REMEDIES AND SANCTIONS IN (SEX) DISCRIMINATION CASES

ERA/ EU GENDER EQUALITY SEMINAR FOR JUDGES AND PROSECUTORS

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REMEDY - SANCTION

“Remedy” = legal means of enforcing a right or redressing a wrong

“Sanction” = a provision of a law enacting a penalty imposed by courts for noncompliance with a law or legal order - or offering a reward for its observance
LEGAL FRAMEWORK

EU Charter of fundamental rights article 47: effective remedy – effective access to justice - possibility to be advised, defended and represented (ECHR article 13)

Directive 2006/54 (recast)
Directive 2004/113 (goods and services)
Directive 2010/41 (self-employment)

Directive 2000/43 (race)
Directive 2000/78 (the general framework directive or employment directive)
# LEGAL FRAMEWORK

<table>
<thead>
<tr>
<th></th>
<th>2006/54</th>
<th>2004/113</th>
<th>2010/41</th>
<th>2000/78</th>
<th>2000/43</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Right of recourse/defence of rights</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Individual</td>
<td>Art 17(1)</td>
<td>Art 8(1)</td>
<td>Art 9(1)</td>
<td>Art 9(1)</td>
<td>Art 7(1)</td>
</tr>
<tr>
<td>- Association</td>
<td>Art 17(2)</td>
<td>Art 8(2)</td>
<td>Art 9(2)</td>
<td>Art 9(2)</td>
<td>Art 7(2)</td>
</tr>
<tr>
<td><strong>Penalties/reparation</strong></td>
<td>Art 25</td>
<td>Art 14</td>
<td>Art 10</td>
<td>Art 17</td>
<td>Art 15</td>
</tr>
<tr>
<td>- reparation</td>
<td>Art 18</td>
<td>Art 8(2)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Victimization</strong></td>
<td>Art 24</td>
<td>Art 10</td>
<td>-</td>
<td>Art 11</td>
<td>Art 9</td>
</tr>
<tr>
<td><strong>Nullities/compliance</strong></td>
<td>Art 23</td>
<td>Art 13</td>
<td>-</td>
<td>Art 16</td>
<td>Art 14</td>
</tr>
<tr>
<td><strong>Information/social dialogue</strong></td>
<td>Art 21, 22</td>
<td>Art 11</td>
<td>-</td>
<td>Art 12, 13, 14</td>
<td>Art 11, 12</td>
</tr>
<tr>
<td><strong>Body for the promotion of equal treatment</strong></td>
<td>Art 20</td>
<td>Art 12</td>
<td>Art 11</td>
<td>-</td>
<td>Art 13</td>
</tr>
</tbody>
</table>
LEGAL FRAMEWORK

Each directive requires that Member States should:

• provide for real and effective redress
• determine the regime of applicable sanctions
• adopt measures to ensure the enforcement of the sanctions

Where compensation is provided, it must be effective, proportionate and dissuasive

Burden of proof rules for the procedure
The right to recourse (2006/54 art 17)

Art 17(1) – the individual right:
Obligation for the Member States to provide for
- A judicial procedure
- Available to anyone who believes he/ she has suffered discrimination
- Including after working relations have ended
- Possibility of providing for conciliation procedures

- Art 17(3): “without prejudice to national rules relating to time limits for bringing actions as regards the principle of equal treatment”
The right to recourse (2006/54 art 17)

Art 17(2) (7(2)/ 9(2) – the right for associations:
Minimum requirement
Obligation for the Member States to provide for
- Action on behalf of or in support of the complainant with the approval of the complainant
- Action (representation) both in judicial and administrative procedures.

Directive 2000/78: Also action independent of the complainant or in the absence of and identified victim, case C-54/07 Feryn and C-81/12 Accept
The right to effective, proportionate and dissuasive penalties (2006/54 art 25)

Only requirement from EU on remedies: that they are “Effective”, “Proportionate”, “Dissuasive”

- The directives do not define the concepts used
- Wide variety across EU in potential remedies available and level of compensations awarded
- Purpose of sanction: the place the plaintiff in the position that they would have been in had they not suffered the wrong
The right to effective, proportionate and dissuasive remedies (2006/54 art 25):

The State decides at national level:

- which remedy: civil, criminal, administrative, reparatory, financial, non-financial – but must be of a judicial nature
- the character of the remedy: punitive or non-punitive
- purpose (backward or forward-looking, non-pecuniary)
- level (individual level or group level)
- Purpose: remedial, compensatory, punitive or preventive justice
Respect for the principles of

1) **Equivalence**: Provisions of national law giving effect to EU rights must be no less favorable than those applicable in similar domestic causes of actions (C-26/96 Levez, C-63/08 Pontin)

2) **Proportionality**: The severity of the sanction must be commensurate to the gravity of the breaches, especially in ensuring a genuinely dissuasive effect.

3) **Effectiveness** (the dissuasive nature of the penalties): Procedural requirements cannot render the exercise of EU rights impossible or excessively difficult

4) **Procedural autonomy**: Member states are free to prescribe procedural rules and remedies
ECJ Case law:

Starting point: C-14/83 Von Colson
- Equal opportunities require suitable penalties. Symbolic damages are not enough.

Para 22: «it is impossible to establish real equality of opportunity without an appropriate system of sanctions»

Para 23: “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.»
ECJ Case law:

Case C-177/88 Dekker

Para 22: “the Directive does not make liability on the part of the person guilty of discrimination conditional in any way on proof of fault or on the absence of any ground discharging such liability”.

➢ liability for discrimination is not conditional on proof of fault
ECJ Case law:

Case C-271/91 Marshall II
Following from Von Colson:

- Para 25: “Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. (...) 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”.

- Para 26: “Where financial compensation is the measure adopted in order to achieve the objective indicated above, 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 in accordance with the applicable national rules”.

- Para 30: upper limit to damages is not permissible
Case C-180/95 Draehmpael

Para 24: The principle of effectiveness ensures that the sanctioning measures may be effectively relied on before the national courts by the persons concerned - meaning that they do not render virtually impossible or excessively difficult the exercise of rights conferred by the Union law.

Para 29: “In choosing the appropriate solution for guaranteeing that the objective of the Directive is attained, the Member States must ensure that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law of a similar nature and importance.”

Para 39: The sanctions must have a “real dissuasive effect” and be “adequate in relation to the damage sustained in order to ensure real and effective judicial protection.”

ECJ Case law:
ECJ Case law:

Case C-63/98 Pontin

- The detailed procedural rules shall not in practice make it impossible or excessively difficult to exercise rights conferred by EU law, such as limitation periods for bringing actions (para 67)
ECJ Case law:

Case C-246/09 Bulicke:

National time limit rules are permissible as long as “the time limit is not less favourable than that applicable to similar domestic actions in employment law” – starts from when knowledge of the discrimination is acquired – see para 42

(starting point: directive 2000/78 art 9(3): time limits are at the discretion of Member States, but equivalence and effectiveness must be guaranteed)
ECJ Case law:

Case C-54/07 - *Firma Feryn* (2000/43/EC)

para 38-40: “rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.”

- Even if there is no identified victim, a sanction must be available which is effective, proportionate and dissuasive
- Sanctions may include publishing a finding of discrimination at the perpetrator’s expense, an injunction, a fine or an award of compensation in favour of the prosecuting authority
ECJ Case law:

Case C-81/12 Accept (2000/78/EC)

Para 64: “a purely symbolic sanction cannot be regarded as compatible with the correct and effective implementation of Directive 2000/78”.

Para 68: “The mere fact that a specific sanction is not pecuniary in nature does not mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assist in establishing discrimination within the meaning of directive 2000/78 in a possible action for damages”.
Question: “Must the court award the claimant damages which go beyond full compensation for the loss and damage which she sustained, in the form of punitive damages, in order to serve as an example to her former employer and others, given that the concept of ‘punitive damages’ does not exist in Spanish law?”

Para 43-45: “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. It should be added that, on the assumption that a Member State decides to adopt measures allowing the award of punitive damages to the person who has suffered discrimination, it is for the national legal system of each Member State to set the criteria for determining the extent of the penalty, provided that the principles of equivalence and effectiveness are respected.”
The judge is obliged to interpret and apply national legislation adopted for the implementation of the relevant directives in conformity with the requirements of EU law

When the national legislation does not comply with EU law, it can be revoked by national courts (claims brought by individuals against the state), or the judge can refer the question to the EC court (ECJ).

C-555/07, Küçüdeveci: “It is for the national court, hearing proceedings between individuals, to ensure (...) the principle of non-discrimination (...) disapplying if need be any provision of national legislation, independently of whether it makes use of its entitlement in the cases referred to in the article 267(2) TFEU to ask the Court of Justice of the EU for a preliminary ruling on the interpretation of that principle”.

The role of the judge at national level
Challenges implementation: sanctions and remedies

The Joint report of the European Commission in the Implementation of directive 2000/78 and 2000/43 - COM(2014)2 final p 8: “The initial problems which many Member States encountered in relation to the correct transposition of the rules on sanctions have now been addressed and the sanctions provided for by law are generally appropriate. However, there are still potential grounds for concern as regards the availability of remedies in practice and whether sanctions that are imposed in concrete cases comply fully with the requirements of the Directives. The national courts appear to have a tendency to apply the lower scale of sanctions provided for by law and in terms of the level and amount of compensation awarded.”