Remedies and Sanctions in Sex Discrimination Cases

EU Gender Equality Law
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Discrepancy between “Having” Rights and “Acquiring” Rights at EU Level

- Special Eurobarometer Gender Equality (2017)
Main Findings at EU Level

- lack of access to relevant information
- under-reporting
- lack of raising awareness activities
- inequality of resources
- issues with shift of burden of proof
- undue delay in the proceedings
- very low compensation awarded

Right to Effective Remedy (EU Law)

- **Article 47** of the Charter of Fundamental Rights
  "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 17** of the Gender Recast Directive
- **Article 8** of the Gender Equal Access to Goods and Services Directive
Wide Range of Possible Remedies 
(at National Level)

- type of law (civil, penal, administrative)
- punitive or non/punitive character of the remedies
- purpose (backward or forward looking)
- level at which remedies are intended to operate (individual/group level)
- reflection of different theories (remedial, compensatory, punitive and preventive justice) and different concepts of equality (individual justice model, a group justice model or a model based on equality as a participation)

Leading Principles

- **Procedural autonomy**
  
  Member States are free to prescribe procedural rules and remedies
  
  (C-14/83, Von Colson & Kaman v Land Nordrhein-Westfalen).

  **Alternative Dispute Resolution** at the discretion of the Member states.

  **Criminal** and **administrative** regulations are present in some Member states (but convictions require a very much higher standard of burden of proof).

  In any case: a **remedy of judicial nature** (it may be complemented by other avenues)
Leading principles - CJEU case law

- **Effectiveness**
  Procedural requirements cannot render the exercise of EU rights impossible or excessively difficult (C-271/91, Marshall v Southampton and South West Hampshire AHA, C-180/95, Draehmpaehl v Urania Immobilienservice OHG).

- **Equivalence**
  Provisions of national law giving effect to EU rights must be no less favourable than those applicable in similar domestic causes of action (C-326/96, Levez v TH Jennings Ltd; C-63/08, Pontin v T-Comalux SA).

Right of Association to Bring an Action

- Article 7.2 (9.2) is a minimum requirement
- in some countries, domestic legislation recognises the *actio popularis* or class action (Hungary, Slovakia, Germany, Austria, Norway, Netherlands, Romania)
- so is there **an obligation to recognise a right of associations to act on their own initiative**?
- situation can arise where there is a discrimination but **no identified victim seeking redress**
- it appears not – see point 27, C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn
Sanctions

Art. 18 (14)

- effective, proportionate and dissuasive
- Directives do not define these terms – lack of clarity
- wide variance across EU in potential remedies available and levels of compensation awarded
- no single national enforcement system appears to be truly all-encompassing
- based on individualistic and remedial model – rather than a preventative one
- purpose of sanctions – to place a plaintiff in the position that they would have been in had they not suffered the wrong

Effective Sanction

- successful in achieving the desired outcome
- there is no directly effective right to specific sanction, inadequate or symbolic sanction is contrary to EU law (Von Colson)
- not dependent on proof of fault (C-177/88, Dekker)
- statutory upper limits for a discriminatory dismissal, refusing award of interest (Marshall)
- a 3 month statutory limit on compensation for job applicants subjected to discrimination (Draehmpaehl)
- national rules limiting redress if it amounted to unjust enrichment (Cotter and McDermott)
Proportionate Sanction

- balanced, in terms of the gravity, nature and extent of the loss and/or harm
- CJEU case law prior Directives
- if the compensation is chosen it must be "adequate in relation to the damage sustained"; it must therefore "amount to more than purely nominal compensation" (Von Colson) and "enable the loss and damage actually sustained...to be made good in full" (Marshall)

Dissuasive Sanction

- the aim is to deter the perpetrator so that they will desist from any further acts of discrimination (special prevention)
- sanction should dissuade others from doing likewise (general prevention)
- CJEU case law with regard to sanctions in discrimination cases (Von Colson, Draempaehl)
- the compensation must be «painful»
- it can comprise an element of punitive damages – depending on national law (C-407/14, Arjona Camacho)
Guidelines for Assessing Dissuasive Effect

- A sanction is not dissuasive if victims might be reluctant to assert their rights.
- Repeated offences might be an indication that the sanction is not having desired effect.
- Not purely symbolic sanction, but not necessarily monetary.
- It is also required in cases without direct victim.

The Role of National Judge

- Judge remains under an obligation to interpret and apply national legislation adopted for the implementation of the relevant Directives in conformity with the requirements of EU law.
- When such a national legislation does not comply with EU law, it can be disapplied by national court (claims brought by individuals against state).
Sanctions
(Solutions at National Level)

- civil remedies offering relief and redress to victims
  1. bringing discrimination to end
  2. restoring status quo ante
  3. ensuring compensation and damages for harm incurred and future loss of earnings
  4. reinstatement (unlawful dismissal from employment)
- criminal and administrative sanctions punishing the perpetrator
- forward looking, non-pecuniary remedies

Civil remedies I
Comparative Perspective

- substantive and moral damages (usually backward looking)
  - under general tort provisions (Croatia, Denmark, Hungary, France, Poland, Romania)
  - under specific provisions of the anti-discrimination legislation (Austria, Czech Republic, Germany, Spain, Sweden)
Upper limits/Ceiling

- CJEU case law – not acceptable (general rule)
- a lump sum is not in essence dissuasive (Marshall, para 32) unless the adverse effect (not being given the job) would have happened anyway, regardless of the discrimination that took place (Draehmpael, para 33)
- in case of redress of past situation, interest must be awarded (Marshall, para 32)

Upper limits/Ceiling
Comparative Perspective

- no limitation on amounts awarded as compensation (majority of national laws in EU)
- guidelines establishing limits (Supreme Court, Croatia)
- "benchmarking" sanctions in UK (3 bands)
  1. Upper band: 21025-34951 EUR (the most serious cases, a lengthy campaign of harassment)
  2. Middle band: 7008-21025 EUR
  3. Lower band: 817-7008 EUR
- three-months' salary in the event of non-recruitment (Germany)
Civil remedies II
Comparative Perspective

- orders **annulling** the discriminatory provisions of a contract or decision (Belgium, France, Romania)
- orders requiring respondents **to stop violation** and **refrain** from reoffending (Bulgaria, Hungary)
- orders to provide a **plan** to remove acts and effects of discrimination (Italy, UK)
- orders requiring a **private apology** such as a letter or publication in the media (Croatia, Hungary, Latvia, Slovakia)

Solution in Cases without Identifiable Victim

CJEU case law

- **Feryn**
  
  *Is a legal finding of discrimination sufficient?*
  
  Para 39: legal finding of discrimination and publication may be sufficient (among other possibilities)

- **C-81/12, Asociația Accept v Consiliul Național pentru Combaterea Discriminării**
  
  *Do the penalties (warning, fine with statute of limitations of 6 months from the facts, community service) meet requirements of General Framework Directive?*
  
  Para 68: non-financial penalty is not automatically considered purely symbolic
  
  Para 72: it is up to national court to decide whether six month time limit is inapplicable in the light of the General Framework Directive
Criminal and Administrative Sanctions

- A limited number of countries (administrative/minor offence)
- Punishing the perpetrator for the sake of protecting public interest (repressive nature)
- Include administrative warnings or fines, criminal fines, disciplinary measures etc.
- Issued by NBE (Cyprus, Portugal), courts (Finland, Italy, Norway) or by specialized entities (Labour or Consumer Inspectorates in the Czech Republic, Austria, Slovakia)

Forward-looking, Non Pecuniary Sanctions

- "Affirmative" equality – sanction aims to introduce systematic changes (prevention, education, raising awareness)
- Desegregation policies, reviewing recruitment policies, diversity auditing, adopting diversity policies or duty to organize equality training (UK, Ireland)
- Confiscation of property, forfeiture of the right to participate in trade fairs, suspension of licenses (Portugal)
- Exclusion from public tenders (Italy)
Issues for Further Consideration

- **Victimisation**
  C-185/97, Belinda Jane Coote v Granada Hospitality Ltd., para 24, 27
- **Multiple discrimination**
  *no explicit solution*, although different grounds can be entwined
dissuasive effect may require the sanction *to be greater* than what
it would have been if the discrimination had related to just one of
the protected grounds
- **If someone seeks only monetary compensation...**
  C-423/15, Kratzer – «abuse of rights»

**Conclusion**

- the selection of a mode of redress is a matter for the
  national court
- remedy shall ensure **real equality of treatment**, provide the same protection as an **equivalent** national
  law provision, compensate the claimant **in full**, it must be **proportionate** to the act of discrimination
  performed and **deter others** from committing similar
  acts in the future
- different solutions in the EU member states have to be
  assessed **in the context** of domestic legal frameworks
- **lack** of proactive remedies and monitoring
- **quality** of the remedies – real **commitment** to
effectively combat discrimination in our societies
Thank you for your attention!

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