



# Seeking effectiveness: remedies and sanctions in discrimination cases

## Applying EU Anti-Discrimination Law

Seminar for Members of the Judiciary

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## Overview

- Legal Framework
- Remedies and sanctions provided for by the anti-discrimination directives
- Case law of the ECJ

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## Legal Framework



- Art. 47 EU Charter of Fundamental Rights: Everyone whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal
- Art. 19 TEU: Remedies sufficient to ensure effective legal protection in the fields covered by Union Law
- Anti-discrimination Directives

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## Charter of Fundamental Rights



- Scope of Application: Article 51 para 1  
"The provisions of this Charter are addressed to the institutions and bodies 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."
  - Implementation of EU Law = national legislation which falls within the scope of European Union law, see Judgement of 26 February 2013, Åkerberg Fransson, C-617/10

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## Anti-discrimination Directives



- Compliance
- Right to a recourse (individual/association)
- Protection from victimisation
- Information/social dialogue
- Equality Bodies
- Sanctions: effective, proportionate, dissuasive

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## Compliance



- Art. 16 Directive 2000/78, Art. 14 Directive 2000/43
  - Member States shall take all necessary measures to ensure that any laws etc. contrary to the principle of equal treatment are abolished

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## Relationship between National Law and EU Law



- Primacy of Union Law
- Direct Effect of Union Law
- Indirect Effect of Union Law
- State Liability

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## Primacy



- ECJ: Union Law has primacy over national law, even over the constitution
- Only primacy of application, not of validity
- Colliding national law is not applied by the national judge

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# Direct effect



## Direct effect of primary law

Fundamental freedoms

„Equal pay for equal work“ (art. 157 TFEU)

## Direct effect of secondary law

Regulations: in general

Directives have direct effect only in exceptional cases

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# Indirect effect



## ■ Means in particular:

– Duty to interpret national law in such a way as to comply with EU law

■ „This obligation permits national courts to ensure the full effectiveness of European Union law when they determine the disputes before them.“ (e.g. Dominguez, para. 24)

■ No interpretation *contra legem*

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# State liability



- Conditions

- Legislation of EU law intends to confer rights on individuals
- Sufficiently serious breach
- Direct causal link between the breach and the loss suffered

judgments *Frankovich u. Bonifaci* (Rs. C-6/90 u C-9/90, Slg. 1991, I-5357); and state liability for not introducing a reference for a preliminary ruling to the ECJ *Köbler* (Rs. 224/01, Slg. 2003, I-10239).

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# Right to a Recourse



- Art. 9 para. 1 Directive 2000/78, Art. 7 para. 1 Directive 2000/43

- Member States shall ensure the existence of judicial procedures for the enforcement of obligations under the Directives
- Without prejudice to national rules relating to time limits for bringing actions
- Procedural autonomy of Member States
- But: Principle of Equivalence and Effectiveness

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## Right to a Recourse



- Principle of Equivalence  
Conditions similar to those applicable in nationals situations

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## Right to a Recourse



- Principle of Effectiveness
  - Judgment of 29 October 2009, C-63/08, Pontin
  - Judgment of 8 July 2010, C-246/09, Bulicke
    - Not less favourable than similar domestic actions
    - Not practically impossible /excessivly difficult to exercise rights under EU law

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## Right to a Recourse



- Right for associations: Art. 9 para. 2 Directive 2000/78, Art. 7 para. 3 Directive 2000/43
  - Member States shall ensure that associations may engage, either on behalf or in support of the complainant, with his/her approval, in any judicial and/or administrative procedure provided for the enforcement of the obligations under the Directives.

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## Right to a Recourse



- Directives do not preclude Member States from laying down the right for associations to bring legal proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant (see ECJ, C-54/07, Feryn).

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## Protection from Victimisation



- Art. 11 Directive 2000/78, Art. 9 Directive 2000/43
  - Member States shall introduce measures to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

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## Equality Bodies



- Art. 13 Directive 2000/43, no provision in Directive 2000/78
  - Member States shall 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 on grounds of sex.
  - Tasks: assistance to victims of discrimination in pursuing their complaints about discrimination; conduct of independent surveys; publication of reports and recommendations

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## Sanctions/Penalties



- Art. 17 Directive 2000/78, Art. 15 Directive 2000/43
  - Effective
  - Proportionate
  - Dissuasive

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## Sanctions/Penalties



- Civil, criminal, administrative character or combinations
- Nullity of action/reinstatement (dismissal)
- Compensation for material/immaterial damages
- Prohibitory injunctions
- Fines

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## ECJ - Von Colson und Kamann



- Judgment of 10 April 1984, C-14/83
  - German Civil Code at the time: restriction of compensation for discrimination in recruitment to reimbursement of the costs for application
  - ECJ: this remedy = inadequate
    - Para 22: „It is impossible to establish real equality of opportunity without an appropriate system of sanctions. That follows not only from the actual purpose of the directive but more specifically from Article 6 thereof which, by granting applicants for a post who have been discriminated against recourse to the courts, acknowledge that those candidates have rights of which they may avail themselves before the courts.”

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## ECJ - Von Colson und Kamann



- Para 18: „Such measures may include, for example, provisions requiring the employer to offer a post to the candidate discriminated against or giving the candidate adequate financial compensation, backed up where necessary by a system of fines. However the directive does not prescribe a specific sanction; it leaves Member States free to choose between the different solutions suitable for achieving its objective.”
- Para 23: Sanction has to guarantee real and effective protection.

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## ECJ - Decker



- Judgment of 8 November 1990, C-177/88
- The employer's liability for infringement of the principle of equal treatment may not be made subject to proof of a fault attributable to the employer
- Sanction must have a real deterrent effect on the employer

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## ECJ – Marshall II



- Judgment of 2 August 1993, C-271/91
- 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: fixing an upper limit for damages does not constitute proper implementation
- See also ECJ, C-180/95 Daehmpaehl

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## ECJ – Feryn



- Judgment of 10 July 2008, C-54/07
  - Sanctions have to be effective, proportional and dissuasive even if there was no concrete victim
  - Appropriateness of a sanction finding by a court with adequate level of publicity, prohibitory injunctions [order to cease the practice], award of damage to the equality body)

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## ECJ - Accept



- Judgment of 25 April 2013, C-81/12
  - Symbolic sanctions (“warning”) cannot be considered as effective, proportionate and dissuasive

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## ECJ - Camacho



- Judgment of 17 December 2015, C-407/14
  - „Punitive“ damages permitted, but not required by Directive 2006/54

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## ECJ - Kratzer



- Judgment of 28 July 2016, C-423/15
  - Application for a post with the sole purpose of seeking compensation does not fall within the definition of ‘access to employment’ within the meaning of Directive 2000/78 and may be considered to be an abuse of rights.

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## ECJ - Braathens



- Judgment of 15 April 2021, C-30/19
  - Articles 7 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter preclude a national law which prevents a court examining the right to compensation for discrimination from examining the claim seeking a declaration of the existence of that discrimination where the defendant agrees to pay the compensation claimed without however recognising the existence of that discrimination.

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Thank you for your attention!

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