

# Sexual orientation discrimination – latest developments

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## Development of legal framework

- History of more than 30 years of efforts in combating sexual orientation discrimination by European institutions (mostly EP resolutions – 1984, 1986 and 1994)
- 1992 – first EC internal code of practice with prohibition of sexual orientation discrimination
- 1997 Amsterdam Treaty, the European Community was given the competence to legislate on ground of sexual orientation
- 2000 – adoption of Employment Equality Directive 2000/78 (the only Directive so far)
- Lisbon Treaty – Art. 10 TFUE: „In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. (*equality mainstreaming*)” **Positive obligation?**

## Development of legal framework

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- Art. 19.1 TFEU – confirmation of mandate to legislate on the ban of sexual orientation discrimination
- 2008 - European Commission proposal of Horizontal Directive that extends protection against discrimination beyond the work related issues
- 2012 – Directive on minimum standards on the rights, support and protection of victims of crime (sexual orientation as a factor to be taken when assessing the individual needs of the crime victim)
- 2013 – Directive on common procedures for granting and withdrawing international protection (sexual orientation as a factor to be taken into consideration when processing the request for the protection) as of 21 July 2015.

## Development of legal framework

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- Hierarchy of protection against discrimination at the level of secondary legislation (despite formal equality of grounds guaranteed by primary law)
- Sexual orientation protected in the field of work and occupation only. One of the least legally protected grounds.

# The scope of the protection

## Employment Equality Directive 2000/78

Material scope:

- conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

# The scope of the protection

## Employment Equality Directive 2000/78

Personal scope:

- Persons discriminated against their actual sexual orientation
- Persons discriminated against their assumed sexual orientation
- Persons discriminated by association with someone of specific sexual orientation (*Colman case*, *Sielatycki case* – Poland, *A.T. case* - Poland)

No definition of sexual orientation in the Directive. Does it apply only to hetero-, homo- and bisexuals?  
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?)

# The scope of the protection

## key legal concepts

Direct discrimination

Indirect discrimination

Harrasment

Victimisation

Instructions to discriminate

Burden of proof

Sanctions

# Sexual orientation discrimination in CJEU judgments

Very 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 on transgender (P.v. S. Cornwall County Council 1996, Grant v. South-West Trains Ltd 1998, K. B. v. National Health Service 2004)

## Sexual orientation discrimination in CJEU judgments

*Maruko case (C-267/06)*

Mr Maruko – registered partner of an employee who worked as a costume designer. The employee contributed to the compulsory pension scheme for more than 40 years. After his death Mr Maruko applied for widower's pension which was available to married couples only.

Mr Maruko was denied to be granted the benefit in question.

Mr Maruko alleged discrimination on the ground of partner's sexual orientation.

## Sexual orientation discrimination in CJEU judgments

**Decision of the CJEU**

- survivor's benefits fall under the material scope of the Directive and recognized the benefit as a part of the concept of „pay”, not the social benefit
- when it comes to discrimination test, married couples and registered partnerships have to be treated equally in comparable situations in relation to the benefit in question. Comparability is to be determined by the national court.
- Direct discrimination was found (contrary to the arguments of Mr Maruko who alleged indirect discrimination since the option of marriage was totally out of the reach for homosexuals in Germany – apparently neutral provision)

## Sexual orientation discrimination in CJEU judgments

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*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

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**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 can 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

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### *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

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### 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.
- CJEU more progressive than ECtHR in similar case (*Manenc v. France*) – the took completely different perspective and assessed that PACS, because of certain differences can not be compared to marriage *ergo* it does not constitute unlawful discrimination.

## 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

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### 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

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- 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

## Sexual orientation discrimination in EU. Challenges.

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- Need of equalization of protection (many Member State have done it already) by adopting Proposal Directive
- Institutional enhancement of protection against discrimination (equality body competent to fight against discrimination)
- Multiple discrimination (e.g. homosexual women) should be addressed
- Interpretation of the meaning of „sexual orientation”
- Raising awareness and culture of rights among LGB individuals in EU

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Thank you for your attention