

Remedies and sanctions in sex discrimination cases

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Montesquieu wrote in the Spirit of Laws: „*In the state of nature people are born equal, but they cannot remain so, and only the laws make them equal again.*”

Earl Warren, Chief Justice of the US Supreme Court: there is “*an invidious view which is now held by many: you can’t wipe out racial discrimination by law, only through changing the hearts and minds of men. This is a false credo. True, prejudice cannot be wiped out, but infliction of it upon others can.*”

Essential role of the law in reducing the number of actions stemming from – conscious or unconscious – prejudices, fulfilled through sanctions and remedies

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Main principles

- effectiveness
- proportionality
- appropriate dissuasiveness

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Function

- deterring the perpetrator of discrimination and other potential perpetrators from similar acts in the future – primary function: legal protection. General and special prevention.
- providing compensation and reparation to victims – secondary function

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Relevant legal background in EU primary legislation

I.

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*

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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.”

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Charter of Fundamental Rights

Article 51 Field of application


1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

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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**
 - **Former:** Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions – in effect until 14 August 2009. – repealed with effect from 15 August 2009 by the new one
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**

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Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC

This Directive lays down a framework for putting into effect in the Member States the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, or contributing to the pursuit of such an activity, as regards those aspects not covered by Directives 2006/54/EC and 79/7/EEC.

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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.

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Right to effective remedy

Possible remedies at national level – in any case: a remedy of judicial nature! (it may be complemented by other avenues)

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.

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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Possible remedies at national level:

- **type of law** (civil, penal, administrative) – procedural autonomy (+ ADR)

BUT effectiveness – procedural requirements cannot render the exercise of EU rights impossible or excessively difficult (C-180/95) and **equivalence** – provisions of national law giving effect to EU rights must be no less favourable than those applicable in similar domestic causes of action (C-63/08)

- **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)

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Common and specific obligations in the directives

- Designate and make the necessary arrangements for a **body** or bodies for the promotion, analysis, monitoring and support of **equal treatment** of all persons without discrimination.
- Must guarantee a **judicial appeal**. (Effective legal protection, insufficient safeguards against victimisation, against retaliation.)
- **Reversal** of the burden of proof.
- Providing inappropriateness **penalty**, and adequate **compensation**.

Article 8 of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities
– 20 protected characteristic

a) **sex**, b) **race**, c) colour, d) **nationality**, e) **membership of a national minority**, f) language, g) **disability**, h) state of health, i) religion or belief, j) political or other opinion, k) family status, l) motherhood (pregnancy) or fatherhood, m) **sexual orientation**, n) gender identity, o) **age**, p) social origin, q) property, r) part-time or fixed-term nature of the occupational relationship or other employment-related relationship, s) membership in a representative organisation, t) any other status, characteristic, or attribute.

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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)
the right of *associations* with a legitimate interest to *bring legal or administrative proceedings* to enforce the obligations resulting from the Directive without acting in the name of a specific complainant or in the absence of an identifiable complainant

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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.

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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**.

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What kind of compensation or penalties can be introduced by a MS as a sanction?

Compensation for damages. *Is it enough to ensure the possibility of this legal instrument?*

NO, because:

1. Need a reparation even there are *no identifiable victim* of the discrimination.
2. In many cases the amount of actual *damage is low* and will not be dissuasive.
3. In many cases there are *no material damage* (and many cases are not primarily motivated by economic interest).
4. If just compensation for damages – admission and possibility of an agreement – private settlements may run counter to the preventive interest – absence of publicity

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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

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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 in nature)
- *Commensurate to the infringement* (not treated as minor offences)
- *Proportionate* (not more harsh than necessary)
- *Equivalent* (to national sanctions in analogous situations)
- *Accessible* (to rightsholders/victims/complainants)

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Mixing the logic of sanctions and damages?

Sanction		Damages
Public interest	→ ←	Private interest
Prevention (Dissuasion – (not only symbolic in nature)	→ ←	Reparation (Compensation – cover full loss and damage)
Proportionate to infringement (not more harsh than necessary)	→ ←	Proportionate to damage (not more than full compensation)
Sanction	→ ←	Settlement
Equivalent (to national sanctions in analogous situations)	→ ←	Equivalent (to national damages in analogous situations)
Accessible (to victims/interested parties)	→ ←	Accessible (to victims)

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

two female social workers not employed at all-male prison; compensation: reimbursement of costs related to job interview.

- 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.

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

Helen Marshall dismissed from her job as dietician because she passed the qualifying age for a State pension, which was different for men and for women. The court awarded her compensation of 19 405 (financial loss, interest and compensation for injury to feelings), but cap on compensations (GBP 6 250), and no interests after damages suffered.

- 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 [...].

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

An NGO's complaint with the Romanian equality body (CNCD) against a football club and its patron, claiming that he would never hire a homosexual player. CNCD concluded discrimination and gave the respondent a warning. – this was the sanction in Romanian law at that time

- 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.

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

Mr Rasmussen was dismissed by employer, upon reaching 60 years of age. A dismissed employee is entitled to a severance payment, but Mr Rasmussen was not under Danish law, because he had joined a pension scheme run by his employer prior to reaching the age of 50.

- 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.

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

BUT: no contra legem interpretation, putting aside law is possible, creating it is not

- 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.

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C-30/19 Diskrimineringsombudsmannen v Braathens Regional Aviation AB

Defendant admits to pay requested amount of 1 000 EUR but denies the alleged discrimination (i.e. the basis of the claim).

Claimant seen as winning party according to Swedish general rules of civil procedure which allows for such 'abstract admissions' as a means for the defendant to end a dispute.

The Stockholm District Court thus ended the trial against the will of the claimant without trying the remaining dispute regarding whether the alleged discrimination had taken place (and whether the defendant was under the duty to pay the amount as a consequence of the alleged infringement).

? Does allowing the defendant to end a trial by an 'abstract admission' (admitting to pay while still denying the alleged discrimination) comply with the rules on sanctions and access to remedies?

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C-30/19 Diskrimineringsombudsmannen v Braathens Regional Aviation AB

”If, in an action for damages, a defendant was able, by paying compensation, not to acknowledge the existence of any discrimination and if that discrimination could not be found by a court, the measures imposed by Directive 2000/43 would, to a large extent, be deprived of their practical effect and would not serve to combat discrimination effectively, since such discrimination could be disregarded.” (p.99)

“In such a situation, a defendant could in a sense ‘pay’ to discriminate, since his discriminatory behaviour would be neither acknowledged nor found to have occurred.” (p.100)

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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

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Thank you for your kind attention!

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