

Searching for effectiveness:

legal remedies and sanctions in cases of discrimination on grounds of gender

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Introduction

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)



Prohibition of discrimination

public and private sector

employment opportunities

vocational training

promotion

working conditions, including termination of employment

Directive 2006/54/EC

Article
17

Legal remedies

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 [...] conciliation procedures, judicial procedures [...] are available

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.

The Directive is without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment.

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Directive 2006/54/EC

Article
18

Compensation

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 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.

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Directive 2006/54/EC

Article
25

Sanctions

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.

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For comparison see Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services

Article 8

Defence of rights

judicial and/or administrative procedures are available to all persons who consider themselves wronged;

actual and effective compensation or remuneration which is dissuasive and proportionate to the damage suffered. Prior definition of the maximum amount may not restrict this compensation or remuneration. [..]

Article
14

Sanctions

The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

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For comparison see Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Article
17

The penalties comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

Sanctions

01

Legal remedies

01

Legal remedies at the discretion of Member States

The principle of the procedure autonomy is applied in the EU law regarding the rights granted by the EU, meaning that:

"[...] in the absence of Community rules governing a matter, **it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights** which individuals derive from the direct effect of Community law [...]".*

*ECJ 23.04.2009 judgement in joined cases C-378/07 to C-380/07 Kiriaki Angelidaki and others v Organismos Nomarchiakis Autodioikisis Rethymnis ([C-378/07](#)), Charikleia Giannoudi v Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou (C-380/07), Paragraph 173

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01

In designing legal remedies, the principle of equivalence and effectiveness must **be complied with**

"Procedural rules to claims for safeguarding rights which individuals derive from the direct effect of Community law must, however, be no less favourable than those governing similar domestic actions (**principle of equivalence**) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (**principle of effectiveness**)."

*ECJ 26.09.2018 judgement in case C-180/17 X and Y v Staatssecretaris van Veiligheid en Justitie Raad van State, Paragraph 35.

For this meaning, see judgements, 05.06.2014, *Kone* etc., C-557/12, Paragraph 25, and also 06.10.2015, *Târşia*, C-69/14, Paragraph 27 and the case law referred therein.

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01

Compliance with the principle of equivalence and effectiveness should be analysed jointly

"With regard to the principle of effectiveness, it must be noted that every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct, and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure"*

*ECJ 27.02.2020 judgement in joined cases C-773/18 to C-775/18 Land Sachsen-Anhal.
See for comparison *ECJ 26.09.2018 judgement in case C-180/17 X and Y v Staatssecretaris van Veiligheid en Justitie Raad van State, Paragraph 36.

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01

Compliance with the principle of equivalence and effectiveness when setting the term for bringing a claim

"For the purpose of legal certainty, setting of reasonable terms of the limitation period is compliant with the Union law.*

[..] provided that the same time limits apply to analogous claims of a purely domestic nature (principle of equivalence) and that the limitation period in issue does not render the EU rights concerned impossible in practice or excessively difficult to enforce (principle of effectiveness). "**

* an exception, for example, ECJ 01.12.1998 judgement in case Levez (C-326/96), Paragraph 34, where the national limitation period for bringing a claim was not applicable because the delay "was attributable to the fact that the employer deliberately misrepresented to the employee the level of remuneration received by persons of the opposite sex performing like work".

**Opinion of Advocate General Evgeni Tanchev of 28.03.2019, ECJ case No. C-171/18 Safeway Ltd v Andrew Richard Newton, Safeway Pension Trustees Ltd, Paragraph 27.

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01

Compliance with the principle of equivalence and effectiveness when setting the term for bringing a claim

Judgement of the Supreme Court Senate of 06.06.2018 in case SKC-79/2018

an employee submitted a claim to the court regarding a discriminating (unfair) wage on the grounds of gender by not complying with the term of three months as stipulated by Part Three of Section 60 of the Labour Law.

The employee referred to application of the term of statute of limitation of two years defined by Section 31 of the Labour Law.

The Senate denied this claim.

For comparison:

- if the "standard" wage was not paid to the employee, the limitation period would be 2 years;
- employees mainly initiate a claim with the court regarding recovery of their wages following termination of employment relationship.

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01

Legal remedies at the discretion of Member States



[A comparative analysis of gender equality law in Europe 2019](https://www.equalitylaw.eu)

<https://www.equalitylaw.eu>

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01

Legal remedies at the discretion of Member States

establishment, termination of discrimination

restoration of certain rights

restrictions in public procurements prohibition of the state aid

the right to terminate an employment contract with an immediate effect and to claim a termination benefit

compensation for moral damage

compensation for damage

administrative or criminal liability

02

Compensation

“Member States should ensure that the victim can receive *full compensation for the caused damage.**

This compensation should correspond to the caused damage.

Therefore no maximum amount may be set for such reimbursement.”**

02

Effect of the compensation for damage and harm

*See ECJ 02.08.1993 judgement, Marshall (C-271/91, Paragraphs 26, 31 and 34), as well as 17.12.2015 judgement Arjona Camacho (C-407/14, Paragraphs 33 and 37).

**See ECJ 02.08.1993 judgement Marshall (C-271/91, Paragraphs 30, 32, 34).

“the Member States must ensure that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance”*

"the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered."**

02

Effect of the compensation for damage and harm

* ECJ 11.10.2007 judgement in case Paquay (C-460/06, Paragraph 44 and the case law referred therein, ** (Paragraph 49).



02

Compensation for material damage

Section 29 of the Labour Law

If the prohibition of differential treatment and the prohibition against causing adverse consequences is violated, an employee, in addition to other rights specified in this Law, has **the right to request compensation for losses** and compensation for moral harm.

In case of dispute, a court at its own discretion shall determine the compensation for moral harm.



02

Compensation for material damage

[Law on compensation of damage caused by the state administration institutions, Civil Law](#)

Material damage:

- every detriment which can be assigned a material value
- also a damage related to reduction or elimination of damage
- includes also costs related to legal assistance;
- in calculation of material damage, also the lost profit is taken into account if the victim can prove that the profit would have been gained in the normal course of development of events.




02

Estimation of the amount of compensation for material damage

Estimation of the amount of the material damage:

- in estimating the amount of lost profit, general risks and circumstances of the particular situation affecting the probability of lost profit are taken into account;
- if an accurate amount of damage cannot be estimated, the damage as a whole or its individual constituents are evaluated;
- in assessing the damage, the overall experience and circumstances of the particular event are reasonably taken into account;
- if joint liability by the victim is established, the amount of the damage is reduced accordingly;
- the material damage caused to the victim may be compensated in the form which does not provide for payment of compensation for the damage, but restores the actual situation of the victim's property prior to causing the damage.

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02

Compensation for moral damage

Moral damage:

- infringement regarding the life, health, freedom, respect and dignity, personal or private secret, other moral rights or interests of a natural entity protected by the law resulting in unfavourable moral consequences
- In case of discrimination the moral damage is presumed. If there is a dispute, the court has the task of defining the amount of compensation.

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02

Estimation of the amount of compensation for moral damage

Definition of compensation for moral damage:

The following to be evaluated in particular:

- importance of infringed rights and interests protected by the law;
- gravity of the particular infringement (inter alia, physical and psychological restrictions, possible emotional damage related to the duration of an offence),
- legal and actual justification and motives of the action,
- the victim's participation and joint liability, as well as other substantial circumstances in the particular case.

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02

Estimation of the amount of compensation for moral damage

Definition of compensation for moral damage:

Moral damage may be compensated by restoring the status as it was prior to causing the damage, or, if this is not possible or not fully possible, or is not adequate, by begging pardon or paying a suitable reimbursement.

If in the result of assessing the circumstances of the particular case it is found that the infringement of rights or interests protected by the law is not serious, written or public begging pardon may serve as the permanent or additional compensation for moral damage.

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[Law on compensation of damage caused by the state administration institutions](#)

Article 13

Material damage [...] is usually compensated in the following amount:

- 1) if the estimated amount does not exceed 145,000 *euro*, — 100 per cent of this amount;
- 2) if the estimated amount exceeds 145,000 *euro*, but does not exceed 1,450,000 *euro*, — 145,000 *euro* plus 50 to 100 per cent of the amount above 145,000 *euro*;
- 3) if the estimated amount exceeds 1,450,000 *euro*, suitable compensation may be below 50 per cent of this amount.

02

Compensation limits?

Compensation of moral damage is set in the amount not exceeding 7000 *euro*. If serious moral damage has been caused, the compensation may be set up to 10,000 *euro*, however, if harm to life or particularly serious harm to health has been caused, the maximum amount of compensation may be up to 30,000 *euro*.

03

Sanctions

03

Sanctions

effective

preventive

commensurate

may include a compensation payment to the victim

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03

Sanctions

"Sanction in relation to the performer of discrimination must have actual preventive effect."

ECJ 10.04.1984 judgement, von Colson and Kamann (14/83, Paragraph 23).

p.s. The above judgement and following case-law has been taken into account by the Union legislator in new directives adopted in the area of equal treatment.

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03

Sanctions

"Sanctions cannot be purely symbolic and must be commensurate to the seriousness of the breaches while respecting the principle of proportionality. Sanctions may also have a punitive function."

Opinion of Advocate General Henrik Saugmandsgaard Øe of 14.05.2020 in case C-30/19 Diskrimineringsombudsmændene v Braathens Regional Aviation AB, Paragraph 60

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03

various sanctions

Ombudsman's
verification case

administrative fine

criminal liability
fine

criminal liability
community service

criminal liability
deprivation of
liberty

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Section 149¹ of the Criminal Law Violation of the Prohibition of Discrimination

For a person who commits discrimination due to racial or ethnic belonging or for the violation of the prohibition of any other type of discrimination, if substantial harm is caused thereby or it is related to violence or threat, or if it has been committed by a group of persons or a public official, or a responsible employee of an undertaking (company) or organisation, or if it is committed using an automated data processing system,

the applicable punishment is the deprivation of liberty for a period of up to one year or temporary deprivation of liberty, or community service, or a fine.



Sanctions

Section 150 of the Criminal Law Incitement of Social Hatred and Enmity

For a person who commits an act oriented towards inciting hatred or enmity depending on the gender, age, disability of a person or any other characteristics, if substantial harm has been caused thereby,

the applicable punishment is the deprivation of liberty for a period of up to four years or temporary deprivation of liberty, or community service, or a fine.



Section 161 of the Labour Law

For violation of prohibition of differential treatment in the field of employment relationships

- a warning or a fine from twenty-eight to seventy units of fine shall be imposed on the employer if it is a natural person (140-350 EUR)

- a fine from seventy to one hundred and forty units of fine - if it is a legal person (350-700 EUR)



Sanctions

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