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## **The Court of Justice of the European Union as the Creator of a Protective Standard Against Discrimination on the Basis of Sexual Orientation: A Critical Analysis<sup>1</sup>**

### **Introduction**

Sexual orientation is one of more recent legally-protected characteristics under EU law. The Union acquired the competence to legislate EU anti-discrimination law with regard to it (as well as the other grounds of prohibited discrimination listed in Article 19 of the Treaty on the Functioning of the European Union (TFEU),<sup>2</sup> in addition to gender) by the Treaty of Amsterdam (TA).<sup>3</sup> Indeed, it introduced Article 13 into the Treaty establishing the European Community,<sup>4</sup> which expanded the possibility of the adoption of anti-discrimination measures at the EU level. Prior to the entry into force of the TA, the legislative competence of the EU in this regard was limited to the prohibition of discrimination on grounds of nationality and, as mentioned above, gender.<sup>5</sup> With respect to sexual orientation, the Union exercised this competence in the form of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.<sup>6</sup> Currently, the prohibition of discrimination on the basis of sexual orientation is also expressed in the Charter

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<sup>2</sup> Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26.10.2012, p. 47, hereinafter: TFEU.

<sup>3</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10.11.1997, p. 1, hereinafter: TA.

<sup>4</sup> Treaty establishing the European Community (consolidated version 1997), OJ C 340, 10.11.1997, p. 173.

<sup>5</sup> Attention to this is drawn by A. Zawadzka-Łojek, *Sources of antidiscrimination law of the European Union* [in:] *Antidiscrimination law of the European Union*, eds. eadem, A. Szczerba, Warsaw 2021, p. 47.

<sup>6</sup> OJ L 303, 2.12.2000, p. 16.

of Fundamental Rights of the European Union (CFR or Charter)<sup>7</sup> and remains a component of the principle of equal treatment as a general principle of EU law. The normative dimension of the principle of equality in the EU legal order is the result not only of lawmaking activity, including legislation, but also of jurisprudence. Indeed, the Court of Justice of the European Union (CJEU) plays a major role in raising the level of protection of homosexual persons from discrimination both in the spheres covered by EU anti-discrimination law and in other areas of EU law. The CJEU's most recent jurisprudence on this subject-matter relates to the freedom of movement of persons, which indicates a progressive synergy between the regime of anti-discrimination law based on Article 19 TFEU and Article 18 TFEU.

The purpose of this article is to analyse the activity of the CJEU in relation to the protection of the rights of persons of non-heteronormative sexual orientation against discrimination. The starting point of this analysis will be the identification of EU law stipulating the prohibition of unequal treatment on the basis of sexual orientation. The analysis concentrates on selected judgments of the CJEU, which will permit tracing the development of the CJEU's case law in relation to the prohibition of discrimination against homosexual people. These considerations will be enriched by an attempt to analyse critically the conditions and course of this development, as well as to anticipate its future directions.

The object and purpose of the analysis determined the research methods used, which consist of the dogmatic-legal method, the theoretical-legal method, and a kind of legal hermeneutics that takes into account the socio-cultural context of the judicial application of EU anti-discrimination law.

## **1. Sources of EU law on the protection against discrimination based on sexual orientation**

### **1.1. Equality as a general principle of EU law<sup>8</sup>**

The CJEU began the process of decoding the general principle of equal treatment with the Defrenne III judgment, in which it confirmed that respect for human rights – which undoubtedly includes the prohibition of discrimination on the basis of sex – is one of the general principles of EU law that it is obliged to ensure.<sup>9</sup> It is now an established jurisprudential standard – confirmed by the wording of Article 6(3) TEU – that the principle of equal treatment is a general principle of EU law, derived from various international instruments and the common constitutional traditions of the Member States.

<sup>7</sup> OJ C 326, 26.10.2012, p. 391, hereinafter CFR or Charter.

<sup>8</sup> Cf. A. Szczerba-Zawada, *Equality as the foundation of the European Union. Study of the criteria of equal treatment in the construction of the internal market*, Warsaw 2019, p. 36 *et seq.*

<sup>9</sup> Judgment of the CJ of June 15, 1978 in Case C-149/77, Defrenne III, EU:C:1978:130, paragraphs 26–27.

The general principle of equal treatment, guaranteed by Articles 20 and 21 of the CFR, requires that comparable situations are not treated differently, and that different situations are not treated equally, unless such treatment is objectively justified.<sup>10</sup> As a general principle of EU law, equality sets an overarching standard of fairness and rationality.<sup>11</sup> Moreover, it is sufficient in itself to confer on individuals a right upon which they may rely in disputes between them in a field covered by EU law.<sup>12</sup> The scope of the general principle of equal treatment is not limited to the spheres covered by the equality directives. Moreover, it also affects areas not covered by EU law, namely those that fall within the exclusive competence of the Member States.<sup>13</sup> The prohibition of discrimination on the basis of sexual orientation has similar consequences, as indicated by the judgments of the CJEU which are discussed later in this article, although so far it has not confirmed the status of the prohibition of discrimination on the basis of sexual orientation as a general principle of EU law.

## **1.2. The CFR as a foundation for protection against discrimination based on sexual orientation**

The CFR was adopted in 2000 as a non-legally binding instrument. By virtue of the Lisbon Treaty<sup>14</sup> its status was changed and the Charter became part of EU primary law.<sup>15</sup> As a result, Member States are obliged to abide by it, and individuals – including non-heteronormative persons – have a new instrument to protect their rights. Insofar as regards the beneficiaries, the rights guaranteed by the Charter are the rights of every person, unless the Charter's provisions specify otherwise. This means that in principle any person can challenge any EU legislation or national legislation implementing EU law if he or she finds it incompatible with the provisions of the CFR, including the prohibition of discrimination based on sexual orientation expressed therein. At the same time, national courts may seek guidance from the CJEU on the correct interpretation of the Charter under the preliminary ruling procedure set out in Article 267 TFEU.<sup>16</sup>

The material scope of the impact of the prohibition of discrimination on the basis of sexual orientation under the CFR refers to those provisions that establish the tasks and competences of the EU (with respect to its institutions and bodies) or have

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<sup>10</sup> This is how the CJEU defined the general principle of equal treatment in its May 22, 2014 judgment in Case C-356/12, *Glatzel*, EU:C:2014:350, para. 43.

<sup>11</sup> M. Bell, *The Principle of Equal Treatment: Widening and Deepening* [in:] *The evolution of EU law*, eds. P. Craig, G. de Búrca, Oxford 2011, p. 626.

<sup>12</sup> CJEU judgment of January 22, 2019 in Case C-193/17, *Cresco Investigation*, EU:C:2019:43, para. 76.

<sup>13</sup> A. Szczerba-Zawada, *Equality as a foundation...*, p. 57.

<sup>14</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on December 13, 2007, OJ C 306, 17.12.2007, p. 1.

<sup>15</sup> See Article 6 of the Treaty on European Union (Consolidated Version), OJ C 326, 26.10.2012, p. 13: "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."

<sup>16</sup> *Handbook of European Non-Discrimination Law*, Luxembourg 2011, p. 16.

a connection with EU law (with respect to the Member States). In view of this, the EU is bound by the Charter while exercising of its treaty-established tasks and competencies, while the Member States are bound by it to the extent to which they implement EU law (Article 51(1) of the Charter). As a result, the Charter applies when, *inter alia*, the subject matter of national legal measures is straightforwardly subject to the provisions of EU law, as in the judgment in Case C-148/13 to C-150/13,<sup>17</sup> in which the CJEU assessed the legality of means of verifying non-heteronormative sexual orientation as a prerequisite for applying for asylum in a Member State. The CJEU confirmed that the assessment of the accuracy of this verification should be done, among other things, in a manner consistent with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity (Article 1 of the Charter), or the right to respect for private and family life (Article 7 of the Charter). The CJEU has clarified that EU law precludes an assessment through interrogations based solely on stereotypical notions of homosexual behaviour;<sup>18</sup> detailed interrogations about an asylum seeker's sexual practices; tests to prove an asylum seeker's homosexuality; or the submission of video recordings of sexual activities by an asylum seeker. Thus, although the CJEU did not define sexual orientation as a prerequisite for asylum – such a definition has also not been developed under anti-discrimination law by either the EU legislature or the judiciary – it did point out those criteria which cannot be applied – according to EU law – to verify it. Since the specificity of this premise lies in its strong connection with the intimate sphere of life of the individual, in assessing the legitimacy of invoking the protection associated with it, the right to respect for private life and other rights guaranteed by the CFR must be respected. This standard, *per analogiam*, should also be applied to protection against discrimination.

The right to non-discrimination on the basis of sexual orientation is expressed in Article 21(1) of the Charter, according to which: "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." Sexual orientation is therefore a characteristic legally protected under the Charter against both discriminatory acts and omissions. The *signum specificum* of Article 21 of the Charter as a source of protection against discrimination on the basis of sexual orientation is its hybrid-law nature and the manner in which this provision is implemented, as set forth in Article 52(2) of the Charter.

Article 52(2) of the Charter helps define the relationship between rights under the CFR and the identical ones subject to the regulations of the Treaties and the provisions

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<sup>17</sup> The relevant EU act therein was Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, pp. 12–23.

<sup>18</sup> The role of stereotypes in sexual orientation discrimination is emphasized by J. Maliszewska-Nienartowicz, *Discrimination based on religion, disability, age or sexual orientation. Directive 2000/78 and the jurisprudence of the CJUE. Commentary*, Warsaw 2013, p. 13.

adopted pursuant to them, indicating that: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." This requires that the anti-discrimination clause contained in Article 21 of the CFR must be viewed through the prism of those provisions of EU law that express the prohibition of discrimination (including in the case of discrimination on the basis of sexual orientation), and not in an autonomous manner. The hybrid nature of the prohibition of discrimination is confirmed by the doctrine claiming that "reducing the nature of the prohibition of discrimination to a principle within the meaning of Article 52 of the Charter would mean a significant weakening of the function of this provision, since the principle can be invoked only to interpret and control certain facts."<sup>19</sup> This leads to the conclusion that Article 21(1) of the Charter implies the right to non-discriminatory treatment<sup>20</sup> with the attribute of direct effect.<sup>21</sup> Consequently, protection against discrimination on the basis of sexual orientation on the grounds of the CFR might be invoked by anyone before EU bodies and institutions, as well as before national authorities, including the courts, which can and even must apply the Charter directly. Unfortunately, the potential of the Charter as a source of protection against discrimination *in genere*, and in particular against discrimination on the basis of sexual orientation, is not fully exploited, as evidenced by the judgments of the CJEU analysed in the next section of this article.

### **1.3. Directive 2000/78/EC as an instrument of EU law on protection against discrimination on the basis of sexual orientation**

At the level of secondary law, the most important act of protection against discrimination against homosexual people is Directive 2000/78/EC. Under this act, protection from discrimination on the basis of sexual orientation extends to heterosexuals (experiencing sexual desire and affection for persons of the opposite sex); homosexuals (experiencing sexual desire and affection for persons of the same sex); and bisexuals (experiencing sexual desire and affection for persons of either sexes).<sup>22</sup> In the reality of social life, as is reflected in the CJEU case law cited below, the problem of discrimination on the basis of sexual orientation primarily affects the second indicated group.

At the same time, it should be borne in mind that the scope of protection against discrimination based on sexual orientation has expanded thanks to the Court's jurisprudence, and now also includes less favourable treatment of certain forms of same-sex relationships,<sup>23</sup> although Directive 2000/78 does not address issues related to fam-

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<sup>19</sup> A. Wróbel, *Article 21 of the Charter of Fundamental Rights of the European Union. General issues* [in:] *Charter of Fundamental Rights of the European Union. Commentary*, ed. *idem*, Warsaw 2013, p. 717.

<sup>20</sup> A. Zawadzka-Łojek, *Sources...*, p. 53.

<sup>21</sup> Which the CJEU confirmed in its April 17, 2018 judgment in Case C-414/16, Egenberger, EU:C:2018:257.

<sup>22</sup> J. Maliszewska-Nienartowicz, *Discrimination due to...*, p. 25.

<sup>23</sup> More extensively, see A. Szczerba-Zawada, *Equality as a foundation...*, pp. 292–293 *et seq.*

ily status and the benefits arising therefrom (recital 22), leaving such issues to national legislation.

The prohibition of discrimination on the basis of sexual orientation established by Directive 2000/78 applies to conditions for access to employment, self-employment, or to occupation; including selection criteria and recruitment conditions, regardless of the branch of activity and at all levels of the professional hierarchy, including promotion (Article 3(1)(a)). Thus, the scope of this directive covers all professional activities, regardless of their nature or characteristics, as the CJEU confirmed in its judgment in Case C-356/21, J.K. v. TP S.A.<sup>24</sup> This refers, in the first instance, to persons having the status of an employee within the meaning of EU law, i.e. any person performing actual and effective work for and under the direction of another person, regardless of the amount of full-time employment. In addition, the concept of employee includes a person seeking employment in the territory of another member state, as well as a person whose employment relationship has been terminated under circumstances governed by EU law, such as a person who is temporarily unable to work as a result of an accident. The directive applies to any employee, whether in the public or private sector.<sup>25</sup> However, the EU legislator did not intend to limit the scope of Directive 2000/78 only to positions held by an “employee” within the meaning of Article 45 TFEU. Consequently, protection against discrimination on the basis of sexual orientation covers a wide range of professional activities, including those carried out by self-employed persons for the purpose of making a living, provided that they are genuine in nature and are carried out within the framework of a professional relationship characterized by a certain stability.<sup>26</sup>

The directive prohibits various forms of discrimination against non-heteronormative people, i.e. those that are more easily associated with unequal treatment (direct discrimination (Article 2(2)(a)); indirect discrimination (Article 2(2)(b) of Directive 2000/78) and those that give rise to greater public debate – harassment (Article 2(3)) and/or an instruction to discriminate (Article 2(4)). “The concept of harassment includes manifestations of homophobia consisting of pejorative or negative comments, suggestions or name-calling, or insults to persons who are gay, lesbian or bisexual by an employer or co-workers.”<sup>27</sup> These can be either words, insults, or gestures, as long as they meet the criteria with which the law associates the existence of harassment. At the same time, revealing one’s orientation, or coming out, is not a justification for discrimination. An instruction to discriminate, on the other hand, consists not only of direct acts that constitute discrimination, but also of management giving orders. “This concept should include situations in which one is forced to discriminate or an

<sup>24</sup> CJEU judgment of January 12, 2023, in Case C-356/21, J.K. v. TP S.A., EU:C:2023:9.

<sup>25</sup> T. Romer, *Prohibition of discrimination against employees based on sexual orientation* [in:] *Counteracting discrimination on the basis of sexual orientation in the light of Polish law and European standards*, ed. K. Śmiszek, Warsaw 2006, p. 81.

<sup>26</sup> See CJEU judgment J.K. v. TP S.A., paragraphs 36, 37, 44 and 45.

<sup>27</sup> D. Pudzianowska, *Sexual Orientation* [in:] *Anti-discrimination Law of the European Union*, eds. A. Zawadzka-Łojek, A. Szczerba, Warsaw 2021, p. 286.

expressed preference to treat people worse because of their sexual orientation.”<sup>28</sup> It is worth noting that the parameters of this form of discrimination may evolve in the future thanks to case law, including that of the CJEU.

Not all differential treatment based on sexual orientation will constitute discrimination. Directive 2000/78 envisages certain exceptions to the prohibition of discrimination, accepting differences in treatment that are based on, for example, relevant and determinative occupational requirements (Article 4(1)); however, the purpose of such differentiation must not be unlawful or disproportionate.

## **2. The principle of equality on the grounds of sexual orientation in the case law of the CJEU**

### **2.1. Protection of same-sex registered partnerships against wage discrimination – judgment in Case C-147/08, Römer**

The judgment under review concerns the social security system in which the plaintiff in the main proceedings, Mr. Römer, who was in a registered partnership, applied for a supplementary pension benefit, which was reserved for married persons under German law.

The CJEU, in response to a preliminary question,<sup>29</sup> compared the legal regime of registered partnerships and marriages. It concluded that the two are similar, among other things, in terms of the obligations imposed on partners and spouses, including to contribute adequately to the common needs of the partnership by their work and from their property, which the benefit at issue in the case in the main proceedings was intended to ensure. Indeed, it was intended to provide a replacement income at the time of retirement, which should directly benefit the person concerned and indirectly those living with him or her.<sup>30</sup> Accordingly, such benefits constitute pay within the meaning of Article 157 TFEU. Taking into account the economic criteria, the CJEU stated that Directive 2000/78 precludes “a provision of national law [...] under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if in the Member State concerned marriage is reserved to persons of different gender and exists alongside a registered life partnership, which is reserved to persons of the same gender, and there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension.”<sup>31</sup> The CJEU left

<sup>28</sup> *Ibid.*, p. 287.

<sup>29</sup> See CJEU judgment of May 10, 2011, in Case C-147/08, Römer, EU:C:2011:286, para. 28.

<sup>30</sup> See *ibid.*, para. 47.

<sup>31</sup> *Ibid.*, para. 52. From the preliminary question, it is possible to read the position of the national court, which stated that there are no differences between marriage and civil unions in relation to their rights.

the assessment of this comparability to the national courts in the case under review, considering it to be within its competence. This decision might be considered a manifestation of a conservative attitude on the part of the Luxembourg court, which may be deserving of criticism, especially when one considers the greater willingness of the CJEU to shape protection against discrimination on the basis of sex, for example.<sup>32</sup>

In fact, this judgment is criticized by the doctrine,<sup>33</sup> even though the CJEU confirmed in it the possibility for same-sex couples to seek protection from discrimination under Directive 2000/78 also in spheres that are related to the exclusive competence of the Member States (marital status). It is criticised for several reasons. Firstly, the CJEU's method of comparing registered partnerships and marriages to identify unequal treatment on the basis of sexual orientation led it to limit the scope of the protection it established only to the Member States that legally sanctioned same-sex unions in a manner similar to the institution of marriage. In states that do not provide for same-sex registered partnerships at all, or that have adopted a different legal model of partnerships as compared to marriage, people in same-sex partnerships will be (or at least may be) deprived of such protection. Secondly, the CJEU did not clarify whether the principle of non-discrimination on the basis of sexual orientation could be considered a general principle of EU law, although the structure of the Court's reasoning remained consistent with those judgments in which it qualified as such discrimination based on different grounds. Thirdly, the CJEU failed to analyse the prohibition of discrimination as a fundamental right under the CFR, missing an opportunity to emphasize the importance of the Charter as the main source of fundamental rights. Fourthly and finally, it also failed to clearly answer the question of how to balance the circumstances in which, on the one hand, Member States are obliged to respect the principle of equal treatment, including on the basis of sexual orientation, and on the other – by virtue of constitutional solutions – extend special protection to marriage and family. This would be particularly helpful for protection of non-heteronormative persons in Member States such as Poland.<sup>34</sup>

## **2.2. Protection against homophobic recruitment policy – judgment in Case C-81/12, *Asociația Accept***

The prohibition of discrimination on the basis of sexual orientation also protects people at the stage of access to employment. It therefore covers recruitment criteria for

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<sup>32</sup> The Court had no reluctance to give the provision of Article 119 of the Treaty establishing the European Economic Community, <http://www.hri.org/MFA/foreign/treaties/Rome57/BH343.txt>, obliging the Member States to ensure equal treatment of men and women with regard to remuneration, the value of direct effect also horizontally. See CJEU judgment of April 8, 1976 in Case C-43/75, *Defrenne II*, EU:C:1976:56.

<sup>33</sup> Cf. L. Pech, *Between judicial minimalism and avoidance: The Court of Justice's sidestepping of fundamental constitutional issues in Römer and Dominguez*, "Common Market Law Review" 2012, Vol. 49, No. 6, p. 1842 *et seq.*; and J. Maliszewska-Nienartowicz, *Prohibition of Discrimination...*, p. 44 *et seq.*

<sup>34</sup> More extensively on the criticism of this judgment, see A. Szczerba-Zawada, *Equality as a foundation...*, pp. 307–308.



a specific position, including in sports. According to the case law of the CJEU, the domain of sports is subject to EU law to the extent that it falls under the scope of a professional activity.<sup>35</sup> The protection of athletes from discrimination on the basis of sexual orientation was confirmed by the CJEU in the *Asociația Accept* judgment.<sup>36</sup>

The case pending before the national court concerned an interview given by an FC Steaua shareholder, in which he publicly considered the potential transfer of a player to that sports club, stating that instead of hiring a footballer with a homosexual orientation, he would prefer to close the club or appoint a junior player. FC Steaua did not distance itself from the statement, and in fact confirmed it in a lawyer's communiqué, claiming that the presence of a homosexual player would create tensions within the team and among spectators.

The CJEU, in response to a preliminary question from the national court,<sup>37</sup> ruled that an employer cannot deny the existence of facts that it is potentially pursuing a discriminatory employment policy by merely claiming that statements suggesting the existence of a homophobic recruitment policy came from a person who, while having an important role in the management of the club, is not legally capable of binding it in recruitment matters. Indeed, the fact that such an employer might not have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of its overall appraisal of the facts.<sup>38</sup>

Thus, it was confirmed by the CJEU that facts such as those in the case before it must be interpreted as a presumption of discrimination under Articles 2(2) and 10(1) of Directive 2000/78. This also applies to situations in which the presence of a legally-protected characteristic is only presumed. This means that the directive also protects those people who do not possess the trait in question – for example, a non-heteronormative sexual orientation – but are nevertheless presumed not to be heteronormative and suffer less favourable treatment because of this presumption. Thus, with this judgment the CJEU confirmed that EU law prohibits discrimination by assumption<sup>39</sup> in addition to discrimination by association, the unacceptability of which, under the same directive, the CJEU pointed out in the *Coleman* judgment.<sup>40</sup> An important implication of the *Asociația Accept* judgment is also that in certain circumstances an employer may be liable for the discriminatory behaviour of a third party.<sup>41</sup> Finally, it should be borne in mind that a manifestation of direct discrimination may also consist of, in light of the judgment in question, homophobic hate speech. This may compensate for the lack of protection against it in Polish criminal law for example. The judgment thus un-

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<sup>35</sup> *Ibid.*, p. 298.

<sup>36</sup> CJEU judgment of April 25, 2013 in Case C-81/12, *Asociația Accept*, ECLI:EU:C:2013:275, para. 25.

<sup>37</sup> *Ibid.*, para. 35.

<sup>38</sup> *Ibid.*, paragraphs 49 and 50.

<sup>39</sup> D. Pudzianowska, *Orientation...*, p. 259.

<sup>40</sup> CJEU judgment of July 17, 2008 in Case C-303/06, *Coleman*, EU:C:2008:415.

<sup>41</sup> As noted by D. Pudzianowska, K. Śmiszek, *Combating Sexual Orientation Discrimination in the European Union*, Luxembourg 2015, p. 48.

doubtedly represents a strengthening of protection against discrimination on the basis of sexual orientation in EU law, and by extension in national law.

### **2.3. Similarity of the position of same-sex relationships and marriages for the purposes of protection against discrimination on the basis of sexual orientation in terms of remuneration – judgment in Case C-267/12, Hay**

The ruling in question relates to employee benefits arising from the fact of employment. This is another CJEU ruling addressing the prohibition of discrimination on the basis of sexual orientation in terms of same-sex relationships. Frédéric Hay had been employed at Crédit agricole since 1998. On July 11, 2007, he entered into a civil solidarity pact, known as PACS, with a person of the same sex. On that occasion, Mr. Hay applied for days of special leave and a marriage bonus granted to employees who marry under the national collective agreement. His request was denied on the basis that the beneficiary of these entitlements could only be married persons.

Given the broad scope of the concept of remuneration, which includes “any consideration, whether in cash or in kind, whether immediate or future, provided that the employee receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis,”<sup>42</sup> the CJEU classified the case pending before the national court as falling under Directive 2000/78. The CJEU’s practice of a broad interpretation of the concept of “pay” – known from gender-based wage discrimination cases and applied in the Römer case – once again led to the situation in which the prohibition of discrimination on the basis of sexual orientation protected the rights of non-heteronormative persons in a situation that is within the exclusive competence of the Member States.

In examining whether there was direct or indirect discrimination in the case pending before the national court, the CJEU relied on settled case law concerning restrictions on the rights of partners in registered same-sex unions. The application of the comparative method,<sup>43</sup> known, among others, from the Römer judgment, led the CJEU to conclude that same-sex couples unable to marry and therefore opting for PACS are in a comparable situation to married couples in terms of benefits related to remuneration and additional benefits, such as in the case at hand. It should be mentioned however that this CJEU ruling is considered by some to be an over-interpretation with regard to the significant factual differences between these institutions.<sup>44</sup> However, since

<sup>42</sup> CJEU judgment of December 12, 2013 in Case C-267/12, Hay, EU:C:2013:823, para. 28.

<sup>43</sup> For more on the CJEU’s use of this method, see K. Lenaerts, K. Gutman, *The Comparative Law Method and the European Court of Justice: Echoes Across the Atlantic*, “American Journal of Comparative Law” 2016, Vol. 64, p. 848.

<sup>44</sup> See M. Łączkowska, *Glosa to the judgment of the Court of Justice of the European Union of December 12, 2013 in the case of Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, “Legal Forum” 2014, No. 4, pp. 49–50; and A.N. Schulz, *The marital status of homosexuals and the principle of non-discrimination in the jurisprudence of the CJEU against the background of the answer to the preliminary question in Case C-267/12 – Frederic Hay v. Credit agricole mutuel de Charente-Maritime et des Deux-Sevres*, “Legal Studies” 2015, No. 2, p. 95.

a finding of comparability of situations, which implies the obligation of equal treatment, does not require the sameness of all aspects analysed, the differences identified between the two unions do not preclude the possibility of establishing the similarity of the position of the parties to both of them for the purposes of protection against discrimination on the basis of sexual orientation in terms of remuneration. With regard to the existence of discrimination itself, the Court found that the Member State's regulations that limit salary-related benefits constitute direct discrimination on the basis of sexual orientation against employees in same-sex relationships under PACS.<sup>45</sup> The Court thus went further than in *Römer*, where it left the assessment of the existence of direct discrimination to the national court.

This judgment, which undoubtedly strengthens protection against discrimination on the basis of sexual orientation, nevertheless has limited effects with regard to the rights of non-heteronormative persons being in relationships. This is because, in its light, the obligation to treat persons in such relationships equally as compared to married couples applies only to those Member States that have similarly-constructed institutions of civil partnership and marriage. The Court thus perpetuated the permissibility under EU law of less favourable treatment in terms of protection against discrimination based on sexual orientation of unions of homosexual persons in those Member States whose national legislation does not recognize such a relationship, i.e. when the need for this type of protection by the EU legislation seems most desirable. The judgment in question thus indicates that the CJEU has stopped halfway when it comes to the progressiveness of its approach to protection against discrimination on the basis of sexual orientation.

#### **2.4. A missed opportunity to strengthen the protection of LGBT+ persons – judgment in Case C-443/15, Parris**

In the Parris judgment, the CJEU had to evaluate Irish regulations on the right of surviving civil partners of program members to receive a survivor's benefit. A prerequisite for obtaining such a benefit was that the program member had entered into a registered partnership before the age of 60. In the case of the plaintiff in the main proceedings, and other homosexual people of comparable age, this requirement was impossible to meet, since domestic law did not allow a non-heteronormative sexual orientation member of the complainant's age to enter into a registered partnership before that caesura.

Advocate General of the CJEU, Juliane Kokott, observed in her opinion that "there is no doubt that the requirement to enter into a marriage or civil partnership before the employee's 60th birthday constitutes an apparently neutral criterion which, as indicated above, bears no direct relation to the sexual orientation of the employee [...] On closer examination, however, it emerges that the 60-year age limit affects a large number of homosexual employees in Ireland more severely and more deleteriously

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<sup>45</sup> Hay Judgment, para. 41.

than their heterosexual colleagues.<sup>46</sup> Indeed, while heterosexual employees were free to choose whether to marry before their 60th birthday, homosexual employees could not do so until 2011, due to the lack of a legal regulation. This legal impossibility was, in the Advocate's General opinion, sufficient grounds for a finding of indirect discrimination under Directive 2000/78.<sup>47</sup>

However, the CJEU took a different view, stating that no discrimination on the basis of sexual orientation (neither indirect nor direct) occurred in the case at issue.<sup>48</sup> The Court compared the situation of heterosexual spouses and homosexual partners in terms of access to the benefit, when the marriage or registered union was not concluded before the parties' age of 60. As a result of such a comparison, it saw no sign of less favourable treatment of persons of homosexual orientation, as it found that both unions were equally excluded from access to the benefit. Thus, the choice of such and not another comparator affected the CJEU's decision. As in the earlier judgment in *Grant*,<sup>49</sup> the criterion of the "equal misery" of both heterosexual spouses and homosexual partners applied by the Court in the *Parris* case did not allow the Court to find differences in the treatment of homosexuals and heterosexuals with respect to access to the benefit in question. It should be borne in mind that the CJEU is sometimes inclined to be more creative in its choice of a comparator, as evidenced by the *P.* judgment.<sup>50</sup> In its narrow comparative perspective in the judgment at stake, the CJEU also failed to take into account the differentiation between homosexual and heterosexual couples in the form of the lack of legal possibility for homosexual persons born before 1951 to marry before the age of 60, which was related to another characteristic legally protected under EU law – age.

Referring to the criterion of marital status, the CJEU concluded that this issue and the related benefits fall within the competence of the Member States, within which they are free to introduce forms of legal recognition of same-sex relations and to determine the moment from which such forms will have effect. Union law, in particular Directive 2000/78, does not oblige either the introduction of marriage or other

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<sup>46</sup> Opinion of Advocate General Juliane Kokott delivered on June 30, 2016 in Case C-443/15, *Parris*, EU:C:2016:493, paragraphs 55 and 57.

<sup>47</sup> See also F. Staiano, *(In)Comparable Situations: Same-Sex Couples' Right to Marriage in European Case Law*, "federalismi.it. Rivista di Diritto Pubblico Italiano, Comparato, Europeo" 2017, No. 6, p. 6.

<sup>48</sup> CJEU judgment of November 24, 2016 in Case C-443/15, *Parris*, EU:C:2016:897, paragraphs 49–56 and 61.

<sup>49</sup> Judgment of the CJEU of February 17, 1998 in Case C-249/96, *Grant*, EU:C:1998:63. For a critical discussion of this approach of the CJEU in the *Grant* case, see P. Pogodzinska, *The EU principle of equal treatment and freedom of movement of workers with regard to the situation of sexual minorities in employment*, "Problems of Contemporary International, European and Comparative Law" 2004, Vol. 2, p. 84 *et seq.*

<sup>50</sup> Judgment of the CJEU of April 30, 1996 in Case C-13/94, *P.*, EU:C:1996:170. In it, the Court compared the applicant in the main proceedings, who underwent gender reassignment, with the gender to which she belonged before the correction, in essence the same gender, but in a different time frame, bringing protection on the basis of gender identity into EU law.

forms of relationship for same-sex couples, or the retroactive recognition of such a relationship.<sup>51</sup>

Against exactly the same character of the competence of the Member States in matters of marital status, the CJEU in the Parris judgment, unlike in the Römer or Hay judgments analysed above, but also unlike in the judgments on discrimination against same-sex couples in a cross-border situation discussed below, refused to grant protection to same-sex couples. It also missed the opportunity to introduce the notion of intersectional discrimination, i.e. discrimination based on more than one characteristic interacting in an inseparable manner, into EU law. Since – in the CJEU's view – there was no violation of the prohibition of discrimination based on sexual orientation or age taken in isolation, there could not have been discrimination based on the combined effect of sexual orientation and age either.<sup>52</sup> It seems that the direction of development of EU legislation, which has already recognized discrimination due to the combination of several legally protected characteristics,<sup>53</sup> may contribute to a change in the CJEU's approach to different forms of multiple discrimination.

## **2.5. Protection of same-sex marriages in cross-border situations – judgment in Case C-673/16, Coman et al.**

The Coman et al. ruling is a breakthrough for homosexual spouses, opening up the possibility for them to invoke the freedom of movement of persons guaranteed by Directive 2004/38.<sup>54</sup> This was the first such unequivocal judgment interfering in the sphere of family law and the legal orders of Member States because of the need to protect the rights of homosexuals, although interestingly without viewing this issue from the perspective of the prohibition of discrimination based on sexual orientation.<sup>55</sup>

Romanian and U.S. citizen Relu Adrian Coman and U.S. citizen R.C. Hamilton began their acquaintance in June 2002 in New York. Coman then moved to Brussels, where he took a job at the European Parliament. On November 5, 2010, they got married in Brus-

<sup>51</sup> CJEU judgment in Parris, para. 60.

<sup>52</sup> *Ibid.*, para. 82.

<sup>53</sup> See e.g. directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, OJ L 132, 17.5.2023, p. 21.

<sup>54</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, p. 77.

<sup>55</sup> For a critical view, see A. Szczerba-Zawada, *Derived right of residence of the spouse of a citizen of the European Union of the same sex – gloss on the judgment of the Court of Justice of 5.06.2018, C-673/16, Relu Adrian Coman et al. v. Inspectoratul General pentru Imigrări i Ministerul Afacerilor Interne*, "European Judicial Review" 2018, Vol. 11, pp. 41–47. An analysis of this judgment in the perspective of anti-discrimination law is also offered by A. Szczerba in: *Free Movement of Same-Sex Marriages: The CJEU and the (Troublesome) Protection of EU Citizens Regardless of Their Sexual Orientation in the Light of the Coman Judgment*, "State and Law" 2022, No. 8, pp. 38–54.

sels. In December 2012, they asked the Romanian inspectorate for information on the procedures for obtaining Hamilton's right to legally reside in Romania for more than three months as a family member of a EU citizen.<sup>56</sup> In response, they were informed that the right to stay could be a maximum of three months, as same-sex marriage is not recognized in the Romanian Civil Code.

Responding to a preliminary question from the Romanian Constitutional Court,<sup>57</sup> the CJEU interpreted the term "spouse," stressing that under Directive 2004/38 it is gender-neutral and may therefore cover the same-sex spouse of the Union citizen.<sup>58</sup> Moreover, in the judgment in question, the CJEU agreed that, under Directive 2004/38, a same-sex marriage that was lawfully entered into under the law of one of the Member States results in the necessity of recognizing the persons concerned as spouses in other Member States. However, this does not detract from the exclusive competence of a Member State to regulate marital status, including the decision whether or not to allow marriage for persons of the same sex. Nevertheless, it is well-established case law that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom of movement conferred on all Union citizens.<sup>59</sup> For these reasons, according to the CJEU "a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state."<sup>60</sup>

A Member State's refusal to recognize a marriage lawfully entered into by a Union citizen in another EU Member State would impinge on the effectiveness of the freedom of movement and residence within the territory of a Member State, granted to citizens of the Union by Article 21(1) TFEU. Indeed, it would have far-reaching consequences, including discouraging such a person from returning to his or her place of nationality with his or her spouse. In the opinion of the CJEU, such a restriction on the free movement of EU citizens is not justified on grounds of public policy or respect for the national identity of the Member States.<sup>61</sup>

This judgment has eliminated the legal uncertainty regarding the ability of same-sex couples to invoke the provisions of Directive 2004/38 for the purposes of exercising their EU freedom of movement. Access to this right, hitherto differentiated on the basis of sexual orientation, has also been unified in all Member States.<sup>62</sup> On the other hand, the CJEU's reasoning was based on the EU provisions stipulating freedom of movement of EU citizens, not anti-discrimination legislation. The failure to invoke the prohibition of discrimination on the basis of sexual orientation in the judgment at

<sup>56</sup> CJEU judgment of June 5, 2018 in Case C-673/16, *Coman*, EU:C:2018:385, para. 11.

<sup>57</sup> *Ibid.*, para. 17.

<sup>58</sup> *Ibid.*, para. 35.

<sup>59</sup> *Ibid.*, paragraphs 37 and 38.

<sup>60</sup> *Ibid.*, para. 36.

<sup>61</sup> A. Szczerba-Zawada, *Equality as a foundation...*, p. 316.

<sup>62</sup> A. Szczerba-Zawada, *Derived right of residence...*, p. 44.

stake indicates the CJEU's conservative attitude towards sexual orientation as a legally protected characteristic, and its tendency to replace this socially sensitive criterion with a more neutral one, namely "gender." Despite this, it should be highlighted that the CJEU's approach in *Coman et al.* indicates the progressiveness of the interpretation of the relevant provisions of Union law by the Court in Luxembourg, as compared to the European Court of Human Rights' (ECtHR's) rulings under the European Convention on Human Rights with regard to the obligation to recognize a same-sex marriages concluded in a member state, The CJEU's ruling also indicates a certain autonomization of the concept of "marital status," unlike in the *Parris* judgment. This trend continues in Luxembourg's jurisprudence on so-called rainbow families.

## **2.6. Rainbow families and the freedom of movement – order in Case C-2/21, Rzecznik Praw Obywatelskich**

The Court has also issued a ruling via the preliminary ruling procedure on the conformity with EU law of national regulations preventing the transcription of a foreign birth certificate of a child – a citizen of the Union – on the grounds that same-sex parenthood is inadmissible under national law. It ruled on this subject, among others, in its decision in the case C-2/21, *Rzecznik Praw Obywatelskich*.<sup>63</sup> The case before the national court grew out of the Polish Ombudsman's complaint about the impossibility of obtaining travel documents – an identity card and a passport – due to the lack of the legal possibility of transcribing the foreign birth certificate of a minor Polish citizen, in which two women were indicated as her parents.

In the order at issue, the CJEU concluded that under Article 4(3) of Directive 2004/38, Polish authorities are obliged to provide such a child with an identity card or passport, regardless of the transfer by transcription of that child's foreign birth certificate to the Polish civil status register. Thus, insofar as Polish law requires the birth certificate to be transcribed before a Polish identity card or a Polish passport is issued, that Member State cannot invoke its national law as a justification for refusing to issue such an identity card or such a passport.<sup>64</sup> This does not however make the institution of transcription as such inadmissible under EU law. In pointing out the need to protect various rights guaranteed by the CFR, including respect for family life (Article 7) and the rights of the child (Article 24 of the CFR), the CJEU affirmed the obligation of all Member States to recognize the parent-child relationship – biological or legal – established by law in another Member State between a child being a citizen of the Union and his or her parents, regardless of their sex, for the purpose of permitting that child to exercise – without impediment, with regard to each of his or her two parents – the rights which that child derives from EU law. Thus, on the basis of Article 21 TFEU, all Member States should recognize the right of two men or two women designated as parents of a minor Union citizen and over whom they have de facto custody to ac-

<sup>63</sup> CJEU order of June 24, 2022 in Case C-2/21, *Ombudsman*, EU:C:2022:502.

<sup>64</sup> *Ibid.*, para. 39.

company them in exercising their rights to move and reside freely within the territory of the Member States.<sup>65</sup>

Therefore, by the order at issue the CJEU formulated two obligations of Member States with regard to children of same-sex couples. The first is the obligation to issue an identity card and/or passport to such child, who is a citizen of that Member State born in another Member State and whose birth certificate issued by the authorities of that other Member State designates two persons of the same sex as his or her parents. The second is the obligation to recognize the parent-child relationship between that child and each of those two persons for the purpose of exercising of that child's rights derived from EU law. However, this does not imply that the Member State of which the child in question is a national is obliged to provide for same-sex parenthood in its national law.

As in *Coman et al.*, the CJEU's ruling was based on and limited to the freedom of movement of EU citizens within the EU. Unlike in *Coman et. al.* however, it did so by invoking the prohibition of discrimination on the basis of sexual orientation. It did so however not by directly invoking Article 21 of the CFR, but by invoking Article 2 of the Convention on the Rights of the Child, which must be applied when interpreting Article 24 of the CFR and which introduces, with respect to a child, the principle of non-discrimination and the consequent requirement that the rights set forth in the aforementioned Convention – among which is the right to have a birth certificate drawn up immediately after the child's birth, the right to be given a name, and the right to obtain citizenship – are guaranteed to that child without discrimination, including without discrimination based on the sexual orientation of his or her parents.

## Conclusions

The CJEU has played and continues to play a major role in defining the legal status of individuals in EU law. In its role as the guardian of human rights, the CJEU has not only contributed to strengthening the position of the individual in relation to the Member State, but also to the development of the system of EU law as a supranational organization, with competences that include the protection of human rights. It has done this by successively developing the principle of primacy of EU law; the principle of its direct effect; and finally by recognizing fundamental rights as general principles of EU law.<sup>66</sup> The relevance of the CJEU's jurisprudence to the protection of fundamental rights is also revealed in its judgments on the prohibition of discrimination on the basis of sexual orientation. As the analysis in this article has indicated, it is undoubtedly thanks to this that the prohibition includes homophobic hate speech, and the need to recognize

<sup>65</sup> *Ibid.*, paragraphs 42 and 45.

<sup>66</sup> More extensively on the role of the CJEU for the protection of fundamental rights, see A. Szczerba-Zawada, *Protection of human rights in the European Union* [in:] *European Union: Essence, opportunities, challenges*, eds. E. Latoszek, M. Proczek, A. Szczerba-Zawada, A. Masłóń-Oracz, K. Zajączkowski, Warsaw 2018, p. 115 *et seq.*



in all Member States – including those whose legislation does not envisage such solutions – same-sex marriages or parenthood of same-sex couples, even if limited to the freedom of movement.

Nevertheless, the jurisprudence of the CJEU on the protection of the rights of persons of non-heteronormative sexual orientation reveals a certain minimalism when it comes to cases involving controversial or ambiguous issues, which undoubtedly include protection against discrimination based on sexual orientation. Against this background, there is a notable tendency on the part of the CJEU to sacrifice the sustainability of its case law – the principle of legal certainty or the legal security of individuals – for the sake of public support for the judgments it issues.<sup>67</sup> A tangible manifestation of this is the granting of protection to registered same-sex partners only when their status is comparable to that of spouses under national law, or the refusal to recognize multiple discrimination, which could substitute for the lack of protection against discrimination on the basis of sexual orientation in the event of the overlap of this legally protected characteristic with others in areas where the latter would be protected (e.g. gender or ethnic origin). A less conservative stance is taken by the CJEU in those cases where the given circumstances also require the safeguarding of other fundamental individual rights, such as freedom of movement, implying an increasing level of synergy between the two regimes of EU anti-discrimination law.

The analysis of the CJEU's case law contained in this article allows for another conclusion – namely about the relevance of the level of protection of the rights of non-heteronormative persons in a given Member State to the CJEU's willingness to progressively interpret EU law in favor of strengthening their legal status. The order in Case C-2/21, *Rzecznik Praw Obywatelskich*, in a situation in which the CJEU has already resolved an analogous legal issue, seems to confirm this hypothesis. The CJEU's decision to contextualise the interpretation of analogous EU law in the so-called "Baby Sara case"<sup>68</sup> to the Polish circumstances, one may connect to the homophobic actions of public authorities in the form of so-called anti-LGBT resolutions to some local government units in Poland.

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## Summary

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### **The Court of Justice of the European Union as the Creator of a Protective Standard Against Discrimination on the Basis of Sexual Orientation: A Critical Analysis**

Sexual orientation is one of the characteristics legally protected under European Union law. The normative dimension of the principles of equal treatment and non-discrimination in the EU order – not limited to this issue only – is the result not only of lawmaking activity, in particular legislative, but also of jurisprudence. Indeed, the Court of Justice of the European Union (CJEU) plays a major role in raising the level of protection of persons of non-heteronormative sexual orientation from discrimination, both in the spheres covered by EU anti-discrimination law and in other areas of EU law. The purpose of this article is to analyse the activity of the CJEU vis-à-vis the protection of homosexual persons from discrimination. The analysis is enriched by an attempt to critically evaluate selected Luxembourg jurisprudence and to anticipate the direction of its development. The object and purpose of the analysis determined the research methods used, which consist of the dogmatic-legal method, the theoretical-legal method, and a kind of legal hermeneutics.

**Keywords:** prohibition of discrimination, sexual orientation, Court of Justice of the European Union.

## Streszczenie

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### **Trybunał Sprawiedliwości Unii Europejskiej jako kreator standardu ochronnego przed dyskryminacją ze względu na orientację seksualną – analiza krytyczna**

Orientacja seksualna jest jedną z cech prawnie chronionych na gruncie prawa Unii Europejskiej. Normatywny wymiar zasad równego traktowania i niedyskryminacji w porządku unijnym – także, ale nie wyłącznie ze względu na tę przesłankę – jest wynikiem nie tylko działalności prawotwórczej, w tym w szczególności – prawodawczej, ale także orzeczniczej. Trybunał Sprawiedliwości Unii Europejskiej odgrywa bowiem ogromną rolę w podnoszeniu poziomu ochrony osób o nieheteronormatywnej orientacji seksualnej przed dyskryminacją zarówno w sferach objętych unijnym prawem antydyskryminacyjnym, jak i w innych dziedzinach prawa UE. Celem niniejszego artykułu jest przeanalizowanie aktywności orzeczniczej TSUE w przedmiocie ochrony osób homoseksualnych przed dyskryminacją. Analizę wzbogacono o próbę krytycznej oceny wyselekcjonowanego orzecznictwa luksemburskiego oraz antycypacji kierunku jego rozwoju. Przedmiot i cel analizy determinują wykorzystane metody badawcze, na które składają się: metoda dogmatyczno-prawna, teoretyczno-prawna oraz pewien rodzaj hermeneutyki prawniczej.

**Słowa kluczowe:** zakaz dyskryminacji, orientacja seksualna, Trybunał Sprawiedliwości Unii Europejskiej.