

Remedies, and Enforcement of the Obligations under the Framework Directive and Race Directives

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Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Art 15 Race Directive

Art 17 Framework Directive

Sanctions

1. The articles require
 - (a) that there are sanctions, which may comprise the payment of compensation to the victim, and which must be effective proportionate and dissuasive.
 - (b) that all measures necessary to ensure that those sanctions are applied are adopted.

What do these principles require the state to do?

2. Some provisions of the Directives suggest that conciliation should be available. Conciliation procedures should provide an additional alternative². They would not in themselves provide adequate sanctions but would be appropriate for certain types of dispute.

¹ This paper is based on one delivered in September 2005 (TAIEX Bucharest) October 2005 (Maastricht) February 2006 (Riga) and April 2006 Brussels.

² See Race Directive Art 7(1).

Which sanctions are required by the Directives?

3. In order to comply with the Directive, national law must provide “effective, proportionate and dissuasive” sanctions for violation of national anti-discrimination norms. Sanctions “may comprise the payment of compensation to the victim”³. The requirement that sanctions must be effective, proportionate and dissuasive means that all forms of damages (including punitive damages) must be available to the person whose claim is well founded.

“...it has been consistently held since *Marshall v Southampton and SW Hampshire Area Health Authority* ... that a Directive cannot of itself impose obligations on an individual, in this case a private-sector employer, and thus cannot be relied upon as such against such a person. However, it has also been consistently held since [Case 14/83 *Von Colson and Kamann* [1984] ECR 1891] that the Member States’ obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article 5 of the Treaty of Rome [now Article 10 EC] to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. As follows from *Marleasing SA v La Comercial Internacional de Alimentación* 1990 ECR I-4135, paragraph 8, and *Wagner Miret v Fondo de Garantía Salarial* 1993 ECR I-6911, paragraphs 20 and 21, in applying national law, in particular legislative provisions which, as in the present case, were specially introduced in order to implement the Directive, the national court is required to interpret its national law, so far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the third paragraph of Article 189 of the Treaty.” [Coote v Granada Hospitality Ltd (C185/97) [1998] E.C.R. I-5199]

4. The European Court of Justice said in *Von Colson*⁴:
"It follows from [Article 6] that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the directive to ensure that those measures may in fact be relied upon before the national courts by the persons concerned."

Further at p. 1908 para. 23:

³ Note that there does not appear to be an obligation to introduce penal sanctions in respect of employment matters (see e.g. the proposal COM (1999) 565 final – 1999/0225 (CNS) for a council directive establishing a general framework for equal treatment in employment and occupation. However it is arguable that the Directives require criminal sanctions for the most extreme forms of behaviour at work (inciting hatred for example) in order to comply with the Directive’s requirements for sanctions.

⁴ at p. 1907 para 18

"Although full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that the sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer."

5. A study of the various cases gives no constant idea of what the ECJ considers the requirement that the remedies under the Directive be effective proportionate and dissuasive means⁵. However it is possible that what seems to be a common concept is used in a different way in different fields of application. Thus the policy considerations surrounding the imposition of a strict liability system in respect of rest hours in road transport has at its heart public safety and health and safety considerations (as well as considerations of competition).
6. In *Hansen*⁶ the reference to road safety identifies a legitimate aim by reference to which a sanction might be justified in respect of its contravention. The ECJ decided that it was proportionate for the state to impose a system of strict liability in those circumstances.
7. Similarly in the *Italy v Commission* case⁷ the Commission's correction to the level of controls in respect of olive oil production was justified in the sense that the requirement for controls aimed at a legitimate aim and the issue was whether the correction was proportionate to that aim in the context of a Community law provision explicitly requiring effective, proportionate and dissuasive sanctions.
8. It may be that the different aims involved in these cases lead to different sanctions being effective proportionate and dissuasive in the particular contexts.
9. What is clear from cases such as *Marshall II*, is that you can test a proposed sanction or remedy by reference to the aim proposed under a Directive. In the case of Directives aimed at equality, *Marshall II* provides useful guidance:

"Article 6 [of EC Directive 76/207] does not prescribe a specific measure to be taken in the event of a breach of the prohibition of discrimination, but leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, depending on the different situations which may arise.

24 However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of

⁵ See Christa Tobler Thematic Report Remedies and Sanctions in EC Non-Discrimination Law June 2005 para 2.3 www.migpolgroup.com or www.publications.eu.int

⁶ *Aknlagemynidgheden v Hansen & Soen I/S* [1990] ECR I-2911

⁷ C 297/02 of 23 September 2003

measures appropriate to restore such equality when it has not been observed. As the Court stated in paragraph 23 of the judgment in *Von Colson and Kamann*, cited above, those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.

25 Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. In the event of discriminatory dismissal contrary to Article 5(1) of the Directive, a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.

26 Where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.”⁸

10. Once the transposition period is finished, individuals can rely on provisions of the Directives which are sufficiently clear and precise and unconditional in their prohibition of discrimination to permit an individual to rely on them against an emanation⁹ of the state¹⁰.

11. **Individuals’ claim against the state for failure to implement the directive (*Francovich and Bonifaci v Italy*¹¹).** There may be compensation for losses suffered arising from failure to implement the Directive correctly if

- a. The rule of law infringed was intended to confer rights on the individual
- b. The breach by the state was sufficiently serious
- c. There was a direct causal link between the breach and the loss sustained.

12. **Choice of sanctions.** It is possible to have criminal (or penal) sanctions for discriminatory behaviour and/or civil sanctions or remedies. Either are acceptable under the Directive, provided that they achieve the aim of dissuading the person doing the wrongful act from discrimination.

⁸ C 271/91 *Marshall v Southampton and South West Hampshire Area Health Authority (Marshall II)* [1990] 3 C.M.L.R. 425

⁹ Including privatised state industries but not the private employer or service provider.

¹⁰ Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337. Direct effect, in practice means that even where national law has not been brought into line with the rights guaranteed by the directive, an individual can nonetheless enforce its provisions in national courts. The provisions of the directive must be clear and precise, and unconditional. Thus an obligation to ensure “appropriate remuneration” would not be precise enough (Case C-131/97 *Carbonari and others* [1999] ECR I-1103, para 8.).

¹¹ Cases C-6/90 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357: an action directly against the state seeking compensation for the losses they have suffered as a result of the state’s failure to implement the directive correctly.

13. **The practice of EU countries** varies. Some countries, such as Austria and Luxembourg, relied in the past mainly on criminal sanctions¹². Other countries use a civil model, but rely on a concept of moral damage for breach of constitutional provisions. The UK prohibits certain acts under criminal law, but for the most part permits recovery of damages for discrimination. Recovery of civil damages is always possible for cases of discrimination at work. Damages will also be available for breaches of race discrimination laws in the field of goods and services. All such damages include damages for injury to feelings, psychiatric (or other) injury as well as direct financial losses such as lost wages.
14. The legal systems of most European States provide for various types of sanctions, ranging from fines and imprisonment under criminal law, to payment of compensation for damages to the victim under civil law.
15. It is likely that a combination of measures in the criminal field and in the civil field will be necessary to give full implementation to the principles in the Directive.
16. Is the use of a specialized tribunal appropriate to determine the remedy? What is important is the power given to the decision making body rather than a forum. However if a victim of discrimination must first go to a criminal court, there is an argument for ensuring that the court has the power to award civil damages. The problem is that if this is the only remedy (or excludes an application to a civil court) the burden of proof provisions in the Directive do not apply to criminal trials.

Criminal Sanctions¹³

17. These are required by the Directives because sufficient protection for the worst kinds of discrimination must be given in the work place¹⁴. For certain types of behaviour in the workplace the requirement that the employer/discriminator pays damages may not be a sufficient deterrent to persuade the discriminator not to discriminate. Different levels of criminal offence will require different sanctions:

¹² The Austrian Equal Treatment Act 2004 requires the provinces to enact anti discrimination laws concerning discrimination in employment and between private individuals in employment.

¹³ See 96/443/JHA: Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (*Official Journal L 185 , 24/07/1996 P. 0005 – 0007*) and referred to in the preamble to the Directive 2000/43.

¹⁴ Criminal proceedings are necessary for: Gross acts of discrimination involving actual or threatened personal violence; to prevent persistent harassment; to control the abuse of freedom of speech stirring up hatred and provoking violence (see Robin Allen QC's *Implementing European Anti-Discrimination law* (Prague: Note of Contribution 27 April 2002)).

- a. Aggravated offences where the protected ground forms the basis for the offence (assault on a young member of staff/racial abuse by a service provider)
- b. The distinction between fines and imprisonment - both would need to be available depending on the severity of the offence.
- c. Community punishments - the Directives are based on the aim of ensuring equality of opportunity - restoring it where necessary. Community punishments mark restoration to society by the wrongdoer. There is a debate to be had about whether it is desirable for a community punishment to require the wrongdoer to provide reparation to the wronged person. Often the wronged person will not want this.

18. Whilst criminal sanctions are appropriate to other crimes affected by a protected ground element or protected ground specific crimes (such as incitement of racial/religious hatred), there is a debate as to whether criminal sanctions are appropriate in all cases of discrimination¹⁵. One can also question whether criminal sanctions provide the individual with proper redress. Generally they belong to the state.

19. The use of a criminal sanctions model means that a prosecutor has the decision whether to bring or continue the prosecution. The person who experiences the discrimination does not generally have control over the process and cannot exercise initiative or control over them. If the criminal sanctions model is used, the prosecutor must have specialist training and a clear understanding of the concepts involved in discrimination law¹⁶. Thus specific training will need to be provided in matters of evidence and proof of discrimination. The scope of the application of such criminal offences also needs consideration. For example the Convention on the Elimination of Racial Discrimination would not require a general criminal provision to be effective in the way in which the Directives would require criminal sanctions to be effective. However the Directives have a more limited field of application and would not require the introduction of an effective general anti-discrimination criminal provision.

¹⁵ In the UK there is very limited acknowledgement of the need for criminal sanctions predicated on protected categories such as age, disability etc in the workplace. There are provisions for race to be taken as an aggravating feature of offences including ones which may occur in the workplace.

¹⁶ See *Lacko v Slovak Republic* (11/1998) (2002) 9 I.H.R.R. 47 UN Committee on the Elimination of Racial Discrimination: Lacko complained that SR failed to take adequate action on his complaint of racial discrimination and thus violated the International Convention on the Elimination of all Forms of Racial Discrimination 1965 (United Nations). He was a Roma of Slovakian nationality, and was refused service in a restaurant because of his racial origin in April 1997. He brought civil and criminal complaints under the domestic law but no action was taken against the restaurant owner. However, after he brought the communication to the Committee, the Prosecutor General decided to prosecute the restaurant owner and he was convicted of inciting racial hatred in July 2000. L contended that the remedy was ineffective on the ground of delay. However the Committee dismissed the application, on the basis that despite the delay, the restaurant owner's prosecution had afforded L an effective remedy and fulfilled S's Convention obligations. Clearly the criminal process had disempowered L.

20. Criminal sanctions, although necessary, are not sufficient. They cannot form the whole system of remedies under the Directives.

Civil Sanctions

21. The first requirement imposed by the Directive is that the sanction must be **effective**. Therefore administrative processes having no legal consequences will be insufficient. The use of a human rights ombudsman to persuade state organs to comply with discrimination requirements would be insufficient¹⁷.
22. Any administrative process must also comply with the guarantees under Article 6 of the Convention on Human Rights and Fundamental Freedoms¹⁸. So whilst it is permissible to have administrative investigations, there must always be recourse to the courts to determine the obligations and rights of the parties under the Directive.
23. Early cases in the UK and those in Sweden illustrate the tendency of the tribunals initially to award comparatively low amounts of compensation for non-financial loss such as injury to feeling¹⁹. Such low awards can be criticized as failing to provide an effective remedy for the wrong done. In terms of the impact on an individual it should be remembered that equality is a key concept of EU law and also fundamental human rights law. The individual's status as a citizen /human being is severely impaired if that right is not accorded to him or her. Therefore moral damages awards should be such as to ensure that the law is not brought into disrepute and should be such as effectively to compensate for the damage to the person's status. The sanctions must also be effective to ensure equality of opportunity. As the *Marshall II* case illustrates, this may require restitution of a job or job opportunity.
24. The second requirement is that the remedy must be **proportionate**. That requirement must be seen in the context of the third requirement which is that the remedy must be **dissuasive of discrimination**. The requirement that the remedy is proportionate means that the remedy must maintain a fair balance between individuals and as between individuals and the wider community having regard to the aim of eliminating discrimination. It is debatable whether a system of

¹⁷ This is the model that has previously been used in Poland. The administrative system used in Ireland has legal consequences. An investigating officer is appointed to determine liability and remedies. This is likely to be sufficiently effective (for extensive case law examples see: <http://www.equalitytribunal.ie/index.asp?locID=27&docID=-1>). Ireland permits applications to the ordinary courts by parties to such investigations. In Sweden the system allows for employment discrimination to be brought to the attention of both the ombudsman but also the Labour Court.

¹⁸ The system should not therefore require hearings to be held only in private.

¹⁹ Ombudsman commented on an award of damages by the Labour Court of SEK 40.000 that small, and that the sum sought by the complainant (SEK 120.000) was appropriate where a 26 year old Bosnian, who had lived in Sweden since 10, and who did not have a noticeable accent was denied a job on the basis of her accent. The company asserted that its employees must not have any accent!

compensation based on the size and resources of the discriminator but which is aimed at ensuring that a company could never be forced out of business no matter how grave the discrimination perpetrated by it would satisfy the policy of dissuasion. However it is arguable that such a system of remedies would be proportionate. That would depend on a view being taken on the balance between the compensatory effect and the dissuasive element in compensation. For the most severe forms of discrimination, the system of compensation should be such as to ensure that an employer cannot afford to take the risk of discriminating and the effect of prohibiting an upper limit to compensation to the person suffering discrimination is that the employer may in a sufficiently serious case run the risk of going out of business. Therefore the system of compensation should not have such an upper limit.

25. However civil law sanctions need not be confined to monetary remedies. The Directives point out that they may comprise compensation. They therefore may take the following forms:
- a. Preventive orders
 - b. Remedial orders
 - c. Compensation
 - d. Punitive compensation
 - e. Punitive orders.

Note that in most cases a combination will be required. The law should therefore permit such combination.

26. **Preventive orders** of a court include interim injunctions and declarations. Where a person is experiencing discrimination on a continuing basis, the wrongdoer can be required to do something or refrain from certain actions or suffer a penalty from the court²⁰.

27. Thus in *Tribunale di Reggio Emilia, ordinanza 2.11.2000* a Nigerian football player was granted an injunction against the Italian Football Federation²¹. In the UK an injunction was granted to prevent the further distribution of leaflets in Manchester calling on people to object

²⁰ The system in the UK: Part III (ss. 17 – 27) relates to discrimination in fields other than the employment field covered by Part II. The treatment of complaints within Part III is different from that of complaints within Part II (employment). By s. 57 (1) a claim of unlawful discrimination under Part III may be made the subject of civil proceedings in the same way as any other claim in tort. However only a designated County Court (which has experienced non-legal members of the court) may hear a claim. In addition to being able to award damages not subject to a statutory ceiling the County Court can grant injunctions. The County Court judge will normally sit with two assessors appointed from a list of persons appearing to the Secretary of State to have special knowledge and experience of problems connected with relations between persons of different racial groups.

²¹ See also *Tribunale di Terano – sez Giulianova, ordinanza 4.12.2000 n267 – est Manfredi published ivi, 2001, n1 pp 97-101*: a basketball player obtaining a declaration and an injunction with damages to be assessed later remedying the Italian Basketball Federation's refusal to award him membership on the grounds of race.

to the planning authority about planning applications made by Asians for planning approval²².

28. **Remedial orders:** in certain jurisdictions the body specified to undertake investigations may also have the power to order a specified course of action²³. In the UK a court may order a defendant to take a certain course of action as a result of a finding of discrimination in relation to the provision of goods and services, but an employment tribunal may not order an employer to take a specified course of action. It can only recommend a course of action. The employer is not obliged to follow the course of action, which can, in any event only be aimed at avoiding discrimination in the future.

Compensation

29. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²⁴, Articles 15-20 deal with the types of compensation and remedy that should be available for gross violations of international human rights law. It is clear from Article 20 that compensation should include any economically assessable damage, such as:
- (a) Physical or mental harm;
 - (b) Lost opportunities, including employment, education and social benefits;
 - (c) Material damages and loss of earnings, including loss of earning potential;
 - (d) Moral damage;
 - (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
30. Where **compensation** is awarded to penalise breaches of the prohibition of discrimination, such compensation has to be more than nominal so as to guarantee effective protection and to provide a deterrent to employers²⁵. Thus a system of law requiring fault to be proved before discrimination compensation can be awarded will be in breach of the requirements of the Directive²⁶. An upper ceiling may be placed on non-monetary compensation and may be justified where there was no prospect of the person being recruited even if they had not been discriminated against²⁷.

²² *Commission for Racial Equality v Riley (County Court case 5.7.1982)* – His Honour Judge Da Cunha commented that the Defendant had been convicted of incitement to racial hatred in respect of the same leaflets and it was a pity that there had to be two sets of proceedings as the criminal court did not then appear to have the power to make the injunction preventing distribution. However an injunction cannot be obtained from the employment tribunals.

²³ Equality Officers in Ireland, appointed by the Director, have wide powers to investigate a complaint and, where it is upheld, to order compensation and/or a specified course of action. Their decisions are binding unless appealed. They also offer mediation where appropriate.

²⁴ C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005)

²⁵ *Von Colson v Land Nordrhein-Westfalen (14/83)* [1984] E.C.R. 1891

²⁶ *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus (C177/88)* [1990] E.C.R. I-3941

²⁷ *Draehmpaehl v Urania Immobilienservice ohG (C180/95)* [1997] E.C.R. I-2195 The ECJ ruled that (i) a person who has been discriminated against on grounds of sex in the making of an appointment should receive compensation independent of the requirement of fault. (ii) the

31. The principle of ordinary compensation in discrimination is that the person who has suffered the wrong should be put in the same position he or she would have been in if he or she had not suffered the wrong²⁸. The victim must be compensated for losses that have already happened (for example salary up to the date of the hearing), but the court must also make a forecast as to the course of future events. This forecast is constructed on the basis of the best assessment that can be made on the relevant material available to the court including the court's knowledge of the prevailing local labour market conditions. Compensation for future predicted loss can include lost profits where appropriate. The Claimant may need compensation for lost promotion opportunities if the promotion can be predicted as following on from a job which discrimination has denied to the Claimant. However compensation must also cover matters such as the loss of a job which the Claimant finds enjoyable. How is that to be compensated? This is a real issue when a person loses their vocation. It is really a species of non-monetary loss.
32. **Exemplary or punitive damages.** Exemplary damages may be appropriate where there has been oppressive, unconstitutional conduct by servants of the government: where the conduct has been calculated to make a profit which may exceed the compensation to the complainant; where statute expressly authorizes such an award²⁹. They can be justified by reference to the principle in the Directives of dissuasive damages. Further it can be argued that the international law requirements require compensation which will ensure that future misconduct is deterred.³⁰
33. Where a compensatory award is an inadequate punishment to the wrongdoer an award might be appropriate. However it will need to be proportionate and therefore regards should be had to the means of the guilty party.

Court of Justice pointed out that sanctions chosen by the member states to avoid discrimination on the grounds of sex must have a real dissuasive effect on the employers. Therefore, a national law ceiling on the amount of compensation of three month's salary in the case of discrimination against a single individual, and six months' salary in the case of discrimination against several applicants, did not correspond with the aim of the Directive. However it is legitimate for an upper limit of three months' salary to be fixed for cases where the employer can show that the successful job applicant was better qualified than the complainant who therefore would not have obtained the job even if there had not been discrimination.

²⁸ This principle mirrors that in Marshall II. In the UK's Court of Appeal see the case of *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 (see BAILII website <http://www.bailii.org/> for a free access UK and Irish Case law data base).

²⁹ In the UK see *Kuddus v Chief Constable of Leicestershire* [2001] 2 WLR 1789 House of Lords

³⁰ see Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

34. **Aggravated damages** Another notion, which may increase damages and be a dissuasive element in sanction, is that of aggravated damages. Where the employer has behaved in a 'high-handed, malicious, insulting or oppressive manner'³¹. That behaviour may have occurred prior to complaint by the employee but can also include the way in which the defence was conducted if it was conducted in an insulting manner intended to embarrass, intimidate and deter the applicant from pursuing her case. In the UK such damages are not supposed to be punitive³².
35. The feature of discrimination of all sorts which causes the greatest difficulty in determining an appropriate sanction is that when discrimination is established, there must be some recognition that what has been **damaged is a right to human dignity** (an abstract right to be protected) and probably:
- a. The **feelings** of the person experiencing discrimination. This encompasses feelings of irritation disappointment and other relatively short lived emotions, but also severe emotional disturbance requiring medical intervention;
 - b. The financial position of the person experiencing the discrimination.
36. **Personal injury** Discrimination often undermines the confidence of the person against whom it is aimed. In certain cases the effects of discrimination go beyond simple injury to feelings and result in a psychiatric injury. Such damages should be recoverable from the same tribunal considering the discrimination claim.
37. The undoubted aim of the Directive in the area of sanctions is **proportionate deterrence**. How is that to be achieved?
38. *Criminal Sanctions*: In the UK the effect of a court finding that a criminal offence is racially aggravated is that the sentence given for the offence is increased to reflect the seriousness of the racial aggravation. The court must state in public that the offence was racially aggravated³³. This allows the courts to apply sanctions to racially motivated behaviour which is otherwise criminal. As racism is a way of doing other acts, this is probably a good way to approach criminal sanctions. An alternative is to try to specify racial offences or combine the two approaches. Clearly there will be specific racial offences such as inciting racial hatred.

³¹ In the UK *Alexander v Home Office* [1998] IRLR 190 (the case of a prisoner refused prison kitchen by state prison officers on the grounds of race)

³² The common law guidelines on injury to feeling are now contained in the UK Court of Appeal case of *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871 (available free on the BAILII website) and *ICTS Ltd v Tchoula* [2000] IRLR 643 and see *Zaiwalla & Co v Walia* [2002] IRLR 697

³³ Crime and Disorder Act 1998, sections 29 – 32, and section 152 of the Powers of the Criminal Courts (Sentencing) Act 2000

39. The definition of a “racially aggravated offence” might cause some difficulty. In the UK for an offence to be “racially aggravated”, at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group³⁴.
40. Some countries have relied on systems of fines for breach of the Labour Code (Czech Republic, Estonia, Hungary, Latvia and Slovakia). However a fine does not compensate the individual. Whilst therefore criminal sanctions may deter they do not by themselves fulfill the requirement of compensation for the individual.

The Adequacy of civil sanctions

41. **Employment compensation** – Ireland used to have an upper limit on the amount of compensation that may be recovered in the District Court in civil proceedings relating to compensation which limits compensation³⁵. Such upper limits do not permit adequate and proportionate compensation.
42. In Italy (and many other states) there is a system whereby unlimited compensation, including compensation for non-pecuniary loss may be recovered. The same principle applies in the UK as a result of the Marshall case³⁶ in which an upper limit for compensation was ruled unlawful.

Publicity based sanctions

43. It is open to a Member State to include publicity based sanctions in the case of discrimination cases. Various forms of publicity may be effective (a) publicity in the local press (b) publicity in the workplace³⁷ (c) directed publicity to state organs³⁸ (d) maintenance of a public

³⁴ section 28 Crime and Disorder Act 1998. "membership", in relation to a racial group, includes association with members of that group and "presumed" means presumed by the offender. It is immaterial whether or not the offender's hostility is also based, to any extent, on the fact or presumption that any person or group of persons belongs to any religious group or any other factor not mentioned. "Racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

³⁵ In equal pay cases (including those based on race) - an award of equal pay and arrears in respect of a period not exceeding the preceding three years. In other cases - equal treatment and compensation of up to a maximum of two years pay (or £10,000 where the person was not an employee). In dismissal cases, the Labour Court may order re-instatement or re-engagement with or without compensation.

³⁶ Marshall v Southampton and SW Hampshire Area Health Authority [1986] 1 C.M.L.R. 688

³⁷ In France there is a requirement to place a notice at work and in the local papers as to the result of the complaint.

³⁸ In Italy, if the company receives benefits from the state or regions or a contractor with public authorities for the execution of public works etc, the judge must transmit his decision to

registry of decisions (e) obligations to declare information in certain circumstances³⁹.

Sanctions other than individual sanctions

“1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.”⁴⁰

44. EU law recognises that effective judicial protection is a fundamental principle⁴¹. This recognises the right of an “aggrieved person” to bring a complaint. However the Directives recognise that other bodies may need access to justice. Therefore Article 9.2 extends access to justice to a range of ‘interested bodies’⁴²:-

“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 engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.”

45. In the UK, no right is given to interested bodies to bring cases on behalf of ‘named complainants’⁴³.

The UK- the example of the Equality and Human Rights Commission

the relevant public authority which will then withdraw the benefit or contract. If the case is particularly severe a company can be excluded from such contracts for up to two years.

³⁹ In the UK a local authority, in determining to whom a public contract is to be awarded, may ask the tendering party about its record of findings of race discrimination against it. It is a relevant factor in the decision.

⁴⁰ Article 9.1 of the Framework Directive and see Article 6 of the Equal Treatment Directive 1976 (as amended).

⁴¹ Case 222/84, *Johnston v The Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, the Court was concerned with an attempt by the British Government to prevent the applicant from bringing a sex discrimination case to a tribunal by issuing a certificate declaring that the case involved ‘national security’. The Court invoked Article 6 of the European Convention of Human Rights, ‘Right to a fair trial’, to conclude that EC law recognises a fundamental ‘principle of effective judicial protection’. Therefore the tribunal was required to set aside the certificate and hear the case. The Court also declared that Article 6, Equal Treatment Directive, was ‘directly effective’, that is directly enforceable in court proceedings against State bodies.

⁴² This now provided in Article 6.3 of the Equal Treatment Directive (as amended).

⁴³ By contrast in the Netherlands, NGOs, trade unions and works councils may do so. In the Republic of Ireland, the Equality Authority can bring cases. Interested bodies act ‘in support of’ named complainants when the named complainant brings the cases. They act ‘on behalf of’ named complainants if the interested body brings the case in its own name. The latter is a more effective enforcement mechanism as it removes the random element of reliance on an individual litigant.

46. The Equality Act 2006, in the UK, provides that

28 Legal assistance

(1) The Commission may assist an individual who is or may become party to legal proceedings if—

(a) the proceedings relate or may relate (wholly or partly) to a provision of the equality enactments, and

(b) the individual alleges that he has been the victim of behaviour contrary to a provision of the equality enactments.

47. Decisions relating to the grant of legal representation are made by the Legal Committee of the Commission on the advice of officers, who will normally have interviewed the applicant and made some enquiries to test the merits of the applicant's case. The Legal Committee meets periodically; emergency decisions are possible between meetings.

48. The EHRC can also intervene to assist the court, for example in cases which raise significant questions of interpretation of the equalities legislation (including those implementing the Directives).

49. The EHRC can conduct a formal investigation for any purpose connected with the carrying out of its duties and a non-accusatory 'general' formal investigation, in which the Commission will examine practices of a single organisation or a number of organisations carrying out similar activities. It is not based on a suspicion of unlawful discrimination. At the conclusion of a general formal investigation the Commission can make recommendations.

DECLAN O'DEMPSEY

CLOISTERS
19 November 2007.