existence of children. Furthermore, Mr Römer’s contributions to the pension scheme were not in any way based on his marital status, since he was required to make the same contributions as his married colleagues (§ 49-51).

7. Accordingly, the Directive precludes national law under which a pensioner with a registered life partner receives lower retirement benefits than those granted to a married, not permanently separated, pensioner if (i) in the Member State marriage is reserved to persons of different gender and exists alongside a registered life partnership which is reserved for persons of the same gender and (ii) there is direct discrimination on the grounds of sexual orientation because that life partner is in a legal and factual situation comparable to that of a married person as regards that pension, which it is for the referring court to determine (§ 52).

*Question 5*

8. If the Tax Provision is discriminatory, Mr Römer can claim the right to equal treatment against the pension fund without needing to wait for the legislature to make the Tax Provision consistent with the Directive. Did this right already exist between 15 October 2001 (registration of life partnership) and 2 December 2003 (transposition deadline)? In Mangold and Küçükdeveci the ECJ held that the Directive does not in itself lay down the principle of equal treatment in employment, which derives from various international instruments and from constitutional traditions. Nonetheless, for the non-discrimination principle to apply in a case such as that of Mr Römer, that case must fall within the scope of EU law (§ 54-60).

9. Neither Article 13 FFEU, on which the Directive is based, nor the Directive itself enables a situation such as that at issue to be brought within the scope of EU law in respect of the period before 2 December 2003 (see, by analogy, Bartsch, case C-427/06). Moreover, the Tax Provision is not a measure implementing the Directive or other provisions of EU law. Therefore, if the Tax Provision is discriminatory, Mr Römer can only claim equal treatment from 3 December 2003 (§ 61-64). [Note: this part of the ruling goes against the Advocate General's opinion].

*Questions 5 and 6*

10. In view of the answers to Questions 3 and 5 there is no need to answer Question 4.

11. Given that the main proceedings relate to pension paid from 1 November 2001, the Barber ruling has no bearing on this case.

**Ruling**

The supplementary pensions at issue constitute “pay” within the meaning of Article 157 TFEU and do not fall outside the material scope of the Directive.

The Directive precludes national law such as the Tax Provision if certain conditions are satisfied (see above).

If the Tax Provision is discriminatory, Mr Römer can claim equal treatment under the Directive, but not for the period before 3 December 2003.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2011-05-10

**Case number:** C-147/08