

Gender equality: remedies and sanctions in discrimination cases

Jean-François Neven
Judge – Labour Court of Brussels
Lecturer at the University
of Louvain (U.C.L.) and the *Université libre* Brussels (U.L.B.)



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

Introduction and general presentation

- Texts:
 - Articles 17 to 25 of Directive 2006/54 (recast)
 - Articles 8 to 14 of Directive 2004/113 (goods and services)
 - Articles 9 to 11 of Directive 2010/41 (self-employment)
- Principles resulting from case law (C-14/83, *Von Colson and Kamann* ; C-271/91, *Marshall*,...)
- Concern for effectiveness: “*It is impossible to establish real equality of opportunity without an appropriate system of sanctions.*” (case C-14/83, *Von Colson*, § 22...)
- Important role of the general principles of the law (“sincere cooperation”, “equivalence”, “effectiveness”)
- Potential impact of the ECHR (Art. 6 and 13) and of the Charter of Fundamental Rights (Art. 47)

ERA – Gender equality – 5.XI.2018

Introduction and general presentation

	Directive 2006/54 (recast)	Directive 2004/113 (goods and services)	Directive 2010/41 (self-employment)
Nullities/compliance	Art. 23	Art. 13	---
Remedies			
- individual	Art. 17, § 1	Art. 8, § 1	Art. 9, § 1
- association	Art. 17, § 2	Art. 8, § 3	Art. 9, § 2
Sanctions, effective, proportionate and dissuasive	Art. 25 Art. 18 (reparation)	Art. 14 Art. 8, § 2 (reparation)	Art. 10 (reparation)
Protection from victimisation	Art. 24	Art. 10	---
Information and/or social dialogue	Art. 21 & 22	Art. 11	---
Body for the promotion of equal treatment	Art. 20	Art. 12	Art. 11

1. Nullities: compliance with EU law

The States shall ensure that any laws, regulations, contracts, collective agreements, internal rules of undertakings, statutes... contrary to the principles of equal treatment are *abolished/declared void/amended* (Art. 23 Directive 2006/54)

Also aimed at the judge:

- 1) Direct effect of Art. 157 TFEU; direct *vertical* effect of the provisions of a directive which, from the point of view of their content, are unconditional and sufficiently precise (notably Articles 14 and 15 of Directive 2006/54, among others *Napoli, C-595/12*)
- 2) *Levelling up*: putting the worker who has suffered discrimination back in the same situation as that of workers of the other sex, until the legislature intervenes again (et.al. C-231/06, *Jonkman*; C-417/13, *Starjakob*, § 46).



3) The judge is also bound by the principle of consistent interpretation:

"A national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary"

Recent jurisprudence:

"Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible [...] to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation" (of consistent interpretation) (case C-441/14, Dansk Industri, § 41-42).

The requirement of consistent interpretation includes, when necessary, the obligation for the courts to modify established jurisprudence if it is based on an interpretation of national law which is incompatible with the objectives of the Directive (see also Case C-68/17, IR).

ERA – Gender equality – 5.XI.2018




4) Possibility of upholding State liability for non-transposition: presupposes, in particular, a "sufficiently serious" breach

To be assessed according to:

- the degree of clarity of the infringed rule
- the margin of appreciation
- the involuntary nature of the breach
- the loss or damage
- the excusable nature of the possible error of law
- the attitude taken by an EU institution...

ERA – Gender equality – 5.XI.2018



2. Remedies


2.1. Individual remedies (Art. 17, § 1, Directive 2006/54)

Obligation for the Member States to provide for,

- a judicial procedure
- available to anyone who believes he/she has suffered discrimination
- including after working relations have ended
- possibility of providing for conciliation procedures

But “*without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment*”
(Art. 17, § 3)

ERA – Gender equality – 5.XI.2018



Procedural autonomy of the Member States in regard to the organisation of actions, but with respect for the principles of equivalence and effectiveness

Equivalence principle:

- breaches of EU law shall be penalised under conditions, fundamental and procedural, that are similar to those applicable to breaches of national law of similar nature and importance
- it is, in principle, incumbent upon the national courts to examine whether the detailed procedural rules intended to ensure, in domestic law, the safeguarding of individuals' rights under EU law comply with the principle of equivalence

ERA – Gender equality – 5.XI.2018



Effectiveness principle:

- the detailed procedural rules shall not, in practice, make it impossible or excessively difficult to exercise rights conferred by EU law
Example: regarding limitation periods for bringing actions (case C-63/08, *Pontin*).
- the principle of effectiveness does not prevent the limitation period under national law for rights based on EU law taking effect before the CJEU decision clarifying the legal position in the case (case C-417/13, *Starjakob*, § 69)

ERA – Gender equality – 5.XI.2018



2.2. Remedies for associations

“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.” (Art. 17, § 2, Directive 2006/54).

On behalf or in support of the complainant + approval

ERA – Gender equality – 5.XI.2018



However,

“Directive [2000/78] does not preclude a Member State from laying down the right for associations with a legitimate interest in ensuring compliance with that directive to bring proceedings (...) to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant.”
(Cases C-54/07, *Feryn* and C-81/12, *Accept*)

Action independent of the complainant or in the absence of an identified victim.

Some national legislations provided for an “*Actio popularis*” or a “*Class action*”

ERA – Gender equality – 5.XI.2018

3. Effective, proportionate and dissuasive sanctions

3.1. General characteristics (Art. 25 Directive 2006/54)

- Autonomy of the States regarding the choice of sanctions (civil, criminal, administrative; reparatory or “for the future”; financial, non-financial ...)
- Respect for the principles of:
 - 1) Equivalence (see above)
 - 2) Proportionality
 - 3) Effectiveness (dissuasive nature of the sanctions)
- Discretion in each case (case C-271/91, *Marshall, II*, § 25)

ERA – Gender equality – 5.XI.2018



3.2. Guidelines for assessing the dissuasive nature

- An action is not dissuasive when victims could be hesitant to assert their rights (*Accept* case, § 67)
- A second offence may indicate the absence of dissuasive sanctions (*ditto*)
- A dissuasive sanction should also be provided for even when there is no identifiable victim (*Feryn*, §§ 38 and 40; *Accept*, § 62)
- Sanctions shall not be purely symbolic but do not necessarily have to be financial
- Dissuasive nature of a simple warning? (*Accept* case)

ERA – Gender equality – 5.XI.2018



3.3. Dissuasive nature (softened?) when the Member State chooses “civil liability” for sanction rules (Art. 18 Directive 2006/54)

- Discrimination is necessarily a fault : “...when a Member State chooses a sanction forming part of the rules on civil liability, the breach of the principle of non-discrimination constitutes, in itself, a fault...” (case C-177/88, *Dekker*, § 25)
- In the case of discrimination in access to employment, the Directive does not lay down that the employer has to offer a job to the applicant discriminated against, but the reparation shall not be limited to reimbursement of the costs incurred by the application (*Von Colson* case, C-14/83): absence of true dissuasive effect
- A discriminatory dismissal may be rectified by reinstatement or by compensation making good “in full the loss and damage actually sustained as a result of the discriminatory dismissal, in accordance with the national rules” (case C-271/91, *Marshall*, II, § 26).

ERA – Gender equality – 5.XI.2018



- A lump sum compensation (or “upper limit fixed *a priori*”) is not, in principle, dissuasive (case C-271/91, *Marshall*, § 32) except “*in cases where the employer can prove that the only damage suffered by the applicant is the refusal to consider his/her job application*” (see case C-180/95, *Draehmpaehl*, § 33)
- The Directive does not require a provision for “*punitive damages*”, but does not prohibit them either (case C-407/14, *Arjona Camacho*, § 40); possible impact of the principle of equivalence, if punitive damages are available under national law in similar situations (see case C-407/14, *Arjona Camacho*, § 44)
- When it is a matter of compensating for a situation that has expired, interest must be provided for (case C-271/91, *Marshall*, § 32)

ERA – Gender equality – 5.XI.2018



3.4. Penalising multiple instances of discrimination (based on sex and another protected criterion)

- No explicit solution
- The dissuasive nature could require that the sanction be greater than what would have applied in the event of discrimination for a single motive
- However, the sanction must remain proportionate (the damage is not necessarily greater in the case of multiple instances of discrimination...)

ERA – Gender equality – 5.XI.2018



3.5. Examples of special sanctions provided for by some national legislations in cases of discrimination

- Publication of the decision (in the press or in the undertaking)
- Temporary closure of the undertaking
- Temporary suspension of the right to pursue an occupation or activity requiring a licence from the public authorities
- Reduction in subsidies
- Seizure of certain assets
- Order to cease trading (under penalty of a daily fine for delay)
- Exclusion from public works contracts...

ERA – Gender equality – 5.XI.2018



- 3.6. Sanctions and procedures which may not be abused?

Case C-423/15, *Kratzer*:

- *Application for a post for the purpose of acquiring applicant status only in order to claim compensation for discrimination*
- Outside the scope of Directive 2000/78 and not a “victim” or “person injured”
- Potentially abusive practice (for conditions see § 37-41)
- Attention to the risk of exploitative misuse of procedures
- Rather specific circumstances of the case: *refusal to hold a meeting without receiving compensation beforehand (see § 21)*

ERA – Gender equality – 5.XI.2018

4. Protection from victimisation

Objective recognised by the CJEU (before protection is provided for by the Directive): protecting the right to take legal action

- To protect against any measures that an employer could adopt in order to dissuade workers who consider themselves victims of discrimination from taking legal action (case C-185/97, *Cooté*, § 24)
- Including, against prejudicial measures that might be inflicted after the end of the employment relationship, such as a refusal to provide references (case C-185/97, *Cooté*, § 27)

ERA – Gender equality – 5.XI.2018

“Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees’ representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.” (Art. 24 Directive 2006/54)

Protection of the representatives of (or witnesses for) the victim:

- but only if they are working for the employer to whom the complaint refers?
- Directive 2006/54 > Directive 2004/113 (covering the protection of “persons” against unfavourable treatment in response to a complaint or legal action)?

ERA – Gender equality – 5.XI.2018

5. Body for the promotion of equal treatment

“Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguarding of individuals’ rights.” (Art. 20, § 1, Directive 2006/54).

Missions (Art. 20, § 2):

- Assistance to victims in pursuing their complaints
- Independent surveys and reports
- Power to make recommendations

ERA – Gender equality – 5.XI.2018

- European Commission (2010) observes obstacles to the independence and effectiveness of bodies for the promotion of equal treatment (in particular since the crisis)
- European Parliament resolution of 16 April 2013 (regarding Directive 2004/113): lack of effectiveness attributable to the absence of a real capacity to act and to a shortage of staff and financial resources
- Guarantees of independence inferior to the recommendations of the United Nations (“Paris Principles” of 1993) and of the Council of Europe (ECRI – General recommendation no. 2 – 1997: regarding racism)

ERA – Gender equality – 5.XI.2018



Conclusions

Commission Report of 17 January 2014 (regarding Directives 2000/43 and 2000/78):

“...there are still potential grounds for concern as regards the availability of remedies in practice and whether sanctions that are imposed in concrete cases comply fully with the requirements of the Directives. **The national courts appear to have a tendency to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded.**” (Com(2014) 2 final, p. 8).

ERA – Gender equality – 5.XI.2018



Thank you for your attention!

jean-francois.neven@uclouvain.be

ERA – Gender equality – 5.XI.2018