

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

Mathias Möschel
Associate Professor
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Primary EU Law sources

I) Art. 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, **including the rights of persons belonging to minorities**. These values are common to the Member States in a society in which pluralism, **non-discrimination**, tolerance, justice, solidarity and equality between women and men prevail.

II) Art. 10 TFEU

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based *inter alia* on racial or ethnic origin and sexual orientation (equality mainstreaming).

III) Art. 19 TFEU (former Art. 13 of Amsterdam Treaty) granting EU broader competences in the domain

=> Adoption of *inter alia* Directives 2000/43/EC (RED), 2000/78/EC (EED).....

IV) Art. 21 Charter of Fundamental Rights of EU

"Any 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** shall be prohibited"

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Secondary EU legislation – Directive 2000/78/EC (EED Directive)

I) Material scope

- Limited to employment and occupation
- Applies also to discrimination on the grounds of age, disability and religion/belief

II) Other principles

- Recital (22): “This Directive is without prejudice to national laws on marital status and the benefits dependent thereon”
- No requirement for equality body imposed



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Earlier CJEU case law on sexual orientation

- i) Case C-13/94, *P. v. S. and Cornwall County Council*
 - Dismissal of transsexual person constitutes sex discrimination
- ii) Case C-249/96, *Grant v. South-West Trains*
 - Denial of an employment related benefit to a lesbian railway employee does not constitute sex discrimination
- iii) Case C-122/99 P and C-125/99 P, *D. and Kingdom of Sweden v. Council of Europe*
 - Same-sex life partners of whom one was working in the European institutions could be excluded from marriage-related benefits
- iv) Case C-117/01, *K.B. v. National Health Service Pension Agency*
 - Denial of survivor's pension after sex change of partner is violation of equal pay principle



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CJEU case law on EED Directive (1)

a) Case C-267/06, *Maruko*

- Denial of survivor's pension to same sex partner constitutes *direct* discrimination on the grounds of sexual orientation

b) Case C-147/08, *Römer*

- Denial of supplementary retirement pension to same sex partner constitutes *direct* discrimination on the grounds of sexual orientation

c) Case C-267/12, *Hay*

- Exclusion of same sex partners from benefits established in collective agreements constitutes direct discrimination on the grounds of sexual orientation



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CJEU case law on EED Directive (2)

d) Case C-443/15, *Parris*

- Denial of survivor's pension because same-sex civil partnership entered into only after the 60th birthday of the pension scheme member (Irish legislation not allowing it earlier) does not constitute discrimination on grounds of sexual orientation, of age or of both together
- AG Kokott had found direct age discrimination, indirect sexual orientation discrimination and also intersectional discrimination
- CJEU found that for age discrimination exception under Article 6(2) applies and that for sexual orientation, Recital 22 applied as providing that EU law cannot force MS to retroactively recognize same sex couples
 - Rejected the notion of intersectionality



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CJEU case law on EED Directive (3)

e) Case C-81/12, *ACCEPT*

- Homophobic statements by patron of a football club (without club clearly rejecting them) indicates discriminatory recruitment policy
- Sanctions need to be proportionate and effective and mere warning of sanction is not sufficient

f) Case C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*

- Statements made by lawyer during a radio interview that he would never hire a gay person deemed to be employment discrimination if and when those statements come from a person who has or may be perceived as having a decisive influence on hiring
- No actual victim (ie potential employee) needed and NGOs have standing to bring such cases



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CJEU case law on EED Directive (4)

g) Case C-356/21, *TP*

- Firing a freelancer working for public TV fired after publishing a Christmas song on YouTube that promoted tolerance towards same-sex couples deemed to be discrimination under EED Directive

=> EED Directive applies also to self-employment, *given that otherwise this instrument would be deprived of its practical effect to prevent sexual orientation discrimination*



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Non-EED Directive CJEU case law

- a) Joined Cases C-199/12 to C-201/12, *X and Others* (refugee status for gay men)
- Directive 2004/83 on refugee status
 - Homosexuals recognized as specific group
 - BUT criminalization per se of homosexual acts cannot count as grounds of persecution
- b) Case C-528/13, *Léger* (blanket ban of blood donation for gay men)
- Directives 2002/98, 2004/33 + Artt. 21/52(1) of CFR
 - Ban OK (protection of public health), if proportionate with current scientific prevention techniques



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Sexual orientation (II) – Non-EED Directive CJEU case law

- c) Case C-673/16 (GC), *Coman* (freedom of movement of same sex couples)
- Directive 2004/38 + Article 21 TFEU
 - Freedom of movement of same sex couples strengthened
- d) Case C-184/20, *OT v Vyriausioji tarnybinės etikos komisija* (Chief Official Ethics Commission, Lithuania)
- EU General Data Protection Regulation (“GDPR”) (EU) 2016/679
 - Indirect disclosure of sexual orientation data is prohibited because protected as special category data under Article 9 of the GDPR



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Other (recent) actions

European Commission (EC) LGBTIQ Equality Strategy 2020-2025

- Adopted on 12 November 2020 + Progress Report of 23 April 2023;
 - a) *Tackle discrimination against LGBTIQ people (continued push for horizontal anti-discrimination directive of 2008);*
 - b) *Ensure LGBTIQ's people's safety (EC proposal to include hate crimes/speech also under EU crimes listed in Art. 83 TFEU);*
 - c) *Build LGBTIQ inclusive societies (EC proposal for a regulation harmonising the Member States' rules of private international law relating to parenthood);*
 - d) *Promote LGBTIQ equality around the world (external relations and funding).*
 - EC launched infringement procedures of Art. 2 TEU against Poland (LGBTQI free zones) and Hungary (publications promoting homosexuality) on 15 July 2021;
 - Hungarian case referred to CJEU in July 2022; Polish case ended.

