

Remedies and sanctions in discrimination cases

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Introduction and general presentation

- Texts:
 - Articles 7 to 15 of Directive 2000/43
 - Articles 9 to 14 + 16 and 17 of Directive 2000/78
- Principles from case law on equality (C-14/83, *Von Colson and Kamann*; C-271/91, *Marshall*,...)
- Concern for effectiveness: "*It is impossible to establish real equality of opportunity without an appropriate system of sanctions.*" (Case C-14/83, *von Colson*, § 22...)
- Important role of general principles of law ("loyal cooperation", "equivalence", "effectiveness"...)
- Potential impact of the ECHR (Articles 6 and 13) and the Charter of Fundamental Rights (Article 47)

Introduction and general presentation

	Directive 2000/43 (race)	Directive 2000/78 (general framework - employment)
Right to individual remedy	+	+
Right to engage in proceedings for associations	+	+
Nullities/compliance		
Sanctions effective, proportionate and dissuasive	+	+
Protection from victimisation	+	+
Information and social dialogue	+	+
Equality body	+	0

1. Nullity: compliance with EU law

States shall ensure that all provisions of laws, regulations, contracts, collective agreements, internal company regulations, statutes of the independent professions... which are contrary to the principles of equal treatment (Article 16 of Directive 2000/78 + Article 14 of Directive 2000/43) are *abolished* or *declared void*.

Compliance is also aimed at national courts:

1° direct vertical effect of the provisions of a directive which, from the point of view of their content, are unconditional and sufficiently precise (*Napoli, C-595/12*)

2° The judge is bound by the principle of consistent interpretation:

"A national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to misapply, where necessary, any provision of national law that is contrary"

"Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible [...] to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation" (of consistent interpretation) (case C-441/14, *Dansk Industri*, § 41-42).

3° Levelling up: the judge must place the discriminated worker in the same situation as that of workers of the other sex, until further intervention by the legislator (e.g. case C-231/06, *Jonkman*; C-417/13, *Starjakob*, § 46).

The Court deduced from Article 21 of the Charter of Fundamental Rights of the European Union that:

"where discrimination contrary to Union law has been established and as long as measures restoring equal treatment have not been adopted, respect for the principle of equality can be ensured only by granting persons in the disadvantaged category the same advantages as those enjoyed by persons in the privileged category. Disadvantaged persons must therefore be placed in the same situation as the persons benefiting from the advantage concerned" (ECJ, *Cresco Investigation GmbH*, 22 January 2019, C-193/17, § 79; ECJ, 17 April 2018, *Egenberger*, C-414/16, § 76; ECJ, 9 March 2017, *Milkova*, C-406/15, § 66).

A private employer does not escape the obligation of levelling up which concerns reasons other than gender (religions, age, disability...).

4° Possibility of upholding State liability for non-transposition:
presupposes, in particular, a "sufficiently serious" breach

To be assessed according to:

- the degree of clarity of the infringed rule,
- the margin of appreciation,
- the involuntary nature of the breach or damage suffered,
- the excusable nature of any error of law,
- the attitude taken by an EU institution.....

2. Right of remedies

2.1. Individual right (Article 9(1) of Directive 2000/78 + Article 7(1) of Directive 2000/43)

Obligation for Member States to provide for

- a judicial procedure
- accessible to any person who considers himself to be a victim of discrimination
- including when (labour) relations have ended
- possibility of providing for conciliation procedures

But "*without prejudice to national rules on time limits for bringing proceedings with regard to the principle of equal treatment*" (Article 9(3), Directive 2000/78, Article 7(3), Directive 2000/43)

Procedural autonomy of Member States with regard to the organisation of appeals, but in compliance with the principles of equivalence and effectiveness

Equivalence principle:

- breaches of EU law shall be penalised under conditions, fundamental and procedural, that are similar to those applicable to breaches of national law of similar nature and importance

- it is, in principle, for the national courts to determine whether the procedural arrangements designed to ensure, under national law, the protection of the rights which individuals derive from Union law comply with the principle of equivalence

Principle of effectiveness:

- the detailed procedural rules shall not, in practice, make it impossible or excessively difficult to exercise rights conferred by EU law

Example: regarding limitation periods for bringing actions (case C-63/08, *Pontin*).

- the principle of effectiveness does not prevent the limitation period under national law for rights based on EU law taking effect before the CJEU decision clarifying the legal position in the case (case C-417/13, *Starjakob*, § 69)

2.2. Right for associations

"Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with may, on behalf of or in support of the complainant, with his or her approval, initiate any judicial and/or administrative procedure provided for the enforcement of the obligations arising from this Directive" (Article 9(2) of Directive 2000/78 + Article 7(2) of Directive 2000/43).

On behalf of or in support of the complainant + approval

However,

"Directive[2000/78] does not preclude a Member State from providing for the right of associations having a legitimate interest in ensuring compliance with that Directive to initiate proceedings (...) to enforce obligations under that Directive without acting on behalf of a specific complainant or in the absence of an identifiable complainant" (Case C-54/07 Feryn, and Case C-81/12 Accept,)

Action independent of the complainant or in the absence of an identified victim.

Some national laws provide for an "Actio popularis" or a "Class action".

3. Effective, proportionate and dissuasive sanctions

3.1 General characteristics (Art. 17 Directive 2000/78; Art. 15 Directive 2000/43)

- Autonomy of States with regard to the choice of sanctions (civil, criminal, administrative; restorative or "for the future"; financial, non-financial...)
- Respect for principles:
 - 1° of equivalence (see *above*)
 - 2° proportionality
 - 3° effectiveness (dissuasive nature of sanctions)
- Assessment in each case (Case, C-271/91 *Marshall*, II, § 25)

3.2. Guidelines for assessing the dissuasive nature

- An action is not dissuasive when victims could be hesitant to assert their rights (*Accept case*, § 67)
- A second offence may indicate the absence of dissuasive sanction(*ditto*)
- A dissuasive sanction should also be provided for even when there is no identifiable victim (*Feryn*, § § 38 and 40; *Accept*, § 62)
- Sanctions shall not be purely symbolic but do not necessarily have to be financial
- Dissuasive nature of a simple warning? (*Accept case*)

3.3 Dissuasive nature when the Member State chooses "civil liability" as the sanction system

- Discrimination is necessarily a fault:
 - *"where a Member State chooses a sanction as part of a civil liability regime, the breach of the principle of non-discrimination constitutes in itself a fault"* (Case C-177/88, *Dekker*, § 25)
- In the event of discrimination in access to employment, the Directive does not require that the employer must offer a job to the discriminated candidate
 - but the remedy cannot be limited to the reimbursement of the costs incurred by the application (Case *Von Colson*, C-14/83): absence of any real deterrent effect
- A discriminatory dismissal can be remedied by reinstatement or compensation
 - Compensation must compensate *"in full for the damage actually suffered as a result of the discriminatory dismissal, in accordance with national rules"* (Case C-271/91, *Marshall*, II, § 26).

- Lump-sum compensation (or *"a priori maximum limit"*) is in principle not a deterrent (Case C-271/91, *Marshall*, § 32) except *"in cases where the employer can prove that the only damage suffered by an applicant is the refusal to take into consideration his application for employment"* (see Case C-180/95, *Draehmpaehl*, § 33)
- The Directive does not require the provision of *"punitive damage"*, but neither does it prohibit it (Case C-407/14, *Arjona Camacho*, § 40); possible impact of the principle of equivalence, if punitive damage is provided for by national law in similar situations (see Case C-407/14, *Arjona Camacho*, § 44)
- When it is a matter of compensating for a situation that has expired, interest must be provided for (Case C-271/91, *Marshall*, § 32)

3.4. Sanctioning in the event of multiple discrimination

- Multiple discrimination combines various grounds: "the accumulation or combination of grounds causes aggravated effects of non-integration, vulnerability and exclusion" (I. Daugareilh, 2011)
- Should multiple discrimination be specifically sanctioned? - no explicit solution
- The dissuasive nature could require that the penalty is higher than what would have been applicable in the case of discrimination on a single ground
- However, the sanction must remain proportionate (however, the material damage is not necessarily higher in the case of multiple discrimination...)

3.5. Examples of specific sanctions provided for in the event of discrimination, by certain national laws

- Publication of the decision (in the press or in the company)
- Temporary closure of the company
- Temporary suspension of the right to pursue a profession or activity requiring authorisation by public authorities
- Reduction in subsidies
- Order to cease trading (under penalty of penalty payment)
- Exclusion from public work contracts....

3.6. Sanctions and procedures that cannot be abused (Case C-423/15, *Kratzer*):

- Quite special circumstances: *candidate for a job not to hold that job but to obtain compensation: refusal to participate in an interview unless prior compensation is provided*
- Potentially abusive attitude (conditions see § 37-41)
- Attention paid to the risk of instrumentalization of procedures
- The person concerned may not be considered a victim or an injured person

4. Protection from victimisation

Objective recognised by the CJEU (before protection is provided for by the Directive): protecting the right to take legal action

- provide protection against any measures that an employer might adopt to dissuade workers who consider themselves wronged by discrimination from taking legal action (Case C-185/97, *Coote*, § 24)
- including, against prejudicial measures that would be imposed after the termination of the employment relationship, such as a refusal to provide references (Case C-185/97, *Coote*, § 27)

"Member States shall introduce into their national legal systems the necessary measures to protect workers against dismissal or any other unfavourable treatment by the employer in response to a complaint made at company level or to legal action for compliance with the principle of equal treatment" (Article 11 of Directive 2000/78 + Article 9 of Directive 2000/43)

Protection of the victim's representatives (or witnesses):

- Directive 2000/78: protection of workers / Directive 2000/43: protection of persons
- Directive 2000/43 > Directive 2000/78: not only if they are employed by the employer against whom the complaint is made?

5. Equality body

"Member States shall designate one or more bodies responsible for promoting equal treatment between all persons without discrimination on grounds of racial or ethnic origin. They may be part of bodies responsible for defending human rights or protecting the rights of individuals at national level" (Article 13(1) of Directive 2000/43).

Aims (Art. 13, § 2):

- Assistance to victims in initiating proceedings
- Independent surveys and reports
- Power to make recommendations on all issues related to discrimination

- European Commission (2010) notes obstacles to the independence and effectiveness of equality bodies (particularly since the crisis)
- European Parliament resolution of 16 April 2013 (on Directive 2004/113): inefficiency due to lack of real capacity to act, lack of staff and financial resources
- Guarantees of independence lower than the recommendations of the United Nations ("Paris Principles" of 1993) and the Council of Europe (ECRI - General Recommendation No. 2 - 1997: on racism)

Conclusions

Report of the European Commission of 17 January 2014 (on Directives 2000/43 and 2000/78):

*"(...) there are still potential grounds for concern as to the practical availability of remedies and whether sanctions imposed in specific cases are fully in line with the requirements of the Directives. **National courts seem to have a tendency to apply the least strict scale of legal sanctions and to have little control over the level and amount of compensation imposed**".*

(Com(2014) 2 final, p. 8).

The same concern was expressed in a European Parliament resolution of 15 September 2016

Report of the EUROPEAN EQUALITY LAW NETWORK (2018):

“On initial examination, with the exception of the United Kingdom and Ireland for employment cases, the levels of compensation awarded in most countries seem relatively low. This, coupled with the length of time it can take to obtain a decision, throws doubt on the effectiveness of remedies and even whether they in actual fact make good the loss. Their dissuasiveness is also questionable, in particular with regard to the issue of whether such sums will deter larger employers. Spanish and Portuguese legislation provide criteria based on company turnover to determine the level of penalty in some cases. This approach presents an interesting option” (*A comparative analysis of non-discrimination law in Europe 2018*, p. 118).

The effectiveness of anti-discrimination law still seems insufficiently guaranteed....

Thank you for your attention

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