Overview of recent cases before the Court of Justice of the European Union for the special issue on strategies for Social Europe

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Abstract
Being part of the special issue on strategies for Social Europe, this overview of recent cases before the Court of Justice is focused on matters that are high on the European agenda for Social Europe. Firstly, in the aftermath of the economic crisis, many Member States had to reduce their generous pension schemes. The YS case, rendered by the Grand Chamber on the 23rd September 2020, deals with the limits afforded by the Member States when they reduce an occupational pension scheme in order to secure the continuity of State-funded pensions. Secondly, the status of “self-employed” delivery carriers operating in the gig economy is being discussed in many Member States’ courts. In the Yodel case, the Court of Justice clarified in July 2020 whether such delivery carriers should be considered as “self-employed persons” or as “workers” for the purposes of the Working Time Directive. Lastly, the AFMB case concerns the underlying issue of using a company situated in a Member State as the formal employer of international transport workers in order to benefit from more advantageous social security legislation. The Court then determined in April 2020 the criteria to establish who is the actual employer of international transport workers.

Keywords
Worker, self-employed, gig economy, transport, occupational pension

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1. Limits allowed for Member States when reducing occupational pensions: YS v NK

YS is a former employee of NK, a limited liability public company in which the province of Lower Austria holds participation of approximately 51%. YS concluded an occupational pension contract with NK stipulating that his occupational pension, called the ‘direct defined benefit pension’, was financed and paid from the employer’s reserves. Furthermore, the occupational pension contract contained an index clause so that the pension benefits were to be indexed by the same percentage as for the highest category of employment as provided for in the collective agreement applicable to the employees of the Austrian undertakings in the relevant industry.

With a view to ensure continuity in the State-funded pensions, Austria adopted measures limiting the automatic increases of pensions from occupational pension agreements in State-controlled undertakings. In particular, the Austrian measures, adopted at both federal and provincial level, have the effect that (i) part of the amount of the occupational pension which the employer is contractually bound to pay directly to its former workers must be withheld at source by that employer and (ii) the contractually agreed indexation of the amount of that benefit is ineffective. As a result, NK did not apply the 3% index increase to the occupational pensions of its former workers, such as YS. YS started a case against NK asking for the increase of his occupational pension according to the terms of his occupational pension contract with NK. In the case referred to the Court of Justice by the Landesgericht Wiener Neustadt (Wiener Neustadt Regional Court), YS argued that he was being discriminated, on grounds of sex and age since men would be more negatively affected than women and workers of a certain age would be more impacted than younger workers as such occupational pension contracts were not concluded in Austria since 2000.

In essence, the Court was asked about the compatibility of the Austrian legislation with Directive 2000/78, Directive 2006/54, and with Articles 16, 17, 20, 21 and 47 of the Charter.

In relation to the argument of indirect discrimination, the Court first noted that the national legislation at issue created a potential disadvantage only for the recipients of pensions exceeded a certain thresholds. In other words, only those receiving a generous occupational pension were to be impacted by the Austria legislation.

Regarding the potential indirect discrimination on the ground of sex, the Court recalled that the existence of a particular disadvantage can be established if it were proved that national legislation is to the disadvantage of a significantly greater proportion of individuals of one sex as compared with individuals of the other sex. Statistical evidence can be used by the national court to assess the extent to which there is indirect discrimination or a purely fortuitous, short-term inequity.

Concerning the potential of indirect discrimination based on age, YS argued that he was indirectly discriminated against – in comparison with younger persons who concluded their occupational pension after 2000 – since the Austrian legislation on the reduction of the occupational pension did not apply to these younger individuals. The Court, however, held that the correct group

1. Case C-223/19 YS v NK AG, ECLI: EU: C:2020:753.
2. It should be noted that the referring court also asked about Directive 79/7, but the Court found that this case did not fall within the scope of that Directive. Case C-223/19 YS v NK AG, ECLI: EU: C:2020:753, para.35.
3. Case C-223/19 YS v NK AG, ECLI: EU: C:2020:753, para.47.
4. Ibid, para.49.
5. Ibid, para.51.
for comparison are individuals who receive a pension paid by a State-controlled undertaking in the form of a ‘direct defined benefit pension’. The Court found that the mere fact that a new legal framework has been applied in regards to persons under a certain age cannot give rise to indirect discrimination on the grounds of age to the detriment of other persons to whom the former legal framework applies. There was no evidence in this case that a significantly higher proportion of persons above a certain age were put at a disadvantage by that legislation. Therefore, the Court did not further examine the argument of indirect discrimination on the ground of age, but solely focused on the potential indirect discrimination on the ground of sex.

In the event that the referring court would find that, according to available statistics, the national legislation indeed impacts considerably more former male workers than former female workers, the Court then considered whether such indirect sex discrimination – which is contrary to Article 5(c) of Directive 2006/54 – could then be justified by objective factors pursuant to Article 2(1)(b) of the same directive.

The Court recalled its case-law on the fact that Member States have a broad margin of discretion in choosing the measures capable of achieving the aims of their social and employment policy. The Court found that, while budgetary considerations cannot justify discrimination based on sex, the objectives of “reducing the imbalance created by ‘special’ pensions” and “ensuring the long-term funding of retirement benefits” put forward by the Austrian government could constitute legitimate social policy objectives.

The Court then turned to the potential incompatibility of the Austrian legislation with Articles 16, 17, 20 and 21 of the Charter. Concerning Articles 20 and 21 of the Charter on equal treatment and the prohibition of discrimination, the Court noticed that those elements are already addressed under Directive 2006/54 and Directive 2000/78. While recognizing that the loss of pension created by the national legislation was a matter falling within the scope of Article 16 of the Charter on the freedom to conduct a business and of Article 17 of the right to property, the Court reminded that those freedoms and rights were not absolute. Limitations to those freedoms and rights are allowed to the extent that (i) they are necessary to meet the objectives recognized under EU law, (ii) they are provided by law, (iii) they respect the essence of those freedom and right, and (iv) they comply with the principle of proportionality. Applying those conditions to the case at hand, the Court found that the limitations to the freedoms and rights were provided by the national legislation for the purpose of ensuring the long-term funding of State-funded retirement pensions and for narrowing the gap between the levels of those pensions. Moreover, in compliance with the proportionality principle, the national legislation still respected the essences of the freedoms and rights since only a very small part of the occupational pensions was being withheld.

6. Ibid, para.74.
7. Ibid, para.73.
8. Ibid, para.74.
9. Ibid, paras.54-55.
10. Case C-226/98 Jørgensen, ECLI: EU: C:2000:191, para. 41; Case C-123/10 Brachner, ECLI: EU: C:2011:675, para.73.
11. Case C-223/19 YS v NK AG, ECLI: EU: C:2020:753, para. 57.
12. Ibid, paras.59-61.
13. Ibid, paras. 82-85.
14. Ibid, paras. 87 and 91.
15. Ibid, paras.88 and 92.
16. Ibid, paras. 89 and 92.
17. Ibid, paras. 89 and 92.
Finally, the Court quickly dismissed the last argument on Article 47 of the Charter on effective judicial remedy. The Court found that since the national legislation at issue can, at least indirectly, be reviewed by national courts, the principle of effective judicial protection has not been infringed upon on account of the lack of a free-standing legal remedy.18

2. Clarification of the concept of “worker” for delivery carriers: B v. Yodel Delivery

In a reasoned order of the 22nd of April 2020, the Court of Justice clarified the concept of “worker” in the context of delivery carrier services.

The Yodel case involves a parcel delivery courier, “B”, who carries his work exclusively for the parcel delivery undertaking called “Yodel.” B has a courier service agreement with Yodel which specifies that he is working as a “self-employed independent contractor.” The courier service agreement states that B can make use of sub-contractors provided that they comply with the basic skills and qualifications for carriers imposed by Yodel. B is given a specific timeframe to deliver his parcels, however, he can organize his time and deliveries as he wishes. Additionally, he should carry his deliveries using his own vehicle and mobile phone. Finally, B is free to make deliveries for other undertakings while making deliveries for Yodel.

Under UK law, the status of “worker” implies that the person personally performs the work or the service in question.20 As a result, the possibility of sub-contracting the delivery work in the courier service agreement concluded between B and Yodel is considered to be the main reason for B qualifying as a “self-employed person” under UK law, even though B has never actually made use of sub-contractors.

In the context of the current debate on the classification of those “self-employed persons” operating in the gig economy, the Watford Employment Tribunal called into question the compatibility of the concept of “worker” as defined under UK law with that established in EU law.21 As a result, the referring court asked the Court of Justice whether B should be considered as a “worker” for the purposes of the Working Time Directive (Directive 2003/88).

The Court of Justice started its answer by recalling that while the Working Time Directive does not define the concept of “worker,” such concept has been given an autonomous meaning under EU law.22 The Court has defined a “worker” as “a person who performs services for and under the direction of another person for a certain period of time in return for which he receives remuneration.”23 The Court recalled that the classification of an “independent contractor” under national law did not precluded the person from being considered as a “worker” under EU law when the independence of the person was merely fictitious.24 Some elements, such as the “choice of the type of work and tasks to be executed, the manner in which that work or those tasks are to be performed, the time and place of work, the freedom in the recruitment of his own staff,” are typically

18. Ibid, paras.95-97.
19. Case C-692/19 B v. Yodel Delivery Network Ltd, ECLI: EU: C2020:288.
20. Ibid, para.16.
21. Ibid, para.19.
22. Ibid, paras. 24 and 26
23. Case C-316/13 Fenoll, ECLI: EU: C2015:200, para. 27.
24. Case C-692/19 B v. Yodel Delivery Network Ltd, ECLI: EU: C2020:288, para.30.
associated with the functions of an independent service provider. The Court left it for the referring court to ascertain whether the circumstances of the case indicated that B is a “worker” under the case-law of the Court.

Nevertheless, the Court still provided pertinent indications for the referring court. The Court considered that B seemed to have a great amount of independence from Yodel. In particular, the use and choice of sub-contractors by B is only controlled in a limited way by Yodel in the sense that those sub-contractors must possess the same basic skills and qualifications of its carriers. In addition, the Court highlighted that B seemed to have an absolute right not to accept the tasks assigned to him by Yodel, and that B can provide similar services to direct competitors of Yodel, in parallel and simultaneously. Finally, the Court considered that the time slots set by Yodel were inherent in the nature of the service in order to ensure the proper performance of that service.

Considering all those factors, the Court held that the Working Time Directive must be interpreted as precluding a person engaged under a service agreement stipulating that he is a “self-employed independent contractor” from being classified as a “worker” for the purposes of that directive, “where that person is afforded discretion:

- to use subcontractors or substitutes to perform the service which he has undertaken to provide;
- to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
- to provide his services to any third party, including direct competitors of the putative employer; and
- to fix his own hours of ‘work’ within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer, provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.

3. Determination of the actual employer of an international long-distance lorry driver: AFMB and Others

In AFMB and Others, the Grand Chamber of the Court had the opportunity to ascertain which criteria are relevant in determining the ultimate employer of an international long-distance lorry driver for the purposes of Regulation 1408/71 and Regulation 883/2004.

AFMB, a transport company established in Cyprus, concluded fleet management agreements with transport firms established in the Netherlands. Under the agreements, AFMB undertook the management of heavy goods vehicles operated by the Dutch transport firms, on behalf of and at the

25. Ibid, para.32.
26. Ibid, para.33.
27. Ibid, paras.38 and 39.
28. Ibid, paras. 40 and 41.
29. Ibid, para.42.
30. Ibid, para.45.
31. Case C-610/18 AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringbank, ECLI: EU: C:2020:565.
risks of those businesses. AFMB also concluded employment contracts with international long-distance lorry drivers residing in the Netherlands. Those employment contracts mentioned AFMB as the employer of those lorry drivers. The referring court highlighted the fact that some of the drivers had previously been employees of the Dutch transport firms for which AFMB operates. Furthermore, the referring court emphasized that the drivers have never lived or worked in Cyprus. The drivers, in fact, continued to live in the Netherlands and worked on behalf of the Dutch transport firms in two or more Member States.32

Despite the wording of the employment contracts, the Dutch Social Insurance Bank (De Sociale verzekeringsbank, “Svb”) considered the Netherlands social security legislation to be applicable to those drivers as the transport firms established in the Netherlands ought to be considered as the actual employers of those drivers.

In that context, the referring court essentially asked the Court of Justice which firm(s) should be considered the “employer(s)” of the drivers for the purpose of determining the social security legislation applicable under Regulation 1408/71 and Regulation 883/2004.

Under the conflict rules of Regulation 1408/71 and Regulation 883/2004, persons who are employed in two or more Member States but who do not principally work in the territory of the Member State where they reside, are subjects to the legislation of the Member State in which the employer has its registered office or place of business.

The Court started its judgment by noting that neither Regulation 1408/71 nor Regulation 883/2004 were defining the concepts of “member of the personnel” or “employer,” concepts that will determine who is the employer of the lorry drivers in this particular case.33 Given the fact that there is no reference to a national law for defining those concepts, the Court considered that those concepts must be given an autonomous and uniform interpretation that takes into account not only the wording of the provisions but also the context and objectives pursued by the regulations.34

Considering the usual meaning of those concepts, the Court observed that the relationship between an “employer” and the “personnel” employed implies the existence of a hierarchical relationship.35 In terms of context, the rules contained in the regulations depend solely on the objective situation of the worker concerned.36 Recalling its case-law on the corresponding provisions on posted workers in Regulation No 3 and Regulation 1408/71, the Court found that all of the circumstances of the employment were relevant in defining the objective situation of the worker. Hence, while the wording of the contract is an important element to take into account, it is not possible to make a definitive conclusion that there is a hierarchical relationship between the company and the worker on the sole basis of the contract.37 Instead, it is necessary to consider which firm actually (i) exercises authority over the worker, (ii) bears, in reality, the relevant wage costs, (iii) and has the actual power to dismiss that worker.38

According to the Court, an interpretation based solely on formalities, such as the wording of the contract, would in fact run counter to the objectives of Regulation 1408/71 and Regulation 883/2004.

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32. Some of those long-distance lorry drivers were also working in one or more EFTA States.
33. Case C-610/18 AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank, ECLI: EU: C:2020:565, para.49.
34. Ibid, para. 50.
35. Ibid, para.53.
36. Ibid, para.54.
37. Ibid, para. 61.
38. Ibid.
2004 that are based on the free movement of workers and on the free movement of persons. The Court found that those objectives will "be undermined if the interpretation were to make it easier for employers to be able to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules." For all those reasons, the Court then concluded that Article 14(2)(a) of Regulation 1408/71 and Article 13(1)(b)(i) of Regulation 883/2004 must be interpreted as meaning that the employer of an international long-distance lorry driver is not the company with whom the driver has formally concluded a contract, but the firm which has actual authority over him or her in terms of bearing the costs of paying his or her wages and of having the actual power of dismissal.

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39. *Ibid*, paras. 63-69.
40. *Ibid*, para. 69.
41. *Ibid*, para. 80.