



Application of the proportionality principle in cases affecting public health

Judgment of the European Court of Justice (ECJ) of 29 April 2015, on Case C-528/13

In the information society the decisions affecting sensitive matters immediately capture the attention of media and public. The immediacy of digital media and summarizing very complex matters in a mere headline or 140 characters sometimes prevents us from forming an accurate opinion on the issue. This seems to occur with this judgement regarding the prohibition of blood donation for sexuality reasons. It could be said, according to certain article published, that the ECJ approves discrimination based on safety reasons, although a careful reading contradicts such conclusion.

Facts of the case

The case stems from an appeal lodged by an individual before a French court, after a doctor denied him the possibility to donate blood as a result of having declared that he had had sexual intercourse with another man. The doctor denied the donation on the grounds that the French regulations consider this circumstance a reason for permanent exclusion. The French court decided to suspend the proceedings and to pose to the ECJ whether such regulations respect the EU Charter of Fundamental Rights.

Safety and Proportionality

The ECJ departs from the fact that Directive 2004/33 on technical requirements for blood permits permanent exclusions if there is a "high risk" for the recipient to get a serious infectious disease, leaving some flexibility to the Member States to define such cases. However, the Euro-

pean Court insists on the fact that such limitations imposed by Member States must not go beyond what is strictly necessary to protect the recipient's health, seeking always the least coercive measure possible.

The defenders of the measures that prevent homosexuals from donating blood emphasized that the current state of science cannot prevent a «window period» during which, infections cannot be detected. Given that infections can be sexually transmitted, and since it would not be possible to determine if there is an infection when making the donation, they consider reasonable to exclude the possibility of homosexuals to donate blood.

The ECJ understands that this exclusion may be compatible with European law, and it requires the national court to decide on the basis of the principle of proportionality and to assess, taking into account the rights of the potential donors, whether it is possible to ensure a high level of health protection using detection techniques that are more effective and less coercive than permanent exclusion. If that were the case, the contraindication included in the French laws would infringe the principle of proportionality and should be revised. Therefore, it will be necessary to wait for the decision of the French court, although it is possible that this decision may never come given that the French authorities announced that current regulations will be revised.