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Advocate General's Opinion in Case C-356/21 | TP (Audiovisual editor for public television)

Advocate General Ćapeta: Sexual orientation cannot be a reason to refuse to conclude a contract with a self-employed worker

The freedom to choose a contracting party cannot be invoked to justify discrimination based on sexual orientation

A self-employed worker provided editing services to a Polish public television station for seven years on the basis of consecutive short-term contracts. In December 2017, he and his partner published a Christmas music video aimed at promoting tolerance towards same-sex couples on Youtube. Shortly after publication of this video, the television station informed the worker that his current contract was terminated and that no new contract would be concluded.

Considering that the television station has taken these decisions because of his sexual orientation, the self-employed worker lodged an action for compensation with the District Court for the Capital City of Warsaw. This Polish Court has, in essence, asked the Court of Justice if the Framework Directive for equal treatment in employment and occupation¹ is applicable to such a case so that it precludes Polish legislation that allows a refusal to conclude a contract with a self-employed worker because of the sexual orientation of that person.

In today's Opinion, Advocate General Ms Tamara Ćapeta takes the view that **the Directive covers the situation of a refusal to sign a contract with a self-employed worker because of his sexual orientation**. She also clarifies that **the freedom to choose a contracting party cannot be usefully relied on to justify discrimination based on sexual orientation**.

First, the **Directive explicitly refers to** conditions for access to **both employment and self-employment**. The Advocate General recalls that, by covering the area of 'employment and occupation', the Directive aims at enabling citizens to realise their potential and earn their living by providing their work. **What is important for the application of that Directive is that a person engages in personal work, irrespective of the legal form under which that work is provided.**

For that reason, the Advocate General considers that the notion of 'self-employment' **does not exclude the provision of goods and services if the provider offers their personal work in order to earn their living**.

Second, the Advocate General finds that the 'conditions for access to self-employment' cover circumstances or facts which must be established in order that a person is able to secure a particular job as a self-employed worker. In this regard, the Advocate General emphasises that if the potential recipient of a self-employed worker's services makes access to a job dependent on that person not being homosexual, a person of such sexual orientation cannot secure

¹ 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).

that particular work.

Consequently, **a refusal to conclude an individual contract for services with a self-employed worker because of the sexual orientation of that person is covered by the expression 'conditions for access to self-employment'.**

Furthermore, the Advocate General points out that, under the circumstances of the case at hand, not only the provision of the Directive which refers to the 'conditions for access to self-employment' of the self-employed worker concerned is applicable, but also the provision relating to the termination of his contractual relationship by reason of his sexual orientation.

Third, the Advocate General considers that **the Directive precludes Polish legislation that allows economic operators to take account of sexual orientation for the selection of a contracting party. Not being necessary for the protection of the freedom of others in a democratic society, that legislation does not fall within the possible exceptions to that Directive.**

The Advocate General stresses that the freedom to choose a contracting party can legitimately be restricted with a view to protecting other important values of a democratic society, such as equal treatment in employment and occupation. The Directive specifically guarantees that value, without affecting the essence of the freedom to choose a contracting party. Namely, economic operators are still able to choose the most suitable person for the work based on reasons which are relevant for the work at issue.

The Directive also satisfies the requirements of proportionality, as it is adequate and necessary for achieving its goal of a society free of discrimination on prohibited grounds in the area of employment and occupation. The equality to which the directive aims can only be achieved if nobody who requires and seeks another person's work takes into consideration one of the characteristics prohibited by the Directive.

Given that the freedom of contract is not disproportionately limited by the Directive, the Advocate General points out that **the referring Court must set aside the Polish legislation at issue**, as it precludes the enforcement of a right not to be discriminated on the basis of sexual orientation guaranteed by the Directive.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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