



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-528/13  
Geoffrey Léger v Ministre des affaires sociales et de la santé and  
Établissement français du sang

**According to Advocate General Mengozzi, a sexual relationship between two men does not, in or of itself alone, constitute conduct that justifies permanent exclusion from giving blood**

*Such exclusion may, however, be justified in the light of the objective of protecting public health, provided it does not go beyond what is necessary*

On 29 April 2009, a doctor with the Établissement français du sang (French Blood Agency, 'the EFS') refused the blood donation that Mr Léger wished to make, on the grounds that the latter was homosexual and that French law permanently excludes men who have had, or have, sexual relations with other men from giving blood. Mr Léger having challenged that decision, the tribunal administratif de Strasbourg (administrative court, Strasbourg) has asked the Court of Justice whether this permanent exclusion is compatible with an EU directive.<sup>1</sup> According to that directive, persons whose sexual behaviour puts them at high risk of contracting severe infectious diseases that can be transmitted by blood are permanently excluded from giving blood.

In his Opinion today, Advocate General Paolo Mengozzi considers that the mere fact that a man has had, or has, sexual relations with another man does not constitute, within the meaning of the directive, 'sexual behaviour' warranting permanently excluding that man from giving blood. In reaching that conclusion, the Advocate General referred to the common meaning of the term 'sexual behaviour' (that term not being defined in the directive). According to Mr Mengozzi, behaviour defines how an individual behaves, that is to say, the manner in which he conducts himself; sexual behaviour may thus in particular be defined by the sexual practices and habits of the individual concerned, in other words, by the specific circumstances in which sexual relations take place.

From that point of view, the fact that a man had, or has, sexual relations with another man does not constitute behaviour for the purposes of the Directive. The French legislation tends rather to regard that fact as an irrebuttable presumption of exposure to high risk, regardless of the circumstances and frequency of the relations or of the practices observed. On the basis of that presumption, it is essentially the entire male gay and bisexual population that is excluded by French law from giving blood for the sole reason that those men have had, or have, sexual relations with another man. The criterion chosen by France is thus worded too broadly and generically, whereas the concept of 'sexual behaviour' used by the EU legislature requires a specific attitude or behaviour exposing the prospective donor to a high risk of contamination to be identified.

Nonetheless, it is apparent from the FEU Treaty that Member States may maintain or lay down more stringent protective measures than those laid down in the directive.<sup>2</sup> In that regard, Mr Mengozzi has recalled that Member States' freedom ends as soon as observance of the primary law of the EU and in particular, of fundamental rights and freedoms is threatened. By definitively excluding every man who has had, or has, sexual relations with another man from giving blood, the French legislation introduces obvious indirect discrimination on the combined bases of gender (men) and of sexual orientation (homosexuality and bisexuality).

<sup>1</sup> Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (OJ 2004 L 91, p. 25).

<sup>2</sup> Article 168(4)(a) TFEU.

The Advocate General has considered whether such a difference in treatment is warranted and proportionate. In that regard, he notes that the French legislation does pursue a legitimate aim, insofar as it seeks to minimise the risk of contamination for recipients and thus contributes to the overall objective of ensuring a high level of protection of public health.

On the other hand, as regards the principle of proportionality, Mr Mengozzi considers that, while the French regulation seems to be appropriate for attaining the objective pursued, it possibly goes beyond what is necessary in order to attain that objective. According to the Advocate General, the referring court must, therefore, determine whether the specific epidemiological situation in France is based on reliable, representative, recent statistics and whether, as scientific knowledge now stands, it would not be possible, without subjecting the transfusion chain to excessive constraints, to provide quarantine measures for donations pending expiry of the window period.<sup>3</sup> Mr Mengozzi notes that it is this window period that is the most critical and that exposes recipients to the highest risk. Letting the period during which the virus is not detectable elapse before testing the blood donation would make it possible to come considerably closer to zero risk.

The Advocate General has also pointed out the inconsistency of the French legislation: for example, there is no specific contraindication for a woman whose partner might have or have had sexual relations with other men. Moreover, a person whose partner is HIV-positive is subject only to a temporary contraindication of four months, although, in such a case, the risk exposure is real. Lastly, Mr Mengozzi compares the case of a man who has, at one point in his life or occasionally, had protected homosexual relations (that man being permanently excluded from giving blood) with that of a heterosexual person who regularly has unprotected sexual relations (that person being subject only to a temporary contraindication).

According to Mr Mengozzi, the referring court must also establish whether it is not possible to revise the questionnaire designed to assess prospective blood donors so as to allow medical staff to identify, during an individual interview, whether the prospective donors' sexual behaviour is what is known as 'risk behaviour' (such an assessment indeed being possible for the rest of the population) and thus satisfactorily protect the health of recipients.

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

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

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

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*Pictures of the delivery of the Opinion are available from "[Europe by Satellite](#)" 📠 (+32) 2 2964106*

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<sup>3</sup> The 'window period' is the period during which the HIV 1 and HIV 2 viruses cannot be detected during screening tests (that is 12 days for the HIV 1 virus and 22 days for the HIV 2 virus). As the maximum period for the storage of blood is 45 days, the quarantine of donations for 22 days and the test of those donations at the end of that period could objectively be a solution in order to best achieve the objective pursued by France.