

ADVOKATFIRMAET

OKLAND

SEEKING EFFECTIVENESS: REMEDIES AND SANCTIONS IN DISCRIMINATION CASES

APPLYING EU ANTI-DISCRIMINATION LAW
ERA/EU SEMINAR
FOR MEMBERS OF THE JUDICIARY

LISBON, PORTUGAL, 6 NOVEMBER 2017
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This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.



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REMEDY - SANCTION

- “Remedy” = legal means of enforcing a right or redressing a wrong
- “Sanction” = a provision of a law enacting a penalty imposed by courts for noncompliance with a law or legal order - or offering a reward for its observance

LEGAL FRAMEWORK

EU Charter of fundamental rights article 47: effective remedy – effective access to justice - possibility to be advised, defended and represented
(ECHR article 13)

Directive 2006/54 (recast)

Directive 2004/113 (goods and services)

Directive 2010/41 (self-employment)

Directive 2000/43 (race)

Directive 2000/78 (the general framework directive or employment directive)

LEGAL FRAMEWORK

	2006/54	2004/113	2010/41	2000/78	2000/43
Right of recourse/ defence of rights					
- Individual	Art 17(1)	Art 8(1)	Art 9(1)	Art 9(1)	Art 7(1)
- Association	Art 17(2)	Art 8(2)	Art 9(2)	Art 9(2)	Art 7(2)
Penalties - reparation	Art 25 Art 18	Art 14 Art 8(2)	Art 10	Art 17	Art 15
Victimization	Art 24	Art 10	-	Art 11	Art 9
Nullities/ compliance	Art 23	Art 13	-	Art 16	Art 14
Information/ social dialogue	Art 21, 22	Art 11	-	Art 12, 13, 14	Art 11, 12
Body for the promotion of equal treatment	Art 20	Art 12	Art 11	-	Art 13

LEGAL FRAMEWORK

Each directive requires that Member States should:

- provide for real and effective redress
- determine the regime of applicable sanctions
- adopt measures to ensure the enforcement of the sanctions

Where compensation is provided, it must be effective, proportionate and dissuasive

Burden of proof rules for the procedure

THE RIGHT TO RECOURSE

– *the individual right: An obligation for the Member States to ensure*

2006/54 - Art 17(1)

- A judicial procedure
- Available to anyone who believes he/ she has suffered discrimination
- Including after working relations have ended
- Possibility of providing for conciliation procedures
- Art 17(3): “without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment”

2000/78 - Art 9(1)

- Judicial and/or administrative procedure
- Available to all persons who consider themselves wronged by failure to apply the principle of equal treatment
- Even after the relationship in which the discrimination is alleged to have occurred has ended
- Possibility of providing for conciliation procedures
- Art 9(3) “without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment”

(C-417/13 - ÖBB Personenverkehr AG v Starjakob, para 62-64)

THE RIGHT TO RECOURSE

– *the right for associations*

2000/78 Art 9(2), 2000/54 Art 17(2) (7(2)) : Minimum requirement

Obligation for the Member States to provide for

- Action on behalf of or in support of the complainant with the approval of the complainant
- Action (representation) both in judicial and administrative procedures.

Directive 2000/78: Also action independent of the complainant or in the absence of an identified victim, case C-54/07 *Feryn* and C-81/12 *Accept*

The right to effective, proportionate and dissuasive penalties (2000/78 art 17)

Only requirement from EU on remedies: that they are “Effective”, “Proportionate”, “Dissuasive”

- The directives do not define the concepts used
- Wide variety across EU in potential remedies available and level of compensations awarded
- Purpose of sanction: the place the plaintiff in the position that they would have been in had they not suffered the wrong

The right to effective, proportionate and dissuasive remedies (2000/78 art 17)

The State decides at national level:

- which remedy: civil, criminal, administrative, reparatory, financial, non-financial – but must be of a judicial nature
- the character of the remedy: punitive or non-punitive
- purpose (backward or forward-looking, non-pecuniary)
- level (individual level or group level)
- Purpose: remedial, compensatory, punitive or preventive justice

PRINCIPLES ESTABLISHED IN ECJ CASE LAW

Respect for the principles of

- 1) **Equivalence:** Provisions of national law giving effect to EU rights must be no less favorable than those applicable in similar domestic causes of actions (C-26/96 *Levez*, C-63/08 *Pontin*)
- 2) **Proportionality:** The severity of the sanction must be commensurate to the gravity of the breaches, especially in ensuring a genuinely dissuasive effect.
- 3) **Effectiveness** (the dissuasive nature of the penalties): Procedural requirements cannot render the exercise of EU rights impossible or excessively difficult
- 4) **Procedural autonomy:** Member states are free to prescribe procedural rules and remedies

ECJ CASE LAW

Starting point: C-14/83 *Von Colson*

- Equal opportunities require suitable penalties. Symbolic damages are not enough.

Para 22: «it is impossible to establish real equality of opportunity without an appropriate system of sanctions»

Para 23: “full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee **real and effective judicial protection**. Moreover it must also have a real **deterrent effect** on the employer. It follows that where a member state chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be **adequate** in relation to the damage sustained.»

ECJ CASE LAW

Case C-177/88 *Dekker*

Para 22: “the Directive does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability”.

- liability for discrimination is not conditional on proof of fault

ECJ CASE LAW

Case C-271/91 Marshall II

Following from Von Colson:

- Para 25: “Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. (...) a situation of equality could not be restored without either **reinstating** the victim of discrimination or, in the alternative, granting **financial compensation** for the loss and damage sustained”.
- Para 26: “Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be **adequate**, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be **made good in full** in accordance with the applicable national rules”.
- Para 30: upper limit to damages is not permissible

ECJ CASE LAW

Case C-180/95 *Draehmpael*

Para 24: The principle of effectiveness ensures that the sanctioning measures may be **effectively relied on** before the national courts by the persons concerned - meaning that they do not render virtually impossible or excessively difficult the exercise of rights conferred by the Union law

Para 29: “In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law **of a similar nature and importance**”

Para 39: The sanctions must have a “**real dissuasive effect**” and be “adequate in relation to the damage sustained in order to ensure real and effective judicial protection”.

ECJ CASE LAW

Case C-63/98 *Pontin*

- The detailed procedural rules shall not in practice make it impossible or excessively difficult to exercise rights conferred by EU law, such as limitation periods for bringing actions (para 67)

Case C-429/12 *Pohl* para 29

ECJ CASE LAW

Case C-246/09 *Bulicke*:

National time limit rules are permissible as long as “the time limit is not less favourable than that applicable to similar domestic actions in employment law” – starts from when knowledge of the discrimination is acquired – see para 42

(starting point: directive 2000/78 art 9(3): time limits are at the discretion of Member States, but equivalence and effectiveness must be guaranteed)

ECJ CASE LAW

Case C-54/07 - *Firma Feryn* (2000/43/EC)

para 38-40: “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.**”

- Even if there is no identified victim, a sanction must be available which is effective, proportionate and dissuasive
- Sanctions may include publishing a finding of discrimination at the perpetrator’s expense, an injunction, a fine or an award of compensation in favour of the prosecuting authority

ECJ CASE LAW

Case C-81/12 *Accept* (2000/78/EC)

Para 64: “a purely **symbolic** sanction cannot be regarded as compatible with the correct and effective implementation of Directive 2000/78”.

Para 68: “The mere fact that a specific sanction is not pecuniary in nature does not mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assist in establishing discrimination within the meaning of directive 2000/78 in a possible action for damages”.

ECJ CASE LAW

Case C-407/14 Securitas

Question: "Must the court award the claimant damages which go beyond full compensation for the loss and damage which she sustained, in the form of punitive damages, in order to serve as an example to her former employer and others, given that the concept of 'punitive damages' does not exist in Spanish law?"

Para 43-45: "In the absence of a provision of national law making possible the payment of punitive damages to a person injured by discrimination on grounds of sex, Article 25 of Directive 2006/54 does not provide that a national court can on its own require the person responsible for the discrimination to pay such damages. It should be added that, on the assumption that a Member State decides to adopt measures allowing the award of punitive damages to the person who has suffered discrimination, it is for the national legal system of each Member State to set the criteria for determining the extent of the penalty, provided that the **principles of equivalence and effectiveness** are respected."

ECJ Upcoming case on sanctions: C-27/16 and C-24/17

ECJ CASE LAW

Do ECJ judgments affect the starting point of a limitation period fixed by national law?

No

C- 429/12 Pohl para 30:

"...a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it **takes effect** from the date on which the **rule** interpreted **entered into force**"

Repeated in C-417/13 - *ÖBB Personenverkehr AG v Starjakob*, para 63:

Para 70 "...the principle of effectiveness must be interpreted as meaning that, in a case such as that at issue in the main proceedings, it does not preclude a national limitation period for claims which are founded in EU law from starting to run before the date of delivery of a judgment of the Court which has clarified the legal position on the matter"

– para 69: "in the case in the main proceedings, Mr Starjakob's right to request a re-evaluation of the reference date is not time-barred"

THE ROLE OF THE JUDGE AT NATIONAL LEVEL

The judge is obliged to interpret and apply national legislation adopted for the implementation of the relevant directives in conformity with the requirements of EU law

When the national legislation does not comply with EU law, it can be revoked by national courts (claims brought by individuals against the state), or the judge can refer the question to the EC court (ECJ)

C-555/07, Küçüdeveci: "It is for the national court, hearing proceedings between individuals, to ensure (...) the principle of non-discrimination (...) disapplying if need be any provision of national legislation, independently of whether it makes use of its entitlement in the cases referred to in the article 267(2) TFEU to ask the Court of Justice of the EU for a preliminary ruling on the interpretation of that principle".

CHALLENGES IMPLEMENTATION: SANCTIONS AND REMEDIES

The Joint report of the European Commission in the Implementation of directive 2000/78 and 2000/43 - COM(2014)2 final p 8: "The initial problems which many Member States encountered in relation to the correct transposition of the rules on sanctions have now been addressed and the sanctions provided for by law are generally appropriate. However, there are still potential grounds for concern as regards the **availability of remedies in practice** and **whether sanctions that are imposed in concrete cases comply fully with the requirements** of the Directives. The national courts appear to have a tendency to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded."