

Seeking effectiveness: remedies and sanctions in discrimination cases

*ERA Seminar
'Applying EU Anti-Discrimination Law'*

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Outline

- introduction
- effective legal protection in EU law
- legal nature and purpose of sanctions and remedies
- sanctions in EU anti-discrimination law
- remedies in EU anti-discrimination law



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Shocking!

**Risk fines of up to
€20 million
or 4% of your organisations
global turnover**



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Effective legal protection in EU law

- Article 19.1 TFEU
- Article 2 and 4(3) TEU
- Article 47 of the EU Charter of Fundamental Rights

Landmark case:

*C-64/16 Associação Sindical dos Juizes Portugueses
v. Tribunal de Contas (27.2.2018)*



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Effective legal protection in EU law

Dynamic development of CJEU jurisprudence in Polish rule of law cases:

- Case C-216/18 PPU *Minister for Justice and Equality v LM* (Grand Chamber judgment of 25.07.2018)
- Case C-619/18 *Commission v Poland* – interim measure of 17.12.2018, Grand Chamber judgment 24.6.2019
- Joined Cases C-585/18, C-624/18 and C-625/18 (Grand Chamber judgment of 19.11.2019) *A. K. and Others v Supreme Court*



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Effective legal protection in EU law

However:

- barriers to access to justice (FRA reports and handbook)
- effectiveness of sanctions and remedies differentiated in MS
- specific obstacles in seeking justice in discrimination cases
- non-judicial procedures: independent equality bodies + EQUINET



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Effective legal protection in EU law

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13 Directive 2000/43/EC

(similar: 2004/113/EC - art. 12, 2006/54/EC - art. 20):

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), **providing independent assistance to victims of discrimination** in pursuing their complaints about discrimination,
- conducting **independent surveys concerning discrimination**,
- publishing **independent reports and making recommendations** on any issue relating to such discrimination.



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Effectiveness of anti-discrimination legislation – duties of Member States

I. Anti-discrimination protection – SANCTIONS

- punitive character

II. Providing relief for victims – REMEDIES

- reparative character (compensation, reparation)

Similar claims (national and EU) must be protected equally; test of effectiveness and equivalence



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Idea and purpose of sanctions

There is no legal system based solely on the moral power of norms. The sanctions and remedies must exist in order to enforce the law.

Even if antidiscrimination legislation is morally powerful (dignity!), the sanctions have to exist. Acting legally is thus more attractive than violation of norms/discrimination.



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General purpose of sanctions and remedies in EU law

- **Enforcing *effet utile* of EU law** (*Commission v. Greece, case 66/68, p. 23* „Article 5 requires MS to take all measures necessary to guarantee application and effectiveness of Community law”)
- **Securing coherence of EU law**
- **Protection of EU fundamental rights**

Sanctions and remedies may be seen as an instrument of EU law implementation



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Sanctions in EU law

Sanction in a formal sense – a possibility, foreseen by a legal norm, that the addressee of that legal norm will suffer if she/he violates the normative behaviour; the state safeguards this application

Sanction in a material sense – is an actual punishment executed by the state through application of a sanction



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Sanctions in EU law - functions

Repressive function – aims at punishing the subject violating the legal norm, as a retribution for disobedience to legislation

Preventive function (motivating) – sanction as an incentive has an impact on addressee's behaviour, motivates them to act accordingly with the legal norm and discourage from violation (prevention negative and positive)

Restitution function – sanction ensures execution of legal norms; the addressee of the norm is not complying voluntarily, therefore the state will enforce its execution or force her/him to retribute (ex-ante restitution)



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Bibliography

one book instead of many

K. Wladasch, The sanctions regime in discrimination cases and its effects, An Equinet Paper, December 2015

[http://www.equineteurope.org/IMG/pdf/sanctions_regime_discrimination - final for web.pdf](http://www.equineteurope.org/IMG/pdf/sanctions_regime_discrimination_-_final_for_web.pdf)



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Sanctions in EU anti-discrimination law

Sanctions must meet criteria:

- established by CJEU jurisprudence,
 - codified in EU legislation:
-
- Article 15 Race Equality Directive 2000/43/EC
 - Article 17 Employment Equality Directive 2000/78/EC
 - Article 25 Equal Treatment Directive 2006/54 (recast)
 - Article 14 Goods/Services Directive 2004/113/EC



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Sanctions in EU anti-discrimination law

Sanctions must be:

- **EFFECTIVE** and
- **DISSUASIVE** and
- **PROPORTIONATE**

(Commission v. Greece, case 66/68; von Colson and Kamann, C-14/83)



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EFFECTIVE SANCTIONS

- sanctions cannot be purely symbolic (*ACCEPT, C-81/12*)
- legislation should not set any upper limits (*Marshall, C-271/91*)
- sanctions may be applied even if there is no individual discriminated against (*Feryn, C-54/07*)



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DISSUASIVE SANCTIONS

- case *von Colson and Kamann* (C-14/83)
- sanctions must have a real deterrent effect (*Decker*, C-177/88)
- sanctions can comprise an element of punitive damages over and above the damage incurred (*María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA*; C-407/14)
- the severity of sanctions must be commensurate to the seriousness of the breaches for which they are imposed (*ACCEPT*, case C-81/12)



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PROPORTIONATE SANCTIONS

- case *von Colson and Kamann* (C-14/83):
- need of balancing between law violation, its character, weight and consequences, and the amount and a kind of a sanction
- sanction is proportionate if it ensures optimal protection of legally recognized values and does not cause unnecessary burden
- sanction protecting public and private interest may not overweight other private interests
- appropriate to the situation at issue (*Feryn*, C-54/07) – as regards the type of sanction



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Sanctions in EU anti-discrimination law

Sanctions must be:

- EFFECTIVE and
- DISSUASIVE and
- PROPORTIONATE

and also:

- commensurate
- equivalent
- adequate



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Type of sanctions

- obligation to stop discrimination
- compensation
- fine
- finding the fact of discrimination by a court or competente public authority
- warnings
- prohibitory injunction
- award of damages to the body bringing proceedings (Firma Feryn, C-54/07)
- obligation to fulfill community services (NL)
- obligation to implement anti-discrimination policies/plans (AT, UK)
- publication of an apology

Which type of sanctions is the most effective?

(K. Wladasch, Equinet 2015)

Different perspectives:

Victim's perspective

NGO's and equality bodies' perspective

- administrative fines
- publication of a decision (fear of negative PR)



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Remedies in EU anti-discrimination law

EU Charter of Fundamental Rights

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.



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Remedies in EU anti-discrimination law

Article 17 Framework Directive 2000/78/EC
Article 15 Race Directive Directive 2000/43/EC
Article 14 Goods/Services Directive
2004/113/EC
Article 25 Recast Directive 2006/54/EC

Obligation addressed to MS to establish an
effective system of legal remedies



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Remedies in EU anti-discrimination law

Means of redress and enforcement of the right
when it is violated

- judge-made remedies
- *effet utile* (Frankovich and Bonifaci C-6/90 and C-9/90)
- equivalence test
- enforcement of EU law



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National legal framework

- Compensation for material and immaterial damage
- Penalties (e.g. administrative penalty)
- Persuasive measures (e.g. recommendations)
- Restitution of non-discriminatory situation
- Publication of a decision or judgment regarding a discriminatory action



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MS are obliged to secure the victim gets a compensansation or reparation

Article 18 Recast Directive 2006/54/EC

(also art. 9 2004/113/EC, art. 15 2000/43)

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.*



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How compensation or reparation can be calculated?

Factors to be taken into account:

- the status of the perpetrator (private/public, natural/legal person)
- gravity and frequency of discriminatory acts
- financial situation of the perpetrator
- extent of the discrimination
- grounds infringed, multiple discrimination
 - **COMPARE: Article 83.2 GDPR**



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Article 83.2 GDPR – calculation of administrative fines

When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine **in each individual case due regard shall be given** to the following:

- (a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;
- (b) the intentional or negligent character of the infringement;
- (c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;
- (d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them
- (e) any relevant previous infringements by the controller or processor;
- (f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- (k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

Article 83.5 GDPR – amount of administrative fines

Infringements of the following provisions shall, in accordance with paragraph 2, be subject to **administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover** of the preceding financial year (...)

Article 84 Penalties 1. Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.

How compensation can be calculated?

Klaus M. Alenfelder, *Damages in discrimination cases*,
„ERA FORUM” 2012

https://profdralenfelder.weebly.com/uploads/6/0/5/3/6053312/2012_-_alenfelder_-_damages_in_discrimination_cases_-_springer.pdf



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How compensation can be calculated? Polish example

Judgment of Regional Court in Warsaw 27.11.2012, VI Pa 56/12

- what kind of infringed value
- intensity of discrimination actions
- employer's attitude towards discrimination
- severity of damage aiming at preventive effect
- proportionality of amount to be paid in the light of financial situation of an employer
- full compensation of all material and immaterial damage as regards the victim of discrimination
- need to stigmatize discrimination actions
- incentive to apply anti-discrimination policies.



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Thank you!

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