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

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Legal provisions in the EU

• Article 19 TFEU (ex Article 13EC)
Differences between the Directives

• Protection against racial and ethnic origin discrimination stronger than protection against discrimination on grounds of religion or belief, disability, age and sexual orientation

• More areas covered
• Duty to designate equality body/bodies
• Less exceptions allowed


Definition race and racial or ethnic origin

• Absent from Race Directive
• International Convention on the Elimination of all Forms of Racial Discrimination (United Nations): race, colour, descent or national or ethnic origin
• European Commission against Racism and Intolerance (Council of Europe): “race”, colour, language, religion, nationality or national or ethnic origin
• Race Directive: racial (or race) and ethnic origin:
  – probably includes colour and descent
  – does not include nationality or religion
  – nationality or language discrimination could be indirect ethnic origin discrimination
Problems with defining race and racism

• Terms are heavily negatively loaded
• abuse of theories about race and racism are casting long shadows over debate in Europe
• in many EU countries, problematic to talk about race and racism
• Compromise: Recital 6 Preamble Race Directive:

> the EU rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in the Directive does not imply an acceptance of such theories

Definition sexual orientation

A person’s sexual orientation to:
• persons of the same sex (homosexuality)
• persons of the opposite sex (heterosexuality)
• persons of either sex (bi-sexuality)

Both Race Directive and Employment Equality Directive:
• include discrimination by association (C-303/06 Coleman v Attridge Law and Steve Law ECLI:EU:C:2008:415 )
• include discrimination by assumption/perception (C-81/12 Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării, ECLI:EU:C:2013:275)
Feryn case

- Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV
  ECLI:EU:C:2008:397

- a policy where members of certain racial or ethnic groups are not considered for employment is directly discriminatory

- under EU law, a complaint can be made without there being a direct individual victim

- The statements made in public were enough for a presumption of discrimination, thus burden of proof shifted to employer who had to prove that recruitment policy was not discriminatory (Article 8 Race Directive)

Other cases under the Race Directive

- Case C-391/09 Runevič-Vardyn v Vilniaus miesto savivaldybės administracija
  ECLI:EU:C: 2011:291

- Case C-415/10 Galina Meister v Speech Design Carrier Systems GMBH
  ECLI:EU:C:2012:217

- Case C-571/10 Servet Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others
  ECLI:EU:C:2012:233

- Case C-394/11 Valeri Hariev Belov v ChEZ Elektro Balgaria AD and others
  ECLI:EU:C:2013:48
CHEZ case

- C-83/14 CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia ECLI:EU:C:2015:480
- Indirect discrimination by association is also covered by the Race Directive
- ethnicity has its origin in idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds
- direct discrimination where ethnicity has determined the decision for the treatment, treatment was by reason of the ethnicity
- indirect discrimination considers the effect of a measure, which is ‘ostensibly’ neutral or neutral ‘at first glance’
- C-668/15 Jyske Finans A/S v Liegebehandlingsnaevnet ECLI:EU:C:2017:278

CJEU and sexual orientation discrimination

- C-267/06 Tadao Maruko v Versorgungsanstalt der Deutschen Buhnen ECLI:EU:C:2008:179
- C-147/08 Jürgen Römer v Freie und Hansestadt Hamburg, ECLI:EU:C:2011:286
- C-124/11 Dittrich, C 125/11 Klinke and C 143/11 Muller v Bundesrepublik Deutschland ECLI:EU:C:2012:771
- C-267/12 Frédéric Hay v Crédit Agricole Mutuel de Charente-Maritime et des Deux-Sèvres, ECLI:EU:C:2013:823

CONCLUSION

- Member States remain free to decide whether or not to institute and recognise legally recognised same-sex partnerships
- However, once national law recognises such relationships as comparable to that of spouses then the principle of equal treatment applies
**ACCEPT case**

- Case C-81/12 Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării ECLI:EU:C:2013:275

- facts were capable of amounting to facts from which a court could presume discrimination (follows Ferijn: statements made in public are enough for a presumption of discrimination and thus burden of proof shifts)

- club could rebut presumption by distancing itself from discriminatory statements and/or by including provisions in its recruitment policy to comply with the equal treatment principle

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**CJEU and multiple discrimination**

C-443/15 Parris v Trinity College Dublin

ECLI:EU:C:2016:897: rejection of claim on combined grounds