



Diskriminerings
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Sanctions and Damages in EU Non-Discrimination Law

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"It is impossible to establish real equality of opportunity without an appropriate system of sanctions"

Case 14/83, von Colson and Kamann, p. 22

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Two main duties of MS under EU non-discrimination legislation

Protecting against infringements

General duty to provide effective, proportionate and dissuasive sanctions for the effectiveness of EU-law (the directives)

Focus: providing sanctions that can prevent infringements

Logic: punitive (proportionate to infringement)

Key words: dissuasion, effective protection

Providing relief for victims

General duty to secure adequate reparation and compensation to victims of discrimination

Focus: providing effective remedies for victims

Logic: reparative (proportionate to damage)

Key words: reparation, remedies, damages, access to justice

Main interests of prevention and reparation in EU non-discrimination law

Protection of primary right
(not to be discriminated against)

Individual prevention

General prevention

Dissuading infringer from future infringements

Dissuading other infringers from future infringements

Protection of secondary right
(to reparation if discriminated)

Satisfaction

Compensation

Declaration of infringement

Reparation for damages

The obligation to provide for sanctions

"It should be observed that where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law."

Case 66/88, Commission v. Greece, p. 23

The obligation to provide for sanctions

"For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."

Case 66/88, Commission v. Greece, p. 24

The obligation to provide for sanctions

Article 25 Dir. 2006/54/EC (Recast)

“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.”

And: Article 15 Dir. 2000/43/EC (Race), Article 17 Dir. 2000/78/EC (Framework), Article 14 Dir. 2004/113/EC (Goods and Services)

The obligation to provide for sanctions

NB, national law must provide for sanctions for infringements even in the absence of an individual victim:

“sanctions being required, in accordance with Article 17 of Directive 2000/78, to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party”

Case C-507/18 [GC] Associazione Avvocatura per i diritti LGBTI, p. 64

And: Case C-81/12 Accept, p. 62 and 63, Case C-54/07, Firma Feryn, p. 38 and 40

The obligation to provide for sanctions

Type of sanction highly contingent on context!

"If it appears **appropriate to the situation at issue** in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, **where appropriate, a fine**. They may, moreover, take the form of the award of damages to the body bringing the proceedings." Case C-54/07, Firma Feryn, p. 39

The obligation to provide for sanctions

Must be FOR the infringement (voluntary payment when discrimination is contested deprives sanction of effect – importance of an admission of guilt or a finding of discrimination)

"[...] the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination by inducing him or her not to repeat the discriminatory behaviour and thereby preventing further discrimination on his or her part where, as in the present case, he or she contests the existence of any discrimination." Case C-30/19, Braathens Regional Aviation p. 39

The obligation to provide for sanctions

Must be commensurate to seriousness of breach + genuinely dissuasive but still be proportionate.

“The severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect ... while still respecting the principle of proportionality”

Case C-81/12, *Accedit*, p. 63

The obligation to provide for sanctions

A sanction cannot be purely symbolic in nature:

“In any event, a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78.”

Case C-81/12, *Accedit*, p. 64

The obligation to provide for sanctions

No requirement that sanction be pecuniary. Combined effects should be considered:

”It is true that 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.

Case C-81/12, *Accept*, p. 68

The obligation to provide for sanctions

BUT a lighter form of sanction is not ok should the classification not be commensurate to the infringement.

“Furthermore, if it were the case that, as *Accept* argues, the sanction consisting in a warning is generally only imposed in Romanian law for very minor offences, that fact would tend to suggest that such a sanction is not commensurate to the seriousness of a breach of the principle of equal treatment within the meaning of that directive.”

Case C-81/12, *Accept*, p. 70

The obligation to provide for sanctions

... or the options for to bring proceedings are not effective in practice:

“those with legal standing to bring proceedings might be so reluctant to assert their rights under the national rules transposing Directive 2000/78 that the rules on sanctions adopted in order to transpose that directive are not genuinely dissuasive.”

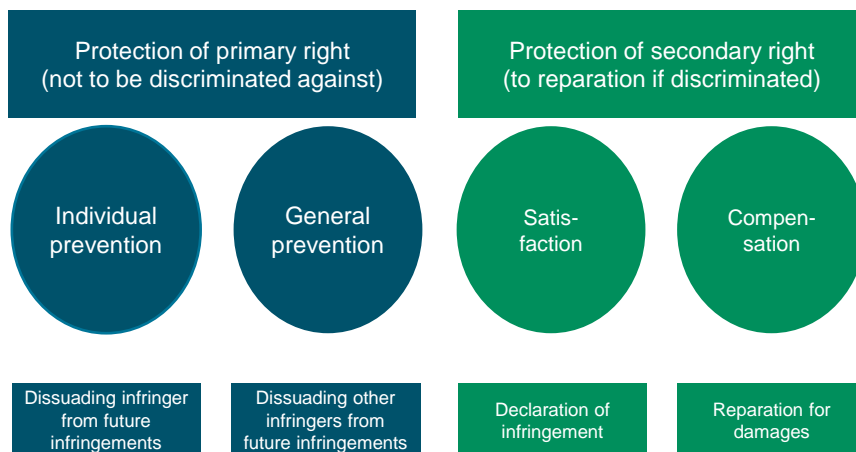
Case C-81/12, *Accedit*, p. 67

Summary: The obligation to provide for sanctions

Stemming from the duty of loyalty to secure effectiveness of the protection provided for in the Directives. No specific requirement as to form, but must be:

- Genuinely dissuasive (not only symbolic + FOR infringement)
- Commensurate to the infringement (not treated as minor offences)
- Proportionate (not more harsh than necessary)
- Equivalent (to national sanctions in analogous situations)
- Accessible (to victims and other interested parties w standing)

Main interests of prevention and reparation in EU non-discrimination law



The obligation to provide a remedy for victims

Article 47.1 EU 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.”

See also:

Article 7, Dir. 2000/43/EC (Race)

Article 9, Dir. 2000/78/EC (Framework in Employment)

Article 8, Dir. 2004/113/EC (Goods and Services)

Article 17, Dir. 2006/54/EC (Recast)

The obligation to ensure damages to victims

Article 18 Dir. 2006/54/EC (Recast)

"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."

And: Article 9 Dir. 2004/113/EC (Goods and Services)

(No corresponding provisions in Dir. 2000/78/EC [Framework] and Dir. 2000/43/EC [Race])

Remedy must make it possible to establish discrimination

Article 47.1 EU Charter of Fundamental Rights

"[...] the payment of a sum of money is insufficient to meet the claims of a person who seeks primarily to obtain recognition, by way of compensation for the non-material damage suffered, of the fact that he or she has been the victim of discrimination, meaning that the payment cannot, for that purpose, be regarded as having a satisfactory compensatory function [...]"

Case C-30/19, Braathens Regional Aviation p. 39

Sanction in the form of damages?

Can damages constitute a sanction?

Yes... at least in part, if chosen by MS:

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

Article 17 Dir. 2000/78/EC (Framework)

Article 15 Dir. 2000/43/EC (Race)

Article 14 Dir. 2004/113/EC (Goods and Services)

Article 25 Dir. 2006/54/EC (Recast)

Sanction in the form of damages?

Can damages constitute a **dissuasive** sanction?

- Yes... if part of a package which includes other punitive measures (e.g. publication of a warning in Accept etc) and which viewed as a whole functions dissuasively.
- Yes... if the damages contain a punitive element and the total amount works as a deterrent.
- Yes... in some cases where there are no other punitive elements or measures, but the actual loss is so high that the amount awarded in damages will *de facto* be dissuasive.

Sanction in the form of damages?

Does “dissuasive” damages mean anything else than full compensation?

“Article 18 of Directive 2006/54 requires Member States which choose the financial form of compensation to introduce in their national legal systems, in accordance with detailed arrangements which they determine, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained, but does not provide for the payment of punitive damages.”

Case C-407/14, Camacho, p. 37

Sanction in the form of damages?

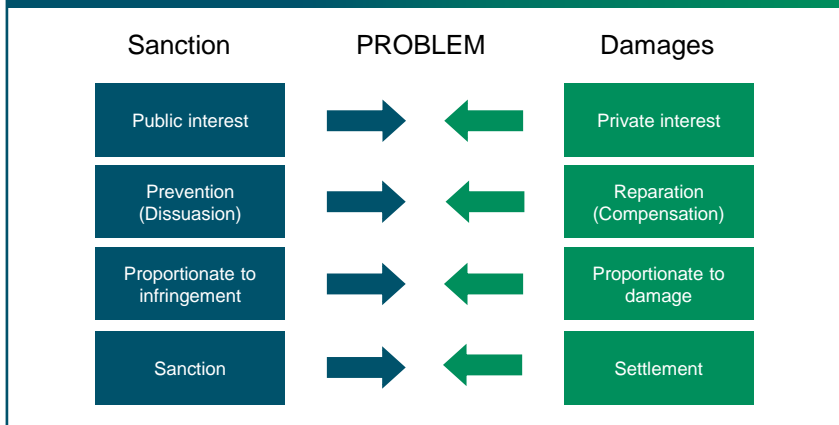
Is it enough for a MS to only provide for damages as sanctions?

No... since there is a duty to provide sanctions in cases where there is no identifiable victim.

No...since in many cases involving structural infringements the amount of damages awarded will not be dissuasive in relation to nature of the infringement.

No...since in many cases involving structural infringements there will be private settlements which may run counter to the preventive interest (contingent on the amounts and eventual absence of publicity).

Mixing the logic of sanctions and damages?



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Summary

Sanctions

- Sanction FOR infringement (importance of admission/finding of discrimination if contested)
- Genuinely dissuasive (not only symbolic in nature)
- Commensurate to the infringement (not treated as minor offences)
- Proportionate to infringement (not more harsh than necessary)
- Equivalent (to national sanctions in analogous situations)
- Accessible (to victims/interested parties)

Damages

- Compensation FOR infringement (importance of admission/finding of discrimination if contested)
- Cover full loss and damage
- Proportionate to the damage suffered (not more than full comp.)
- Equivalent (to national damages in analogous situations)
- Accessible (to victims)

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