

EFFECTIVE SANCTIONS AND REMEDIES IN EU GENDER EQUALITY LAW

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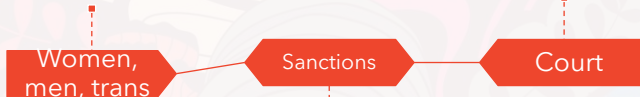
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A practical, bottom-up assessment with emphasis on Hungarian law and practice

When is the law used
against sex
discrimination?

What should judges
do to ensure their
access to justice?



What do plaintiffs
want to achieve?

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- Key dilemmas:
 - Discrimination is embedded in prejudice and stereotypes held by society at large and legal tools seem inefficient to tackle them
 - Discrimination is structural and institutional but proceedings tend to focus on individual incidents and plaintiffs.
 - The law lacks the means to prevent discrimination from recurring
- Outstanding issues:
 - existence/sum of non-pecuniary damages,
 - deterrence,
 - how to avoid levelling down
- What do plaintiffs want to achieve?
 - Individual goals: recognition of harm, apology, compensation,
 - Structural change: (not) changing work practices (NB: men challenging positive action), deterrence from future wrongdoing

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Have you encountered difficulties in sanctioning sex discrimination?

To what degree does your national law and practice comply with EU standards on sanctions and remedies?

Fully, largely, partially, not at all?

What are these standards?

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- „For the application of effective, proportional and dissuasive sanctions, the applicant is better to submit the case to a court of law (instead of, or after, the procedure at the equality body). Hungarian anti-discrimination legislation makes it rather difficult and time-consuming for women to seek effective, proportionate and dissuasive penalties under the Equal Treatment Act (with the exception of (1) a fine (EUR 140 to EUR 16 700); and (2) publishing the decision).”
- „It seems to be an unbreakable practice of many employers to dismiss pregnant women once pregnancy is reported to the employer during the probation period. Employers often attempt to take advantage of the fact that the Labour Code does not oblige them to give a reason for a dismissal during a trial period. However, recent case law of the national courts and the equality body point out that the reason for a dismissal may never be discriminatory in nature despite the fact that there is no obligation to justify a dismissal during a trial period.” This indicates positive change attributable to EI anti-discrimination law.

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When is the law used against sex discrimination in Hungary?

1. Equal pay cases
2. Dismissal due to pregnancy during trial period
3. Harassment
4. Domestic violence

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- High profile harassment cases
- Hate speech!crimes
- Challenges against occupational segregation
- Challenges by men against positive action measures tailored for women - latest: Test Achats
- Trans cases relying on sex as a protected ground - list of protected grounds is broader than in EU law, yet if preliminary referral is made, the ground matters because of the varied legal basis in EU law (different for sex and sexual orientation)
- In early 2010s the number of complaints not specifying a protected ground or indicating ‚any other ground’ grew steadily: need to identify if the ground is sex, need to identify bogus discrimination claims that seek to benefit from BoP provision

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When is the law not used against sex discrimination in Hungary?

The role of trade unions, non-governmental organisations, public authorities (e.g. consumer protection, equality body):

TUs do not support large scale equal pay cases (such as Danfoss, Enderby).

Few consumer challenges in comparison to other countries (such as Czechia).

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Country reports

[e Commission issues opinion on merging the Equality into the Ombudsman's Office \(102 KB\)](#)

[Hungary - Country report non-discrimination 2021 \(1,88 MB\)](#)

Transposition and implementation at national level of Council Directive 2000/43 and 2000/78 - State of affairs 1 January 2021

Compliance with EU ADL regarding sanctions

1. Legislation largely compliant or goes beyond EU standards : civil/labour, criminal and administrative sanctions
2. Judicial and administrative practice improving on quantum of damages and fines, as well as injunctive relief mandating structural/institutional change

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- Labour Code Article 12(1): In connection with employment relationships, such as the remuneration of work, the principle of equal treatment must be observed. Remedying the consequences of any breach of this requirement may not result in any violation of, or harm to, the rights of other workers.
- Civil Code: Section 2:51: (1) (a) finding of discrimination, (b) order to discontinue discrimination and refrain from it in future; (c) order to provide adequate redress in public; (d) termination of discrimination and in integrum restitutio; (e) handing over the financial asset acquired through discrimination.
- Civil Code Section 2:52: (1) A discriminated person, may claim a grievance fee (sérelemdíj) for the non-pecuniary damage suffered. (2) The provisions pertaining to damages shall be applied with the difference that the claimant shall not be required to prove any further damage beyond the occurrence of discrimination. (3) The amount shall be determined in one sum, considering the gravity of discrimination, whether it was committed on one or more occasions, the degree of responsibility, its impact on the victim and his environment

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Hungarian law going beyond EU ADL

1. Labour Code: levelling down pay of more favourably treated group is prohibited
2. Civil Code: detailed regulation of non-pecuniary damages, broad range of other sanctions, such as injunctive relief, apology
3. Equal Treatment Act (Article 17/A): equality body has wide ranging sanctioning powers similar to those in Civil Code + fines

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- Labour Code Article 82(1): The employer shall be liable to provide compensation for damages resulting from the wrongful termination of an employment relationship. (2) Compensation for loss of income from employment payable to the employee may not exceed twelve months' absentee pay.
- Old Civil Code Article 84: 'if the amount of damages is insufficient to mitigate the gravity of the actionable conduct, the court shall also be entitled to penalise the person having violated personality rights by ordering them to pay a fine to be used for public purposes.' This fine was payable to the state. In a number of actio popularis lawsuits, the courts imposed public interest fines.
- After judgment in the Gyöngyöspata case, the National Public Education Act was amended in 2020. Article 59(4) now reads: 'If the educational institution violates the inherent personal rights of a student in relation to education, the Civil Code's provisions regarding moral damages shall be applied with the difference that **the moral damages shall be granted by the court in the form of educational or training services.** The educational or training services granted by the court can be either provided or purchased by the violator.' – subject of infringement action

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Non-compliance with EU ADL

1. Capped damages for discriminatory dismissal
2. No damages for representative claimants
3. Regression since transposition:

A, public interest fine no longer available under 2013 Civil Code

B, no compensation for discrimination in education

C, equality body's independence and performance deteriorating

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- Article 47 CFREU: Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal ... Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal ... Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
- Article 157 TFEU - equal pay and positive measures, but no provision on remedies
- Directive 2004/113/EC - gender equality regarding goods and services, Articles 8 to 11
- Directive 2006/54/EC (recast) - equal treatment directive, Articles 17 to 20, 25 (penalties may comprise the payment of compensation)

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Key principles, relevant EU primary and secondary law

Principles:

- effectiveness,
- proportionality,
- dissuasiveness

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- Directive 2006/54/EC Article 18 Member States shall introduce ... measures ... 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.
- Marshall II (C-271/91): 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 ...
- Draehmpaehl, C-180/95: Upper limit of three month's salary not adequate, if the applicant was the best qualified. Could be adequate, if the applicant would not have been given the job also without discrimination.

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Outstanding issues, EU law & jurisprudence

Cap or upper limit on compensation

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- Once sex discrimination is established, should remedy level up or down?
- Does the discriminated claimant have a right to be treated in a more advantageous manner?
- • Jonkman (2006), case pertaining to equal pay:
- • Levelling up, if the criteria determining the amount of pay have not changed, i.e. more pay must be given to the discriminated person(s)
- • If the conditions have changed, any direction is possible: higher / lower pay to all workers

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Outstanding issues, EU law & jurisprudence

Levelling down: not absolutely prohibited

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- Feryn C-54/07
- No person effected in concrete case (racially discriminatory job advertisement), yet sanctions must be imposed.
- Feryn can be invoked to award damages to representative plaintiffs but also to impose injunctive relief.
- Sanctions have to be effective, proportional and dissuasive even if there is no concrete victim.
- Proposals for appropriate sanctions:
- • Finding of discrimination by the court in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant
- • Prohibitory injunction - in case necessary with fine
- • Damages to the (equality/administrative) body bringing the proceedings

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Outstanding issues, EU law & jurisprudence

Availability/sum of non-pecuniary damages - all EU anti-discrimination directives include a provision on sanctions and remedies, which stipulate that sanctions MAY include compensation.

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- No proof of fault can be required from claimant in order to sanction discrimination Decker C-177/88: Violation of the prohibition of discrimination has to be sanctioned in a way that is adequate to guarantee real and effective protection and to have a real deterrent effect on the employer. Once making the liability for infringement dependant on proof of a fault or the non-existence of a ground of exemption the practical effect of those principles would be weakened considerably.
- Proportionality ACCEPT C 81/12: finding discrimination is insufficient.
- Arjona Camacho, C-407/14 (pecuniary damage EUR 3.000) Member States have to take measures necessary to ensure real and effective compensation or reparation. **Dissuasive effect does not necessarily mean that punitive damages have to be foreseen.** Punitive damages are possible, if the concept forms part of the national legal system.

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Some useful pointers from caselaw

Proof of fault not necessary to sanction discrimination

Sanctions cannot be merely symbolic

Punitive damages or other means (familiar in national legal context) to make sanctions dissuasive

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- Compensation without a finding of discrimination? Braathens Regional Aviation AB, C-30/19
- Additional security check for person presumed to be an Arab and/or Muslim by airline. Airline was ready to pay for compensation but without admitting any form of discrimination
- Articles 7 and 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding a national law which prevents a court that is seized of an action for compensation based on an allegation of discrimination prohibited by that directive from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination. It is for the national court hearing a dispute between private persons to ensure, within its jurisdiction, the judicial protection for litigants flowing from Article 47 of the Charter of Fundamental Rights by disapplying as necessary any contrary provision of national law.

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Can you deliver a judgment without a finding of discrimination?

No, you must first establish legal ground and then order sanction

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- EU law does not require national regimes to provide new legal remedies, but the equivalence of remedies afforded under EU and national law, as well as the practical applicability of rights arising from EU law must be ensured.
- The ECJ considers the effectiveness of legal remedy to be of utmost importance in sex discrimination cases. It required national courts to ignore effective pieces of legislation (both substantive and procedural provisions) that limited the claimant's ability to enforce her claim. This applied to the principle of unjust enrichment in Cotter, to the upper limit of damages in Marshall II, and to the deadline for taking legal action in Emmott.
- According to Craig and De Búrca, the prevailing doctrine is that the ECJ expects national courts to analyse the limiting national legal rule pertaining to the case from the perspective of proportionality, and to ignore any such provisions if necessary to ensure the application of EU law.

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What can judges do to ensure access to justice?

Interpreting national law in light of EU law
 Disapplying national law
 Making preliminary referral/constitutional challenge on questions regarding sanctions and remedies

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Which power to use?

1. Capped damages for discriminatory dismissal - interpretation, referral
2. No damages for representative claimants - interpretation, referral
3. Regression since transposition:
 - A, public interest fine no longer available under 2013 Civil Code - referral
 - B, no compensation for discrimination in education - disapplying Public Education Act and deciding under Civil Code or referral, e.g. in a case of harassment against female/trans students
 - C, equality body's independence and performance deteriorating - length of proceedings, deteriorating quality of decisions, fewer findings of discrimination, most can be addressed in JR

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Challenges for HU judges in sex discrimination cases

Interpreting national law in light of EU law
 Disapplying national law
 Making preliminary referral/constitutional challenge on questions regarding sanctions and remedies

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Thank you for your attention!

- Be inspired by ground-breaking judgments, like these:
 - judgment No. 27.P.20.939/2020/44 of 4 October 2021, ERRC v Ministry of Human Capacities, [083-HU-ND-2021-1st instance judgment removal of romani children \(equalitylaw.eu\)](#)
 - SOS Racisme and FGBT v Adecco, damages in representative claim, [FLASH REPORT \(equalitylaw.eu\)](#)
 - 12 plaintiffs (mothers caring for severely disabled children at home) v Ministry of Human Capacities, [Megnyertük az otthongondozó anyák és gyermekeik perét az állam ellen | TASZ](#) HUF 5 million per person + order to house plaintiffs.

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