

# Applying EU Anti-Discrimination Law

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# Seeking effectiveness

Remedies and sanctions in discrimination cases

## Effectiveness

- Finding the right means to achieve a goal
- In the current context:
  - Means to activate the EU anti-discrimination norms
    - Provisions for due lawful conduct
    - Protection measures against unlawful conduct

## Discrimination

- Setting the goal: Equal treatment – a fundamental principle of EU law
  - Article 2 Treaty on EU
  - Article 3 (3) Treaty on EU
  - Article 8, Article 10 and Article 18 Treaty on the Functioning of the EU
  - Charter of Fundamental Rights of the EU – Title III Equality

## Primary EU law

- Strategies in the area of equal treatment
- Programmes to promote equal opportunities
- Integration measures
- Prohibition of discrimination
- Anti-discrimination measures – Article 19 TFEU
- Measures to apply equal treatment and opportunities for genders in the area of employment – Article 157 (3) TFEU

## Implementing the fundamental principle at multiple levels

- The principle of equal treatment does not apply directly; it needs to be implemented through legislative acts in order to ensure its effectiveness
  - Pursuant to Article 19 (1) TFEU
  - Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate **action to combat** discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
  - Pursuant to Article 157 (3) TFEU
  - The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt **measures to ensure the application** of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

## Directives

- Pursuant to Article 19 TFEU
  - Directive 2000/43 (race)
  - Directive 2000/78 (framework, in the area of employment)
- Pursuant to Article 157 TFEU
  - Directive 2006/54
  - Directive 79/7
  - Directive 92/85
  - Directive 2004/113
  - Directive 96/34
  - Directive 2010/41

## Obligations ensuing from EU law

Obligations for the EU – Take into account the principle of equal treatment in its law-making and law-enforcement activities

Obligations for the Member States – Set up authorities (research, reports, promotion of equal treatment), transpose, repeal norms which are contrary to the right to equal treatment, implement procedural means (procedural representation by non-governmental organisations, burden of proof, etc.), protect and assist the victims, introduce sanctions and apply them, and others

Obligations *erga omnes* – Refrain from actions or conduct in breach of the prohibition of discrimination and others

## Briefly about the obligations of the EU and the Member States

Obligations of the EU – non-performance

Remedies:

- Appeal of acts under Article 263 TFEU or objection of non-compliance under Article 277 TFEU
- In relation to a reference for a preliminary ruling on validity under Article 267 TFEU
  - C-236/09, Association belge des Consommateurs Test-Achats, ECLI:EU:C:2011:100 – invalidity of a provision for derogation not subject to any temporal limitation regarding the rule on premiums and benefits regardless of gender
- Claim to establish unlawful omission under Article 265 TFEU
- Compensation under Article 268 TFEU in conjunction with Article 340 (2) TFEU

## Briefly about the obligations of the EU and the Member States

- In law-enforcement, the EU through the institutions, authorities, services and agencies applies the EU law in keeping with the fundamental rights protected by the Charter
- Scope of application of the Charter – Article (1) – C-617/10, § 19
- Competence of the Court of Justice of the EU – C-27/16

## Application of the EU law

- The principle is developed in directives – therefore:
- Obligations for the Member States for a result and for a form
- A principle is applied in view of the national legislation transposing the directives – expanded protection is even possible
- Procedural autonomy – the Member States determine the competent authorities and means of protection for the rights granted to people through EU law
- The procedural norms and rules laid down in the national law are applied

## The Member State as a link

- Obligations under Article 4 (3) TEU – a claim of non-compliance under Article 258 TFEU
- Article 4 (3) TEU
- Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
- The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
- The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.
- C-186/09, Commission/UK, ECLI:EU:C:2010:60; C-326/09, Commission/Poland, ECLI:EU:C:2011:155 – Non-compliance with the obligation to transpose Directive 2004/113
- C-192/18, Commission/Poland, ECLI:EU:C:2019:924 - New national law which is contrary to EU law (different retirement age for male and female judges, lowering of the retirement age and operational independence of the Minister of Justice as to whether to extend the period of exercise of the duties of a judge)
- Pecuniary liability of the State in the event of a void or unlawful statutory act due to non-compliance with EU law – under the Liability of the State and Municipalities for Damage Act
- C-571/16 – Paragraph 5 of the operational part

## Requirements

- Based on the case-law of the Court of Justice of the EU
- Equitability – equal application of the internal remedies with regard to the infringements of national law and EU law
- Effectiveness – exercise of the rights granted to people through EU law should not be impossible or too difficult
- Right to effective court defence
- Proportionality, adequacy and effective legal protection

## Prohibition of discrimination

- General rule of conduct
- As regards private and public subject of law
- Covers all forms of discrimination – direct, indirect and harassment
- As regards discrimination through acts, actions or omissions

## Fulfilment of the obligations not to allow discrimination

- Voluntary performance
- Application of sanctions
  - Requirements for the sanctions – effective, proportionate and preventive
  - The obligation to introduce sanctions does not cover form but a result – a real and effective protection, a prevention effect
- Types of sanctions and coercion
  - Criminal
  - Administrative criminal
  - Administrative coercion – coercive measures
  - Civil liability – compensation for damage
  - Disciplinary liability – in the cases of harassment of employees

## Criminal sanctions

- Framework decision 2008/913/JHA – approximation of law and regulations
- In Bulgaria:
  - Elements of specific crimes
  - Motive – a qualified element of convention crime

## Administrative-criminal liability

- Provisions in the Protection against Discrimination Act – fines for natural persons and pecuniary sanctions for legal entities
  - For cases of discrimination
  - For failure to provide information or evidence
  - For failure to fulfil another obligations laid down in law
  - For allowing cases of discrimination – of a manager
  - For failure to execute a decision of the Commission Protection against Discrimination or the court under this Act
- Imposed at the same time discrimination is established by the Commission for Protection against Discrimination

## Administrative means of protection and coercion

- Establishment of discrimination – Commission for Protection against Discrimination
  - Coercive measures to prevent and put an end to violations:
    - Mandatory instructions to eliminate violations
    - Suspension of the execution of decisions or orders of employers which result or court result in discrimination of different content
- Operational independence of the Commission for Protection against Discrimination

## Civil means of protection and coercion

- Establishment of discrimination – court
- Sentence to put an end to a violation, to restore the situation before a violation, to refrain from further violations
- Claim for compensation

## Specificities in Bulgaria

- Two alternative regimes to establish discrimination –  
Commission for Protection against Discrimination and court
  - Difference in powers
  - Appeal against decisions of the Commission for Protection against Discrimination before an administrative court
  - Additional compensation proceedings before a district court
  - Full scope of powers of the district court
  - Different legal grounds for compensation depending on the respondent
- Appeal against administrative acts on the grounds of being contrary to anti-discrimination norms – issues in relation to the legal interest in appeals against general and secondary administrative acts

## Civil liability of private subjects of law

- In line with the general procedure – Protection against Discrimination Act
- Pecuniary damage – full compensation
- Non-pecuniary damage – compensation

## Powers of the national courts in applying EU law

- Interpret in accordance with the EU law norm
- Not to apply
- To request a ruling
- Direct effect

## Specific procedural norms

- In relation to the standing to bring proceedings – participation of non-economic organisations in support or instead of the victim –
  - C-507/18
- In relation to the burden of proof
- In relation to *ex officio* action – principle of equivalence – if it applies the principle of national norms, it must also apply it for EU law
- In relation to preclusive terms