



CHARLES UNIVERSITY  
Faculty of Law

## Discrimination on grounds of race and sexual orientation

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## TFEU

- Article 19 Without prejudice to other provisions of the Treaties and within the powers conferred by the Union on the Treaties, the Council, acting in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate measures to combat discrimination based on sex , **race or ethnic origin**, religion or belief, disability, age or **sexual orientation**.

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## Charter of Fundamental Rights of the EU

- *Article 21*

- Any discrimination is prohibited, in particular by sex, **race**, color, ethnic or social origin, genetic characteristics, language, religion or belief, political belief or other nature, belonging to a national minority, property, origin, disability, age or **sex . orientation**.



## DISCRIMINATION BASED ON SEXUAL ORIENTATION



Council **Directive 2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

- only for the purpose of access to employment
- material scope reduced capacity compared to sex and race
- The directive, which was intended to extend the material scope, had not yet been adopted (COM (2008) 426 - the prohibition of discrimination should concern areas of social protection, including social security and health care, social benefits, education and access to goods and other services available to the public including housing and their provision)
- Despite the modest legal regulation, the jurisprudence of the CJEU is already significant



## Old cases

- C-267/06 Maruko - association registered in Germany, which claims the survivor's pension from the placement system - arguments: they must support each other in the same way that spouses, under German law, could not marry and meet the conditions for the survivor's pension - a direct or indirect speech. - according to GA - indirect, according to direct ESD
- C-147/08 Römer - because married people in another tax category - supplementary retirement pensions for partners less than spouses - ESD: no discrimination on the basis of basic sex rules. orientation - general principle of EU law (see Mangold, Küçükdevici)



## Social security – „new“

- C-443/15 Parris
- For the occupational pension scheme to which Dr Parris belongs as a former lecturer at Trinity College Dublin denies his partner the right to a survivor's pension. The reason given is that the couple formalised their relationship too late, that is to say not until after Dr Parris had turned 60. In response, Dr Parris argues that it had not been possible for him to enter into a same-sex marriage or civil partnership before his 60th birthday because of the legal position in Ireland.
- a national rule which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, does not constitute discrimination on grounds of sexual orientation
- a national rule, which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, does not constitute discrimination on grounds of age
- national rule such is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation



## Employer's homophobia

- C-81/12 Accept
- in a conversation about the possible transfer of professional footballer X and in connection with his alleged sexual orientation, the club's chief director said he would prefer to recruit a junior player before hiring a footballer introduced as a homosexual.
- employment contract with this player not concluded
- These facts can be classified as "facts that suggest discrimination", even if the author of the declaration does not necessarily have the legal capacity to bind or represent the club in the field of work. National legislation should impose an effective, proportionate and dissuasive sanction, not just a warning



## Employer's homophobia II.

- C-507/18 NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford
- 'in a conversation during a radio programme, a lawyer made a series of statements gradually elicited by his interviewer ... in support of his general aversion to a particular category of individuals that he would not wish to have around him in his firm ... nor in the hypothetical choice of his co-workers
- there was no current or planned recruitment procedure at that time
- Court: The concept of 'conditions for access to employment ... or to occupation' must be interpreted as covering statements made by a person during an audiovisual programme even though no recruitment procedure had been opened, nor was planned, provided that the link between those statements and the conditions for access to employment or occupation within that undertaking is not hypothetical



## Pension reduced because of homophobic criminal conviction

- C-258/17, E.B. v Versicherungsanstalt öffentlich Bediensteter BVA
- Article 2 of Directive 2000/78 applies to the future effects of the disciplinary decision adopted before the entry into force of that directive.
- Furthermore, the Court noted that the disciplinary decision was based on a difference of treatment on the grounds of sexual orientation and constituted direct discrimination
- the directive obliges the national court to review the 25 % reduction of the claimant's pension entitlement and calculate the amount he would have received in the absence of any discrimination on the grounds of sexual orientation.



## Holiday in occasion of same-sex couple registration

- C-267/12 Hay - The EU legislation precludes a clause of a collective contract on the basis of which an employee of the same sex is denied the right to obtain benefits such as extra holidays and bonuses granted to employees in connection with the closing of marriage



**DISCRIMINATION BASED ON SEX.  
ORIENTATION – DIFFERENT SOURCES OF  
LAW**



## Freedom of residence of same-sex couples

- Mr Coman, who holds Romanian and American citizenship, and Mr Hamilton, an American citizen, met in New York (United States) in June 2002 and lived there together from May 2005 to May 2009. Mr Coman then took up residence in Brussels (Belgium) in order to work there, while Mr Hamilton continued to live in New York. They were married in Brussels 2010. 2012, Mr Coman ceased to work but continued to live in Brussels, where he received unemployment benefit until January 2013. In December 2012 they requested information on the procedure and conditions under which Mr Hamilton, a non-EU national, in his capacity as member of Mr Coman's family, could obtain the right to reside lawfully in Romania for more than three months.
- RO response: marriage between people of the same sex is not recognised, and that an extension of Mr Hamilton's right of temporary residence in Romania could not be granted on grounds of family reunion.
- Court: EU law precludes competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
- third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.



## Blood donation, asylum seekers

- C-528/13 Léger - the criterion of permanent exclusion from blood donation in relation to sexual behavior also applies to a situation in which a Member State determines, in light of the situation prevailing in that state, a contraindication to blood donation for men who have had sexual relations with other men when, based on current medical, scientific and epidemiological knowledge and data, it turns out that such sexual behavior exposes them to a high risk of infectious diseases transmissible via the blood, and there are no procedures effective detection in compliance with the principle of proportionality infectious diseases
- C-148-150 / 13 EU law prevents competent national authorities acting under judicial control from assessing the facts and circumstances of the alleged sexual orientation of an asylum seeker whose application is based on the fear of persecution because of this orientation a declaration of this applicant, as well as written or other documents submitted in support of his request, through investigations based exclusively on stereotypical images of gays
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# DISCRIMINATION BASED ON RACE AND ETHNIC ORIGIN

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## Council Directive 2000/43 / EC which implements the principle of equal treatment between persons irrespective of racial or ethnic origin

### material scope

conditions of access to employment, self-employment including work flow;  
access to all types and levels of vocational guidance and training  
working conditions and working conditions  
membership and participation in the organization of workers or employers, including the benefits provided by these organizations  
social protection, including social security and health care  
social benefits  
education  
access and provision of goods and services available to the public, including accommodation



## The jurisprudence is not vast, but audacious

- **C-54/07, Feryn**
- The fact that the employer declares that the public does not accept an employee of a certain ethnic or racial origin is manifestly such as to effectively deter some candidates from enrolling and therefore constitutes an obstacle to their access to the labor market, giving rise to discrimination direct in recruitment. pursuant to directive 2000/43. The existence of such direct discrimination does not presuppose the existence of a particular complainant who claims to have been the victim of such discrimination.
- EU law does not prevent an "anti-discrimination association" from requiring judicial or administrative proceedings to ensure compliance with the obligations under the directive without acting on behalf of a particular complainant or where a particular complainant does not exist
- it is for the defendant to prove that there has been no violation of the principle of equal treatment, unless there is evidence of direct or indirect discrimination. The obligation to provide evidence to the contrary, which is so burdensome for the author of the alleged discrimination, is subject to a mere finding of a presumption of discrimination based on established facts. These facts, which may justify the hypothesis that this is a discriminatory hiring policy, are statements with which the employer publicly announces that he will not accept employees of a certain ethnic or racial origin in his employment policy



## C-83/14 - ČEZ Razpredelenie Bulgaria AD

- "Discrimination on the basis of ethnic origin" = all electricity meters in a district, where predominantly the Roma reside higher than in other districts, regardless of whether the measure concerns people of a particular ethnic origin or that this origin does not, but are treated less favorably with the former or are specifically disadvantaged following the measure
- if it seems that the measure has been introduced or maintained for reasons linked to the ethnic origin common to the majority of the population of the district in question - direct discrimination
- this measure could be objectively justified by the desire to guarantee the safety of the electricity grid and the correct registration of the electricity consumed only on condition that this measure does not go beyond what is appropriate and necessary to achieve these legitimate objectives and that the negative effects caused are not disproportionate to these objectives
- access to electricity supplies in conditions that do not have an offensive or stigmatizing effect and that allow a regular control of electricity consumption



## Case C-668/15, Jyske Finans A/S v. Ligebehandlingsnævnet, acting on behalf of Ismar Huskic, judgment of 6 April 2017

- issue at stake before the referring court was the legality of an internal procedure of the credit institution Jyske Finans with regard to persons applying for a loan to purchase a car. The procedure required additional proof of identity, in the form of a copy of a passport or residence permit, from those applicants who had produced as a form of identification a driving licence indicating as country of birth a non-Member State of the EU or of the European Free Trade Association (EFTA). The initial claimant argued that the difference in treatment which caused this additional procedure amounted to discrimination on grounds of racial or ethnic origin, while the credit institution argued that it was required to abide by the additional internal procedure in view of its obligations under the rules on the prevention of money laundering
- The Court concluded that there is no direct or inextricable link between country of birth and ethnic origin and noted that 'it cannot be presumed that each sovereign State has one, and only one, ethnic origin
- the 'favourable' treatment was extended to all those born in an EU or EFTA Member State and that the comparison to determine indirect discrimination must be more precise and specific than one which would compare 'persons of a "given ethnicity" with "other persons"'
- The Court concluded that the practice at hand could not be found to amount to either direct nor indirect discrimination on the ground of racial or ethnic origin



## Pending case – C-30/19 Diskrimineringsombudsmannen v Braathens Regional Aviation AB

- In July 2015, a passenger of Chilean origin residing in Stockholm (Sweden) and travelling on an internal flight from Gothenburg to Stockholm ('the passenger') operated by Braathens was, by decision of the captain, subject to an additional security check together with another passenger. According to the Ombudsman, Braathens had taken the passenger to be an Arab and a Muslim, had subjected him for that reason to an additional security check and, consequently, had placed him at a disadvantage for reasons relating to physical appearance and ethnicity, by treating him less favourably than other passengers in a comparable situation.
- right of a person who considers himself a victim of such discrimination to have a court examine whether, and, where appropriate, find that, that discrimination has occurred.
- question whether a national procedural mechanism — under which a defendant may bring a dispute to an end by admitting a claim for compensation for discrimination without acknowledging the existence of discrimination and without the applicant being able to obtain an examination or finding of discrimination from a court — allows that applicant fully to assert his or her rights under Directive **2000/43**, read in the light of the Charter of Fundamental Rights of the European Union ('the Charter')
- AG: to have a court examine whether, and, where appropriate, find that, that discrimination has occurred. A procedural mechanism for ending proceedings, such as admission, cannot lead to a different result.



## Conclusions

- Race – strong law, strong advocacy
  - Reality – discr. of asylum seekers and segregation in schools
  - Case law – only 1 case on Roma, actually none on asylum seekers connected with discrimination
  - Case law sometimes provocative
- Sexual orientation
  - Weaker law – only occupation and employment
  - More cases, case law still quite „colourful“

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# Thank for your attention



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Jméno přednášejícího



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