

Remedies and sanctions in discrimination cases

Jean-François NEVEN

Lecturer at the Free University of Brussels (U.L.B.)

Lawyer at the Brussels Bar

Vice president of the Brussels Council for Equality F/M



Funded under the 'Citizens, Equality, Rights and Values (CERV)
programme 2021-2027' of the European Commission

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
- 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", "primacy of EU law", "consistent interpretation"...)
- 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. Remedies

1.1. 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 (or administrative?)
- accessible to any person who considers him/herself to be a victim of discrimination
- including when (labour) relations have ended
- possibility of providing for conciliation procedures

Conformity with Article 47 of the Charter of Fundamental Rights (CJEU, 19 November 2019, C-585/18): effective remedy, fair trial, independent and impartial tribunal,...

But this obligation is imposed „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 principle of equivalence
- the principle of 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

e.g. a limitation rule cannot be considered to be contrary to the principle of equivalence if it applies independently of whether the breach of law invoked falls under EU law or national law.

- it is, in principle, for the national court to verify compliance with the principle of equivalence: it has direct knowledge of the procedural rules governing such actions in the field of the law relating to the civil service and thus is best placed to consider both the purpose and the essential characteristics of allegedly similar domestic procedures (see, CJEU, 27 February 2020, C-773/18 to 775/18, point 66)

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).

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

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 without acting on behalf of a specific complainant or in the absence of 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)*

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!

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!

2.2. 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*

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, § 62)

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.....

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 (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)

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)

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

- On different occasions, the Commission (2010) and the Parliament have noted either a lack of independence or a lack of means and real ability to act on the part of the bodies for the promotion of equality
 - Recommendation of the Commission 22 June 2018 “on standards for equality bodies” C(2018) 3850 final
 - Report of 2021 in detail:
 - « Because Member States are responsible for the actual implementation of the provisions, there are divergences between equality bodies in terms of their mandate, powers, structure, leadership, independence, resources and effectiveness. In turn, these divergences have led to an unequal enforcement of the Directive across Member States, as regards the level and nature of protection and the promotion of equality and awareness-raising among the general public and national institutions.
- Nevertheless, in most cases, equality bodies have proved to be key to promoting and enforcing equal treatment legislation. They have emerged as necessary and valuable institutions for change at the level of individuals, institutions and society at large”.
- Proposal for directive to make the designation of an equality body compulsory also for directive 2000/78 (and 2006/54)

Conclusions

Report of the European Commission on the application of Directives 2000/43 and 2000/78:

« In practice, some difficulties in the implementation of the Directives seem to persist, e.g. in relation to compensation ceilings and cases without an identifiable victim. Some national courts tend to establish rather moderate levels of damages, favour non-monetary compensation or offer amounts of compensation at the lower end of the scale. Such tendencies may discourage victims from taking legal action or from asking for pecuniary compensation in court.

The Commission continues to monitor the standards applied in the use of sanctions and remedies in the Member States, although detailed information at national level is difficult to gather and often not available. (...) » (Explanatory Memorandum to COM(2021)139 - Application of Racial Equality Directive and Employment Equality Directive)

Thank you for your attention

jean-francois.neven@ulb.ac.be