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# Remedies and Sanctions in EC non-discrimination law

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# Remedies and Sanctions in EC non-discrimination law

“Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination”

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European Network of Legal Experts in the non-discrimination field

**Employment & social affairs**

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1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
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## Executive Summary

The most important as well as the most specific requirements under EC law regarding remedies were first developed in the case law of the European Court of Justice concerning sex discrimination. Due to their general nature and due to parallels between sex discrimination law and other areas of Community law, the requirements resulting from sex equality case law are not limited to sex equality law but are also relevant in other contexts, such as the Race Equality Directive and the Employment Equality Directive.

It follows from the Court's case law that the maxim 'where there is a right, there must be a remedy' is inherent in the system of the EC Treaty. Accordingly, the right to a remedy is of a general nature under Community law and does not depend upon the existence of explicit provisions stating it.

The term 'sanctions' in the Race and Employment Framework Directives, as well as in other recent EC non-discrimination legislation, is not to be understood in the strict sense of the word. Rather than relating to penalizing measures only, the term 'sanctions' as used in the Directives refers mainly to remedies in the sense of relief and redress for victims of discrimination (remedies in a substantive sense).

Following general EC law as well as the law of the European Convention on Human Rights, the remedy made available under national law for a breach of EC law must provide adequate judicial protection, although the wording of some recent legislation seems to leave a choice between judicial and administrative remedies. A system of remedies without legal ramifications is not sufficient.

The remedy must be of a personal nature, that is, it must be a remedy for the victim of discrimination. Penal sanctions by themselves are not sufficient, although they may be necessary to back up other remedies (in particular in view of the requirement of dissuasiveness, mentioned immediately below).

The remedy granted under national law must be effective, proportionate, and dissuasive. The Court's case law does not provide generally applicable and at the same time specific guidelines regarding the meaning of the concept of effective, proportionate and dissuasive remedies. Instead, the meaning of this concept must be determined in each concrete case in the light of the individual circumstances. In a broader context, the United Nations (Draft) Basic Principles and Guidelines on the Right to a Remedy and Reparations should be used as a benchmark.

For certain cases, the Court's case law contains specific indications regarding the Community law requirements in relation to remedies. Thus, in the case of discriminatory dismissal, the remedy (or remedies) granted must in any case include either reinstatement or compensation. Further, where compensation is chosen as a remedy it must fully make good the damage. Upper limits are not acceptable, except for situations where the damage was not purely caused through discrimination.

Thus far, there is no case law from the European Court of Justice concerning multiple discrimination. In order to be adequate, remedies for multiple discrimination must reflect the multiple and thus aggravated nature of the discrimination.

In the national law of some Member States implementing the Race and Employment Framework Directives, there are some interesting elements which point to a forward-looking and a non-individual approach to remedies. These remedies relate in particular to innovative non-pecuniary measures, the powers of the specialised administrative non-discrimination body, the range of ancillary administrative remedies that are available, the use of punitive damages and the withdrawal of and exclusion from state benefits, in particular in the context of public procurement.

# Introduction

In her study on remedies in international human rights law, Shelton (1999:14) observes that the causes of many human rights abuses are linked to long-standing political, economic and social problems, including prejudice, ignorance, disease, poverty, greed and corruption. It is therefore clear that human rights law by itself is not able to prevent or to remedy human rights abuses. In addition to efforts on the legal level, education and other broad social efforts are required. Nevertheless, Shelton states that the law has an important role to play since appropriate remedies can have a dissuasive effect on those who would commit violations, as well as serving to redress the wrong done to victims. Such remedies are, therefore, a significant aspect of ensuring the rule of law.

In practice, a wide range of possible remedies exist, depending, for example, upon the type of law (e.g. civil, criminal, administrative remedies; Malmberg 2004), the punitive or non-punitive character of the remedies (Harding & Swart 1996), their orientation as backward-looking or forward-looking (the latter meaning remedies seeking to adjust future behaviour; Curtin 1985) and the level on which they are intended to operate (individual/micro or group/macro level; McCrudden 2001, Kilpatrick 2000, Malmberg 2004, O'Dempsey 2004). It also needs to be remembered that remedies may be available through various, possibly complementary, enforcement processes (administrative, industrial relations and judicial processes; Malmberg et al. 2003). Depending upon such characteristics, the remedies offered by a particular legal order will reflect different (combinations of) theories of remedies (e.g. remedial, compensatory, punitive and preventive justice; Shelton 1999) and also different concepts of equality (e.g. an individual justice model, a group justice model or a model based on equality as participation; McCrudden 2001). It follows that a comprehensive enforcement approach is very broad indeed. It addresses not only procedural aspects and the substance of remedies (relief and redress for the victims of discrimination) but also broader issues such as victimisation, compliance, mainstreaming and positive action, as well as other innovative measures such as corrective taxation (compare the approaches taken by Cohen 2004, Lappalainen 2004, McCrudden 1993, 1999 and 2001, Moon 2004, Shelton 1999).

Within this broad range of enforcement issues, this report focuses on one specific element, namely the form and extent of remedies for discrimination as required under EC law, and more specifically under the Race<sup>1</sup> and Employment Framework Directives.<sup>2</sup> Being part of a new generation of EC non-discrimination law, these Directives explicitly state the right of victims of discrimination to an 'effective, proportionate and dissuasive' remedy (in the Directives called 'sanctions').<sup>3</sup> This report examines what the concept of 'effective, proportionate and dissuasive sanctions' requires EU Member States to do in the implementation of the Race and Employment Framework Directives.<sup>4</sup> As a background, the report discusses the development and the meaning of the concept of effective, proportionate and dissuasive remedies in EC sex equality law (where it has its historic origin) and in general EC law. It then turns to the requirements regarding remedies under international human rights law. Thereafter, the report discusses the meaning of the concept of effective, proportionate and dissuasive remedies in the specific framework of the Race and Employment Framework Directives. A final part deals with upper limits on compensation.

<sup>1</sup> Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 19.7.2000 L 180/22.

<sup>2</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ 2.12.2000 L 303/16.

<sup>3</sup> Regarding the terminology, see IV.1. further below.

<sup>4</sup> This concerns the substantive side of remedies, rather than procedural issues. Regarding the effectiveness of the national procedures in the context of enforcement, an interesting parallel can be drawn with procedures under EC law; see Case C-263/02 P *Commission v Jégo-Quéré & Cie SA*, judgment of 1 April 2004, n.y.r.

Filippo | 1985



## Part I

# ECJ case law on effective, proportionate and dissuasive remedies

As Malmberg et al. (2003:225) observe, it is the European Court of Justice (ECJ) which has been the driving force in the development of the requirement for national systems of remedies in the enforcement of EC law. The concept of effective, proportionate and dissuasive remedies has its historic origin in EC sex equality law, although the Court later declared this to be generally relevant. Indeed, it will be shown below that the statements made by the Court in the context of sex equality law are of a general nature. Accordingly, they are also relevant outside this particular context (Tobler 2004).

## 1. Sex discrimination cases

### 1.1. Existence of a right to a (personal and judicial) remedy

The most recent generation of EC non-discrimination legislation expressly mentions the duty of the Member States to set up a system of remedies.<sup>5</sup> However, the right to a remedy existed even before the adoption of such explicit legislation as a result of the Court of Justice's case law concerning Art. 6 of the Second Sex Equality Directive. In its original version,<sup>6</sup> the Directive merely stated a procedural right to judicial process in the case of alleged discrimination. In her opinion on the leading sex equality case on remedies, *von Colson and Kamann*,<sup>7</sup> Advocate General Rozès stated that provisions such as Art. 6 'suggest that a breach will not remain unpunished by national sanctions' (para. 2(b) of the AG's opinion). In other words, in addition to a procedural remedy such provisions imply the existence of a right to a substantive remedy. The Court of Justice agreed, holding that it follows from the purpose of the Directive and more specifically from Art. 6 that '[i]t is impossible to establish real equality of opportunity without an appropriate system of sanctions'<sup>8</sup> and that victims of discrimination 'have rights of which they may avail themselves before the courts' (*von Colson and Kamann*, para. 22). The latter element in particular shows that the remedies must be linked to the victims of discrimination who, accordingly, have a right to a personal remedy.<sup>9</sup>

It is important to note that when stating the right to a personal remedy in *van Colson and Kamann*, the Court referred to general provisions of EC law, namely Art. 249 EC (then Art. 189 of the EEC Treaty), obliging the Member States to adopt 'all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues', and to Art. 10 EC<sup>10</sup> (then Art. 5 of the EEC Treaty), obliging the Member States to take all appropriate measures to ensure the fulfilment of their obligation to achieve the result envisaged by the Directive (*von Colson and Kamann*, para. 15 and 26).<sup>11</sup> In *Johnston*<sup>12</sup> (para. 18), the Court stated that the requirement of effective judicial control stipulated by Art. 6 of the Second Sex Equality Directive reflects a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in Arts. 6

<sup>5</sup> See I.1.3. and I.2.2. further below.

<sup>6</sup> Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 14.2.1976 L 39/40.

<sup>7</sup> Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891; see also Case 79/83 *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 1921.

<sup>8</sup> Again, regarding the terminology see E.I below.

<sup>9</sup> Criminal sanctions are not personal remedies in this sense; see E.II.2 further below.

<sup>10</sup> This is the provision stating the principle of cooperation in good faith between the Member States and the Community, also called the principle of solidarity or loyal cooperation.

<sup>11</sup> See also AG Darmon's opinion on the *Johnston* case (para. 4), where the AG made interesting links to both Art. 10 EC and to the principle of primacy.

<sup>12</sup> Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651.

and 13 of the European Convention on Human Rights (ECHR). Accordingly, the right to judicial process as well as the right to a personal remedy flowing from that are not dependent upon the existence of an explicit provision of law stating such rights (Prechal 2005:143: 'a self-standing principle of law').

Three additional points of general importance need to be mentioned. First, where an explicit provision such as Art. 6 of the Second Sex Equality Directive exists, it has direct effect as far as the right to an effective judicial remedy is concerned, (*Johnston*, para. 58). Second, the Court stated in *Coote*<sup>13</sup> (para. 24 subs.) that the protection afforded by the Directive also extends to the time after the termination of employment since otherwise the principle of effective judicial control would be deprived of an essential part of its effectiveness. Accordingly, the right to protection against victimisation is part of the effective enforcement of the Directive<sup>14</sup> (Senden 1999:345, Dougan 1999:665).<sup>15</sup> Third, the Court held in *Dekker*<sup>16</sup> (para. 22 subs.) that liability on the part of the person guilty of discrimination under the Second Sex Equality Directive is 'not conditional on proof of fault or on the absence of any ground discharging such liability' since otherwise the practical effect of the principle of equal treatment would be weakened considerably. In other words, a finding of discrimination, and therefore also the right to a remedy, does not depend upon proof, brought by the victim of discrimination, of fault on the side of the employer.<sup>17</sup>

## 1.2. Requirements for remedies in the field of sex equality law: effectiveness, proportionality and dissuasiveness

In addition to the existence of a personal and judicial remedy, EC sex equality law demands that this remedy be effective, proportionate and dissuasive. In fact, the requirement of effectiveness appeared in one of the original sex equality Directives, namely the Equal Pay or First Sex Equality Directive.<sup>18</sup> Under Art. 6 of this Directive, the Member States shall ensure that 'effective means are available' so that the principle of equal pay is observed. However, the requirement of effectiveness is broader than this. In *von Colson and Kamann* (para. 18 subs.) the Court held that under Art. 6 of the Second Sex Equality Directive the Member States are required to adopt measures that are sufficiently effective to achieve the objective of the Directive. More specifically, the Member States are obliged to ensure that those measures 'may in fact be relied on' before the national courts by the persons concerned and that the remedies chosen 'guarantee real and effective judicial protection' (the requirement of effectiveness). The remedies 'must have a real and deterrent effect on the employer' (dissuasiveness). If compensation is the chosen

<sup>13</sup> Case C-185/97 *Coote v Granada Hospitality Ltd.* [1998] ECR I-5199.

<sup>14</sup> Under Art. 7 of the Directive, Member States must protect employees against dismissal by the employer as a reaction to a complaint or legal proceedings in relation to sex discrimination. In *Coote*, the Court stated that it could not be held that the legislature's intention was to limit the protection of workers against retaliatory measures decided on by the employer solely to cases of dismissal.

<sup>15</sup> More recent legislation contains general provisions concerning victimisation, e.g. Art. 9 of the Race Equality Directive, Art. 11 of the Employment Equality Directive, Art. 7 of the Revised Second Sex Equality Directive. Such provisions address an important aspect of enforcement. AG Mischo describes them as ensuring 'that anyone who has dared to brave an employer's wrath by alleging discrimination [...] will not repent that boldness' (*Coote*, point 6 of the AG's opinion). - Dougan (1999:668) raises the question whether *Coote* is really a remedies case at all, or rather a case in which the Court used Art. 6 to expand the substantive scope of the relevant Directive.

<sup>16</sup> Case C-177/88 *Dekker v VJV-Centrum* [1990] ECR I-3941.

<sup>17</sup> In Dutch comments on this judgment, it has been noted that the Court in effect modified the Dutch legislation on liability, and in doing so changed the national private law; e.g. Betlem (1991:1370), Prechal (1991:668). In the context of UK law, see Shaw (1991:319). - The issue of fault is also connected to the question whether administrative remedies which do not depend upon fault are lawful under Community law in view of human rights principles; see Stix-Hackl & Gardette 2004 who argue that they are indeed lawful.

<sup>18</sup> Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ 19.2.1975 L 45/19.

sanction, it ‘must in any event be adequate in relation to the damage sustained’ (which implies the requirement of proportionality).<sup>19</sup>

In academic writing, general definitions of the requirements of effectiveness, proportionality and dissuasiveness are offered. For example, Cohen (2004:19) explains: ‘To be effective, remedies and sanctions must achieve the desired outcome; to be proportionate, they must adequately reflect the gravity, nature and extent of the loss and/or harm; and to be dissuasive, sanctions must deter future acts of discrimination.’ Cohen adds that whatever the national law may provide, ‘sanctions will be none of these if there are not effective, simple, swift and sustained mechanisms for enforcement’. Beyond such broad definitions it is hardly possible to formulate generally applicable criteria for judging the requirements of effectiveness, proportionality and dissuasiveness. There is the question, raised by Cohen (2004:18), from whose perspective effectiveness, proportionality and dissuasiveness will be assessed. Also, the various individual criteria (of effectiveness, proportionality and dissuasiveness) may conflict with each other. Cohen points out that if, on the one hand, a Member State wants to adopt remedies that are truly dissuasive, it is useful to consider what discriminators or potential discriminators least want to lose – for example, money, reputation or business opportunities (Lappalainen 2004:28: ‘the more discrimination costs, the more diversity pays’). On the other hand, a system of compensation making it possible to ensure that a company is forced out of business in the case of particularly grave infringements might be disproportionate (O’Dempsey 2004:8). In practice, much will depend on the particular circumstances of each individual case. Accordingly, the most important guideline is to judge the requirements of effectiveness, dissuasiveness and proportionality in the light of the circumstances of each individual case (see *Marshall II*,<sup>20</sup> para. 25; Moore 1993:538; Moon 2004:4; more generally also Griffiths 1999:327). However, there are also certain more specific requirements under EC law, as discussed in the following section as well as in the section on damages.<sup>21</sup>

### 1.3. Form and extent of the remedy

Community law is not very specific when it comes to the form and the extent of the remedies to be applied in specific situations involving sex discrimination. Only in some rare cases does the law itself specify a certain type of sanction (e.g. Art. 4 of the Equal Pay Directive: nullity or amendment of unlawful pay provisions). As AG Léger observed, whilst it is indisputable that the principle of equal treatment of men and women constitutes a rule of Community law, it is also true that the practical rules for its implementation have not been laid down in detail (Sutton,<sup>22</sup> point 60 of the AG’s opinion). Thus, in *von Colson and Kamann* (para. 18), the Court emphasised that the Second Sex Equality Directive does not prescribe a specific sanction. Accordingly, the choice of remedies is for the Member States to make, provided that the remedies chosen are effective, proportionate and dissuasive. Afilalo (1998) in this context speaks of a ‘controlled experimentation approach’: the Court in essence lets the Member State experiment with various forms of remedies, whilst empowering the national judge to ensure that the government meets certain minimum standards.

In *von Colson and Kamann* (para. 18), the Court gave some concrete examples of what sufficiently effective measures might mean in a situation of discriminatory refusal of employment, namely ‘provisions requiring the

<sup>19</sup> With regard to the requirement of proportionality, AG Rozès in her opinion on the *von Colson and Kamann* case (para. 3) drew an analogy with sanctions that Member States may take in the area of the law of free movement, in particular in the context of movement and residence. Regarding the question of upper limits on compensation, see F below.

<sup>20</sup> Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, where the Court referred to the specific circumstances of the case in the context of the requirements of effectiveness and dissuasiveness.

<sup>21</sup> See V below.

<sup>22</sup> Case C-66/95 *The Queen v Secretary of State for Social Security, ex parte Eunice Sutton* [1997] ECR I-2163.

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. This statement carries the important message that fines, be they of an administrative or of a criminal nature, are merely complementary, rather than being at the forefront of the national enforcement system. Penal sanctions may be important in the context of the requirement of dissuasiveness (Moon 2004:3 speaks about the importance of sending out a signal of the state's abhorrence of the most severe types of discrimination through criminal sanctions).

For one specific situation of discrimination the Court has actually specified the types of remedies that must be granted, by stating that one of two alternative remedies must be adopted. In *Marshall II* (para. 25) the Court explained that in the case of discriminatory dismissal 'a situation of equality could not be restored without either reinstating the victim of discrimination or, as an alternative, granting financial compensation for the loss and damage sustained'. In such a situation, therefore, the Member States' choice is limited in the sense that they must in any event provide for either reinstatement or financial compensation. Obviously, these can then be complemented by other remedies, such as an apology to the victim of discrimination, punitive damages or other types of sanctions (e.g. community service). In fact, certain additional remedies reinforcing the personal remedy granted to the victim of discrimination may be necessary in view of the requirement of dissuasiveness.

From a practical perspective, the fact that the Directive does not prescribe a particular type of remedy means that to that extent Art. 6 of the Second Sex Equality Directive is not unconditional and sufficiently precise for the purposes of direct effect. In other words, individuals cannot rely on it before national courts in order to claim a right to a particular remedy (*von Colson and Kamann*, para. 27). For that, national legislation implementing Community law is required. However, the Directive is indeed directly effective in relation to the duty to provide for remedies itself and also in relation to the effective, proportionate and dissuasive nature of the remedies chosen by the Member State. As the Court stated in *Marshall II* (para. 36), the fact that the Member States may choose among different solutions cannot result in an individual's being prevented from relying on Art. 6 (see Curtin 1994:643 subs.).

Finally, the above case law is codified in more recent EC sex equality legislation. Thus, the right to an effective, proportionate and dissuasive remedy<sup>23</sup> is stated in explicit terms in Art. 8d of the Revised Second Sex Equality Directive,<sup>24</sup> in Art. 8(2) of the Goods and Services Directive<sup>25</sup> and in Art. 26 of the proposed Recasting Directive.<sup>26</sup> The Directives also mention compensation. The Commission's explanations of its proposals show that the relevant provisions are indeed intended to grant a personal remedy to victims of discrimination.

<sup>23</sup> Like the Race and Employment Framework Directives, the Revised Second Sex Equality Directive and the Recasting Directive use the term 'sanctions'. Again, the problems posed by this terminology will be discussed later; see E.I below. The Goods and Services Directive speaks of 'real and effective compensation or reparation'.

<sup>24</sup> Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 5.10.2002 L 269/15. See also consideration 20 of the preamble to this Directive which states the need for 'adequate legal protection'.

<sup>25</sup> Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 21.12.2004 L 373/37.

<sup>26</sup> Proposal for a Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, COM(2004) 279.

## 2. The effective remedies rule in general EC law

### 2.1. General starting points

Turning from EC sex equality law to general EC law on remedies, a first point to be made is that several ‘overarching remedies’ have been developed by the Court of Justice, namely the general remedy of setting aside national measures conflicting with EC law,<sup>27</sup> and the specific remedies of restitution,<sup>28</sup> interim relief<sup>29</sup> and compensation in cases of Member State liability<sup>30</sup> (Van Gerven 2000:503 subs., with particular reference to Brealey & Hoskins 1998; also Van Gerven 2004:266, Craufurd Smith 1999:300 subs., Ward 2000:23 subs., Prechal 2005:165 subs.). Apart from these overarching remedies, the traditional starting point in EC law has been that the matter of remedies is left to the Member States, provided that they observe the principles of equivalence and effectiveness derived from Art. 10 EC (as developed by the Court of Justice since *Rewe (Saarland)*;<sup>31</sup> e.g. *Gil Ibáñez* 1999:211 subs., *Tridimas* 1999:279 subs. and 2000:37 subs., *Malmberg et al.* 2003:43 subs., *Prechal* 2005:137 subs.). Under these principles, ‘it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)’ (*Recheio-Cash & Carry*,<sup>32</sup> para. 17). The meaning of these general principles in the specific context of remedies has been expressed by Ellis (1998:144) as meaning that, in relation to Community rights, ‘the same remedies must be available as would be available in a similar domestic claim, provided that these do not actually frustrate the EC claim’. The Court’s case law provides little concrete guidance as to the meaning of either of the two principles whose meaning in a specific case must be assessed in the context of all relevant factors of that case (e.g. *Steffensen*,<sup>33</sup> para. 65 subs.).

<sup>27</sup> This is a consequence of the principle of primacy, see Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para. 21.

<sup>28</sup> E.g. Case C-188/95 *Fantask A/S and others v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783, para. 35 subs.

<sup>29</sup> Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame (Factortame I)* [1990] ECR I-2433.

<sup>30</sup> Sutton provides an example concerning compensation in the context of discrimination (see Van Casteren 1998:489 subs., Steyger 1998, Ward 1998:72 subs., Craufurd Smith 1999:306 subs.). According to the Court, actions concerning interest on arrears of social security benefits do not come under Art. 6 of the Third Sex Equality Directive (Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6/24) but rather had to be dealt with under the general EC law on Member State liability. In that latter context, the Court simply recalled its conditions under case law such as *Francoovich* (Joined Cases C-6/90 and C-9/90 *Francoovich and Bonifaci v Italy* [1991] ECR I-5357), *Brasserie du Pêcheur* (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* [1996] ECR I-1029) and *Dillenkofer* (Joined Cases C-178, 179, 188, 189 and 190/94 *Dillenkofer v Germany* [1996] ECR I-4845) as well as the two general principles of equivalence and effectiveness (see immediately below). The Court then left the assessment of the concrete case at hand to the national court.

<sup>31</sup> Case 33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

<sup>32</sup> Case C-30/02 *Recheio-Cash & Carry v Fazenda Pública/Regista Nacional de Pessoas Colectivas*, judgment of 17 June 2004, n.y.r.

<sup>33</sup> Case C-276/01 *Joachim Steffensen* [2003] ECR I-3735, in the context of the effectiveness of national procedural rules.

## 2.2. A general right to an (unspecified) judicial remedy which must be effective, proportionate and dissuasive

Following *Johnston*, the Court also confirmed the existence of a general right to a judicial remedy outside sex equality law. In *Heylens*<sup>34</sup> (para. 14), a case concerning the mutual recognition of diplomas within the framework of the free movement of persons, the Court stated: 'Since free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community, the existence of a remedy of a judicial nature against a decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the Court held in its judgment of 15 May 1986 in [*Johnston*], that requirement reflects a general principle of Community law which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>35</sup> In the *Greek Maize*<sup>36</sup> case (para. 23 subs.), which concerned the protection of the Community's financial interests in the context of agricultural levies, the Court emphasised the duties of the Member States under what is now Art. 10 EC in view of the effectiveness of Community law and the ensuing requirements in relation to remedies. Regarding the latter, the Court explained: '[W]hilst the choice of penalties remains within their [i.e. the Member States'] discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.' (Emphasis added).<sup>37</sup> Subsequently, these requirements were explicitly mentioned in various different areas of EU law (first pillar<sup>38</sup> second pillar<sup>39</sup> and third pillar law).<sup>40</sup>

As in the context of sex discrimination, the Court emphasised that, in the absence of specific legislation,<sup>41</sup> the Member States are free to choose the type of remedies. For example, Art. 10 EC does not oblige the Member States to introduce a specific system of liability (e.g. *Vandenne*,<sup>42</sup> para. 11 subs.). An important point is made in *Nunes*,<sup>43</sup>

<sup>34</sup> Case 222/86 *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others* [1987] ECR 4097.

<sup>35</sup> The Court added that effective judicial review must be able to cover the legality of the reasons for the contested decision. Consequently, there is also a duty to state reasons.

<sup>36</sup> Case C-68/88 *Commission v Greece* [1989] ECR 2965.

<sup>37</sup> Compare Schermers & Waelbroeck 2001, para. 204 subs.

<sup>38</sup> E.g. Art. 2 of Regulation 2988/95 (EC, Euratom) on the protection of the European Communities' financial interests, OJ 23.12.1995, L 312/1 (see also the Preamble to the Convention on the protection of the European Communities' financial interests, OJ 27.11.1995 C 316/48); Art. 8 of the Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, OJ 23.3.2002 L 80/29; Art. 14 of Regulation 793/2004/EC amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, OJ 30.4.2004 L 138/50; Art. 5 of Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access, OJ 28.11.1998 L 320/54; Art. 20 of the Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 17.7.2000 L 178/1.

<sup>39</sup> E.g. Art. 4.a. of Joint Action 98/742/JHA on corruption in the private sector, OJ 31.12.1998 L 358/2.

<sup>40</sup> E.g. Art. 5 of the Council Framework Decision 2002/475/JHA on combating terrorism, OJ 5.7.2002 L 164/3.

<sup>41</sup> An example of such harmonised sanctions can be found in the provisions of Regulation 2847/93/EEC establishing a control system applicable to the common fisheries policy, OJ 20.10.1993 L 261/1 (as amended), Arts. 31 subs.; see Berg 1996:67 subs.

<sup>42</sup> Case C-7/90 *Criminal proceedings against Paul Vandenne and others* [1991] ECR I-4371. The case concerned Regulation 3820/85 on the harmonization of certain social legislation relating to road transport (OJ 31.12.1985 L 370/1) and, more specifically, rest hours for drivers. Under Art. 17, the Member States are obliged to take all necessary measures, including on penalties in case of breach. Thus, the Regulation mentions penalties but does not define them.

<sup>43</sup> Case C-186/98 *Criminal proceedings against Maria Amélia Nunes and Evangelina de Matos* [1999] ECR I-4883.

namely that where Community legislation specifies certain remedies, the list given may not be exhaustive. In such a case, the Member States are free to adopt other types of remedies in addition to those prescribed by Community law. In *Nunes*, this issue arose in relation to Community legislation concerning the European Social Fund,<sup>44</sup> which only mentioned civil law remedies (namely suspension, reduction, withdrawal and/or recovery of aid used in an improper manner). In addition to such remedies, Portuguese law provided for criminal sanctions. The Court held that the measures taken by the Member States under Art. 10 EC to penalise conduct affecting the financial interests of the Community 'may include criminal penalties even where the Community legislation only provides for civil remedies. The remedy must be analogous to those applicable to infringements of national law of similar nature and importance, and the remedy must be effective, proportionate and dissuasive' (*Nunes*, para. 14). In practice, damages are important particularly because of the existence of the principle of EC/state liability, as already mentioned<sup>45</sup> (though it should be noted that there is no general principle requiring compensation to be paid in all circumstances where damages result from Community law; *Booker*,<sup>46</sup> para. 85). Again, some recent secondary legislation specifies certain types of remedies.<sup>47</sup>

Overall, Van Gerven (2000:521) concludes from the Court's case law that the maxim 'ubi ius ibi remedium' ('where there is a right there must be a remedy') is now a principle of Community law, which is inherent in the system of the Treaty. Under this principle, the remedy made available under national law must provide adequate judicial protection, i.e. the redress must be commensurate with the nature and the degree of interference with individuals' rights. Similarly, Prechal (2005:89 subs.) states that there now exists a general Community law requirement that remedies must be effective, proportionate, and dissuasive. As a general point, it needs to be added that the right of Member States to determine the form and extent of remedies is conditional upon the observance of the fundamental principles of Community law, which include inter alia the general principle of equality and non-discrimination (*Olaso Valero*,<sup>48</sup> para. 34). Under this principle, discrimination can result from 'treating either similar situations differently or different situations identically' (*Italian Refrigerators*,<sup>49</sup> p. 177 subs.). An example is provided by the *Olaso Valero* case, which concerned the protection of workers under Community law in the event of the insolvency of their employer.<sup>50</sup> The Court held that where, under national law, a right to a remedy exists in the event that a dismissal is found to be unfair by a court, the same right also exists where the existence of such discrimination is stated in a conciliation procedure.

<sup>44</sup> Regulation 2950/83 on the tasks of the European Social Fund, OJ 22.10.1983 L 289/1.

<sup>45</sup> See I.2.1. above.

<sup>46</sup> Joined Cases C-20/00 and C-64/00 *Booker Aquacultur Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] ECR I-7411.

<sup>47</sup> For an example from the EU's third pillar (before the Amsterdam revision), see Art. 7 of the Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ 11.11.2004 L 335/8. In relation to legal persons, the following sanctions may be imposed in addition to criminal or non-criminal fines: exclusion from entitlement to tax relief or other benefits or public aid; temporary or permanent disqualification from the pursuit of commercial activities; placing under judicial supervision; a judicial winding-up order; temporary or permanent closure of the establishments used for committing the offence; the confiscation of substances which are the object of certain offences, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities.

<sup>48</sup> Case C-520/03 *José Vicente Olaso Valero v Fondo de Garantía Salarial (Fogasa)*, judgment of 16 December 2004, n.y.r.

<sup>49</sup> Case 13/63 *Italy v Commission* [1963] ECR 165.

<sup>50</sup> Directive 80/987 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 28.10.1980 L 283/23.



### 2.3. Case law regarding the meaning of 'effective, proportionate and dissuasive remedies' in general EC law

An examination of the Court's case law regarding the requirements of effectiveness, proportionality and dissuasiveness in relation to national remedies under general EC law gives the impression that the Court does not explain precisely how it arrives at the conclusion that a given remedy is or is not acceptable. For example, in *Hansen*<sup>51</sup> the Court found that a national system of strict liability for infringements of EC social legislation relating to rest hours in road transport was acceptable under Community law. First, the Court held that the specific duties imposed on the employer by the relevant Regulation<sup>52</sup> (namely to set up a service timetable and a duty roster) did not prevent Member States from setting up a system of liability on the part of the employer. Second, the Court found that a system based on strict or automatic liability (i.e. liability arising even in the event where there is no fault on the side of the employer) does not in itself involve a distortion of conditions of competition within the Community and that such a system is not disproportionate. In the latter context, the Court simply stated that road safety is a matter of public interest which may justify the imposition of a fine on the employer for infringements committed by employees and a strict system of liability. No further explanation is given. Similarly, in *Italy v Commission*<sup>53</sup> the Court found that the extent of the reduction determined by the Commission of the amount paid to Italy from the European Agricultural Guidance and Guarantee Fund following a finding of insufficient controls on the part of the Italian authorities over the production of olive oil was justified. The special aspect of this case was that it concerned a provision of Community law that explicitly states the requirements of effectiveness, proportionality and dissuasiveness.<sup>54</sup> The Court simply stated that the Commission had taken into account the positive aspects of the Italian system of controls but that there had been irregularities in the level of controls. In view of the nature of these irregularities, the correction of 2% as determined by the Commission appeared justified. Again, there are no further explanations.

The picture is similar in the different but related area of determining the amount of the fine or lump sum<sup>55</sup> to be paid by a Member State whose failure to fulfil its obligations has been stated in a second round of enforcement proceedings. The Commission has defined its method for calculating the suggested fines and lump sums in Communications.<sup>56</sup> In case law concerning this calculation, only a few general statements can be found. In *Commission v Greece*,<sup>57</sup> a case concerning Community environmental protection law, the Court stated that in the absence of specific provisions regulating the issue in the Treaty, the Commission may adopt guidelines. It also stated that the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. The Court added that in

<sup>51</sup> Case C-326/88 *Anklagemyndigheden v Hansen & Soen I/S* [1990] ECR I-2911.

<sup>52</sup> Regulation 543/69 on the harmonisation of certain social legislation relating to road transport, OJ 29.3.1969 L 77/49.

<sup>53</sup> Case C-297/02 *Italy v Commission*, judgment of 23 September 2003, n.y.r.

<sup>54</sup> Art. 2(1) Regulation 2988/95 on the protection of the European Communities' financial interests, OJ 23.12.1995 L 321/1, which provides: 'Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.'

<sup>55</sup> In Case C-304/02 *Commission v France* (pending), the question is raised whether it is possible to impose simultaneously both a lump sum and penalty payment. AG Geelhoed argued that this is possible in view of the requirement of dissuasiveness (para. 73 subs. of the AG's first opinion of 29 April 2004).

<sup>56</sup> Information from the Commission - Memorandum on applying Article 171 of the EC Treaty, OJ 21.8.1996 C 242/6; Information from the Commission - Method of calculating the penalty payments provided for pursuant to Article 171 of the EC Treaty, OJ 28.2.1997 C 63/2.

<sup>57</sup> Case C-387/97 *Commission v Greece* [2000] ECR I-5047.

Ashley | 1963



applying these criteria, particular attention should be paid to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations (*Commission v Greece*, para. 92).<sup>58</sup> With regard to the specific case before it, the Court simply made a number of statements and then drew a conclusion. The Court found that, in the case of an ongoing breach, a penalty payment is the means best suited to the circumstances. It considered that the infringement was particularly serious because the obligation to dispose of waste without endangering human health and without harming the environment forms part of the very objectives of Community environmental policy and also because of the infringement's considerable duration. Further, the Court found that one particular breach alleged by the Commission had not been proven. From this it concluded that a penalty payment of EUR 20,000 was appropriate for each day of delay in implementing the measures necessary to comply with the Court's earlier judgment, from the day on which that later judgment was delivered to the day on which the earlier judgment was complied with. The Commission had suggested an amount of ECU 24,600. It is not clear from the judgment how precisely the Court arrived at the difference of EUR 4,600.<sup>59</sup> *Mutatis mutandis*, the same approach can be observed in the later case *Commission v Spain*.<sup>60</sup>

Overall, these examples illustrate the point made earlier in the context of sex equality law, namely that it may be difficult if not impossible to formulate criteria that are at the same time generally applicable and specific concerning the meaning of the requirements of effectiveness, proportionality and dissuasiveness. Prechal (2005:177) observes in a more general context that in practice only a limited uniformity of EC law on enforcement is feasible. Indeed, there may be only one general guideline for the determination of the effectiveness, proportionality and dissuasiveness of national remedies for breach of EC discrimination law, namely the duty to determine the remedy in light of the concrete circumstances of each individual case. Finally, the general EC law principle of equivalence must in particular be remembered.<sup>61</sup> In practice, this principle can mean that the remedies to be provided under national law must go beyond the minimum requirements of effectiveness, proportionality and dissuasiveness, namely where national laws provide for a stronger remedy for similar actions (e.g. for higher compensation or for more serious penal sanctions).

<sup>58</sup> A similar approach can be found in other contexts where Community law prescribes a penalty but does not define its level; e.g. Case C-225/97 *Commission v France* [1999] ECR I-3011, in relation to the obligation of the Member States to set a penalty payment for the infringement of Community public procurement law at a level high enough to dissuade the contracting entity from committing or persisting in an infringement.

<sup>59</sup> In terms of value 1 ECU corresponds to 1 Euro; see Art. 2 of Regulation 1103/97 on certain provisions relating to the introduction of the euro, OJ 19.6.1997 L 162/1.

<sup>60</sup> Case C-278/01 *Commission v Spain*, judgment of 25 November 2003, n.y.r.

<sup>61</sup> See I.2.1. above.



## Part II

# Remedies in international human rights law

## 1. General starting points

The report will now briefly examine the requirements in relation to remedies under international human rights law. International law is interesting not only for the purposes of comparison but also because it forms the broader background of much of EC discrimination law. As Signatory States to numerous international human rights instruments, the EU Member States will have to make sure that both their national and their regional law (EU and EC law) is in line with their obligations under such Treaties. Under general principles of international law, States are bound by the substantive principle of *pacta sunt servanda* ('treaties must be observed') but they are, in principle, free to choose the means of implementation and enforcement (see the Court of Justice in *Portugal v Council*,<sup>62</sup> para. 35). Increasingly, instruments of international law contain explicit provisions on remedies, albeit on different levels (Shelton 1999:15 subs.). Some international human rights instruments explicitly state the right to effective, proportionate and dissuasive remedies and some even specify the type of remedies to be granted (e.g. Art. 13 of the Council of Europe's Cybercrime Treaty, which specifies that effective, proportionate and dissuasive remedies must include the deprivation of liberty).<sup>63</sup> However, at present, provisions such as Art. 8 of the Universal Declaration of Human Rights and Art. 13 ECHR are much more commonly used. Both simply state the right to 'an effective remedy'. In the absence of more explicit provisions, there is no clear set of specific and directly applicable requirements under international law with regard to enforcement or remedial structures (McCrudden 2001:279). In the following section, some examples are given from jurisprudence regarding remedies under two instruments of international human rights law, namely the European Convention on Human Rights (ECHR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

## 2. Two examples

### 2.1. The right to an effective remedy under Art. 13 ECHR

As has already been mentioned, Art. 13 ECHR provides for the right to an effective remedy for persons whose rights and freedoms as set forth in the Convention are violated. The provision establishes a minimum requirement linked to the protection of other and more specific provisions, such as under Art. 5(4) and (5) ECHR and Art. 6 ECHR (right to a fair trial etc.). In addition, substantive provisions such as Art. 2 ECHR (right to life) and Art. 3 ECHR (prohibition of torture) also have remedial aspects, although the requirements of Art. 13 ECHR are broader than, for example, the procedural obligation under Art. 2 ECHR to conduct an effective investigation (Shelton 1999:30). Art. 13 ECHR has been strengthened in its relationship with other provisions of the Convention through the case law of the Court of Human Rights. The Court held that, in the event that national remedies are inadequate or ineffective, applicants are absolved from their obligation to exhaust domestic remedies before they can turn to the Court in order to complain about infringements of provisions such as Arts. 6 and 13 ECHR (e.g. *Aksoy v. Turkey*, para.<sup>64</sup> 57; discussed by Lawson & Schermers 2000:654).<sup>65</sup> In *Kudła*<sup>66</sup> (para. 146 subs.), the Court clarified the distinction

<sup>62</sup> Case C-149/96 *Portugal v Council* [1999] ECR, I-8395.

<sup>63</sup> Convention on cybercrime; see <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>. Although this Treaty is not strictly a human rights law instrument, it does have human rights aspects (e.g. racism, pornography).

<sup>64</sup> *Aksoy v. Turkey*, adm.no. 21987/93, judgment of 18 December 1996.

<sup>65</sup> In this case, the Court found that it could not examine Art. 6 ECHR because the applicant, due to the special circumstances of the case, had not even attempted to make an application before the civil courts. The Court therefore considered the complaint in relation to the more general obligation on States under Art. 13 ECHR to provide an effective remedy in respect of violations of the Convention (see para. 88 subs.).

<sup>66</sup> *Kudła v. Poland*, adm.no. 30210/96, judgment of 26 October 2000.

between the issues arising under Arts. 13 and 6 ECHR. The Court held that in certain circumstances Art. 6(1) must be deemed to constitute a *lex specialis* in relation to Art. 13 ECHR, so that it is unnecessary to consider the latter in addition to the former. In contrast, there is no such overlap in a situation where the alleged Convention violation is a violation of the right to trial within a reasonable time, contrary to Article 6(1) ECHR. In such a case, the question of whether the applicant did benefit from trial within a reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether an effective remedy was available to the applicant under domestic law to ventilate a complaint on that ground. In its former case law, the Court had nevertheless declined to examine Art. 13 ECHR as well. In *Kudła*, however, the Court changed its approach and decided to examine Arts. 6(1) and 13 ECHR separately.<sup>67</sup>

As for the substance of Art. 13 ECHR, the Court in *Silver and others v. UK*<sup>68</sup> (para. 113) listed the principles governing the applicability of Art. 13 ECHR (see Gomien, Harris & Zwaak 1998:336 subs., Mowbray 2001:591 subs.), namely: 1) the claim of a violation must be arguable, 2) though the authority in charge need not necessarily be of a judicial nature,<sup>69</sup> its powers and guarantees are relevant in determining whether the remedy is effective, 3) further, an aggregate of remedies may satisfy Art. 13 even if no single remedy does so. The Convention does not lay down any given manner for ensuring effective implementation. In *Aksoy v. Turkey* (para. 95), the Court of Human Rights held that the scope of the obligation under Art. 13 ECHR varies depending on the nature of the applicant's complaint under the Convention but that the remedy "be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State'. The Court also stated that Art. 13 ECHR requires 'the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief' (emphasis added; see also Smith and *Grady v. UK*,<sup>70</sup> para. 135). Within this framework, States Parties to the Convention enjoy a broad margin of appreciation when implementing Art. 13 ECHR.

The Court's case law on Art. 13 ECHR appears to deal mostly with the procedural aspects of the right to an effective remedy (that is, access to a judicial or administrative authority to deal with claims of a violation of the Convention), although in certain cases the Court explicitly mentions compensation as one possible form of relief (e.g. *Aydin v. Turkey*,<sup>71</sup> para. 103). According to Kilpatrick (2000:23 subs.), it is very difficult to construct any general criteria about what might constitute an effective remedy and the threshold is very low. Kilpatrick concludes that the promise of Art. 13 ECHR has not been fulfilled (see also White 2000). Similarly, Shelton (1999:32) appears to suggest that a wider interpretation of the Court's remedial powers under Art. 13 ECHR would be possible. In particular, the Court could direct the State in breach of the Convention to remedy the breach in the first instance when such a case reaches it, rather than allowing for successive cases concerning the same State and the same problem to come to it.

<sup>67</sup> The reason indicated by the Court was the continuing accumulation of applications in which the only, or principal, allegation was that of a failure to ensure a hearing within a reasonable time in breach of Article 6(1) ECHR as well as the growing frequency of violations. In that context, the Court spoke of an important danger for the rule of law within national legal orders when excessive delays in the administration of justice occur in respect of which litigants have no domestic remedy.

<sup>68</sup> *Silver and others v. UK*, adm.no. 5947/72, judgment of 25 March 1983.

<sup>69</sup> It should be noted that this applies only within the framework of Art. 13 ECHR. In contrast, Art. 6 ECHR explicitly states a right to a court.

<sup>70</sup> *Smith and Grady v. UK*, adm.no. 33985/96 and 33986/96, judgment of 27 September 1999.

<sup>71</sup> *Aydin v. Turkey*, adm.no. 23178/94, judgment of 25 September 1997.

## 2.2. The right to effective protection and remedies under Art. 6 CERD

The second example of a provision on effective remedies in international human rights law to be mentioned briefly in the present context is Art. 6 CERD. It is more explicit than Art. 13 ECHR in that it provides for effective protection and remedies for victims of racial discrimination, including just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination (see McCrudden 2001:267 subs.). The meaning of the concepts of reparation and satisfaction has been explained by the Committee on the Elimination of Racial Discrimination in particular in General Recommendation 26,<sup>72</sup> where the Committee mentioned both pecuniary and moral damage. McCrudden mentions several concrete cases examined by the Committee in the context of Art. 6 CERD. A case concerning the Netherlands<sup>73</sup> is of particular interest because here the Committee recommended a specific type of remedy. The case concerned alleged racial discrimination against a Moroccan citizen looking for a house in the Netherlands. The Committee found that the investigation by the police and prosecution authorities had not met the requirements of due diligence and expediency but had been inadequate and incomplete. The Committee recommended that the Netherlands should review its policy and procedures regarding the investigation of instances of alleged racial discrimination and that it should 'provide the complainant with relief commensurate with the moral damage he had suffered' (points 6.3. subs. of the Committee's opinion; emphasis added; see also McCrudden 2001:273).

## 3. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparations

More specific information on the possible meaning of the right to an effective remedy under international human rights law can be found in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparations. In 2000, the UN Commission on Human Rights adopted a Resolution on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, in which it called upon the international community to give due attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights. It also requested the Secretary-General to circulate to all Member States the draft text of the Basic Principles and Guidelines.<sup>74</sup> In 2003, the Commission on Human Rights requested a revised version of the Basic Principles, taking into account the opinions and commentaries of States and of intergovernmental and non-governmental organisations as well as the results of the consultative meeting.<sup>75</sup> In a Resolution adopted in 2004, the Commission on Human Rights called for a further consultative meeting on the text, with a view to finalising the Basic Principles and Guidelines.<sup>76</sup> As far as the present writer can see, the finalization of the text is still going on.

In the revised text of the Basic Principles and Guidelines,<sup>77</sup> it is stated that the obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, inter alia: a State's duty to investigate violations effectively and, where appropriate, to take action against the violator, in accordance with domestic and

<sup>72</sup> See e.g. <http://www1.umn.edu/humanrts/gencomm/genrexxvi.htm>.

<sup>73</sup> Netherlands: Communication No 4/1991 (16/3/93) [CERD/C/42/D/4/1991].

<sup>74</sup> Commission on Human Rights Resolution 2000/41 on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2000.41.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2000.41.En?Opendocument). On the earlier development of this document, see Shelton 1999:18 subs. The text of the Basic Principles can be found at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2000.62.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2000.62.En?Opendocument), in the annex.

<sup>75</sup> Commission on Human Rights Resolution 2003/34 on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.34.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2003.34.En?Opendocument).

<sup>76</sup> Commission on Human Rights Resolution 2004/34 on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, [www.ohchr.org/english/events/meetings/docs/RES\\_2004\\_34.doc](http://www.ohchr.org/english/events/meetings/docs/RES_2004_34.doc).

<sup>77</sup> For the text, see the link indicated at <http://www.unhcr.ch/html/menu2/restitution.htm>.



international law; to provide victims with equal and effective access to justice; to afford appropriate remedies to victims, and to provide for or facilitate reparation to victims (point 3). Reparation must be adequate, effective and prompt as well as proportionate to the gravity of the violations and the harm suffered (point 15). Taking account of individual circumstances, reparation should take the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (point 21). The text of the Basic Principles and Guidelines is quite specific regarding the form and extent of these remedies. It states:

'22. Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

23. Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities, including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity; and
- (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

24. Rehabilitation should include medical and psychological care as well as legal and social services.

25. Satisfaction should include, where applicable, any or all of the following:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) The search for the bodies of those killed or for the disappeared, and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
- (e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial or administrative sanctions against persons responsible for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels.

26. Guarantees of non-repetition and prevention should include, where applicable, any or all of the following:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media, and other related professions, and human rights defenders;
- (e) Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, including law enforcement officials, as well as military and security forces in international humanitarian law;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;
- (g) Creating mechanisms for monitoring inter-social conflict resolution and preventive social intervention.'

McCrudden (2001:297) has observed that a noticeably more cautious approach has been adopted of late in Europe (meaning in the framework of the Council of Europe and the EU/EC) than internationally, and that a growing gap between international normative rhetoric and European remedial structures can be identified. For present purposes, it is important to note that the idea behind the Basic principles is not to create new substantive legal mechanisms but to systematise obligations already existing under different sources of international human rights law. Given that EC human rights law must be seen against the background of International Human Rights Law, it must be concluded that the principles expressed in the Basic Principles and Guidelines must be taken seriously by the EU Member States as the benchmark in relation to remedies when implementing and applying EC human rights law.

## Part III

# Case studies of national legislation and jurisprudence on effective, proportionate and dissuasive remedies in discrimination law

In the following sections, selected examples of national legislation<sup>78</sup> on remedies under the Race and the Employment Framework Directives will be described because of certain specific features of their approach to remedies. As a whole, no single enforcement system appears to fulfil all requirements mentioned in the introduction to this study in relation to a truly encompassing enforcement system. Essentially, they are all based on an individualistic and remedial - rather than preventive - approach. What is more, Waaldijk & Bonini-Baraldi (2004:588) in their report on sexual orientation discrimination in the 'EU of 15' conclude that in hardly any of the Member States can the total repertoire of sanctions be considered effective, proportionate and dissuasive. Based on the Network's national reports,<sup>79</sup> it seems possible that the same is also true with regard to the Member States that joined the European Union in 2004. Nevertheless, certain particularly interesting elements can be found in the laws of Austria, Cyprus, France, Ireland, Italy and Portugal. These elements are discussed below.

## 1. Ireland: non-pecuniary remedies

Irish law provides for a broad range of remedies, including compensation awards, re-instatement and re-engagement, as well as orders requiring employers to take specific courses of action. Certain discriminatory actions can amount to a criminal offence. For present purposes, the non-pecuniary remedies in the form of orders requiring employers to take certain courses of action are of particular interest. The Network's Irish country rapporteur, Shivaun Quinlivan, observes that the non-financial remedies made possible by Irish law have huge potential.<sup>80</sup> According to information provided by the rapporteur (both in the country report and separately, following specific questions), there is case law concerning the following orders in particular:

- The creation of an equal opportunities policy;
- Re-training of staff with particular emphasis on disability issues;
- Reviewing recruitment procedures;
- Reviewing sexual harassment procedures;
- Formal training of interview boards;
- Review of customer service practices;
- Equality training for staff;
- Inviting the complainants and their companions for a complimentary meal or drink;
- The drafting of formal written policies on the refusal of services that comply with the law.

## 2. Cyprus: powers of the specialised anti-discrimination body

The Cypriot enforcement system includes civil elements (reinstatement or damages), criminal elements (in relation to race discrimination) and administrative elements (via the Commissioner of Administration). Two aspects in

<sup>78</sup> In the case of most Member States, there is no case law yet, Ireland being a particularly important exception (see in particular <http://www.odei.ie>; also Turner, pp. 9 subs.).

<sup>79</sup> The European Network of Legal Experts in the Non-discrimination Field provides the European Commission with independent information and advice on the implementation and application of the Race and Employment Framework Directives. The Network is managed by a consortium consisting of human european consultancy (Utrecht, the Netherlands) and the Migration Policy Group (Brussels, Belgium). The Network provides the European Commission with information on various levels, including in particular a 'Comprehensive Report', which contains one national report on the implementation of Directives 2000/43/EC and 2000/78/EC in each one of the 25 EU Member States, as well as thematic reports - such as this present report on remedies and sanctions.

<sup>80</sup> The country rapporteur adds that in practice it may be difficult to use such remedies to full effect due to a lack of human and financial resources. Further, it is difficult to monitor how the remedies are put into practice and enforced.

particular appear to be noteworthy in the approach adopted by Cyprus. The first of these concerns the powers of the Commissioner of Administration, which is the specialised anti-discrimination body under Cypriot law for race discrimination and certain other forms of discrimination. In the Network's Cyprus country report, the powers of the Commissioner in relation to certain forms of discrimination are described as going beyond those prescribed by the Race and the Employment Framework Directives. The Commissioner's powers includes in particular:

- The power to receive and investigate complaints of discrimination, and the power to issue reports of findings as well as orders (through publication in the Official Gazette) for the resolution of the situation which produced the discrimination. The Commissioner's Reports can be used for the purposes of obtaining damages in court;
- The power to issue binding recommendations to the person against whom a complaint has been lodged, and to supervise compliance with orders issued against persons found guilty of discrimination (subject to annulment by the Supreme Court of Cyprus);
- The power to investigate issues in his/her own right or following applications by NGOs, chambers, organisations, committees, associations, clubs, foundations, trade unions, funds and councils acting for the benefit of professions or other types of labour, employers, employees or any other organised group, local authorities, public law persons, the Council of Ministers, the Parliament etc. In such cases, the Commissioner is empowered to issue recommendations to the person or group found guilty of discriminatory behaviour as to alternative treatment or conduct and the abolition or substitution of the offending provision, term, criterion or practice;
- The power to issue Codes of Good Practice regarding the activities of any persons in both the private and public sector, obliging them to take practical measures for the purpose of promoting equality of opportunity irrespective of community, racial, national or ethnic origin, religion, language and colour;
- The power to investigate complaints against the civil service and its officials, which expressly covers investigation into complaints that acts or omissions violate human rights and to make suggestions or recommendations to the competent authority for reparation of the injury or injustice, including time limits within which such reparation must take place. The Commissioner can report failures to give effect to a suggestion or recommendation for reparation to the House of Representatives and the Council of Ministers.<sup>81</sup>

The second noteworthy aspect of the system of remedies adopted by Cyprus is that this system, unlike that of most other countries, puts particular emphasis on a non-individualistic approach by not only aiming to stop and to some extent remedy discrimination in the individual case but also by changing the law and/or administrative practice, if necessary. Thus, the findings and reports of the Commissioner must be communicated to the Attorney General of the Republic of Cyprus, who will advise on the adoption or otherwise of appropriate legislative or administrative measures, taking into account the Republic's international law obligations, and will prepare legislation for the abolition or substitution of the relevant legislative provision. With this approach, the Cypriot system aims to address, at least to some extent, the problem of discrimination on a more general (macro) level.<sup>82</sup>

<sup>81</sup> The country report points to certain limits to the above system: first, the above powers relate only to racial discrimination and to certain other forms of discrimination but not to discrimination at large. Second, the fines that the Commissioner can impose are very small and therefore hardly dissuasive (in fact, on the level of individual redress the Commissioner is not very powerful). Thirdly, thus far the Commissioner has not yet made use of all her powers (e.g. concerning Codes of Good Practices).

<sup>82</sup> Other examples for a non-individual approach of specialised bodies are provided by the UK Commission for Racial Equality and by the Dutch Equal Treatment Commission, both of which enjoy powers going beyond the examination of individual cases.

### 3. Portugal: administrative remedies

The Portuguese approach to remedies appears noteworthy in view of the interesting list of ancillary administrative remedies that are indicated in the country report. Overall, the Portuguese system contains the usual elements of individual redress in the form of civil sanctions (reinstatement, damages), criminal sanctions for some types of discrimination (race, colour, ethnic and national origin as well as religion), and administrative sanctions. Besides fines, administrative sanctions include in particular the following measures, which are available for all types of discrimination:

- Publication of the decision;
- Censure of the perpetrators of the discriminatory practices;
- Confiscation of property;
- Prohibition of the exercise of a profession or activity which involves a public capacity or which depends on authorisation or official approval by the public authorities;
- Removal of the right to participate in trade fairs;
- Removal of the right to participate in public markets;
- Prohibition of access to establishments;
- Suspension of licences and other authorisations;
- Removal of the right to the benefits granted by public bodies or services.

### 4. Portugal, Austria, Italy and France: withdrawal of state benefits (including benefits obtained in the framework of public procurement procedures)

Of the list just mentioned in relation to Portugal, the last element (removal of the right to benefits granted by public bodies or services) deserves particular emphasis. A similar element can be found in Austrian law, namely the withdrawal of federal benefits. However, the Network's Austrian country rapporteur, Dieter Schindlauer, points out that this does not extend to the exclusion from public procurement which (in his opinion) would enhance the effectiveness of this particular remedy. In contrast, Portuguese, Italian and French law explicitly address the issue of public procurement in the context of remedies for discrimination. According to the Italian country report, if a discriminatory act or behaviour 'is performed by enterprises to which public bodies have awarded tenders, or supply contracts or public financial assistance, such benefits can be withdrawn. In certain particular cases these enterprises may be excluded for up to two years from tenders and/or financial assistance.' Similarly, the Network's French country report mentions accessory sanctions provided by the Penal Code that include, among others, exclusion from public procurement contracts.

Although the use of government contracts to put social policies into effect has a long history (see McCrudden 2004,<sup>83</sup> with further references), the role of public procurement as an instrument to fight discrimination is still often underestimated. It follows from the fact that the EU Member States are bound by their own national discrimination law, by the law of the EU and by international human rights law, that they are under an obligation to

<sup>83</sup> The article provides an introductory and worldwide survey of social procurement practices. It describes the history and current use of government contracting and in doing so considers examples of the use of procurement to promote equality on the basis of ethnicity and gender drawn from Malaysia, South Africa, Canada and European countries. The article proposes the umbrella term 'sustainable procurement' for both social and environmental purchasing.

respect and enforce that law on all levels of their actions, including public procurement.<sup>84</sup> As the Portuguese, Italian and French examples show, public procurement can be used not only as a forward-looking remedy but also as a backward-looking remedy for discrimination. Both aspects are important in the context of the requirements of effectiveness, proportionality and dissuasiveness for a national system of remedies. In the framework of EC law, the Court of Justice's case law has made clear that even when they were not mentioned in the European Community's public procurement legislation,<sup>85</sup> the use of non-economic criteria in public procurement procedures was acceptable within the limits of general EC law, that is, within the particular limits of the equality principle (case law beginning with *Beentjes*).<sup>86</sup> In the new public procurement legislation that was recently adopted, non-economic criteria relating to the performance of the contract are explicitly mentioned.<sup>87</sup> Within this legislative framework and in relation to non-discrimination, public procurement procedures can be used very generally as a means to ensure compliance with the State's non-discrimination law. More specifically, public procurement procedures can also be used in view of positive action measures. In both cases, public procurement is essentially used as a forward-looking remedy for discrimination. Backward-looking remedies are the logical continuation of such an approach in the event of an infringement of national non-discrimination law. First, the withdrawal of benefits obtained through public procurement procedures is a necessary consequence of discrimination. Second, the exclusion of the enterprises concerned for a certain period of time from future tenders and/or financial assistance appears to be an adequate way of providing for a proportionate and dissuasive sanction against discrimination (see also ERRC, Interights & MPG 2004:28).

<sup>84</sup> In the framework of EC law, this duty is based on Art. 10 EC which, among other things, encompasses a positive obligation on the part of the Member States 'to ensure that everyone complies, within their jurisdiction, both with Community law and with national measures implementing Community law' (Swart 1996:5).

<sup>85</sup> For a useful overview of the Directives presently in force, see [http://europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm#current](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm#current).

<sup>86</sup> Case 31/87 *Gebroeders Beentjes BV v The Netherlands* [1988] ECR 4635; see further Case C-225/98 *Commission v France* [2000] ECR I-7445, Case C-513/99 *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki, HKL-Bussiliikenne* [2002] ECR I-7213 and Case C-448/01 *EVN AG & Wienstrom GmbH v Austria*, judgment of 4 December 2003, n.y.r. See also the Interpretative communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 fin.; further Tobler 2000 as well as the chapter on public procurement in Tobler 2005, both with further references.

<sup>87</sup> Art. 38 of Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 30.4.2004 L 134/1, and Art. 26 of Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 30.4.2004 L 134/114 provide as follows: 'Contracting entities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the notice used as a means of calling for competition or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

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## Part IV

Application to the meaning of effective,  
proportionate and dissuasive remedies in the  
race and framework employment directives

## 1. Structure and terminology of the Directives

Turning now to the requirements with regard to remedies under the Race and the Employment Framework Directives, a first remark concerns the Directives' structure and terminology. First, the Directives' chapters on remedies and enforcement (Arts. 7 subs. of the Race Equality Directive and Arts. 9 subs. of the Employment Equality Directive) do not explicitly state a right to a substantive remedy, even though the Directives' preambles stress the importance of adequate means of legal and judicial protection and despite the fact that the Commission in the Explanatory Memoranda claims that the chapters deal with both of the 'two main conditions for effective legislation against discrimination: the right of victims to an effective personal remedy against the person or body who has perpetrated the discrimination, and the existence of adequate mechanisms in each Member State to ensure adequate levels of enforcement'. In fact, the remedies and enforcement chapters solely deal with enforcement procedures, time limits for bringing actions, the burden of proof, victimisation, dissemination and information as well as social dialogue. Possibly, the lack of an express and general provision on the right to a personal remedy in this part of the Directives can be explained by the experience with the procedural provisions in the Sex Equality Directives (in particular Art. 6 of the Second Sex Equality Directive) which have been interpreted by the Court as 'including' such a right to a personal remedy. In other words, it may be that the Commission considered Art. 7 of the Race Equality Directive and Art. 9 of the Employment Equality Directive to imply a general right to a personal remedy.

However, the two Directives contain a provision on remedies outside the remedies and enforcement chapters. In the chapter on final provisions, Art. 15 of the Race Equality Directive and Art. 17 of the Employment Equality Directive oblige the Member States to lay down rules on effective, proportionate and dissuasive 'sanctions' applicable to infringements of the national provisions adopted pursuant to these Directives. This raises questions with regard to the relationship between remedies and sanctions (see also Hill, p. 4 subs.). What is more, the Commission's proposals for the two Directives<sup>88</sup> spoke of 'penalties' and only later was the term changed to that of 'sanctions'. (The latter term is also used in recent sex equality legislation, though the Goods and Services Directive uses the term 'penalties'.) Whilst remedies (understood in a substantive sense) can generally be defined as concerning the form and the extent of the relief and redress granted to victims of discrimination (see Van Gerven 2000:525),<sup>89</sup> sanctions in a strict sense concern penalizing measures (and thus the type of measures aimed at by the Commission in its original proposals). Consequently, compensation in the sense of making good damage suffered by the victim is not a sanction in this sense (Van Gerven 2000:503, footnote 11). Only punitive damages would be covered by this term. However, in their final form Arts. 15 and 17 also include a reference to compensation ('sanctions, which may comprise the payment of compensation to the victim'), which indicates that the provisions are not intended to be limited to sanctions in the strict sense of the word but rather concern the broader concept of remedies. Indeed, this is the way that they are generally interpreted in academic writing according to which it is here that the right to a general and personal remedy can be found in the Directives (e.g. Turner, Hill, O'Dempsey 2004, Moon 2004). The confusing use of the term 'sanctions' is due to the Court's case law in the area of sex discrimination, discussed earlier in this report,<sup>90</sup> where the Court used the term 'sanctions' when in fact speaking about the right to a personal remedy.

<sup>88</sup> Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM(99) 566 fin.; Amended proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 31.10.2000 C 311 E/169, COM(2000) 328 fin.; Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM(99) 565 fin.; Amended proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, OJ 27.2.2001 C 62 E/152, COM(2000) 652 fin.

<sup>89</sup> In academic writing it is noted that there appear to be differences in understanding the term 'remedies' in common law and in civil law systems, and that even within one particular system there are different interpretations of the term 'remedies' (e.g. Van Gerven 2000:526 subs.; Harlow 2000:72).

<sup>90</sup> See I.1. above.

## 2. Form and extent of effective, proportionate and dissuasive remedies

### 2.1. In any case: a judicial remedy

When it comes to the form and the extent of the remedies ('sanctions') required by the Race and the Employment Framework Directives, a first point to be noted is that Art. 7 of the Race Equality Directive and Art. 9 of the Employment Equality Directive oblige the Member States to make available 'judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures'. In academic writing, it is sometimes said that this gives the Member States a choice between judicial and administrative remedies (e.g. Moon 2004:2, Turner, p. 2), though it has also been suggested that administrative processes having no legal ramifications will be insufficient in view of the requirement of effectiveness (according to O'Dempsey 2004:7, the Irish administrative system is likely to fulfil this criterion).<sup>91</sup> In my opinion, the broader background of the Directives shows that there must be in any case a remedy of a judicial nature. Thus, it was mentioned earlier that under general EC law there is a right to a judicial remedy and that such a remedy is also required in the light of Art. 6 ECHR. It is clear that specific EC law cannot derogate from this double requirement. In addition, it is likely that when the Member States negotiated the text of the future Directives, they did not mean to do away with the requirement of a judicial remedy but rather meant to encourage national legislators to consider in addition other types of approaches, such as administrative or conciliation procedures which are more easily accessible (a fact that is confirmed by the national reports). Indeed, it can be argued that the requirement of effectiveness may call for a combination of judicial and other types of remedies (e.g. Waaldijk & Bonini-Baraldi 2004:588). Accordingly, Arts. 7 and 9 need to be interpreted as in any case stating a right to a judicial remedy that may be complemented by other avenues. Obviously, this also reflects on the types of remedies available under Arts. 15 and 17 of the Directives.

### 2.2. Effective, proportionate and dissuasive remedies

As for the meaning of the terms 'effective, proportionate and dissuasive' under the Race and Employment Framework Directives, the only concrete indication that can be found in the Directives is that the remedies 'may comprise the payment of compensation to the victim' - without any further information either on the type of damages (pecuniary, non-pecuniary, punitive) or on their extent.<sup>92</sup> Generally, reference can be made to what was said earlier in the context of sex equality and of general EC law, namely that there are no very specific indications as to the meaning of the requirements of effectiveness, proportionality and dissuasiveness, other than the general rule that each case must be judged in the light of its individual circumstances. One specific rule that needs to be remembered is that in the case of discriminatory dismissal the remedies granted must in any case include either reinstatement or compensation. Specific information on appropriate remedies can also be found in the UN Basic Principles and Guidelines that the Member States should use as a benchmark when dealing with remedies. Further, the general EC law principle of equivalence<sup>93</sup> must be remembered. In practice, this principle can mean that the remedies to be provided under national law must go beyond the minimum requirements of effectiveness, proportionality and dissuasiveness, namely where national law provides for a stronger remedy for similar actions (e.g. for higher compensation or for more serious penal sanctions).

<sup>91</sup> Unlike in other countries, the decisions issued by the administrative specialised non-discrimination body in Ireland are binding; see Waaldijk & Bonini-Baraldi 2004:586 and 631.

<sup>92</sup> Again, the same reference can be found in recent sex equality legislation. Regarding compensation, see below F.

<sup>93</sup> See I.2.1. above.

Two remarks should be added. The first concerns the importance of criminal sanctions. It has been argued that in the specific context of race discrimination a combination of civil and criminal measures will be necessary to facilitate full implementation of the Directive (e.g. O'Dempsey 2004:4, ERRC, Interights & MPG 2004:28). The reason for this appears to be the fact that the UN Convention on Race Discrimination (CERD) calls for criminal sanctions. In other words, mere civil and administrative measures will not be sufficient, particularly in view of the requirements of effectiveness and dissuasiveness. However, it can certainly be argued more generally that particularly serious forms of discrimination, on whatever grounds, must be punished through criminal measures in order for the remedy to be effective, dissuasive and proportionate (e.g. Waaldijk & Bonini-Baraldi 2004:586, Moon 2004:3). On the other hand, a system focusing (almost) entirely on criminal sanctions is not sufficient in the light of the right to a personal remedy: in legal systems based on the rule of law, criminal sanctions are not personal remedies for the victims of discrimination. Further, the Court's decision in *Dekker*, according to which the right to a remedy does not depend on fault on the side of the discriminator,<sup>94</sup> confirms that criminal sanctions (which do depend on fault on the side of the discriminator) alone cannot be sufficient in the light of the requirements of EC law.

A second point to be made concerns the phenomenon of multiple discrimination (see Schiek 2004). In a situation where Community law prohibits several different types of discrimination, some of which may be intrinsically linked, the issue of multiple discrimination is increasingly important in a legal perspective. Multiple discrimination is mentioned in consideration 14 of the preamble to the Race Equality Directive, in the context of race and sex discrimination. Although there is no such reference in the Directive in the specific context of remedies, it seems logical that under the requirement of proportionality the remedies granted in such cases must reflect the multiple and thus aggravated nature of the discrimination. For example, multiple discrimination must carry higher penalties than 'single' discrimination. It seems that in the national laws of the Member States the problem of multiple discrimination is rarely addressed in an explicit manner, and if so, then not necessarily in the context of sanctions understood as penalizing measures (e.g. Portugal where, according to the Network's country rapporteur, Manuel Malheiros, the law provides 'for higher damages because of the aggravated conduct of the discriminator'). In Germany, draft legislation explicitly mentions multiple discrimination and the reasoning relating to the relevant provision states that damages may be higher if someone is disadvantaged on more than one ground.

<sup>94</sup> See I.1.1. above.; also Waaldijk & Bonini-Baraldi 2004:586.

# Part V

## Upper limits on compensation and their compatibility with the directives

## 1. Forms of damages

The final part of this report deals with one specific type of remedy, namely compensation or damages. The main types of damages mentioned in the national laws of the Member States are pecuniary and non-pecuniary damages. Punitive (or exemplary) damages are much less common. It would seem that only the national laws of Cyprus, Ireland and the UK provide for punitive damages in the context of the implementation of the Race and Employment Framework Directives.<sup>95</sup> It is often thought that it is predominantly common law systems that provide for punitive damages.<sup>96</sup> However, Shelton (1999:75 subs.) has pointed out in the context of international human rights law that punitive damages are not only known in common law systems but also in civil law systems. Punitive damages are a particularly interesting remedy because they may incorporate a forward-looking strategy and a macro rather than just a micro approach (cases where the amount awarded is used for combating, on a group level, the type of discrimination at issue, including through positive action measures). According to O'Dempsey (2004:13), punitive damages can be justified in view of the requirement of dissuasiveness.

The Race and Employment Framework Directives do not specify the types of damages that must be granted under EC law if compensation is the chosen remedy. It would seem that even under the existing sex equality case law it is not entirely clear which types of damages are necessarily included in the concept of compensation. In the cases that have come before the Court of Justice, different types of damages have been mentioned, although the Court did not always explicitly address them. Under the Court's case law, no doubts can exist in relation to material or pecuniary damages, that is, loss of physical assets (*damnum emergens*) and/or loss of income (*lucrum cessans*). Such damages must also include interest<sup>97</sup> - although in the context of sex equality the Court did not address possible distinctions between different types of interest. In *Marshall II* (para. 31), the Court simply stated that the award of interest must 'be regarded as an essential component of compensation for the purposes of restoring real equality of treatment'. The Court's case law on damages under general EC law shows that damages can relate to *damnum emergens* as well as to *lucrum cessans* (e.g. *Kampffmeier*,<sup>98</sup> in the context of Member State liability; also *TEAM*,<sup>99</sup> in the context of a decision to annul an invitation to tender). It also includes interest on damages (here, the Court may distinguish between default interest and compensatory interest, with the former arising only where the amount of the principal sum owed is certain or can at least be ascertained on the basis of established objective factors; *Brazzelli*,<sup>100</sup> para. 35, in the context of staff law and salary arrears). According to AG van Gerven, all of the most important components of compensation must be included in the concept of compensation, namely loss of physical assets, loss of income, moral damage and damage on account of the effluxion of time (*Marshall II*, point 18 of the AG's opinion). It was also seen that moral damages may be required under international human rights law.<sup>101</sup> However, it can be argued that with regard to injury to feelings there may be other types of remedies that might also be effective, proportionate and dissuasive (meaning that in this regard the national law does not necessarily have to provide for a right to damages). Such remedies may include, for example, an apology to the victim of

<sup>95</sup> Some country reports point out that to some extent non-pecuniary damages may overtake the function of punitive damages (country reports of Austria and Portugal).

<sup>96</sup> Compare Rädler (1999:258) who noted in 1999 and in the context of race discrimination that only UK and US law provide for punitive damages.

<sup>97</sup> As Moore (1993:539) rightly states, the duty to pay interest is not limited to cases of discriminatory dismissal but also relates to other situations involving discrimination.

<sup>98</sup> Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Firma E. Kampffmeyer and others v Commission* [1967] ECR 245.

<sup>99</sup> Case T-13/96 *TEAM Srl v Commission* [1998] ECR II-4073.

<sup>100</sup> Case C-136/92 P *Commission v Augusto Brazzelli Lualdi and others* [1994] ECR I-1981.

<sup>101</sup> See II.2.2. above.

discrimination, acknowledgment of the truth of events involved in the discrimination or commemorations and tributes to the victims of the discrimination. Non-pecuniary remedies may be granted through the means of remedial orders, as mentioned in the Network's Irish country report<sup>102</sup> (see also Shelton 1999:292 subs.).<sup>103</sup>

## 2. Upper limits on compensation

The Race and Employment Framework Directives are not specific regarding the level of compensation granted as a remedy for discrimination. In the country reports it is often noted that the level of damages awarded to victims of discrimination under the national laws of the Member States is in practice and generally speaking very low and that for this reason this particular remedy may not be sufficiently effective, proportionate and dissuasive. On the legal level, upper limits<sup>104</sup> are not uncommon, although there are wide differences regarding the amounts set in law.<sup>105</sup>

Upper limits for pecuniary damages seem to apply under the laws of Estonia (six months' salary in the case of discriminatory termination of an employment contract where the victim of discrimination waived reinstatement), Hungary (twelve months' average earnings, in addition to reinstatement in cases of discriminatory dismissal), Ireland (104 weeks' pay; EUR 12,697 where the victim of discrimination was not an employee; EUR 6,348.69 under the Equal Status Act) and Sweden (32 months' wages in cases of dismissal after 10 years of employment; 48 months if the victim of discrimination is aged 60 years or over). In Finland, there appears to be an informal upper limit (EUR 15,000; this limit can be exceeded for special reasons). Statutory upper limits on compensation for non-pecuniary damages seem to apply in Belgium (six months' salary in the case of victimisation where a dismissal is proven to be a form of reprisal) and Malta (200 Liri, which is equivalent to EUR 465). There appear to be no limits in relation to either pecuniary or non-pecuniary damages in the national laws of the Czech Republic, Germany (based on draft legislation which is still under debate), Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain and the UK. In Latvia, there are currently no upper limits but this may change in the future (a draft law provides for upper limits on moral damages: 3,000 Lats or 5,000 Lats (equivalent to EUR 4,310 and 7,184, respectively, in cases of grave moral damages; 10,000 Lats, equivalent to EUR 14,369, if grave harm has been caused to life, physical integrity or health). Finally, Austrian law provides for an upper limit of EUR 500 in cases of non-recruitment or non-promotion if the employer proves that the victim would not have been recruited or promoted even in the absence of discrimination.

<sup>102</sup> See above III.1.

<sup>103</sup> As Shelton notes more generally, it is not always appropriate to substitute money damages for the invaded interest as it may allow the perpetrator 'to buy injustice'. Whilst damages are certainly adequate in situations where actual economic damage has occurred, performance must remain the preferred remedy in order to contravene notions of human rights reduced to a series of propositions assuring the payment of money to victims.

<sup>104</sup> The opposite, namely lower limits (minimum compensation) is also conceivable. For example, Austrian law provides for a minimum compensation of one month's salary for cases where the discrimination proves crucial for non-employment. Similarly, in cases of harassment, there is a minimum compensation of EUR 400.

<sup>105</sup> The following statements are based on the country reports as available to the author at the end of March 2005. In many cases, these are not yet the final versions of the reports. Also, certain reports, even in their final versions, do not provide all the information that would be useful for the author's purposes. Whether or not there are upper limits on damages for discrimination remains unclear particularly with regard to Cyprus, Denmark, Greece, Slovenia, Spain and France (according to O'Dempsey 2004:12, in France there is a system of upper limits on compensation for employment related wrongs. The Network's country report does not address the issue of such limits). – Based on the materials available to the present author, Lithuanian law does not seem to provide for damages at all.

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Of the countries where limits do exist, Ireland is particularly interesting because there are no comparable statutory limits on compensation for discrimination on grounds of sex. Under EC law, there can be no doubt that upper limits on compensation for discrimination are not acceptable either in the context of either the Race or Employment Framework Directives. Even though, to date, explicit case law and legislation<sup>106</sup> on this issue concerns sex discrimination, there is no conceivable convincing reason why a different approach should apply in relation to other types of discrimination. Rather, the Court's reasoning in the sex equality cases indicates that its findings are based on general, rather than sex discrimination-specific, considerations. Thus, the Court held in *Marshall II* (para. 26) that where compensation is the remedy chosen by the national legislator, 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.'<sup>107</sup> In the same decision (para. 30), the Court also stated that 'the fixing of an upper limit of the kind at issue [meaning the limits under national law for *damnum emergens*] cannot, by definition, constitute proper implementation of Article 6 of the [Second Sex Equality] Directive, since it limits the amount of compensation a priori to a level which is not necessarily consistent with the requirement of ensuring real equality of opportunity through adequate reparation for the loss and damage sustained as a result of the discriminatory dismissal' (see also *von Colson and Kamann*, para. 24). Commentators link the prohibition of upper limits on compensation to the requirement of proportionality (namely of the damage suffered to the compensation awarded; e.g. *Betlem* 1991:1367). Others explain the Court's explicit approach, rather than reliance on the more general requirements of equivalence and effectiveness under Art. 10 EC, by the Court's concern for the *effet utile* of EC non-discrimination law (e.g. *Curtin* 1994:640).

In *Draehmpaehl*<sup>108</sup> (para. 33), the Court held that a statutory presumption of an upper limit on compensation is acceptable in cases of a discriminatory refusal to take an application for employment into consideration where there was no prospect of being recruited even in the absence of discrimination. Ward (1998:71) explains that the Court in this case distinguished between a situation where an applicant was not the best qualified person for the position but who had suffered discrimination on grounds of sex and a situation where the applicant would have been appointed to the post but for the discrimination. The fact that a limitation of damages in the former case may be acceptable is due to the fact that it involves a less radical form of harm. Alternatively, it could also be said that in this case discrimination is not the only cause for not being appointed (rather, there are two parallel causes). Subsequently, the *Draehmpaehl* ruling was codified in Art. 6(2) of the Revised Second Sex Equality Directive. Finally, I agree with O'Dempsey (2004:13) that upper limits on punitive damages appear acceptable in situations where there was no loss.

<sup>106</sup> Art. 6(2) of the Revised Second Sex Equality Directive, Art. 8(2) of the Goods and Services Directive, Art. 18 of the Recasting Directive.

<sup>107</sup> Interestingly, AG van Gerven had suggested that following *von Colson and Kamann* Community law did not require full damages in the sense of compensation equal to the full damage sustained but only adequate damages (para. 17 of the AG's conclusions). The Court expressly contradicted this interpretation by its clear statement on full damages.

<sup>108</sup> Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195.



## Part VI

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## Conclusion

In the European Union, the rule of law is a fundamental principle (Art. 6 EU). One significant aspect of this rule is to provide victims of discrimination with appropriate remedies. This report has emphasised that under the remit of EC law there is a general right to a personal remedy for victims of discrimination. Whilst there is a broad range of remedies that may be useful and appropriate in the overall context of the Race and Employment Framework Directives, it is important to note that under both EC law and the European Convention on Human Rights there must in any case be a right to a remedy of a judicial nature.

The Directives state that the remedy must be effective, proportionate and dissuasive. In this report, it has been contended that, in the absence of case law from the Court of Justice concerning the meaning of these terms under the Race and Employment Framework Directives, regard must be had to the Court's case law from other areas of EC law, in particular from the area of sex discrimination, where there is also a requirement for an effective, proportionate and dissuasive remedy. Under this case law, the general starting point is that the choice of remedy must be based on the specific circumstances of each individual case. However, for certain cases there are specific Community law requirements. Thus, in the case of discriminatory dismissal the remedy (or remedies) granted must in any case include either reinstatement or compensation. Where compensation is chosen as a remedy it must fully make good the damage. Upper limits are not acceptable, except for situations where the damage was caused not only through discrimination. The report has emphasised that, in a broader perspective, the United Nations (Draft) Basic Principles and Guidelines on the Right to a Remedy and Reparations provide useful concrete guidelines concerning the meaning of the concept of effective, proportionate and dissuasive remedies.

Finally, it has been noted that the national laws of some EU Member States implementing the Race and Employment Framework Directives contain some interesting elements, relating in particular to innovative non-pecuniary remedies, the powers of the specialised administrative non-discrimination body, the range of ancillary administrative remedies, the use of punitive damages and the withdrawal of and exclusion from state benefits, in particular in the context of public procurement. However, in the case of most Member States greater efforts are needed in order to meet fully the requirements under EC law to impose a personal remedy of a judicial nature, and a remedy that is truly effective, proportionate and dissuasive.

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