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DISCRIMINATION ON THE GROUNDS OF RACE/ETHNIC ORIGIN AND SEXUAL ORIENTATION

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INTRODUCTION

Presentation of the speaker and topic

Discrimination on the grounds of race and ethnic origin and sexual orientation
Main features
•Legal framework in UN, Council of Europe and EU
•Directive 2000/43 and 2000/78
Case law

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LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

Multi level protection against discrimination in UN, Council of Europe, European Union law and national systems

UN

- International Convenant on Civil and Political rights, CCPR art. 2
- Convenant on economic, social and cultural rights, ESCR art. 2
- Similar provisions found in the conventions on race discrimination (CERD), discrimination of women (CEDAW), childrens rights (CC), torture (CAT), rights of migrant workers, disability etc.
- No special treaty regarding protection against discrimination on the grounds of sexual orientation

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LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

European Regulation

Council of Europe

- The European Human Rights Convention, art. 14 "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"
- A non exhaustive list of protected grounds Race exclusively included, sexual orientation not explicitly mentioned but covered
- Discrimination is prohibited only in relation to the exercise of another right of the ECHR
- Protocol 12 to ECHR: Optional Protocol
  - general prohibition against discrimination
  - ratified by 15 EU member states
  - not ratified by e.g. Denmark

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LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

Primary European Union law

- Art 10 TFEU - Combating discrimination with regard to i.a. race, ethnic origin and sexual orientation in all actions and policies of the EU (equality mainstreaming)
- Art 19 TFEU (former Art 13 of Amsterdam treaty) - Mandate for the European Council (in cooperation with the EP) to legislate on the ban of discrimination)
- Art 21 in the Charter of Fundamental Rights – Prohibition of discrimination based on any ground such as sex, race, colour, ethnic or social origin, sexual orientation etc. Immanent part of the primary EU law

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LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

Secondary European Union law

- "Racial equality directive" Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- "Equality employment directive" Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (religion or belief, disability, age or sexual orientation)
- Pending: Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM (2008) 426

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LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

Secondary European Union law - hierarchy

- There is a hierarchy of protection against discrimination at the level of secondary legislation – despite formal equality of grounds guaranteed by primary law.
- Sexual orientation, religion or belief are the least legally protected grounds. Less than racial or ethnic origin and gender. Racial and ethnic origin most protected (gender no protection regarding education)

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RACIAL EQUALITY DIRECTIVE

Personal scope: - race and ethnicity.

- There is no definition of grounds in directive. Preamble (6) "The European Union rejects theories which attempts to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories".
- Race and ethnic origin may overlap with national origin, language and religion.
- Outside the scope of application of the Racial Equality Directive is different treatment on the basis of nationality with regard to entry and residence of third-country nationals and their access to employment and occupation (Art 3 (2) and Recital 13 og the Preamble)

Material scope:

- Broad, covers most areas of life such as access to employment, vocational training, memberships in trade unions, social security, healthcare, education, goods and services available to the public, including housing.

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RACIAL EQUALITY DIRECTIVE

Covers different forms of discrimination

- Direct discrimination
  - Entails a direct link between the cause of the case and the discriminatory effect, e.g. ethnic origin as a cause for dismissal
- Indirect discrimination
  - Neutral rules leading to exclusion and unfavorable treatment for certain groups
- Harassment
  - Discriminatory behaviour based on steoretypes and prejudice
  - Covers jokes, threats, physical assault etc.
- Instruction
  - To perform discriminatory actions

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RACIAL EQUALITY DIRECTIVE

- Minimum requirements at the national level. Member states may introduce or maintain provisions which are more favorable to the protection of the principle of equal treatment than those laid down in the Directive.
- Institutional protection. Member states shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. Member States shall ensure that the competences of these bodies include providing assistance to victims of discrimination, conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to such discrimination.
- Burden of proof shift, effective remedies, positive actions also regulated in Directive

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CASE LAW ON RACE AND ETHNIC ORIGIN

C-54/07 – Feryn

- First CJEU case regarding Directive 2000/43
- Public statement of the employer that he is not going to employ persons of certain ethnic background (due to requirements of the clients of the company)
- No victim of this recruitment policy claimed discrimination
- Equality body intervened

- CJEU ruled that under EU law a complaint can be made without a direct individual victim
- Public statment of an employer constitutes direct discrimination in respect of recruitment
- Public statements are sufficient for a presumption of the of the existence of a recruitment policy which is directly discriminatory

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CASE LAW ON RACE AND ETHNIC ORIGIN

C-84/14 – CHEZ

- The complainant filed a claim to the Bulgarian equality body stating that the electricity meter was placed much higher than in other areas of the city. She claimed that it was due to the fact that the district was inhabited mainly by persons of Roma Origin. She was unable to check her electricity meter for the purpuse of monitoring her consumption. She accused the company of direct discrimination based on nationality.
- Decision of the Bulgarian equality body: Indirect discrimination
- CJEU ruled that supply of electricity is covered by Racial Directive 2000/43
- The concept of ethnicity – the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds, applies to the Roma community
- The principle of equal treatment applies not only to persons who have a certain ethnic origin, but also those who, although they are not themselves a member of the ethnic group concerned, suffer, together with the former, less favorable treatment or a particular disadvantage on account of a discriminatory measure

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CASE LAW ON RACE AND ETHNIC ORIGIN

C-84/14 – CHEZ

- The installation of electricity meters in an inaccessible height in a district densely populated by Roma is liable to constitute discrimination on the grounds of ethnic origin when such meters are installed in other districts at a normal height.
- It is however for the Bulgarian court to take account of all the circumstances sorrounding that practice in order to determine whether it has in fact been imposed for such a reason of an ethnic nature and thus constitute direct discrimination.
- If not direct discrimination on the grounds of ethnic origin – the CJEU stated that the practice could, in principle, constitute indirect discrimination. Assuming that the practice has been carried out exclusively in order to respond to abuse committed in the district concerned, it would be based on an apparently neutral criteria while affecting persons of Roma origin in considerably greater proportions. Thus, it would give rise to an disadvantage in particular for those persons compared with other persons not possessing such an ethnic origin.

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EMPLOYMENT EQUALITY DIRECTIVE

Personal scope:

- No definition of sexual orientation in Directive. Applies to hetero, homo- and bisexuals. Given the absence of CJEU case law on the matter, the question remains open whether the Directive also covers broader issues of non-heterosexuality, such as dress-style, manners of expression etc.
- According to the CJEU unfavorable treatment because a transsexual person has undergone or plans to undergo gender reassignment amounts to discrimination on the ground of sex. It is debatable whether in the future the court will be willingly to take a similarly broad approach with respect to transsexual and/or intersex people who have not undergone gender assignment.
- Protect persons discriminated against because of their actual or assumed sexual orientation.
- Persons discriminated by association with someone of specific sexual orientation (Coleman case regarding disability). In practice an example may be the case where an employee is put at an disadvantage after it is made known that his or her child is homosexual.

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EMPLOYMENT EQUALITY DIRECTIVE

Material scope:

- Employment and occupation including access to employment, self-employment, selection criteria, recruitment conditions, access to vocational training, employment and working conditions, memberships in trade unions.
- Covers different forms of discrimination like the racial equality Directive.
- No institutional protection (equality body or bodies)
- Minimum Directive like Racial Equality Directive
- No progress regarding the horizontal directive, which means if the MS only adopt a minimum standard required by EU Directives, there is no protection against discrimination with regard to sexual orientation in the area of healthcare, social security, education, access to goods and services including housing.

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CASE LAW ON SEXUAL ORIENTATION

Most cases concern employment-related benefits for unmarried homosexual employees

C-147/08 - Römer case

- 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, which for tax reasons would place him in a better financial position. He was refused because the law, according to the City of Hamburg, only permitted to recalculate the pension in relation to married employees.
- The Court ruled that supplementary pensions constitute ”pay” and fall within the material scope of the Directive. The comparability test was left for the national court but indicated that the assessment of that comparability must be carried out in a specific and concrete manner in the light of the benefit concerned.

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CASE LAW ON SEXUAL ORIENTATION

C-147/08 - Römer case

- The 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 partnerships by their work and from their porperty, as it is the case between spouses during their life together.
- ➢ Therefore, the two situations are comparable.

- In other words, the issue in cases like the Römer case, is not whether a registered partnership i 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).

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CASE LAW ON SEXUAL ORIENTATION

C-267/12 - Hay case

- Mr Hay worked for the french Credit Agricole. In 2007 he netered into a registered partnership under French law, known as PACS, with a partner of the same sex. On that occasion Mr Hay applied for days of special leave and a marriage bonus granted to emplyees who got married, an accordance with Credit Agricole national collective agreement.
- However credit agricole refused those benefits to Mr Hay on the ground that under the relevant collective agreement the benefits were granted only upon marriage. When the matter was litigated the French Supreme Court decided to refer to the CJEU for a preliminary ruling.

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CASE LAW ON SEXUAL ORIENTATION

C-267/12 - Hay case

- The CJEU ruled in favor of Mr. Hay. First it stated that provisions regulated be collective agreements are covered by the Directive as ”pay”.
- The court assessed the comparability test itself rather than leaving it to the national court. In contrast with the German registered life partnership which was at issue in Römer, the french PACS is available to both hetero- and homosexuals.
- The court when assessing the comparability took into consideration main aims of the PACS – commitment to mutual support by partners, organising partners' lives together, assistance to each other. By the form of concluding the relations (legal contract) is similar to marriage
- The fact that opposite-sex partners also were allowed to enter PACS did not change the assesment 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.

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CASE LAW ON SEXUAL ORIENTATION

C-81/12 - ACCEPT case (hate speech and the burden of proof)

- Mr Becali who was a shareholder in a football club stated publicly that the club would would not hire a homosexual palyer. He would rather close the club down or employ a junior player than accept a homosexual on the team. The football clud (employer) did not distance itself from the statement.

Decision of the CJEU:

- Similar to the Feryn case – discriminatory statements with no individual victim. The fact that the 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 a recruitment policy to prove that it is not discriminatory.

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CASE LAW ON SEXUAL ORIENTATION

C-81/12 - ACCEPT case (hate speech and the burden of proof)

- It is not necessary to prove that the employer employs people of certain sexual orientation as it would breach a fundemental right to privacy in some cases.
- The main message of the ACCEPT case is that under certain circumstances an employer may be held responsible for discriminatory statements made by a third person. At the same time the judgment confirms that discriminatory (here homephobic) statements are capable of constituting acts of direct discrimination in and of themselves.

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Thank you for the attention

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