THE EU ANTI-DISCRIMINATION DIRECTIVES

REMEDIES & SANCTIONS

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1. As the recitals to both Directive 2000/43 and 2000/78 make clear, the right of all persons to equality before the law and protection against discrimination is a fundamental human right recognised by, amongst other things, the Universal Declaration of Human Rights, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Directives thus recognise the importance of *respecting* such a right and *protecting* persons against discrimination. The Directives provide that:

> Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.[1]

2. Articles 7 / 9 provide in identical terms:

> Defence of rights
> 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.
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> 2. 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.

[1] Recitals 26 and 35 respectively.

> 3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

3. Articles 15 / 17 provide, again in identical terms:

> 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 ...

4. The Directives thus require member states to:

    a. Ensure that judicial and/or administrative procedures for the enforcement of obligations under the Directives are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them;
    b. Ensure that associations, organisations or other legal entities which have a legitimate interest in ensuring that the provisions of the Directives are complied with, may engage in such procedures; and
    c. Lay down rules on sanctions, which must be effective, proportionate and dissuasive.

Enforcement

5. It is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of Community law rights, provided that those conditions are not less favourable than those relating to similar actions of a domestic nature (known as the principal of equivalence) and do not make it impossible in practice to exercise those rights (known as the principle of effectiveness), see Advocate-General Sharpston in the Unibet case, Case No. C- 432/05:

32. [It is a principle of Community law], first laid down in Rewe 1, (Case 33/76 Rewe v Landwrirtschaftskammer fur das Saarland [1976] ECR 1989, paragraph 5) that it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of Community law rights, provided that those conditions are not less favourable than those relating to similar actions of a domestic nature (principal of equivalence) and do not make it impossible in practice to exercise those rights (principle of effectiveness). That approach was confirmed in Rewe 11, (Case 158/80 Rewe v Haupzollamt Kiel [1981] ECR 1805, paragraph 44, emphasis added) where the court stated that the Treaty was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law and that the system of legal protection established by the Treaty implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect.

33. Those principles have been constantly reiterated by the Court; see for example Peterbroeck (Case C-312/93 [1995] ECR 1-4599, paragraph 12) where it was stated that, in the absence of Community rules governing a matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law, subject to the proviso that such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

6. In Von Colson v Land Nordrhein-Westfalen Case No. 14/83[2] the ECJ said:

> It follows from [Article 6 of Directive 76/207 on the principle of equal treatment for men and women] that Member States are required to adopt measures which are sufficiently effective to achieve the objective of the Directive and to ensure that those measures may in fact be relied upon before the national courts by the persons concerned.

7. Procedural rules applying to the enforcement of Community rights should be no less favourable to the Community citizen than the rules of the domestic legal system that apply to "similar actions of a domestic nature": i.e. actions that do *not* involve the assertion of a Community right. That condition was made plain at p 1659G of the judgment of this court in Matra Communications SAS v The Home Office [1999] 1 WLR 1646:

> [An] action for breach of other directly effective Community rights ... was one of the comparators relied on before the judge. He correctly held that the comparison was wrong as a matter of Community law, because the comparator must be concerned with similar rights derived wholly from domestic law: per the Advocate General in Levez v TH Jennings (Harlow Pools) Ltd (Case C-326/98) [1999] ICR 521, 528.

8. As for effectiveness, in Johnston v Chief Constable of the Royal Ulster Constabulary Case No. 222/84, the ECJ held that

> Member States must take measures which are sufficiently effective to achieve the aim of the Directive and … they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.

[2] at p. 1907 para 18

9. The requirement is that the domestic rules should not render the assertion of the Community right "impossible or excessively difficult". That wording has been used many times by the ECJ; is the wording of the Advocate-General in her opinion in Unibet; and is the wording of the Grand Chamber in its subsequent judgment in Unibet of 13 March 2007.

10. Note that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law, the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law, see Amministrazione delle Finanze dello Stato v Simmenthal SpA Case No. 106/77.

11. However the obligation of transformation does not require specific legislation on the part of the member state if before the date of the Directive there already exist in the national legal order provisions that are sufficient to ensure the effective achievement of the Directive's objectives, see Case 29/84 [1985] ECR 1661 (Federal Republic of Germany) at §29.

UK experience

12. In the UK, claims for discrimination in the workplace are brought in the Employment Tribunal, a specialised body comprising a lawyer and two lay representatives with employment experience[3]. Claims for discrimination in relation to the provision of goods and services are brought in the County Court (Sheriff Court in Scotland). The time limit for bringing a claim in the Employment Tribunal is generally three months from the date of the act complained of which is comparable with the time limit for bringing non-Community law related claims, such as the right to claim unfair dismissal. In

[3] Constituted by and regulated in accordance with the Employment Tribunals Act 1996 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

the County Court the time limit is six months[4]. In both cases there is provision to extend the time limit where the court or tribunal considers that it is "just and equitable" to do so.

Interested parties

13. There has been little consideration of this particular provision of the Directives. In the UK, the Equality and Human Rights Commission (the EHRC) has recently taken over from three different bodies, the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The Equality Act 2006 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.

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

15. 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.

[4] See s. 68 of the Race Relations Act 1976 for example.

16. Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 an Employment Tribunal has power to that any person who the chairman or tribunal considers has an interest in the outcome of the proceedings may be joined as a party to the proceedings.

Sanction

17. The choice of sanction is also left to Member States and may be criminal, civil or a combination of the two. Practice varies. Some countries, such as Austria and Luxembourg, relied in the past mainly on criminal sanctions[5]. Other countries use a civil model, but rely on a concept of 'moral damage' for breach of constitutional provisions. UK legislation criminalises certain acts, but the most common remedy for unlawful discrimination is an award of compensation.

18. In Von Colson, the ECJ said:

> 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[6].

19. In Marshall v Southampton and South West Hampshire Area Health Authority Case No. 271/91 this idea was developed further:

> 23. 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.

[5] The Austrian Equal Treatment Act 2004 requires the provinces to enact anti discrimination laws concerning discrimination in employment and between private individuals in employment.
[6] Para. 23

24. However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of 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.[7]

Civil sanctions

20. The first requirement imposed by the Directive is that the sanction must be *effective*. Therefore administrative processes having no legal consequences whatsoever will be insufficient. For example the use of a human rights Ombudsman to persuade state organs to comply with discrimination requirements would be insufficient[8].

21. Any administrative process must also comply with the guarantees under Article 6 of the Convention on Human Rights and Fundamental Freedoms[9]. 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.

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

[8] 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.

[9] The system should not therefore require hearings to be held only in private.

22. 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* – it must act as a deterrent. 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.

Compensation

23. 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 Law[10], 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.

24. Where compensation is awarded to redress unlawful discrimination, such compensation has to be more than nominal so as to guarantee effective protection and to provide a deterrent to employers[11]. Thus a system of law requiring fault to be proved before discrimination compensation can be

[10] C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/ L.10/Add.11 (19 April 2005)
[11] Von Colson v Land Nordrhein-Westfalen (14/83) [1984] E.C.R. 1891

awarded will be in breach of the requirements of the Directive[12]. An upper limit on the amount of compensation is generally not permitted[13].

25. The principle which underlies the award of compensation is that the person who has suffered the wrong should be put in the same position that he or she would have been in if he or she had not suffered the wrong. The victim must be compensated for actual loss i.e. loss that has already been incurred (for example lost salary up to the date of the hearing in the case of an unlawful dismissal from employment) and future loss - which will involve making a forecast as to future events so, for example, compensation for future loss can include compensation for lost promotion opportunities or loss of opportunity to earn bonus or commission.

26. Compensation is also awarded for non-economic loss. This is often the hardest loss to assess accurately. It is compensation for **loss of dignity** and **injury to feelings**. The latter encompasses feelings of irritation disappointment and other relatively short-lived emotions, but can also include actual physical or mental injury. In Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481 the Court of Appeal confirmed that an employment tribunal has jurisdiction to award compensation by way of damages for personal injury, including both physical and psychiatric injury, caused by unlawful discrimination.

27. **Exemplary damages**. In the UK 'exemplary damages' (otherwise known as punitive damages) may be awarded where there has been oppressive, unconstitutional conduct by servants of the state: where conduct has been

[12] Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus (C177/88) [1990] E.C.R. I-3941
[13] 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 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. This principle mirrors that in Marshall (No. 2).

calculated to make a profit which may exceed the compensation to the complainant; or where expressly authorized by legislation[14].

28. **Aggravated damages.** Aggravated damages are awarded where the wrongdoer has behaved in a 'high-handed, malicious, insulting or oppressive manner [15]. Such behaviour usually takes place before the complaint but can courts and tribunals can also have regard to the way in which the defence is conducted for example if it was conducted in an insulting manner intended to embarrass, intimidate and deter the complainant from pursuing her case. Aggravated damages are still compensatory in that they compensate for the aggravation suffered by the complainant and as such are not supposed to be punitive[16].

UK experience

29. As originally enacted UK legislation imposed a 'cap' or limit on the amount of financial compensation that could be awarded for an act of unlawful discrimination[17]. However in Marshall the ECJ held that:

> 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.

30. As a result the cap was removed and courts and tribunals now have the power to award unlimited compensation and often do award very significant sums indeed. When anti-discrimination legislation was first enacted in the UK courts and tribunals had a tendency to award relatively low amounts of compensation for non-financial loss such as injury to feelings, perhaps in the light of the statutory cap. In Alexander v. The Home Office [1988] IRLR 190;

[14] See Kuddus v Chief Constable of Leicestershire [2001] 2 WLR 1789 House of Lords
[15] 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)
[16] 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] IRL.R 697
[17] In 1993 the cap was approximately 10,500 euros.

[1988] 1 WLR 968 the Court of Appeal increased an award of compensation for injury to feelings from approximately 70 euros to 700 euros and commented that awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the legislation gave effect. The leading case is now Vento v Chief Constable of West Yorkshire Police (No.2) [2002] EWCA Civ 187; [2003] IRLR 102. In that case an Employment Tribunal awarded a woman police officer who was the victim of sex discrimination some 93,000 euros in non-financial loss (in addition to 210,000 euros for loss of earnings). The appellate courts reduced that sum on appeal to 40,000 euros.

31. In Vento the Court of Appeal recognised that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for a judicial process as subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is therefore bound to be an artificial exercise.

32. The Court commented that the total award of 93,000 euros for non-financial loss made in this case was in excess of guidelines for the award of damages for moderate brain damage, involving epilepsy, for severe post-traumatic stress disorder having permanent effects and badly affecting all aspects of the life of the injured person, for loss of sight in one eye, with reduced vision in the remaining eye, and for total deafness and loss of speech.

33. The Court proposed three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury:

    a. The top band should normally be between 19,000 euros and 31,000 euros. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on a prohibited ground. Only in the most exceptional case will an award of compensation for injury to feelings exceed £25,000;

b. The middle band of between 6,500 euros and 19,000 euros should be used for serious cases, which do not merit an award in the highest band;
c. Awards of between 700 euros and 6500 euros are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than 700 euros are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

Non financial sanctions

34. Civil law sanctions are not confined to an award of compensation. The Directives point out that the sanction may comprise a payment of compensation to the victim. The sanction therefore could therefore also include:

a. Preventative orders
b. Remedial orders

35. **Preventative 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 doing something. Thus in Tribunale di Reggio Emilia, ordinanza 2.11.2000 a Nigerian football player was granted an injunction against the Italian Football Federation[18]. In the UK an injunction was granted to prevent the further distribution of leaflets in Manchester calling on people to object to the Planning Authority about planning applications made by Asians for planning approval[19].

[18] 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.

[19] 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.

36. In the UK breach of a court injunction is treated as a contempt of court and is punishable by a fine and/or imprisonment.

37. **Remedial orders**: a remedial order is an order requiring the defendant to take action with a view to avoiding a repetition of unlawful discrimination. In the UK a court hearing a case of discrimination in relation to the provision of goods and services may order a defendant to take remedial action. An Employment Tribunal does not have power to make such an order but can only recommend a course of action.

Criminal Sanctions

38. Criminal sanctions are most usually applied where a prohibited ground of dismissal (race, disability etc) is an aggravating factor in the commission of an offence. An assault on an employee might be motivated by racial or religious hatred, for example. In the UK a finding that an offence is racially motivated will result in an increased sentence. There is legislation dealing with criminal offences aggravated by religious hatred in Northern Ireland. However, there is as yet no criminal sanction for an offence aggravated by discrimination on grounds of age or disability.

39. Criminal offences are punishable in a variety of ways. Imprisonment is the most draconian and is rare. Some countries have impose fines for breach of the rights enshrined in the national Labour Code (Czech Republic, Estonia, Hungary, Latvia and Slovakia). However a fine does not compensate the victim of unlawful discrimination. Whilst criminal sanctions might deter a potential wrongdoer, they cannot by themselves fulfill the requirement to ensure that any actual loss sustained as a result of an act of discrimination is "made good in full" per Marshall (No. 2).

40. It is also worth noting that with criminal sanctions the decision whether to bring or to continue a prosecution usually rests with the state / prosecutor and not the complainant, though some legal systems do enable individuals to bring 'private prosecutions'.

Publicity

41. It is open to a Member State to provide for publicity-based sanctions in discrimination cases. Adverse publicity may be a effective deterrent and takes many forms: (a) in the media (b) publicity in the workplace[20] (c) directed publicity to state organs[21] (d) maintenance of a public registry of decisions (e) obligations to declare information in certain circumstances[22].

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[20] In France there is a requirement to place a notice at work and in the local papers as to the result of the complaint.
[21] 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 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.
[22] 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.