



Remedies & Sanctions

EC non-discrimination law

Directives 2000/43 et 2000/78

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Warning

- “*National procedural autonomy*” is a long established rule of EC-law
- A tremendous potential variety of procedures, parties, remedies, sanctions, time frames etc.
- EC-law offers little more than the bare minimum floor!
- EC-law often requires national interpretation!

Goal & Structure

- Focus on the 2000 Directives, but with an eye for EC-law – *not* MS law
- Broader context of legal force & its implications
- Key directive points: defence of rights, victimisation, compliance, sanctions
- Macro level

Broader Context: Legal Force & Its Consequences

General EC Law: Art 10 TEC

- *“Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.”*
- MS duty of “loyal cooperation” to ensure “effet utile”

General EC Law: Art 10 TEC

- Procedural rules re community law claims no less favourable than other
- MS duty to remedy consequences of infringement of EC-law, up to and including MS liability
- MS duty to provide effective judicial protection: basis of remedies case-law in sex discrimination & beyond



Direct Effect as Remedy

- Gradual growth of legal force of directives
- Vertical direct effect:
 - Unconditional and precise
 - In relation to the state
 - State organisations or bodies, in particular when providing a public service
 - Also as employer: the civil service and beyond

Direct Effect as Remedy

- No horizontal direct effect: private sector employment
- Indirect horizontal effect:
 - Interpretation or construction of national law amenable to interpretation
 - National law prior or after the directive
- Non-application of conflicting national law: also in a horizontal setting?

Direct Effect as Remedy

- (Vertical) direct effect  supremacy & its remedial consequences
- Indirect (horizontal) direct effect  preventive and (perhaps) remedial non-application
- Non-discrimination as a general principle of EC-law with horizontal direct effect??



The 2000 Directives Brick by Brick

Brick by Brick

- Defence of rights
- Victimisation
- Compliance
- Sanctions

Defence of Rights

- Member States shall ensure that **judicial and/or administrative procedures**, including where they deem it appropriate conciliation procedures, (...) 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.*

Defence of Rights

- “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.”

Defence of Rights

- Right to a personal judicial remedy & access to justice – direct effect
- No discrimination in procedural rules – not less favourable
- “Effective judicial control” & liability is not conditional on the proof of fault for the defendant
- ***“without prejudice to rules relating to time limits for bringing actions”*** but: cannot render “virtually impossible” or “excessively difficult” the exercise of the Community rights

Victimisation

- “Member States shall introduce into their national legal systems such measures as are necessary to protect individuals (employees) against any adverse treatment or consequence (dismissal or other adverse treatment by the employer) as a reaction to a **complaint (within the undertaking)** or **to (any legal) proceedings aimed at enforcing compliance with the principle of equal treatment.**”

Compliance

- “Member States shall take the necessary measures to ensure that:
- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are **abolished**;
- (b) any ***provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.***”

Compliance

- Compulsory partial nullification, implying a principle of “levelling up”?
- Ex post level is free to decide
- Restrictions on backdating: balance between legal certainty & effective judicial protection

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.”**

Sanctions: D 2006/54

- “Ensure **real and effective *compensation or reparation*** as the Member States so determine ***for the loss and damage*** sustained by a person injured as a result of discrimination (...), in a way which is **dissuasive and proportionate to the damage suffered**.
- Such compensation or reparation ***may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant (...) is the refusal to take his/her job application into consideration***”

Sanctions

- 1. *Effective*: reach the desired outcome vis-à-vis the **victim**
- 2. *Proportionate*: adequate relation to the intrinsic gravity (**society**)
- 3. *Dissuasive*: have a real and deterrent vis-à-vis the **culprit**
- With MS choice & in light of all the circumstances of the case
- Directive does not offer a specific claim or remedy (no direct effect)
- Policy choice between reparation in kind and compensation in money remains

Sanctions: lessons from ECJ

- Discriminatory refusal of employment: hire or “adequate financial compensation”
- Discriminatory dismissal: reinstate or compensate for “the loss and damage sustained”
- What type of loss/damage?
- What amount? More than nominal & fixed sum has to allow for alternative of compensation for total damage



Societal Remedies: Positive Action

Art. 5 D2000/43 and Art. 7.1 D2000/78

- *“With a view of ensuring full equality in practice (between men and women in working life), the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures (providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or) to prevent or compensate for disadvantages (in professional careers) linked to any of the grounds.”*

Positive Action

- Group v. individual
- Results v. opportunity
- Substance v. form
- Avenue for remedial group based compensation for previous discrimination
- Even positive discrimination, if legitimate, effective, and proportionate/necessary



Conclusion

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- The dogma of “national procedural autonomy”
- ECJ (too) timid
- EC non-discrimination law shoots itself in the litigation foot
- But the principles themselves have potential, particularly as regards sanctions

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