

Remedies and Sanctions in Anti-Discrimination Cases

Applying EU Anti-Discrimination Law
ERA

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Discrepancy between “Having” Rights and “Acquiring” Rights at EU Level

- ❑ studies by **European Commission** (2009) and **Fundamental Rights Agency** (2011) concerning «**Access to justice**»
- ❑ **Joint Report** of European Commission on the Implementation of Race Directive and General Framework Directive (2014)
- ❑ **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 one
- purpose of sanctions – to place a plaintiff in the position that they would have been in if they had 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)



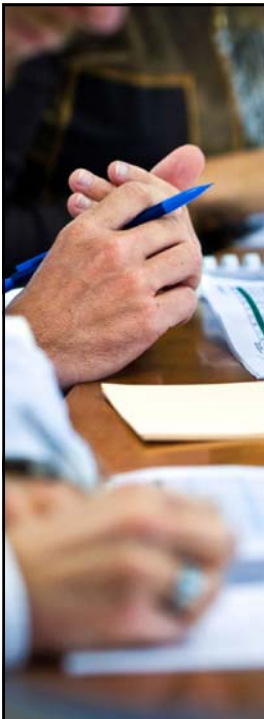
Dissuasive Sanction

- ❑ 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 antes*
 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

- ❑ **Victimisation - article 9 of the Race Directive, article 11 of the General Framework Directive**
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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