

# Discrimination based on *race* and *sexual orientation*: Case-law of the Court of Justice of the EU

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## Preliminary notes

- No definitions of race/ethnicity (R/E) and sexual orientation (SO) in the directives
- R do not exist (preamble, Racial Equality Directive)
  - Social construct, source of prejudice
- CJEU: non-exhaustive definition of E in *CHEZ/Nikolova* (C-83/14)
  - Refers to the ECHR: R and E – “related, overlapping”; discrimination on grounds of E is racial
  - Including “by association”: non-bearers of a characteristic, part of the targeted group
- *Paraskeva Todorova* (ECHR, 2010) – “ethnocultural belonging”, “Roma origin”, “Roma community”, belonging to a “minority group”, “ethnicity”; “racism”

## Associazione Avvocatura per i diritti LGBTI C-507/18 (2020)

- Public homophobic statements
- Related to recruitment
- “Personal opinion” v. capacity of employer
- No relation to a vacancy/procedure
- Freedom of expression
- Standing to bring proceedings association – compensation

## CJEU:

- Applicability
  - Despite the lack of an open procedure
  - Teleological, not narrow interpretation – directive purpose; nature of the rights, a fundamental principle
  - Reference to *Asociația Accept* (2013)
  - Condition: actual (not hypothetical) connection with the terms of employment
    - National court – comprehensive analysis
    - Subject – decisive influence, actual / it is how it is seen
    - Nature of statements – related to employment, intention to discriminate
    - Context – publicity

## CJEU:

- Freedom of expression – not absolute
  - Restrictions – legislative, legitimate goal, compatible
- Effect of statements – demotivate applicants
- Standing to bring proceedings – admissible *without a specific victim* as well, including compensation
- Sanctions – offer sufficient dissuasion *without an individual victim*

## Asociația Accept C-81/12 (2013)

- Statements to prevent employment
  - A person without the capacity to represent the employer
  - “Decisive influence” as perceived
- Rebut the presumption of discrimination (D) – a conflict with the personal sphere
- Effectiveness of sanction – only a warning

## CJEU:

- No need for an identifiable victim in order to have direct D
  - Established case-law, *Feryn* (2008)
- Standing to bring proceedings NGO, no victim – admissible
- Modification of the burden of proof (BoP) in such cases – admissible
- Statement – sufficient to modify the BoP (*prima facie* D)?

## CJEU:

- Consideration of facts capable to create a presumption of D – national court
  - Subject without legal capacity – not an obstacle < perception of influence
  - The employer did not take a different stand – factor
  - Lack of procedure – not an obstacle
- Retroactive proof – no evidence due that LGB are/have been hired
  - Conflict of personal sphere
  - Employment factors – no relation to characteristic
  - Explicit internal rules
  - Definitive dissociation from statements

## CJEU:

- Sanction – not symbolic but actual protection
- Warning – the national court decides on effectiveness
  - Sufficient publicity
  - Grounds for follow-up sanctions (damage case)
    - NGO?
  - In principle, under the national law for minor offences – negative factor
- Interpretation in line with a directive – result pursued

## Firma Feryn

C-54/07 (2008)

- Leading judgment (precedent)
- Statement to exclude “immigrants”
- Director = employer
- Alleged client preferences
- The equality authority loses a case
  - There is no individual affected – an applicant rejected

## CJEU:

- Directive purpose – effective protection, inclusion/participation of all  
> lack of a victim is not an obstacle
- Statements demotivate applicants – obstacles to access
- Direct D
- Standing to bring proceedings equality authority, no victim – admissible
- BoP – the national court to consider
  - Statement – sufficient for a presumption
  - Rebuttal – statements do not correspond to the actual policy

## CJEU:

- Sanctions
  - Without a victim as well – to be effective, dissuasive
  - Admissible:
    - Compensation for the equality authority
    - Publicity judgment at the expense of the respondent
    - Fine
    - Instruction terminate D and refrain in the future

## CHEZ/Nikolova C-83/14 (2015)

- Inaccessible electricity meters – done since 1998 primarily in sections with a predominant Roma population
  - *Belov*, C-394/11 (2013) – the Commission for Protection against Discrimination is not a “court or tribunal”, inadmissible request
- Alleged abuse in these sections
- Ms. N – expressly non-Roma; direct D, grounds “ethnicity”

## CJEU:

- Applicability – teleological, not narrow interpretation; purpose – involvement of all; nature of the rights, fundamental principle
  - Directive – consumers’ right to monitor and regulate
- “Ethnic origin” (EO): “social groups marked by common ethnicity/nationality, religion, language, culture and traditions”
  - Roma – indisputably EO
  - Does the prohibition of ethnic D cover affected non-Roma?
- “On grounds of EO” – not necessarily of the person affected > also non-bearers (*Coleman*, C-303/06, 2008) < protection of “all persons”

## CJEU:

- Ms. N. – victim of direct/indirect D on grounds of EO – suffers along with the targeted group
- Direct/indirect D – the national court is to decide. Factors:
  - Only in sections with a predominantly Roma population
  - Statements that abuse is mainly there – racial stereotypes
  - Above statements – unproven, non-specific – “common knowledge”
    - Refusal to provide information of the respondent – relevant for the presumption of D (Meister, C-415/10, 2012)
  - Practice – coercive, widespread – indiscriminate, long-lasting – not updated

## CJEU:

- Unfavourable treatment – stigmatization; impossibility to control consumption
- Comparable situation – all consumers in the area in comparison to the same supplier
- If the practice has been introduced/is maintained in view of EO > direct D
  - Rebuttal – the factors are objective even without a connection to EO

## CJEU:

- Indirect D:
  - “Apparently neutral” = based on factors not related to EO
    - There may be no provision which defines indirect D as treatment based on a characteristic, i.e. different treatment
    - “Section with abuse” – a possible criterion
  - The treatment is applied universally but, in practice, it affects the bearers of a certain EO unproportionately more than others – “special unfavourable treatment”
    - No criterion “burden”; “special” = the persons affected among the bearers represent a greater share than among others
    - If sections with a predominantly Roma population turn out to be affected by the application of the apparently neutral criterion “section with abuse” – justification is necessary

## CJEU:

- Potential for acquittal:
  - Low
  - Concept – narrow interpretation
  - Proving abuse as a fact: scope and topicality
  - If yes, the national court is to check if there are other means which are not so restrictive to achieve the desired prevention legitimately
  - If there are other means, there is no justification
  - If there are no other means, the national court is to decide whether the restrictions are excessive in view of the desired prevention – greater than the purpose is capable of justifying
    - Indiscriminate – universal
    - Consumer interest recognised by the EU: access to measurement, non-insulting conditions

## Coman

### C-673/16 (2018)

- Same-sex marriage concluded in another EU Member State
- Freedom of movement and residence, return
- Refusal to recognise the derivative right to residence of a spouse who is a third country national < the national law does not recognise same-sex marriage

## CJEU:

- Inadmissible refusal
  - The freedom of movement includes that, upon their return, EU citizens continue normally their family life established while they resided in another EU Member State
    - Regardless of the fact that the spouse is a third country national
    - EU citizen – fundamental status, may be claimed against the country of origin
  - Family members – derivative right to residence without a time limit
    - Otherwise, EU citizens will be demotivated to exercise their freedom of movement
    - “Spouse” – includes one of the same sex

## Jyske Finans C-668/15 (2017)

- A credit institution demands an additional identity document from a Danish citizen who was not born in Denmark (but in Bosnia)
- It does not demand it of people born in Denmark

### CJEU:

- The difference in treatment is not based on EO
  - The country of birth is not = definite EO
  - A number of factors for EO, not just one; listing in *CHEZ* – illustrative

### CJEU:

- Indirect D: the concept does not apply to discrediting different EO – everyone born outside Denmark
  - There must be a *certain* EO

### MI: Restrictive interpretation.

- Rejected in literature
- Contrary to *Feryn*? “Immigrants”, i.e. everyone coming from the outside; direct D.

**E.B.****C-258/17 (2019)**

- A police officer sentenced for an attempted offence of indecency with boys
- Disciplinary sanction – early retirement, pension reduced by 25%
- The same act with girls is not an offence
  - The disciplinary sanction would be more lenient
  - Difference based on SO

**CJEU:**

- After the term to transpose the directive, the future consequences of the sanction as regards the reduced pension – revise to eliminate D
- The national court is to recalculate – amount regardless of the homosexual nature

**Meister****C-415/10 (2012)**

- Multiple D – gender, EO, age
  - Russian national: education recognised in Germany
- Employment
  - Not invited to an interview concerning a position she is qualified for
  - Twice
  - No explanation
  - In the case, the employer does not claim that she is not sufficiently qualified
- Ms. M demands information – the file of the person employed to prove that she is more qualified
  - Does she have the right? Consequences of the refusal?

## CJEU:

- She does not have the right to demand the information to establish a presumption of D
- The national court is to take into account that the refusal is of such a nature as to prevent attainment of the goals of protection – to prevent it
  - To take it into account in the consideration whether the presumption has been established – inasmuch as it is indicative
  - Together with other factors: her undisputed qualification, no invitation to an interview, twice

## Léger

### C-528/13 (2015)

- By regulation, exclusion from blood donations of men who have sex with men (MSM)
  - Rejection with respect to Mr. L

#### CJEU:

- The national court is to check if the risk of acquiring a disease is higher for MSM – not just a risk
  - Up-to-date epidemiological data
- To what extent is it justified for the rejection to be permanent
  - Infringes upon fundamental rights (Charter)

## CJEU:

- Test the restriction of fundamental rights – by the national court
  - Laid down in law
  - With a legitimate purpose
  - Respect the main content of the restricted rights
  - Proportionate – appropriate and necessary
- Other, less restrictive means to preserve health?
  - Testing
  - Individual interview about contacts, consider the specific personal risk – rather than exclude MSM in general
- If not – disproportionate

## Maniero

### C-457/17 (2018)

- Italian citizen, born in Germany
- Obtained a degree in Armenia
- Asks a private foundation about the terms for an educational scholarship
- A state exam must have been passed in Germany
- Does not apply

## CJEU:

- Applicability: Access to scholarships > access to education > “education”
  - Not narrow but a teleological interpretation to be made by the national court
- Indirect D?
  - The ones excluded are not of a *certain* EO – the concept of indirect D does not cover such a general disenfranchisement
  - A specific ethnic group must be affected – *Jyske Finans*

## Parris

C-443/15 (2016)

- Multiple D – SO and age
- Right to survivor’s benefit is afforded only to spouses/partners who entered into marriage/registered partnership before the age of 60
- Mr. P was unable to register partnership before that age – the national law at the time did not provide for/recognise this

## CJEU:

- No direct D based in SO – spouses and partners are treated the same  
MI: Does not discuss the relative comparison between the situations that a marriage could have been concluded at any time unlike a partnership
- No indirect D based on SO either:
  - Civil status – competence of the Member States
  - Not obligated to recognise a same-sex marriage
  - Nor to provide for partnership
  - Nor to set a certain starting date
  - Nor to provide for transitional cases such as the one of Mr. P

## CJEU:

MI: Does not discuss whether the age restriction for registration is justified

- Legitimate purpose, proportionality, etc.

Whether the Member States have discretion, justification is not necessary? Contrary to previous case-law?

- When they exercise their competence, Member States need to take EU law into account

## CJEU:

- No D based on age either
  - The different treatment based directly on age is among the exceptions under the directive – “establish an age for access to the right to pension”
- Multiple D based on a combination as a separate category, cannot be established inasmuch as not established by individual criteria

### MI: Restrictive

- Intersectional multiple discrimination – recognised in literature for 30 years (Kimberlé Crenshaw)

## Hay

### C-267/12 (2013)

- According to the collective agreement, the right to benefit is accorded only to spouses and not to partners
- Same-sex marriage is not recognised

### CJEU:

- Applicability: terms of employment
- Direct D:
  - Comparison spouse/partner – made specifically for the purposes of the benefit, not in abstract
  - A pact is the only option for same-sex couples

## CJEU:

- The benefit is also provided in the event of marriage of children/sisters/brothers
- The difference is not directly based on SO but on marriage inasmuch as it is not excluded from the ones affected, D is direct
  - MI: Proxy criterion in the event of functional equality – proxy characteristic for the criterion
- Irrelevant that a pact may also be concluded by heterosexuals
  - MI: They are not in the same position < choice between marriage and pact
- Justification: none for direct. Solely under an exception – is not covered
- Inadmissible provisions

## Römer

### C-147/08 (2011)

- Employee of a local authority
- Refusal of the employer to recalculate a more favourable additional pension for length of service in the event of partnership
- Applicable for marriage

#### CJEU:

- Applicability: scope of the concept of “pay”
- Direct D: comparison
  - Not identical

## CJEU:

- Comparison between spouse/partner – specific, not general (*Maruko*, C-267/06, 2008)
- No marriage for same-sex couples
- Partnership for such
- Terms – equal to marriage
- The contributions due are the same, regardless of SO
- The national court is to check the comparison resulting in direct D
- If it finds such > inadmissible provisions

## CJEU:

- The national court must guarantee the effectiveness of EU law
  - In its discretion, it does not apply national norms which are contrary – prevalence of EU law
  - It does not wait for them to be repealed/ruling of a supreme/constitutional court
  - Mr. R may rely on this right under the directive against his employer – a public subject – without waiting for the provisions to be repealed

Thank you for your attention!

**You're welcome – want to discuss?**

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