

Discrimination on grounds of race and sexual orientation: main features and CJEU cases

Seminar
Trier, 18-19 September 2017
Dr Krzysztof Śmiszek
Polish Society of
Anti-Discrimination Law



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Anti-discrimination legal frameworks

European Union law

Art. 10 TFUE
combating discrimination with regard to i.a. race and ethnic origin and sexual orientation in all actions and policies of the EU (*equality mainstreaming*)

Art. 19 TFUE (former Art. 13 of Amsterdam Treaty)
Mandate for the European Council (in cooperation with the EP) to legislate on the ban of discrimination)

Anti-discrimination legal frameworks

European Union law

Art. 21 Charter of Fundamental Rights
prohibition of 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.

Immanent part of the primary EU law

Anti-discrimination legal frameworks

European Union law

Directive 2000/43/EC „Racial Directive”

Personal scope – race and ethnicity.

No definitions of grounds.

Preamble „(6) The European Union rejects theories
which attempt to determine the existence of
separate human races. The use of the term "racial
origin" in this Directive does not imply an
acceptance of such theories”.

Material scope: broad, most crucial areas of life

Institutional protection (equality body or bodies)

Anti-discrimination legal frameworks

European Union law

Directive 2000/78/EC „Equality Employment Directive”

Personal scope – sexual orientation (+ religion or belief, disability, age).

Material scope: employment and occupation only

Lack of institutional protection

Anti-discrimination legal frameworks

2008 - European Commission proposal of Horizontal Directive which extends protection against discrimination on the grounds of *i.a.* sexual orientation beyond the work related issues

+

institutional protection

Anti-discrimination legal frameworks

- Hierarchy of protection against discrimination at the level of secondary legislation (despite formal equality of grounds guaranteed by primary law)
- Sexual orientation (along with disability, religion or belief, age) the least legally protected ground. Less than racial or ethnic origin and gender.

Why do we need antidiscrimination law?

Eurobarometer shows that in 2015 around one in five respondents (21%) say that, in the 12 months preceding the survey, they personally felt discriminated against or harassed on the basis of one or more of the following grounds: their gender (4%), **ethnic origin** (3%), religion or beliefs (3%), disability (3%), being under 30 years old (2%), **sexual orientation** (2%), gender identity (1%) or for another reason (6%).

In total, 5% of respondents say that they felt discriminated against on multiple grounds.

Sexual orientation discrimination

Personal scope:

- Persons discriminated against their **actual** sexual orientation (protection works for ALL sexual orientations)
- Persons discriminated against their **assumed** sexual orientation (Polish example: teacher perceived to be lesbian)
- Persons discriminated **by association** with someone of specific sexual orientation (*Sielatycki* case / *A.T.* case / recent case of one of Polish celebrities *R.R.* discriminated by one of the Catholic dioceses because of his public support of same-sex registered partnership draft law)

No definition of sexual orientation in the Directive.

Does it cover broader issues as non-heteronormativity (dress style, manners, behaviours that are not in line with the expectations of the heterosexual majority and gender roles?)

Sexual orientation discrimination in CJEU judgments

Limited number of sexual orientation discrimination cases dealt by CJEU (comparing to gender equality or age discrimination cases).

Most of them concerned employment-related benefits for unmarried homosexual employees.

Few cases concerned issues related to blood donations by gay men, asylum claims based on sexual orientation or gender identity.

Future cases: free movement of same-sex partners

Sexual orientation discrimination in CJEU judgments

Römer case (C-147/08)

Mr Römer worked for the City of Hamburg for 40 years. Some years after his retirement he entered into registered partnership and applied for supplementary occupational retirement pension. Namely, to recategorize him to another tax group which would place him in better financial position.

He was refused. The City of Hamburg based its decision not to recalculate the pension, because the law permitted to do so only in relations to married employees.

The case went to the Hamburg Labour Court with the allegation of discrimination based on sexual orientation.

Sexual orientation discrimination in CJEU judgments

Decision of the CJEU

-similarly to Maruko, the benefit in issue falls under the scope of the Directive and is covered by the concept of „pay”

-Direct discrimination (not indirect) based on sexual orientation

-Comparability test was left for the national court but indicated that

„the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned. Thus the comparison of the situations must be based on an analysis focusing on the rights and obligations of the spouses and registered life partners as they result from the applicable domestic provisions, which are relevant taking account of the purpose and the conditions for granting the benefit at issue in the main proceedings, and must not consist in examining whether national law generally and comprehensively treats registered life partnership as legally equivalent to marriage.”

Sexual orientation discrimination in CJEU judgments

Decision of the CJEU

Comparability

Court emphasised that the German law on registered life partnerships provides that life partners have duties towards each other to support and care for one another and to contribute adequately to the common needs of the partnership by their work and from their property, as is the case between spouses during their life together.

Therefore, according to the Court, the same obligations are incumbent on both registered life partners and married spouses. It follows that the two situations are thus comparable.

Sexual orientation discrimination in CJEU judgments

- In other words, the issue in cases like in *Römer* is not whether a registered partnership is generally comparable to marriage but rather whether it is so with respect to the matter at issue (in this case the calculation of supplementary retirement)
- AG opinion in relation to possible justification of direct discrimination, namely, the provision on protection of family and marriage:
- *„It seems to me to go without saying that the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it.”*
- Effect of ECtHR rulings in sexual orientation cases (e.g. *Kozak v. Poland*, *Karner v. Austria*)?

Sexual orientation discrimination in CJEU judgments

Hay case (C-267/12)

Mr Hay worked for one of the French financial institutions . In 2007 he entered PACS with a male partner and , according to the collective agreement, on this occasion he applied for days of special leave and a marriage bonus for newly married employees. He was refused according to the fact that the benefit was envisaged for opposite-sex marriages only.

Sexual orientation discrimination in CJEU judgments

Decision of the CJEU

- provisions regulated by collective agreements are also covered by the Directive 2000/78
- the benefits at stake are covered by the concept of „pay”
- Comparability test (in contrast to the previous cases, French PACS was available to both same-sex and opposite-sex couples). The Court itself assessed the test rather than leaving it to the national court.

Sexual orientation discrimination in CJEU judgments

- The Court, when assessing the comparability took into consideration main aims of the PACS – commitment to mutual support by partners, organizing partners' lives together, assistance to each other. By the form of concluding the relations (legal contract) PACS is similar to marriage.
- the fact that opposite-sex partners also were allowed to enter PACS did not change the assessment since for the same-sex partners it was the only way of institutionalization of their relationships (in contrary to opposite-sex partners who were also entitled to marriage). Therefore, direct discrimination was found.

Sexual orientation discrimination in CJEU judgments

- CJEU more progressive than ECtHR in similar case of *Manenc v. France*
ECtHR found that PACS is something more than just community of interest, included rights and obligations in relations to taxation, property and social issues,
- BUT
- Differs from marriage because of conditions of entering into it
 - Lack of inheritance rights
 - Differences in termination

No sexual orientation discrimination, since all PACSed couple, regardless of their sex were treated in the same way. Sole ground of different treatment – civil status as well as margin of appreciation in relation to protection of the family based on the bonds of marriage.

Sexual orientation discrimination in CJEU judgments

ACCEPT case (C-81/12)

The applicant was a non-governmental organisation that promoted lesbian, gay, bisexual and transsexual rights in Romania. It lodged a complaint to the National Council for Combating Discrimination against Mr Becali who was a shareholder in a football club and made public statements that the club would not hire a homosexual player. He also said publicly that he would rather close the club down or employ a junior player than accept a homosexual on the team.

The National Council for Combating Discrimination (national equality body) held that the proceedings did not fall within the scope of an employment relationship as the statements were not from the employer football club, its legal representative or a person responsible for recruitment.

Sexual orientation discrimination in CJEU judgments

Decision of the CJEU

- similar to the Feryn case – discriminatory statements with no individual victim
- public statement (speech acts) as evidence of discriminatory recruitment policy
- the fact that the actual employer did not distance itself from the homophobic statements may be taken into consideration by the national court when assessing the case
- if the employer wants to rebut the alleged discrimination he/she can present recruitment policy to prove that it is not discriminatory

Sexual orientation discrimination in CJEU judgments

- it is not necessary to prove that the employer employs people of certain sexual orientation (as it would breach a fundamental right to privacy in some cases)
- one of the ways of proving non-discriminatory policy could be a clear reaction of the employer or existence of clear provisions concerning its recruitment policy with the principle of equal treatment within the meaning of the Directive 2000/78
- in certain circumstances an employer may be held responsible for discriminatory statements of third person
- Accept and Feryn cases frame a niche for combating hate speech via EU antidiscrimination law

Racial and ethnic discrimination in CJEU judgments

Case C-54/07 Feryn

- Public statement of the employer that he is not going to employ persons of certain ethnic background (due to requirements of the clients of the company)
- No victim of this „recruitment policy” claimed discrimination
- Equality body intervened
- CJEU ruled that:
 - under EU law, a complaint can be made without a direct individual victim
 - Public statement of an employer constitutes direct discrimination in respect of recruitment
 - Public statements are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory

Racial and ethnic discrimination in CJEU judgments

C-83/14 CEZ Razpredelenie Bulgaria AD v Komisa za zashtita ot diskriminatsia

Area of the access to goods and services

Facts:

- The complainant lodged a claim to the Bulgarian equality body stating that the electricity meter was placed much higher than in other areas of her city. She claimed that it was due to the fact that the district was inhabited mainly by persons of Roma origin. She was unable to check her electricity meter for the purpose of monitoring her consumption and making sure that the bills sent to her, which in her view overcharged her, were correct. She accused the company of direct discrimination based on nationality.
- Decision of equality body: indirect discrimination

Racial and ethnic discrimination in CJEU judgments

CJEU ruled that:

- supply of electricity is covered by Racial Directive 2000/43
- the concept of ethnicity - the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community
- the principle of equal treatment applies not only to persons who have a certain ethnic origin, but also to those who, although are not themselves a member of the ethnic group concerned, suffer, together with the former, less favourable treatment or a particular disadvantage on account of a discriminatory measure.

Racial and ethnic discrimination in CJEU judgments

- the installation of electricity meters at an inaccessible height in a district densely populated by Roma is liable to constitute discrimination on the grounds of ethnic origin when such meters are installed in other districts at a normal height
- It is however for the Bulgarian court to take account of all the circumstances surrounding that practice in order to determine whether it has in fact been imposed for such a reason of an ethnic nature and thus constitutes direct discrimination

Racial and ethnic discrimination in CJEU judgments

- if not direct discrimination on the grounds of ethnic origin - the CJEU stated that that practice could, in principle, constitute indirect discrimination. Assuming that the practice has been carried out exclusively in order to respond to abuse committed in the district concerned, it would be based on apparently neutral criteria while affecting persons of Roma origin in considerably greater proportions. Thus, it would give rise to a disadvantage in particular for those persons compared with other persons not possessing such an ethnic origin.

Thank you for your attention