

Seeking effectiveness: remedies and sanctions in discrimination cases

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Presentation

- Legal framework and conceptual clarifications
- Case law of the Court of Justice of the European Union
- The principles of effectiveness, proportionality, and dissuasiveness
- Sanctions in EU Member States
- Shortcomings and obstacles
- Good practices
- Conclusion: persisting issues and the potential impact of the new Directives on standards for Equality Bodies

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Article 15

Sanctions

Member States shall lay down the rules on sanctions 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 sanctions, which may comprise the payment of compensation to the victim, must be **effective, proportionate and dissuasive**. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

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Sanctions in non-discrimination law

Sanctions in a stricter sense
penalties = sanctions
(focus on the perpetrator)

Sanctions in a broader sense

- Textual interpretation (civil remedies)
- Case law CJEU
- Letter of formal notice by the Commission to Malta (Infringement No. 2006/2258)
- Gender Pay Gap Directive (EU) 2023/970: Article 16

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Para. 23

Although, as has been stated in the reply to Question 1, 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.

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The aims of sanctions

1. Compensatory aim
2. Punitive aim
3. Preventive aim
4. Social-preventive aim

Katrin Wladasch, 'The Sanctions Regime in Discrimination Cases and Its Effects', *An Equinet Paper*, 2015.

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Case law of the Court of Justice of the EU

Compensation: von Colson, Marshall, Draemphael

Sanctions: Draemphael, Asociația Accept, Arjona Camacho

Procedural rules: Dekker, Feryn, Associazione Avvocatura per i diritti LGBTI

Effectiveness and dissuasiveness: von Colson, Braathens

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Judgment of the Court of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, EU:C:2008:397.

Para. 39

If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.

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The principles of sanctions

Effectiveness: a sanction is effective if it produces the desired effect for the victim and makes fully good the harm produced by the discrimination, it results in a punitive effect for the perpetrator, and it contributes to achieving the objective of the directive, namely fostering the effective implementation of the principles of equal treatment and non-discrimination.

Proportionality: a sanction is proportionate to the extent that the damage and loss suffered by the victims are reflected in the sanction or remedy foreseen in a way that is appropriate. Proportionality should also be considered with reference to the social damage and the sanction be commensurate to the seriousness of the breach of the principle of equal treatment.

Dissuasiveness: a sanction is dissuasive when it constitutes an appropriate preventive tool both for the infringer from committing the same violation and for society as a whole.

Vincenzo Tudisco and Emma Lantschner, 'Preventing and Reacting to Discrimination through Sanctions and Remedies', *Equinet*, 2023.

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Sanctions in member states

Competent authorities: (administrative, civil, labour, criminal, specialised) courts, Equality Bodies, other public authorities

Most common sanctions

- Obligation to stop discriminatory practises/structures/procedures
- Reinstatement in situation without discrimination
- Compensation for material damages
- Compensation for immaterial damages
- Compensation as alternative to reinstatement
- Publication of decision
- Non-compliance penalty
- Declaration of the act as void

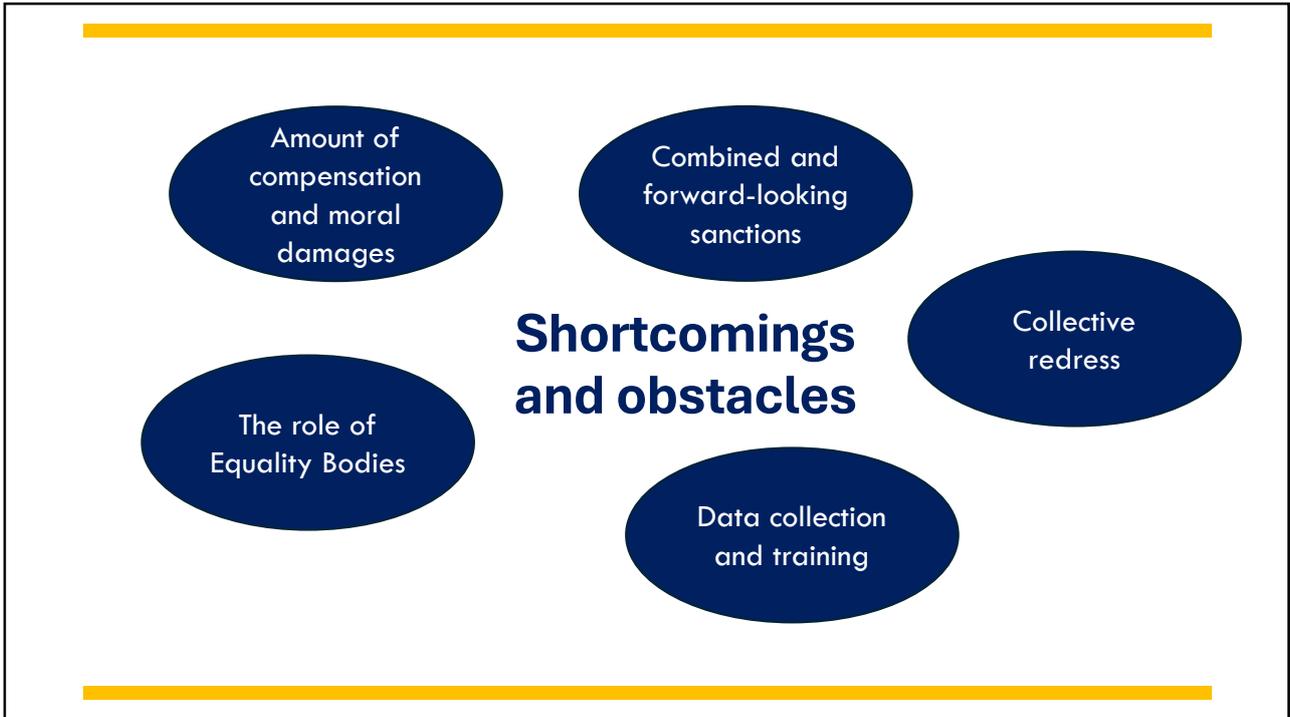
Less common sanctions

- Removal of the right to receive public benefits, public contracts, and/or public funding
- Forfeiture of items
- Expulsion

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Good practices

- **Belgium:** 2023 reform of non-discrimination law (Loi portant modification de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, de la loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination et de la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes)
- **Spain:** 2022 law (Ley 15/2022, de 12 de julio, integral para la igualdad de trato y la no discriminación)
- **Sweden:** compensation for immaterial damages and prevention surcharge
- **France:** Clerc method (compensation – labour law)

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Conclusions

Prevention first

1. Amount of compensation and moral damages
2. Combined and forward-looking sanctions
3. Collective redress
4. Role of Equality Bodies
5. Data collection and training

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- Council Directive (EU) 2024/1499 of 7 May 2024 on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in matters of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and amending Directives 2000/43/EC and 2004/113/EC
- Directive (EU) 2024/1500 of the European Parliament and of the Council of 14 May 2024 on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and amending Directives 2006/54/EC and 2010/41/EU

- Article 7 Alternative dispute resolution
- Article 8 Inquiries
- Article 9 Opinions and decisions
- Article 10 Litigation
- Article 16 Data collection and access to equality data

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Article 9

Opinions and decisions

1. Member States shall ensure that equality bodies are empowered to provide and document their assessment of the case, including establishing the facts and a reasoned conclusion on the existence of discrimination. Member States shall determine whether this is to be done by means of non-binding opinions or binding decisions.
2. **Where appropriate, both non-binding opinions and binding decisions shall include specific measures to remedy any breach of the principle of equal treatment found and to prevent further occurrences.** Member States shall establish appropriate mechanisms for the follow-up to non-binding opinions, such as feedback obligations, and for the enforcement of binding decisions.
3. Equality bodies shall publish at least a summary of those of their opinions and decisions which they consider to be of particular relevance.

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Article 10

Litigation

1. Member States shall ensure that equality bodies have the right to act in court proceedings in civil and administrative law matters relating to the implementation of the principle of equal treatment laid down in Directives 79/7/EEC, 2000/43/EC, 2000/78/EC and 2004/113/EC as set out in paragraphs 2 to 4 of this Article, in accordance with national law and practice on the admissibility of actions, including any rules on requiring the approval of the victim.
2. The right of the equality body to act in court proceedings shall include the right to submit observations to the court, in accordance with national law and practice.
3. The right of the equality body to act in court proceedings shall also include at least one of the following:
 - (a) the right to initiate court proceedings on behalf of one or several victims;
 - (b) the right to participate in court proceedings in support of one or several victims; or
 - (c) the right to initiate court proceedings in its own name, in order to defend the public interest.
4. The right of the equality body to act in court proceedings shall include the right to act as a party in proceedings on the enforcement or judicial review of binding decisions, where equality bodies are empowered to take such decisions pursuant to Article 9(1).

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Case law

- Judgment of the Court of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, C-14/83, EU:C:1984:153.
- Judgment of the Court of 2 August 1993, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, C-271/91, EU:C:1993:335.
- Judgment of the Court of 22 April 1997, *Nils Draehmpaehl v Urania Immobilienservice OHG*, C-180/95, EU:C:1997:208.
- Judgment of the Court of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, C-54/07, EU:C:2008:397.
- Judgment of the Court of 25 April 2013, *Asociația Accept v Consiliul Național pentru Combaterea Discriminării*, C-81/12, EU:C:2013:275.
- Judgment of the Court of 17 December 2015, *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA*, C-407/14, EU:C:2015:831.
- Judgment of the Court of 23 April 2020, *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, C-507/18, EU:C:2020:289.
- Judgment of the Court of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, C-30/19, EU:C:2021:269.

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Thank you for listening

Questions?