

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

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Prohibition of discrimination

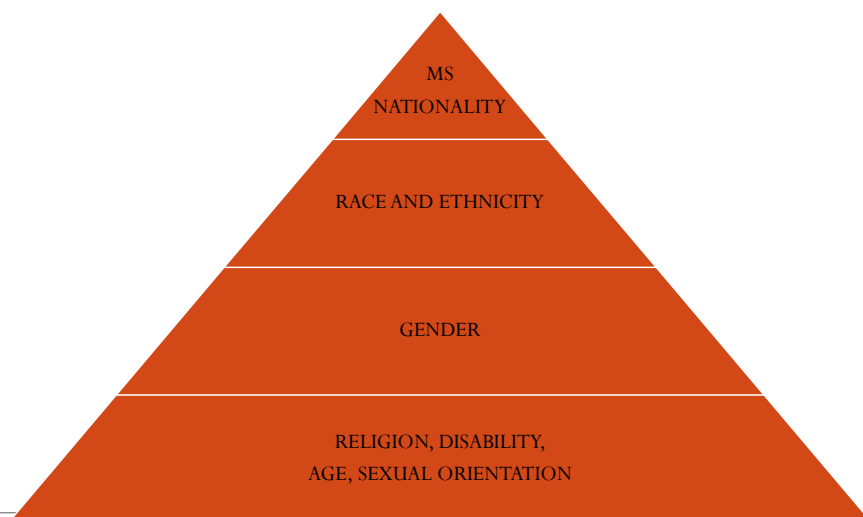
EU law

- Charter of Fundamental Rights
- EU equality directives – ie. 2000/43/EC, 2000/78/EC, 2004/113/EC, 2006/54/EC
- Principle of non-discrimination as **a self-standing individual right** (see *CHEZ*)

ECHR system

- European Convention of Human Rights (with Additional Protocols)
- Prohibition of discrimination *in enjoyment of rights and freedoms guaranteed in the Convention*
- Principle of non-discrimination may only be invoked **in conjunction with another right or freedom**
- unless a State is a Party to Protocol 12

Hierarchy of protected grounds in EU anti-discrimination law



Sexual orientation as a protected ground in EU anti-discrimination law

- No protection before the adoption of Directive 2000/78/EC
- C-249/96 *Grant v South-West Trains Ltd.* (1998) – refusal of travel concessions to same-sex cohabitants
- C-122/99 *P* and C-125/99 *P. D and Kingdom of Sweden v Council of the European Union* (2001) – refusal of household allowance to a registered partner under the Staff Regulations
- Currently: fragmented protection granted by the Charter and EU equality directives
- Sexual orientation is covered only by the Framework Equality Directive prohibiting discrimination with regard to employment and occupation
- In EU law there are no legal acts prohibiting discrimination on the basis of sexual orientation in the area of:
 - Social protection, social security and health care
 - Education
 - Access to and supply of goods and services available to the public, including housing
 - Transport
- Monitoring the legal and social situation of LGBTI community – FRA reports on homophobia
- Recent tendencies to recognize an individual / corporate right to deny services to gay persons as part of protected freedom (negative) of speech – so USSC in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

Prohibition of discrimination on the ground of sexual orientation – application of the Charter

- Article 21 CFR - Prohibition of discrimination on the ground of sexual orientation binding EU institutions and EU MS implementing EU law
- C-528/13 *Léger* (2015) – blood donation
- Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components

C-528/13 *Léger* (2015)

- Point 2.1 of Annex III to Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components must be interpreted as meaning that the criterion for permanent deferral from blood donation in that provision relating to sexual behaviour covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behaviour puts those persons at a high risk of acquiring severe infectious diseases and that, with due regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication for ensuring a high level of health protection of the recipients. It is for the referring court to determine whether, in the Member State concerned, those conditions are met.
- Note the „unnoted” case of different treatment between men who have had sexual relations with other men and other categories of people engaging in „unsafe” sexual relations resulting in permanent deferral from blood donation

Employment cases

- C-267/06 *Tadao Maruko* (2008) – survivor's benefit
- C-147/08 *Römer* (2011) – supplementary benefits
- C-267/12 *Frédéric Hay* (2013) – marriage bonus
- C- 81/12 *ACCEPT* (2013) – 'no gays' in a football club
- C-443/13 *David Parris* (2016) – conditions for survivor's benefit

C-267/06 *Tadao Maruko* (2008)

- Same-sex partnerships have the same right to employment-related benefits as marriages
- Survivor's benefits granted under an occupational pension scheme constitute 'pay' and fall in the material scope of the Directive
- In Germany „a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings.” (par. 69)
- „Mr Maruko and the Commission maintain that refusal to grant the survivor's benefit at issue in the main proceedings to surviving life partners constitutes indirect discrimination within the meaning of Directive 2000/78, since two persons of the same sex cannot marry in Germany and, consequently, cannot qualify for that benefit, entitlement to which is reserved to surviving spouses. In their opinion, spouses and life partners are in a comparable legal situation which justifies the granting of that benefit to surviving life partners.” (par. 63).
- „If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor's benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute **direct discrimination on grounds of sexual orientation**, within the meaning of Articles 1 and 2(2)(a) of Directive 2000/78.” (par. 72).

C-147/08 Römer (2011)

- Supplementary pensions constitute 'pay' and fall in the material scope of the Directive
- Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78 preclude a provision of national law (...), under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if
- in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership (...), which is reserved to persons of the same gender, and
- **There is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension.** It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.

C-267/12 *Frédéric Hay* (2013)

- Refusal to grant the days of special leave and the marriage bonus granted for staff who got married to an employee who entered the civil solidarity pact (PACS)
- Preliminary reference: does the refusal to grant the staff benefits constitute indirect discrimination and does the national law allowing only persons of different sex to marry constitute a legitimate, appropriate and necessary aim such as to justify this discrimination?
- Preliminary question rephrased by CJEU:
- do the provisions of the Framework Directive preclude a collective agreement, under which an employee who concludes a civil solidarity pact with a person of the same sex is not allowed to obtain the same benefits, such as days of special leave and a salary bonus, as those granted to employees on the occasion of their marriage, where the national rules of the Member State concerned do not allow persons of the same sex to marry?

Hay

- Discrimination presupposes weighing up two comparable, but not identical situations
- 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 – it follows from *Maruko* and *Römer* that that national authorities must compare the situations on the basis of 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
- Thus, the differences between marriage and PACS concerning property, succession or parenthood are irrelevant for this case
- Refusal to grant the benefits to employees who entered into PCS constitutes direct discrimination with regard to sexual orientation because the national law reserves the benefits only to spouses
- Direct discrimination is not subject to justification (moreover the legitimate aim was not raised in the course of national proceedings)

C- 81/12 ACCEPT (2013)

- Public statement about no-gay policy regarding selection of football players to the national team by the main shareholder
- Probatio diabolica if the club has to show that the actual selection contradicts the statement
- facts such as those from which the dispute in the main proceedings are capable of amounting to ‘facts from which it may be presumed that there has been ... discrimination’ as regards a professional football club, **even though the statements concerned come from a person presenting himself and being perceived in the media and among the general public as playing a leading role in that club without, however, necessarily having legal capacity to bind it or to represent it in recruitment matters.**
- if facts such as those from which the dispute in the main proceedings arises were considered to be ‘facts from which it may be presumed that there has been direct or indirect discrimination’ based on sexual orientation during the recruitment of players by a professional football club, **the modified burden of proof laid down in Article 10(1) of Directive 2000/78 would not require evidence impossible to adduce without interfering with the right to privacy.**

ACCEPT

- Article 17 of Directive 2000/78 must be interpreted as meaning that **it precludes national rules by virtue of which, where there is a finding of discrimination on grounds of sexual orientation within the meaning of that directive, it is possible only to impose a warning such as that at issue in the main proceedings where such a finding is made after the expiry of a limitation period of six months from the date on which the facts occurred where, under those rules, such discrimination is not sanctioned under substantive and procedural conditions that render the sanction effective, proportionate and dissuasive.** It is for the national court to ascertain whether such is the case regarding the rules at issue in the main proceedings and, if necessary, to interpret the national law as far as possible in light of the wording and the purpose of that directive in order to achieve the result envisaged by it.

C-443/13 *David Parris* (2016)

- Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **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.**
- Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, 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.
- Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings 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.

C-258/17 E.B.

attempted act of same-sex indecency committed by a civil servant on male minors subject to criminal and disciplinary sanction
=> resulting in compulsory early retirement accompanied by a reduction in the pension entitlement

In 1976, Austrian law provided for two separate criminal offences: 'defilement' (sexual acts with persons *under the age of 14*); and 'indecency' (*male* homosexual acts with persons *under the age of 18*). In 2002, the latter offence was held to amount to unjustified discrimination on the grounds of sexual orientation. It was repealed (Opinion, para. 2).

E.B claims the right to the entirety of his pension, without any reductions.

36. (...) **after the entry into force of Directive 2000/78**, a comparable disciplinary sanction could no longer be imposed in Austria. **It would no longer be permissible to differentiate, even for the purposes of applying disciplinary law, between the incitement of a minor aged between 14 and 18 to perform male homosexual acts, on the one hand, and the incitement to perform heterosexual or lesbian acts, on the other hand.** The disciplinary decision of 10 June 1975 was made on the basis of just such a differentiation, its central foundation having been that the conduct with which E.P. was charged was, at that time, a criminal offence punishable by law due to its male homosexual nature. Even if it could not be excluded that such an incitement to perform heterosexual or lesbian acts would have been interpreted as a violation of decency, punishable at that time by disciplinary action, the disciplinary sanction which would potentially have been imposed on the civil servant found guilty of the indecency, in the absence of the constituent elements provided for in Paragraph 129 I of the StG, would have been significantly less severe. According to the referring court, in particular, **the acts committed by E.B. could not have been such as to justify the disciplinary sanction consisting in compulsory retirement.**

C-258/17 E.B.

- ***Ratione materiae***

- – the concept of „pay” within the meaning of Article 157 TFEU
- 45. (...) „only criterion which may prove decisive is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer, that is to say, the criterion of employment.”
- 46. (...) a pension which concerns only a particular category of workers, which is directly related to the period of service completed and whose amount is calculated by reference to the final salary comes within the scope of that article (see C-267/06 *Maruko*, para. 47-48).
- 48. (...) „a situation such as that created by the disciplinary decision of 10 June 1975 comes within the scope *ratione materiae* of that directive.”

C-258/17 E.B.

- *Ratione temporis*

- 53. (...) „only from the expiry of the time limit for transposing Directive 2000/78, namely from 3 December 2003, that that directive brought the effects of the decision at issue in the main proceedings within the scope of EU law.”
- 60. (...) „at that time, a criminal offence punishable in accordance with a provision of Austrian law which criminalised attempted acts of male homosexual indecency committed against a minor, but which did not criminalise attempted acts of heterosexual or female homosexual indecency committed against a minor. The referring court also pointed out that a possible disciplinary sanction imposed in the absence of elements constituting an attempted act of male homosexual indecency provided for by that provision of Austrian criminal law would have been considerably less severe.”
- Directive not applicable to the calculation of pension, but to its reduction.
- Necessary to review of the reduction of E.B.'s pension entitlement as from the date of its transposition, in order to put an end to the discrimination on the grounds of sexual orientation.
- The pension E.B. would have been entitled to if the homosexual nature of the offence is to be disregarded.

C-258/17 E.B.

- Suggested answer of AG Bobek
- Article 2 of Directive 2000/78 **does not preclude** the maintenance in effect of the legal position created by an administrative decision that has become final under national law, in the area of law governing disciplinary action in the civil service (disciplinary decision), compulsorily retiring and reducing the pension benefits of a civil servant, where
 - – that administrative decision was not yet subject to provisions of EU law, in particular the directive, at the time when it was adopted, but
 - – a (notional) decision to the same effect would infringe the directive if it were adopted within the temporal scope of the directive.

Asylum cases

- C-199/12, C-200/12, C-201/12 - X., Y., Z. (2013) – sodomy laws as a risk of persecution
- C-148/13, 149/13, 150/13 – A., B., C. (2014) – phallometric gay testing
- C-473/16 - *F v. Bevándorlási és Állampolgársági Hivatal* (2018) – psychological gay testing

C-199/12, C-200/12, C-201/12 - X., Y., Z. (2013)

- Preliminary reference made by the Dutch Council of State:
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
- The existence of criminal laws, which specifically target homosexuals, permit to consider persons of homosexual orientation as a social group
- Criminalisation of homosexual acts per se does not constitute an act of persecution, however the actual risk of imprisonment for committing homosexual acts constitutes an act of persecution
- National authorities when assessing an application for refugee status cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation

C-148/13, 149/13, 150/13 – A., B., C. (2014)

- Preliminary reference from the Dutch Council of State
- Article 4(3)(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Article 13(3)(a) of Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted as **precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.**
- Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.**
- Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as **precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.**
- Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as **precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.**

C - 473/16 F. v. Bevándorlási és Állampolgársági Hivatal (2018)

- Article 4 of Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, must be interpreted as meaning that **it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the courts or tribunals seised, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.**
- Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as **precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant.**

Recognition of same-sex couples before the ECtHR

- *Schalk and Kopf v. Austria* (2010)
“the relationship of the applicants, a cohabiting same - sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different - sex couple in the same situation would”. (para. 94).
- *Taddeuci and McCall v. Italy* (2016) - refusal to grant the family residence permit to a *de facto* same-sex partner, a third country national
„la situation des requérants ne saurait cependant être considérée comme analogue à celle d’un couple hétérosexuel non marié. À la différence de ce dernier, les intéressés n’ont pas, en Italie, la possibilité de se marier. Ils ne peuvent donc pas être qualifiés d’« époux » selon le droit national. Dès lors, une interprétation restrictive de la notion de « membre de la famille » ne constitue un obstacle insurmontable à l’octroi du permis de séjour pour raison familiale que pour les couples homosexuels. Ces derniers ne pouvaient pas non plus obtenir un mode de reconnaissance juridique autre que le mariage, étant donné qu’à l’époque des faits, le système juridique italien ne prévoyait pas, pour les couples homosexuels ou hétérosexuels engagés dans une relation stable, la possibilité d’avoir accès à une union civile ou à un partenariat enregistré attestant leur statut et leur garantissant certains droits essentiels..” (para. 83)
- *Pajić v. Croatia* (2016) - refusal to grant the family residence permit to a *de facto* partner, a third country national, when the national law authorizes granting the family residence permit to aliens in heterosexual extramarital relationships on the ground of family reunification

Recognition of same-sex couples in the EU

- Freedom of movement of EU citizens and their family members
 - Right to protection of family life
 - Prohibition of discrimination with regard to sexual discrimination
- BUT
- National constitutional traditions
 - Reverse discrimination of own nationals living in same-sex couples
-
- Art. 2 para. 2 b of the Citizens’ Directive 2004/38/EC – right of entry and residence of family members of EU citizens – limited to *de iure* partners or spouses
 - Art. 3 para. 2 requirement to facilitate entry and residence of *de facto* partners.
-
- Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, [COM\(2011\)0126](#)

C-673/16 *Coman and others* – AG Wathelet

- the term 'spouse' applies to a national of a third State of the same sex as the citizen of the European Union to whom he or she is married
- the spouse of the same sex as a citizen of the Union who accompanies that citizen in the territory of another Member State enjoys in that territory a right of residence of more than three months, provided that the Union citizen concerned satisfies the conditions laid down in Article 7(1)(a), (b) or (c).
- in a situation in which a citizen of the Union has developed or consolidated a family life with a national of a third State while actually residing in a Member State other than that of which he or she is a national, the provisions of Directive 2004/38 apply by analogy when that citizen of the Union returns, with the family member concerned, to his or her Member State of origin.
- a national of a third State, of the same sex as the citizen of the Union to whom he or she is married in accordance with the law of a Member State to be treated whether as '[another] family member' or as the 'partner with whom the Union citizen has a durable relationship, duly attested'

Coman - AG opinion

- Article 3(2) of Directive 2004/38 must be interpreted as meaning that:
 - it does not oblige Member States to grant the national of a third State legally married to a Union citizen of the same sex a right of residence on their territory for a period of more than three months;
 - Member States must nonetheless ensure that their legislation includes criteria that allow that national to obtain a decision on his or her application for entry and residence that is founded on an extensive examination of his or her personal situation and, in the event of refusal, is supported by reasons;
 - although the Member States have broad discretion in selecting those criteria, the latter must be consistent with **the normal meaning of the word 'facilitate' and must not deprive that provision of its effectiveness**; and
 - **refusal of the application for entry and residence may not at all events be based on the sexual orientation of the person concerned.**

Future challenges

- Lack of progress regarding the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {[SEC\(2008\) 2180](#)} and its amended versions – [on hold / blocked by the Council](#)
- Conservative movements spreading homophobia and mobilizing against LGBT community (see Poland „LGBT-free zones” actions)
- Denial of access to goods and services to LGBT persons or community on religious grounds (invoking negative free speech rights)

Thank you for your attention!