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ECLI:EU:C:2023:9

Provisional text

JUDGMENT OF THE COURT (Second Chamber)

12 January 2023 (\*)

(Reference for a preliminary ruling – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 3(1)(a) and (c) – Conditions for access to self-employment – Employment and working conditions – Prohibition of discrimination based on sexual orientation – Self-employed person working on the basis of a contract for specific work – Termination and non-renewal of contract – Freedom to choose a contracting party)

In Case C-356/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla m. st. Warszawy w Warszawie (District Court, Warsaw, Poland), made by decision of 16 March 2021, received at the Court on 7 June 2021, in the proceedings

**J.K.**

v

**TP S.A.,**

intervening parties:

**PTPA,**

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, M.L. Arastey Sahún (Rapporteur), F. Biltgen, N. Wahl and J. Passer, Judges,

Advocate General: T. Ćapeta,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2022,

after considering the observations submitted on behalf of:

- J.K., by P. Knut, adwokat, M.R. Oyarzabal Arigita, abogada, and B. Van Vooren, advocaat,
- the Polish Government, by B. Majczyna, E. Borawska-Kędzierska and A. Siwek-Ślusarek, acting as Agents,
- the Belgian Government, by C. Pochet, L. Van den Broeck and M. Van Regemorter, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and P. Huurnink, acting as Agents,
- the Portuguese Government, by C. Alves, P. Barros da Costa and A. Pimenta, acting as Agents,
- the European Commission, by D. Martin and A. Szmytkowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2022,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 3(1)(a) and (c) and Article 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

2 The request has been made in proceedings between J.K. ('the applicant') and TP S.A., concerning a claim for compensation for damage resulting from that company's refusal to renew the contract for specific work that it had concluded with the applicant on the ground, according to the latter, of his sexual orientation.

## **Legal context**

### ***European Union law***

3 Recitals 9, 11 and 12 of Directive 2000/78 state:

'(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high

level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.'

4 Article 1 of Directive 2000/78, headed 'Purpose', provides:

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

5 Article 2 of that directive, entitled 'Concept of discrimination', provides, in paragraph 5 thereof:

'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

6 Article 3 of that directive, entitled 'Scope', provides, in paragraph 1(a) and (c):

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

...

(c) employment and working conditions, including dismissals and pay'.

7 Article 17 of Directive 2000/78, entitled 'Sanctions', provides:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.'

### ***Polish law***

8 Article 4 of the ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Law on the transposition of certain provisions of EU law regarding equal

treatment) of 3 December 2010 (Dz. U. No 254, item 1700), in its consolidated version (Dz. U. of 2016, item 1219) ('the Law on equal treatment'), provides:

'This Law shall apply to:

...

(2) the conditions for taking up and pursuing economic or professional activities, including in particular in the context of an employment relationship or work performed under a civil-law contract;

...'

9 Article 5 of that law provides:

'This Law shall not apply to:

...

(3) the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality;

...'

10 Article 8(1)(2) of that law states:

The unequal treatment of individuals on the basis of sex, race, ethnic origin, nationality, religion, creed, belief, disability, age or sexual orientation shall be prohibited with respect to:

...

(2) the conditions for taking up and pursuing economic or professional activities, including in particular in the context of an employment relationship or work performed under a civil-law contract.'

11 Article 13 of that law reads:

'1. Anyone in respect of whom there has been a breach of the principle of equal treatment shall have the right to compensation.

2. In cases involving a breach of the principle of equal treatment, the provisions of the [ustawa – Kodeks cywilny (Law on the Civil Code) of 23 April 1964] ... shall apply.'

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

12 Between 2010 and 2017, in the context of his independent economic activity, the applicant entered into a series of short-term contracts for specific work with TP, a company which operates a nationwide public television channel in Poland and whose sole shareholder is the State Treasury.

13 On the basis of those contracts, the applicant performed one-week shifts within TP's Channel 1 Editorial and Promotional Office, during which he prepared audiovisual material, trailers or

features for TP's promotional programmes. W. S., the manager of the Channel 1 Editorial and Promotional Office and the applicant's immediate supervisor, assigned shifts to the applicant and a second journalist who performed the same tasks, each of them working two one-week shifts per month.

14 As of August 2017, a reorganisation of TP's organisational structure was planned, in which the applicant's tasks were to be transferred to a newly established unit, namely the Creative and Advertising Agency.

15 At a work meeting in late October 2017, it was indicated that the applicant was among the associates who had been positively evaluated with a view to that reorganisation.

16 On 20 November 2017, a new contract for specific work was concluded between the applicant and TP for a period of one month.

17 On 29 November 2017, the applicant received his working hours for December 2017, which provided for two one-week shifts beginning on 7 and 21 December 2017 respectively.

18 On 4 December 2017, the applicant and his partner published on their YouTube channel a Christmas music video aimed at promoting tolerance towards same-sex couples. That video, entitled '*Pokochaj nas w święta*' ('Love us at Christmas time'), showed same-sex couples celebrating Christmas.

19 On 6 December 2017, the applicant received an email from W. S. informing him of the cancellation of his one-week shift scheduled to start on 7 December 2017.

20 On 20 December 2017, W. S. informed the applicant that he was no longer expected to carry out the one-week shift scheduled to begin on 21 December 2017.

21 The applicant therefore did not carry out any shift in December 2017 and, subsequently, no new contract for specific work was concluded between him and TP.

22 The applicant brought an action before the referring court, the Sąd Rejonowy dla m. st. Warszawy w Warszawie (District Court, Warsaw, Poland), seeking an order that TP pay him the sum of 47 924.92 Polish zlotys (PLN) (approximately EUR 10 130), together with statutory default interest, by way of compensation and for non-material harm resulting from a breach of the principle of equal treatment in the form of direct discrimination on grounds of sexual orientation in respect of the conditions for accessing and pursuing an economic activity under a civil-law contract.

23 In support of that action, the applicant submits that he was the victim of such discrimination, since the probable cause of the cancellation of the shifts referred to in paragraph 17 above and the termination of his collaboration with TP was the publication of the video mentioned in paragraph 18 above.

24 TP contends that the action should be dismissed, submitting, inter alia, that the law did not guarantee the renewal of the contract for specific work which it had concluded with the applicant.

25 The referring court has doubts as to the compatibility of Article 5(3) of the Law on equal treatment with EU law, in so far as that provision excludes from the scope of that law and, accordingly, from the protection against discrimination conferred by Directive 2000/78, the

freedom of choice of contracting parties, so long as that choice is not based on sex, race, ethnic origin or nationality.

26 That court questions whether the situation at issue in the main proceedings falls within the scope of Article 3(1)(a) and (c) of Directive 2000/78 guaranteeing protection against discrimination based, inter alia, on sexual orientation, as regards conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, as well as employment and working conditions.

27 In the first place, that court asks, inter alia, whether the applicant's independent activity may be classified as a 'self-employment' within the meaning of Article 3(1)(a).

28 In the second place, it asks whether that provision must be interpreted as being intended to provide protection against discrimination based on sexual orientation also in a situation such as that at issue in the main proceedings, where the refusal to conclude a contract with a self-employed person solely on the ground of his sexual orientation appears to constitute a restriction on the conditions for access to self-employment.

29 In those circumstances, the Sąd Rejonowy dla m. st. Warszawy w Warszawie (District Court, Warsaw) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 3(1)(a) and (c) of [Directive 2000/78] be construed as permitting the exclusion from the scope of [Directive 2000/78], and consequently also as permitting the exclusion from the application of the sanctions laid down in national law pursuant to Article 17 of [that directive], of the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality, in a situation where the alleged discrimination consists in a refusal to enter into a civil-law contract under which work is to be carried out by a self-employed natural person when that refusal is based on the sexual orientation of the prospective counterparty?'

### **Consideration of the question referred**

30 As a preliminary point, it should be noted that, by the reference in its question to Article 17 of Directive 2000/78, the referring court merely intends to emphasise that, in the event that the provisions of Article 3(1)(a) and (c) of that directive are applicable to the dispute in the main proceedings, Article 17 and, consequently, the sanctions provided for by national law in implementation of the latter provision will also be applicable. To that extent, the question does not call for a specific interpretation of Article 17.

31 By its question, the referring court asks, in essence, whether Article 3(1)(a) and (c) of Directive 2000/78 must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.

32 The question thus arises as to whether a situation such as that at issue in the main proceedings falls within the scope of Directive 2000/78.

### ***Article 3(1)(a) of Directive 2000/78***

33 Article 3(1)(a) of Directive 2000/78 provides that, ‘within the limits of the areas of competence conferred on the [European Union], [that] Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion’.

34 In that regard, it should be noted that that directive does not refer to the law of the Member States in order to define the concept of ‘conditions for access to employment, to self-employment or to occupation’ in that provision. It follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union (judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 25 and the case-law cited).

35 In addition, since that directive does not define the terms ‘conditions for access to employment, to self-employment or to occupation’, they must be interpreted by reference to their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 26 and the case-law cited).

36 In the first place, it should be noted that it follows from the use, together, of the terms ‘employment’, ‘self-employment’ and ‘occupation’ that the conditions for access to any occupational activity, whatever the nature and characteristics of such activity, are covered by Article 3(1)(a) of Directive 2000/78 and, accordingly, fall within the scope of that directive. Those terms must be construed broadly, as is apparent from a comparison of the different language versions of that provision and the use of general expressions in those versions, such as, first, as regards the concept of ‘self-employment’, ‘*actividad por cuenta propia*’, ‘*selvstændig erhvervsvirksomhed*’, ‘*selbständiger Erwerbstätigkeit*’, ‘*activité non salariée*’, ‘*arbeid ... als zelfstandige*’ and ‘*pracy na własny rachunek*’, and, secondly, as regards the concept of ‘occupation’, ‘*ejercicio profesional*’, ‘*erhvervsmæssig beskæftigelse*’, ‘*unselbständiger Erwerbstätigkeit*’, ‘*travail*’, ‘*beroep*’ and ‘*zatrudnienia*’ in Spanish, Danish, German, French, Dutch and Polish respectively (see, to that effect, judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 27).

37 Moreover, apart from the fact that that provision expressly refers to self-employment, it also follows from the terms ‘employment’ and ‘occupation’, understood in their usual sense, that the EU legislature did not intend to limit the scope of Directive 2000/78 to posts occupied by a ‘worker’, within the meaning of Article 45 TFEU (see, to that effect, judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 28 and the case-law cited).

38 The wording of Article 3(1)(a) of Directive 2000/78 confirms that the scope of that directive is not limited solely to the conditions for accessing posts occupied by ‘workers’, within the meaning of Article 45 TFEU, since, in accordance with that wording, that directive applies to ‘all persons, as regards both the public and private sectors, including public bodies ... whatever the branch of activity and at all levels of the professional hierarchy’ (see, to that effect, judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 29).

39 The textual interpretation of Article 3(1)(a) of Directive 2000/78 is confirmed by the objectives of that directive, from which it follows that the concept of ‘conditions for access to

employment, to self-employment or to occupation’, which defines the scope of that directive, cannot be interpreted restrictively (see, to that effect, judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-507/20, EU:C:2022:419, paragraph 30 and the case-law cited).

40 In that regard, it must be noted that Directive 2000/78 was adopted on the basis of Article 13 EC, now, after amendment, Article 19(1) TFEU, which confers on the Union the power to take appropriate action to combat discrimination based, inter alia, on sexual orientation (judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 35).

41 In accordance with Article 1 of Directive 2000/78, and as is clear from the title of, and preamble to, the directive, as well as from its content and purpose, the directive is intended to establish a general framework for combating discrimination on the grounds, inter alia, of sexual orientation as regards ‘employment and occupation’, with a view to putting into effect in the Member States the principle of equal treatment, by providing everyone with effective protection against discrimination based, inter alia, on that ground (judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 36 and the case-law cited).

42 In particular, recital 9 of that directive states that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential. In that respect also, recital 11 of the directive states that discrimination based inter alia on sexual orientation may undermine the achievement of the objectives of the TFEU, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons (judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 37).

43 Therefore, Directive 2000/78 is not an act of EU secondary legislation such as those based, in particular, on Article 153(2) TFEU, which seek to protect only workers as the weaker party in an employment relationship, but seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided (judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 34 and the case-law cited).

44 Although Directive 2000/78 is thus intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood, it is nevertheless necessary to distinguish activities falling within the scope of that directive from those consisting of the mere provision of goods or services to one or more recipients and which do not fall within that scope.

45 It is therefore necessary, in order for occupational activities to fall within the scope of Directive 2000/78, that those activities are genuine and are pursued in the context of a legal relationship characterised by a degree of stability.

46 In the present case, while it is for the referring court to assess whether the activity pursued by the applicant satisfies that criterion, it should be noted, first, that it appears from the file before the Court that the applicant personally prepared, on the basis of consecutive short-term contracts for specific work, concluded in the context of his independent economic activity, audiovisual material, trailers or features for TP’s Channel 1 Editorial and Promotional Office. Secondly, it also appears from that file that the applicant depended, in pursuing that activity, on the assignment of one-week



shifts by W. S. and that he had recently again received a positive evaluation in the context of the reorganisation of TP's internal structure.

47 Since, as is apparent from the order for reference, the activity pursued by the applicant constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient, enabling the applicant to earn his livelihood, in whole or in part, the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as 'employment' or 'self-employment', given that the scope of that provision and, accordingly, the scope of that directive must be construed broadly, as noted in paragraph 36 above.

48 In the second place, as regards the question whether the conclusion of a contract for specific work, such as that at issue in the main proceedings, falls within the concept of 'conditions for access' to self-employment, within the meaning of Article 3(1)(a) of Directive 2000/78, the Polish Government maintained, in its written observations and at the hearing, that the applicant had already fully exercised his right of access to a self-employed activity before concluding the contract for specific work at issue in the main proceedings and that there was no obstacle to his continuing to pursue that activity, including for recipients other than TP, since the latter is not able to restrict that right, which concerns the very decision to pursue such an activity.

49 In that regard, it should be noted that it follows from the Court's case-law that the phrase 'conditions for access' to self-employment covers, in everyday language, circumstances or facts the existence of which is essential in order for a person to be able to pursue a particular self-employed activity (see, by analogy, judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, EU:C:2020:289, paragraph 33).

50 It must be emphasised that, in order for a person such as the applicant to be able to pursue his occupational activity effectively, the conclusion of a contract for specific work constitutes a factor the existence of which may be essential. Therefore, the concept of 'conditions for access' to self-employment, within the meaning of Article 3(1)(a) of Directive 2000/78, may include the conclusion of a contract such as that at issue in the main proceedings.

51 It follows from the foregoing that the refusal to conclude a contract for specific work with a contractor engaged in an independent economic activity on grounds linked to the sexual orientation of that contractor falls within the scope of that provision and, accordingly, within the scope of that directive.

#### ***Article 3(1)(c) of Directive 2000/78***

52 Under Article 3(1)(c) of Directive 2000/78, that directive is applicable 'in relation to employment and working conditions, including dismissals and pay'.

53 In the first place, it should indeed be noted that, unlike Article 3(1)(a) of that directive, Article 3(1)(c) does not expressly refer to 'self-employment', but relates only to 'employment' and 'working' conditions.

54 However, as is apparent from the case-law of the Court cited in paragraph 43 above, Directive 2000/78 does not seek to protect only workers as the weaker party in an employment relationship, but seeks to eliminate, on grounds relating to social and public interest, all discriminatory obstacles to access to livelihoods and to the capacity to contribute to society through work, irrespective of the legal form in which it is provided.

55 It follows that the protection conferred by Directive 2000/78 cannot depend on the formal categorisation of an employment relationship under national law or on the choice made at the time of the appointment of the person concerned between one type of contract and another (see, by analogy, judgment of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 69), since, as noted in paragraph 36 above, the terms of that directive must be construed broadly.

56 In so far as, under Article 3(1)(a) of Directive 2000/78, that directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation to ‘conditions for access ... to self-employment’, the objective pursued by that directive could not be achieved if the protection conferred by the directive against all forms of discrimination on any of the grounds referred to in Article 1 of that directive, such as, inter alia, sexual orientation, did not enable the principle of equal treatment to be guaranteed after access to that self-employment and, therefore, inter alia, in relation to the conditions for pursuing and terminating that activity. Therefore, that protection extends to the professional relationship concerned in its entirety.

57 That interpretation reflects the objective of Directive 2000/78, which is to lay down a general framework to combat discrimination on the grounds, inter alia, of sexual orientation in employment and occupation, so that concepts which, in Article 3 of that directive, define the scope of that directive cannot be interpreted restrictively (see, by analogy, judgment of 2 June 2022, *HK/Danmark and HK/Privat*, C-587/20, EU:C:2022:419, paragraph 51).

58 Thus, it follows from a teleological interpretation of Article 3(1)(c) of Directive 2000/78 that the concept of ‘employment and working conditions’ in that provision refers, in a broad sense, to the conditions applicable to any form of employment or self-employment, whatever the legal form in which it is pursued.

59 In the second place, the question arises whether TP’s decision not to honour and not to renew the contract for specific work which it concluded with the applicant, terminating their professional relationship, on grounds allegedly connected with the sexual orientation of the person concerned, falls within the concept of ‘employment and working conditions’, within the meaning of Article 3(1)(c) of Directive 2000/78.

60 In that regard, the Polish Government submits that, in his or her relations with the contracting party, a self-employed person is not bound by an employment relationship in which one party may ‘dismiss’ the other.

61 It is true that the concept of ‘dismissal’ generally refers to the termination of an employment contract concluded between an employee and his employer.

62 However, as the Advocate General noted, in essence, in point 102 of her Opinion, Article 3(1)(c) of Directive 2000/78 refers to ‘dismissal’ only by way of example of ‘employment and working conditions’, and covers, inter alia, the unilateral termination of any activity referred to in Article 3(1)(a) of that directive.

63 It should be noted, in particular, that just as an employed worker may involuntarily lose his or her job following, for example, a ‘dismissal’, a person who has been self-employed may also find himself or herself obliged to stop working due to his or her contractual counterparty and thus be in a vulnerable position comparable to that of an employed worker who has been dismissed (see, to that effect, judgment of 20 December 2017, *Gusa*, C-442/16, EU:C:2017:1004, paragraph 43).

64 In the present case, TP unilaterally cancelled the applicant's one-week shifts scheduled to start on 7 and 21 December 2017 respectively, and no new contract for specific work was concluded between TP and the applicant following the online publication, by the latter, of the video referred to in paragraph 18 above.

65 Therefore, the fact that, in December 2017, the applicant was unable to complete any of the one-week shifts provided for in the contract for specific work which he had concluded with TP appears to constitute, in the light of the case-law of the Court cited in paragraph 63 above, an involuntary termination of activity of a self-employed person which may be assimilated to dismissal of an employee, which is nevertheless a matter for the referring court to determine.

66 In those circumstances, subject to the assessment referred to in paragraph 46 above, TP's decision not to renew that contract for specific work on the ground, according to the applicant, of his sexual orientation, thus terminating the professional relationship between them, falls within the scope of Article 3(1)(c) of Directive 2000/78.

#### *Article 2(5) of Directive 2000/78*

67 It is for the referring court to determine, in the light of all the relevant circumstances of the dispute before it, in particular the Law on equal treatment, the interpretation of which falls within its exclusive jurisdiction, whether the exclusion from the scope of that law of the freedom of choice of contracting parties, so long as that choice is not based on sex, race, ethnic origin or nationality, as provided for in Article 5(3) of that law, constitutes direct or indirect discrimination based on the sexual orientation of the applicant.

68 In the event that that court were to find that there was such discrimination, it should also be stated that that discrimination cannot be justified, as the applicant and the Belgian Government submit, on one of the grounds referred to in Article 2(5) of Directive 2000/78.

69 Under that provision, that directive is to be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

70 In adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and adjudicate on a conflict between, on the one hand, the principle of equal treatment and, on the other, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature thus decided that, in certain cases set out in Article 2(5) of Directive 2000/78, the principles established by the directive do not apply to measures incorporating differences in treatment on one of the grounds referred to in Article 1 of that directive, on condition, however, that those measures are necessary for the attainment of the abovementioned objectives (judgment of 7 November 2019, *Cafaro*, C-396/18, EU:C:2019:929, paragraph 41 and the case-law cited).

71 As Article 2(5) of Directive 2000/78 establishes an exception to the principle prohibiting discrimination, it must be interpreted strictly (judgment of 7 November 2019, *Cafaro*, C-396/18, EU:C:2019:929, paragraph 42 and the case-law cited).

72 In the present case, it must be noted, in the first place, that the national legislation at issue in the main proceedings, namely Article 5(3) of the Law on equal treatment, constitutes a measure laid down by national law, within the meaning of Article 2(5).

73 In the second place, Article 5(3) of the Law on equal treatment indeed appears, a priori, to pursue an objective which seeks to protect the rights and freedoms of others, within the meaning of Article 2(5) of Directive 2000/78, more specifically to protect freedom of contract, by guaranteeing the freedom to choose a contracting party, provided that that choice is not based on sex, race, ethnic origin or nationality.

74 The protection afforded by Article 16 of the Charter of Fundamental Rights of the European Union, entitled ‘Freedom to conduct a business’, covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition and covers, in particular, the freedom to choose with whom to do business (judgment of 21 December 2021, *Bank Melli Iran*, C-124/20, EU:C:2021:1035, paragraph 79 and the case-law cited).

75 However, the freedom to conduct a business is not absolute, but must be viewed in relation to its social function (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 45 and the case-law cited).

76 In the present case, it is sufficient to note that, as the Advocate General, in essence, pointed out in point 111 of her Opinion, the very fact that Article 5(3) of the Law on equal treatment provides for a number of exceptions to the freedom to choose a contracting party shows that the Polish legislature itself considered that discrimination could not be regarded as necessary for the purposes of safeguarding freedom of contract in a democratic society. There is nothing to suggest that the situation would be different depending on whether the discrimination concerned is based on sexual orientation or on one of the other grounds expressly referred to in Article 5(3) of that law.

77 Moreover, to accept that freedom of contract allows a refusal to contract with a person on the ground of that person’s sexual orientation would be tantamount to depriving Article 3(1)(a) of Directive 2000/78 of its practical effect in so far as that provision specifically prohibits any discrimination based on that ground as regards access to self-employment.

78 In the light of the foregoing, it must be held that Article 5(3) of the Law on equal treatment cannot justify, in circumstances such as those at issue in the main proceedings, an exclusion from the protection against discrimination conferred by Directive 2000/78 where that exclusion is not necessary, in accordance with Article 2(5) of that directive, for the protection of the rights and freedoms of others in a democratic society.

79 In the light of all the foregoing considerations, the answer to the question referred is that Article 3(1)(a) and (c) of Directive 2000/78 must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.

## **Costs**

80 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

**Article 3(1)(a) and (c) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**

**must be interpreted as precluding national legislation which has the effect of excluding, on the basis of the freedom of choice of contracting parties, from the protection against discrimination to be conferred by that directive, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.**

[Signatures]

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\* Language of the case: Polish.

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