

# Reparation and penalties in discrimination cases

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## 1. Reparation and penalties: general issues

A large part of anti-discrimination Directives is dedicated to reparation for victims of discrimination and the penalties to be imposed on those who engage in discriminatory conduct. Reparations and penalties are what we might call the consequences of breaching Directives on the part of private individuals. It is often part of domestic legislation (that has to ensure compliance on the part of private individuals), but it rarely features in European Union Directives (which theoretically only constitute obligations for Member States).

There are three established mechanisms in European Union anti-discrimination legislation in the event of non-compliance on the part of private individuals:

1. The right of victims of discrimination to bring court action to demand compliance with the anti-discrimination principle: Article 17 of Directive 2006/54 (gender-based discrimination); Article 7 of Directive 2000/43 (discrimination based on ethnicity); Article 9 of Directive 2000/78 (discrimination based on religion, belief, age, disability and sexual orientation). Victims' right to legal action is not limited to the formal possibility of going to court, but it also entails the right for court proceedings to provide them with sufficient compensation.

2. The right to effective and dissuasive compensation or reparation (reparation by the offender to the victim). This is only established in Article 18 of Directive 2006/54, in cases of gender-based discrimination. It is an uncommon precept which is not found in other Directives, not even in other anti-discrimination Directives. It establishes the right of the victim to receive compensation or reparation that adequately compensates for the damage suffered from the offender. In reality this is specified in the right to legal action.

3. The obligation for Member States to penalise adequately violation of anti-discrimination regulations on the part of the private individuals, with the aim of preventing further conduct of this nature. This is covered in Article 25 of Directive 2006/54, Article 15 of Directive 2000/43, and in Article 17 of Directive 2000/78. The obligation is directed at the State to ensure that the consequences set out by laws applying the anti-discrimination Directives have a sufficient deterrent effect.

These three obligations, which are the basis for this presentation, may take effect through various instruments. Financial compensation, restitution *in natura*, declaration of

invalidity of the conduct, compulsory readmission, administrative sanction, criminal penalty, among others, are some of the consequences applicable to discriminatory conduct that can be applied to any of the three consequences listed above. However, there is a multifunctional instrument which may be used to comply with the three obligations simultaneously: indemnification, compensation or reparation for the damages caused by discriminatory conduct. To be sure, if a Member State guarantees adequate compensation in cases of discrimination, it complies with the guarantee of the right to legal action; it expressly complies with the provisions Article 18 of Directive 2006/54 (on gender-based discrimination) and, at the same time, it can sufficiently fulfil the obligation for an effective deterrent. This explains the particular attention paid to compensation as an instrument for the effectiveness of anti-discrimination Directives over the following pages.

In general, Directives of the European Union (in any area or matter) do not expressly refer to the obligation of application on the part of Member States (they are obligatory rules *per se*), and nor do they specify the way in which they must do so. After all, the freedom to choose the instrument considered most appropriate by each Member State is what characterises Directives. In fact, the existence of a specific section dedicated to horizontal clauses in Directive 2006/54 is interesting, as is the fact that Directives 2000/43 and 2000/78 have specific sections on "remedies and enforcement". The purely formal issue of what should be the specific mechanism to enforce an obligation set out in a Directive has been considered a strictly national matter. Admittedly, there may be a progressive tendency for the CJEU<sup>1</sup> to require that Directives be enforced in a certain way<sup>2</sup>, and in the case of anti-discrimination Directives such intervention in the transposition phase has even been reflected in the text of the Directives themselves.

Establishing the specific mechanisms for enforcing anti-discrimination Directives is part of a general context intended to reinforce the effectiveness of Directives, which has other significant manifestations: overcoming the strictly vertical effectiveness of anti-discrimination Directives and the obligations for national judges to apply the principle of primacy of European Union anti-discriminatory regulations.

1. Overcoming the doctrine of direct vertical effectiveness of anti-discrimination Directives.

One of the main theoretical obstacles to the enforcement of Directives has generally been the principle of solely vertical (as opposed to horizontal) direct effectiveness. Vertical effectiveness means that compliance with Directives is not binding upon private individuals, but only upon the State<sup>3</sup>. It is a formal principle that arises from the fact that Directives, by definition, constitute obligations for Member States and not private individuals. The vertical direct effectiveness of Directives therefore implies that victims could not file a court claim against a private individual for breaching a Directive if the

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<sup>1</sup> References to the European Union court responsible for interpreting European Union Law herein always refer to the "Court of Justice of the European Union" (CJEU), even if this court had a different name when the pronouncements were made. I have chosen to refer to this court by a single name for the sake of clarity. I have also chosen to cite the judgments of this court simply by referring to their date and case name. These details are enough to identify the decision at [www.curia.eu](http://www.curia.eu), the general search engine for CJEU decisions.

<sup>2</sup> VAN GERVEN makes an interesting reflection on internal competencies in choosing the procedure to enforce Directives and their development in "Of rights, remedies and procedures", *Common Market Law Review*, 37, 2000, p. 501 *et seq.*, in particular p. 517 *et seq.*

<sup>3</sup> However, EU primary legislation and EU Regulations have direct horizontal effectiveness, which allows for claims between private individuals (CJEU Judgment of 5 February 1963, *Van Gend en Loos* case)

State had not transposed it adequately, because in theory individuals are not obliged to comply with Directives, but only national laws that transpose them. Vertical effectiveness means that individuals can only file legal action for an inadequately transposed Directive to be applied if the respondent is the State. According to the solely vertical theory of the effectiveness of Directives, where the failure to transpose a Directive causes damages to a private individual (in light of their inability to demand compliance by another private individual due to a lack of horizontal direct effectiveness) it would be possible for the individual to claim compensation for damages from the non-complying State<sup>4</sup>. It is easy to predict that the theory of vertical effectiveness of Directives quickly appeared as a significant obstacle to their enforcement, especially when they became the typical and most commonly used regulatory instrument of the European Union (leading to a decline in Regulations), and when Directives starting to contain rights and obligations specific to private individuals<sup>5</sup>, which is particularly evident in the case of anti-discrimination Directives.

The prohibition of gender-based discrimination was one of the first areas to escape the doctrine of the strictly vertical effectiveness of Directives, which enabled claims between private individuals for the direct application of anti-discrimination Directives where the State had not met its obligation of transposition effectively. Indeed, the CJEU had already recognised the direct horizontal effectiveness of gender-based discrimination legislation in the 1970s, not only because it arose from primary law (the then Article 119 of the TEC), but also because it constituted an essential principle of European Union law (since the CJEU Judgment of 8 April 1976, *Defrenne* case). Gender-based anti-discrimination Directives were drawn up according to this general principle and, as a result, they had de facto direct horizontal effectiveness since the beginning, in the 1970s. The direct horizontal effectiveness of EU rules against gender-based discrimination is made possible by the fact that they usually establish full and complete rights that are specific enough to be applied directly<sup>6</sup>.

This crisis over the vertical effectiveness of Directives later spread to other matters. Today, the application of the effectiveness principle of Directives has generally ended up neutralising the doctrine of strictly vertical direct effectiveness. Indeed, it is easy to see the contradiction in that, on the one hand, Directives are construed as full regulations, and on the other, that their effectiveness as such might be obstructed by preventing direct claims by private individuals, who are more frequently becoming their de facto focus.

However, the doctrine of the vertical effectiveness of Directives seemed a difficult obstacle to overcome in the case of Directives against discrimination on grounds other than gender. The reference that primary law makes to the prohibition of discrimination based on the next generation of grounds (ethnicity, religion, belief, disability, age and sexual orientation) are contained in the current Article 19 TFEU (ex Article 13 TEC), which does not directly prohibit discrimination on these grounds, but which simply empowers the Community institutions to regulate on this matter<sup>7</sup>. Direct horizontal

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<sup>4</sup> CJEU Judgment of 19 November 1991, *Francovich* case

<sup>5</sup>As MILLAN MORO pointed out in “La eficacia directa de las Directivas: evolución reciente”, *Revista de Instituciones Europeas*, vol. 18, 1991, p. 845 *et seq.*

<sup>6</sup>In order for Directives to have direct effectiveness they need to be precise, clear, unconditional and to not require complementary measures (CJEU Judgment of 4 December 1974, *Van Duyn* case; CJEU Judgment of 5 April 1979, *Ratti* case; and CJEU Judgment of 12 July 1990, *Foster* case)

<sup>7</sup>Article 19(1) TFEU states the following: *Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European*

application between private individuals, due to the link with primary law, was therefore complicated, just as it was in the case of Directives against gender-based discrimination. It also seemed difficult for the next-generation grounds for discrimination to be a principle of the European Union when they were drawn up simply to empower the Community institutions. However, in these cases the CJEU ended up applying direct horizontal effectiveness. First, the CJEU established, in its Judgment of 22 November 2005, *Mangold case*, that the principle of non-discrimination on the grounds of age was a general principle of European Union regulation and thus had direct horizontal effectiveness (in the *Mangold* case the deadline for transposing Directive 2000/78 had not even passed). Later, the CJEU more strongly established, via its Judgment of 19 January 2010, *Küçükdeveci* case, that Directive 2000/78 is a specific application of the general principle of non-discrimination on the grounds of age and that the provisions of the Directive must therefore be respected in lawsuits between private individuals<sup>8</sup>. Thus, both anti-discrimination Directives enacted under Article 19 TFEU (Directive 2000/43 for ethnicity, and Directive 2000/78 for religion, belief, age, disability and sexual orientation) constitute rules that specifically apply the general principles of European Union legislation and, as such, have direct horizontal effectiveness<sup>9</sup>.

The principle of direct horizontal effectiveness and of real effectiveness was already implicit in the first Directives against gender-based discrimination. Article 6 of Directive 76/207 (which set out the principle of legal action as will be discussed below) expressly stated that Member States must ensure that victims of gender-based discrimination could "pursue their claims" before the courts<sup>10</sup>. It is a statement that, in reality, summarises the concept of direct horizontal effectiveness of the principle of non-discrimination based on gender according to the terms in which, at almost the same time, they were being recognised in CJEU case law. It shows the interest of the European Union legislator in reinforcing these principles and making them more visible. Article 6 of Directive 76/207 is currently, with some changes, Article 17 of Directive 2006/54, and a similar wording has been used in other anti-discrimination Directives (Dir. 2000/43 and Dir. 2000/78).

2. The obligation for national judges to apply the principle of primacy of anti-discrimination legislation.

CJEU case law on Directives against gender-based discrimination have unequivocally applied the principle of primacy of EU<sup>11</sup> law, establishing the obligation for national judges to substitute national rules for the violated Community rules<sup>12</sup>. In theory, applying

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*Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

<sup>8</sup>MOL examined the scope of the judgment handed down in the *Küçükdeveci* case in "Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law, Court of Justice of the European Union", *European Constitutional Law Review*, 6, 2010, p. 293 *et seq.*

<sup>9</sup>REQUENA CASANOVA, "La tutela judicial del principio general de igualdad de trato en la unión europea: una jurisprudencia expansiva basada en una jerarquía de motivos discriminatorios", *Revista de Derecho Comunitario Europeo*, 40, 2011, p. 790

<sup>10</sup>Article 6 of Directive 76/207 established the following: *Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.*

<sup>11</sup>This has been a basic principle of EU regulation since its inception. CJEU Judgment of 15 July 1964, *Costa v. ENEL* case

<sup>12</sup>For gender-based discrimination, Judgment of 9 March 1978, *Simmenthal* case; CJEU Judgment of 26 February 1986, *Marshall I* case; and CJEU Judgment of 20 March 2003, *Kutz-Bauer* case, among many others

the principle of primacy should not be complicated, taking into account that the establishment of subjective rights in anti-discrimination Directives is usually clear enough to allow them to be directly applied (essentially prohibition of discrimination), and also taking into account that in case of doubt on the part of the court of first instance, a reference for a preliminary ruling may be made before the CJEU regarding the general scope of anti-discrimination concepts and whether or not they conform to European Union legislation. However, there are highly complex concepts in anti-discrimination legislation, which may hinder the substitution of national legislation for higher European Union legislation. The concept of indirect discrimination is a good example of this, given that, unlike direct discrimination, it does not have a gauge by which equality of treatment should be achieved. In order to put right direct discrimination, it is sufficient to compare the treatment of women with that of men (or compare the treatment of groups to which the anti-discrimination Directives apply). This is what the application of the principle of primacy by national judges would involve. However, in the case of indirect discrimination, which occurs when a specific act has an adverse effect on women or on any of the groups protected by the anti-discrimination Directives, the elimination of this act from national law may be complicated if there is no express substitute regulation. A similar situation arose in Spain following the CJEU Judgment of 22 November 2012, *Elbal Moreno* case. This Judgment established that the system for accessing pensions in Spain constituted indirect gender-based discrimination because it had adverse effects on part-time workers. The question for a preliminary ruling was referred by the Juzgado de lo Social 33 de Barcelona (Social Court 33 of Barcelona) because Spanish legislation then in force established that, for part-time workers, the 15 years of contributions required to access the retirement pension must be calculated whereby five hours of work is equivalent to one day of work. In the *Elbal Moreno* case, the CJEU found that this regulation specific to part-time workers constituted indirect discrimination on the grounds of gender. Seven months later, via Royal Decree-Law 11/2013 of 2 August, the Spanish legislator altered the precept in question and established a new system for calculating the contribution period in terms of part-time workers' pensions (the partiality coefficient)<sup>13</sup>, but until then the Spanish Courts of Justice had to resolve the issue and were thus faced with the dilemma that any decision meant replacing the action of the legislator. Indeed, the qualifying period generally established in Spain requires fifteen "years" of contribution (not days or hours), but in the case of full-time workers calculating the qualifying period by the day was an appropriate mechanism because they worked every day of the year. The precept declared discriminatory by the CJEU came into effect when counting the number of days for part-time workers. In the specific case that gave rise to the reference for a preliminary ruling that culminated in the *Elbal Moreno* case, the judgment settled the case by counting one full working day of contribution for every day of work by the part-time worker, as requested by the plaintiff<sup>14</sup>. However, the Courts of Justice did not generally apply this solution to all of the cases brought before them in the interim period between the judgment passed in the *Elbal Moreno* case and Royal Decree-Law 11/2013. This is because counting full days was one of the possible solutions, but it was not the only one. It was met by a certain level of resistance by the national Courts which continued to apply the discriminatory legislation until it was expressly corrected by the legislator, arguing that there was no overlap in the subsequent cases since they were not as serious as the one resolved by the judgment handed down in the *Elbal Moreno*<sup>15</sup> case. If, instead

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<sup>13</sup> The new system established by the legislator is not, however, particularly beneficial for part-time workers. It could in fact be said that the Spanish legislator has corrected part-time workers' problems with accessing the retirement pension but has transferred the indirect discrimination to the amount, as pointed out by AGUSTIN MARAGALL, "Cuestiones críticas –resueltas y pendientes de resolución– en el acceso, duración y cuantía de las prestaciones de seguridad social contributiva" (Critical issues - resolved and pending resolution - regarding access, duration and amount of contributive social security benefits), a presentation at the "Las reformas de a protección social" (Social Protection Reforms) round table discussion at the Congress on *Las reformas de la protección social en España* (Social Protection Reform in Spain), Alicante, 22 and 23 of October 2015

<sup>14</sup> Judgment of the Social Court 33 of Barcelona of 30 November 2012, confirmed by Judgment of the Catalonia High Court of Justice of 27 November 2013, Court Report 1339/2013

<sup>15</sup> Catalonia High Court of Justice of 4 March 2013, Court Report 7851. This judgment had a dissenting vote signed by a large number of Magistrates.

of denying any overlap between the cases, the court had found that the Directive did not apply due to a lack of specific content, it would at least have allowed the victim of the discriminatory conduct, at least in this case, to file a claim for damages against the infringing State (under the *Francovich* doctrine, CJEU Judgment of 19 November 1991).

## **2. THE RIGHT TO LEGAL ACTION FOR REDRESS TO THE VICTIM OF DISCRIMINATION**

Within the scope of the prohibition of gender-based discrimination, the right to legal action for compensation of the victim is currently provided for in Article 17(1) of Directive 2006/54, which stipulates the following: *Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial 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.* For discrimination based on ethnicity, Article 7 of Directive 2000/43 has a similar meaning. For discrimination based on religion or belief, age, disability and sexual orientation Article 9 of Directive 2000/78 also has the same meaning. The second paragraph of these provisions authorise associations with a legitimate interest in ensuring compliance with the Directives to bring legal action on behalf or in support of the claimant, with his/her permission.

In Directive 2006/54 (gender-based discrimination), Article 17 can be found under Title III (dedicated to horizontal precepts, or instruments for the application of the Directive's provisions); in Chapter One (dedicated to remedies and enforcement), and in Section One (dedicated to remedies). The first section (remedies) contains Article 17 (which generally refers to court action to seek redress for the victim) and Article 18 (which refers to a specific measure for redress: compensation). In Directives 2000/43 and 2000/78, there is no specific section dedicated to remedies, though there is a general section dedicated to remedies and enforcement which includes the general provision of legal action for redress to the victim. Directives 2000/43 and 2000/78 do not have a provision equivalent to Article 18 of Directive 2006/54.

The right to legal action has two parts: (i) It implies that victims of discrimination have a formal right to file a court claim for violation of the right to non-discrimination. This means, therefore, that there can be no procedural obstacles to the court claim; (ii) It also implies that legal systems must have established mechanisms by which the court can compensate the victim of discrimination, since at the end of such proceedings he/she shall foreseeably receive adequate reparation/compensation (CJEU Judgment of 2 August 1993, *Marshall II* case).

Article 17 of Directive 2006/54 and equivalent articles of other anti-discrimination Directives establish a right to legal action that may be preceded by preliminary recourse to other competent authorities. This is expressly set out in these provisions of the Directives. Thus, the possibility of establishing mechanisms for administrative-type claims is provided for, which are valid insofar as the subsequent action before the courts is admitted. The involvement of administrative bodies with competence to issue binding settlements in anti-discrimination matters in the first instance shall be in accordance with anti-discrimination Directives, provided that they allow for a legal challenge regarding the merits of the case. I understand that, if an administrative body or state agency were competent to settle a discrimination case, with the Courts only being able to examine the formal deficiencies of the preliminary administrative resolution rather than the merits of

the case, the right to legal action referred to by the provisions at issue here would not be guaranteed. These preliminary administrative proceedings include potential administrative conciliation. It may seem insignificant, but the mention of conciliation fulfils a twofold objective: firstly, it implicitly serves to acknowledge that any agreement reached in the conciliation procedure has value, provided that the legal channel remains open (to challenge the agreement); and, secondly, it also serves to establish that there are two mechanisms for intervention prior to court proceedings that may be laid down by Member States: on the one hand, those aimed at encouraging agreement between the parties (conciliation), and on the other, those that entail involvement of an administrative body or agency with the capacity to adjudicate, as long as their actions may be challenged before the courts. What is significant in all of the Directives is that neither the agreement reached, nor the administrative intervention, may close the legal channel; both must be subject to legal challenge. Internal mechanisms that might run counter to anti-discrimination Directives in this matter may be difficult to detect, since they do not always expressly mention anti-discrimination. There may be general, procedural or substantive rules that do not specifically impede the right to legal action of discrimination victims, but they present an obstacle insofar as they obstruct the general right to legal action. Where domestic regulations have this effect, they are contrary to anti-discrimination Directives<sup>16</sup>.

The final paragraph of Article 17 of Directive 2006/54 and equivalent articles of anti-discrimination Directives state that legal action is appropriate *even after the relationship in which the discrimination is alleged to have occurred has ended*. This refers to two situations: the possibility of filing a court claim for discriminatory dismissal, and the possibility to file a court claim for discriminatory acts committed before the end of the working relationship, without the need for the reason for terminating the contract to have been discriminatory. Incidentally, anti-discrimination Directives do not wish to address the issue of time limits/expiry dates established by Member States for initiating court proceedings for claims against discriminatory acts. The *time limits for bringing actions* are therefore expressly outside of the protection afforded by the Directives (Article 17(3) of Directive 2006/54 and equivalent articles).

The right of victims to legal action in anti-discrimination Directives is complemented by certain rights to legal action of additional claimants. The anti-discrimination Directives refer to such claimants: (i) Article 17(2) of Directive 2006/54 and its equivalent articles in other anti-discrimination Directives, authorises associations, organisations or other legal entities with a legitimate interest in ensuring compliance with anti-discrimination regulations to engage, either on behalf or in support of the complainant and with his/her approval, in the corresponding legal actions<sup>17</sup>. The provision grants collective entities with an interest in the matter a right to bring collective action. This does not necessarily have to apply solely to associations of the groups protected by the anti-discrimination

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<sup>16</sup> An example might be Article 41 of the Workers' Statute in Spain. This regulation establishes that any agreement reached during adjustment procedures due to a company crisis (substantial modification of working conditions for economic, technical, organisational or production-related reasons) can only be challenged for reasons of fraud, criminal intent, coercion or abuse of law. This has meant that courts do not consider the possible existence of gender-based discrimination that such agreements may contain (Supreme Court Judgment of 25 May 2015, Court Record 307/2013)

<sup>17</sup> Article 17(2) of Directive 2006/54 states: *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/her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*

legislation, but to any entity with an interest. It therefore seems that if Member States granted authorisation, for example, to trade unions, this would be in line with the provision. Furthermore, such authorisation refers to the procedural capacity to bring proceedings on behalf or in support of a victim of discrimination, and only with his/her approval. These associations are not obliged to have authorisation to bring legal action in defence of collective interests, although nothing would prevent Member States from doing so<sup>18</sup>. In Spain, trade unions have procedural capacity to act on behalf of the victim of discrimination if he/she is a member, and are presumed to have the victim's approval if, having been notified, he/she does not object to the union acting on his/her behalf<sup>19</sup>. There is also the possibility for the most representative union, the union of which the worker is a member and even public or private entities whose aims include the promotion of fundamental rights, to act as an intervener (in support of the victim) in proceedings arising from the violation of fundamental rights<sup>20</sup>; (ii) Article 24 of Directive 2006/54 and its equivalents in other anti-discrimination Directives prohibit adverse treatment (in the form of dismissal or in any other form) by the employer of the worker undertaking internal proceedings within the company or legal proceedings in defence of the right to non-discrimination. This provision (entitled "Victimisation") not only establishes a safeguard against company reprisals against the victim of discrimination (which is implied in other provisions on reparation), but it also provides safeguards against reprisals against workers in the company who may have taken action against discriminatory conduct by the company (particularly workers' representatives). Although the provisions of other anti-discrimination Directives do not expressly protect representatives and workers who are not victims but who act in their defence, it should be understood that they are also protected from reprisals. This is because they refer to the general protection that should be afforded in light of claims made within the company or before the courts. As with other types of victim protection, Member States are free to establish these guarantees (restitution, compensation and so forth), but they must be effective. The right to legal action as set out in Article 17 of Directive 2006/54 and equivalent articles is not new; it was already set out in a similar manner in Article 6 of Directive 76/207 for gender-based discrimination. The main difference between the wording of Directive 76/207 and that of Directive 2006/54 (which is in turn based on Directive 2002/73) is that the 1976 Directive stated that victims of gender-based discrimination must be able to "pursue their claims", whereas the 2006 Directive states that the victim of discrimination must be able to demand "enforcement". In short, the principle of legal action (both in the 1976 Directive and Directive 2006/54) entails a right to restitution/reparation/invalidation/compensation in favour of the victim. Its aim is not dissuasive in itself (although it may be) but rather it intends to provide redress for the victim. The right to legal action has given rise to an interesting CJEU doctrine establishing what the system for adequate reparation/compensation should be in the case of gender-based discrimination. This CJEU doctrine is perfectly applicable to cases of discrimination as set out in Directive

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<sup>18</sup> In Spain for example, Article 11 bis of the Law of Civil Procedure authorises the most representative trade unions, national associations in defence of equality between men and women, and competent public bodies to bring legal action in the defence of these diverse collective interests. The provision states: *Where those affected are a number of persons that are unspecified or are difficult to specify, authorisation to bring legal proceedings to defend these diverse interests shall be the sole responsibility of the public bodies with competence in the matter, the most representative trade unions and state-run associations whose main purpose is equality between women and men, without prejudice, where those affected are determined, to their own procedural authorisation.*

<sup>19</sup> Article 20(1) and (2) of the Regulatory Law on Social Jurisdiction (LRJS)

<sup>20</sup> Article 177(2) LRJS



2000/43 and Directive 2000/78, given that both have provisions almost identical to Article 17 of Directive 2006/54.

This doctrine for legal action in favour of victims, as can be deduced from the CJEU's application of Article 6 of Directive 76/207, could be summarised as follows:

(i) **FREEDOM OF CHOICE UNDER THE GUARANTEE INSTRUMENT:** Member States are completely free to establish the instruments that guarantee subjective effectiveness of the principle of non-discrimination on the basis of gender (CJEU Judgment of 10 April 1984, *Von Colsson* case).

There are large number of possible instruments, but they can essentially be grouped into two main areas when it comes to providing redress to victims (which is the purpose of these provisions): firstly, recovery or restitution of the entitlement (for example, annulment of dismissal, if this was the discriminatory conduct), and secondly, financial compensation for the damage suffered. One aspect of particular importance is that it is not compulsory for legal systems to guarantee first and foremost the recovery and restitution of the entitlement; rather, the principle of substantial effectiveness is ensured simply if compensation is established for the damage suffered (CJEU Judgment of 2 August 1993, *Marshall II* case).

(ii) **ADEQUATE COMPENSATION.** If the only instrument adopted to provide redress for the victim is that of compensation, it should be proportionate to the damage suffered (CJEU Judgment of 10 April 1984, *Von Colsson* case).

- a) Adequate compensation is that which offers full reparation for the damage, and so it is not possible for a maximum amount of compensation which may not adequately compensate for the damage suffered to be set by law (CJEU Judgment of 2 August 1993, *Marshall II* case, and CJEU Judgment of 22 April 1997, *Draehmpaehl* case). Furthermore, all mechanisms that the Member State has for effective reparation of the damage caused by the discriminatory conduct should be applied, including the payment of interest (CJEU Judgment of 2 August 1993, *Marshall II*).
- b) When choosing a specific instrument to guarantee reparation/compensation, MS must ensure that the consequences foreseen are similar to those for infringements of a similar nature (principle of equivalence). This is about the effectiveness of the anti-discrimination principle guaranteed by the Member State not having less force than other rights with a similar scope (CJEU Judgment of 21 September 1989, *Commission v. Greece* case, and CJEU Judgment of 22 April 1997, *Draehmpaehl* case).
- c) There are CJEU judgments which state that where compensation is used as an instrument to enforce an anti-discrimination Directive, it should have a deterrent effect (CJEU Judgment of 10 April 1984, *Von Colsson* case). In some judgments, however, the deterrent effect does not seem all that different from adequate reparation when defined as full reparation.

### **3. THE OBLIGATION FOR MEMBER STATES TO ESTABLISH EFFECTIVE AND DISSUASIVE PENALTY MECHANISMS**

Member States must ensure that the laws transposing discrimination legislation have a deterrent effect. This is set out in Article 25 of Directive 2006/54 for gender-based discrimination: *Penalties Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.* This obligation was first established via Directive 2002/78 on gender-based discrimination. For discrimination on the basis of ethnicity, the equivalent provision is Article 15 of Directive 2006/54, and for other prohibited forms of discrimination, the equivalent provision is Article 17 of Directive 2000/78.

The main characteristic of the provisions that make penalties obligatory is that they are real instruments for enforcing the Directives. Indeed, in order to guarantee effectiveness in the transposition of a Directive, the Member State must ensure that the measures adopted have a deterrent effect, although it does not necessarily have to ensure redress for victims<sup>21</sup>. Not only must Member States establish penalties in the event of non-compliance, but they must also ensure that they are applied where discriminatory conduct occurs (effective penalties); that they are potentially preventative (deterrent effect), and that they are proportionate. In addition to this, the penalty must not be lower than the amount established to guarantee compliance with other rules of similar importance (principle of equivalence<sup>22</sup>).

However, the obligation for effective penalties is also a preventative measure against discrimination which, from this perspective, shares its aim with other provisions of anti-discrimination Directives. Other preventative actions include those established with the aim of encouraging employers and entities providing vocational training to prevent discrimination, under Article 26 of Directive 2006/54. There is no similar provision in Directives 2000/78 and 2000/43, although all three Directives make reference to social dialogue as an instrument to prevent discriminatory actions (Article 11 of Directive 2000/43, Article 13 of Directive 2000/78 and Article 22 of Directive 2006/54).

The contrast between Article 25 of Directive 2006/54 (and equivalent articles of anti-discrimination Directives), on the one hand, and Article 17 of Directive 2006/54 (and equivalent articles), on the other, give the impression that a dual system of action against discrimination is intended: firstly penalties, to achieve a deterrent effect (Article 25 Directive 2006/54); and secondly reparation/compensation, for the purposes of obtaining redress for the victim (Article 17 Directive 2006/54). But this conclusion is only apparent because Article 25 Directive 2006/54 and equivalent articles state that penalties may include compensation to the victim. Directives therefore allow compensation to take on a penalising function which, if sufficiently effective, proportionate and dissuasive, could even eliminate the need to apply specific penalties. On the other hand, it might be concluded that if compensation were the only method of penalisation laid down by the Member State and it did not serve as a deterrent (at least not in all cases), it would not comply with Article 25 of Directive 2006/54 and equivalent articles. Redress for victims

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<sup>21</sup> This is clearly shown, for example, in CJEU judgments on the application of Directive 99/70 on temporary employment. In the CJEU Judgment of 11 December 2014, C-86/14, *León Medialdea* case, the purpose of the reference for a preliminary ruling concerned the dissuasive nature, or otherwise, of domestic legislation (in this case Spanish) with regards to the link with temporary contracts. The deterrent effect is what must be guaranteed when it comes to ensuring that the State has transposed the Directive adequately. The CJEU Judgment of 4 July 2006, C-212/04, *Adeneler* case, was pronounced with a very similar scope, as were many others that, with regards to the application of this Directive, are mentioned in both judgments. The *Adeneler* case established the following: *Thus, where, as in the present case, Community law does not lay down any specific sanctions should instances of abuse nevertheless be established, it is incumbent on the national authorities to adopt appropriate measures to deal with such a situation. Those measures must be not only proportionate, but also sufficiently effective and a sufficient deterrent to ensure that the provisions adopted pursuant to the Framework Agreement are fully effective.*

<sup>22</sup> CJEU Judgment of 11 December 2014, C-86/14, *León Medialdea* case

and the deterrent effect are compulsory and distinguishable outcomes of the measures adopted by Member States, which may or may not be brought about by the same instrument.

The merging of the objectives of compensation and dissuasion into a single instrument calls for reflection on the position of the various European legal systems regarding liability for punitive damages<sup>23</sup>. This concept is a stand-alone compensatory bonus, with a strictly dissuasive function, which is added to the amount of compensation for damages where such compensation is not sufficiently dissuasive. The idea of punitive damages originates from Britain but has ended up being an American archetype<sup>24</sup>. Such damages are considered unique to common law legal systems. However, in continental civil law systems, legal tradition has tended to separate the objective of prevention (under the responsibility of the Governmental Authority through administrative and/or criminal penalties) and the reparative function (served by compensation strictly for the reparation of damages)<sup>25</sup>. In fact, there is radical opposition to punitive damages among some sectors in continental Europe, since they are considered to be against European tradition and the *nulla poena sine lege* principle in particular<sup>26</sup>. Private civil liability and criminal or administrative responsibility remain separated in continental tradition, whereas in the Anglo-Saxon common law tradition the concept of punitive damages exists half way between both<sup>27</sup>.

That said, recent years have seen a certain level of acceptance by continental legal systems of punitive damages when compensating for damages. For example, in France a review of the Civil Code is being considered in order to incorporate punitive damages into liability for damages<sup>28</sup>. At the same time, the United States is undergoing a process of

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<sup>23</sup> I carried out an analysis of the application of punitive damages under Spanish labour law in BALLESTER PASTOR, “El proceloso camino hacia la efectividad y adecuación de las indemnizaciones por vulneración de derechos fundamentales”, *Revista de Derecho Social*, 69, 2015, p. 31 *et seq.*

<sup>24</sup> P. SALVADOR CODERCH, “Punitive damages”, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid*, 4, 2000, p. 139

<sup>25</sup> There are a number of studies on the differences between Anglo-Saxon common law and continental law systems in terms of allowing punitive damages. See H. KOZIOL, “Punitive damages – A European perspective”, 68 *Louisiana Law Review*, 2008; or J. GOTANDA, “Punitive damages: a comparative analysis”, 42 *Columbia Journal Of Transnational Law (2003-2004)*

<sup>26</sup> For example, EUROPEAN GROUP ON TORT LAW, “Principles of European Tort Law: text and commentary”, 2005, p. 159 (<http://www.egt.org/>) and STUDY GROUP ON A EUROPEAN CIVIL CODE AND RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), “Principles, definitions and models rules of European Private Law. Draft common frame of reference” 2009, Art. VI-6, (<http://www.copec.org/>)

<sup>27</sup> T. ROUHETTE, “The availability of punitive damages in Europe: growing trend or nonexistent concept”, 74 *Defendant Counsel Journal (2007)*, p. 320

<sup>28</sup> J. GOTANDA, “Charting developments concerning punitive damages: is the tide changing?”, 45 *Columbia Journal Transnational Law (2006-2007)*, p. 507. This author also points to the existence of judicial decisions enforcing American sentences involving punitive damages in Italy and Spain, which could be considered an implicit recognition of their legitimacy, given that an *exequatur* is only applicable where the obligation to be enforced is lawful in the executing country. Confirming the harmonisation of the American system of punitive damages and the German system, V. BEHR, “Punitive damages in American and German Law – tendencies towards approximation of apparently irreconcilable concepts”, 78 *Kentucky Law Review (2003)*, p. 148-152; In fact, in German case law, an old judgment found in favour of the dissuasive functionality of compensation for damages, as pointed out by P. SALVADOR CODERCH AND M.T. CASTIÑEIRA PALOP, *Prevenir y castigar. Libertad de información y expresión, tutela del honor y funciones del derecho de daños*, Madrid, 1997, p. 171. With regards to Spain, S.R. JABLONSKY, “Translation and comment: enforcing U.S. punitive damages awards in foreign Courts – a recent case in the Supreme Court of Spain”, 24 *Journal of Law and Commerce*, (2004-2005), p. 391. In Spain there is a very clear example of liability for punitive damages in the case of

recognition and regulatory limitation of punitive damages<sup>29</sup>, which shows that its application is an integral part of the everyday practice of its courts of justice. The resurgence of punitive damages highlights the shortcomings of the strictly compensatory system. Indeed, the advantages of punitive damages have been reinforced by globalisation and the existence of multinational companies for which compensatory damages lacked any deterrent effect given the very low number of individual lawsuits (for example within the scope of private consumption or the environment). Furthermore, because rates of compensation have ended up being pre-determined, it has made them completely foreseeable and this has consequently led to the cost of unlawful conduct being included in company strategies and ordinary company accounting. Certainly, punitive damages present some issues in terms of application, such as possible concurrence with public sanctions or even a lack of proportion that may arise when claims are filed by multiple victims (the theory of total harm)<sup>30</sup>. Yet even these problems can be solved by appropriate regulation. It is easy to see that when applying anti-discrimination Directives within the labour jurisdiction, it is typical for strictly compensatory penalties to be insufficient to deter employers from engaging in discriminatory conduct<sup>31</sup>.

Anti-discrimination Directives have touched upon the possibility for compensation for damages caused by discriminatory conduct to be included in the concept of punitive damages. This explains the wording of Article 25 of Directive 2006/54 (and its equivalents in other anti-discrimination Directives): *The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive*. It should be pointed out that anti-discrimination Directives do not say that compensation to the victim could contain the penalty (which would be recognition of the implicit deterrent effect of compensation), but rather that the penalty could include compensation to the victim. This wording suggests that the compensatory aim does not take precedent over the dissuasive aim, which enables the validity of punitive damages by themselves to be recognised. In fact, this was recently acknowledged by the CJEU in its Judgment of 17 December 2015, *Arjona Camacho* case.

The reference for a preliminary ruling that gave rise to the CJEU Judgment in the *Arjona Camacho* case was based on Article 18 of Directive 2006/54, but in order to arrive at its verdict, the CJEU interpreted Article 18 and Article 25 of Directive 2006/54 jointly. It is

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accidents at work due to an employer's failure to comply with workplace risk prevention regulations: a surcharge in social security benefits. This is a variable increase (depending on the damage and the fault of the offender) in social security benefits for the injured worker to be paid for by the employer. Regarding its hybrid, compensatory and dissuasive nature, J.L. MONEREO PEREZ, *El recargo de prestaciones por incumplimientos de seguridad e higiene en el trabajo*, Civitas, 1992, p. 86 *et seq.*

<sup>29</sup> In some American States there are ceilings for determining punitive damages (as referred to in J. GOTANDA, "Punitive damages: a comparative analysis"..., *op. cit.* p. 392). Some American States have included social benefits as part of punitive damages, establishing the obligation for part of them to be paid back to the State. For example, 75% of punitive damages should be paid back to the public treasury in the State of Georgia, MAGNUS, "Why is U.S. tort law so different?", *Journal of European Tort Law*, 102, 2010, p. 6 *et seq.*

<sup>30</sup> B. COLBY, "Beyond the multiple punishment problem: punitive damages as punishment for individual, private wrongs", 87 *Minnesota Law Review* (2003), p. 583

<sup>31</sup> This is a possibility that may hypothetically arise in any legal system, though it is not the case in the Spanish system, at least in theory. In Spanish legislation, the consequence envisaged for discriminatory dismissal (or any other form of discriminatory conduct) is annulment, not a set rate of compensation (which is provided for in the case of unfair dismissal). Even once annulment has been declared, it is possible for additional compensation to be awarded to repair the damage caused by the discriminatory conduct, if restitution were not sufficient to do so.

the only CJEU Judgment to date that has ruled on the basis of punitive damages by themselves in compensation for discriminatory conduct. The reference for a preliminary ruling was issued in light of a dismissal on discriminatory grounds of worker Arjona Camacho by her employer (the company Seguridad España SA). In addition to reinstatement, as provided for by Spanish law in the event of dismissal on discriminatory grounds or in breach of fundamental rights (Article 108 of the Regulatory Law on Social Jurisdiction<sup>32</sup>, LRJS), Spanish law allows the offender to be punished with additional payments for damages caused by discriminatory conduct (Article 183(3) LRJS)<sup>33</sup>. The trial judge<sup>34</sup> found that the dismissal was discriminatory on gender grounds, because he believed it had been proven that the real reason for dismissal was that the worker was undergoing fertility treatment. The question was asked because the trial judge believed that awarding the worker 3000 euros sufficiently compensated for the damages occasioned, in addition to reinstatement by annulling the dismissal. However, the amount of compensation sought by the worker was 6000 euros, which would exceed by 3000 euros the strictly compensatory amount of the damages caused. The trial judge asked whether this additional amount could be recognised as punitive damages, given that in this case the offender held an aggravated form of responsibility, which would justify exemplary punishment for his highly reprehensible conduct so that it would have a real deterrent effect. At first, the trial judge held that the concept of punitive damages did not exist in Spanish law<sup>35</sup>. In reality, the absence of the concept of punitive damages in Spanish law is not as clear-cut as the judgment stated, since Article 183(2) LRJS establishes that a deterrent effect must be an essential part of all compensation awarded due to a violation of fundamental rights<sup>36</sup>. In fact, the application of punitive damages in compensation in Spanish labour disputes has started to be implicitly recognised by the Supreme Court<sup>37</sup>. In any event, this was the assumption in the reference for a preliminary ruling by the Spanish Court, which sought a pronouncement by the CJEU as to whether the recognition of punitive damages was compulsory for Member States in order to guarantee real and effective compensation under the terms set out in Article 18 Directive 2006/54 (*in a way which is dissuasive and proportionate to the damage suffered*). The content of the CJEU Judgment handed down in the *Arjona Camacho* Case could be summarised as follows: (i) The judgment starts by making a thorough reference to the doctrine of the CJEU regarding the freedom of Member States to choose the instrument they deem appropriate to ensure the effectiveness of anti-discrimination Directives. The provision used as a point of reference for this doctrine was Article 6 of Directive 76/207 (current Article 17 of Directive 2006/54, which sets out the right to legal action of victims of gender-based discrimination). The characteristics of this doctrine have already been outlined above; (ii) the CJEU states, *inter alia*, that payments for damages must have compensatory and dissuasive effectiveness (with reference to the *Von Colsson* case).

<sup>32</sup> Regulatory Law on Social Jurisdiction, Law 36/2011 of 16 October

<sup>33</sup> I analysed the scope of compensation envisaged in Spanish law for violation of fundamental rights, particularly in relation to anti-discrimination Directives, in BALLESTER PASTOR, “Reparación adecuada y efectividad de la norma a través de la indemnización laboral”, Presentation at the XXVII Jornades catalanes de Dret Social 2016, Barcelona 17 and 18 March 2016, <http://www.iuslabor.org/jornades-i-seminaris/ponencies/>

<sup>34</sup> Reference for a preliminary ruling from the Juzgado de lo Social (Social Court) No 1 of Córdoba, via the ruling of 1 August 2014

<sup>35</sup> This is expressly set out in paragraph 23 of the judgment passed in the *Arjona Camacho* Case

<sup>36</sup> I set out the arguments for believing that punitive damages are recognised in Article 183(3) LRJS in BALLESTER PASTOR, “El proceloso camino...”, op. cit. p. 34 *et seq.*

<sup>37</sup> For example, Supreme Court Judgment of 13 July 2015, Court Record 221/2014. It has also been recognised by some High Courts of Justice, for example in the Judgment of the Basque Country High Court of Justice of 30 June 2015, Court Record 1136/2015

Nevertheless, it prefers not to go into the scope of the deterrent effect. It simply points out that the enactment of Article 18 of Directive 2006/54 has not changed it (paragraph 36), meaning that, at least with regards to the deterrent effect of compensation, the previous doctrine of the CJEU is upheld, which certainly never stated that it was compulsory to recognise punitive damages as an integral part of adequate compensation. It seems that this doctrine of the CJEU only considered the deterrent effect as an implicit consequence of awarding effective compensation, but without this involving additional separate sums being awarded, aimed solely at having a deterrent effect. According to the CJEU, this is how it should still be interpreted after Article 18 Directive 2006/54; (iii) Nevertheless, in the final paragraphs of its judgment, the CJEU makes express reference to Article 25 of Directive 2006/54, specifying that it is this provision that regulates punitive damages in European Union anti-discrimination legislation. It states the following in this respect: *Consequently, although Article 18 of Directive 2006/54 seeks to impose compensation or reparation for the loss and damage sustained by the person injured, it follows from the wording of Article 25 of that directive that that article grants Member States the option of adopting measures which seek to penalise discrimination on grounds of sex in the form of compensation paid to the victim* (paragraph 39). *Thus, Article 25 of Directive 2006/54 allows, but does not require, Member States to take measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex* (paragraph 40). As a result, punitive damages in compensation are not compulsory under Community law, but they are permitted for the purposes of rendering effective the penalty established in Article 25 of Directive 2006/54; (iv) There is one final point, however, that may go unnoticed in the *Arjona Camacho* Case judgment, but which is of great importance. In paragraph 44 the CJEU states that if the Member State recognises punitive damages as an instrument for punishing discriminatory conduct, such damages must guarantee the principle of effectiveness and equivalence. Punitive damages, therefore, deserve the same treatment as instruments of effective penalty as any other type of established penalty. This could implicitly mean that if the penalty (administrative and/or criminal) established within a legal system did not sufficiently guarantee the deterrent effect as set out in Article 25 of Directive 2006/54, and if the possibility of punitive damages is recognised in national legislation, they should be applied by the trial judge in order to ensure that the discriminatory conduct is adequately punished; (v) Given that the foregoing with respect to Article 25 of Directive 2006/54 has equivalence in other provisions of Directive 2000/43 and 2000/78 with regards to prohibited grounds for discrimination other than sex, the conclusions drawn from the *Arjona Camacho* case are also transferable to the latter Directives.

#### **4. THE RIGHT TO EFFECTIVE AND DISSUASIVE COMPENSATION**

Article 18 of Directive 2006/54 provides that Member States must ensure real and effective compensation or reparation, which are in turn dissuasive and proportionate. The first sentence of Article 18 of Directive 2006/54 states the following in this regard: *Member States shall introduce into their national legal systems such measures as are necessary to 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 on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered*. Thus, Article 18 of Directive 2006/54 requires compensation to be dissuasive (as well as effective). The following sentence from Article 18 of Directive 2006/54 is much more specific. It establishes the following: *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 as a result of*

*discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.*

1. COMPENSATION OR REPARATION: When Article 18 of Directive 2006/54 talks of "compensation" or "reparation" as two separate concepts, certain doubts arise as to its meaning, as in everyday language they are often used as synonyms. However, in the strict legal sense "compensation" refers to financial recompense, whereas "reparation" has a wider meaning, of eliminating unlawfulness and restoring the prior situation (or something as close to it as possible). Therefore, the concept of "reparation" includes not only financial recompense, but also restitution or restoration of the victim's rights by imposing an obligation on the offender (for example, the obligation to cease the conduct, compulsory reinstatement, etc.) As a consequence, pursuant to the wording of Article 18 of Directive 2006/54, it appears that a Member State would be in compliance where it awards financial compensation, where it imposes the obligation of restitution (obligation to do), or both together. This is because "compensation" and "reparation" appear as alternatives in Article 18 of the Directive. Before Article 18 of Directive 2006/54, the CJEU had already established that it was not necessary, for the purposes of considering whether it had been adequately transposed, for there to be restitution, since compensation, if effective, could be sufficient<sup>38</sup>.

In any case, it should be noted that the possibility for Member States to establish only one of these would only be valid if the applicable instrument met the requirements of Article 18 of the Directive (real, effective, dissuasive and proportionate). Therefore if reparation established by a Member State does not provide adequate redress for a victim of discriminatory conduct, the State should guarantee financial compensation for additional damages (particularly non-material damages), and also ensure adequate compensation if restitution of the entitlement is not possible<sup>39</sup>.

2. THE "REITERATIVE" NATURE OF ARTICLE 18 OF DIRECTIVE 2006/54: There is no difference between the objective scope of Articles 17 and 18 of Directive 2006/54. Both provisions refer to the need for Member States to establish mechanisms to ensure redress for victims, which may consist of financial compensation and/or reparation (within the full meaning of the term). The purpose of Article 18 is simply to summarise case law doctrine that had previously been created by the CJEU concerning the application of Article 6 of Directive 76/207 (right to legal action, the precursor to Article 17 of Directive 2006/54). In fact, the descriptions of compensation and reparation, as mentioned in Article 18 of Directive 2006/54 (real, effective, dissuasive and proportionate), are the same as what was required for a long time by the case law of the CJEU, which was that Member States should fulfil the right to legal action established in ex Article 6 of Directive 76/207 (current Article 17 Directive 2006/54) as above<sup>40</sup>. In case there was any doubt, the CJEU itself, in the *Pujalte Camacho* case above, expressly stated that Article 18 of Directive 2006/54 did not imply any change to the application of what

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<sup>38</sup>See CJEU Judgment of 2 August 1993, *Marschall II* case

<sup>39</sup> There are no CJEU pronouncements in this respect, though there is a considerably important one by the European Court of Human Rights, whose conclusions could also be applied within in the scope of European Union law, given that they deal with adequate redress for the victim of discriminatory conduct. In the ECHR Judgment of 19 February 2013, application 38285/09, *Garcia Mateos* case, the ECHR condemned Spain for not ensuring adequate compensation to a claimant whose entitlement could not be restored following discriminatory conduct.

<sup>40</sup>See above. See CJEU Judgment of 10 April 1984, *Von Colsson* case, and CJEU Judgment of 2 August 1993, *Marschall II* case

should be understood as adequate compensation for damages caused through discriminatory conduct.

3. REAL, EFFECTIVE, DISSUASIVE AND PROPORTIONATE REPARATION/COMPENSATION: These are the four adjectives contained in Article 18 of Directive 2006/54 that must apply to the compensation and/or reparation in order to be considered adequate. The following clarifications should be made in this regard:

(i) The scope of what should be understood by adequate compensation/reparation by applying these four adjectives should be considered in accordance with previous CJEU doctrine, given that Article 18 of the Directive merely summarises this doctrine;

(ii) The overall appropriateness of compensation/reparation should be ensured, taking into account all of the applicable measures in national legislation. It is possible for a Member State to establish a system of compensation in addition to reparation which, together, are adequate under the terms of Article 18 of Directive 2006/54 (although they would not have been in isolation). This should be ensured by national judges;

(iii) The dissuasive nature of reparation or compensation does not mean that punitive damages should be awarded as part of compensation, given that the deterrent effect of measures for transposing directives are not regulated by Article 18 but rather by Article 25 of Directive 2006/54 (*Arjona Camacho* case).

(iv) The statement in Article 18 of the Directive that reparation or compensation must be real, effective and proportionate means that it must at least serve to repair the damage caused in its entirety. The question this raises is whether this total reparation should also include moral prejudice. The CJEU has recently established, by applying Directive 2004/48, on intellectual property, that adequate compensation requires potential moral prejudice to be considered, where this is proven<sup>41</sup>. Although this judgment was pronounced outside the scope of anti-discrimination Directives, the considerations raised in this judgment as to whether complete reparation includes moral prejudice are perfectly applicable to appropriate compensation in the event of a discriminatory act.

4. NON-APPLICATION OF COMPENSATION CEILINGS. Article 18 of Directive 2006/54 expressly states that the establishment by Member States of fixed compensation in the event of discriminatory actions does not adequately comply with anti-discrimination legislation. This is in keeping with the objective of real and effective compensation/reparation as intended by the Directive, and this has for a long time been recognised by the CJEU. The final paragraph of Article 18 of Directive 2006/54 makes an seemingly more complex reference to the fact that fixed compensation would be valid *in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration*. This refers back to the case dealt with by the CJEU Judgment of 22 April 1997, *Draehmpaehl* case. In this case, the CJEU considered whether it was appropriate for States to establish fixed compensation for cases where the employer violates anti-discrimination legislation in terms of access to employment. The CJEU based its opinion on the assumption that conduct can be discriminatory regardless of whether the victim of discrimination was hired or not. However, the CJEU subsequently

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<sup>41</sup> CJEU Judgment of 17 March 2016, *Liffers* case



distinguished between both outcomes when deciding whether States could fix compensation. The CJEU concluded that, if the victim of discrimination would have been hired if there had been no discriminatory conduct in the recruitment procedure, fixed compensation could not be considered appropriate, since all of the circumstances should be considered in each case when determining real and effective damage. However, if it could be proven that the victim of discriminatory conduct would not have been hired, fixed compensation could be considered adequate insofar as the only prejudice suffered by the victim was the refusal to accept their candidacy. The findings in the *Draehmpaehl* case judgment appear to be highly specific, but it has at least two important consequences that are worth highlighting: (i) the only exception to the prohibition of fixed compensation for discriminatory conduct is compensation for access to employment where the candidate would not have been appointed. With this, Article 18 of Directive 2006/54 halts any attempt to expand the *Draehmpaehl* doctrine to other unlawful actions by employers, though there may be a certain level of homogeneity in the outcome for potential victims; (ii) Fixed compensation is only valid in the specific case where the "only" damage suffered by the candidate was the refusal to consider his/her job application, where the burden of proof falls upon the employer to show that this was indeed the only damage suffered. This in fact means that it is assumed further damages were caused, and it is up to the employer to prove otherwise. The text of Article 18 of Directive 2006/54 is, in this respect, more restrictive on the employer than the *Draehmpaehl* doctrine. This judgment only established that the burden is on the employer to prove that the applicant would not have been appointed to the vacancy, but it did not establish that the employer was responsible for proving that the only damage suffered by the applicant was that his/her job application was not considered.

5. THE EXTENSION OF THE PROVISIONS OF ARTICLE 18 OF DIRECTIVE 2006/54: Article 18 of Directive 2006/54 refers exclusively to gender-based discrimination. There are no equivalent provisions in Directive 2000/43 nor in Directive 2000/78. It is in any case difficult to know whether what is set out in Article 18 of the Directive is also applicable to other prohibited grounds for discrimination. After all, Article 18 is clearly exclusive to Directive 2006/54, against gender-based discrimination. This notwithstanding, it could be concluded that the content of Article 18 may be extended to other forms of prohibited discrimination. This is because the CJEU stated that Article 18 does not add anything new to the previous regulation (*Arjona Pujalte* case) on compensation, and this previous system for protection from discrimination is the same for all anti-discrimination Directives (Article 17 of Directive 2006/54, Article 7 of Directive 2000/43 and Article 9 of Directive 2000/78). Furthermore, it should be noted that Directive 2006/54, and even its previous version, Directive 2000/73 (gender discrimination), came after Directives 2000/43 and 2000/78 (discrimination on next-generation grounds). This is why it can hardly be said that if there were a desire for them to be assimilated into legislation against gender-based discrimination it could have been done expressly. It is difficult to arrive at the conclusion that the lack of provisions similar to Article 18 in Directives 2000/43 and 2000/78 was intentional, with the aim of preventing application of the doctrine on effective compensation that proved to be applicable to measures against gender-based discrimination.