

SHARPENING THE TEETH OF EU SOCIAL FUNDAMENTAL RIGHTS? THE CASE OF STATE PENSION AGE

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ABSTRACT: *This article analyzes current EU pension law and policy in light of the case “State Pension Age” (SPA) and considers the implications of this analysis for EU social rights. In examining the applicability of EU pension law, it provides two critical entry point of analysis into the SPA cases: i) Article 21 Charter Fundamental Rights of the European Union, and ii) The Internal Market scenario.*

SUMMARY: 1. Introduction. - 2. Background. - 3. The Delve and Glynn judgements. - 4. Analysis. - 5. Concluding remarks.

1 Sarmiento wrote in 2018 a blog named: *‘Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer’*.¹ This interesting analysis can be put into practice on the basis of a recent judgement by the Court in the United Kingdom (still bound by EU Law regarding pensions).²

This article examines an important and very topical EU Law element of the judgments (first instance³ and appeal⁴) regarding two claimants (*Delve and Glynn*),

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¹SARMIENTO, ‘Sharpening the Teeth of EU Social Fundamental Rights: A Comment on Bauer’, available at: <https://despiteourdifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/>.

²SANDEEP, H. VAN MEERTEN, ‘UK Collective Defined Contribution: Is it ‘Dutch-Style’ Collective Defined Contribution?’, in: S. Andrew (et.al, eds.), *Pensions Law, Policy and Practice*. Oxford: Hart Publishing, 2020.

³<https://www.judiciary.uk/wp-content/uploads/2019/10/Delve-and-Glynn-v-SSWP-CO-3174-2018-Final.pdf>.

⁴DELVE & ANOR, R (On the Application Of) v The Secretary of State for Work And Pensions [2020] EWCA Civ 1199 (15 September 2020), available at <https://www.bailii.org/ew/cases/EWCA/Civ/2020/1199.html>.

backed by *BackTo60*, versus the UK Department of Work and Pensions (hereafter: *Delve and Glynn*). The claimants argued that the UK State Pension Age (SPA) was discriminatory and contrary, *inter alia*, to EU Law.

In this article the focus is *not* if SPA is discriminatory, but rather whether the SPA falls in the ambit of EU law. The Courts in the UK stated that SPA falls outside the scope of EU Law. Didn't the UK Courts in *Delve and Glynn* conclude too easily that SPA falls outside the scope of EU Law? In other words, as Sarmiento would have put it, how can we further sharpen the teeth of EU social protection?

2. The facts of the case are derived from the two judgements.⁵ In *Delve and Glynn* it can be read that in successive statutes between 1995 and 2014 Parliament has legislated to equalise SPA between men and women. Legislation has contained a timetable for the adjustment of SPA, structured for successive cohorts of women defined by age, initially to age 65 and subsequently to age 66, rising to age 68. The Claimants *Delve and Glynn* are women born in the 1950s affected by these changes. 1950s-born women argue that the pace of change has been too quick and penalises them as a cohort. The Claimants "seek judicial review" of the mechanisms chosen to "Implement the Government's policy" of raising and equalizing the SPA. They also seek judicial review of "the failure to inform women of the changes".

3. The UK Court in first instance rightly admits that non-discrimination is a general EU principle. The Court also states that the principle applies only where the relevant national rule falls within the scope of EU law.

Firstly, the Court held that the receipt of state pension is not "pay" as defined by the TFEU, because it is not a wage or salary, and is not paid in respect of employment. The "equal pay" obligation contained in Article 157(1) has thus no

⁵*Ibidem*.

application.⁶

Secondly, the Court concludes that the claimants' claim to have been directly or indirectly discriminated against on grounds of sex contrary to EU law cannot progress in the face of Article 7 [of Directive 79/7/EEC (the Social Security Directive)]. The derogation contained in that provision extends to all aspects of the determination of pension age, whether equal or unequal.

Thirdly, the Court states that a regime for the payment of state pensions to those above a certain age is a paradigm example of a social protection scheme. Directive 2000/78 (the Equality Directive) does not apply, according to the Court.

The Court thus concludes:

“The Claimants’ EU law arguments must fail, because this legislation [SPA, HvM] is not within the scope of EU law”.

In appeal, the Court upheld the decision in first instance and stated⁷:

‘The first claim was that the legislation unlawfully discriminated against the Appellants on grounds of age, contrary to EU law. The Appellants relied on both a general EU principle of non-discrimination and on the Equality Directive, Council Directive 2000/78/EC of 27 November 2000. The Court dismissed this claim on the grounds that the general principle did not apply because the payment of state pension did not come within the ambit of EU law concerning age discrimination and further that state pensions were excluded from the scope of the Equality Directive by Article 3(3) of that Directive: [37] and [41]. The Appellants do not appeal against that decision’.

4. To our mind, the UK Courts jumped too quick to conclusions, reaching decisions which open up venues for discussion on the applicability of EU law.

Prima facie the UK Court in first instance seems right. Regulating state

⁶Article 157(1) TFEU reads: *‘Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.’*

⁷*Delve & Anor, R (On the Application Of) v The Secretary of State for Work And Pensions* [2020] EWCA Civ 1199 (15 September 2020) at [17], available at <https://www.bailii.org/ew/cases/EWCA/Civ/2020/1199.html>.

pensions is not a competence of the EU. Also can be agreed with the conclusion of the UK Court in first instance that state pension is not “pay” as defined by the TFEU. The same goes for the reasoning of the UK Court in first instance regarding sex discrimination.

Nonetheless, the ‘scope’ argument by the UK Court in first instance – which was then upheld in appeal – can be contested.

There are at least two arguments that the ‘scope argument’ is too narrowly interpreted by the UK Courts: *i)* Article 21 Charter Fundamental Rights of the European Union, and *ii)* The Internal Market scenario.

First, concerning *i)* the dispute between *Delve and Glynn* versus the Secretary of State for Work and Pensions is a vertical relation: individuals against the State. ECJ Case law concerning direct horizontal relations (individuals vs individuals and/or pension funds) however seems to apply *mutatis mutandis* and *a fortiori*.

Moreover, the ECJ stated in *Milkova*:⁸

“66 In that regard it must be recalled that, according to settled case-law, where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category (judgments of 26 January 1999, Terhoeve, C-18/95, EU:C:1999:22, paragraph 57; of 22 June 2011, Landtová, C-399/09, EU:C:2011:415, paragraph 51; and of 28 January 2015, ÖBB Personenverkehr, C-417/13, EU:C:2015:38, paragraph 46). Disadvantaged persons must therefore be placed in the same position as persons enjoying the advantage concerned (judgment of 11 April 2013, Soukupová, C-401/11, EU:C:2013:223, paragraph 35).”

The ECJ goes on by stating that a national court must set aside any discriminatory provision of national law, without having to request or await its

⁸C-406/15, *Milkova*.

prior removal by the legislature.

At first glance, this seems a 'Catch 22' situation: whether the SPA is discriminatory cannot be judged on the basis of EU law, because the SPA falls outside the scope of EU law. This issue will be elaborated upon further below.

Primarily, it is essential to make some remarks concerning the scope of Directive 2000/78.⁹ This Directive establishes a general framework for equal treatment in employment and occupation. The UK Equality Act 2010 is the current legislation which covers the implementation of Directive 2000/78 (Equality Directive).

The Court states that the Equality Directive does not apply. The Court points at Recital 13 of the Equality Directive, which is relevant to the ambit of the Directive. It excludes social security and social protection schemes:

"(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment."

In the ECJ case of *Dansk Industri*¹⁰ in 2016 the European Court of Justice (ECJ) held:

"Lastly, it should be added that, in order for it to be possible for the general principle prohibiting discrimination on grounds of age to be applicable to a situation such as that before the referring court, that situation must also fall within the scope of the prohibition of discrimination laid down by Directive 2000/78."

But is the description of the scope in the Directive still the decisive criterion to decide whether EU Law applies, even when an applicable Directive excludes certain fields from its scope? In *Bauer*¹¹ the ECJ stated:

"53 Since the national legislation at issue in the main proceedings is an

⁹Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

¹⁰C-441/14, *Dansk Industri*.

¹¹C-570/16, *Bauer*.

implementation of Directive 2003/88, it follows that Article 31(2) of the Charter is intended to apply to the cases in the main proceedings (see, by analogy, judgment of 15 January 2014, Association de médiation sociale, C-176/12, EU:C:2014:2, paragraph 43)."

In other words, implementing an EU Directive triggers automatically the Charter of Fundamental Rights of the European Union¹² (the Charter). One might say then that, because of recital 13 of the Directive, the SPA is not implementation of Equality Directive. Hereby we must adhere a broader understanding of what it means to 'implement a Directive'. The scope of Article 21 of the EU Charter comes into play. In *Delve and Glynn* Article 21 of the Charter was not invoked. It must be observed that a national court is obliged to apply the Charter *ex officio*.

Article 21 Charter is the codification of the general anti-discrimination principle. Article 21 (1) Charter reads:

"Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

Paragraph 2 provides:

"Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

Again here, we face a 'Catch 22' situation. How can be judged if the SPA is EU discriminatory if it falls outside the scope EU Law and/or Article 21 which prevents any form discrimination? Or must we reason the other way around: whether a national measure is EU discriminatory is *per se* a matter of EU law, since the founding principle of EU law is to forbid any form of discrimination.¹³ As the

¹²Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

¹³P. BORSJÉ, H. VAN MEERTEN, 'A EU Pensions Union', in: F. Pennings et al. (Eds), *Research Handbook on European Social Security Law*. Cheltenham: Edward Elgar publishing Limited, 2015, p. 385-412.

Court rightly stated, non-discrimination is a general principle of EU law and also of UK law and the law in many other EU Member States. Thus (potential) anti-discrimination falls via Article 6 (3) TEU in the ambit of EU law.¹⁴

‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.

As AG Trstenjak noted,¹⁵ it can be argued that also in the case of *Delve and Glynn* it seems consistent to use the relevant provisions of the Charter as the starting point for interpretation of all other rules of EU law, including general legal principles and secondary legislation, *“(i)t is particularly worth avoiding any interpretation of rules that might conflict with sentiments expressed in the Charter”*.

In the ECJ case of *IR*¹⁶, the ECJ stated:

“69 Before the entry into force of the Treaty of Lisbon, which conferred on the Charter the same legal status as the treaties, that principle derived from the common constitutional traditions of the Member States. The prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is therefore a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law.”

To conclude the first point, in the judgement of *IR* it seems that the ECJ is stating that the dispute in that case is covered by EU law because the Directive is applicable. This is the ‘classic’ reading. However, one might also reason that a ‘field covered by EU Law’ seems determined by the Charter, and thus by a fundamental principle that, via Article 6 TEU, automatically becomes EU law.

It can be inferred from several judgments that the conditions of Article

¹⁴Ibidem.

¹⁵C-282/10, Maribel Dominguez.

¹⁶C-68/17), *IR*.

51(1) of the Charter are satisfied if the national regulation constitutes a (i) measure implementing EU law or that it is (ii) connected in any other way with EU law. In particular the second criterion following from Article 51(1) of the Charter mentioned above ('connected in any other way') may lead to a broad scope of application for the Charter, precisely because it seems unclear what 'connected in any other way' means.¹⁷

The applicability of EU law to actions of Member States would result in a situation in which there are, in principle, no cases in which EU law applies without those fundamental rights of the Charter being applied.¹⁸

Second, as for ii) the EU Internal Market scenario.

As said, the dispute between *Delve and Glynn* versus the DWP is a vertical relation. As was already stated,¹⁹ from the case law of the ECJ that refers to Article 51(1) Charter in vertical situations, a wide range of situations can qualify as the implementation of EU Law. Furthermore, national acts that might impede free movement fall within the meaning of Article 51(1) Charter.

In *ING/Pensii*²⁰ the ECJ held:

"50 In the present case, it is apparent from the documents submitted to the Court that the services in question could be cross-border in nature as the persons under an obligation to affiliate themselves to one of the approved funds and their employers might be established in other Member States and the pension funds established in Romania might belong to companies situated in other Member States."

This shows great similarities of the classic *Dassonville*²¹ case, in which the ECJ took the view that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to

¹⁷H. VAN MEERTEN, *EU Pension Law*. Amsterdam: Amsterdam University Press, 2019.

¹⁸*Ibidem*.

¹⁹M. DE MOL, 'Het leerstuk van de horizontale directe werking van Unie-grondrechten op de voet gevolgd', *Ars Aequi*, 2019, 5.

²⁰C-172/14, *ING/Pensii*.

²¹Case 8/74, *Dassonville*.

quantitative restrictions.

To conclude the second point, one could argue that – if the SPA (even potentially) hinders the intra-Community trade, the SPA is a matter of EU Law. It seems not too hard to argue that it actually does.

5. This article analyzed current EU pension law and policy in light of the SPA case-law and considers the implications of this analysis for EU social fundamental rights. The article begins by addressing the major points of the. The article then examines the central challenge to bring the SPA under EU Law. A challenge, but not that far from being impossible.

This article puts forward the following arguments.

The SPA falls within the scope of EU Law. Individuals can directly invoke Article 21 Charter, and if they did not, a national Court *ex officio* must apply Article 21 of the Charter. National legislation that discriminates must directly be tested against the Charter. However, there might be an objective justification for age discrimination. The ECJ sometimes relatively is ‘quick’ – seen the budgetary consequences for the State – to assume that there is.²² This is however a different topic.

In the conclusion AG Bobek²³ makes a very interesting case for individuals to grant them the most effective end enforceable rights. Not via horizontal direct effect but via the full effect of EU Law, an approach that the ECJ seems to follow. Bobek writes:

“146. The absence of horizontal direct effect of Article 21(1) (and, for that matter, other provisions) of the Charter does not mean they have no horizontal effects. Quite on the contrary. But those are of a different nature. With regard to national law, the Charter serves: (i) as an interpretative tool for conform interpretation of national law; (ii) as a yardstick for the compatibility of EU and

²²See (in Dutch): A.J. VAN DE GRIEND, H. VAN MEERTEN, ‘Hervorming pensioenstelsel: degressieve opbouw in uitkeringsovereenkomsten en vlakke premies in premieovereenkomsten’, *Sociaal Economische Wetenschappen*, 2017/ 5, p. 189-198.

²³C-193/17, Cresco.

national rules, with the possible consequence that where national rules (applied in the context in which the Member State acts within the scope of EU law) are incompatible with the Charter, they must be set aside by the national judge, even in disputes between private individuals.”