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SCHOOL OF BUSINESS, ECONOMICS AND LAW

## IT'S (NOT) ALL 'BOUT THE MONEY:

Remedies for nonmaterial damages in and after C-30/19  
*Braathens*

*Anna Wallerman Ghavanini*

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## THE FACTS OF THE CASE



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## THE PROBLEM

Action for compensation (SEK 10 000)

- Conceded by the defendant without admission of guilt
- Defendant concession binding on the courts under national law → no examination on merits

Action for declaratory ruling

- Declared inadmissible under national law as serving no purpose

Can a violation of a primarily nonmaterial right can be adequately compensated solely by the award of monetary damages?



## THE JUDGMENT

Conclusion: National law incompatible with EU Law

- Art 7 (defence of rights) of the Racial Equality Directive 'necessarily' entails right to have violation recognised
- Remedies provided by national law are provide neither adequate compensation nor effective deterrent, as required by Art 15 (sanctions)
- National rules cannot be justified as proper conduct of civil proceedings
- Enforcement before national court is possible because of primacy and direct effect of Art 47 CFR



## THREE MAIN LESSONS OF *BRAATHENS*

Two conclusions...

- I. Upgrading nonpecuniary compensation in equality law
- II. The Charter of Fundamental Rights as the relevant standard for review of national procedural/remedial rules

... and a puzzle

- III. The function(s) of the Charter



## I: FROM *VON COLSON* TO *BRAATHENS*

*Von Colson*: Recognition without compensation

*Braathens*: Compensation without recognition

A gradual development...

... leading to two novelties:

- The twofold function of sanctions: compensation and dissuasion
- A new theory of dissuasion



## II: THE CHARTER OF FUNDAMENTAL RIGHTS

The Charter is hot – *Rewe* effectiveness is not!

Consolidating the trend: *Egenberger, Leitner, Braathens*



## III: WHAT DOES THE CHARTER COMPATIBILITY TEST ENTAIL?

The three effects of Article 47 CFR:

Modification: National law *'infringes the requirements imposed by Articles 7 and 15 of [the Directive], read in the light of Article 47 of the Charter'*. (para 45)

Exclusion: National law incompatible *'not only with Articles 7 and 15 of [the Directive] but also with Article 47 of the Charter.'* (para 56)  
- Competing justification standards: Rule of reason or Art 52 CFR?

Substitution: *'Article 47 of the Charter, [...] is sufficient in itself [...] to confer on individuals a right which they may rely on as such.'* (para 57)



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**THANK YOU!**

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Further reading:

A Wallerman Ghavanini, 'Remedies for nonmaterial damages: Striking out a new direction? Braathens' 59(1) *Common Market Law Review* 2022 (forthcoming)

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