

Seeking effectiveness: remedies and sanctions in discrimination cases

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Remedies

Article 47 of the Charter of Fundamental Rights provides for the

- **right to an effective remedy** before a **tribunal**
- in case of a violation of any right or freedom guaranteed by the Charter

For **discrimination cases** MS have to ensure that

- **judicial/administrative procedures**, including
- conciliation procedures (if adequate) are in place

2000/43/EC Race Directive Art 7
2000/78/EC Employment Equality Directive Art 9
2006/54/EC Recast Directive Art 17

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Remedies

- In cases concerning the application of EU (non-discrimination) law the right to effective remedy before a tribunal requires the jurisdiction of an **independent and impartial tribunal**

(AK v Sąd Najwyższy, C-585/18)

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Remedies

Member States have to make sure that

associations or other organisations with a

- legitimate interest in the implementation of the non discrimination principle are entitled to
- either **on behalf or**
- **in support of a complainant**
- **engage in any judicial and/or administrative procedure** provided for its enforcement.

(Article 7 Race Directive)

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Remedies – *Actio popularis*

When

- there is no concrete person affected by discrimination or
- person does not want to proceed in a case.
 - no barrier to finding discrimination
 - associations with a legitimate interest can be given the right to bring legal or administrative **proceedings in the general interest of a group** by national legislation.

(Feryn, C-54/07, confirmed by Accept, C-81/12)

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Remedies – *Actio popularis*

In **Croatia**

an association may file a **complaint in its own name** with to purpose of

- a declaratory judgement on discrimination of a group
 - stopping discriminatory conduct
 - proactively eliminating discrimination and discriminatory practises
 - publication in the media
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Remedies – Collective Complaint

In France

a number of individual cases can be brought to court together as a **collective complaint**

can be initiated by NGO or in employment cases by trade union

- to stop discrimination
 - to claim compensation for the group as a whole
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Remedies – third party intervention

NGOs and Equality Bodies in many countries can

- intervene as a third party if the case is of interest for a whole group or the question is of strategic interest
 - be involved in in court cases by providing an expert opinion (EBs)
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Sanctions

Sanctions in discrimination cases have to be

- effective
- dissuasive
- proportionate

design is up to
national legislator

2000/43/EC Race Directive Art 15
2000/78/EC Employment Equality Directive Art 17
2006/54/EC Recast Directive Art 25

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Case Law of the CJEU

Proportionality *von Colson C-14/83*

Application as social workers in a prison by two women, job was given to men, court decided on discrimination, damages: travel costs 7,20 German Marks

CJEU:

- Even, if the relevant Directive (76/207/EC) does not require a specific type of sanction, it is still necessary to **guarantee that it is effective and has a dissuasive effect**
 - **Compensation** in any case has to be **proportional** in relation to the damage sustained
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Case Law of the CJEU

Proportionality *ACCEPT C 81/12*

Discriminatory comments in relation to homosexuality, when talking about a potential transfer of a soccer player by a publicly known person perceived as a functionary of a soccer club. Complaint to the Consiliul Național pentru Combaterea Discriminării. Harassment was acknowledged, but based on Romanian law only a warning could be given.

CJEU:

- Affirms its case law also for ,non-gender' cases
 - Sanction can not be mere symbolic**
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Case Law of the CJEU

No proof of fault *Decker C-177/88*

Application as an educator, notification of pregnancy, jury proposes applicant as most qualified, but not employed. National Dutch Law social insurance does not cover maternity allowance, if pregnancy already in application process, employer can not afford to employ substitute - justification?

CJEU:

Violation of the prohibition of discrimination has to be sanctioned in a way that is adequate

- *to guarantee real and effective protection*
- *to have a real deterrent effect on the employer*

Making the liability for infringement dependant on proof of a fault or the non-existence of a ground of exemption *the practical effect of those principles would be weakened considerably.*

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Case Law of the CJEU

No upper limit *Marshall C-271/91*

Dismissal at the age of 62, when wanted to work until 65. UK law entitled women to receive pension payment at that age. Discrimination on grounds of gender. Law determined upper limit for damages, which did not cover actual damage (difference between pension and income)

CJEU:

• *Reparation of the loss and damage sustained by a person injured as a result of discriminatory dismissal may not be limited to an upper limit fixed a priori or by excluding an award of interest to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.*

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Case Law of the CJEU

No upper limit *Draehmpaehl, C-180/95*

Job advert: Female assistant to sales management department. No reaction to a job application by a male applicant. Discrimination on grounds of gender.
German Law: upper limit of three month's salary in failure to make an appointment.

CJEU:

- Sanction must have a real deterrent effect on the employer and must in any event be adequate in relation to the damage sustained
 - Upper limit of three month's salary not adequate, if the applicant was the best qualified.
 - Could be adequate, if the applicant would not have been given the job also without discrimination.
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EU Legal Framework

Gender Recast Directive 2006/54 requires **real and effective compensation or reparation for the damage sustained** (Article 18)

- in a way which is dissuasive and proportionate to the damage suffered
 - Restriction by the fixing of a prior upper limit ,only' for cases, where it was refused to take a job application into consideration
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CJEU Case Law

No need for a concrete victim Feryn C-54/07

Executive director of a company makes clear that he would not employ Marroccans, because his client would not want them. Belgian equality body claims. No person effected in concrete.

CJEU:

- sanctions have be to effective, proportional and dissuasive even if there is no concrete victim.
 - Proposals for appropriate sanctions:
 - Finding of discrimination by the court in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant
 - Prohibitory injunction – in case necessary with fine
 - Damages to the body bringing the proceedings
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CJEU Case Law

Punitive damages? *Arjona Camacho*, C-407/14

Dismissal of a security officer of prison for juveniles after two years.
Discrimination on grounds of gender. Factual damage was EUR 3.000,-. Enough to be dissuasive? Can a sanction include punitive damages?

CJEU:

- Member States have to take measures necessary to ensure real and effective compensation or reparation
 - Measures should be sufficiently effective to achieve the objective of the Directive
 - Dissuasive effect does not necessarily mean that punitive damages have to be foreseen
 - Punitive damages are possible, if the concept forms part of the national legal system
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CJEU Case Law

Compensation without discrimination? *Braathens Regional Aviation AB*, C-30/19

Additional security check for person presumed to be an Arab and/or Muslim by airline

Airline was ready to pay for compensation but without admitting any form of discrimination

CJEU:

- the absence of a link between the compensation and the declaration of a breach of the right to equal treatment undermines both the compensatory and deterrent function of the sanction.
 - the right to effective judicial protection (Art 47 CFR) includes applicant's right to have a court examine whether, or find that, discrimination has occurred.
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Case Law of the CJEU

Sanctions in discrimination cases should

- be adequate in relation to the damage sustained (*von Colson* C-14/83)
 - not be mere symbolic (ACCEPT C 81/12)
 - not be made dependant on a proof of fault (*Decker* C-177/88)
 - have a real deterrant effect (*Decker* C-177/88)
 - not have any upper limits (*Marshall* C-271/91)
 - not be dependant on the existance of an individual victim (*Feryn* C-54/07)
 - might include punitive damages, that are really additional (*María Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A.*, C-407/14)
 - include applicant's right to have a court examine, if discrimination has occurred. *Braathens Regional Aviation AB*, C 30/19
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National Approach

- Compensation for material and immaterial damages
 - Administrative fines
 - Disciplinary sanctions
 - Obligations/recommendations to stop discriminatory treatment
 - (Re-)instatement into a situation without discrimination
 - Publication of a decision
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Calculation of a sanction

National legislation and case law

- Financial capacities of the perpetrator
 - Status of the perpetrator (public or private entity)
 - Number of discriminatory acts (repeated discrimination)
 - Dimension/Gravity of discrimination (multiple discrimination)
 - Need of preventive effect
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Other solutions

Alternative forms of dispute resolution are frequently applied in non-discrimination cases by equality bodies and many cases at court end up with a **settlement** – with or without mediation procedures

Pros	Cons
Victim might reach what he/she wants - effectiveness	No case law created
Possibility to keep up (employment) relation	No need to change policies – lack of dissuasiveness
Quicker	
Contribution to a change of attitude?	

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Obstacles and challenges

- Each case is different – would require a tailor-made form of redress
 - Range of possible sanctions not in line with what persons affected would want
 - Low chances to achieve adequate compensation, specifically for immaterial damages
 - Lack of experience in and sensitivity for discrimination cases on the side of the judiciary
 - How to provide evidence
 - Lack of enforcement
 - Lack of structured and efficient monitoring procedures
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Enhance effectiveness, proportionality and dissuasiveness

- Improve **access to relevant information** for (potential) victims of discrimination, making also relevant **case law** easily accessible
 - Strengthen the capacities of legal professionals in **understanding and applying the concepts** of immaterial and aggravated damages and of multiple and intersectional discrimination
 - Encourage **widening the range of sanctions** available so that the one most suitable to the case can be applied
 - Increase possibilities for **class action/collective action** in order to address structural discrimination patterns (incl. adequate sanctions)
 - **Make public** a decision, a judgement and/or a concrete sanction issued
 - Monitor **enforcement of decisions**
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Thank you!

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