



Remedies and sanctions in sex discrimination cases

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Main principles

- effectiveness
- proportionality
- appropriate dissuasiveness



Function

- deterring the perpetrator of discrimination and other potential perpetrators from similar acts in the future
- providing compensation to victims



Relevant legal background in EU primary legislation

1. The Treaty on the Functioning of the European Union Article 157 (1) „Each Member State shall ensure that the principle of **equal pay** for male and female workers for equal work or work of equal value is applied.”
2. The Charter of Fundamental Rights of the European Union Article 47 „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.” – *within a reasonable time, legal aid*

Relevant legal background in EU primary legislation

II.

3. Charter of Fundamental Rights Article 21 (1) „Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

4. Charter of Fundamental Rights Article 23 „Equality between women and men must be ensured in all areas, including employment, work and pay.”

Relevant legal background in EU secondary legislation

1. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) Article 17-18 and 25

2. Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services Article 8-11

Directive 2006/54/EC

Defence of rights

Article 17

1. **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.

Right to effective remedy

Possible remedies at national level

- type of law (civil, penal, administrative) – procedural autonomy
- punitive or non/punitive character of the remedies
- purpose (backward or forward looking)
- level at which remedies are intended to operate (individual/group level)
- different approaches (remedial, compensatory, punitive and preventive)

Right of association to bring an action

Minimum requirement – Directive 2006/54/EC Article 17 paragraph 2

Actio popularis or class action (Hungary, Slovakia, Germany, Austria, Netherlands, Romania)

Is there an obligation to recognise a right of association to act on their own initiative?

What is the situation where there was discrimination but no identified victim seeking redress?

(C-507/18 NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford)

Directive 2006/54/EC

Compensation or reparation

Article 18

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.

Directive 2006/54/EC

Penalties

Article 25

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.**

Sanctions at national level

I. civil remedies

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)

II. criminal and administrative sanctions punishing the perpetrator

III. forward looking, non-pecuniary remedies

C-14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen

- it is impossible to establish real equality of opportunity without an appropriate system of sanctions
- BUT! full implementation of the directive does not require any specific form of sanction for unlawful discrimination,
- HOWEVER, the directive does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover, it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

C-271/91 M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority

- in the event of discriminatory dismissal [...] a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained.
- where financial compensation is the measure adopted [...], it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full.
- fixing of an upper limit of financial compensation [...] cannot, by definition, constitute proper implementation of the directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation [...].

C-81/12 Asociația Accept v Consiliul Național pentru Combaterea Discriminării

- a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.
- **HOWEVER**, the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages.
- inappropriate: sanctions adopted are not genuinely dissuasive; may also take account, where appropriate, of any repeat offences of the defendant concerned.

C-441/14 Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen

- EU law is to be interpreted as meaning that 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 to the general principle prohibiting discrimination on grounds of age.
- the principles of legal certainty and the protection of legitimate expectations can not alter this obligation.

C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España SA*

- in the absence of a provision of national law making possible the payment of punitive damages to a person injured by discrimination on grounds of sex, Article 25 of Directive 2006/54 does not provide that a national court can on its own require the person responsible for the discrimination to pay such damages.

Special implications for the judiciary

Effectiveness

- Enforceable decision (e. g. reasonable accommodation)

Setting aside of national statutory or case law not complying with the EU standard

- Marshall – upper limit of sanctions
- Dansk Industri – deviation from existing case law (e. g. too low compensation for non-pecuniary damages)

Boundaries of judicial interpretation:

- binding claims of the parties
- Camacho – no new sanctions
 - But: creative interpretation of law



Thank you for your kind attention!

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