

OPINION OF ADVOCATE GENERAL  
ĆAPETA  
delivered on 8 September 2022([1](#))

**Case C-356/21**

**J.K.**  
v  
**TP S.A.,**  
**joined parties:**  
**PTPA**

(Request for a preliminary ruling from the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw in Warsaw, Poland))

(Reference for a preliminary ruling – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 3 – Prohibition of any discrimination based on sexual orientation – Self-employed worker – Refusal to renew a contract)

## **I. Introduction**

1. After seven years of a working relationship based on consecutive short-term contracts, TP, a public TV station, refused to sign a new contract for editing services with J.K. because of his sexual orientation. ([2](#))
2. Is J.K., as a self-employed worker, entitled to protection against discrimination based on his sexual orientation under Directive 2000/78?
3. The scope of Directive 2000/78 is the main issue the Court is invited to clarify by the reference of the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw in Warsaw, Poland).
4. The other issue which the reference raises concerns the relationship between the prohibition of discrimination and freedom of contract. The referring court questions the conformity of a provision of national law, which allows sexual orientation to be taken into account as a criterion in choosing with whom to conclude a contract, with Directive 2000/78.

## **II. Legal framework**

### **A. European Union law**

5. Article 1 of Directive 2000/78 (entitled ‘Purpose’) provides that the purpose of that 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’.

6. Article 2 of that directive (entitled ‘Concept of discrimination’) states:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(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;

...

5. 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.’

7. According to Article 3 (entitled ‘Scope’):

‘1. Within the limits of the areas of competence conferred on the [EU], 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;

...’

## **B. Polish law**

8. According to Article 2(1) of the Ustawa o wdrożeniu niektórych przepisów prawa Unii Europejskiej w zakresie równego traktowania (Law on the implementation of certain provisions of EU law regarding equal treatment) of 3 December 2010 (Dz. U. of 2020, item 2156 – consolidated version) (‘the Polish Equality Law’), that ‘law shall apply to natural persons, as well as to legal persons and unincorporated organisational units that are granted legal capacity under the law’.

9. More precisely, Article 4(2) of the Polish Equality Law indicates that that law is to apply to ‘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’.

10. Article 5(3) of the Polish Equality Law states that that law does not apply to ‘the freedom of choice of parties to a contract so long as that choice is not based on sex, race, ethnic origin or nationality’.

11. Article 8 of the Polish Equality Law states:

‘1. 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.

...’

12. Article 13 of the Polish Equality 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.’

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

13. Between 2010 and 2017, J.K. concluded a series of consecutive short-term contracts on a self-employed basis with TP, a company which operates a nationwide public television channel in Poland and whose sole shareholder is the State Treasury.

14. On the basis of those contracts, the work performed by J.K. included the preparation of edited material for trailers or features, which were subsequently used in the channel’s promotional materials. He performed his tasks within the channel’s internal organisational unit – Redakcja Oprawy i Promocji Programu 1 (Channel 1 Editorial and Promotional Office), whose manager was W.S. Within the framework of the contracts concluded for specific work, J.K. performed scheduled weekly shifts during which he prepared materials for the channel’s promotional programmes. W.S., his immediate supervisor, assigned shifts to J.K. and a second journalist who performed the same tasks, each of them working two one-week shifts per month.

15. As of August 2017, a reorganisation of TP’s organisational structure was planned, in which J.K.’s tasks were to be transferred to a newly established unit, the Agencja Kreacji Oprawy i Reklamy (Creative and Advertising Agency). Two new employees were appointed to carry out the reorganisation and to vet the associates to be transferred to the new agency.

16. At meetings in late October and early November 2017, at which one of the new employees responsible for the reorganisation was present, J.K. received a positive evaluation and was listed among the associates who had successfully passed the vetting procedure.

17. On 20 November 2017, a contract for specific work was concluded between J.K. and TP for a period of one month.

18. On 29 November 2017, J.K. received his working hours for December 2017. They provided for a fortnight of service in total, with the first week due to begin on 7 December 2017 and the second on 21 December 2017.

19. On 4 December 2017, J.K. and his partner published on their YouTube channel a Christmas music video aimed at promoting tolerance towards same-sex couples.

20. Two days later, on 6 December 2017, J.K. received an email from TP cancelling his period of service starting on 7 December 2017.

21. On 20 December 2017, J.K. was informed that he would likewise not be required to report for the period of service scheduled to start on 21 December 2017. He did not therefore perform any period of service during December 2017 as contracted, nor was he, as clarified at the hearing, paid for these contracted services.

22. Ultimately, a new contract (for January 2018) was not concluded between J.K. and TP. The decision to terminate cooperation with J.K. was, according to the reference, made by the persons

responsible for carrying out the reorganisation.

23. By application lodged at the referring court, the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw in Warsaw), J.K. is seeking the amount of 47 924.92 zlotys (PLN) (approximately EUR 10 130), together with statutory default interest calculated from the date on which the action was lodged to the date on which payment is made. The amount of PLN 35 943.69 (approximately EUR 7 600) is claimed by way of compensation and the amount of PLN 11 981.23 (approximately EUR 2 530) by way of redress for breach of the principle of equal treatment on the grounds of sexual orientation in the form of direct discrimination in respect of the conditions for accessing and pursuing economic activities under a civil-law contract.

24. In support of his action, J.K. submits that he was the victim of direct discrimination by TP on account of his sexual orientation. He claims that the probable cause of the cancellation of the periods of service and the termination of the working relationship with TP was the publication on YouTube of the aforementioned Christmas music video.

25. TP contends that the action should be dismissed, arguing that neither its practice nor the law guarantees the renewal of business contracts.

26. The referring court explains that the extent to which self-employed workers are covered by the protection of Directive 2000/78 is not clear. It also harbours doubts as to whether Article 5(3) of the Polish Equality Law, which that court considers applicable to the circumstances of the case, is compatible with that directive.

27. In those circumstances, the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw in Warsaw) decided to stay the proceedings and to refer the following question to the Court 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?’

28. Written observations have been lodged by J.K., the Belgian, Netherlands, Polish and Portuguese Governments, as well as the European Commission. A hearing was held on 31 May 2022 at which J.K., the Polish Government and the Commission presented oral arguments.

#### **IV. Analysis**

29. I understand that, by its question, the referring court essentially seeks to establish whether it is obliged to apply Article 5(3) of the Polish Equality Law when deciding on whether TP is required to compensate J.K. for discriminating against him on the basis of his sexual orientation.

30. Under EU law, that depends on the applicability of Directive 2000/78. If J.K. can rely on Article 3 of that directive to exclude the possibility that TP may take his sexual orientation into consideration as a reason not to conclude a contract with him, the referring court would be obliged to set aside Article 5(3) of the Polish Equality Law when deciding this case.

31. The pertinent question is, therefore, whether the refusal to conclude a contract because of the sexual orientation of a potential contracting party comes within the scope of Directive 2000/78, and more precisely, whether such a contract is a condition ‘for access to ... self-employment’, as provided in Article 3(1)(a) thereof.

32. Due to the particularities of the situation in this case, a relevant provision which might also be applicable is Article 3(1)(c) of Directive 2000/78.

33. I will therefore proceed as follows. First, I will analyse whether Article 3(1)(a) of Directive 2000/78 covers situations such as the one in the present case (A). In that regard, I will explain how the term self-employment used by that provision is to be understood, and how, if at all, it is to be delimited from the notion of the provision of goods and services. Subsequently, I will argue that the conclusion of an individual contract falls within the term ‘conditions for access to ... self-employment’ in Article 3(1)(a) of Directive 2000/78. In the following section, under (B), I will briefly explore the question of whether Article 3(1)(c) of that directive is applicable to this case, as the referring court also invoked that provision in its question as formulated. After finding that both provisions apply, I will analyse whether freedom of contract, as implemented by Article 5(3) of the Polish Equality Law, might allow for the application of Directive 2000/78 to be excluded (C) and if not, what the consequences for Article 5(3) of the Polish Equality Law and what the obligations of the referring court under EU law are (D).

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

34. According to its Article 3(1)(a), Directive 2000/78 applies to ‘conditions for access to employment, to self-employment or to occupation’.

35. Thus, that provision refers explicitly to self-employed workers. None of the participants to the present procedure has disputed that J.K. might be considered a self-employed worker. Why then, does the question of the applicability of that provision arise at all?

36. First, as the referring court suggested in its reference, the concept of ‘self-employment’ as used in Directive 2000/78 has not yet been clarified by the Court. Given that that directive does not refer back to Member States’ laws, that concept should be interpreted as an autonomous concept of EU law, whose meaning and scope is indeed for the Court to clarify. (3) This reference for a preliminary ruling therefore offers such an opportunity to the Court.

37. Second, the Polish Government claims that, even if J.K. is a self-employed worker, the conclusion of a contract with such a person does not represent a condition for access to self-employment.

38. I will therefore first explain that, in my view, ‘self-employment’ as set out in Directive 2000/78 comprises the provision of goods and services when they consist in personal work, which their provider has invested in such goods or services. I will then explain that for a self-employed worker the conclusion of a contract with a person for whom he or she is to provide personal work is a condition for access to self-employment. Both explanations together lead to the conclusion that Article 3(1)(a) of Directive 2000/78 applies to a situation such as that in the present case.

#### ***1. Concept of self-employment in Directive 2000/78***

39. Directive 2000/78 does not define ‘self-employment’.

40. Academics have observed that self-employment is often used as a residual category, ‘a sort of conceptual dumping ground where all those work relations that do not fit the (often tight) mould of subordinate employment are discarded’. (4) Thus, in a binary divide of work, a person who works is either employed or self-employed. (5)

41. But what if a person’s work can at the same time be categorised as a provision of goods or services to others? A person who, for example, undertakes a job to clean someone’s apartment for remuneration, or to bake a cake for somebody’s birthday party for remuneration is providing a service (cleaning) or a good (cake) through his or her work. If that is how the persons from the example make their living, we can think of them simultaneously as self-employed and as providers of goods or services. As recipients of their goods or services, we ‘buy’ their work and the end product of that work at the same time.

42. In such a case, are those providers covered by the concept of ‘self-employment’ as set out in Directive 2000/78?

43. Before continuing, I need to pause to explain why the question of the delimitation between self-employment and the provision of goods and services arises at all in the framework of Directive 2000/78.

44. That directive is one of the directives adopted on the basis of what is now Article 19 TFEU, (6) which bestowed on the European Union a competence to combat discrimination. Directive 2000/78 prohibits discrimination on a number of grounds, including sexual orientation. (7) However, that directive cannot (8) and does not combat discrimination on those prohibited grounds generally. The EU legislature confined ‘the battleground’ of that directive to the area of ‘employment and occupation’. (9)

45. At the same time, ever since 2008, the proposal for another directive has been in the EU legislative pipeline. (10) That directive, when (and if) adopted, (11) will have as its aim to combat discrimination on the same prohibited grounds as those covered by Directive 2000/78 in the area described, inter alia, that of ‘access to and supply of goods and services’. It is therefore clear that the EU legislature has not (yet) regulated ‘access to and supply of goods and services’ in order to prohibit discrimination on the basis of sexual orientation.

46. Does the fact that that legislative proposal uses the wording ‘access to and supply of goods and services’ exclude the possibility of placing providers of goods or services which are the result of their personal work within the scope of Directive 2000/78? In my opinion, it does not.

47. Neither the meaning of ‘employment and occupation’ in Directive 2000/78 nor the meaning of ‘access to and supply of goods and services’ in the proposal for the new directive (12) are explained any further in their texts. Furthermore, the Court has not yet defined those expressions, including their use in Directive 2000/43, (13) which, in contrast to Directive 2000/78, covers both ‘employment and occupation’ and ‘access to and supply of goods and services’. (14)

48. In my view, the answer to the question of whether a person who offers his or her work by providing goods and services is a self-employed worker contemplated by Article 3(1)(a) of Directive 2000/78 depends on the interpretation of what is meant by ‘employment and occupation’, as this expression describes the scope of application of Directive 2000/78. If the provision of goods and services which is the result of personal work on a self-employed basis is covered by that expression, the use of the wording ‘supply of goods and services’ in a legislative proposal (without any intention to prejudge its interpretation) does not exclude the application of Directive 2000/78 to such self-employed workers.

49. What is therefore meant (and what is not) by the wording ‘employment and occupation’?

**(a) ‘Employment and occupation’**

50. According to Article 1 thereof, the purpose of Directive 2000/78 is to combat discrimination on the enumerated grounds as regards ‘employment and occupation’.

51. The EU legislature has not explained any further what is meant by those terms. However, several recitals of Directive 2000/78 offer some indications. Recital 4 of that directive refers to Convention No 111 of the International Labour Organisation (ILO) which itself uses that wording. That convention prohibits discrimination in the field of employment and occupation understood as covering ‘all workers’, including those in self-employment. (15)

52. Recital 9 of Directive 2000/78 explains 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’.

53. Those two recitals (16) suggest that Directive 2000/78 aims at protecting all persons who participate in society by providing their work.

54. The case-law has endorsed such an interpretation. In his Opinion in the *HK* case, Advocate General Richard de la Tour considered that ‘the directive seeks to eliminate, on grounds relating to social and public interests, 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'. (17) That point of view was endorsed by the Court in its recent judgment in the *HK* case. (18)

55. I fully agree. The purpose of Directive 2000/78 can be interpreted as aiming at prohibiting discrimination based on, inter alia, sexual orientation in the working life of a person. (19) By covering the area of 'employment and occupation', its aim is to enable citizens to realise their potential and earn their living by providing their work.

56. This importance of work for individual self-fulfilment is recognised by the Charter of Fundamental Rights of the European Union ('the Charter'). Article 15(1) thereof provides that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. (20)

57. Directive 2000/78 thus aims to protect from discrimination those who work, and Article 3(1)(a) thereof aims at enabling discrimination-free access to work.

58. How should 'work' be understood to determine the scope of Directive 2000/78? Recent case-law has confirmed that the scope of Directive 2000/78 is to be interpreted broadly (21) and that it is not limited solely to the conditions for accessing posts occupied by 'workers', within the meaning of Article 45 TFEU. (22)

59. Therefore, when protecting those who work, Directive 2000/78 is not aimed only at 'workers' in the sense of free-movement law or secondary legislation adopted on the basis of Article 153 TFEU. (23) Even if Directive 2000/78 goes beyond 'workers' within the meaning of Article 45 TFEU, the latter are, of course, also covered by it. (24)

60. The 21st century requires a broader conception of a person who works. (25) Nowadays, a person who works is someone who invests his or her own time, knowledge, skills, energy, and often enthusiasm, in order to provide a service or create a product for someone else, and not for himself or herself, for which that person is (in principle) promised remuneration.

61. Directive 2000/78 aims at paving access to all work free from discrimination, performed as a way of making one's living, in all the different forms in which work can be offered. In such an understanding of the purpose of Directive 2000/78, there is no justification, as I will explain under the following title, to exclude from its scope self-employed work that consists in the provision of goods or services organised in whatever legally available form.

### ***(b) Diversity of work and why the provision of goods or services cannot be excluded from Directive 2000/78***

62. Work refers to both the activity and the result of that activity. (26) For the application of anti-discrimination law in the field of 'employment and occupation' it makes no difference whether a worker hands over the result of his or her work to its recipient in advance, as happens in a classic employment relationship, or offers it as a good or service to recipients afterwards. In both cases, the worker earns his or her living and participates in a society by investing his or her personal work.

63. The same work may be provided in many forms, even if traditional employment, understood as work that is full-time, indefinite and part of a subordinate and bilateral employment relationship, (27) still represents the most common model. Non-standard forms of work have, however, increased, (28) causing fragmentation in the labour market (29) and imposing new regulatory challenges. (30)

64. A person can earn his or her living by working for only one or for multiple 'employers'; for longer or shorter periods of time; part-time or only seasonally; at one place, or at different places; using his or her own tools or somebody else's. Likewise, work can be agreed on the –basis of time (for example, 20 hours per month), or on the basis of the tasks to be performed (for example, painting six walls white). (31)

65. There are, thus, different ways in which a person can engage in the same work. That also means that the same work may be provided under different legal frameworks. The legal framework that applies to a particular type of work that is available might differ from one Member State to another.



66. Those different legal frameworks should, therefore, not be relevant for the application of Directive 2000/78. What is important for its application is that a person engages in *personal work*, irrespective of the legal form under which the work is provided.

67. The idea of ‘personal work’ has been developed in the area of labour law as a reaction to the fragmentation of work, as a result of which many individuals have been left outside the protection of employment law as they do not belong to the conventional understanding of the employee. (32) Thus, personal work has been proposed as a criterion for determining which workers are and which are not the beneficiaries of labour rights.

68. However, labour lawyers tend to include within the scope of labour law all workers who provide services personally, but exclude those who are ‘genuinely operating a business on his or her own account’. (33)

69. In my opinion, EU anti-discrimination law should rely on an even wider view of personal work, which does not exclude businesses (34) if a business owner provides his or her personal work.

70. The reason for this follows from the different aims of anti-discrimination and labour legislation.

71. Labour law (with Article 153 TFEU as its legal basis in the EU), aims at protecting a worker against a person to whom he or she provides goods or services on the assumption that he or she is in a subordinate and therefore weaker position in such a working relationship.

72. Directive 2000/78, adopted on the legal basis of what is today Article 19 TFEU, has a different aim. (35) It is an instrument for creating equal opportunities for everyone to work. That equality of opportunities requires that a person’s access to work not be limited by, inter alia, his or her sexual orientation. The implementation of Directive 2000/78 should therefore lead to a result in which any person or company seeking to acquire work becomes ‘blind’ to the characteristics of a potential work provider in respect of which it is prohibited to discriminate, including his or her sexual orientation.

73. That is why the provision of goods and services as a form of personal work cannot be excluded from the scope of Directive 2000/78.

74. Let me explain what I mean on the basis of an example. A woman has IT skills, and, for instance, can create software that uses machine-learning algorithms. The first option how she might engage in work for which she is skilled that comes to mind is by being employed, on the basis of a contract of full-time employment, by a software development company.

75. However, she might find it unfulfilling to work only for one company and may therefore decide to offer the same work as a self-employed worker to multiple companies. She may, for example, try to establish a steady relationship with one company in order to be certain of gaining remuneration regularly. This can be accomplished on the basis of a contract for providing specified goods and services (for instance, creating tailor-made machine-learning algorithms, maintaining the company’s software and educating its personnel on how to use it). Such a contract might be concluded for a specified period of time, say a year, and be renewed annually. At the same time, she will try to find other companies that might require her work. With these other companies, or individuals, she might enter into only one specific contract to develop the machine-learning algorithms that they require.

76. As a self-employed individual, she would, therefore, have several types of contractual relationship. The first type, based on the contract for services which she offers during a certain number of hours per month or per year, and other types, based on contracts for the end product, namely software adjusted to the needs of a particular customer. All of the work described above can be based on the contracts for goods or services concluded individually with the IT expert at issue. However, the same IT expert may also decide to create a company and sell her work through that company.

77. For example, in some Member States, consecutive individual contracts for services with the same company might be prohibited. That might even be as a result of implementing EU labour legislation aimed at guaranteeing workers more secure non-fixed-term employment contracts. (36) However, our IT expert does not wish to be employed. The company for which she works on the basis



of consecutive one-year contracts for services does not have an incentive to employ her either, but wishes, on the other hand, to continue working with her. In such a situation, our IT expert may decide to create her own company. She could thus continue to offer her work to that same company through her own company without triggering the legislation prohibiting consecutive limited-time contracts for services.

78. Throughout all the variations described in the example above, the IT expert was performing the same type of work, and the companies or individuals with whom she entered into contracts had satisfied the same need for work.

79. However, there are arguments that the contract concluded with her as a person is indeed a form of self-employment, whereas the contract concluded with her company is not, because it is a provision of goods or services. In the first case, the potential 'employer' buys her 'work', and in the second, her 'goods' or 'services'.

80. In the light of Directive 2000/78, which aims at protecting people's right to engage in society and earn their living through personal work, is there really any difference? A company's refusal to conclude a contract with our hypothetical IT expert because she is homosexual (or of a certain religion, or too old or too young), or because she possesses any other characteristic which has nothing to do with her capacity to produce machine-learning software, prevents her access to that particular job and, therefore, limits her access to work.

81. There is no problem accepting that such discrimination should not be allowed if she were seeking traditional employment. Why should the same not apply in all other situations where she was offering her work on the basis of contracts for goods or services concluded with her as a person, or on the basis of contracts for goods or services concluded with her company, but promising her personal work?

82. In essence, both from the point of view of the person providing the work, and from the perspective of a company procuring her personal work, there is no difference. She provides the work, which somebody else needs. To exclude some of these situations from the scope of Directive 2000/78, which aims at enabling discrimination-free access to livelihoods and the capacity to contribute to society through work, irrespective of the legal form in which it is provided, (37) seems to me to be unfaithful to the aims of that directive.

83. It makes no difference to the application of anti-discrimination law whether a person providing work is at the same time a business, and is therefore in a horizontal, rather than a subordinate position, in relation to a potential 'employer'. (38) After all, in certain legal systems, at least in some professions, self-employed workers are required to register as a business, or are at least usually so organised.

84. One such example is that of commercial agents. Relationships between commercial agents and their principals are business to business. In the majority of cases, however, commercial agents are self-employed individuals who are at the same time the sole owners of businesses or small and medium-sized enterprises (SMEs). (39) Could a potential principal refuse to conclude a contract with a commercial agent only because he or she is of a certain sexual orientation? Would such a refusal not be captured by Directive 2000/78?

85. Finally, if the personal provision of goods and services is excluded from the scope of Directive 2000/78, that would enable companies or individuals requiring certain work to be performed for them to circumvent the prohibition of discrimination by opting to 'buy' goods or services rather than employ a service provider. That would, as claimed by J.K. and the Commission, be contrary to the useful effect of that directive.

86. If discrimination is to be prohibited on the enumerated grounds in respect of access to work, the provision of goods and services cannot therefore be excluded from the concept of self-employment in Article 3(1)(a) of Directive 2000/78, as long as a provider offers his or her personal work in order to make his or her living.

87. As follows from the circumstances of this case, TP had a need for the services of an editor. That TV station considered, for undisclosed reasons (it might have been cheaper), that it is preferable to buy editing services from an independent contractor than to employ one. For another TV station, that calculation might have been different – it could be cheaper, or seen as less risky, to employ a part-time or full-time editor. I cannot see any reasonable justification why Directive 2000/78 should be read as prohibiting the TV station from considering sexual orientation when employing an editor and not when contracting his or her services, directly or through his or her company. From both the point of view of the TV station and of the editor, the situation is substantively the same: the TV station is acquiring editing services which it needs, and the editor is offering his or her personal work.

### *Interim conclusion*

88. The term ‘self-employment’, as used in Directive 2000/78, covers the provision of goods and services when the provider engages in personal work. In such a situation, a potential recipient of goods or services cannot refuse to sign a contract on the basis of the sexual orientation of the provider.

## **2. *Is concluding an individual contract a ‘condition for access to ... self-employment’ within the meaning of Article 3(1)(a) of Directive 2000/78?***

89. The Polish Government argues that a refusal to conclude an individual contract for services does not come under the notion of ‘condition for access to ... self-employment’ within the meaning of Article 3(1)(a) of Directive 2000/78. In its view, the term ‘condition for access to self-employment’ concerns only general conditions for exercising certain professions. That rule relates, as the Polish Government explained at the hearing, only to regulated professions. In the case at hand, no public rule prevents J.K. from offering his editing services. There is therefore no barrier to his access to that occupation. An individual decision of a potential recipient of a service is therefore not a ‘condition for access to ... self-employment’. Such a decision is instead covered by the freedom of a person to choose with whom to sign a contract.

90. J.K., the Belgian, Netherlands and Portuguese Governments and the European Commission consider that Article 3(1)(a) of Directive 2000/78 is applicable to the refusal to conclude, on the basis of sexual orientation, a contract with a self-employed worker.

91. The Court had the opportunity to clarify the concept of the ‘conditions for access to employment’ in Article 3(1)(a) of Directive 2000/78 in the judgment in *LGBTI*, (40) a case that also concerned discrimination on the basis of sexual orientation. The Court first explained that that expression must be interpreted by reference to its usual meaning in everyday language and by taking into account the context in which it appears and the purposes of the rules of which it forms part. (41) On that basis, it concluded that conditions of access concern ‘circumstances or facts the existence of which must be established in order for a person to be able to secure particular employment or a particular occupation’. (42)

92. Even though the Court referred only to access to employment in the judgment in *LGBTI*, the same is also applicable to the concept of the ‘conditions for access to ... self-employment’, given that Article 3(1)(a) of Directive 2000/78 refers at the same time to employment, self-employment and occupation. Therefore, conditions for access to self-employment cover circumstances or facts which must be established in order for a person to be able to secure a particular job as a self-employed worker.

93. A self-employed worker enters into a job by concluding a contract for services or a similar civil-law contract. If the potential recipient of a self-employed worker’s services conditions access to a job by insisting that a person providing it is not homosexual, it is clear that a person of that sexual orientation cannot secure that particular work.

94. Therefore, if, in a situation of conventional employment, a refusal to enter into a contract of employment with a person because of his or her sexual orientation is prohibited by Article 3(1)(a) of Directive 2000/78, then a refusal to conclude a contract for services or a similar contract with a self-employed worker because of his or her sexual orientation must also be prohibited by that provision, which refers to both employment and self-employment.

95. Finally, I would like to address an additional question, which was discussed at the hearing. Would Article 3(1)(a) of Directive 2000/78 apply even in a hypothetical situation in which a self-employed worker, such as J.K., did not have a long-lasting previous working relationship, but had applied for the job for the first time and was refused a contract because of his or her sexual orientation? In other words, does the continuity of work make any difference?

96. J.K. and the Commission considered that applying for the first time would not make any difference. The Polish Government maintained its previous position that individual decisions of that kind do not fall under the concept of ‘conditions of access to ... self-employment’.

97. I agree with J.K. and the Commission. The situation covered by point (a) is access to work. Previous working relationships are unrelated to applying for a job and succeeding in concluding a contract. In other words, it is not that the refusal to conclude the contract in the main proceedings falls under Article 3(1)(a) of Directive 2000/78 because J.K. had previous contracts with TP, but rather because he was denied access to new work through TP’s refusal to conclude a new contract with him.

#### *Interim conclusion*

98. A refusal to conclude an individual contract for services with a self-employed worker that is motivated by the sexual orientation of that person is covered by the expression ‘conditions for access to ... self-employment’ set out in Article 3(1)(a) of Directive 2000/78.

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

99. In the particular circumstances of the present case, refusal to conclude the contract with J.K. not only prevents his access to a new job, but also terminates his seven-year-long working relationship with TP on the sole basis of his sexual orientation. In my view, therefore, Article 3(1)(c) of Directive 2000/78 is also applicable in the present case.

100. The Polish Government argued that Article 3(1)(c) of Directive 2000/78 cannot apply because, first, self-employment is not expressly mentioned in that provision and, second, self-employed workers cannot in any case be ‘dismissed’.

101. In my view, Article 3(1)(c) of Directive 2000/78 complements point (a) thereof. Whereas the latter applies to access to work, the former applies to conditions of work, including its termination. The lack of a reference to self-employment in point (c) is, therefore, to be attributed to unclear legislative drafting, rather than to the intention of the legislature to exclude self-employed workers. Namely, whereas point (a) of Article 3(1) refers to both the personal and material scope of Directive 2000/78, point (c) refers only to its material scope.

102. Moreover, it is true that self-employed workers cannot be dismissed, if the word dismissal is used only in relation to employment. That is, however, irrelevant. Article 3(1)(c) of Directive 2000/78 refers to dismissal by way of example of what is understood under the term ‘employment and working conditions’. That provision applies to all conditions of work and its termination. (43)

#### *Interim conclusion*

103. A situation, such as the one in the present case, in which a self-employed worker already had established working relations with the recipient of services who refused to conclude the new contract solely by reason of his or her sexual orientation falls under the scope of Article 3(1)(c) of Directive 2000/78.

#### ***C. Can freedom of contract be relied upon to justify discrimination on the ground of sexual orientation?***

104. Another question, implied in the reference, is whether freedom of contract, understood as a right to choose freely a contracting party as provided for in Article 5(3) of the Polish Equality Law, can be invoked by TP as a justification to exclude the application of Directive 2000/78.

105. Directive 2000/78 provides, in Article 2(5) thereof, that national measures may exceptionally exclude the application of that directive if they are, inter alia, necessary for the protection of the rights and freedoms of others. The Court has explained that that provision, being an exception to the principle prohibiting discrimination, is to be interpreted strictly. (44)

106. Can Article 5(3) of the Polish Equality Law be understood as a measure necessary for the protection, in a democratic society, of the freedoms of others, as laid down in Article 2(5) of Directive 2000/78?

107. Article 5(3) of the Polish Equality Law guarantees freedom to choose a party to a contract. According to that provision, such freedom can be limited to prevent discrimination based on sex, race, ethnic origin or nationality. However, the limitation of freedom of contract is not envisaged in a situation in which a choice results in discrimination on the basis of sexual orientation. Thus, basing a decision on whether to conclude a contract on the sexual orientation of a potential contracting party is permitted under that law.

108. In application of Article 2(5) of Directive 2000/78, a provision of national law which allows discrimination on the ground of sexual orientation is not contrary to that directive if it is necessary to enable the freedom to contract.

109. At the outset, and before engaging in any form of proportionality review, I must express a difficulty I have when trying to think of that question in terms of balancing. For, can permission to discriminate on the basis of any of the prohibited grounds be at all part of freedom of contract in a society which is based on the value of equality? (45)

110. However, if it can be accepted that freedom of contract is limited by the prohibition of discrimination on the grounds enumerated in Directive 2000/78, conventional proportionality analysis leads to the conclusion that allowing discrimination on the grounds of sexual orientation is not necessary to protect freedom of contract in a democratic society.

111. A shortcut to concluding that Article 5(3) of the Polish Equality Law is not necessary in a democratic society in order to protect freedom of contract is to point out that that provision already prohibits discrimination on grounds of gender, race or ethnic origin in choosing a co-contracting party. That in itself demonstrates that the Polish legislature does not understand the freedom to discriminate as necessary to guarantee freedom of contract in a democratic society.

112. The way to balance two fundamental rights is to assess whether either of them has been disproportionately limited. Given that under Article 2(5) of Directive 2000/78, freedom of contract is used as justification for derogating from that directive, that, paradoxically, requires a reversal of analysis. The question becomes whether freedom of contract has been disproportionately limited by Directive 2000/78. If that proves not to be the case, the conclusion is drawn that the national law protecting the freedom used as justification (freedom of contract) is not necessary in a democratic society. (46)

113. If applied to the present case, the analysis is conducted as follows. The starting point is to note that the right offered as justification, here freedom of contract, is not an absolute right. (47) It may be limited by law in order to achieve socially acceptable goals, provided that the very essence of that right is not affected, and the limitation is proportionate (appropriate and necessary) to the goals pursued.

114. The requirement that a limitation to freedom of contract is contained in the law is satisfied, given that it is set out in an EU directive.

115. Second, the goal of Directive 2000/78 is to make equality in the field of ‘employment and occupation’ a reality in all EU Member States. That directive also contributes to the achievement of other goals stated in the Treaties. According to recital 11 thereof, ‘discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement ... 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’. Therefore, Directive 2000/78 limits

freedom of contract in order to achieve equality and other important EU goals, which are legitimate goals.

116. Third, that directive only limits the freedom to choose contractors by excluding the possibility that such choice is based on one of the enumerated grounds. It does not prevent employers or others in a similar position from choosing the most suitable person for the job. In that regard, recital 17 of Directive 2000/78 explains that that directive ‘does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned ...’. That, I believe, is the essence of freedom of contract.

117. A decision not to hire or to dismiss can be based on different reasons, which are relevant to the job at issue.<sup>(48)</sup> Therefore, the prohibition to discriminate on the enumerated grounds when making a choice with whom to enter into contract does not affect the essence of freedom of contract.

118. Finally, if we accept that a limitation to the freedom of contract does indeed exist, it is further necessary to demonstrate that such a limitation is appropriate and necessary to achieve the legitimate goal(s) of Directive 2000/78. I will confine myself to a proportionality analysis in relation to the goal of combating discrimination in the area of employment and occupation, as this is the goal that is directly connected with the legal basis on which that directive was adopted. <sup>(49)</sup>

119. By excluding the possibility of discriminating on prohibited grounds, and by requiring, in Article 17 thereof, that Member States envisage effective and dissuasive sanctions when transposing it, Directive 2000/78 is appropriate to contributing to the combat against discrimination, as it could be expected that that will lead to a gradual decrease in and, ultimately, the disappearance of such behaviour.

120. A society free of discrimination on prohibited grounds in the area of employment and occupation can only be achieved if nobody who requires and seeks another person’s work takes into consideration the characteristics enumerated in Directive 2000/78. If that is not so, persons who have those characteristics will not enjoy equal chances of securing work. Therefore, in a society in which such concerns still play a role, prohibiting such choices and dissuading them by appropriate sanctions is a minimum necessary to achieve that goal. I cannot think of a less restrictive alternative to achieve the goal of a discrimination-free area of employment and occupation.

121. Therefore, given that freedom of contract, which Article 5(3) of the Polish Equality Law purports to protect, is not disproportionately limited by Directive 2000/78, that provision cannot be interpreted as necessary for protecting the freedom of choice of contracting parties in a democratic society.

#### *Interim conclusion*

122. A national provision, such as Article 5(3) of the Polish Equality Law, is not necessary for the protection of the freedom to choose a contracting party in a democratic society. That provision cannot therefore justify the application of Directive 2000/78 being excluded on the basis of Article 2(5) thereof.

#### ***D. Obligations of a referring court where there is a conflict between the rule of national law and Directive 2000/78***

123. As Article 5(3) of the Polish Equality Law is not necessary in a democratic society, Directive 2000/78 remains applicable in the case at hand to the refusal to conclude a contract with a self-employed worker because of the sexual orientation of that person.

124. The referring court explained in its reference that Article 5(3) of the Polish Equality Law is applicable to the situation in the main proceedings. <sup>(50)</sup>

125. That means that the referring court is faced with two opposing provisions applicable to the pending case: the first, contained in Directive 2000/78, prohibits TP from refusing to conclude the



contract with J.K. because he is homosexual; the second, contained in the Polish Equality Law, allows TP to refuse to conclude the contract with J.K. because he is homosexual.

126. EU law has a rule which applies where there is such a conflict between two rules that are both applicable to the same set of facts: the national court has to apply the EU rule and set aside the rule of national law when deciding the case. (51) The primacy of EU law thus resolves such a conflict of rules to the benefit of the EU rule.

127. For the sake of completeness, it should be added that primacy functions as a rule of conflict and requires the disapplication of a contrary national rule when an EU rule has direct effect. (52)

128. Directives have direct effect in vertical situations. (53) Given that TP is a public TV station, (54) it has been held in the case-law that such a situation is to be understood as vertical for the purposes of the direct application of a directive. (55) J.K. can therefore rely on Directive 2000/78 against TP in the main proceedings.

129. Furthermore, the relevant provisions of Directive 2000/78 (Article 3(1)(a) and (c)) are unconditional and sufficiently precise to enable a national court to apply them. (56) It is clear that a subject such as J.K. (a self-employed worker) has, on the basis of those provisions, the right not to be discriminated against on the ground of his or her sexual orientation when applying for a new job or the extension of the existing working relationship; and it is clear that a subject such as TP, which is seeking editing services, cannot refuse to conclude a contract with a self-employed worker solely because of his or her sexual orientation. It is therefore possible to conclude on the basis of the relevant provisions of Directive 2000/78 that J.K. has been bestowed a right; that TP has a correlative obligation; and that the content of that right/obligation means that reliance on sexual orientation as a criterion for concluding a contract is precluded.

130. Consequently, the national court cannot apply Article 5(3) of the Polish Equality Law to decide the case that is pending before it. It is also worth repeating that such an obligation of a national court is not dependent on the national legislature's decision to amend national law to bring it into conformity with EU law. That does not, however, exclude the parallel obligation of a national legislature to do so.

#### *Interim conclusion*

131. Article 3(1)(a) and (c) of Directive 2000/78 is applicable to the case at hand and has direct effect. J.K. can therefore rely before the referring court on the prohibition, imposed on TP, to refuse to sign a contract with him, as a self-employed worker, because of his sexual orientation. The referring court is therefore required to set aside the contrary national provision.

## **V. Conclusion**

132. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw in Warsaw, Poland) as follows:

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 allows a refusal to conclude a civil-law contract for services under which personal work is to be carried out by a self-employed worker, where the refusal is motivated by the sexual orientation of that person.

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<sup>1</sup> Original language: English.

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[2](#) The referring court founded the present preliminary reference on the premiss that the refusal to conclude the contract was motivated by J.K.'s sexual orientation. The decision as to whether there was discrimination is a matter for that court. In that respect, see recital 15 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), and judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 42). This Opinion will therefore proceed on the assumption that the situation that led to the dispute is one of direct discrimination based on sexual orientation.

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[3](#) Judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)* (C-24/19, EU:C:2020:503, paragraph 75).

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[4](#) Countouris, N. and De Stefano, V., *New trade union strategies for new forms of employment*, ETUC, Brussels, 2019 p. 34.

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[5](#) Countouris and De Stefano (ibid.) thus note that: 'if one is not a subordinate employee, if his/her work is not subject to the control or performed under the direction of an employer, if it is not integrated in a business, or does not engender any particular business risk, then most legal systems will simply assume that person to be self-employed'.

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[6](#) That legal basis was introduced into the treaties by the Treaty of Amsterdam, and was, at the time that Directive 2000/78 was adopted, Article 13 TEC.

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[7](#) As specified in Article 1 of Directive 2000/78, that directive prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation.

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[8](#) Article 19 TFEU empowers the EU to combat discrimination only within the limits of the powers conferred upon it by the Treaties.

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[9](#) See the title of Directive 2000/78 and Article 1 thereof.

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[10](#) Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426 final).

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[11](#) Its legislative history reveals that the most important factors that are slowing down the adoption of that directive are (i) the costs of enabling discrimination-free access to goods and services for persons with disabilities and (ii) subsidiarity. See, to that effect, Council of the European Union, *Progress Report*, No 14046/21, 23 November 2021.

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[12](#) See footnote 10 to this Opinion.

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[13](#) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

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[14](#) Directive 2000/43, which prohibits discrimination on the grounds of racial and ethnic origin, was also adopted on the basis of what is now Article 19 TFEU at approximately the same time as Directive 2000/78, which is what makes the use of the terms in those two directives comparable.

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[15](#) See, in that respect, De Stefano, V., ‘Not as simple as it seems: The ILO and the personal scope of international labour standards’, *International Labour Review*, 2021, pp. 387-406, p. 399. See also, Schubert, C., *Economically-dependent Workers as Part of a Decent Economy*, Beck/Hart/Nomos, 2022, p. 237.

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[16](#) See also Explanatory Memorandum of the Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation. Part of that memorandum, which described what would later become Article 3 of Directive 2000/78, specifically indicates that ‘equality of treatment in respect of access to employed or self-employed activities ... involves the elimination of any discrimination arising from any provision which prevents *access of individuals to all forms of employment and occupation*’. Emphasis added.

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[17](#) Opinion of Advocate General Richard de la Tour in *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:29, point 37).

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[18](#) Judgment of 2 June 2022, *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:419, paragraph 34).

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[19](#) See, in that respect, the Swedish-language version of Directive 2000/78, which uses the expression ‘working life’ (*arbetslivet*) in Article 1 of that directive, to cover the English expression ‘employment and occupation’ or the French wording of *‘emploi et travail’*.

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[20](#) The importance of work for individual self-fulfilment has also been highlighted in the case-law. In his Opinion in *Coleman* (C-303/06, EU:C:2008:61, point 11), Advocate General Poiares Maduro considered that ‘access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one’s living but also as an important way of self-fulfilment and realisation of one’s potential’. That same quote was repeated as important for understanding the scope of Directive 2000/78 by Advocate General Sharpston in her Opinion in *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2019:922, point 44).

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[21](#) Judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 39) (‘the judgment in *LGBTI*’). See also Opinion of Advocate General Sharpston in that case (C-507/18, EU:C:2019:922, point 42). The Court repeated in the *HK* judgment that the terms ‘employment’, ‘self-employment’ and ‘occupation’ must be construed broadly, as it is apparent from a comparison of the different language versions of Article 3(1)(a) of Directive 2000/78 that many languages use general expressions. Judgment of 2 June 2022, *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:419, paragraph 27).

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[22](#) Judgment of 2 June 2022, *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:419, paragraph 29). See also paragraph 28 of the same judgment where the Court said ‘accordingly, apart from the fact that Directive 2000/78 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’.

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[23](#) On the development of the concept of ‘worker’ in internal market and secondary EU labour law in the case-law of the Court, see Countouris, N., ‘The Concept of “Worker” in European Labour Law: Fragmentation, Autonomy and Scope’, *Industrial Law Journal*, 2018, pp. 192-225, and Goldner Lang, I., ‘Sloboda kretanja radnika’, in Čapeta, T. and Goldner Lang, I. (eds), *Pravo unutarnjeg tržišta Europske unije*, Narodne Novine, Zagreb, 2021, pp. 77-110.

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[24](#) In that respect, see Opinion of Advocate General Richard de la Tour in *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:29, point 35).

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[25](#) In that respect, see Supiot, A., ‘Homo faber: continuités et ruptures’, in Supiot, A. (ed.), *Le travail au XXI<sup>e</sup> siècle, Livre du centenaire de l’OIT*, éditions de l’Atelier, Paris, 2019, pp. 15-41.

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[26](#) See also, in that respect, Supiot, A., ‘Homo faber: continuités et ruptures’, in Supiot, A. (ed.), *Le travail au XXI<sup>e</sup> siècle, Livre du centenaire de l’OIT*, éditions de l’Atelier, Paris, 2019, pp. 15-41, p. 17; Dujarier, M.-A., *Troubles dans le travail, Sociologie d’une catégorie de pensée*, puf, Paris, 2021, pp. 365-366.

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[27](#) That is how ‘standard employment relationship’ was described in an ILO study on non-standard forms of work. See *Non-standard employment around the world: Understanding challenges, shaping prospects*, ILO, Geneva, 2016, p. 7. See also the map at page 52 of that study.

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[28](#) Ibid.

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[29](#) Deakin, S. and Wilkinson, F., *The Law of the Labour Market*, OUP, Oxford, 2005, pp. 311-313.

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[30](#) Fudge, J., ‘Blurring Legal Boundaries: Regulating for Decent Work’, in Fudge, J., McCrystal, S. and Sankaran, K., *Challenging the legal boundaries of work regulation*, Hart, Oxford, 2012, pp. 1-26; De Stefano, V. and Aloisi, A., *European Legal framework for digital labour platforms*, European Commission, Luxembourg, 2018.

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[31](#) Collins explains that personal work can be based on a time-service contract or on a task performance contract. From an economic perspective, there might be different reasons, mostly related to the allocation of risks, why a particular type of work might be agreed upon. In that respect, see Collins, H., ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment’, *Oxford Journal of Legal Studies*, vol. 10(3), 1990, p. 362.

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[32](#) On the idea of personal work see, for example, Freedland, M. and Countouris, N., *The Legal Construction of Personal Work Relations*, OUP, Oxford, 2011, pp. 5 and 42; Supiot, A., ‘Towards a European policy on work’, in Countouris, N. and Freedland, M. (eds), *Resocialising Europe in a Time of Crisis*, CUP, Cambridge, 2013, pp. 19-35, p. 35; Countouris, N. and De Stefano, V., *New trade union strategies for new forms of employment*, ETUC, Brussels, 2019, p. 64.

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[33](#) Such definition of personal work relation was proposed by N. Countouris and V. De Stefano in *New trade union strategies for new forms of employment*, ETUC, Brussels, 2019, p. 65: ‘the idea of “personal work relation” can be used to define the personal scope of application of labour law as applicable to any person that is engaged by another to provide labour, unless that person is genuinely operating a business on his or her own account.’

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[34](#) See also, to that effect, C. Barnard, who explains that there are also those who would argue that the reference to ‘self-employed’ covers, in the area of equality law, even independent self-employed (entrepreneurs). In: *EU Employment Law*, OUP, Oxford, 2012, 4th ed., p. 348.

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[35](#) In its judgment of 2 June 2022, *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:419, paragraph 34), the Court considered: ‘as the Advocate General observed in point 37 of his Opinion, 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 ...’

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[36](#) Clause 5 of the Framework Agreement on fixed-term work of 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

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[37](#) See point 54 of this Opinion and the case-law cited therein.

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[38](#) That does not mean that in other areas of EU law, such as, for instance, competition law, that fact does not play a role. In that respect see judgment of 4 December 2014, *FNV Kunsten Informatie en Media* (C-413/13, EU:C:2014:2411).

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[39](#) See, in that respect, Commission Staff Working Document, Evaluation of Directive 86/653 (REFIT Evaluation), SWD(2015) 146 final, 16 July 2015.

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[40](#) Paragraph 39.

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[41](#) The judgment in *LGBTI*, paragraph 32.

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[42](#) The judgment in *LGBTI*, paragraph 33.

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[43](#) Additionally, I wish to point out that the Court has, in a different context related to free movement and citizens’ rights based on Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights 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 (OJ 2004 L 158, p. 77), already recognised that the involuntary termination of work of a self-employed worker can be assimilated with the involuntary dismissal of an employed worker. See judgments of 20 December 2017, *Gusa* (C-442/16, EU:C:2017:1004, paragraph 43), and of 11 April 2019, *Tarola* (C-483/17, EU:C:2019:309, paragraph 48).

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[44](#) See, to that effect, judgment of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 56).

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[45](#) In recent judgments of the Court, sitting as a full court, it has explained that values enumerated in Article 2 TEU, including equality, are an integral part of the very identity of the European Union (judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 232, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, paragraph 264). The very purpose of Directive 2000/78 is to turn the value of equality into reality, by putting into effect prohibition of discrimination, as expressed in Article 21 of the Charter. Ever since the judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56), equality has represented a social model that the European Union aims to achieve. McCrudden, for example, explains that when equality is understood as a right-protective concept, the principle of equal treatment has particular importance in demonstrating that the goals of the European Union go beyond economic goals and extend to the protection of the European social model. See McCrudden, C., ‘The New Concept of Equality’, *ERA*, 2003, p. 18. See also Waddington, L., ‘Testing the Limits of the EC Treaty Article on Non-discrimination’, *Industrial Law Journal*, 1999, pp. 133-151, p. 134, who considered

that the inclusion of Article 13 EC in the Treaty was not primarily prompted by the desire to combat discrimination for economic reasons, but rather to bring Europe ‘closer to the citizens’.

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[46](#) The Court undertook a similar balancing between the right to non-discrimination, as provided for in Directive 2000/78, and freedom of expression, as protected in Article 11 of the Charter, in the judgment in *LGBTI*, paragraphs 47 to 57. The Court balanced the right to non-discrimination, as provided for in Directive 2000/78, against freedom of association, as protected in Article 12 of the Charter, in the judgment of 2 June 2022, *HK/Danmark and HK/Privat* (C-587/20, EU:C:2022:419, paragraphs 41 to 47).

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[47](#) It is worth noting that freedom of contract has also been recognised by the EU legal order as one of the fundamental rights, as part of the freedom to conduct a business guaranteed by Article 16 of the Charter. See, for example, judgment of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraph 79). That, in the first place, means that the EU legislature is under an obligation to take that freedom into consideration when enacting anti-discrimination legislation. In the second place, as understood in the EU legal order, freedom of contract is not absolute. Quite to the contrary, the Court has held that the freedom to conduct a business, as provided for in Article 16 of the Charter, ‘may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest’. See, in that respect, judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 46); see also judgment of 21 December 2021, *Bank Melli Iran* (C-124/20, EU:C:2021:1035, paragraphs 80 to 81). In relation to the latter point, see also Weatherill, S., ‘Use and Abuse of the EU’s Charter of Fundamental Rights: on the improper veneration of “freedom of contract”’, *European Review of Contract Law*, 2014, pp. 167-182.

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[48](#) See, for instance, for the case of a pregnant woman dismissed due to collective redundancy, judgment of 22 February 2018, *Porrás Guisado* (C-103/16, EU:C:2018:99, paragraph 71).

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[49](#) See point 44 of this Opinion.

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[50](#) The competence to interpret national law lies solely with the national court. In preliminary ruling proceedings, the Court therefore has to rely on the national court’s interpretation of national law. The referring court explained that it considers the type of contract such as the one in the case at issue to be covered by the Polish Equality Law on the basis of Article 4(2) thereof and that, therefore, Article 5(3) of that law also applies.

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[51](#) Judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 21 to 23), and of 22 February 2022, *RS (Effects of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraphs 62 and 63).

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[52](#) Judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraphs 60 to 64 and 68).

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[53](#) Judgments of 5 April 1979, *Ratti* (148/78, EU:C:1979:110, paragraphs 20 to 23), and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 45).

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[54](#) Its owner is the State Treasury. It is worth noting that TP, the defendant in the proceedings before the referring court, has not submitted written observations or participated in the hearing before the Court.

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[55](#) Judgments of 26 February 1986, *Marshall* (152/84, EU:C:1986:84, paragraphs 46 to 49), and of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraphs 32 to 35).

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[56](#) Judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraphs 11 and 12); of 24 January 2012, *Dominguez* (C-282/10, EU:C:2012:33, paragraph 33); of 16 July 2015, *Larentia + Minerva and Marenave Schiffahrt* (C-108/14 and C-109/14, EU:C:2015:496, paragraphs 48 to 49); and of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)* (C-205/20, EU:C:2022:168, paragraphs 17 to 19).