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Annotatie Case C-267/06 Maruko

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Case C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Judgment of the Grand Chamber of the Court of Justice of 1 April 2008, not yet reported.

1. Introduction

Maruko is the first case decided by the Court of Justice under Directive 2000/78/EC that concerns discrimination on grounds of sexual orientation. Earlier cases involving arguments regarding such discrimination either arose at a time when this Directive was not yet adopted (*Grant*)¹ or concerned the Staff Regulations (*D and Sweden v. Council*).² Like *Maruko*, these earlier cases concerned facilities for the partners of employees. In those cases the interpretation of EC law provided by the Court of Justice was not favourable for the plaintiffs.³ *Maruko* is the first decision on discrimination on grounds of sexual orientation in the Court of Justice's case law that is favourable for the plaintiff. However, *Maruko* is not only important for being a "first" in this sense and for being "part of the long process of accepting homosexuality, which is a vital step towards achieving equality and respect for all human beings", as stated by Advocate General Ruiz-Jarabo Colomer in his Opinion on *Maruko* (para 2). In addition, the case is important in the context of the division of competences between the EC and the Member States, in particular in relation to civil status, as well as regarding the distinction between direct and indirect discrimination even beyond the field of discrimination on grounds of sexual orientation. It is therefore not surprising that the judgment was handed down by a Grand Chamber of the Court of Justice.

1. Case C-249/96, *Lisa Grant v. South-West Trains Ltd.*, [1998] ECR I-621.

2. Joined Cases C-122/99 P & C-125/99 P, *D and Sweden v. Council*, [2001] ECR I-4319.

3. In *Grant*, the Court refused to interpret the term "discrimination on grounds of sex" as including unfavourable treatment of an employee because she had a same-sex partner. The employee was refused a salary benefit for her partner whilst employees with an opposite-sex partner received the benefit. On *Grant*, see e.g. McInnes, 36 CML Rev. (1999), 1043–1058. In *D and Sweden v. Council*, the Court found that the EU staff law in force at the time did not prohibit unfavourable treatment of a worker having a registered same-sex partner as compared to a worker being married to a different-sex partner. On this case, see e.g. Ellis, 39 CML Rev. (2002), 151–157. In 2004, the Staff Regulations were revised so as to treat registered non-marital partnerships in the same way as marriages, provided that certain conditions are fulfilled (see the very end of this annotation).

2. Facts and legal issues

Under German law, marriage is reserved to opposite-sex couples and a registered partnership is reserved to same-sex couples. In 2001 Mr Maruko and his male partner had their partnership registered in Germany. Mr Maruko's partner used to work as a designer of theatrical costumes. In that capacity, he was a continuous member of the German Theatre Pension Institution (*Versorgungsanstalt der deutschen Bühnen*, Vddb) since 1959. When he died in 2005, Mr Maruko applied for a widower's pension but was refused it because the Pension Regulations did not provide for a pension in such a situation. Under the relevant provision, "[t]he spouse of the insured woman or retired woman, if the marriage subsists on the day of the latter's death, shall be entitled to a widower's pension." In the original German language the word "spouse" in this rule indicates a male person (*"der Ehemann einer Versicherten oder Ruhegeldempfängerin"*). Conversely, it indicates a female person in the parallel rule on widow's pensions (*"die Ehefrau eines Versicherten oder Ruhegeldempfängers"*). After an unsuccessful appeal Mr Maruko brought an action to the competent administrative court (the *Bayerisches Verwaltungsgericht München*), arguing that to refuse him a widower's pension was contrary to Directive 2000/78/EC⁴ (the so-called Employment Equality Directive). In his opinion, the survivors' pensions paid under the Vddb pension system constitute pay, and as such are covered by Directive 2000/78/EC by virtue of its Article 3(1)(c), rather than a social security benefit as excluded by Article 3(3). According to Mr Maruko, to refuse him such a benefit amounts to indirect discrimination on grounds of the sexual orientation of the employee in question (i.e. Mr Maruko's partner), and as such is prohibited under Articles 1 and 2(2)(b) of the Directive. The national court having doubts about the interpretation of the Directive, requested a preliminary ruling from the Court of Justice on the following questions:

- "1. Is a compulsory occupational pension scheme, such as the scheme at issue in this case administered by the [Vddb], a scheme similar to State schemes as referred to in Article 3(3) of Council Directive 2000/78 ...?
2. Are benefits paid by a compulsory occupational pension institution to survivors in the form of widow's/widower's pensions to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78 ...?
3. Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78 ... preclude regulations governing a supplementary pension scheme under which a registered partner does not after the death of his partner receive survivor's benefits equivalent to those available to spouses, even though,

4. Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

like spouses, registered partners live in a union of mutual support and assistance formally entered into for life?

4. If the preceding questions are answered in the affirmative: Is discrimination on grounds of sexual orientation permissible by virtue of Recital 22 in the preamble to Directive 2000/78 ...?

5. Would entitlement to the survivor's benefits be restricted to periods from 17 May 1990 in the light of the case law in *Barber* ...?

Questions 1 and 2 must be read against the background of Recital 13 in the preamble of the Directive, which states: "This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 EC." Regarding question 3, it should be noted that whilst Mr Maruko argued indirect discrimination under Article 2(2)(b) of Directive 2000/78/EC, the national court's reference to Article 2(2)(a) concerns direct discrimination. As will be seen, that is a key issue in the *Maruko* case. As for question 4, Recital 22 states that the Directive is "without prejudice to national laws on marital status and the benefits dependent thereon".

3. Opinion of Advocate General Ruiz-Jarabo Colomer

Advocate General Ruiz-Jarabo Colomer began his Opinion by analysing whether Directive 2000/78/EC can be relied on at all in a situation like that of Mr Maruko (para 29). The facts of the *Maruko* case (namely the refusal to grant Mr Maruko a pension) occurred in February 2005. At that time, the period for the implementation of the Directive had long expired, namely on 2 December 2003. However, the German implementing legislation (the *Gesetz zur Umsetzung Europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*, or Law transposing the European Directives on the principle of equal treatment) was enacted only on 14 August 2006. Accordingly, the *Maruko* case concerned a situation of an alleged difference between a national rule and an unimplemented EC Directive, and Mr Maruko tried to directly rely on provisions of the latter. The Advocate General opined that this does not pose any problem, since, first, the Directive contains an unconditional and precise prohibition of discrimination on grounds of sexual orientation, and, second, the VddB is a public-law body with legal personality and under the administrative control of the State (vertical direct effect of provisions of a directive).⁵

5. See annotation of *Maruko* by Mok, (2008) *Nederlandse Jurisprudentie – Uitspraken in burgerlijke en strafzaken*, No. 350.

In a next step, the Advocate General discussed the scope of Directive 2000/78/EC (paras. 36 et seq.). He turned to the case law on equal pay from the area of sex equality law and recalled that occupational pensions can fall under the concept of pay, the decisive criterion being the relationship of the pension with the employment. In the present case, the Advocate General found that the Vddb survivors' pension does indeed fall under the notion of pay, and that insofar it is covered by Directive 2000/78/EC.

Regarding Recital 22, the Advocate General explained that its role is merely to assist with the interpretation of the provisions of the Directive (para 76). He agreed that the Community has no powers with regard to marital status. However, whilst Community law accepts each Member State's definition of marriage, singleness, widowhood, and other forms of "civil (marital) status", the Member States must exercise that competence in a manner that does not infringe Community law (para 77). The prohibition of discrimination on grounds of sexual orientation is part of that law, in particular in relation to pay. Accordingly, Recital 22 does not prevent cases such as that of Mr Maruko from falling within the scope of application of Directive 2000/78/EC.

The Advocate General then turned to the question of whether the refusal to grant Mr Maruko a survivor's pension amounts to discrimination on grounds of sexual orientation (paras. 83 et seq.). In his analysis, the reason why Mr Maruko was refused a pension was that he was not married to his partner and, therefore, is not a "widower" within the meaning of the pension fund regulations. The Advocate General argued that since the refusal was not based on the sexual orientation of the insured, there is no direct discrimination on grounds of sexual orientation. Instead, he considered that the case involves indirect discrimination, which occurs where an apparently neutral provision puts persons having a particular sexual orientation at a disadvantage, unless that discrimination is objectively justified by a legitimate aim.

According to him, the present case does not concern the access to marriage as such (which under German law is reserved to opposite-sex couples), but rather the effects of two types of union governed by different legal arrangements, namely marriage and the registered partnership. It is therefore necessary to establish whether those two types of union warrant equal treatment, for which purpose the national court must determine whether the legal situation of spouses is akin to that of persons in a registered civil partnership. The Advocate General concluded (para 102): "On that premise, refusal to grant a pension on the grounds that a couple has not married, where two persons of the same sex are unable to marry and have entered into a union which produces similar effects, constitutes indirect discrimination based on sexual orientation, contrary to Article 2 of Directive 2000/78."

Finally, regarding the temporal effect of a judgment of the Court of Justice that would find discrimination on grounds of sexual orientation in relation to a situation like that of Mr Maruko, the Advocate General recalled that case law permits a restriction of the right to rely on a provision only in exceptional circumstances, namely where there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force. Since the assessment of the risk requires the knowledge of a number of factors, of which the Court was not informed, the Advocate General suggested that the Court does not give a reply to this question (paras. 105 et seq.).

4. Judgment of the Court of Justice

The Court began by addressing the scope of the Directive, as relevant against the background of a case like *Maruko* (paras. 34 et seq. of the judgment). The Court stated that the scope of the Directive must be understood, in the light of Article 3(1)(c) and (3) of the Directive read in conjunction with Recital 13 of the Preamble to the Directive, as excluding *inter alia* social security or social protection schemes, the benefits of which are not equivalent to pay within the meaning given to that term for the application of Article 141 EC. Accordingly, the Court set out to determine whether a survivor's benefit granted under an occupational pension scheme such as that managed by the Vddb can be treated as equivalent to "pay" within the meaning of Article 141 EC. Like the Advocate General, the Court recalled its earlier case law according to which, for the purposes of assessing whether a retirement pension falls within the scope of Article 141 EC, the one criterion that may prove decisive of several criteria is whether the retirement pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment. In relation to Vddb pensions, the Court found that the Vddb is a compulsory occupational pension system for a particular category of workers set up by a collective agreement, and that it is financed by the employers and the employees of the relevant industry, to the exclusion of any contribution by the State, that the amount of the pension is not fixed by statute but rather calculated by reference to the total amount of the contributions paid throughout the worker's membership. Accordingly, the benefit in question is pay within the meaning of Directive 2000/78/EC.

As regards Recital 22 of the Preamble to Directive 2000/78/EC, the Court recalled that whilst civil status and the benefits flowing from it are matters which fall within the competence of the Member States, and Community law does not detract from that competence, in the exercise of that competence the

Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination. Accordingly, where a benefit falls within the scope of Directive 2000/78, Recital 22 of the Preamble to Directive 2000/78 cannot affect the application of the Directive.

The Court then turned to the question of whether a case such as that of Mr Maruko involves discrimination on grounds of sexual orientation (paras. 62 et seq.). After having recalled the legal definitions of direct and indirect discrimination in Article 2 of the Directive, the Court referred to various statements of the national court in relation to marriage and registered partnerships under German law. According to the national court, there is a gradual movement towards recognizing equivalence of the two regimes. As a consequence, a registered partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses as far as the survivor's benefit at issue in the main proceedings is concerned. However, the national court finds that entitlement to that survivor's benefit is restricted, under the provisions of the Vddb Regulations, to surviving spouses and is denied to surviving registered partners. The Court of Justice continued:

“71... That being the case, those life partners are treated less favourably than surviving spouses as regards entitlement to that survivor's benefit.

72 If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.

73 It follows from the foregoing that the answer to the third question must be that the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation such as that at issue in the main proceedings under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit. It is for the referring court to determine whether a surviving life partner is in a situation comparable to that of a spouse who is entitled to the survivor's benefit provided for under the occupational pension scheme managed by the Vddb.”

Finally, regarding the effects of the judgment in terms of time, the Court's answer was very brief (paras. 77–79). The Court recalled that it is only exceptionally that the Court, taking account of the serious difficulties which its judgment may create as regards events in the past, is moved to restrict the possibility for all persons concerned of relying on the interpretation which the Court gives to a provision in response to a reference for a preliminary ruling.

The Court found that there was nothing in the documents on the present case to suggest that the financial balance of the scheme managed by Vddb is likely to be retroactively disturbed if the effects of this judgment are not restricted in time. Accordingly, the Court did not limit the effect of the judgment in terms of time.

5. Comment

The main conclusion from the *Maruko* decision is this: in relation to matters falling within the scope of Directive 2000/78/EC, the Member States are obliged to treat in the same way married opposite-sex partners and registered same-sex partners if, under the national law, in relation to the relevant issue, registered partners and married partners are in a comparable situation. In the following comments on the Court's considerations in *Maruko*, a number of issues will be discussed. Two issues are left aside, namely the direct effect of Article 2 of Directive 2000/78/EC and the temporal limitation of the effect of the Court's judgment. In relation to the latter, suffice it to note that whilst *Maruko* is one more of many cases in which this issue is raised, the Court only very rarely decides in favour of such a limitation (*Defrenne II*,⁶ *Barber*,⁷ to mention two examples from the area of social non-discrimination law).

Regarding direct effect, the Court of Justice does not address it in *Maruko*, most likely because the national court had not asked about it. It is probable that the national court did not have any doubts on this issue and, therefore, did not need any assistance from the Court of Justice in that respect. Most notably, the *Maruko* case did not pose the same problems as the much debated case *Mangold*,⁸ which concerned discrimination on grounds of age allegedly committed by an individual against another individual during the prolonged implementation period in the context of discrimination on grounds of age or disability. In the following comments, three issues are discussed: first, in the context of the scope of Directive 2000/78/EC, the role of recitals in preambles

6. Case 43/75, *Gabrielle Defrenne v. SABENA*, [1976] ECR 455.

7. Case C-262/88, *Douglas Harvey Barber v. Guardian Royal Exchange Assurance Group*, [1990] ECR I-1889.

8. Case C-144/04, *Werner Mangold v. Rüdiger Helm*, [2005] ECR I-9981; on *Mangold*, see e.g. Editorial comments, "Horizontal direct effect – A law of diminishing coherence?", 43 CML Rev. (2006), 1–8, and Tobler, "Putting *Mangold* in perspective: in response to Editorial comments, Horizontal direct effect – A law of diminishing coherence?", 44 CML Rev. (2007), 1177–1183. More recently, see also the Court's judgment in Case C-427/06, *Brigit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, judgment of 23 Sept. 2008, nyr.

to directives; second, the distinction between direct and indirect discrimination; and, third, the comparability of married and registered partners.⁹

5.1. *The role of recitals in the Preamble to Directive 2000/78/EC for the scope of the Directive*

The longer a preamble, the more issues may arise in relation to it. Compared to early legislation, more recent secondary law of the EC often contains long preambles. For example, whilst Directive 64/221/EEC¹⁰ contained just four (unnumbered) recitals, the directive replacing it, namely Directive 2004/38/EC,¹¹ contains 31 of them. To mention two more (and more extreme) examples: the Preamble to the e-commerce Directive¹² contains 65 recitals covering more than seven pages in the Official Journal, and the Services Directive¹³ boasts the almost incredible number of 118 recitals covering more than 14 pages. Compared to this, the 37 recitals of the Preamble to the Employment Equality Directive appear relatively modest. Even so, some of them have already caused debate. *Maruko* is an example.

In *Maruko*, Advocate General Ruiz-Jarabo Colomer explains the difference between legislative provisions and recitals in preambles in the following manner (para 76): “[L]egislative provisions describe facts, situations or circumstances and attribute certain consequences to them. The factual situation and the legal result are therefore the two essential elements of a legal rule. But the explanatory memorandum, the preamble or the introductory recitals, which merely seek to illustrate, state the reasons for or explain, do not form part of these essential elements, since, although they accompany, and usually precede, the enacting terms of the measure, forming a physical part of it, they have no binding force, notwithstanding their usefulness as criteria for interpretation, a role which the Court has frequently cited.”¹⁴ It should be noted that assisting

9. See also Waaldijk, annotation of *Maruko*, (2008) *European Human Rights Cases*, No. 65, 628–631.

10. Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, O.J. 1964, 56/850–857.

11. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J. 2004, L 158/77.

12. Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), O.J. 2000, L 178/1.

13. Directive 2006/123/EC on services in the internal market, O.J. 2006, L 376/36.

14. Earlier, A.G. Tizzano in his Opinion on the *BECTU* case explained that preambles merely serve “the purpose of giving reasons for the substantive provisions which follow, not to lay down

interpretation is not the only function of recitals. At least as important are its functions in the context of the political and judicial control over the legality of the measure at issue.¹⁵

Maruko illustrates that the assisting role of recitals is unproblematic where a recital correlates with an explicit provision of the directive at issue. In contrast, it can cause quite some debate where a recital stands alone, i.e. where there is no corresponding provision in the directive. In Directive 2000/78/EC, Recital 13 is an example of the former situation and Recital 22 the latter. In *Maruko*, the Court states that two parts of Article 3 of the Directive must be read in conjunction with Recital 13, namely Article 3(1)(c), which includes pay in the scope of the Directive, and Article 3(3), which excludes social security from it. To these provisions, Recital 13 adds the link to Article 141 EC, which prescribes equal pay for men and women for equal work and for work of equal value, in relation to the meaning of the concept of “pay”. However, it is questionable whether the Court needed such prompting. After all, since it first began with the famous *Barber* case, a very considerable case law has developed in the area of sex equality law precisely on the delicate question when occupational pension benefits must be regarded as pay. It is therefore likely that even without Recital 13 the Court would have turned to this case law. Even though different types of discrimination raise different issues,¹⁶ many basic legal issues are the same. Accordingly, the case law on sex discrimination, which is both much older and much larger than that on Directive 2000/78/EC or on Directive 2000/43/EC,¹⁷ will be often relied on when interpreting legal concepts under these directives. It is therefore not surprising that it was also relied on in *Maruko* – contrary to the argument made by the VdB, according to which the *Barber* case law could not apply because that case arose in a different type of dispute (see para 25 of the A.G.’s Opinion), and in spite of the fact that the legal consequences of the distinction between social security benefits and pay are not quite the same under Directive 2000/78/EC as under sex equality law or under Directive 2000/43/EC.¹⁸ In fact, the explicit

legislative rules of their own”; Case C-173/99, *The Queen v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, [2001] ECR I-4881, para 41 of the A.G.’s Opinion.

15. See e.g. Case 24/62, *Germany v. Commission EEC*, [1963] ECR 63. For the origins of the duty to give reasons contained in the EC Treaty, see the references in Waaldijk, *Motiveringsplichten van de wetgever* (Vermande, Lelystad, 1994), pp. 324–326.

16. See e.g. McCrudden, “Thinking about the discrimination directives”, (2005) *European Anti-Discrimination Law Review*, 17–21, at 17.

17. Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22.

18. If a particular case involves a social security benefit, this brings it outside the scope of Directive 2000/78/EC altogether. Under sex equality law, it means that Directive 79/7/EEC (on

wording of Recital 13 shows that both of these points are not relevant. More generally, it is well known that the Court of Justice sometimes even relies on case law from another area of law,¹⁹ though at the same time it will emphasize that the same term will not necessarily have the same meaning in all contexts but may differ, for example depending on whether the term is part of the definition of a fundamental right or of a derogation to such a right (compare e.g. the different interpretation of the term “pay” in the cases *Allonby*²⁰ and *Del Cerro Alonso*²¹).

Compared to Recital 13, Recital 22 in Directive 2000/78/EC caused much more of a debate. When implementing the Directive, at least three Member States (Ireland, Italy and the United Kingdom) interpreted this recital as a basis for allowing more beneficial treatment of married partners.²² Indeed, courts in the United Kingdom and Germany have held that Recital 22 provides the legal basis for such different treatment.²³ In *Maruko*, the national court noted that the content of Recital 22 is not reflected in the enacting terms of Directive 2000/78/EC and it wondered whether such a Recital can restrict the scope of the Directive. According to the national court it is not appropriate, in view of the importance of the Community law principle of equal treatment, to interpret

the progressive implementation of the principle of equal treatment for men and women in matters of social security, O.J. 1979, L 6/24) rather than Art. 141 EC applies. Under Art. 141(1) and (2) EC, different treatment of comparable cases on grounds of sex is absolutely prohibited (no justification possibilities). In contrast, under Art. 7 of Directive 79/7, the Member States are entitled to exclude from the directive’s scope, among other things, the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits (though Member States must periodically examine matters excluded under para 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned). The Race Directive (2000/43/EC, *supra* note 17) explicitly includes “social protection, including social security and healthcare” in its scope.

19. E.g. Case C-317/93, *Inge Nolte v. Landesversicherungsanstalt Hannover*, [1995] ECR I-4625, para 19, regarding the concept of the “working population”, where the Court referred, among other things, to case law from the area of free movement for workers.

20. Case C-256/01, *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, [2004] ECR I-873, para 66.

21. Case C-307/05, *Yolanda Del Cerro Alonso v. Osakidetza-Servicio Vasco de Salud*, [2007] ECR I-7109, para 39.

22. See Waaldijk and Bonini-Baraldi, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive* (Asser, The Hague, 2006), p. 115.

23. For Germany, see Lembke, “Sind an die Ehe geknüpfte Leistungen des Arbeitgebers auch an Lebenspartner zu gewähren?”, (2008) NJW, 1631–1634, at 1633. For the UK, see Gijzen, *Selected Issues in Equal Treatment Law* (Intersentia, Antwerpen, 2006), pp. 364–370. Gijzen also describes the changes that were made to the marital status exception in the anti-discrimination regulations when civil partnership legislation was introduced in the UK in 2005.

the recitals to the Directive broadly. Before the Court of Justice, Mr Maruko argued that if the Community legislature had wanted to exclude all benefits bound up with civil status from the scope of Directive 2000/78/EC, the content of that recital would have been the subject of a particular provision among the enacting terms of the Directive. According to the Vddb and the United Kingdom Government, Recital 22 contains a clear and general exclusion and determines the scope of the Directive (para 39 of the judgment). The Commission thought that the recital does no more than state that the European Union lacks competence in matters regarding civil status. As for Advocate General Ruiz-Jarabo Colomer, he argued that, “like the rest of the preamble, Recital 22 to Directive 2000/78 merely assists with the interpretation of the provisions of the Directive and its significance must not be overstated” (para 76 of the Opinion).

The arguments made by the parties in *Maruko* very much resemble those made in the earlier case *Palacios de Villa*,²⁴ which concerned the question of whether the fixing of a statutory compulsory retirement age in employment falls within the scope of application of Directive 2000/78/EC. According to Recital 14, this Directive “shall be without prejudice to national provisions laying down retirement ages”. In *Palacios de la Villa*, the governments of Spain, Ireland, the Netherlands and the United Kingdom as well as the defendant maintained that because of Recital 14 the principle of non-discrimination on grounds of age as laid down in the Directive does not apply to a national law such as the one in question (para 43 in the Advocate General’s Opinion). Similar questions are again asked in the pending cases *Römer*²⁵ and *Age Concern England*.²⁶ However, both in *Palacios de la Villa* and in *Maruko* the Court refused to accept the reasoning that the recitals in question limit the Directive’s scope. Instead, it followed the line of argument of the Commission. In *Palacios de Villa*, the Court stated (para 44 of the judgment): “It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.”

24. Case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, [2007] ECR I-8531. On *Palacios de la Villa*, see Waddington, 45 CML Rev. (2008), 895–905, in particular at 902.

25. Case C-147/08, *Jürgen Römer v. Freie und Hansestadt Hamburg*, pending.

26. Case C-388/07, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, pending.

In *Maruko* (para 59 of the judgment), the Court explicitly adds what would appear to be implied in *Palacios de la Villa*, namely that whenever the Member States exercise their competences, they must respect the limits set by Community law and, in particular, the provisions relating to the principle of non-discrimination. This is a well-known adage in the Court's case law where it has been applied in such different contexts as direct taxation,²⁷ social security systems,²⁸ the organization of the Member States' military forces,²⁹ and collective action,³⁰ to mention just a few examples. In effect, this means that the fact that the Treaty does not give the EC an explicit competence in a given field, thereby leaving it with the Member States, does not mean that EC law from *other* areas – either on the level of Treaty provisions or that of secondary law – cannot apply in this field. Put differently, the Member States' competences are not “exclusive” in the sense that national legislation is immune from EC law. For the Member States, this may be difficult to accept, in particular where EC law touches upon fields that have traditionally been considered as Member State reserves, such as taxation, the army or marriage.³¹

Against this background, the Court's considerations in *Maruko* confirm that a reference to a Member State competence in the preamble to an EC law measure does not mean that the application of this measure is thereby excluded.³² Rather, whether or not the measure applies depends on its field of application. In the specific context of *Maruko*, it follows that those Member States that, within the field of application of the Directive, allow for disadvantageous

27. E.g. Case 270/83, *Commission v. France*, [1986] ECR 273 (*Avoir fiscal*), para 24, and many cases since.

28. This is the example to which the Court refers in *Maruko*, by mentioning Case C-372/04, *The Queen, on the application of Yvonne Watts v. Bedford Primary Care Trust and Secretary of State for Health*, [2006] ECR I-4325, para 92, and Case C-444/05, *Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmaton (OAE)*, [2007] ECR I-3185, para 23.

29. Case C-273/97, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence*, [1999] ECR I-7403, para 16; Case C-285/98, *Tanja Kreil v. Bundesrepublik Deutschland*, [2000] ECR I-69, para 16; Case C-186/01, *Alexander Dory v. Germany*, [2003] ECR I-2479, para 31.

30. Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779, para 40.

31. Apart from the issue of competences, family law is a prime example of an area where EC law has an influence simply because of the frequent reference in EC law to concepts coming from this area; see e.g. Tobler, “Der Begriff der Ehe im EG-Recht”, (2001) *Die Praxis des Familienrechts*, 479–499. More recently, see e.g. Art. 2 of Directive 2004/38/EC, *supra* note 11.

32. See also Brinktrine (case note on *Maruko*), (2008) *Justizzeitung*, 790–792, at 791, and Driguez, *Discrimination en raison de l'orientation sexuelle*, Europe 2008 Mai Comm. No. 150, 13.

treatment of same-sex partners simply based on Recital 22, as mentioned above, will have to reconsider their laws in the light of the *Maruko* decision.

Finally, even though the Court does not say so explicitly in *Maruko*, it is clear that for the issue of the basic division of competences between the EC and its Member States it does not matter whether or not a recital in a preamble relates to an explicit provision in the piece of secondary legislation at issue. After all, a recital such as Recital 22 contains a mere statement of a fact that exists independent of the Directive, namely as part of the constitutional system set up by the EC Treaty.³³ Evidently, this constitutional framework can neither be changed by a recital nor by a provision in a Directive, not even by a combination of a provision and a recital.

5.2. *The distinction between direct and indirect discrimination*

On the level of substance, the finding that a case like that of Mr Maruko, turning in fact about the sex of his partner, has to be examined in the light of the prohibition of discrimination on grounds of sexual orientation, rather than sex or any other ground of discrimination, is not new in EC law. It can already be derived from the Court's judgment in *Grant*.³⁴ The same approach has been taken by the European Court of Human Rights (*Karner*),³⁵ and by the UN Human Rights Committee (*Young v. Australia*,³⁶ *X v. Colombia*).³⁷ According to this case law (all about unequal treatment of same-sex and different-sex unmarried cohabiting partners), sexual orientation not only refers to a characteristic of a person but also to his or her relationship with another person.³⁸

Much more surprising is the finding in *Maruko* that the disputed differentiation between married and registered partners involves *direct* discrimination on grounds of sexual orientation, rather than *indirect* discrimination on that ground, as had been argued by the Commission, Advocate General Ruiz-Jarabo Colomer and even Mr Maruko himself. The distinction between the two concepts is important for practical reasons. First, in most contexts the possibilities of justification are fewer in the case of direct discrimination than in the case of indirect discrimination, since direct discrimination can only be justified on the

33. Similarly, de Schutter, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States. Part I – Legal Analysis* (European Union Agency for Fundamental Rights, Vienna, 2008), p. 55.

34. *Grant*, *supra* note 1.

35. *Karner v. Austria*, judgment of 24 July 2003, application No. 40016/98, ECHR 2003-IX.

36. *Young v. Australia*, decision No. 941/2000 of 29 Aug. 2003.

37. *X v. Colombia*, decision No. 1361/2005 of 30 March 2007.

38. Waaldijk and Bonini-Baraldi, *op. cit. supra* note 22, pp. 110–117.

basis of justification grounds stated in the law. In fact, under Directive 2000/78/EC, only with respect to the ground of age can direct discrimination be justified on the basis of objective reasons in a broad sense of the word.³⁹ For other types of discrimination, the Directive provides a limited number of specified justification grounds (none of which seem relevant in the case of *Maruko*). In fact, it has been suggested that in *Maruko* the Court opted for a finding of direct discrimination in order to exclude the objective justification argument of fostering marriage, that had been accepted by the German courts on the basis of Article 6 of the German Constitution.⁴⁰ Second, indirect discrimination may be less easy to prove than direct discrimination, in particular where the law requires proof on the basis of statistics. Under Directive 2000/78/EC, statistical proof is not necessary. However, regarding the appreciation of the facts from which it may be inferred that there has been discrimination, Recital 15 in the preamble to the Directive refers to rules of national law or practice. The same recital explicitly states that such rules “may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence”.

The *Maruko* decision does not offer any real explanation as to what brought the Court to apply a direct rather than an indirect discrimination approach. The Court notes that under German law marriage remains reserved to heterosexual couples, and that, in order to grant same-sex couples the possibility to enter into a formal relationship, a special regime was introduced in 2001 in the form of a registered partnership, which the national court considers as equivalent to a marriage for present purposes. The Court further notes that under the pension scheme of the VdDB a surviving registered partner is treated less favourably than a surviving married partner. From this, the Court then simply concludes that there is direct discrimination on grounds of sexual orientation, provided that – so far as concerns the survivor’s benefit at issue – the situation of surviving registered partners is comparable to that of surviving married partners. In most academic comments, this finding is welcomed,⁴¹ though finding the

39. Art. 6 of the Directive, which was at issue in *Mangold*, cited *supra* note 8. Further examples where objective justification is possible for direct discrimination are: Clause 4 in the Annex to Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, O.J. 1998, L 14/9; Clause 4 in the Annex to Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, O.J. 1999, L 175/43, and Art. 4 of Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. 2004, L 373/37.

40. Lembke, *op. cit. supra* note 23, 1633.

41. E.g. Mahlmann, “Gleichstellung gleichgeschlechtlicher Lebenspartnerschaften bei Hinterbliebenenversorgung”, (2008) *EuZW*, 314–319, at 319; Potz, “Gleichstellung homosexueller Paare bei der Hinterbliebenenversorgung?”, (2008) *Österreichisches Recht der Wirtschaft*,

reasons for the Court's approach is not easy. When searching for such an explanation, it may be useful to recall the fact that, different from an earlier generation of EC non-discrimination law, the Employment Equality Directive contains legal definitions of both direct and indirect discrimination. Under Article 2(2) (a), "direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1". In situations of direct discrimination the link with the discrimination ground is strong both in form and in substance. Regarding the form, the link is straightforward inasmuch as a prohibited ground is explicitly and obviously relied on. For example, people of colour are refused access to a nightclub whilst other people are accepted. Regarding substance, the entire group of the disadvantaged consists of people of colour, whilst the entire group of the advantaged consists of other people. This is typical for direct discrimination. In contrast, indirect discrimination concerns cases where "an apparently neutral provision, criterion or practice" would put persons protected by the relevant provision "at a particular disadvantage compared with other persons" (Art. 2(2)(b) of the Directive). Here, the link with the discrimination criterion is weaker both in form and in substance. On the level of form, there is a reliance on an apparently neutral criterion. On the level of substance, it is characteristic for indirect discrimination that the division between the groups that are differently affected (i.e. those advantaged and those disadvantaged by the measure in question) is not quite the same as in the case of direct discrimination. Typically, the group of the disadvantaged is consisting not exclusively, but only disproportionately of persons that are protected by the discrimination ground in question. Accordingly, they are "merely" over-represented in the disadvantaged group. This may be illustrated by using the classic example of part-time work in the context of sex discrimination. Where part-time workers are treated less favourably than full-time workers, this will normally disproportionately affect women. This is due to the fact that in many countries of the EU a traditional division of roles in the family applies, according to which it is predominantly women who perform domestic work and care work, which in turn makes it difficult for women to engage in full-time work outside the home. At the same time, there is nothing to prevent men from working part-time, and some men (though a considerably smaller percentage than that of women) indeed do. Accordingly, worse treatment of part-time workers than full-time workers will affect not only women, but also these men.

405–408, at 404; Weisse-Marchal, "Le droit à une pension de veuf du partenaire de vie du même sexe", (2008) *Recueil Dalloz*, 1873–1876, at 1876; and Lhernould, "Les droits sociaux des couples homosexuels", (2008) *Droit social*, 712–716, at 714. Conversely, Lembke, op. cit. *supra* note 23, 1633, criticizes the Court of Justice's finding of direct discrimination.

Before the *Maruko* case came to the Court, some academic writers had already argued that such cases involve direct discrimination on grounds of sexual orientation, though they usually expected that the Court would find indirect discrimination once it would be presented with such a case.⁴² This expectation was justified in view of case law of the Court of Justice that did put the emphasis on the formal aspect. Under this case law, any measure that did not formally rely on a prohibited criterion would be assessed in the framework of indirect discrimination, even if its substantive effect was (practically) the same as in the case of direct discrimination. The only somewhat special case was disadvantageous treatment on grounds of pregnancy, which the Court considered equivalent to sex, because of the fact that by nature only women can become pregnant (*Dekker*,⁴³ para 12). Here the disadvantaged group consisted not (only) disproportionately but exclusively of women. Outside this special case, the Court's approach, as briefly described, is illustrated by *Schnorbus*, a sex equality case decided in 2000.⁴⁴ This case concerned admission to practical legal training in Germany. Since there were more applications than places, the law provided for the postponing of applications, with certain derogations in cases of hardship. One of these derogations concerned persons who had done compulsory military or civil service. Under German law, this applied exclusively to men. As a result, only men could benefit from this particular hardship clause, and women could never benefit from it. Asked whether this amounts to direct or to indirect sex discrimination, the Court stated that "only provisions which apply differently according to the sex of the persons concerned can be regarded as constituting discrimination directly based on sex" (*Schnorbus*, para 33). The Court therefore analysed the hardship clause in the light of the concept of indirect sex discrimination. This was criticized in academic writing where it was suggested that in view of their substantive effects

42. Bell, "Sexual orientation discrimination in employment: an evolving role for the European Union" in Wintemute and Andenas (Eds.), *Legal Recognition of Same-Sex Partnerships* (Hart, Oxford, 2001), pp. 653–676, at p. 668; Waaldijk, "Towards the recognition of same-sex partners in European Union law: Expectations based on trends in national law" in *ibid.*, pp. 635–651, at p. 645; Ytterberg, "Sweden" in Waaldijk and Bonini-Baraldi, *Combating sexual orientation discrimination in employment* (Universiteit Leiden, Leiden, 2004), pp. 439–477, at pp. 459–460 (available at <http://hdl.handle.net/1887/12587>); Wintemute, "United Kingdom" in *ibid.*, pp. 479–518, at p. 495; Waaldijk and Bonini-Baraldi, *op. cit. supra* note 23, pp. 42 and 115–117.

43. Case C-177/88, *Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV Centrum) Plus*, [1990] ECR I-3941.

44. Case C-79/99, *Julia Schnorbus v. Land Hessen*, [2000] ECR I-10997. Other, earlier examples concern the obligation to perform military service; see Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia, Antwerp/Oxford, 2005), pp. 308 et seq.

such cases should be analysed in the context of direct discrimination.⁴⁵ However, the same approach can also be found in national case law. For example, the Dutch Equal Treatment Commission (which is a quasi-judicial equality body dealing with discrimination cases on many grounds) in cases comparable to *Maruko* found indirect discrimination on grounds of sexual orientation.⁴⁶ It is, therefore, not surprising that Mr Maruko himself, the Commission and Advocate General Ruiz-Jarabo Colomer all argued in favour of indirect discrimination.

However, more recently the Court appears to have moved away from an approach that focuses on form alone. Before *Maruko*, this could already be observed in *Nikoloudi*, which was decided in 2005.⁴⁷ *Nikoloudi* is a rather complex case concerning rules under a collective agreement on the promotion of temporary staff to established staff. Under those rules, only temporary staff that had worked full-time for at least two years were eligible for the position of established member of staff. The case concerned a female temporary staff member who, after having been employed part-time as a cleaner, worked full-time for a little less than two years and for that reason did not qualify for the promotion to established staff member. The national court seized with the matter asked the Court of Justice whether such a case involves indirect sex discrimination, even if the rule excluding part-timers from promotion in fact only affected female cleaners. The reason for this was a provision in the General Staff Regulations stipulating that only women could be taken on as part-time cleaners. Ms Nikoloudi, the Commission and Advocate General Stix-Hackl all argued that such a case involved indirect sex discrimination.

However, the Court found that “the ... exclusion of a possibility of appointment as an established member of staff by reference, ostensibly neutral as to the worker’s sex, to a category of workers which, under national rules having the force of law, is composed exclusively of women constitutes direct discrimination on grounds of sex” (*Nikoloudi*, para 36). The Court added that where, in spite of the General Staff Regulations, the part-time work force did in fact include some men, the analysis would have to be one of indirect discrimination (*Nikoloudi*, paras. 44 et seq.). In *Maruko*, the Court takes the same approach. In both cases, it would seem that the Court has shifted its focus away from

45. Tobler, op. cit. *supra* note 44, pp. 312 et seq., with further references; also Bell, “Direct Discrimination” in Schiek, Waddington and Bell (Eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart, Oxford, 2007), pp. 185–322, at p. 218.

46. E.g. Dutch Equal Treatment Commission decision of 19 Oct. 1998 in Case 1998/115 (text available at www.cgb.nl).

47. Case C-196/02, *Vasiliki Nikoloudi v. Organismos Tilepikinonion Ellados AE*, [2005] ECR I-1789.

form to substance. It is a move away from an approach under which only measures that are explicitly based on the prohibited criterion or on a criterion that is by nature indissociably linked to it (such as pregnancy in the case of sex) amount to direct discrimination. Instead, direct discrimination now also includes measures that are formally neutral but that, due to legislative provisions or to binding rules of the employer, have the same exclusionary effect as measures directly relying on the prohibited criterion. This means that direct discrimination now also includes cases where reliance on a formally neutral criterion in fact only affects one protected group, be it by nature or because of a rule that has the force of law. In contrast, indirect discrimination relates to cases where an apparently neutral criterion has as an effect that is less far-reaching but still reaches the required level of disparate impact or particular disadvantage.⁴⁸

A similar approach was already reflected in a case decided in 1990 in the United Kingdom, namely *James v. Eastleigh Borough Council*,⁴⁹ which concerned sex discrimination and pensionable age. In this case, which concerned free entry to a swimming pool for women once they had reached the age of 60 and for men once they had reached the age of 65, the House of Lords decided that given the legal situation in the UK at the time, reliance on the pensionable age could not be regarded as a requirement or condition which is applied equally to persons of either sex, because it was by itself discriminatory between the sexes. Instead, it was no more than a convenient shorthand expression that referred to the age of 60 in a woman and to the age of 65 in a man. Commenting on this decision, Gijzen notes that its consequence is that policies that are founded on a status-based criterion are not susceptible for objective justification.⁵⁰ According to Gijzen this is a correct approach. The present writers agree, because such criteria do not merely have a disparate impact within the meaning of the concept of indirect discrimination, but indeed an effect which is substantially the same as that of direct discrimination.

Finally, it is important to note that the Court of Justice's approach to the distinction between direct and indirect discrimination in *Maruko* is not a result of the modern legal definition of direct discrimination under Directive 2000/78/EC. After all, the Court relied on the same approach in *Nikoloudi*, which was decided under Directive 76/207/EEC in its original version.⁵¹ Since this

48. As to the situation where national law does not reserve partnership registration to same-sex couples only, see below, in the section on comparability.

49. *James v. Eastleigh Borough Council*, [1990] 2 All ER 607.

50. Gijzen, *op. cit. supra* note 23, p. 103.

51. Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 1976, L 39/40.

Directive did not contain any legal definitions of discrimination,⁵² the case law definition of direct discrimination applied, which is somewhat different from that under Directive 2000/78/EC.⁵³

5.3. *The comparability of married and registered partners*

A final element to be discussed is the requirement of comparability contained in the definition of direct discrimination in Article 2(2)(a) of the Directive 2000/78/EC. The national laws of several Member States, including Romania, Belgium and The Netherlands, do not mention such a requirement.⁵⁴ As for EC law, it must be remembered that under the general definition of equality and discrimination in EC law (which, according to the Court,⁵⁵ “are simply two labels for a single general principle of Community law” and thus mean the same), the right to equal treatment presupposes a comparability of situations. According to the Court, “discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations”.⁵⁶ This broad definition mirrors the general principle of non-discrimination or equal treatment, (sometimes also called “general principle of equality”), which underpins the whole of EC law and which requires that what is like (comparable) be treated alike whereas that what is different be treated differently according to the degree of difference, unless there is objective justification.⁵⁷ Against this background the express reference to the requirement of comparability in the definition of direct discrimination in Article 2(2) (a) does not add anything new or surprising.

52. The directive was later amended by Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. 2002, L 269/1. It will be replaced by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O.J. 2006, L 204/23. Both the amending directive and the Recast Directive contain legal definitions of direct and indirect discrimination.

53. Tobler, op. cit. *supra* note 44, pp. 288 et seq.

54. Waaldijk and Bonini-Baraldi, op. cit. *supra* note 22, pp. 99 and 159; Bell, op. cit. *supra* note 45, p. 209. Until 2008, this was also true for France, but Law 2008–496 of 27 May 2008 (*portant diverses dispositions d’adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*) has now introduced a definition of direct discrimination that is very similar to that of the Directive.

55. Case C-422/02 P, *Europe Chemi-Con (Deutschland) GmbH v. Council and Commission*, [2005] ECR I-791, para 33.

56. E.g. Case C-157/02, *Rieser Internationale Transporte GmbH v. Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)*, [2004] ECR I-1477, para 39.

57. E.g. Case C-390/06, *Nuova Agricast Srl v. Ministero delle Attività Produttive*, judgment of 15 April 2008, nyr., para 66.

Whether or not Mr Maruko will actually win his case in Germany depends on whether the national court considers that, under German law, his situation is comparable with that of a surviving spouse. In this context, it must be noted that the comparability – as concerns the survivor's benefit at issue – is to be judged "under national law" (para 73 of the judgment). Advocate General Ruiz-Jarabo Colomer describes the essential features of the German *Lebenspartnerschaft* (registered partnership) as follows (para 17 the Opinion):

"Paragraph 1(1) provides that, to register such a union, it is necessary to demonstrate the desire to set up a life-long partnership. For the duration of the relationship, the partners must support and care for one another (Paragraph 2). They must contribute to the common needs of the partnership and, with regard to maintenance obligations, they are bound by the provisions of the Civil Code applicable to spouses (Paragraph 5). Like spouses, the partners are subject to the financial system of common ownership of property acquired ex post facto, although they are free to agree to a different system (Paragraph 6). In addition, each partner is regarded as a member of the other partner's family (Paragraph 11). In a further similarity to the provisions of the Civil Code, should the partners separate, the maintenance obligation remains (Paragraph 16) and there must be an equalising apportionment of pension entitlements (Paragraph 20)."

At first sight, Mr Maruko's chances seem good: when requesting a preliminary ruling from the Court of Justice, the *Bayerisches Verwaltungsgericht München* has already indicated that in its view a registered partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the case (para 69 of the judgment). The national court in particular took into account that in 2004 the German law on statutory widow's or widower's pensions was changed in such a way as to treat registered partnerships as equivalent to marriages. However, it cannot be ruled out that a favourable judgment of the national court of first instance would be overturned by a higher instance, based on the argument that, under German law there are more legal differences between a registered partnership and a marriage than in some of the other countries where such registrations are possible. In the different context of family allowances, some German courts have ruled that marriage and registered partnership are not comparable.⁵⁸ However, in the present writers' opinion, this case law is not relevant for the present purposes where a survivor's benefit is at issue.⁵⁹ After all,

58. See e.g. BVerwG 2 C33.06, judgment of the German Federal Administrative Court of 15 Nov. 2007, as well as 2 BvR 1830/06, decision of the German Constitutional Court of 6 May 2008, with further references.

59. Perhaps not surprisingly, one of the lawyers who represented Mr Maruko at the ECJ is of the same opinion: Bruns, "Der EuGH beendet die deutsche Sonderrechtssprechung zur

the Court of Justice does not require comparability (let alone similarity) of registered partnership legislation and marriage legislation in general, but only comparability “so far as concerns that survivor’s pension” (para 73 of the judgment, repeated in the operative part of the judgment).

It is important to note that *Maruko* only deals with the situation in a Member State that has chosen to introduce a form of registered partnership. The Directive does not require other Member States to do likewise. Under the constitutional framework set up by the EC Treaty the Member States retain the competence to decide on the forms of civil status that are available under their national legal system. Indeed, cases identical to that of *Maruko* will not arise in all Member States, because many of them do not yet have a form of registered partnership. Of those Member States that do have a form of registered partnership for same-sex couples, three also allow same-sex couples to marry (Spain, Belgium and The Netherlands), so there the argument that employment discrimination between married and registered partners amounts to sexual orientation discrimination, can only be made with respect to the brief period after the introduction of registered partnership and before the opening up of marriage. In Denmark, Finland, Sweden and the UK the legal effects of registered partnership are almost identical to those of marriage, so there the argument that such discrimination amounts to direct sexual orientation discrimination can easily be made. It will be interesting to see in what contexts the national courts in France,⁶⁰ Luxembourg, Slovenia and the Czech Republic, where registered partnership entails less rights and obligations,⁶¹ will speak of comparable situations of registered and married partners.

A complication in France is that in that country partnership registration (*pacte civil de solidarité*) is also available to different-sex couples (as is the case in Belgium, The Netherlands and most parts of Spain). The *Maruko* judgment does not make clear whether in such a situation an allegation of discrimination between married and registered partners should also be treated as direct sexual orientation discrimination. In its *Nikoloudi* judgment the Court had specified that if the

Benachteiligung verpartnerter Beschäftigter”, (2008) EuZW, 257–258, and “Die Maruko-Entscheidung im Spannungsfeld zwischen europäischer und nationaler Auslegung”, (2008) NJW, 1929–1931. See also Pärli, “Anspruch auf Hinterbliebenenrente für Partner aus gleichgeschlechtlicher Partnerschaft”, (2007) *European Law Reporter*, 455–458, at 457.

60. In France, opinions as to the comparability of registered partnership and marriage are divided. Referring to jurisprudence of the *Conseil d’Etat*, Weisse-Marchal, op. cit. *supra* note 41, 1876, emphasizes the differences. Referring to jurisprudence of the *Conseil constitutionnel*, Lhernould, op. cit. *supra* note 41, 712, takes the opposite view.

61. See Waaldijk and Fassin, *Droit conjugal et unions de même sexe – Mariage, partenariat et concubinage dans neuf pays européens* (PUF, Paris, 2008), plus the report *More or less together – Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners* (INED, Paris, 2005) on which that book is based, available at hdl.handle.net/1887/12585.

disadvantaged category of workers did not consist exclusively of women, there could be no direct but only indirect sex discrimination.⁶² If that approach of the Court still holds, it would seem that French same-sex registered partners wishing to challenge unequal treatment of married and registered couples, cannot invoke the prohibition of direct sexual orientation discrimination, but only that of indirect sexual orientation discrimination.⁶³ However, it could also be argued that even in countries where registered partnership is available to same-sex and different-sex couples alike (and where marriage is only available to different-sex couples), the denial of a certain benefit of marriage to registered partners still excludes *all* same-sex partners (and not just a much higher percentage of partners of the same sex than of different sex). Arguably, it could therefore (also) be considered as direct sexual orientation discrimination – provided the comparability test is met.

It is similarly unclear whether, in countries without registered partnership,⁶⁴ unregistered same-sex partners challenging their exclusion from a marital benefit, should invoke the prohibition of direct sexual orientation discrimination or that of indirect sexual orientation discrimination. If, relying on *Nikoloudi*, they would go for the route of indirect discrimination, another question arises: does a comparability test apply? Different from the definition of direct discrimination, the definition of indirect discrimination in Article 2(2)(b) of Directive 2000/78/EC does not mention a requirement of comparability. From this, it has been concluded that in the case of indirect discrimination the comparability test does not apply.⁶⁵ On the other hand, as indicated above, the Court of Justice has consistently held that “discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations”.⁶⁶ The *Maruko* judgment, which deals with direct discrimination, does not address the question.

62. *Vasiliki Nikoloudi v. Organismos Tilepikinonion Ellados AE*, cited *supra* note 47, para 57.

63. Of course they could also invoke the prohibition of direct discrimination based on “*situation de famille*”, see Lhernould, *op. cit. supra* note 41.

64. In Portugal and Hungary (non-married, non-registered) same-sex couples enjoy a certain number of the rights and obligations of marriage, in Austria and Ireland very few, and in Estonia, Latvia, Lithuania, Poland, Slovakia, Bulgaria, Romania, Cyprus, Greece, Malta and Italy probably none. Among the unmarried couples in these countries, there is evidently a much higher percentage of all same-sex couples than of all different-sex couples. See Waaldijk and Bonini-Baraldi, *op. cit. supra* note 22, pp. 83 and 115.

65. Schiek, “Indirect discrimination” in Schiek, Waddington and Bell, *op. cit. supra* note 45, pp. 323–475, at pp. 468–471 (with further references). See also Waaldijk, *op. cit. supra* note 9, p. 630.

66. Tobler, *Limits and potential of the concept of indirect discrimination* (Office for Official Publications, Luxembourg, 2008) (text available at www.migpolgroup.com/documents/4230.html), under IV.2.2.1; compare also Lembke, *op. cit. supra* note 23, at 1633.

The authors of the present annotation hold diverging views on this issue. According to Tobler, comparability remains an essential precondition to the right to equal treatment under any EC law in the context of both the prohibitions of direct and indirect discrimination. Accordingly, reliance on the latter would not do away with the problem that the comparability requirement would inevitably pose in comparing the situations of non-married, non-registered same-sex couples with those of married opposite-sex couples. Indeed, it is to be expected that comparability would be the decisive stumbling block that would prevent a finding of any type of discrimination. In contrast, Waaldijk would argue that for an analysis of indirect discrimination the comparability requirement does not apply. That requirement has been correctly left out of the Directive's definition of indirect discrimination, because indirect discrimination does not imply a difference in treatment, but instead focuses on a difference in impact.⁶⁷ Once a "particular disadvantage" (for persons of a particular sexual orientation) has been established, it is irrelevant whether or not this is caused by different treatment of comparable situations. The particular disadvantage may even be caused by a failure to distinguish between different situations (in this case: the situation of same-sex couples who could not marry on the one hand, and the situation of different-sex couples who have chosen not to get married on the other).⁶⁸ However, whatever the correct approach, the present authors find that there is no foundation for the claim of Weisse-Marchal⁶⁹ that for the prohibition of indirect discrimination to apply, there should not simply be a comparable situation but a legally identical situation.

Finally, it might be added that the *Maruko* judgement will probably not have a great impact on the EU's internal employment law because under the Staff Regulations registered non-marital partnerships are already treated as marriages provided that certain formal conditions are fulfilled.⁷⁰ The Staff

67. Schiek, op. cit. *supra* note 45, p. 471.

68. See the individual opinions of members Lallah and Scheinin appended to the views of the Human Rights Committee in *Joslin v. New Zealand*, Decision No. 902/1999 of 17 July 2002.

69. Weisse-Marchal, op. cit. *supra* note 41, p. 1876.

70. See Art. 1d of the Staff Regulations, in conjunction with Art. 1(2)(c) of Annex VII. The latter provision speaks of "an official who is registered as a stable non-marital partner, provided that: (i) the couple produces a legal document recognised as such by a Member State, or any competent authority of a Member State, acknowledging their status as non-marital partners, (ii) neither partner is in a marital relationship or in another non-marital partnership, (iii) the partners are not related in any of the following ways: parent, child, grandparent, grandchild, brother, sister, aunt, uncle, nephew, niece, son-in-law, daughter-in-law; (iv) the couple has no access to legal marriage in a Member State; a couple shall be considered to have access to legal marriage for the purposes of this point only where the members of the couple meet all the conditions laid down by the legislation of a Member State permitting marriage of such a couple." See ec.europa.eu/civil_service/docs/toc100_en.pdf.

Regulations do not require that the rights and obligations attached to such partnerships are comparable to those of marriage.

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