Remedies and Sanctions in Anti-Discrimination Cases

Applying EU Anti-Discrimination Law
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Discrepancy between “Having” Rights and “Acquiring” Rights at EU Level

- Eurobarometer (2015)
- Equinet Report «The Sanctions Regime in Discrimination Cases and its Effects»
Main Findings at EU Level

- lack of access to relevant information
- under-reporting
- lack of raising awareness activities
- inequality of resources
- issues with shift of burden of proof
- undue delay in the proceedings
- very low compensation awarded

Right to Effective Remedy (EU Law)

- Article 47 of the Charter of Fundamental Rights
  "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 7 of the Race Directive
- Article 9 of the General Framework Directive
Wide Range of Possible Remedies (at National Level)

- type of law (civil, penal, administrative)
- punitive or non/punitive character of the remedies
- purpose (backward or forward looking)
- level at which remedies are intended to operate (individual/group level)
- reflection of different theories (remedial, compensatory, punitive and preventive justice) and different concepts of equality (individual justice model, a group justice model)

Leading Principles

- Procedural autonomy
  Member States are free to prescribe procedural rules and remedies (C-14/83, Von Colson & Kaman v Land Nordrhein-Westfalen).
  Alternative Dispute Resolution at the discretion of the Member states.
  Criminal and administrative regulations are present in some Member states (but convictions require a very much higher standard of burden of proof).
  In any case: a remedy of judicial nature (it may be complemented by other avenues)
Leading principles - CJEU case law

- **Effectiveness**
  Procedural requirements cannot render the exercise of EU rights impossible or excessively difficult (C-271/91, Marshall v Southampton and South West Hampshire AHA, C-180/95, Draehmpaehl v Urania Immobilienservice OHG).

- **Equivalence**
  Provisions of national law giving effect to EU rights must be no less favourable than those applicable in similar domestic causes of action (C-326/96, Levez v TH Jennings Ltd; C-63/08, Pontin v T-Comalux SA).

Right of Association to Bring an Action

- Article 7.2 (9.2) is a minimum requirement
- in some countries, domestic legislation recognises the *actio popularis* or class action (Hungary, Slovakia, Germany, Austria, Norway, Netherlands, Romania)
- so is there an obligation to recognise a right of associations to act on their own initiative?
- situation can arise where there is a discrimination but no identified victim seeking redress
- it appears not – see point 27, C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn
Sanctions

Art. 15 (17)
- effective, proportionate and dissuasive
- Directives do not define these terms – lack of clarity
- wide variance across EU in potential remedies available and levels of compensation awarded
- no single national enforcement system appears to be truly all-encompassing
- based on individualistic and remedial model – rather than a preventative on
- purpose of sanctions – to place a plaintiff in the position that they would have been if had they not suffered the wrong

Effective Sanction

- successful in achieving the desired outcome
- there is no directly effective right to any specific form of sanction, inadequate or symbolic sanction is contrary to EU law (Von Colson, para 23)
- statutory upper limits for a discriminatory dismissal, refusing award of interest (Marshall)
- a 3 month statutory limit on compensation for job applicants subjected to discrimination (Draehmpaehl)
- national rules limiting redress if it amounted to unjust enrichment (Cotter and McDermott)
Proportionate Sanction

- balanced, in terms of the gravity, nature and extent of the loss and/or harm
- CJEU case law prior Directives
- if the compensation is chosen it must be "adequate in relation to the damage sustained"; it must therefore "amount to more than purely nominal compensation" (Von Colson, para 23) and "enable the loss and damage actually sustained...to be made good in full" (Marshall, para 26)

Dissuasive Sanction

- the aim is to deter the perpetrators so that they will desist from any further acts of discrimination (special prevention)
- sanction should dissuade others from doing likewise (general prevention)
- CJEU case law with regard to sanctions in discrimination cases (Von Colson, Draempaehl)
- the compensation must be "painful".
Guidelines for Assessing Dissuasive Effect

- A sanction is not dissuasive if victims might be reluctant to assert their rights.
- Repeated offences might be an indication that the sanction is not having desired effect.
- Not purely symbolic sanction, but not necessarily monetary.
- It is also required in cases without direct victim.

Sanctions
(Solutions at National Level)

- Civil remedies offering relief and redress to victims:
  1. Bringing discrimination to end.
  2. Restoring status quo ante.
  3. Ensuring compensation and damages for harm incurred and future loss of earnings.
  4. Reinstatement (unlawful dismissal from employment).

- Criminal and administrative sanctions punishing the perpetrator.

- Forward looking, non-pecuniary remedies.
Civil remedies I
Comparative Perspective

- substantive and moral damages (usually backward looking)
  - under general tort provisions (Croatia, Denmark, Hungary, France, Poland, Romania)
  - under specific provisions of the anti-discrimination legislation (Austria, Czech Republic, Germany, Spain, Sweden)

Upper limits/Ceiling

- CJEU case law – not acceptable (general rule)
- a lump sum is not in essence dissuasive (Marshall, para 32) unless the adverse effect (not being given the job) would have happened anyway, regardless of the discrimination that took place (Draehmpaehl, para 33)
- in case of redress of past situation, interest must be awarded (Marshall, para 32)
Upper limits/Ceiling
Comparative Perspective

- **no limitation** on amounts awarded as compensation (majority of national laws in EU)
- **guidelines** establishing limits (Supreme Courts, Croatia, Sweden)
- "benchmarking" sanctions in UK (3 bands)
  1. **Upper** band: 21025-34951 EUR (the most serious cases, a lengthy campaign of harassment)
  2. **Middle** band: 7008-21025 EUR
  3. **Lower** band: 817-7008 EUR
- **three-months' salary** in the event of non-recruitment (Germany)

Civil remedies II
Comparative Perspective

- orders **annulling** the discriminatory provisions of a contract or decision (Belgium, France, Romania)
- orders requiring respondents **to stop violation** and **refrain** from reoffending (Bulgaria, Hungary)
- orders to provide a **plan** to remove acts and effects of discrimination (Italy, UK)
- orders requiring a **private apology** such as a letter or publication in the media (Croatia, Hungary, Latvia, Slovakia)
Solution in Cases without Identifiable Victim

CJEU case law
- **Feryn**
  *Is a legal finding of discrimination sufficient?*
  Para 39: legal finding of discrimination and publication may be sufficient (among other possibilities)
- **C-81/12, Asociația Accept v Consiliul Național pentru Combaterea Discriminării**
  *Do the penalties (warning, fine with statute of limitations of 6 months from the facts, community service) meet requirements of General Framework Directive?*
  Para 68: non-financial penalty is not automatically considered purely symbolic
  Para 72: it is up to national court to decide whether six month time limit is inapplicable in the light of the General Framework Directive

Criminal and Administrative Sanctions
- a limited number of countries (administrative/minor offence)
- punishing the perpetrator for the sake of protecting public interest (repressive nature)
- include administrative warnings or fines, criminal fines, disciplinary measures etc.
- issued by **NBE** (Cyprus, Portugal), **courts** (Finland, Italy, Norway) or by **specialized entities** (Labour or Consumer Inspectorates in the Czech Republic, Austria, Slovakia)
Forward-looking, Non Pecuniary Sanctions

- "affirmative" equality – sanction aims to introduce **systematic changes** (prevention, education, raising awareness)
- **desegregation** policies, reviewing recruitment policies, diversity auditing, adopting diversity policies or **duty** to organize equality training (UK, Ireland)
- **confiscation** of property, forfeiture of the right to participate in trade fairs, **suspension** of licenses (Portugal)
- **exclusion** from public tenders (Italy)

Issues for Further Consideration

  - see CJEU case law (C-185/97, Belinda Jane Coote v Granada Hospitality Ltd., para 24, 27)
  - personal scope (**witnesses**), burden of proof (Netherlands, UK)
- **Multiple and Intersectional Discrimination**
  - **no explicit solution**, although different grounds can be entwined
dissuasive effect may require the sanction **to be greater** than what it would have been if the discrimination had related to just one of the protected grounds
- **Can discriminatory treatment be sanctioned twice?**
  - principal of **subsidiarity** of criminal repression
Conclusion

- acknowledgement no ideal sanction for each and any case
- remedy shall ensure real equality of treatment, provide the same protection as an equivalent national law provision, compensate the claimant in full, it must be proportionate to the act of discrimination performed and deter others from committing similar acts in the future
- different solutions in the EU member states have to be assessed in the context of domestic legal frameworks
- lack of proactive remedies and monitoring
- quality of the remedies – real commitment to effectively combat discrimination in our societies
- developing strategies for a concrete case within national context given

Thank you for your attention!

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