

Legal remedies and penalties in discrimination cases (Directives 2000/43/EC and 2000/78/EC)

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Building Competence. Crossing Borders.

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I) Introduction

- Right to equal treatment and protection against discrimination is recognised (EU, Council of Europe, UN declaration of human rights, ILO conventions)
- But: Discrepancy between “having rights” and “acquiring rights”
 - Studies: “Access to justice” (EU Commission, 2009) and “Access to justice”, FRA, 2013)
- Enforcement, dependent on
 - Arrangements for procedures (legal remedies)
 - Effective penalties for discriminatory practices (penalties)

Findings of the (EU) comparative study “Access to justice” (2011)

- Effective access to law is essential for protection against discrimination
- Extra-judicial procedures (mediation, arbitration) are important, but are not an effective replacement for legal proceedings
- Barriers to access
 - Length of proceedings, legal costs
 - Burden of proof (reversal of the burden of proof has not been effectively transposed in all states)
- Penalties
 - Multiplicity of options in different Member States (under civil, administrative and criminal law)
 - Assessment by experts questioned: Penalties are too rarely effective (inter alia because penalties are too small and therefore not dissuasive)

Findings of the study “Access to justice” (2013), analysis in 8 states

- Obstacles to discrimination proceedings (including)
 - Lack of access to relevant information
 - Limited right to take action
 - Inequality of resources
 - No (appropriate) reversal of burden of proof
 - Over-lengthy proceedings, inadequate penalties
- Positive factors (including)
 - Extended right to start proceedings (e.g. for right to a collective remedy)
 - Independence of equality bodies
 - Equality bodies can impose penalties
 - Binding decisions by quasi-judicial equality bodies

II) Primary legal basis for the right to an effective remedy

Starting point:

–Directives 2000/78/EC and 2000/43/EC are intended to bestow rights

–They are addressed to the Member States (requirement for transposition which also includes enabling legal enforcement)

–Obligation on Member States to establish a system with legal remedies, Article 288 TFEU, obligation to transpose directives, see also Article 4(3) TEU, obligation on Member States to fulfil obligations under the treaties and acts of the institutions

Fundamental legal basis

–Article 47 of the Charter of Fundamental Rights, right to an effective remedy, modelled on Article 13 ECHR

–Significance for equality cases? See CJEU case C-243/2009, Fuss I (Working time directive, transfer to office duties rather than operational duties complying with the directive breaches the right to an effective remedy)

III) Right to an effective remedy - Charter of Fundamental Rights and the ECHR

Article 47 of Charter of Fundamental Rights
Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

(...)

(...)

Article 13 ECHR
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

III) The right to an effective remedy in the ECHR system

Two dimensions

–Article 1 ECHR commits the Member States in general terms to safeguard ECHR rights in an effective manner, implying also effective right to a remedy. The states have extensive obligations to implement ECHR rights

–Article 13 ECHR guarantees the right to a remedy in concrete terms

Significance in discrimination cases:

-ECtHR 30/07/2009, Application no 67336/01, Danilenkov

- Employees dismissed for trade union activities were unable to make discrimination claim against the enterprise
- Legal protection against discrimination was inadequate (fault must be proven), Russia has breached its obligation to provide protection

-ECtHR 19/02/2013, Application no 38285/09, Garcia Mateos ./ Spain

- Judgment against Spain for failure to provide remedy following discrimination against a worker on grounds of sex (breach of article 6 combined with article 14 ECHR)

IV) Systematic analysis of directives 2000/78/EC and 2000/43/EC + 2006/54/EC

	Dir. 2000/78/EC (Art.)	Dir. 2000/43/EC (Art.)	Dir. 2006/54/EC (Art.)
Legal remedy	(9) <u>Defence of rights</u>	(7) Defence of rights	(17) Defence of rights
	(10) Burden of proof	(8) Burden of proof	(19) <i>Burden of proof</i>
	(11) Victimisation	(9) Victimisation	(24) <i>Victimisation</i>
	(12) Information	-	-
	(13) Social dialogue	(11) Social dialogue	(21) <i>Social dialogue</i>
	(14) Dialogue with NGOs	(12) Dialogue with NGOs	(22) <i>Dialogue with NGOs</i>
	-	-	<u>(18) Compensation...</u>
Promotion	-	<u>(13) Equality bodies with investigatory powers</u>	(20) <i>Equality bodies with investigatory powers</i>
Penalties	<u>(17) effective, proportionate, dissuasive</u>	(15) effective, proportionate, dissuasive	(25) <i>effective, proportionate, dissuasive</i>

IV) Right to effective remedy

Article 9 Directive 2000/78/EC:

- (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.
- (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.
- (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.

IV) Compensation

Article 18 Directive 2006/54/EC:

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**. Such compensation or reparation may not be restricted beforehand 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.

IV) Penalties

Article 17 directive 2000/78/EC:

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**. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

IV) Equality bodies

Article 13 directive 2000/43/EC:

(1) Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

(2) Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

V) Focus: right to effective remedy (1)

- Arbitration procedures at the discretion of the Member States, but ...
 - legal right to effective remedy is mandatory
- Criminal law, civil law or administrative law?
 - Criminal law alone is not sufficient (see ECtHR, Danilenkov)
- CJEU rulings on national procedural law
 - Principle of equivalence (procedurally equal treatment of claims under EU or national law)
 - Effectiveness (procedural rules may not make it practically impossible to exercise rights granted under EU law)

V) Focus: right to effective remedy (2)

- CJEU Case C-246/09, Bulicke
 - Starting point: Article 9(3) of directive 2000/78/EC (time limits = at discretion of Member States, but: Equivalence and effectiveness must be guaranteed)
 - National time limit rules in the General Law on Equal Treatment [AGG] (Employment discrimination: two month time limit for bringing an action after receiving the rejection)
 - Rule is permissible as long as “that time-limit is not less favourable than that applicable to similar domestic actions in employment law”
 - Interpreted in accordance with paragraph 15(4) AGG, the two-month limit starts at the moment at which knowledge of the discrimination is acquired

V) Focus: right to effective remedy (3)

Significance of the right of associations to take legal action
(Articles 7(2) of directive 2000/43/EC and 9(2) of directive 2000/78/EC)

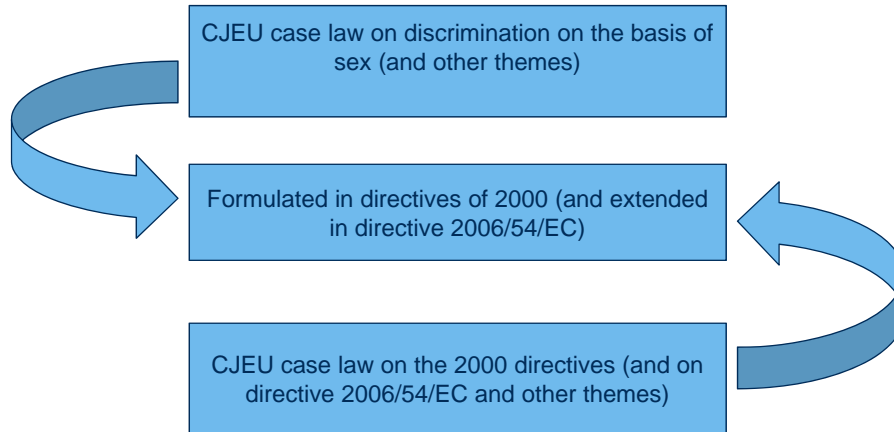
-CJEU 10/07/2008, Case C-54/07, Feryn

- Right of the “Centrum voor gelijkheid von Kansen en voor racismebestrijding” [Centre for equal opportunities and the fight against racism] to bring action under Belgian law
- Hearing for a preliminary ruling before the CJEU

-CJEU 25/04/2014, Case C-81/12, Accept

- Romanian law grants NGOs legal standing
- Hearing for a preliminary ruling

VI) Focus: effective, proportionate and dissuasive penalties



CJEU practice on discrimination on the basis of sex

- Case C-14/83, Colson and Kamann, paras 22-24, equal opportunities require suitable penalties; symbolic damages are not enough
- Case C-177/88, Dekker, para 22, liability for discrimination is not conditional on proof of fault
- Case C-271/91, Marshall, para 30, upper limit to damages is not permissible
- Case C-180/95, Draehmpaehl, upper limit to compensation of three months' pay is only permissible for cases in which the employer can show that the candidate would not have been selected for the post to be filled even if selection had been free of discrimination (now Article 18, directive 2006/54/EC)

On the proportionality of penalties

- Case C-101/01, Lindquist, paras 87 and 88 (data protection)
- C-430/05, Nttonik and Pikoulas, paras 53 et seq. (Directive on information on securities)

54 In particular, the administrative or punitive measures must not go beyond what is necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the EC Treaty (see Case C-210/91 *Commission v Greece*, paragraph 20). It is, however, for the national court to determine, in the light of the foregoing considerations, whether the penalties provided for by the applicable national legislation are proportionate.

CJEU 10/07/2008, Case C-54/07, Feryn

Facts:

- Public statement by a director to the effect that it would not use fitters of foreign origin
- Complaint made at national level by an NGO, hearing for a preliminary ruling before the CJEU

Question to the CJEU (inc.)

- What are “effective, proportionate and dissuasive penalties”? Is a legal finding of discrimination sufficient?
 - Para 38, penalties also required in discrimination cases without direct victim
 - Para 39, legal finding of discrimination and publication may suffice (among other possibilities)

CJEU 25/04/2013, Case C-81/12, *Accept*

Facts:

- Public statement by the co-owner and financier of FC Steaua Bucurest that “his” team would not employ homosexual footballers
- Officers of the club did not distance themselves from the statement
- Complaint made at national level by an NGO, CJEU hearing for a preliminary ruling

Question to the CJEU (inc.)

- Do the penalties available under national law (warning, fine with statute of limitations of six months from the “facts”, community service) meet the requirements of article 17 directive 2000/78/EC?
 - Para 62, penalties are also required in cases without a identifiable victim (confirmation of *Feryn* case law)
 - Paras 63-64: Purely symbolic penalty is not enough, but ...
 - Para 68, non-financial penalty is not automatically considered purely symbolic
 - Para 72, the national court must determine whether the six-month time limit in a case with an identifiable victim is inapplicable in light of the objectives of directive 2000/78/EC

VII) Summary

Legal remedy

- The right to an effective remedy is based on EU primary law and the ECHR
- Legal protection from discrimination is required, criminal law protection alone is inadequate
- Numerous barriers to access in practice

Penalties

-“effective, dissuasive, proportionate”

- Strict liability penalties required
- CJEU case law on sex discrimination has been incorporated into the 2000 directives
- CJEU cases *Feryn* and *Accept*: First outline of the penalties required for racial discrimination or discrimination on the basis of sexual orientation

Practical recommendations:

- Do not ignore the ECtHR path (direct appeal to the ECtHR possible, CJEU route requires lengthy route via national court + preliminary ruling)

VIII) Appendix

Notes on further reading:

–Comparative study on access to justice in gender equality and anti-discrimination law, 2011, http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/final_report_access_to_justice_final_en.pdf

–Access to justice in cases of discrimination in the EU – Steps to further equality, European Agency for Fundamental Rights, 2013.

<http://fra.europa.eu/sites/default/files/fra-2012-access-to-justice-social.pdf>

–Remedies and sanctions in EC non-discrimination law, Christa Tober, European Community, 2005, <http://bookshop.europa.eu/en/remedies-and-sanctions-in-ec-non-discrimination-law-pbKE6905496/>