

• Remedies and sanctions in discrimination cases

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Regulation by EU Directives:

- 2006/54/EC (Implementing the principle of equal opportunities and equal treatment of women and men in matters of employment and occupation) (In their national legal systems, Member States shall provide for measures to ensure real and effective compensation or reparation for the loss and damage suffered by a person who has been the victim of discrimination on grounds of sex in a manner which is dissuasive and proportionate to the damage caused (Art. 18).
 - 2000/43/EC (Racial Equality Directive)
 - 2000/78/EC (Employment Equality Directive)
 - 2004/113/EC (Goods and Services Directive)
 - 2010/41/EC (Self-employed Persons Directive)
- Member States should provide for effective, proportionate and dissuasive penalties applicable to infringements of the obligations under the Directives.
- Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to the Directive and shall take all measures necessary to ensure that they are implemented. The penalties, which may include the payment of compensation to the victim, must be effective, proportionate and dissuasive.

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- General rule from the Directives: recognising the autonomy of national courts,
- At the same time, Member States are required to ensure that EU law is implemented effectively, in line with criteria designed to ensure that sanctions are effective, efficient and dissuasive.

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Forms of sanctions:

- There are several main forms of sanctions:
 - - Criminal penalties for criminal offences and misdemeanours (e.g. public works, arrest or imprisonment for up to three years).
 - - administrative fines of €40 - €1,200 in Lithuania, €125 - €1,000 in Bulgaria, etc., which can be imposed by the Equal Opportunities Ombudsman, whose decision to impose a fine can be challenged in court.
 - (- an administrative offence committed by expressing hatred towards a person(s) or discriminating against a person(s) on the grounds of sex, race, nationality, language, origin, social status, faith, beliefs, opinions or any other grounds may be considered as an aggravating circumstance in the application of administrative sanctions for the commission of administrative offences under the Code of Administrative Offences;)
 - - disciplinary liability in employment relations (dismissal for misconduct, suspension, etc. (e.g. in Lithuania),
 - - when an employee is discriminated against at work, refused employment or dismissed on discriminatory grounds, the employee may be awarded monetary compensation, and may also be reinstated under the law (in practice, this is decided by the labour disputes commission or the court, and the practice in Lithuania regarding reinstatement is not favourable to the employee);

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- - Compensation for material and non-material damage is the main, most commonly used sanction in discrimination cases. The criteria are set out in legislation and case law.
- Importantly, there is no upper limit for non-pecuniary damage for these infringements, but the amounts awarded in case law are low, which does not meet the criteria of effectiveness of the sanction and deterrence.

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- In Norway and Romania, for example, when an employee acts in a discriminatory way, both the employer and the employee are held liable.
- In Lithuania, the Labour Code allows employers to dismiss or suspend an employee if the employee's behaviour is discriminatory. Thus, the following constitutes a serious breach of employment duties:
 - violence or harassment, including psychological violence and gender-based violence or harassment (violence or harassment directed against persons on the basis of their sex or disproportionately affecting persons of a particular sex, including sexual harassment), acts of a discriminatory nature, or breaches of honour and dignity towards other employees or third parties, in the course of employment or in the workplace;
 - In cases of violation of equal treatment of persons with disabilities in order to vote on an equal basis with all persons in elections, the courts in Lithuania reduced the amounts to be awarded against the State taking into account the duration of the violation, the standard of living in the country, which was related to the minimum monthly wage.

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Practice/criteria for the development of sanctions in discrimination cases:

- ECJ case C-180/95, *Nils Draehmpaehl*
- ECJ case C-177/88 Dekker
- ECJ case C-14/83, *Sabine Von Colson*
- ECJ case C-271/91, *M.Helen Marshall*
- ECJ case C-409/95, *Hellmut Marschall*
- ECJ case C-54/07 Feryn
- ECJ case C-81/12 Accept
- ECJ case C-383/92 Commision
- ECJ Joined Cases C-231/06 and C-233/06 (pensions)
- ECJ case C-407/14 Camacho
- Kt.

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ECJ case C-180/95, Nils Draempaehl

- It should be noted that the ECJ found in *Draempaehl* that compensation of three months' salary is not sufficient, i.e. does not have a deterrent effect.
- Compensation for damages suffered as a result of sex discrimination cannot be linked to the fault of the employer. Compensation must be granted in all cases, without any fault being a condition for civil liability.

Case C-180/95, *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-02195.

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ECJ case C-177/88 Dekker

Effectiveness of the sanction - any breach of the prohibition of discrimination must be punishable without exception.

Directive 76/207/EC allows Member States to determine the penalties for discriminatory practices in such a way as to achieve the purpose of imposing them. They must have a **real deterrent effect**.

If a Member State decides to impose civil liability for discrimination, any breach of the prohibition of discrimination is sufficient grounds for civil liability and no exception to national law exempting or limiting liability may be applied.

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ECJ case C-14/83, *Sabine Von Colson*

- The ECJ has stated that although the Directives do not require any specific forms of sanctions for breaches of equal opportunities by requiring the proper implementation of their provisions, they do oblige Member States to ensure that the sanctions guarantee *real and effective legal protection*. Case C-14/83, *Sabine Von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, para. 23.

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ECJ case C-14/83 Von Colson

Proportionality of the sanction - as a form of compensation, it must be proportionate to the nature of the infringement and the amount of damage.

Directive 76/207/EEC does not provide for specific sanctions, but leaves it to the Member States to determine the appropriate sanctions for discriminatory practices to achieve the objective of imposing them. However, the measures appropriate to restore real equality of opportunity must provide an effective and efficient judicial remedy and have a real deterrent effect on the employer.

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ECJ case C-271/91, *M.Helen Marshall v Southampton and South-West Hampshire Area Health Authority*.

- It is up to the national court to decide which sanctions are effective, but the level of the sanction should be based on the ECJ's interpretation in the *Marshall II* case, where the Court stated that the effective, proportionate and dissuasive sanction in a discrimination case should be the **restoration of the violated right, either by recruitment or reinstatement, or by the award of compensation adequate to restore the right.**

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ECJ case C-409/95, *Hellmut Marschall v Land Nordrhein-Westfalen*.

- The preliminary question asked the ECJ to clarify whether Directive 76/207/EC allows national law to impose a **ceiling** on **compensation for discrimination violations**.
- The ECJ found that capping the amount of compensation would be contrary to EU directives.

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ECJ case C-54/07 *Feryn*

Public statements by an employer that it will not employ workers of a particular ethnic origin or race constitute discrimination during recruitment. Where there is no direct victim of discrimination, the statutory authority may require that discrimination be recognised and punished. Such sanctions must be effective, proportionate and dissuasive. Where appropriate, and where this appears appropriate in the circumstances of the case, this may consist of a judicial finding of discrimination, coupled with a requirement for adequate publicity, the costs of which should be borne by the employer. It could also consist of an obligation under national law for the employer to put an end to the discriminatory practices, if necessary by means of a fine. They may also include an award of damages against the authority which initiated the procedure.

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ECJ case C-81/12 Accept

Directive 2000/78 is not fairly and effectively implemented by imposing a merely symbolic sanction. EU law prohibits national legislation which, where discrimination on grounds of sexual orientation is recognised, can only impose a warning as a sanction. The sanction does not have to be monetary in principle, but in accordance with the principle of proportionality, it should be proportionate to the seriousness of the infringement and be effective, proportionate and dissuasive.

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ECJ Case C-30/19 DO v Braathens Regional Aviation

- - payment of compensation without establishing the fact of discrimination is not an effective sanction under Articles 7 and 15 of Directive 2000/43/EC, etc.

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ECJ case C-383/92 Commission

In order to be effective and dissuasive, the (employer) must be fined an amount greater than the amount of money whose non-payment caused the (employee) damage.

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ECJ Joined Cases C-231/06 and C-233/06 (pensions)

If a person has been discriminated against, equal treatment is restored when a worker who has been discriminated against on the grounds of sex is in the same situation as workers of the other sex. It follows that a Member State may choose to restore equal treatment by requiring payment of an amount equal to the difference between the contributions paid by the persons initially discriminated against during the period of discrimination and the contributions paid at the same time by a larger group of persons from another group. In addition, in order to remedy the situation, contributions may be increased by interest to compensate for the depreciation of

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ECJ case C-407/14 Camacho

The purpose of Article 18 of Directive 2006/54 is to oblige the injured party to make good or compensate for the damage suffered. This objective allows Member States to adopt measures to penalise discrimination on grounds of sex and to award compensation to the victim.

It also allows Member States to provide for the award of punitive damages to the victim of sex discrimination, but EU law does not oblige them to do so.

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- While the Directives do not require any specific forms of sanctions for equal opportunities violations, they do oblige Member States to ensure that the sanctions guarantee *real and effective legal protection*.

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Compensatory function of sanctions

- Compensation must be adequate and proportionate to the gravity of the infringement, taking into account the circumstances in which the infringement was committed. Compensation must make good the physical and psychological damage, the loss of opportunities (loss of productivity), the loss of income, including potential income, the non-material damage, as well as the costs of the proceedings.
- The criteria relevant to the amount of damages include the nature of the unlawful discriminatory conduct, its permanence, the concurrent experience of mental and physical suffering, the violation of several non-material values, and the deliberate, particularly cruel and violent conduct of the person who caused the harm, the perpetrator's negative behaviour after the damage has been caused, the extremely painful, long-lasting or irremediable consequences of the unlawful act which will be with the victim throughout his or her life, the motives and aims of the conduct, the duration of the employment relationship, the employer's financial situation, and other criteria, both general and individual.
- (Resolution adopted by the General Assembly 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [2006] UN General Assembly A/RES/60/147).

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- It is considered that the rule established in the case-law, according to which, in the event of unfair dismissal, the employee is awarded his average wage until the date of execution of the judgment, may be considered insufficiently effective as a remedy for the victim of discrimination at work, as, in accordance with the example of some countries and the case-law of the European Court of Justice, the compensation for unfair dismissal is not limited in time.
- In Germany, for example, the so-called Kattenstein formula is used to calculate damages: a worker "sells" his or her skills and productivity to the employer, and if these are compromised, the worker loses his or her economic value - he or she doesn't get a job, or if he or she does, it is for a lower amount. These specific financial losses can be determined by experts and increase the victim's pecuniary or non-pecuniary damage (Alenfelder, K.M. Materieller Schaden wegen Diskriminierung. *Zeitschrift für Arbeits- und Antidiskriminierungsrecht (ZAD)*, 2007, 2:5-8).

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- K.M. Alenfelder gives the example of a worker who is dismissed at the age of 45 because he is "too old". If he had not been dismissed, he might have worked until his retirement age of 65. The average annual income is €60,000. At most, he has lost the €1,200,000 he would have earned over the next 20 years. The author also points out that when the employee takes up a new job, the income from the new job must be deducted from the compensation payable. The employee is entitled to the full amount at once or in annual, monthly instalments. The author refers to *Vento v. Chief Constable of West Yorkshire* [2003] IRLR 102, in which the court estimated that the probability that the employee would have worked until retirement was 75 % (Alenfelder, K.M. Remedies and Sanctions, p. 29).

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- UN General Assembly Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Serious Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, page 18. Paragraphs 18 and 20 establish that **full reparation must be made.**

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"Fully" means:

- This includes **restoring the situation that existed before the infringement, awarding compensation and ensuring that the unlawful acts are not repeated in the future.**

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Adequate - Adequacy in the context of non-pecuniary damage compensation is interpreted as an amount of compensation which, if it cannot be equal to the amount of the damage, must at least correspond to it. It means the determination of the monetary compensation to be granted to the victim not on the basis of a detailed and mathematically precise calculation of the amount of the damage, but simply by following the principle of greater non-pecuniary compensation for greater non-pecuniary damage and stronger experiences and vice versa (e.g., R. Volodko, *Non-pecuniary Compensation for Non-Pecuniary Damage in Lithuania*. Vilnius: VĮ Registrų centras, 2010, p. 175).

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Proportionate - Legal doctrine and case-law hold that the measures imposed by the State for infringements of the law must be proportionate (adequate) to the offence; they must be in accordance with the legitimate aims pursued and the objectives of general interest, and must not be more burdensome for the person concerned than is necessary to achieve those aims; there must be a fair balance (proportionality) between the aim of punishing offenders and preventing infringements of the law and the chosen means of achieving that aim. In other words, the principle of proportionality may also be referred to as the principle of prohibition of excessive coercion (e.g. the decision of the Constitutional Court of the Republic of Lithuania of 6 December 2000).

The amount of compensation must be proportionate to the loss suffered by the injured party (the employee) and at the same time be a proportionate restraint on the employer. See: Resolution of the Panel of Judges of the Civil Cases Division of the Supreme Court of Lithuania of 2 January 2008 in the civil case *D. L. v. UAB „Fleming baldai“*, case No 3K-3-82/2008; etc.

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- Deterrence - the deterrent effect can be measured by a different amount in each case, often depending on the size of the employer, according to EU Member State practice. As mentioned above, the ECJ found in *Draempaehl* that compensation of three months' salary is not sufficient, i.e. does not have a deterrent effect. In Germany, for example, awards in employment discrimination cases range from 6 months' salary to €500 000. Alenfelder, K.M. Remedies and Sanctions. *ERA seminar on 15 March 2010 material*. Trier: ERA, 2010., p. 24.

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- National Equality Ombudsmen in some countries have the power to impose sanctions - fines, obligations - in cases of discrimination (e.g. Lithuania, Bulgaria, Romania, etc). In some countries, offenders may be obliged to make a public apology (Belgium);
- Companies that break discrimination bans can lose public subsidies (e.g. in Italy);
- Unfortunately, in many countries, the Ombudsman's office can only make non-legally binding recommendations (e.g. Norway, Austria);
- The level of administrative fines often depends on whether the fine is imposed for infringements of the rights of a single person, and is significantly higher if the equality of a group of people is violated (e.g. in Portugal).

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Why are the criteria for sanctions stricter?

- Discriminatory behaviour violates **human dignity**. The protection of human dignity is enshrined in a number of international legal instruments - the Universal Declaration of Human Rights, the EU Charter of Fundamental Rights and other international instruments. The importance of human dignity as the highest constitutional value is emphasised by both legal theorists and practitioners.

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- Protecting human dignity is a duty of every democratic state, and cannot be justified on the grounds of public benefit. Dignity is a universal human right, enjoyed by everyone without exception, irrespective of race, nationality, religion, sex, personal characteristics, education, social achievements (A. Vaišvila)

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303/06 Coleman v. Attridge Law and Steve Law

- Advocate General Maduro, in his opinion in the *Coleman* case, interpreted the concept of discrimination in several ways (Opinion of Advocate General Poiares Maduro, delivered in case 303/06 *Coleman v. Attridge Law and Steve Law*.), one of which directed the purpose of non-discrimination law towards the inviolability of the individual's private life and towards the principle of obligation, rather than seeing discrimination in a passive sense, i.e., only in the context of providing relief for harassment that is rooted in discriminatory behaviour.
- In defining the philosophical values of equality law, Advocate General Maduro emphasises human dignity and the inviolability of the individual's private life. Mr Maduro points out that the concept of these values allows the interpretation of the goods protected by the Directives to be particularly broad, including discrimination on the basis of a relationship with a person who has a characteristic that may constitute a ground for discrimination. "Human dignity is the reason why equality must be recognised for every individual. The life of every person is valuable for the simple fact that he or she is a human being, and no human life is of less value than another. No one can therefore act in such a way as to violate any other person's intrinsic sense of self-worth."

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- By treating people belonging to the protected group less favourably because of their characteristics, the discriminator is denying them their privacy. In essence, by valuing equality and enforcing it through the law, we are allowing everyone the right to a private life". In this context, sanctions for discriminatory behaviour must be extremely severe and effective, as they violate the inherent rights and freedoms of the individual and the dignity of the person. Read more: Opinion of Advocate General Poiares Maduro, delivered in case 303/06 *Coleman v. Attridge Law and Steve Law*.

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In its ruling 3K-3-199/2014, the Supreme Court of Lithuania emphasised that in the case it is necessary to assess whether the compensation awarded to the plaintiff is adequate, effective and dissuasive to the employer from discriminatory acts and helps to achieve the main objective of Directive 2006/54/EC transposed into national law, which is to ensure that the principle of equality of opportunities and equal treatment of men and women in matters relating to employment and occupation is implemented.

When deciding on the amount of non-pecuniary damages, it is necessary to take into account the employment-related benefits to be awarded to the applicant in order to ensure that the principle of proportionality, as emphasised in the abovementioned EU Directives and ECJ judgments, is not infringed and that the sanction imposed on the discriminator is effective, efficient and a deterrent to discrimination.

- The amount of damage to property has also been taken into account.

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Irrelevance of the motive in a discrimination case:

- When a woman of Roma ethnic origin arrived for work, her employment was opposed by the company's female employees. A public hearing/vote was held on the woman's employment. The workers unanimously stated that they did not want to work with a Roma woman and that if the director hired her, they would all quit. The director tried to stand up for the worker, but seeing the attitude of the workers, he apologised to the woman that he could not hire her because the staff did not want to work with her. Will the employer be liable?
- The motive is irrelevant in a discrimination case - it's the victim's point of view.

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Important:

- How to determine the deterrent effect for a particular offender in a particular case?
- Does requiring the imposition of a deterrent effect on the employer go beyond the compensatory function of civil liability?
- The main function of civil liability is compensatory, i.e. civil liability is not intended to punish the person who committed the offence, but to compensate the injured party for the damage caused, in such a way that, after an accurate calculation of the amount of the damages, the injured party is restored to the position he or she was in prior to the offence, and that he or she is compensated for the loss or damage suffered, neither too much nor too little, but rather for what was actually suffered and lost.

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European Court of Human Rights case law

Cudak v Lithuania, 2010

Where a person suffers a violation of the right to a fair hearing, the reopening of proceedings at the request of the applicant is, in principle, an appropriate remedy for the violation.

However, the applicant has suffered non-pecuniary damage for which a finding of a violation of the Convention is not sufficient. The ECtHR awarded the applicant €10,000 for all the grounds of damages taken together.

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- The ECtHR awarded €5,000 in non-pecuniary damages in *L. v. Lithuania* (Application No. 27527/03).

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García Mateos v Spain, 2013

The state must make it possible for victims of discrimination to seek legal redress for damages and other losses. Legislation that prevents access to the courts of general or administrative jurisdiction where the issue of compensation is pending is contrary to the ECHR.

As Spain failed to provide effective protection against discrimination, the ECtHR awarded €16,000 in non-material damages.

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Practices of the UN Committee on the Elimination of All Forms of Discrimination against Women

V.K. v. Bulgaria, 2011

L.C. v. Peru, 2011

I.A. v. Belarus, 2011, et al.

Damages must be proportionate to the infringement committed. If the prohibition of discrimination has been infringed, the victim must be awarded adequate financial compensation.

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Case law of the Constitutional

Court of the Republic of Lithuania

The Constitutional Court of Lithuania has repeatedly stressed that the rights of a person must be protected not formally, but in a real and effective manner, both against unlawful actions of private persons and against unlawful actions of public authorities, and therefore, awarding a **formal amount of material and non-material damages** to a person who has suffered from discrimination is a **formal protection of the violated rights, which is inconsistent with the aims of the EU directives.**

(e.g. *the Resolution of the Constitutional Court of the Republic of Lithuania of 8 May 2000.*)

The effectiveness of sanctions makes it possible to achieve the objectives of the Directives and to protect human rights in a real and not a perceived way.

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Examples of case law in Lithuania:

2008 Rome refusal of employment case	2014 Dismissal case of a pregnant woman
Vilnius Regional Court in case No 2A-1020-464/2008, on the grounds of refusal to accept the applicant for a job as a dishwasher on the grounds of her ethnic origin, awarded the applicant LTL 864.98 in compensation for the property - wages for the period of forced absence and LTL 2 000 in non-pecuniary damages .	The Supreme Court of Lithuania 3K-3-199/2014 <i>c.b. on the dismissal of a pregnant woman during her probationary period</i> , awarded the <i>Romanian Embassy</i> LTL 50,000 in damages for property - wages for the period of forced absence and LTL 10,000 for non-pecuniary damage.

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For example:

2010 The case of the buildings demolished on the site of the Roma camp	2018-2022 mobility and visual impairment election files
<p>In Administrative Case No A444-1003/2010, the following amounts of non-pecuniary damages were awarded against the defendant Vilnius City Municipality (for the demolition of buildings belonging to the applicants on the territory of the Roma Tabor in Vilnius): from EUR 1 500 to EUR 3 500</p>	<p>Vilnius Regional Administrative Court in administrative case No el-1659-331/2018 awarded the applicants EUR 1,000 each in non-pecuniary damages for the State and the Vilnius City Municipality for failing to ensure the rights of persons with disabilities to fully participate in the elections to the Parliament of the Republic of Lithuania</p> <p>In administrative case No eA-564-624/2021, the Supreme Regional Court of Lithuania upheld the decision of the Vilnius Regional Administrative Court in administrative case No el-2914-1047/2019, awarding a person with visual impairment EUR 1,000 in non-pecuniary</p>

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For example:

2021 discrimination case against a person with reduced mobility for access to a building providing public services	2022-2023 Discrimination case against a disabled mother and her newborn baby
<p>The Supreme Administrative Court of Lithuania, in administrative case No eA-2796-492/2021, awarded EUR 1,000 for non-pecuniary damage due to the fact of discrimination on the grounds of mobility impairment when the State failed to ensure access to a building for public services.</p>	<p>Supreme Court of Lithuania 2023-10-11 by order of 6 June 2022 in civil case No e3k-3-246-421/2023, finally confirmed the decision of the Kaunas District Court of 6 June 2022 declaring that the Kėdainiai District Municipality had discriminated against the plaintiff on the grounds of disability and against her daughter on the grounds of her relationship with a person with a disability, and awarded them EUR 10,000 each in non-pecuniary damages, as well as in pecuniary damage.</p>

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Locus standi

- In a number of EU countries, legislation allows associations (NGOs, trade unions) to sue for damages on behalf of those they represent, whereas previously damages were awarded only to individuals who suffered discrimination (e.g. in the Netherlands);

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Locus standi

- The Lithuanian Association of the Blind and Partially Sighted successfully used the right of *locus standi* to represent its members in court. The Court, without going into further arguments in Case No 2-397-67/2010 (Vilnius City 2nd District Court of 26 May 2010, decision in the civil case Lithuanian Association of the Blind and Partially Sighted v. AB "Swedbank" (Case No. 2-397-67/2010)) noted that in accordance with Article 2(1) of the Law on Associations of the Republic of Lithuania (Law on Associations. *Valstybės žinios*. 2004, No 25-745), the Lithuanian Association of the Blind and Partially Sighted, as an association, has the right to represent and defend the interests of the members of the association in court and, despite the defendant's objections, recognised the association as a proper claimant in the case.
- The Lithuanian Disability Forum usually helps its members to find a lawyer in discrimination cases and pays their fees, but does not bring cases on its own initiative.

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Discrimination cases in the public interest

- To make sanctions in discrimination cases more effective, in some countries (e.g. Luxembourg), NGOs have the possibility to claim damages in their own favour. These sums allow them to pursue their activities in the public interest in discrimination cases. This means that any compensation awarded by the court goes to the organisation that brought the action.

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Conclusions:

- In general, the two main ways of applying sanctions in discrimination cases in the Member States are either through judicial proceedings in criminal, civil and administrative matters, or through administrative, as well as guidance and other measures provided for in the law, by the Equality Ombudsman.
- Despite the fact that penalties have no ceiling, unfortunately, the courts have been reluctant to award high sums for discriminatory infringements and the damages awarded are not significant, which discourages victims from defending their rights.
- This encourages Member States to look for more creative ways to prevent discriminatory infringements.

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