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## EU law protection from discrimination extends to self-employed workers, confirmed the CJEU in a landmark judgment with LGBT+ rights in the background

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On 12 January 2023, the Second Chamber of the CJEU delivered its decision in Case [C-356/21 J.K. v TP S.A.](#) which represents an important contribution to EU anti-discrimination law. Having examined the [Framework Directive 2000/78](#), the Court has confirmed that the prohibition of discrimination on the grounds of sexual orientation applies not only to access to employment, but also to self-employment, provided there is a stable relationship with the client. This case also touches upon the broader issue of the rights of self-employed persons which lacks clarity at the EU level.

### Facts of the case

The defendant in this case was TP which stands for 'Telewizja Polska' – the Polish national TV broadcaster which is owned entirely by the state and since 2015 has been [controlled](#) by the far-right government led by the PiS (Law and Justice) party. The leadership in Poland has been pushing an openly anti-LGBT+ campaign, notably through the state media channels. One example that made the headlines back in 2020 was the creation of the so-called '[LGBT-free zones](#)' by a number of municipalities and regions where PiS is in charge of the local government.

The applicant, J.K., had a registered business and in this capacity provided audio-visual content to the national broadcaster TP on a business-to-business basis. This working relationship had lasted seven years on a series of consecutive short-term contracts.

Typically, J.K. performed two weekly shifts per month, while during the remaining two weeks of each month the service was provided by another freelance colleague. In late 2017, the state broadcaster underwent some internal restructuring, as a result of which J.K.'s work was to be managed by a different unit. On this occasion, he was reassured that he would not be personally affected by the restructuring. Accordingly, his contract was renewed for another month. In December 2017, the applicant together with his same-sex partner, published a YouTube video to promote equality which showed different same-sex couples celebrating Christmas festivities. Two days later, J.K.'s planned weekly shift was cancelled by TP via email. His other shift which had already been scheduled for late December was later also cancelled, and no further contract between J.K. and Telewizja Polska was ever concluded.

When the matter was brought before the domestic court in Warsaw, the latter sought advice from the CJEU regarding the interpretation of the Framework Directive 2000/78. On one hand, Article 3(1) of the Directive is clear in that it prohibits discrimination to 'conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions' on the enumerated grounds including sexual orientation (see Article 1). On the other hand, the [Polish transposition](#) of the Directive prohibits discrimination on the grounds of sexual orientation in employment but, with regard to the freedom of contract, it limits the prohibited grounds to sex, race, ethnic origin and nationality.

### **Judgment of the Court**

The CJEU's reasoning begins with some remarks on the interpretation of the term 'conditions for access to employment, to self-employment or to occupation'. Mindful of the lack of a uniform definition of self-employment in EU law and of the resulting discrepancies between the Member States, the Court notes, in paragraphs 34-35, that the Framework Directive does not leave it up to the Member States to define the above terms and, therefore, on an EU level, these should be interpreted based on everyday language and the context of each individual case. By referring separately to 'employment', 'self-employment' and 'occupation' in Article 3(1), the EU legislator, thus, has made it clear that the personal scope of the Framework Directive is not limited solely to 'workers' within the meaning of Article 45 TFEU (para 37).

This textual analysis is further supported by a teleological interpretation, whereby the CJEU in paragraphs 41-43 looks at the objective and the legal basis of the provision at issue. The Framework Directive is based on Article 19(1) TFEU which confers upon the EU legislative powers in order to combat discrimination, including on the grounds of sexual

orientation. This, according to the Court, stands in sharp contrast to secondary legislation adopted specifically to protect 'workers' as the weaker party in an employment relationship, such as that enacted on the basis of Article 153(2) TFEU.

In case of self-employed workers, the difficulty to adjudicate properly on their rights often lies in the possible overlap with the principle of the free movement of services. In *J.K. v TP*, the CJEU acknowledges this difficulty and proposes the following test: if a self-employed activity is to fall within the scope of the Framework Directive, it must be, firstly, genuine and, secondly, 'pursued in the context of a legal relationship characterised by a degree of stability' (para 45). In this vein, the Court then proceeds to confirm that J.K.'s working relationship with the Polish state broadcaster fulfilled both conditions, particularly in light of the regularity of contracts. It, therefore, fell within the scope of the Framework Directive.

Finally, the CJEU looks at the Polish [Law on the transposition of certain provisions of EU law regarding equal treatment of 3 December 2010](#). In implementing the Framework Directive, the Polish legislator laid down an exception from the general prohibition of discrimination for the freedom of choice of parties to a contract – in this case, *Telwizja Polska's* freedom to choose its contractors. On this note, the CJEU refers to point 111 of the [Opinion of the Advocate General Ćapeta](#) who observed that the very fact that the principle of freedom of contract was in the 2010 Law qualified by a number of exceptions meant 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'. Therefore, limiting these exceptions to sex, race, ethnic origin and nationality and not including sexual orientation was, according to the CJEU, a breach of the Framework Directive (paras 78-79).

## Commentary

A superficial reading of *J.K v TP* would suggest, firstly, that the CJEU has merely confirmed the literal wording of Article 3(1) of the Framework Directive 2000/78 and, secondly, that Poland has incorrectly transposed the Directive. Upon closer examination, however, neither of these statements is accurate as there is far more to unpack from this interesting judgment. Regarding the Framework Directive, while it might be easy to say in one breath that the prohibition of discrimination applies to access to employment, self-employment and occupation, the fact that it might actually also cover self-employed persons with a registered business has potentially significant consequences for the freedom to provide services. The CJEU has previously been confronted with the issue of self-employed contractors in Case [C-413/13 FNV Kunsten](#). While that judgment concerned specifically the overlap between the right of self-employed persons to collective bargaining and EU

competition law, the broader issue remains the same: where to draw the line between those self-employed who are in a quasi-employment relationship and those who are genuine businesses providing services and are not dependant on a single client?

Some Member States have attempted to make provision for this intermediate category of self-employed workers/contractors, and so has Poland. The 2010 Law transposing Article 3(1) does indeed extend not only to employees but also to an intermediate category of workers who are neither registered as self-employed nor have an employment contract; instead, they are employed on the basis of a civil law contract regulated by the Polish Civil Code. The applicant in *J.K v TP* did not, however, have such a contract, but was registered – in theory – as a proper business. This distinction in the national legislation, nonetheless, is used primarily for determining the person’s tax and social security situation.

Looking at the circumstances of this case, it is clear that J.K. was more than merely a business providing services to Telewizja Polska. He had worked for the state broadcaster for two weeks every month for seven years, and his livelihood was clearly affected when the contract was terminated due to his sexual orientation. It is important that the CJEU in this judgment has recognised his genuine status.

On a broader note, however, this decision exposes the complexity of the issue of self-employed workers, as well as the consequences of the lack of a uniform definition of this category of workforce on EU level. In 2021, the Commission [proposed a Directive on improving working conditions in platform work](#). This important initiative, which is currently at a very advanced stage of the legislative process, seeks to ensure through the principle of primacy of facts that gig economy workers are granted the legal employment status that corresponds to their actual work carried out for businesses such as Uber, Deliveroo etc. While this is a welcome development, it seems that once this new Directive is passed, those who work in the gig economy but do not use digital platforms, like J.K., will not have the same enforcement mechanisms to safeguard their rights.