

# Remedies and sanctions in discrimination cases

Tamás Kádár, Equinet, European Network of Equality Bodies  
Applying EU Anti-Discrimination Law – Webinar for Members of the Judiciary  
ERA training, 26 October 2020



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

## Remedies – in Treaties

*'Member States shall provide **remedies sufficient to ensure effective legal protection** in the fields covered by Union law.'* – Article 19 of the Treaty on European Union

*'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy** before a tribunal in compliance with the conditions laid down in this Article.'* – Article 47 of the Charter of Fundamental Rights of the EU

See also e.g. Art. 6 of ICERD; Art. 2 of CEDAW; Art. 13 of ECHR



## Remedies

*'Member States shall ensure that **judicial and/or administrative procedures**, including where they deem it appropriate conciliation procedures, **for the enforcement of obligations under this Directive are available** to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'*

Article 7 of Directive 2000/43/EC, Article 9 of Directive 2000/78/EC, Article 8 of Directive 2004/113/EC and similar provisions in Article 17 of Directive 2006/54/EC



## Sanctions / Penalties

*'Member States shall lay down the **rules on sanctions** applicable to infringements of the national provisions adopted pursuant to this Directive and **shall take all measures necessary to ensure that they are applied**. The sanctions, which may comprise the payment of compensation to the victim, must be **effective, proportionate and dissuasive**.'*

Article 15 of Directive 2000/43/EC and Article 17 of Directive 2000/78/EC; similar provisions in Article 14 of Directive 2004/113/EC and in Article 25 of Directive 2006/54/EC




## The importance of sanctions

*'It is impossible to establish real equality of opportunity without an appropriate system of sanctions.'* C-14/83, Von Colson and Kamann Case, p. 22.

*'Full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that sanction be such as to guarantee real and effective judicial protection.'* p. 23.

In Dekker (C-177/88) the Court referred back to von Colson and added: *'It [the sanction] must, furthermore, have a real deterrent effect on the employer.'* – p. 23



## Remedies in cases without identifiable complainants

*'Article 15 of Directive 2000/43 requires that **rules on sanctions** applicable to breaches of national provisions adopted in order to transpose that directive **must be effective, proportionate and dissuasive, even where there is no identifiable victim.**'* C-54/07, Firma Feryn, p. 40

See also C-81/12, Asociația Accept, p. 62 and C-507/18, NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford, p. 63-64



## What are appropriate sanctions?

- ▶ **'Directive 2000/43 does not, however, prescribe a specific sanction, but leaves Member States free to choose between the different solutions suitable for achieving its objective.'** – C-54/07, Firma Feryn, p. 37
- ▶ **'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.'** – C-54/07, Firma Feryn, p. 39



## What are appropriate sanctions?

- ▶ **'The severity of the sanctions must be commensurate to the seriousness of the breaches** for which they are imposed, in particular by ensuring a **genuinely dissuasive effect**, while respecting the **general principle of proportionality'** – C-81/12, Asociația Accept, p. 63
- ▶ **'Furthermore, if it were the case that, as Accept argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach** of the principle of equal treatment within the meaning of that directive.' – p. 70

## What are appropriate sanctions?

- A **purely symbolic sanction cannot be regarded as being compatible** with the correct and effective implementation of the Directive. – C-81/12, Asociația Accept, p. 64



- *'those with legal standing to bring proceedings **might be so reluctant to assert their rights** under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive.'* – p. 67

## What are appropriate sanctions?

- **The mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic**, particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages.' – C-81/12, Asociația Accept, p. 68
- **The mere existence of an action for damages cannot, as such, make good any shortcomings** in terms of effectiveness, proportionality or dissuasiveness of the sanction. – p. 69

## What are appropriate sanctions? Summary

Also in the  
absence of an  
identifiable  
victim

Effective,  
proportionate  
and dissuasive

Commensurate  
to the  
seriousness of  
the breaches

Real deterrent  
effect

More than a  
purely symbolic  
sanction

Accessible to  
rights holders

## Sanctions and compensation

'The sanctions, which **may comprise the payment of compensation to the victim**, must be effective, proportionate and dissuasive.'

What is the main objective?

- Public interest ← → private interest of the victim
- Individual and general prevention / dissuasion ← → reparation / individual compensation
- Respond to the infringement ← → respond to the damage



## Compensation / reparation to victims

*'Member States shall introduce into their national legal systems such measures as are necessary to ensure **real and effective compensation or reparation** as the Member States so determine **for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.** Such compensation or reparation **may not be restricted by the fixing of a prior upper limit**, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.'*

Article 18 of Directive 2006/54/EC and similar provision in Article 8 of Directive 2004/113/EC. No such provisions in the 2000 Directives.



## Prohibition of a previously fixed upper limit for compensation

*'(...) reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.'* – C-271/91, M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority, p. 32



## Sanctions and compensation

### Dissuasiveness of compensation

- If part of a set of sanctions, some of which contain punitive elements
- If the compensation contains punitive damages (*but this is alien to some legal systems and the Directives do not require its introduction – see C-407/14 Camacho, p. 37 and 43*)
- If there are no punitive elements but the total amount in itself has deterrent effect




## Sanctions and compensation

### What about:

- The motivation of the victim? – quite often not financial compensation
- Cases with no identifiable victim?
- The reality of the amount of compensation in most jurisdictions?
- 'Paying to discriminate'?





## The importance of an established link between discrimination and sanction

- C-30/19 DO v Braathens Regional Aviation AB: concerns the right of a person who considers himself a victim of discrimination to have a court examine whether discrimination has occurred.
- Context: action for damages where the defendant agreed to pay the compensation sought, but did not admit any form of discrimination.
- AG SAUGMANDSGAARD ØE's Opinion: *'there must be a link between the sanction and the existence of discrimination, either by means of an acknowledgement of the discrimination by the person responsible for it or through a finding of discrimination by a judicial or administrative authority, so that the sanction may perform to the full its compensatory and deterrent functions in accordance with Articles 7 and 15 of Directive 2000/43.'*



## What's the price of a human right?

'Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher (...)'

(GDPR Article 83(5))

'Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.' (GDPR Article 83(1))

'When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following (...)' (GDPR Article 83(2))

