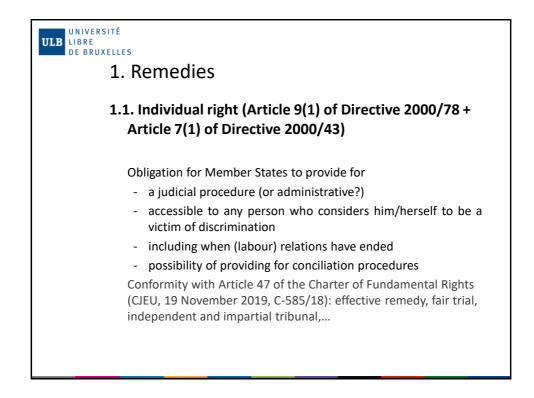
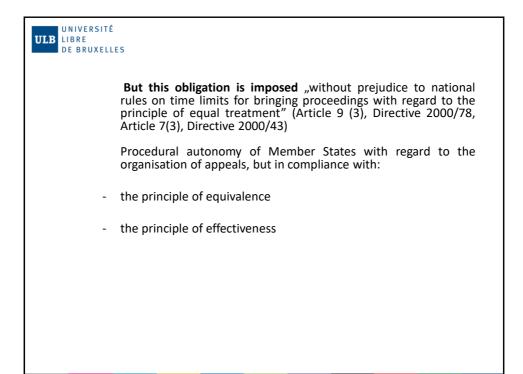


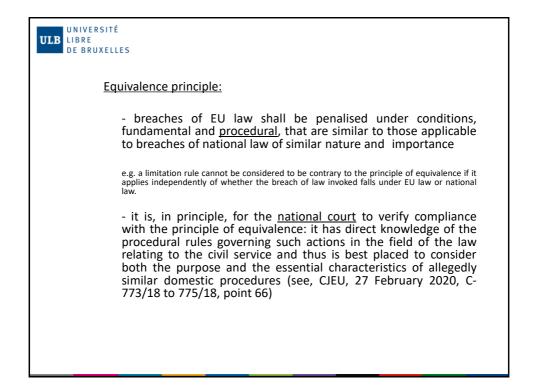
# ULB LIBRE DE BRUXELLES Introduction and general presentation

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	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







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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: the principle of effectiveness does not prevent the appeal period being 2 months; however, "the starting point cannot be fixed so that there is a risk that employees will have no way of determining whether they have been discriminated against, or, if so, to what extent. (see, CJEU, 8 July 2010, Bulicke, C-246/09, point 40).

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### 1.2. 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

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> However, possibility of expanding the actions of associations and allowing action in the absence of an identified victim (as long as it is not purely hypothetical):

- "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 <u>without acting on behalf</u> of a specific complainant or <u>in the absence of</u> an identifiable complainant" (C-54/07 Feryn, and C-81/12 Accept)
- "When a Member State chooses that option, it is for that Member State to decide under which conditions an association ... may bring legal proceedings. ... It is in particular for the Member State to determine whether the for-profit or non-profit status of the association is to have a bearing on the assessment of its standing to bring such proceedings." (C-507/18 NH)

# UNIVERSITÉ **ULB** LIBRE **DE BRUXELLES** 2. 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. Article 16 does not require Member States to adopt specific measures to be taken but leaves them free to choose, from among the different solutions, the one which appears to them to be the most appropriate for that purpose, depending on the situations which may arise" (CJEU, 22 January 2019, Cresco, case C-193 /17, § 88) **Compliance** is also aimed at national courts: four points for the attention of the national judge!

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### 2.1. Leveling up

the judge must place the discriminated worker in the same situation as that of "privileged" workers:

"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).

Pending legislative intervention and provided that a valid reference system exists!

# C.2. Principle of consistent interpretation 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" (C-441/14, Dansk Industri) The judge must take into consideration "all the rules of national law" and the "methods of interpretation recognized by it", if necessary, modifying well-established national case law The judge must not go so far as to accept an interpretation contra legem

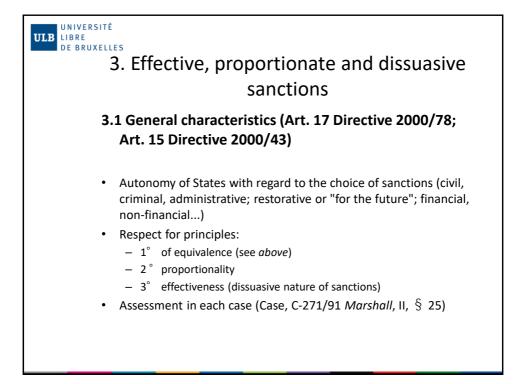
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### 2.3. Disregard of contrary national provision

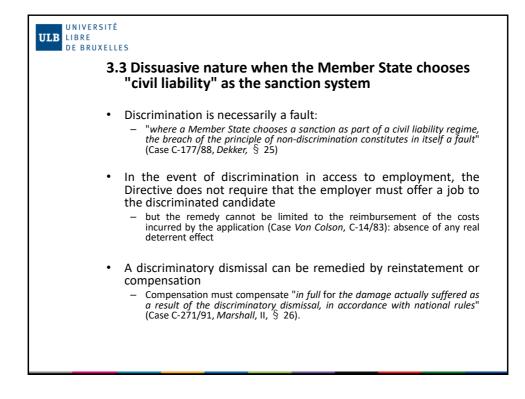
"where it is unable to interpret national law in compliance with the requirements of EU law, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means" (C-573/17, Poplawski, § 58)

According to recent case law, the contradiction must exist with a norm of EU law having direct effect (C-573/17, Poplawski,  $\S$  62)

# UNIVERSITÉ LBRE DE BRUXELLES 2.4. Liability of the State for non-transposition 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......

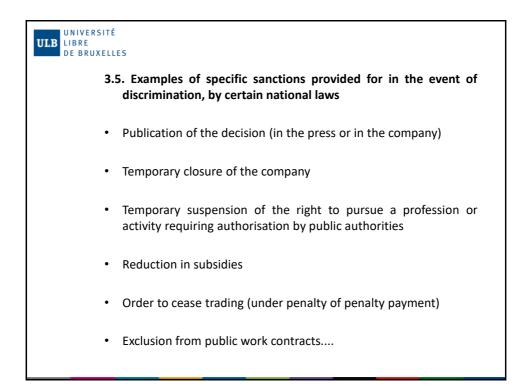


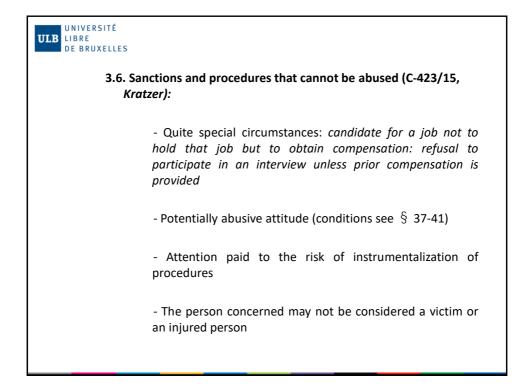
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3.2. Guidelines for assessing the dissuasive nature		
• An action is not dissuasive when victims could be hesitant to assert their rights (Accept case, $\S$ 67)		
<ul> <li>A second offence may indicate the absence of dissuasive sanction(ditto)</li> </ul>		
<ul> <li>A dissuasive sanction should also be provided for even when there is no identifiable victim (<i>Feryn</i>, § § 38 and 40; <i>Accept</i>, § 62)</li> </ul>		
<ul> <li>Sanctions shall not be purely symbolic but do not necessarily have to be financial</li> </ul>		
Dissuasive nature of a simple warning? (Accept case)		



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•	Lump-sum compensation (or " <i>a priori</i> 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 " <i>punitive damage</i> ", but neither does it prohibit it (Case C-407/14, <i>Arjona Camacho</i> , § 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, <i>Arjona Camacho</i> , § 44)
	When it is a matter of compensating for a situation that has expired, interest must be provided for (Case C-271/91, Marshall, $\S$ 32)

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





UNIVERSITÉ LIBRE DE BRUXELLES 4. Protection from victi	misation
Objective recognised by the CJEU (before pro by the Directive): protecting the <u>right to ta</u>	
<ul> <li>provide protection against any measuring might adopt to dissuade workers who wronged by discrimination from takin 185/97, Coote, § 24)</li> </ul>	o consider themselves
<ul> <li>including, against prejudicial meas imposed after the termination relationship, such as a refusal to provi 185/97, Coote, § 27)</li> </ul>	of the employment

# UNIVERSITÉ **ULB** LIBRE DE BRUXELLES "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) Persons protected: the person/worker who feels discriminated against and has lodged a complaint The worker who supported him/her. It is not required "that this employee has intervened as a witness in the context of the investigation of that complaint and that that employee's witness statement satisfies formal requirements laid down by that legislation." (see CJEU, June 20, 2019, Hakelbracht, C-404/18)

