Discrimination due to other grounds: race, religion, sexual orientation

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Legal basis

- Article 19 TFEU - EU competence to legislate
- Article 21 of the EU Charter - non-discrimination principle
- Directive 2000/43/EC - prohibition of discrimination due to racial or ethnic origin in all fields of social life
- Directive 2000/78/EC - inter alia prohibition of discrimination due to religion or belief and sexual orientation in employment relations
- Domestic anti-discrimination legislation - scope may be broader than scope of directives
- Article 14 of the European Convention on Human Rights (applicable only in case of violation of other rights under the Convention)
- Protocol No. 12 to ECHR (ratified by only a few states)
## Scope of Directives

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Racial or ethnic origin

- no specific definition of racial or ethnic origin in the Directive 2000/78

- language, colour of skin or origin - not specifically mentioned in the Directive, but notions „racial or ethnic origin” should be interpreted broadly, e.g. definitions of racial discrimination by UN CERD or by European Committee Against Racism and Discrimination

- *Timishev v. Russia* (ECtHR, No. 55762/00 and 55974/00, 13 December 2005), para. 55: „Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.”

- broad scope of the Directive 2000/78/EC - basically all fields of social life (but not in private life, e.g. private parties).

- differentiated treatment due to racial or ethnic origin: possible only in very limited circumstances (para. 18 of the Preamble to Directive)
Racial or ethnic origin - case-law

- C-54/07, Feryn NV, judgment of 10 July 2008

- Belgian Centre for Equal Opportunities and Combating Racism brought a case against firm Feryn NV. One of directors of the firm made a remark that the firm will not employ "immigrant"

- Feryn NV deals mostly with installation of doors in garages and private houses

- problem of lack of identifiable complainant in the case

- ECJ - public statements made by an employer may dissuade certain candidates from submitting their applications, and thus hinder their access to labour market

- ECJ - such public statements lead to presumption that employer has a recruitment policy which is directly discriminatory
Racial discrimination - case-law

- **Sejdic and Finci v. Bosnia and Herzegovina** (ECtHR, nos. 27996/06, 34836/06, judgment of 22 December 2009) - exclusion of Roma people and Jews from a possibility to participate in elections to the Presidency - the Constitution based on Dayton Agreement and reflecting national composition of the state.

- **Nachova and others v. Bulgaria** (ECtHR, nos. 43577/98 and 43579/98, judgment of 6 July 2005) - burden of proof in case of violence due to discriminatory reasons.

- **Paraskeva Todorova v. Bulgaria** (ECtHR, No. 37193/07, judgment of 25 March 2010) - racial discrimination by the domestic court. The court refused to suspend the sentence for Roma woman, claiming in the sentence that there was "an impression of impunity, especially among members of minority groups, who consider that a suspended sentence is not a sentence."
Religion and belief

- prohibition of discrimination due to religion or belief is covered only by Directive 2000/78

- Case 130/75, Prais v. Council - professional examinations at the time of Jewish holidays

- usual conflicts: dress codes at workplaces and manifestations of religions (EC Report 2008), e.g. headscarfs at safety at work; wearing veil at school

- more examples of discrimination, but outside the scope of Directives (but they might be covered by domestic law or the ECHR), e.g. Jakóbski v. Poland (No. 18429/06, judgment of 7 December 2010) - right to have vegetarian food in prisons

- special exemptions under the Directive 2000/78 for religious establishments
Religion and belief - case study

- **Lillian Ladele and Gary McFarlane v. United Kingdom** (Cases Nos. 51671/10 and 36516/10)
  - civil servants who believe that marriage is a union of man and woman. They refused to participate in ceremonies of entering into civil partnerships.

- **Nadia Eweida and Shirley Chaplin v. United Kingdom** (Cases Nos. 48420/10 and 59842/10)
  - employee of air company and nurse were required not to display crucifix on the neck due to internal policies of the employer

- cases pending before the Grand Chamber of the ECtHR (hearing on 3 September 2012)

- See: policy of the Polish LOT company
Sexual orientation

- Sexual orientation - covered by Directive 2000/78/EC and by Article 14 of the ECHR (usually in conjunction with Article 8)

- Not only individual cases of dismissals and lack of promotion, but also labour consequences for same-sex couples, e.g. announcement for work (… to employ somebody in a stable relationship, seeking for marriage to run family business…)

- In countries having same-sex regulations - applicability of Directive 2000/78 to employment related benefits for couples

- Discrimination by association, e.g. recognition of somebody as gay person, but in fact a person is heterosexual or active work for promotion of LGBT rights (Mirosław Sielatycki case)

- Extreme rare examples of using „sexual orientation” as an objective ground (Swedish HomO case concerning refusal to employ heterosexual person to work in LGBT community on raising awareness on safe sex)
Sexual orientation - case-law

- C-267/06, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, judgment of 1 April 2008

- Registered partnership of two men (under German law)

- Partner of Tadao Maruko worked in a theatre and under collective bargaining was socially insured in VddB (pension fund of German theatres)

- Partner – death in 2005; request by Tadao Maruko to give him „widow” pension

- Internal VddB provisions – lack of such possibility for registered partners - refusal

- Complaint to court – preliminary reference to ECJ
Sexual orientation - case law

- Widow pension is strictly connected to the employment contract – "remuneration" under the Directive 2000/78/EC; right to widow pension after deceased partner.

- Direct discrimination – surviving married partners vs. surviving partners in registered partnership.

- If a legal system provides for registered partnership with rights being similar to marriage – differentiation of a legal situation of surviving partner is discriminatory (as compared to marriage).

- Instruction to German courts to consider comparability.

- Similar case: C-147/08, Römer v. City of Hamburg, judgment of CJ EU of 10 May 2011.

- But - cases applicable only to states which have any same-sex couples legislation. More advanced opinion of Advocate General in Römer case.
ECHR - developments

- **Karner v. Austria** (ECHR, No. 40016/98, judgment of 24 July 2003) - right to step into lease agreement after deceased same-sex partner - applicability of Article 8 and 14 of the ECHR

- **Kozak v. Poland** (ECHR, No. 13102/02, judgment of 2 March 2010); new concept of family emerging in social life, see also „Kozak bis” case (Regional Court in Warsaw)

- **Schalk and Kopf v. Austria** (ECHR, No. 30141/04, judgment of 24 June 2010); **Chaplin and Charpentier v. France** (No. 40183/07 - communicated case) - development of the case-law concerning right to enter into same-sex marriage and recognition of same-sex couples; margin of appreciation left to states

- **E.B. v. France** (ECHR, No. 43546/02, judgment of 22 January 2008): prohibition to discriminate single homosexual person wishing to adopt child; **X and others v. Austria** (ECHR, No. 19010/07, communicated case - is there a right to adopt child by stepmother (lesbian partner)
Thank you for your attention

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