


Seeking effectiveness: remedies and sanctions in sex discrimination cases

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- “It is impossible to establish real equality of opportunity without an appropriate system of sanctions.”
- Although “full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it 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.”
- (CJEU, Judgment of 10 April 1984, *Sabine von Colson*, 14/83, paras 22 and 23)

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“Constitutional” Basis

- Article 47 of the 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 [...]”



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Legal Basis

- 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)

Recitals

(6) [Harassment and sexual harassment] should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

(33) It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

(35) Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.

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Legal Basis

- **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)**
- **Article 18 (Compensation or reparation)**

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.

- **Article 25 (Penalties)**

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**.

- **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**
- **Art. 8/2** 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 within the meaning of this Directive, in a way which is **dissuasive and proportionate** to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.

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The terms

Effective, proportionate and dissuasive

Effectiveness: producing the desired effect for the victim (compensation of damages), resulting in a punitive and preventive effect for the perpetrator and implementing the objective of EU law

Proportionality: extent of damage and loss suffered by the victims reflected in the sanction or remedy foreseen in a way that is appropriate

Dissuasiveness: deterring the infringer as well as others from discrimination (preventive effects).

Cf. Wladasch, K. The Sanctions Regime in Discrimination Cases and its Effects, Equinet 2015

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Sanctions / Penalties

- broader meaning: includes both sanctions in the strict sense (criminal or administrative law, focusing on the perpetrator) and remedies / compensation (focusing on the victim).

- beyond public / private law divide (both interlinked)

E.g. a purely symbolic sanction not compatible X 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

(CJEU, Judgment of 25 April 2013, *Asociația Accept*, C-81/12, paras 64, 68)

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Actions brought by the third party (NGO or equality body)

- where necessary, includes 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.

- (CJEU, Judgment of 10 July 2008, *Feryn*, Case C-54/07, para 39)

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Possible sanctions across Europe

- the obligation to stop discriminatory practises
- reinstatement in situation without discrimination,
- compensation for material damages,
- compensation for immaterial damages (e.g. Spain: presumption of those damages),
- non-compliance penalty,
- declaration of the act as void etc.

The "name and shame" sanctions, such as

- publication of decision (at the expense of the defendant)
 - publication of the apology of the defendant
- etc.

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Decentralized judicial review as a condition for effectiveness of EU antidiscrimination law

41. ... where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category

42. Such an obligation is incumbent not only on the national courts but also on all organs of the State, including the national administrative authorities responsible for applying such arrangements

recently see e.g. CJEU, Judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)*, C-113/22, paras 41 and 42

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A special approach to non-complying Member States

- where an application for the grant of a pension supplement submitted by a male scheme member has been rejected by the competent authority, under national legislation limiting the grant of that supplement to females scheme members only, whereas that legislation constitutes direct discrimination on grounds of sex, within the meaning of Directive 79/7, as interpreted by the Court of Justice in a preliminary ruling delivered prior to the decision rejecting such an application, the national court hearing an action against that decision must instruct that authority not only to grant the pension supplement claimed to the person concerned, but also to pay him compensation enabling the loss and damage actually sustained by him as a result of the discrimination to be made good in full, in accordance with the applicable national rules, including costs and lawyers' fees which he has incurred in court, where that rejection decision was adopted in accordance with an administrative practice of continuing to apply the aforementioned legislation despite that preliminary ruling, thereby obliging the person concerned to assert in court his right to that supplement.
- CJEU, Judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)*, C-113/22, para 62

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The full compensation principle X national procedural rules relating to the lawyers' fees

- It is irrelevant in that regard that, as that court has pointed out, it is not possible, under the Spanish procedural rules relating to employment law, for it to order the body responsible for the discrimination at issue in the main proceedings to pay the costs, since the compensation covering the costs and lawyers' fees does not fall within such procedural rules, but forms an integral part of the full compensation of the person ...
- CJEU, Judgment of 14 September 2023, *TGSS (Refusal of the maternity supplement)*, C-113/22, para 60

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Case law examples –the Clerc method (*méthode Clerc*) in France

- Calculation of damages in discrimination cases
- a group of employees who do not have the characteristics on the basis of which discrimination has allegedly occurred needs to be established to demonstrate that they have experienced a more favourable development, or have not been subject to arbitrary decisions related to the prohibited ground, as compared to the plaintiff.
- **To establish the damage**, certain information from the members of this group is collected (working contracts, pay slips, annual evaluations, or number of trainings) and modelled on a graph. The compensation is then calculated by dividing by 2 the difference in remuneration between the average remuneration of non-discriminated employees and the remuneration of the discriminated employee, multiplied by the number of months the discriminatory act lasted. To this amount, to compensate for the prejudice to future pension entitlements caused by the lower salary, a 30% is added. The amount can be further increased to compensate for non-pecuniary damage

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Case law examples - France

- “Whereas, ... **any dismissal pronounced against an employee due to her state of pregnancy** is void; that, since such a dismissal characterizes an attack on the principle of equal rights between men and women, guaranteed by paragraph 3 of the preamble to the Constitution of October 27, 1946, the employee who requests her reinstatement has **the right to payment of compensation equal to the amount of remuneration that she should have received between her eviction from the company and her reinstatement, without deduction of any replacement income from which she may have benefited during this period**”
- *Cour de cassation, civile, Chambre sociale*, judgment of 29 January 2020, 18-21.862
- <https://www.legifrance.gouv.fr/juri/id/JURITEXT000041551222>

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Case law examples - Czechia

- Where there has been discrimination while hiring employees, the victim cannot successfully seek to remedy the effects of the discrimination by ordering the employer to hire the employee.
 - Judgment of the Supreme Court of 18 December 2014, No. 21 Cdo 4429/2013
 - X Constitutional Court of Czechia: “For the sake of completeness, the Constitutional Court adds that it is not for [the ConCourt] to assess whether the solution chosen by the Supreme Court is the best and most effective possible solution. For example, it is theoretically conceivable that the elimination of the consequences of discrimination by concluding an employment contract would be possible in certain specific cases where discrimination is demonstrably the only reason for not being hired and, but for it, the applicant would certainly have been successful. However, this is only a hypothetical question which the Constitutional Court cannot deal with now, since the complainant was not in such a situation according to the findings of fact of the general courts.”
 - (Resolution of the Constitutional Court of 19 February 2021, No. II. ÚS 1148/20, para 24)

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Case law examples - Czechia

- Just satisfaction may consist, for example, in an apology by the employer to the employee whose rights have been infringed, made in an appropriate (reasonable) manner and form, or in another manifestation by the employer to the employee in which the employer makes it clear that it acknowledges that its conduct has violated the employee's rights and obligations under equal treatment or discriminated against the employee.
- Since the employer, and not the court, provides just satisfaction to the employee, the employee cannot seek to obtain that satisfaction via the court's verdict that the employer discriminated against the employee
- Judgment of the Supreme Court of 18 December 2014, No. 21 Cdo 4429/2013

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Czech Civil Code and Discrimination

§ 2957

The manner and amount of appropriate compensation must be determined in such a way as to compensate for the special circumstances. These are the deliberate infliction of harm, in particular the infliction of harm by means of deceit, threats, abuse of the victim's dependence on the wrongdoer, multiplying the effects of the interference by making it public, or as a result of discrimination against the victim on grounds of his or her sex, state of health, ethnic origin, religion or other similarly serious grounds. The victim's fear of loss of life or serious damage to health shall also be taken into account if the threat or other cause gave rise to such fear.