

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

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INTRODUCTION

Thank you ERA and presentation of the 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

LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

Multi level protection against discrimination in UN, Council of Europe, European Union law and national systems (*national systems sometimes go further in their protection against discrimination*)

UN

- International Covenant on Civil and Political rights, CCPR art. 2
 - *"States must respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*
- Covenant on economic, social and cultural rights, ESCR art. 2 (similar to CCPR article 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 (CRPD) etc.
- No special treaty regarding protection against discrimination on the grounds of sexual orientation

LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

European Regulation

Council of Europe

- The European Convention on Human Rights, 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 (clarified in *Salgiero da Silva Mouta v Portugal*)
- 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 18 EU member states as of 2014
 - not ratified by e.g. Denmark

LEGAL FRAMEWORK ON ANTI-DISCRIMINATION

Primary European Union law

- Art 10 TFEU – when defining and implementing its policies and activities the Union shall aim to combat discrimination with regard to i.a. race, ethnic origin and sexual orientation (equality mainstreaming)
- Art 19 TFEU (former Art 13 of Amsterdam treaty) – contains a 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

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

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.
- In 2008 the European Commission proposed a new Equality Directive that would expand and harmonise protection from discrimination on grounds of disability, religion or belief, sexual orientation, and age. This was intended to expand the protection provided in the Racial Equality Directive and ensure that those groups have the same or similar levels of protection as groups identified by race and gender.
- The proposed directive seeks to prohibit discrimination in both the public and private sectors in relation to: social protection, including social security and healthcare; social advantages; education; and access to and supply of goods and other services which are available to the public, including housing. The proposed scope of protection is therefore similar to the Race Directive.
- The proposal is still before the European Council as it has not been possible to date to secure unanimous agreement of all EU Member States.

HIERARCHY OF PROTECTED GROUNDS

Grounds Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes	Yes	Yes	Yes	Yes	Yes
Education	Yes	No	No	No	No	No
Goods and services	Yes	No	No	No	No	Yes
Social protection	Yes	No	No	No	No	Yes

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".
- Should be interpreted broadly and may include related concepts like national origin, descent, colour, language and religion.
- To be defined in case law. In the CHEZ-judgement the Court considered that *"The concept of ethnicity has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds. Roma therefore constituted an ethnic group"*.
- We can probably expect more references to the Court seeking further explanations regarding the definition e.g., do all criteria in the list need to be satisfied before a group can be considered as constituting an ethnic group or merely some, and if so which, and what are the differences between ethnicity and nationality and ethnicity and religion.
- Pending case from Western High Court in Denmark regarding the difference between ethnicity and nationality/place of birth.

RACIAL EQUALITY DIRECTIVE

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.
- There are two restrictions on its scope of application.
 - 1) Firstly, in relation to access to and supply of goods and services, it only applies to such goods and services that are available to the public. It would therefore not apply to a landlord's decision to rent their house to a white friend without any public advertisement of that house being for rent. The purpose of this qualification is to further people's right to privacy in matters that are considered to be within private life. This is consistent with the right to privacy under Article 8 of the European Convention of Human Rights.
 - 2) Secondly, although the Race Directive applies to nationals of third countries, it does not apply to differences of treatment based on nationality and is without prejudice to provisions regarding the entry, residence and employment of third country nationals. This is intended to ensure that Member States retain control of their immigration policies.
- C-571/10 Kamberaj – Albanian national with a long-term resident status, complained about the rejection of his application for the housing benefit in Bolzano. Difference of treatment occurred not because of race or ethnic origin but because of nationality (status of third-country nationals). Less favorable treatment of third-country nationals who are long-term residents if compared to treatment of nationals of a MS may only be considered in the light of Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long term residents.

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 stereotypes and prejudice
 - Covers jokes, threats, physical assault etc.
- **Instruction**
 - To perform discriminatory actions

RACIAL EQUALITY DIRECTIVE

- Minimum requirements - All Member States must implement all the provisions of the Directives, and must not regress from those levels of protection. In addition, it is important to note that both the Race and Framework Directives lay down minimum requirements in terms of protection in those fields. Member States are free to and in many cases have developed national legislation that goes further than the requirements of the Directives.
- 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.
- 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. Finland accepted the claim and the case is now closed.
- Belov – judgement of 31 January 2013. No jurisdiction to rule on a preliminary question referred by an equality body with no judicial functions (Commission for the Protection against Discrimination in Bulgaria)
- Burden of proof shift, effective remedies, positive actions also regulated in Directive

CASE LAW ON RACE AND ETHNIC ORIGIN

C-54/07 – Feryn

- First CJEU case regarding Directive 2000/43
- Public statement of the employer (one of the directors of the company) that he is not going to employ immigrants (due to requirements of the clients of the company)
- No victim of this recruitment policy claimed discrimination
- Belgium equality body brought the case before the labour court
- CJEU ruled that under EU law a complaint can be made without a direct individual victim
- Public statement of an employer constitutes direct discrimination in respect of recruitment (aim of directive is to foster a socially inclusive labour market)
- Public statements are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory (burden of proof). After that it is for the defendant to prove that there is no breach of the principle of equal treatment.

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 and 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 purpose of monitoring her consumption. She accused the company of direct discrimination based on nationality and stated that she was not Roma herself.
- Decision of the Bulgarian equality body: Indirect discrimination on the grounds of ethnicity
- 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.
- It remains to be seen whether the CJEU will take the same approach in cases where groups other than Roma are involved.
- 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

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 [direct] 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 surrounding 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 had 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.

PENDING CASE FROM DENMARK C-668/15 — JYSKE FINANS A/S V LIGEBEHANDLINGSNÆVNET, ACTING ON BEHALF OF ISMAR HUSKIC REGARDING THE DIFFERENCE BETWEEN NATIONALITY AND ETHNICITY

- Ismar Huskic and his partner Sandie Belloni applied for a car loan. The bank, Jyske Finans, asked Huskic for a copy of his passport or residents permit, because, according to his drivers license, he was born outside of EU, Norway, Iceland, Liechtenstein og Switzerland (in Bosnia). His partner Belloni, who was born in Denmark was not asked to show a copy of her passport/residents permit. They are both Danish citizens.
- Ismar Huskic filed a complaint stating that this behaviour was direct discrimination on the grounds of ethnicity, because place of birth is equivalent to geographical origin, which is covered by the term ethnic origin under Danish law.
- Jyske Finans on the other hand claims that it is different treatment on the grounds of nationality, which is excluded from the Directive.
- The High Court requested the CJEU for a preliminary ruling on 14 December 2015 asking the following questions among others:
 1. Does the practice at issue amount to direct discrimination under Article 2(2)(a)
 2. Does the practice at issue amount to indirect discrimination under Article 2(2)(b)

PENDING CASE FROM DENMARK
C-668/15 — JYSKE FINANS A/S V LIGEBEHANDLINGSNÆVNET

Opinion of General Advocate Wahl, 1 Dec 2016

- A finding of direct discrimination under Article 2(2)(a) requires that the ethnic origin must have determined the decision to impose the treatment, or, in other words, that the treatment at issue proves to have been introduced and/or maintained for reasons relating to ethnic origin.
 - A difference in treatment on the ground of ethnic origin is not an automatic consequence of a difference in treatment based on geographic origin, or place of birth.
 - The statement that most persons born outside of Denmark are not 'ethnic Danes' — should such an ethnic origin exist — does not suffice to establish an instance of direct discrimination. If anything, that rather indicates the presence of indirect discrimination.
 - it is incorrect to restrict the comparison to be undertaken to the situation attaching to persons born in Denmark, on the one hand, against that of persons born in a third country, on the other. The practice at issue is simply not restricted thereto. Rather, the proper test for discrimination under Directive 2000/43 requires assessing whether the practice at issue involves a difference in treatment on grounds of ethnic origin between, on the one hand, a person born in an EU Member State or an EFTA State and, on the other hand, a person born in a third country
- Therefore not direct discrimination

PENDING CASE FROM DENMARK C-668/15 — JYSKE FINANS
A/S V LIGEBEHANDLINGSNÆVNET

Opinion of General Advocate Wahl, 1 Dec 2016

- Does the practice at issue amount to indirect discrimination under Article 2(2)(b) of Directive 2000/43? In order for a measure to be capable of falling within Article 2(2)(b) of Directive 2000/43, it is sufficient that, although using neutral criteria not based on ethnicity, that measure has the effect of placing particularly persons of 'a [certain] ethnic origin' at a disadvantage.
- The essential view of the Kingdom of Denmark is that the additional requirement imposed by the practice at issue affects persons born in third countries and, consequently, mainly persons of 'non-Danish ethnic origin'.
- Assuming for the sake of argument that the Kingdom of Denmark is correct to claim that persons not born in that Member State are not generally of 'Danish ethnic origin', that is not sufficient for a finding of indirect discrimination under Article 2(2)(b) of Directive 2000/43.
- Indeed, in order to be operative, the concept of indirect discrimination under that provision requires that the alleged discriminatory measure has the effect of placing a particular ethnic origin at a disadvantage. Put differently, that provision requires identifying the particular ethnic origin (or origins, in case a practice affects several distinct ethnic communities) to which the protection under that directive applies and which has suffered a less advantageous treatment. The provision cannot be understood to confer (negative) protection against measures which arguably place a given ethnic origin at an advantage, without also identifying a specific ethnic origin which is put at a disadvantage.
- The purpose and general scheme of the directive is, according to recital 17 thereof, 'to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin'.
- Therefore not indirect discrimination

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 willing 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. If you harass a person, because you believe he or she is gay, which is in fact not the case, it is still covered by the Directive.
- 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.

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.
- The Directive is without prejudice to national law on marital status and the benefits dependent thereon
- 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.
- In Denmark we have protection against discrimination on the grounds of sexual orientation and religion and belief in access to goods and services open to the public, but not regarding healthcare, social security, education etc.
- The government is considering a protection against discrimination on the grounds of disability in all areas of life (equivalent to the Racial Equality Directive)

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.

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 property, 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 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).

CASE LAW ON SEXUAL ORIENTATION

C-267/12 - Hay case

- Mr Hay worked for the french Credit Agricole. In 2007 he entered 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 employees who got married, in 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.

CASE LAW ON SEXUAL ORIENTATION

C-267/12 - Hay case

- The CJEU ruled in favor of Mr. Hay. First it stated that provisions regulated by 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.

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 not hire a homosexual player. He would rather close the club down or employ a junior player than accept a homosexual on the team. The football club (employer) did not distance itself from the statement.
- Rumanian NGO brought the case before the court

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.

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 fundamental 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 homophobic) statements are capable of constituting acts of direct discrimination in and of themselves.

CASE LAW ON SEXUAL ORIENTATION

C-443/15 – Parris case (sexual orientation and age discrimination)

- Mr Parris was a lecturer at Trinity College Dublin and a member of its defined benefit pension scheme (the **Scheme**). He had lived with his same-sex partner for more than 30 years and entered into a civil partnership in the UK in 2009. His civil partnership was subsequently recognised (prospectively) in Ireland when civil partnership became lawful there in January 2011 – he was 64 years old at that time.
- The rules of the Scheme provided for surviving spouses or civil partners to receive a two-thirds pension for life except where the marriage or civil partnership had been entered into after the member reached age 60 (the **Survivor Rule**). As Mr Parris had been over age 60 when he entered into a civil partnership, his partner was not entitled on his death to this pension.
- Mr Parris argued that it was not possible for him to comply with the Survivor Rule because civil partnership was not recognised under Irish law until January 2011, after he turned 60. When his claim for a full survivor's pension for his partner came before the Irish Labour Court, it referred three questions to the CJEU. It asked whether the Survivor Rule was directly or indirectly discriminatory on grounds of: (1) sexual orientation, (2) age, or (3) if neither age nor sexual orientation in isolation, the combined effect of both.
- The Advocate General supported Mr Parris' case. She considered that the Survivor Rule was both indirectly discriminatory on grounds of sexual orientation and directly age discriminatory. She also thought that there may have been discrimination on the combined grounds of age and sexual orientation. Of potentially even wider application were her comments around "temporal limitation" – she felt that there was no need to restrict the effect of such a judgment in relation to past periods.

CASE LAW ON SEXUAL ORIENTATION

C-443/15 – Parris case (sexual orientation and age discrimination)

- **The CJEU judgment** did not follow the AG's opinion and found against Mr Parris on all three questions.
- Regarding the first question "Is the Survivor Rule discriminatory on the ground of sexual orientation?" The court said it was "worded neutrally" in that it excluded heterosexual and homosexual partners, without distinction, from receiving a survivor's pension where the marriage or civil partnership was not entered into before age 60. The fact that Mr Parris is unable to satisfy a condition is due to the state of the law in Ireland at the time of his 60th birthday and the absence of transitional provisions under the Survivor Rule.
- Recital 22 of the Equal Treatment Directive says "[t]his Directive is without prejudice to national laws on marital status and the benefits dependent thereon". Member states, according to the court, are "free to provide or not provide for marriage for persons of the same sex or an alternative form of legal recognition of their relationship, and, if they do so provide, to lay down the date from which such a marriage or alternative form is to have effect". Furthermore, the court said the Equal Treatment Directive did not require Ireland or the Scheme "to give retrospective effect to the Civil Partnership Act ... nor, as regards the survivor's benefit at issue in the main proceedings, to lay down transitional measures for same-sex couples in which the member of the scheme had already reached the age of 60".

CASE LAW ON SEXUAL ORIENTATION

C-443/15 – Parris case (sexual orientation and age discrimination)

- Regarding the second question “Is the Survivor Rule age discriminatory?” the court said no. The fact that it was not possible for Mr Parris to enter into a civil partnership before reaching age 60 was not considered to constitute age discrimination, since, as noted above, that was merely a consequence of the fact that, on his 60th birthday, national law did not provide for any form of civil partnership for same-sex couples. And “EU law did not preclude that state of national law”.
- Regarding the third question “Is the Survivor Rule discriminatory as a result of the combined effect of sexual orientation and age?” the court also said no. Where a rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation there is “no new category of discrimination resulting from the combination of more than one of those grounds”.

It shall be interesting to see where
the court will take us in the future.

Thank you for the attention

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