

Discrimination on grounds of race and sexual orientation: CJEU case law

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EU Legal Framework

Primary Law

- Article 2 TEU,

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.

- Article 8 TFEU

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

- Article 10 TFEU

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

EU Legal Framework

The Charter of Fundamental Rights

- Article 21 - Non-discrimination

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.

- Art 23 – Equality between women and men

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.

EU Legal Framework

Secondary Law

- **Directive 2000/43** implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- **Directive 2000/78** establishing a general framework for equal treatment in employment and occupation
- **Directive 2006/54** on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation
- **Directive 2004/38** on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Citizens' Rights Directive)

Antidiscrimination Guarantees in the Directives

- Direct Discrimination
- Indirect Discrimination
- Harassment
 - Harassment on grounds of race/sexual orientation/gender identity
 - Sexual Harassment
- Victimization
- Effective Judicial Protection
 - Burden of Proof
 - Effective, proportional and dissuasive remedy

Equality Directives

The Equal Treatment Guarantee

- ‘Concept of discrimination”

For the purposes of Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

For the purposes of paragraph 1:

- (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of...;
- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of (specific ground of discrimination) at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to (specific ground of discrimination) takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Scope of Application of the Equality Directives

	Employment Vocational Training	Social Protection	Goods and Services	Education
2000/43 Race Directive	✓	✓	✓	✓
2000/78 General Framework Directive (sexual orientation)	✓			
2006/54 Gender Recast Directive (gender identity)	✓	Directive 79/7	Directive 2004/13	? (if for remuneration)

Features of the CJEU case-law

Race and LGBT+

- Relatively few decisions
 - “De Búrca has found significant disparities in the amounts of litigation depending on the type of discrimination. While more than 20 age discrimination cases have come before the CJEU since 2000, there have been just seven cases concerning disability discrimination, five on sexual orientation discrimination, three on racial discrimination, and none alleging religious discrimination.” (NYU Law News, Sep 2015)
 - not clear whether free movement line of cases was accounted for
 - there have been few further cases during 2016 and 2017 (2 religious belief decisions)
- Mostly dealing with direct discrimination
 - significant doctrinal developments
 - the role of the comparator
 - “invisible victim” discrimination
- Tight relation to the sex discrimination case-law

Race - Ethnic Origin

- No definition in the Race Directive
- CJEU relying on the ECHR case-law
 - such as *Nachova and Others v. Bulgaria* and *Sejdić and Finci v. Bosnia and Herzegovina*
 - 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 (CHEZ, para 46)
 - Although no definition of race in the CJEU case-law no feasible reason for not following the same “cooperative” approach
 - „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 color 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” (Timishev v Russia)
- Discrimination by association
 - the principle of equal treatment applies not to a particular category of person but by reference to the grounds mentioned in Article 1 thereof, so that that principle is intended to benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds (CHEZ, para 56).

(Direct) Discrimination on Grounds of Ethnicity

Leading Cases

- C-54/07 Feryn
 - NV Firma Feryn specialises in the sale and installation of doors. One of the company's directors gave an interview to one media outlet stating that Feryn would not recruit persons of North African (particularly Moroccan) origin because the customers did not trust leaving them alone in their homes. He claimed that the policy was not based on prejudice towards that group but business considerations. Centre for Equal Opportunities and Opposition to Racism sued Feryn for violation of the equal treatment although it was never established that the Feryn actually enforced the policy or that there have been a single victim of such discrimination.
- C-83/14 CHEZ
 - A non-Roma shop owner in Romani mahala sued electricity company CHEZ for unfavorable treatment on ground of ethnicity due to the fact that service provider installed its electricity meters at a height of 6-7 meters making it impossible to monitor consumption. This was contrary to the usual practice of installing meters inside homes or at a height which makes them easily readable. CHEZ justified their practice as a response to high levels of meter tampering to steal electricity in the mahala.

Discrimination on Grounds of Ethnicity

the Notion of Direct Discrimination

- Feryn

Nevertheless, it cannot be inferred ...that the lack of an identifiable complainant leads to the conclusion that there is no direct discrimination...The aim of directive...is 'to foster conditions for a socially inclusive labour market'.

The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.

- CHEZ

measure constitutes direct discrimination if that measure proves to have been introduced and/or maintained **for reasons relating to the ethnic origin** (CHEZ, para 91)

Direct Discrimination on Grounds of Ethnicity

Prejudicial Motivation

- C-83/14 CHEZ
- 65 First of all, as is apparent from recitals 12 and 13 in its preamble, Directive 2000/43 is intended to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, and it is to this end that **'any' direct or indirect discrimination** based on racial or ethnic origin as regards the areas covered by the directive should be prohibited throughout the European Union. Article 2(1) of the directive also confirms that the principle of equal treatment for the purpose of the directive means that there is to be 'no' direct or indirect discrimination based on racial or ethnic origin.
- 68 It must be held that a **national provision, such as that at issue in the main proceedings, which classifies only acts that prejudice a 'right' or a 'legitimate interest'** of a person as 'less favourabl[e]' treatment or a 'particular disadvantage' within the meaning of Article 2(2)(a) and (b) of Directive 2000/43 lays down a condition which does not stem from those provisions of the directive and which, therefore, **results in the scope of the protection guaranteed by the directive being restricted.**

Direct Discrimination on Grounds of Ethnicity Relatedness

- Focus is on **the relatedness** of unfavorable treatment and group membership
 - The effects of the disputed policies on the position of the ethnic group in the society are of primary concern
 - the role of comparator is secondary
 - in Feryn the comparator is almost completely absent (no identifiable victim, no identifiable comparator); if there is a comparator it is very abstract and general (group based)
 - In CHEZ the Court dealt with the issue of comparability since the national court explicitly asked for an answer on the issue; not clear that comparator played any decisive role in the courts finding related to direct discrimination
 - the forensic role of comparator
 - comparator as a form of evidence that the treatment was a) unfavorable and/or b) related to group membership (suspect ground)

Direct Discrimination on Grounds of Ethnicity

Remedies

- the absence of identified victim does not entail the absence of harm
 - harm is to the normative value of equality itself, that is, to the societal efforts to eliminate inequality
 - “The objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer.” (Feryn, para. 24)
- a mere violation of the equal treatment principle is sufficiently serious harm
 - “where there is no direct victim of discrimination but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the sanctions which Article 15 of Directive 2000/43 requires to be laid down in national law **must also be effective, proportionate and dissuasive**. If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.” (Feryn, 38-39)

Direct Discrimination on Grounds of Ethnicity Out of Citizenship, Out of Protection

- The Race Directive provides that the antidiscrimination guarantees apply also to non-EU citizens
 - the promise is diluted by the fact that it is “without prejudice” to the MS’ competence to regulate the entry and residence of third-country nationals and their access to employment and to occupation
 - difficult fit with the “social inclusiveness” approach used in Feryn

- C-571/10 Servet Kamberaj

“discrimination of which the applicant in the main proceedings claims to be victim compared to Italian nationals is based on his status as a third-country national. ...Directive 2000/43 applies only to direct or indirect discrimination based on racial or ethnic origin. Article 3(2) of the Directive states that it does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of third-country nationals or stateless persons. Accordingly the discrimination claimed by the applicant in the main proceedings does not fall within the scope of Directive 2000/43.”

Sexual orientation and/or Gender Identity

- Directives do not provide definitions of either term
- CJEU did not explicitly address the notions either
 - “The European Court of Human Rights has held that "the term 'transsexual' is usually applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other; they often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature. Transsexuals who have been operated upon thus form a fairly well-defined and identifiable group" (P v S, par.16)
- Fluidity and mutability of the notions (reflected in linguistic descriptors LGBT+, Queer, etc.) provide a challenge for the antidiscrimination approach based on comparability
 - the challenge is reflected in the CJEU case-law

CJEU approach to discrimination of LGBT+ persons

Gender Identity

- covered by the Directive 2006/54
- not clear what scope of the identity specter is covered
 - the role of medical treatment necessary
- Case-law:
 - C-13/94 P v S
 - C-117/01 K v B

Sexual orientation

- within the Directive 2000/78
- includes unfavorable treatment related to actual and presumed sexuality as well discrimination by association to people of specific sexuality
- Gender fluidity challenges
- Case-law:
 - C-249/96 Grant
 - C-122/99 D and Sweden v. Council
 - C-267/06 Maruko
 - C-147/08 Romer
 - C-81/12 Accept
 - C-267/12 Hay

Early Case-law

Comparative Marry-Go-Around

- C-13/94 P v S

the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law. Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned.

Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavorably by *comparison with persons of the sex to which he or she was deemed to belong* before undergoing gender reassignment.

- to which degree the ground of sex remains determined by physiological markers (undergoes medical reassignment or intends to)
- seems to be comparing the male-to-female transsexual with a male person and the female-to-male transsexual with a female person; why not a male to FtM, female to MtF or MtF to FtM?
- What is the practical purpose of such apparent comparison? Was the CJEU in fact comparing person “to herself”?

- C-249/96 Grant

The refusal to allow Ms Grant the concessions is based ...on the fact that she does not live with a 'spouse or a person of the opposite sex with whom she has had a 'meaningful relationship for at least two years. That condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex ...is...applied regardless of the sex of the worker concerned. Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex. As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way.

- Why is the comparator men living with a men and not men living with a women (on ground of her sex)? Why not a woman living with a men (on ground her partner’s sex)?
- Now when same-sex relationships became “meaningful” is the comparator still the same? Did same-sex relationships became “meaningful” because of the comparator?

Leading cases

Maruko & Hay

- C-267/06 Maruko

Maruko applied for a widower's pension but was refused by the occupational fund his partner had been affiliated with since 1959. He was refused on the ground that the regulations made no provisions for survivor's benefits to be paid to registered partners. He and his partner have been in a legally registered partnership pursuant to the German Same-sex partnership Act since 2001 until 2005 when Maruko's partner deceased.

- C-267/12 Hay

- At the time of the dispute France had not yet opened the institution of marriage to partners of the same sex. M. Hay and his partner entered civil partnership (PACS) being the only available form of legal recognition of their relationship. Upon entering PACS he applied for but was denied employment benefits provided by the collective agreement, such as salary bonuses and days of special leave at the occasion of their marriage.

Maruko:

Member States determine if the relationship is sufficiently comparable (meaningful)

70 However, the referring court finds that entitlement to that survivor's benefit is restricted, under the provisions of the VddB Regulations, to surviving spouses and is denied to surviving life partners.

71 That being the case, those life partners are treated less favourably than surviving spouses as regards entitlement to that survivor's benefit.

72 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.

Hay:

The CJEU (with some help from the ECtHR) determines if the relationship is sufficiently comparable (meaningful)

36 It is apparent from the order for reference and the file submitted to the Court that persons of the same sex may conclude a PACS in order to organise their life together by committing, in the context of that life together, to providing material aid and assistance to each other. The PACS, which must be the subject of a joint declaration and registration with the Registry of the court within whose jurisdiction the persons concerned establish their common residence, constitutes, like marriage, a form of civil union under French law which places the couple within a specific legal framework entailing rights and obligations in respect of each other and vis-à-vis third parties.

38 It should be noted in that regard that...the fact that the French Conseil constitutionnel held ...that married couples and couples in a PACS arrangement were not in a comparable situation for the purposes of a survivor's pension, does not rule out the comparability of the situation of married employees and homosexual employees in a PACS arrangement for the purposes of the grant of days of leave and bonuses at the time of marriage.

43 The fact that the PACS, unlike the registered life partnership at issue in the cases which gave rise to the judgments in Maruko and Römer, is not restricted only to homosexual couples is irrelevant and, in particular, does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, could not, on the date of the facts in the main proceedings, legally enter into marriage.

44 The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.

Free Movement of Citizens

- Directive 2004/38 + EU Charter
- Primary focus on direct discrimination
 - restrictions of the fundamental right to free movement related to
 - sexual orientation/gender identity
 - free movement of family members; right to family life
 - the principle of mutual recognition
 - race/ethnicity
 - The Race Directive allows for the distinction between (third-country) nationality and ethnicity
 - the prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.

Awaiting the Comans

- The cross-border legal recognition of same-sex families
 - The Citizens Directive 2004/38
 - the extent of the mutual recognition principle
- Facts:
 - Romania does not provide any form of legal recognition for same-sex couples
 - The question of compliance with the ECtHR Vallianatos/Oliari decisions
 - Civil Code expressly bans same-sex marriages and registered partnerships and prohibits the recognition of same-sex marriages and registered partnerships entered into abroad
 - Adrian Coman is a Romanian gay rights activist married to his male partner who is a US citizen. The marriage was entered into in Belgium. Mr Coman was informed by the Romanian immigration authorities that they would be denied a residence permit for his spouse due to the Civil Code ban. They started the proceedings claiming that the refusal of the residence permit violated Mr Coman's EU free movement rights as a result of discrimination on the ground of sexual orientation prohibited by the Charter of Fundamental Rights. The first instance court referred the case to the Constitutional Court, which referred it to the CJEU.