

**DISCRIMINATION ON GROUNDS OF RACE AND SEXUAL
ORIENTATION:
MAIN FEATURES AND CJEU CASE LAW**

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EQUALITY IN EU PRIMARY LAW

- EU Treaty
- *Article 2* 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.
- Art 3: „ shall **combat social exclusion and discrimination**, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child..“
- Art. 6. „ The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.“



EU PRIMARY LAW

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



CHARTER OF FUNDAMENTAL RIGHTS EU

○ *Art. 21*

- 1. 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.
- 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

○ *Art. 23*

- Equality between women and men must be ensured in all areas, including employment, work and pay.
- The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex..
- Title III includes also the rights on the child, elderly, persons with disabilities



EQUALITY IN SECONDARY LAW OF THE EU

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation



ROLE OF THE CJEU IN ANTIDISCRIMINATION ISSUES

- CJEU – a key role in antidiscrimination issues
- The CJEU has always actively complement initially relatively austere equality legislation
- From the case arise basic concepts and principles of equal treatment and non-discrimination
- Consideration of the case law in the amendment of the Directive, as well as the adoption of new

RACE AND ETHNIC ORIGIN

Directive 2000/43

- definitions of key concepts
- one of the directives with the most wide **material scope**
 - conditions of access to employment, self-employment, including promotion; access to all types and levels of vocational guidance and training
 - employment and working conditions membership and involvement in an organization of workers or employers, including the benefits provided by these organizations
 - social protection, including social security and health care
 - social benefits
 - Education
 - access to goods and services that are available to the public including housing and supplies



RACE AND ETHNIC ORIGIN

- Directive 2000/43 – personal scope
 - this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies
- Genuine and determining occup. requirements
 - Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, **by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate**
- Positive action, victimisation etc. included



CASE LAW – NOT VAST, BUT COURAGEOUS...

- **C-54/07, Feryn**
- The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin is clearly such a nature that can actually discourage some candidates from make themselves known, and therefore constitutes an obstacle to their access to the labor market, constitutes direct discrimination in recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not the existence of an identifiable complainant who claims to have been the victim of discrimination.
- EU law does not prevent "anti-discrimination association" to initiate judicial or administrative proceedings for the enforcement of obligations under that directive, without acting on behalf of a complainant, or if there is no specific complainant for the defendant to prove that the breach of the principle of equal treatment if the facts indicate that there has been direct or indirect discrimination.
- The obligation to submit evidence to the contrary, so that burdens the originator of alleged discrimination is subject to a straightforward statement presumption of discrimination if it is based on proven facts. Such facts that may justify the assumption that it is a discriminatory recruitment policy, are statements by which an employer publicly announce that as part of its recruitment policy, not recruit employees of a certain ethnic or racial origin



... NOT ALL

- C-394/11 Belov
- state distribution companies in some parts of the Bulgarian city - whose characteristic feature is that they are inhabited mainly by members of the Roma community - electricity at a height of seven meters on poles located outside the dwelling electricity customers
- In contracts for the supply of electricity distributor committed to put electricity so that the customer can check his subscription ... if it is however necessary to protect the life and health of citizens, as well as commercial property ... meter is placed in hard to reach places, while distribution firm is required provide at its expense the possibility of visual inspection within three days of receipt of the written request of the Customer
- Mr. Belov: in his opinion - discrimination based on ethnic origin - filed an application for the removal of the Commission for Protection against Discrimination - she filed a preliminary ruling, the CJEU, but did not find its power - KDZ not a court

C-83/14 ČEZ RAZPREDELENIE BULGARIA


- AG opinion
- If consumers are normally provided with free electricity meters which are installed in or on buildings in such a way that they are accessible for visual checks, whilst in districts inhabited primarily by members of the Roma community such electricity meters are attached to electricity poles at an inaccessible height of approximately 6 m, there is a prima facie case of indirect discrimination based on ethnic origin within the meaning of Article 2(2)(b), in conjunction with Article 8(1), of Directive 2000/43 - **discrimination by association** as a result of a measure on account of its wholesale and collective character.
- the existence of direct or indirect discrimination within the meaning of Article 2(2) of Directive 2000/43 does not require an infringement of rights or interests defined in law
- National rules which make the existence of discrimination dependent on the infringement of rights or interests defined in law are incompatible with Directive 2000/43. The national court must interpret domestic law in this regard in conformity with EU law and, if that is not possible, it is obliged not to apply national legislation which is contrary to the prohibition of discrimination established as a fundamental right

C-83/14 - CJEU

- Discrimination by association confirmed – also non-Roma inhabitants of the district affected
- Concepts of direct and indirect discrimination further interpreted by the Court



OTHER CASE LAW - PENDING

- C-538/14 – Commission v. Finland – infringement proceedings – no body is designated in Finnish legislation to carry out the tasks laid down in Article 13 of Directive **2000/43/EC** in questions of working life
 - C-668/15 - Jyske Finans A/S
 - Must the prohibition on direct discrimination on grounds of ethnic origin in be interpreted as precluding a practice, by which **persons in an equivalent situation who are born outside** the Nordic countries, a Member State, Switzerland and Liechtenstein **are treated less favourably than persons born in** the Nordic countries, a Member State, Switzerland and Liechtenstein?
 - If not, does such a practice thus give rise to indirect discrimination unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary?
 - Can such a practice in principle be justified as an appropriate and necessary means for safeguarding the enhanced customer due diligence measures of the EU law on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing?
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**DISCRIMINATION ON GROUNDS OF
SEXUAL
ORIENTATION: CJEU CASE LAW**

SEXUAL ORIENTATION, AGE, RELIGION, DISABILITY

- Legislated together yet - only for the purposes of access to employment 2000/78
- Material scope significantly reduced in comparison with gender and race
- The directive, which should extend to substantive still not adopted (COM (2008) 426 - prohibition of discrimination should cover the areas of social protection, including social security and health care, social benefits, education and access to goods and other services which are available to the public, including housing and supplies)
- Despite the modest legislation has significant ECJ case law – but much more on age, recently also religion, sex. orientation and disability not so much




SAME SEX COUPLES – LOWER SOCIAL PROTECTION

- C-267/06 Maruko - registered partnerships in Germany, claimed the survivor's pension from the occupational system - arguments must nurture each other as husband and wife, not according to German law to marry and qualify for survivor pension - addressed whether direct or indirect discrimination - According GA - indirect, according to ESD direct
- C-147/08 Römer - because people in marriage in a different tax category - supplementary old-age pensions for partners lower than for husbands
 - ECJ: prohibition of discrimination on Chap. sex. orientation - the **general principles of EU law** (see Mangold, Küçükdevici)



BETTER A JUNIOR PLAYER THAN AN EXCELLENT GAY

- C-81/12 Accept
 - in the context of a conversation about a possible transfer of a professional footballer X and in connection with his alleged sexual orientation, general manager of the club said they would prefer received junior players than would engage footballer presented as gay. As a result of failure to conclude an employment contract with that player.
 - These facts may be classified as ' facts suggesting that there has been discrimination, even though the originator statement does not necessarily have the legal capacity to bind or represent the club in employment
 - National legislation should impose effective, proportionate and dissuasive penalties - not just reprimand
 - **No concrete victim, no person acting officially in the name of the employer**
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HEY, SAME SEX COUPLES! YOU CAN NOT MARRY – NO DAYS OFF FOR YOUR CELEBRATION

- C-267/12 Hay
- EU law precludes a provision in a collective agreement, under which an employee in same sex partnership 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, in so far as, in the light of the objective of and the conditions relating to the grant of those benefits, that employee is in a comparable situation to an employee who marries.



EQUALITY REGARDLESS SEXUAL ORIENTATION VS. PROTECTION OF PUBLIC HEALTH

- C-528/13 Léger
- Homosexual men – risky for blood donations?
 - 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**.



HOMOSEXUALS AS ASYLUM SEEKERS

○ C-148/13-150/13

○ EU law 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.

PENDING CASE

○ C-443/15 Parris

- Does it constitute discrimination on grounds of **sexual orientation**, contrary to Article 2 of Directive 2000/78/EC¹, to apply a rule in an occupational benefit scheme limiting the payment of a survivor's benefit to the surviving civil partner of a member of the scheme on their death, by a requirement that the member and his surviving civil partner entered their civil partnership prior to the member's 60th birthday in circumstances where they were not permitted by national law to enter a civil partnership until after the member's 60th birthday and where the member and his civil partner had formed a committed life partnership before that date?
- Intersectional discrimination?? : Would it constitute discrimination contrary to Article 2 in conjunction with Article 6(2) of Directive 2000/78/EC if the limitations on entitlements under an occupational benefit scheme described in either question 1 or question 2 arose from the **combined effect of the age and sexual orientation** of a member of the scheme?



CONCLUSIONS

- Both grounds protect particularly vulnerable persons – often general prejudice against them
- Secondary law better protects race

- Useful interpretation of direct and indirect discrimination – possible to use also in other areas

- New concepts of CJEU
 - Discrimination by association
 - Intersectional discrimination?





**THANK YOU FOR YOUR
ATTENTION**