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REPORT

Preventing and Reacting to Discrimination through Sanctions and Remedies

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*This designation is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

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Chapter I: Introduction

Conceptual clarifications and aims of sanctions in non-discrimination law

When preventive measures are not sufficient to avoid discrimination, issuing sanctions and remedies becomes crucial to punish the perpetrator, compensate the victim for the suffered harm, and prevent further violations. In fact, the Court of Justice of the European Union (CJEU) established already early on that "[i]t is impossible to establish real equality of opportunity without an appropriate system of sanctions."[1] The EU non-discrimination law envisages the requirements of sanctions under Article 15 of the Racial Equality Directive (RED)[2] and under Article 17 of the Employment Equality Directive (EED);[3]

> Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive.

Similar wordings are envisaged in EU law concerning the equal treatment between men and women: Article 14 of Directive 2004/113/EC (penalties)[4]; Article 18 (compensation or reparation) and Article 25 (penalties) of Directive 2006/54/EC;[5] and Article 10 of Directive 2010/41/EU (compensation and reparation)[6].

Interpretative issues already emerged during the drafting process of both the RED and the EED and, in particular, from the use of the word "sanctions", which was not originally envisaged in the proposal. Sanctions could in fact be understood in a stricter sense and in a broader sense. The stricter interpretation is closer to the terminology of the initially proposed "penalties", which are centred on the punishment of

[1] CJEU, Judgment of the Court of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*, Case C-14/83, EU:C:1984:153, para. 22

[2] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp 22–26.

[3] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp 16–22.

[4] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp 37–43.

[5] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, 26.7.2006, pp 23–36. Its Article 18 reads: "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration."

[6] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp 1–6.

the perpetrator. The broader interpretation of sanctions is however prevailing among scholars[7] and is transpiring from the eventually adopted wording of the 2000 Equality Directives,[8] which read that sanctions "may comprise the payment of compensation to the victim". While the focus of the provision thus still seems to be on the perpetrator, the wording contained in the letter of formal notice sent by the Commission to the Maltese government suggests that some remedies must be available also to the victims of discrimination and that the Commission is focusing in this context on compensation. From the information available to the Commission, it was not clear what remedies existed for the victims of discrimination. The Commission concluded that "[i]t would therefore appear that Article 15 of the Directive has not been properly transposed". The Commission requested "specific information on whether financial compensation is payable to victims of discrimination, whether there are any limits on such compensation and who is liable for such payments."[9] One can therefore conclude that the term "sanctions" as used in the Directives also encompasses forms of redress for victims of discrimination.[10] This broader meaning of sanctions thus includes both sanctions in the strict sense (focusing on the perpetrator) and remedies (focusing on the victim). When we speak about sanctions in the present report, we therefore understand it in this broad sense, while when we use the term remedies, we focus strictly on measures of redress focused on the victim of discrimination.

From these discussions around the meaning of sanctions it is possible to deduce several aims pursued by sanctions. A study commissioned by the European Network of Equality Bodies (Equinet) in 2015 describes these aims in the following terms:

- **Compensatory aim:** providing remedy for single victims of discrimination
- **Punitive aim:** constituting a punishment for the perpetrator
- **Preventive aim:** being a tool for preventing further discrimination by the individual perpetrator
- **Social-preventive aim:** being a tool for fighting discrimination and fostering equality on a societal level.[1]

The focus of the first three aims is clearly on the parties involved in an individual case. The last takes account of the fact that the Directives require sanctions to be effective and dissuasive, which implies that

[7] In this regard, see Christa Tobler, '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' (European Commission - Directorate General for Employment, Social Affairs and Equal Opportunities, 2005), p 32; Romanita Iordache and Iustina Ionescu, 'Discrimination and Its Sanctions - Symbolic vs. Effective Remedies in European Anti-Discrimination Law', *European Anti-Discrimination Law Review*, no. 19 (November 2014), p 12; Katrin Wladasch, 'The Sanctions Regime in Discrimination Cases and Its Effects', *An Equinet Paper*, 2015, p 4.
[8] When using "2000 Equality Directives" in this report, this includes the RED and the EED.
[9] Infringement no. 2006/2258 (letter of formal notice, Malta), p 4.
[10] Op. cit. Tobler, 'Remedies and Sanctions...', p 4; op. cit. Iordache and Ionescu, 'Discrimination and Its Sanctions....', p 11.

they are supposed to be such that they prevent not only the infringer but also others from discriminating. While one form of sanction may possibly fulfil more than one aim, practice shows that it is difficult to achieve all four aims with a single sanction.

The criteria of effectiveness, proportionality, and dissuasiveness foreseen by the Directives will be further analysed in the next section, drawing mainly from the case-law of the CJEU.

Effectiveness, proportionality, and dissuasiveness

The 2000 Equality Directives specify that sanctions must be effective, proportionate, and dissuasive. These three principles have also been used by other European organizations.

Council of Europe

In the context of the Council of Europe, the three principles of effectiveness, proportionality, and dissuasiveness are mentioned by the European Court of Human Rights (ECtHR) when referring to other Council of Europe Standards (such as ECRI's GPR No. 7 – see below) or in the context of criminal sanctions for acts of violence within the family. In such cases, the ECtHR states that "bringing the perpetrators to justice serves to ensure that such acts do not remain ignored by the competent authorities and to provide effective deterrence against them." Other than that, the ECtHR does not provide further clarifications about the interpretation of the three principles.[11]

With regard to the European Commission against Racism and Intolerance (ECRI), General Policy Recommendation (GPR) No. 7[12] refers to "effective, proportionate and dissuasive" sanctions for cases of discrimination in civil, administrative, and criminal law. For civil and administrative law, the recommendations add that sanctions "should include the payment of compensation for both material and moral damages to the victims" (para. 12 of the Recommendation). The explanatory memorandum further mentions the restitution of rights that have been lost (para. 31); highlights the importance of non-monetary forms of reparation, such as the publication of all or part of a court decision (para. 33); and recommends the possibility to impose positive measure programmes on the perpetrator (such as specific training programmes) in the development and supervision of which national Equality Bodies should be involved (para. 34). With regard to criminal law, the law should also provide ancillary or alternative sanctions (para. 23 of the Recommendation). According to the explanatory memorandum, ancillary and alternative sanctions include community work, participation in training courses, deprivation of certain civil or political

[11] See for instance, ECtHR, *Oršuš and others v. Croatia* (judgment), No. 15766/03, 16 March 2010, para. 80; ECtHR, *Tunikova and others v. Russia* (judgment), No. 55974/16 53118/17 27484/18 28011/19, 14 December 2021, para. 86; ECtHR, *Muhammad v. Spain* (judgment). No. 34085/17, 18 October 2022, para. 39.
[12] ECRI, General Policy Recommendation No. 7 (revised) on national legislation to combat racism and racial discrimination, adopted on 13 December 2002 and revised on 7 December 2017.

rights (e.g. the right to exercise certain occupations or functions; voting or eligibility rights) or publication of all or part of a sentence (para. 49). For legal persons, these could include besides fines: refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence, and the dissolution of the legal person (para. 49).

ECRI's GPR No. 7 has thus tried to explain the meaning of effectiveness, proportionality, and dissuasiveness by exemplifying the kinds of sanctions it connects to these terms and that have to be chosen depending on the circumstances of the case, without entering into a more abstract discussion of the three requirements separately.

CJEU case law

In order to better understand the evolution of the concept of sanctions in non-discrimination law, it is necessary to look into the case law of the CJEU regarding sanctions in sex discrimination cases, which helped develop the notions of effectiveness, proportionality, and dissuasiveness (not yet contained in sex discrimination secondary legislation predating the 2000s). Later jurisprudence based on RED and EED developed these requirements further.

Some of this case law concerns compensation. If compensation is envisaged in the legal system, the Member State must ensure that, in order to be effective and to have a dissuasive effect, it is in any case adequate to the damage sustained by the victim and is more than a purely nominal compensation (*Von Colson and Kamann*).[13] In *Marshall*, the CJEU specified that:

> where financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it *must enable the loss and damage actually sustained* as a result of the discriminatory dismissal *to be made good in full* in accordance with the applicable national rules.[14]

As a result, fixing upper limits constitutes improper implementation of EU law and the calculation of the compensation must include interests.[15] Upper limits (for instance, of three months' salary) may be envisaged in employment cases only when the employer proves that the application for the position would have been unsuccessful due to superior qualifications of another applicant (*Draehmpaehl v Urania*

[13] Op. cit. CJEU, 10 April 1984, *Sabine von Colson...*, para. 23.
[14]CJEU, Judgment of the Court of 2 August 1993, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority*, Case C-271/91, EU:C:1993:335, para. 26. Emphasis added.
[15]Ibid, paras. 30-31.

Immobilienservice).[16] Upper limits are however precluded by non-discrimination law in the case that the applicant would have obtained the position if discrimination had not taken place.[17] This case law is now codified under Article 18 of Directive 2006/54/EC.[18]

More generally, the CJEU affirmed that the rules on sanctions must ensure real and effective protection[19] and that sanctions should be commensurate to the seriousness of the violation, so that a genuinely dissuasive effect is ensured.[20] In later case law, the CJEU established that a "purely symbolic sanction" is not compatible with EU non-discrimination law (in the *Asociaţia Accept* case the sanction under examination was a warning).[21] The fact that a sanction is not pecuniary does not however mean that it is symbolic, especially if it guarantees a sufficient degree of publicity and assists in finding discrimination in an action for damages.[22] With regard to warnings, the CJEU stated that if they are generally envisaged in a legal system only for very minor offences, this means that they are not commensurate to the seriousness of a breach of the principle of equal treatment.[23] Sanctions must be genuinely dissuasive (while respecting the general principle of proportionality[24]), and courts may take into account, when appropriate, repeat offenses of the defendant concerned.[25] Dissuasiveness was evaluated also in connection to punitive damages. In the *Arjona Camacho* case, the CJEU considered that genuine dissuasive effect does not necessarily entail awarding to the victim "punitive damages which go beyond full compensation for the loss and damage actually sustained and which constitute a punitive measure."[26]

The case law of the CJEU also concerned procedural rules. In an employment case (*Dekker*), the CJEU clarified that the proof of a fault attributable to the employer for infringements of the principle of equal treatment is not required for the award of material damages.[27] In addition, sanctions must be effective, proportionate, and dissuasive even in the case that there is no concrete victim but an Equality Body or

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[16] CJEU, Judgment of the Court of 22 April 1997, *Nils Draehmpaehl v Urania Immobilienservice OHG*, Case C-180/95, EU:C:1997:208, paras. 35-36.
[17] Ibid, para. 37.
[18] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, pp 23–36.
[19] Op. cit. CJEU, 22 April 1997, *Nils Draehmpaehl...*, paras. 24, 39, and 40.
[20] Op. cit. CJEU, 22 April 1997, *Nils Draehmpaehl...*, para. 40. In this regard, see also CJEU, Judgment of the Court (Third Chamber) of 25 April 2013, *Asociaţia Accept v Consiliul Naţional pentru Combaterea Discriminării*, Case C-81/12, EU:C:2013:275, para. 63.
[21] Ibid, paras. 61 and 73.
[22] Ibid*,* para. 68.
[23] Ibid, para. 70.
[24] Ibid, para. 63.
[25] Ibid, para. 67.
[26] CJEU, Judgment of the Court (Fourth Chamber) of 17 December 2015, *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA*, Case C-407/14, EU:C:2015:831, para. 34.
[27] CJEU, Judgment of the Court of 8 November 1990, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen* (VJV-Centrum) Plus, Case C-177/88, EU:C:1990:383, paras. 23-25.

other organisation that is allowed to bring a complaint in their own name according to national law (*Feryn*).[28] In this case, if appropriate to the circumstances of the case, the sanctions may:

> where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.[29]

With this judgment the CJEU made clear, on the one hand, that a finding of discrimination should come along with an adequate level of publicity to fulfil the requirements for a sanction; and on the other hand, that, while not required under the Directive, national legislation can provide for damages to be awarded not only to individual victims but also to bodies that have been granted legal standing. This jurisprudence has been confirmed in the case *Associazione Avvocatura per i diritti LGBTI*.[30]

In a recent case, the CJEU considered the question of effective and dissuasive sanctions also in light of whether they are capable of guaranteeing effective judicial protection.[31] The case concerned national legislation that allows the defendant, by acquiescing to pay the compensation claimed by the claimant, to avoid the recognition of the discrimination alleged, precluding the claimant to obtain a ruling by a civil court on the existence of that discrimination (*Braathens Regional Aviation*).[32] In this case taken by the Swedish Equality Ombudsman, the CJEU held that the payment of a sum of money (even in the case that it is the amount claimed by the victim of discrimination)

[28] CJEU, Judgment of the Court (Second Chamber) of 10 July 2008*, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, Case C-54/07, EU:C:2008:397, paras. 38 and 40.
[29] Ibid, para. 39.
[30] CJEU, Judgment of the Court (Grand Chamber) of 23 April 2020*, NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, Case C-507/18, EU:C:2020:289, paras. 61 and 65.
[31] See already op. cit. CJEU, 10 April 1984, *Sabine von Colson...*, para. 23: "Full implementation of the Directive does not require any specific form of sanction for unlawful discrimination, it does entail that sanction be such as to guarantee real and effective judicial protection."
[32] CJEU, Judgment of the Court (Grand Chamber) of 15 April 2021, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB*, Case C-30/19, EU:C:2021:269, paras. 44-45.

is *not such as to ensure effective judicial protection* for a person who requests a finding that there was a breach of his or her right to equal treatment derived from that directive, *in particular where the primary interest of that person is not economic but rather to obtain a ruling on the reality of the facts alleged* against the defendant and their legal classification.[33]

Such national legislation fails, according to the CJEU, to fulfil the compensatory and dissuasive functions of sanctions because, on the one hand, compensation only does not sufficiently meet the claims of the victim, who primarily seeks recognition of the fact that discrimination has happened; and, on the other hand, the perpetrator is able to contest the existence of the violation, preserving costs and reputation.[34]

What emerges from this case is the strong connection between the Directives' provisions relating to sanctions and those relating to access to justice (Article 7 RED, Article 9 EED) and an effective remedy, contained most importantly in Article 47 of the Charter of Fundamental Rights.[35] It is therefore not surprising that when dealing with sanctions and remedies, one necessarily has to address also the question as to who can approach a court or administrative authority when a situation is perceived as discriminatory. The text of the Directives as well as the case law of the CJEU show that the enforcement of the non-discrimination regime is heavily reliant on victims coming forward, with NGOs and Equality Bodies having different litigation possibilities depending on national legislation. Victims, however, are often reluctant to report their cases for various reasons, such as fear of victimisation, costs and lengthiness of legal procedures, lack of legal aid, and uncertainty about the prospects of success.[36] This situation is *per se* not dissuasive for potential perpetrators, so that it is necessary to think of an enforcement and sanctions regime that a) is less dependent on individuals exposing themselves to the unpleasant concomitants of a judicial or administrative procedure (such as through stronger reliance on Equality Bodies and associations as intermediaries or complainants); and b) is able to produce effects before discrimination occurs (such as through equality duties and equality impact assessments, the absence of which may lead to sanctions).

[33] Ibid, paras. 46-47. Emphasis added.
[34] Ibid, paras. 48-49.
[35] The right of an effective remedy is furthermore contained under Article 13 of the European Convention of Human Rights and Fundamental Freedoms, which, under Article 14 and Protocol No. 12, prohibits discrimination. In general terms, the Treaty on the European Union prescribes that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article 19).
[36] Wladasch, 'The Sanctions Regime... ', p 38.

Interpretation of the three principles for the purpose of this report

Based on the above case law and for the purpose of this report, the three requirements for sanctions may be described as follows:[37]

- **Effectiveness**: a sanction is effective if it produces the desired effect for the victim and makes fully good the harm produced by the discrimination, it results in a punitive effect for the perpetrator, and it contributes to achieving the objective of the directive, namely fostering the effective implementation of the principles of equal treatment and non-discrimination.
- **Proportionality**: a sanction is proportionate to the extent that the damage and loss suffered by the victims are reflected in the sanction or remedy foreseen in a way that is appropriate. Proportionality should also be considered with reference to the social damage and the sanction be commensurate to the seriousness of the breach of the principle of equal treatment.
- **Dissuasiveness**: a sanction is dissuasive when it constitutes an appropriate preventive tool both for the infringer from committing the same violation and for society as a whole.

In practice, sanctions regimes related to non-discrimination law in EU countries have not fully met these requirements. In the words of the European Commission 2021 Report on the 2000 Equality Directives:

> some difficulties in the implementation of the Directives seem to persist, e.g. in relation to compensation ceilings and cases without an identifiable victim. Some national courts tend to establish rather moderate levels of damages, favour non-monetary compensation or offer amounts of compensation at the lower end of the scale. Such tendencies may discourage victims from taking legal action or from asking for pecuniary compensation in court.[38]

Scholarly literature and reports have also addressed obstacles and challenges concerning the application of effectiveness, proportionality, and dissuasiveness. The 2015 Equinet Report found that the levels of compensation either foreseen in law and/or issued by courts are disproportionately low and lack dissuasiveness; that chances to receive compensation for immaterial damages (at all or at adequate levels)

[37] Readapted version of the description from Wladasch, 'The Sanctions Regime... ', p 5.

[38] European Commission, 'Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')', COM(2021) 139 final, p 10-11.

are low, connected also to the fact that proving the effects of discrimination is difficult; that there is a lack of suitable tools (beyond financial sanctions) that would serve the interests of the victims, victims group and/or have a preventive character; that non-binding decisions of some quasi-judicial Equality Bodies lack effectiveness, especially if there is limited follow-up; and that there is a lack of experience in and sensitivity for discrimination cases on the side of the judiciary, in particular on the need to consider also preventive measures.[39]

Aims, methodology and structure of the report

In order to address these issues, Equinet has commissioned a research about sanctions and remedies in discrimination cases. The aim of the research is to assess to what extent current European sanctions regimes can be considered effective, proportionate, and dissuasive, including through a comparison to other areas of law, in particular consumer protection law and data protection law. The research is directed at identifying challenges and good practices regarding sanctions in non-discrimination law and at formulating recommendations as to whether and how they should be amended, potentially learning from these other fields of law.

To achieve this aim, this report builds on desk research, a survey, and interviews. The desk research consisted of the analysis of Equinet's database concerning Equality Bodies and its previous work in the field of sanctions and remedies; the country reports drafted by the Network of Legal Experts in Gender Equality and Non-Discrimination (for an insight into the legal framework and its application in practice); scholarly literature; CJEU case law; and monitoring reports from relevant international monitoring bodies (such as, e.g., ECRI).

With regard to the survey, a questionnaire was sent to Equality Bodies (members of Equinet) and designed so as to check details of legal transposition and to learn about interpretation and practical use of provisions on sanctions and remedies by courts, administrative authorities, and Equality Bodies. In order to assess to what extent sanctions are effective, proportionate, and dissuasive, the questions aimed at collecting data about legislation, case law, statistics, peculiarities of discrimination law (also considering its grounds and fields), available legal tools, pecuniary sanctions (both in their punitive and compensatory characters), and the role and opinion as experts of Equality Bodies. Indicators developed in previous research guided the

[39] Wladasch, 'The Sanctions Regime... ', p 38. This list is based on European Union Agency for Fundamental Rights, 'Access to justice in cases of discrimination in the EU – Steps to further equality', Luxembourg, 2012, p 46.

design of the questionnaire.[40] The researchers received 18 questionnaires from 16 countries.[41]

The researchers interviewed twelve experts, including three from the fields of data protection and consumer protection law, CSOs and/or litigators, as well as representatives from the Council of Europe and the Fundamental Rights Agency. In addition, five Equality Bodies were selected for in depth interviews taking into account their powers, promising practices, and geographical balance: the Commissioner for the Protection from Discrimination (Albania), Unia (Belgium), the Non-Discrimination Ombudsman (Finland), the National Council for Combating Discrimination (Romania), and the Equality Ombudsman (Sweden). The purpose of these interviews was to have a better understanding about shortcomings, obstacles, and good practices regarding sanctions in non-discrimination law and to consult with experts in data protection and consumer protection.

After having clarified the concepts around which the Report will be developed, such as sanctions and remedies as well as the requirements of effectiveness, proportionality, and dissuasiveness, the remaining of this Report is structured as follows:

- **Chapter II** looks into the sanctions and remedies formally envisaged in the non-discrimination field across European legal systems (2.1) and into law in practice (2.2) identifying most commonly applied sanctions, aims of sanctions, shortcomings and obstacles, as well as good practices.
- **Chapter III** compares non-discrimination law with consumer protection law and data protection law with a focus on the interpretation and application of the principles of effectiveness, proportionality, and dissuasiveness in these fields of law. It further aims to understand how the shortcomings identified in non-discrimination law are dealt with in data protection law and consumer protection law.
- **Chapter IV** concludes with a summary of the lessons that can be drawn from these other fields of law and provides recommendations as to if and how sanctions in non-discrimination cases should be amended to be truly effective, proportionate, and dissuasive.

[40] Emma Lantschner, *Reflexive Governance in EU Equality Law*, Oxford Studies in European Law (Oxford: Oxford University Press, 2021), 108-122. The indicators have been developed following the methodological approach proposed by the OHCHR, providing for structural, process, and outcome indicators. Structural indicators allow researchers to evaluate the legal, policy, and institutional frameworks and inform about how the respective state has transposed the obligation from the Directives into the national legal system. Process indicators provide information about the efforts made by duty bearers to transform their formal commitment into concrete results. Outcome indicators capture the situation on the ground and give information about the level of enjoyment of a right in practice and about the impact of the efforts undertaken by the state.

[41] More specifically, questionnaires were filled in by the Commissioner for the Protection from Discrimination (Albania), the Austrian Ombud for Equal Treatment (Austria), Unia (Belgium), the Public Defender of Rights (Czech Republic), the Non-Discrimination Ombudsman (Finland), the Ombudsman for Equality (Finland), the Defender of Rights (France), the Public Defender / Ombudsman (Georgia), the Federal Anti-Discrimination Agency (Germany), the Office of the Greek Ombudsman (Greece), the Ombudsperson Institution (Kosovo), the Office of the Equal Opportunities Ombudsperson (Lithuania), the Commission for the Rights of Persons with Disability (Malta), the National Commission for the Promotion of Equality (Malta), the National Council for Combating Discrimination (Romania), the Slovak National Centre for Human Rights (Slovakia), Advocate of the Principle of Equality (Slovenia), and the Equality Ombudsman (Sweden).

Chapter II: Sanctions and remedies in national non-discrimination law

This section provides an overview of sanctions and remedies in non-discrimination law in different countries and of the use of these legal possibilities by various judicial and administrative authorities. This will allow to draw some conclusions as to which aims (compensatory, punitive, preventive, and social-preventive) are primarily pursued in practice and whether the requirements of effectiveness, proportionality, and dissuasiveness are achieved in a balanced manner. This section is based on the data collected through the survey among Equality Bodies, integrated with insights received through the additional interviews and secondary sources.

Law in the books: sanctions and remedies formally foreseen in Europe

Regulating the enforcement of non-discrimination provisions either by civil, administrative, or criminal law has not only relevant procedural implications, but also determines the victim or perpetrator orientation of sanctions and sends a societal message.

For instance, when criminal law is used for severe forms of discrimination, the sanctions attached to these breaches raise the awareness of the seriousness of discrimination and have *per se* a dissuasive effect.[42] Criminal and administrative sanctions recognise the impact of discrimination "in affecting not only the dignity of the victim but also in eroding the social fabric" and therefore punish the perpetrator for violating a public good.[43] While this might appear a more systematic approach to react to discrimination, recent literature considered criminal law as generally providing "an inappropriate and an inadequate means" against discrimination for various (mainly procedural) reasons, including the requirement of intention; standard of proof; rules of evidence and (the lack of) the shift of the burden of proof; incompatibility with an open-ended list of grounds; or difficulties in affording all aspects of effective remedy for victims in criminal law.[44] Indeed, as in criminal law the focus is on the perpetrator, such sanctions might not be able to effectively compensate a victim for the harm suffered.

Given the limits of criminal law, sanctions and remedies in civil law and administrative law are deemed to better address most of discrimination cases.[45] In contrast with criminal law, civil law is victim-centred and better suited to address the compensatory aim of sanctions. The focus on victims, however, also leads to a risk of neglecting the societal damage which has implications on the evaluation of the proportionality and the dissuasiveness of a sanction. These aspects can be better addressed via administrative law sanctions, which focus more on punitive, preventive, and social-preventive aims. Annex I provides an overview of sanctions and remedies foreseen by national legislation in discrimination cases. The questionnaire asked in

[42] Op. cit. ECRI GPR No. 7, para 3.
[43] Op. cit. Iordache and Ionescu, 'Discrimination and Its Sanctions....', pp. 15–17.
[44] United Nations Office of the High Commissioner for Human Rights and Equal Rights Trust, *Protecting Minority Rights: A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation*, 2023, 77. On the downsides of criminal procedures for a victim of discrimination, see also op. cit. CJEU, 15 April 2021, Diskrimineringsombudsmannen..., paras. 49-50.
[45] Ibid, p 77.

particular, whether the following types of sanctions are available: obligation to stop discriminatory practises/structures/procedures; reinstatement without discrimination; compensation for material damages; compensation for immaterial damages; compensation as alternative to reinstatement; punitive damages; posting/publication of decision; warnings; non-compliance penalty (penalty for not implementing a judgment/decision); declaration of the act as void; public apology; suspension of a license or of business activities; removal of the right to receive public benefits, public contracts, and/or public funding; obligation to implement non-discrimination policies and/or plans; administrative fine; financial penalties (criminal sanction); imprisonment; community work; loss of civil and political rights; loss of honorary titles and awards; loss of military ranks; bans on certain activities; property confiscation; forfeiture of items; expulsion; ban on residence. Some Equality Bodies mentioned further sanctions available in their countries: obligatory participation in vocational training or educational programmes (**Austrian Ombud for Equal Treatment**); judicial supervision and closure for a period up to five years or permanently for one or more company establishments of the perpetrator (**French Defender of Rights**); corrective labour (**Georgian Public Defender**); declaration of a violation of the prohibition to discriminate by the Equality Body (**Slovenian Advocate of the Principle of Equality**).

A great variation of possible sanctions exists across Europe. **Most countries'** legislation envisages the obligation to stop discriminatory practises/structures/procedures,[46] reinstatement in situation without discrimination,[47] compensation for material damages, compensation for immaterial damages, and compensation as alternative to reinstatement,[48] posting/publication of decision,[49] non-compliance penalty (penalty for not implementing a judgment/decision)[50], or declaration of the act as void.[51] These sanctions may be mainly issued by civil or labour courts and to a lesser extent by Equality Bodies (especially with regard to obligation to stop discriminatory practises/structures/procedures).[52]

The less commonly foreseen sanctions are removal of the right to receive public benefits, public contracts, and/or public funding;[53] forfeiture of items;[54] and expulsion[55]. While the first, when envisaged, may be usually available for Equality Bodies and administrative authorities; the second and the third are typically criminal sanctions.

[46] With the exception of Sweden.
[47] With the exception of Belgium and Finland.
[48] With the exception of Belgium, Finland and Germany.
[49] With the exception of Czech Republic, Germany, and Sweden.
[50] With the exception of Austria.
[51] With the exception of Austria, Czech Republic, and Germany.
[52] See Albania, Finland, France, Georgia, Kosovo, and Malta.
[53] Envisaged in France, Greece, Kosovo, and Slovenia.
[54] Envisaged in Czech Republic, France, Kosovo, Slovakia, and Slovenia.
[55] Of the person from the state. Envisaged in Czech Republic, Greece, Kosovo, Slovenia, and Sweden (in Sweden it is possible in principle as a penalty to the crime of unlawful discrimination, but in practice it is unlikely to be applied).

This general overview shows that largely European countries formally adopted a victim-centred approach with a preference for civil law/labour law remedies. Such an approach is important to ensure the adjustment of a sanction to the specific needs and concerns of the individual victim and to allow for "recovery and healing" in line with the "restorative justice" model.[56] As this, however, may potentially not be able to sufficiently take into consideration the social dimension of the violation as well as the individual and general dissuasiveness of the sanction, it is also interesting to assess to what extent and in which ways national legislation allows for the combination of sanctions in order to better achieve the triple requirement of effectiveness, proportionality, and dissuasiveness and the aims connected thereto.

According to the questionnaires received by Equality Bodies, **in most countries** it is possible that victims claim compensation for both material and immaterial damages and courts can order defendants to stop discriminatory practices. In some cases, like in **Finland**, different authorities need to be approached to achieve this combination of sanctions: the National Non-Discrimination and Equality Tribunal may set a conditional fine to stop and prevent the continuation of discrimination and the district court grant compensation to the victim of discrimination. Similarly, in **Romania** a victim can approach the NCCD, who can impose a warning or fine on the perpetrator, and in parallel lodge a civil complaint to get compensation for material and non-material damages. Conversely, in an injunction procedure in **Belgium** compensatory measures may be granted to the victim in addition to a monetary fine imposed on the defendant. In addition, the same court may also order the publication of the decision. This part of the sanction is sometimes appealed against and quashed if the perpetrator has in the meantime taken measure to stop the discrimination.[57] The publication of decisions establishing the infringement of equality laws can be combined with other sanctions and remedies also under **Georgian** law.

> This overview shows, first, that victims often have to approach more than one authority to get at a set of sanctions that would satisfy the requirement of being effective, proportionate, and dissuasive, as these authorities issue sanctions that are typical for their general orientation. This demonstrates that the whole sanctioning system predominantly relies on victims to come forward even twice, putting on their shoulders, in addition to having suffered the discrimination, the burden of making sure a discrimination is appropriately sanctioned and therefore making it more complicated for right-holders their access to justice. Second, it makes clear that the focus is on pecuniary sanctions (compensation for victims and fines for perpetrators, which are essentially backward-looking) and that more structural, forward-looking sanctions are less common.

[56] Dinah Shelton, *Remedies in International Human Rights Law*, Third Edition (Oxford: Oxford University Press, 2015), 22–27.
[57] For example in Belgium, Cour D'appel Liege, 16 June 2020.

With regard to the legal criteria considered to calculate compensation, the surveyed Equality Bodies mentioned the nature, severity, and duration of the infringement,[58] whether the unfavourable treatment would also have been suffered on non-discriminatory grounds,[59] the victim's experience of the violation,[60] the intention/attitude of the perpetrator (including sincere apology),[61] the consequences of the violation,[62] the public interest in non-discrimination,[63] reiteration[64], and if any financial penalty can be imposed from the same violation.[65] In some countries, no strict legal criteria are established so as to allow judges to evaluate with flexibility the circumstances of the case.[66] Upper limits to compensation are foreseen only in employment cases where the employer proves that even in the absence of the discriminatory act, the applicant would have not been offered the job[67] in line with CJEU jurisprudence.[68] **Slovenia** and **Georgia**, however, have an upper limit to compensation in cases of discriminatory dismissal of public servants, without requiring the public employer to show that the same unfavourable treatment would have been suffered without the discriminatory ground. Article 39(2) of the Slovenian Antidiscrimination Act is also problematic since it limits compensation that can be awarded by the civil court to a range between EUR 500 and EUR 5.000.[69] It is still unclear, if this compensation is available in addition or as an exception to general full compensation in general civil law or *sui generis* compensation under labour law.[70]

The range of administrative fines that can be imposed in discrimination cases is quite different across Europe and depends on many factors. Different fines are envisaged depending on whether the perpetrator is an individual person or a legal person. For instance, **Albania** foresees different fines according to the fact that the convicted person is a natural person (from 10,000 to 60,000 lekë), a legal person (from 60,000 to 600,000 lekë); or a natural person in a legal entity that is responsible for the violation (from 30,000 to 80,000 lekë).[71] Fines may also vary according to the legal sources that foresee them. In **Belgium**, different sanctions are envisaged in the Social Penal Code, in antidiscrimination legislation, and Penal Code (hate crimes). Similarly, different fines are foreseen for different scopes of application. For instance, **Slovenia** differentiates between discrimination in employment on the one hand (that, according to the Labour Law Code, can be sanctioned with a fine up to EUR 20.000), and inaccessibility of goods and services and

[58] Austria (harassment cases), Belgium, Finland, France, Georgia, Germany, Greece, Romania, Slovenia, and Sweden.
[59] Belgium.
[60] Belgium, Georgia, Germany, Romania, and Sweden.
[61] Georgia, Germany, and Sweden.
[62] Sweden.
[63] Germany (reference to prevention) and Sweden.
[64] Sweden.
[65] Finland.
[66] Albania and Czech Republic.
[67] For instance, up to EUR 500 in Austria, up to three months' salary in Germany, up to EUR 16,210 in Finland (the minimum being EUR 3,240, in cases of gender discrimination: Gender Equality Act, section 11§), and up to 18 months' salary in Slovenia.
[68] Op. cit. CJEU, 22 April 1997, *Nils Draehmpaehl...*, paras. 35-36.
[69] Questionnaire by the Slovenian Advocate of the Principle of Equality.
[70] See on this also EELN, Country-Report on Slovenia, 2021, 92.
[71] Antidiscrimination Law, Article 33. The differentiation between individual and legal person is also considered for instance in Slovenia.

transport services to persons with a disability on the other hand (that, according to the Equalisation of Opportunities for Persons with Disabilities Act can be sanctioned with a fine up to EUR 40.000). This shows "clear discrepancies in the system of administrative sanctions, possibly disregarding the gravity of the offence and its consequences."[72] Specific fines in non-discrimination law are envisaged in **France** in the case of failure to comply with accessibility obligations and failure to publish gender equality plans (aimed at addressing the issues identified in the gender equality index). If corrective measures are not taken by the company within three years, the company could be sanctioned with a fine up to 1% of its wage bill. In some countries, however, the amount is calculated at the discretion of the court.[73]

Fines are determined based on the gravity of the violation,[74] effectiveness and prevention,[75] proportionality to the situation that caused the imposition of the sanction,[76] repetition of the violation,[77] the status of the convicted person,[78] the level of the perpetrator guilt,[79] the willingness to pay the fine and admit the violation by the perpetrator,[80] the personal and financial situation of the employer[81] or the perpetrator[82]. With specific regard to legal persons, the criteria for the imposition of fines are the gravity of the violation,[83] the benefit obtained by the perpetrator from the violation,[84] or the material status of the legal person (considering property, income, and other circumstances)[85]. Similar criteria are mentioned by Equality Bodies that are quasi-judicial bodies and may impose fines. The National Council for Combating Discrimination (**Romania**) must consider (1) the nature and scope of the violation and the effect on the victim; (2) the personal circumstances of the offender; (3) and, should the offense be committed against several persons, the proportionality of the fine in relation to the situation that caused the imposition of a sanction. The Commissioner for the Protection from Discrimination (**Albania**) must also take into account the financial circumstances of the perpetrator (turnover and, in the case that the discrimination is committed by an individual, the balance sheet assets and profit, as well as the total payroll). [86]

[72] Questionnaire by the Slovenian Advocate of the Principle of Equality.
[73] For instance, in Belgium.
[74] Georgia, Slovenia, and Sweden.
[75] Romania.
[76] Romania.
[77] Czech Republic and Greece.
[78] Georgia.
[79] Slovenia.
[80] Lithuania and Slovenia.
[81] Georgia and Sweden.
[82] Kosovo (the court may not impose a fine that is higher than the perpetrator's ability to pay), Lithuania, and Slovenia.
[83] Georgia.
[84] Georgia.
[85] Georgia.
[86] Article 33/12 of the Albanian Anti-discrimination Law.

In general, **6 Equality Bodies** consider fines to be low.[87] For instance, the **Austrian** Ombud for Equal Treatment reports in its questionnaire that in cases of discriminatory job and housing advertisements, the fine set as a sanction should not exceed EUR 360, therefore lacking a strong dissuasive effect.

In most cases, legislation does not provide for different sanctions with regard to the different grounds of discrimination. Nonetheless, in some countries different sanctions are envisaged concerning gender, race or ethnic origin, and disability.[88] With regard to gender, it is notable that in **Austria** the period for claiming damages in cases of sexual harassment is longer (three years as opposed to one year) compared to other grounds. In **Slovenia**, the Equalisation of Opportunities for Persons with Disabilities Act (EOPDA) foresees higher fines for the failure to provide accessibility to goods and services, as well as transport services. Furthermore, an administrative fine for breaching the prohibition of public incitement to intolerance (Article 20, Protection of Public Order Act of Slovenia) is envisaged only in cases of national, racial, sexual, ethnic, religious, political, or sexual orientation intolerance.

Concerning the field of discrimination, special sanctions are **commonly** envisaged in cases relating to employment due to the peculiarities of this field.[89] This includes, for instance, reinstatement, compensation as alternative to reinstatement, or a pecuniary compensation amounting to a maximum three-months salaries in the case of discrimination against an applicant that would not have been recruited even without discrimination (cf., CJEU, *Draehmpaehl v Urania Immobilienservice,* para. 35-36). In **Sweden**, an employer found guilty of discrimination must pay a specific discrimination compensation in addition to the compensation for the loss that occurs to the victim as a consequence of the discriminatory act (although this is limited to financial damage – i.e., for the lost salary and other benefits).

Some Equality Bodies observed that the differences in sanctions are therefore mainly due to different procedures – i.e., civil, administrative, criminal law – rather than to grounds and fields of discrimination.[90]

With particular regard to factors to consider for imposing sanctions, repeated infringement is to be taken into account **in ten countries**.[91] It is in most cases a requirement established by law, while in other cases it is an administrative (**Austria**) or judicial practice (**Sweden**). Multiple discrimination must be considered in determining the sanctions in **Albania, Austria, Belgium, Finland, Germany, Greece, Kosovo, Romania**, and **Slovenia**. Just like as regards to repeated infringement, in **most countries** this is established by law. Intersectional discrimination is less commonly regulated, being formally envisaged in law in **Albania, Germany**, and **Greece.**

[87] Austrian Ombud for Equal Treatment, Czech Public Defender of Rights, Finnish Ombudsman for Equality, French Defender of Rights, Slovenian Advocate of the Principle of Equality.
[88] Differences are envisaged in Austria, Germany, Romania, and Slovenia.
[89] Finland, Georgia, Germany, Slovenia, Sweden.
[90] Questionnaire by Unia, Belgium.
[91] Albania, Austria, Finland, Georgia, Germany, Greece, Kosovo, Lithuania, Slovakia, Slovenia, and Sweden.

It is interesting to assess to what extent the obligations bestowed upon the state (in light of the responsibility of public authorities to promote equality and taking into account that citizens must be able to rely on a non-discriminatory treatment by them) are reflected in legislation by considering different kinds of sanctions if a public authority is responsible for discrimination. According to the information provided in the survey, **nine countries**[92] do not envisage or apply different sanctions in these cases. However, **some countries** provide for higher penalties if discrimination is committed by a public official. In **France**, for instance, if a public official commits an act of discrimination in the course of his or her duties, the penalties can be up to 5 years' imprisonment and a EUR 75.000 fine (compared to 3 years/EUR 45.000 for other perpetrators).[93] **Belgium** envisages specific criminal sanctions for holders or agents of public authority or power who, in the exercise of their duties, discriminate against a person on the basis of one of the protected criteria.

Bias motivation as an aggravating factor for all criminal offenses is adopted **in the majority of countries**, while the remaining countries envisage bias motivation as an aggravating factor only for some offenses.[94]

As mentioned above, in order to make the enforcement regime less reliant on individual victims, the introduction of forms of collective redress would be useful. The choice of the model has implications on the kinds of sanctions that can be awarded, which in turn need to be analysed in terms of them being effective, proportionate, and dissuasive. Among the countries that have participated in the survey, *actio popularis*[95] is envisaged in **Albania, Belgium, France, Malta, Slovakia,** and **Slovenia,** although this does not necessarily imply that the Equality Bodies from those countries have the power to pursue discrimination claims in the absence of an identifiable victim or in their own name.[96] In **Austria** and **Germany** this possibility exists only in cases of discrimination on the ground of disability. In general, *actio popularis* across Europe usually envisages the possibility for applicants to claim for declaratory judgments but excludes compensation if the claimant is not a victim of discrimination.[97] In **Austria**, the Federal Disability Equality Act allows some organisations to seek declaratory judgments and, in the case of large corporations,[98] also injunctive relief and the elimination of discrimination on the grounds of disability. A similar provision also applies in **Germany** where the Act on the Equality of Persons with Disabilities (Section 15) envisages the right of action for recognized associations for the protection of persons with disabilities in order to claim a

[92] Albania, Czech Republic, Finland, Georgia, Germany, Lithuania, Romania, Slovakia, and Sweden.
[93] The same applies in Kosovo and Slovenia.
[94] Belgium, Slovakia, and Slovenia.
[95] "*Actio popularis*" is understood in this report as a claim *by organisations acting in the public interest on their own behalf, without a specific victim to support or represent*. Definition by Isabelle Chopin, Catharina Germaine, and European network of legal experts in gender equality and non-discrimination, 'A Comparative Analysis of Non-Discrimination Law in Europe 2021' (Luxembourg: Publications Office of the European Union: European Commission, December 2021), 93.
[96] Ibid: *Actio popularis is permitted by national law for discrimination cases in 22 countries (Albania, Austria, Belgium, Bulgaria, Croatia, France, Germany, Hungary, Italy, Liechtenstein, Luxembourg, Malta, Montenegro, the Netherlands, North Macedonia, Norway, Portugal, Romania, Serbia, Slovakia, Spain, and Turkey.* See Op. cit. Chopin, Germaine, 'A Comparative Analysis...', p 94.
[97] For instance in Austria, Belgium, and Germany.
[98] These are corporations within the meaning of Section 221 (3) of the Austrian Commercial Code (UGB).

declaration of violation of disability protection law. In some countries, Equality Bodies may submit lawsuits on issues related to collective interests in defence of the principles of equality and non-discrimination.[99] In **Belgium**, the Equality Body Unia may claim compensation, but has to prove its damages.[100]

Among the surveyed countries, class action[101] is available in **Albania, France, Germany, Kosovo, Lithuania, Slovakia, Slovenia,** and **Sweden**.[102] Broad possibilities to activate a class action exist in **Kosovo**. Its Law on Protection from Discrimination establishes the rules for group complaints (Article 18). In addition to a declaratory judgment, the court may issue an obligation to stop conducting activities which violate or may violate the right to equal treatment, or perform activities that eliminate discrimination or its consequences in relation to members of the affected group. The Court may also impose the publication of the Court decision in the media, the cost of which must be paid by the offender. Compensation may be claimed by persons who are part of the group.

Non-discrimination legislation in practice

After the above section has assessed what national legislation across Europe formally envisage, this section focuses on how the law works in practice. After describing the most commonly applied sanctions and their aims, it will identify on the one hand shortcomings and obstacles and on the other hand good practices of the sanctions regimes.

Most commonly applied sanctions and their aims

Based on the questionnaires by Equality Bodies, the below table indicates the most commonly applied sanction or sanctions for every country.

[99] Albania and Belgium.

[100] In one case the Labour Court refused the claimed damages: "*With regard to the claim for damages, Unia is subject to the common law provisions of article 1382 of the Civil Code. (…) Unia may claim damages, provided that it proves, inter alia, its loss. Neither in the conclusions, nor in the reply to the advice of the public prosecutor does Unia demonstrate what damage it has suffered specifically in this case. It is not sufficient to argue that it represents a collective interest, and that when one party is guilty of discrimination, it must be compensated with 'adequate compensation'. The appropriate compensation provided for by law has already been awarded to Mr B. who was the victim of the discrimination. The court therefore followed the advice of the public prosecutor: the fight against any form of discrimination, including by means of legal proceedings, is one of Unia's legal missions, for which it has operating resources at its disposal. The exercise of a legal mission cannot be equated with an action for damages. This part of the main appeal is well-founded. The incidental appeal by Unia is unfounded*."

[101] "Class action" is understood in this report as a claim *on behalf of an undefined group of claimants or identified claimants and multiple claims*. Definition by Op. cit. Chopin, Germaine, 'A Comparative Analysis...', p 93.

[102] Ibid. *Class actions … are permitted by law for discrimination cases in 16 countries: Albania, Bulgaria, Denmark, France, Germany, Iceland, Italy, Liechtenstein, Lithuania, Montenegro, the Netherlands, North Macedonia, Norway, Portugal, Slovakia, Slovenia and Sweden. In Germany, new legislation entered into force on 1 November 2018, introducing for the first time a procedure for consumer rights' class action. It remains to be seen whether such class actions could become relevant for discrimination law.* See Op. cit. Chopin, Germaine, 'A Comparative Analysis...', p 95.

Table: Most commonly applied sanction(s)[103]

Country	Most commonly applied sanction(s)
Albania	— Obligation to stop discriminatory practices/ structures/ procedures — Reinstatement in situation without discrimination — Compensation for material damages — Compensation for immaterial damages — Non-compliance penalty (penalty for not implementing a judgment/decision — Administrative fine
Austria	— Compensation
Belgium	— Compensation (civil cases) — Fine and prison (criminal cases)
Czech Republic	— Public apology — Compensation for material/immaterial damages
Finland	— Compensation — Compensation for immaterial damages — Conditional fine
France	— Compensation
Georgia	— Deprivation of liberty (for hate crimes) — Warning (employment) — Obligation to stop discriminatory practises/structures/procedures; obligation to implement non-discrimination policies and/or plans; posting/publication of decisions (Equality Body)
Germany	— Compensation for material damages — Compensation for immaterial damages
Greece	— Administrative sanctions (by administrative authorities)
Kosovo	— Return to non-discrimination position — Compensation for pecuniary damage — Compensation for non-pecuniary damage — Criminal damages — Fines (criminal sanctions) — Administrative fines — Obligation to implement non-discrimination policies and/or plans.
Lithuania	— Initiative to start administrative offence proceedings[104] — Warning for the committed violation — Proposal to discontinue the actions violating equal rights and to amend or repeal a legal act related thereto
Malta (CRPD)	— Obligation to stop discriminatory practises/ structures/ procedures — Reinstatement in situation without discrimination

[103] The Maltese National Commission for the Promotion of Equality and the Slovak National Centre for Human Rights did not answer to this question.
[104] The answers provided by the Lithuanian Office of the Equal Opportunities Ombudsperson are based on the activity of the Equality Body – i.e., the Office of the Equal Opportunities Ombudsperson.

Romania	— fines, warning, recommendation (NCCD) — pecuniary and non-pecuniary compensation (courts)
Slovenia	— Order to stop discriminatory practises / procedures — Compensation
Sweden	— Compensation for immaterial damages

The table demonstrates that the most commonly applied sanctions are compensation (for material and immaterial damages) and obligation to stop discrimination, therefore confirming a prevailing compensatory aim of sanctions already identified in the previous section. This is further underlined by Equality Bodies when specifically asked which aims were mainly pursued in their countries through sanctions. **Most** frequently, they indicated the "compensatory aim". In the case that more aims were indicated, some **Equality Bodies** specified that the compensatory aim was the prevailing one.[105] **Greece**, **Lithuania**, **Malta**, and **Romania** are exceptions as their Equality Bodies indicated the "preventing aim".[106] Sanctions imposed in **Belgium, Kosovo, Slovakia,** and **Slovenia** reportedly pursue all four aims.

Relating to the aims of sanctions, the questionnaire contained a question about whether the situation has changed across time and about the factors that could have influenced such evolution. In **Belgium, Czech Republic, Finland, Lithuania,** and **Malta** no or no significant change occurred. **In some countries**, changes did not entail a shift from the mainly compensatory aim to other aims but rather consisted in rising awareness,[107] which in some cases led to higher levels of compensation.[108] Changes are sometimes determined by the focus on specific issues such as harassment cases[109] or hate crimes[110], by the establishment of new institutions (such as a new Equality Body[111]), or by the adoption of new types of sanctions (such as discrimination compensation that adds a punitive and preventive element to the compensation).[112] Legislative improvements do not necessarily entail increasing case law. **France** adopted over the last 20 years new rules on the shift of the burden of proof, legal standing for trade unions and associations, acceptance of situation testing in civil and criminal proceedings, protection of the employee in case of retaliation, and group action procedure. Nevertheless, the French Equality Body – the Defender of Rights – considers that cases of discrimination are still very rarely sanctioned and that, even in the area of law that has made more progress – employment – sanctions are neither dissuasive nor proportionate

105 For instance, the Slovenian Advocate of the Principle of Equality .
106 The Office of the Greek Ombudsman also added punitive aim, the Maltese Commission for the Rights of Persons with Disability social-preventive, and the Romanian National Council for Combating Discrimination punitive and social-preventive.
107 Albania, Germany, Greece, and Kosovo.
108 Albania.
109 Austria and Romania (in this case, in particular moral harassment).
110 Georgia.
111 Slovenia.
112 Sweden. On the so-called "prevention surcharge" see below under the section dealing with good practices.

(especially in case of structural discrimination that is not addressed via compensation of the individual prejudice).[113]

Furthermore, according to the survey, although sanctions systems are generally victim-centred (in some cases, exclusively victim-centred), victims do not perceive such systems as being effective, proportionate, and dissuasive.[114]

The following section analyses why this is and tries to cluster the shortcomings and obstacles that were identified through the survey, interviews, and additional literature.

Shortcomings and obstacles of sanctions regimes

Amount of compensation and moral damages: effectiveness, proportionality, and dissuasiveness

Low levels of compensation are often mentioned as shortcomings of sanctions regimes.[115] This applies, in particular, in cases where the amount of compensation is lower than court fees. In such cases, the requirement for effectiveness of sanctions established by the CJEU, namely that the loss and damage sustained by a victim must be made good in full, is obviously not fulfilled. Effective legal protection is also not guaranteed in the sense that the low sums are working rather as a disincentive for victims to bring a discrimination complaint. Moral damages are particularly difficult to prove and therefore they are often not awarded or are insufficient.[116] As a result, insufficient compensation contributes to small numbers of discrimination cases brought to court. If potential perpetrators run a low risk of individuals suing them for discrimination, the sanctions regime is not dissuasive.

Indeed both Equality Bodies and experts underlined that while special attention should be paid to victims to provide adequate compensation, perpetrators need to be put more into focus. For instance, the **Austrian** Ombud for Equal Treatment reports that the system is centred on damages and that this "does not seem to be an appropriate remedy e.g. in the educational setting. The Austrian judiciary is hesitant to award any kind of punitive damages and is very much focused on the compensatory character of the damages awarded. The deterring element, especially for large companies is therefore negligible."

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[113] France.
[114] Belgium, Czech Republic, Finland (OE), France, Georgia, Germany, Greece, Kosovo, Romania, Slovakia, Slovenia (given the problem of underreporting, it is likely that victims distrust the sanctions regime), and Sweden (presumably, considering that the level of sanctions awarded in Swedish case law generally is rather low).
[115] Questionnaires by Belgian Unia, the Czech Public Defender of Rights, the Finnish Ombudsman for Equality, the German Federal Anti-Discrimination Agency, the French Defender of Rights, the Slovak National Centre for Human Rights, and the Swedish Equality Ombudsman.
[116] Questionnaire by the French Defender of Rights and the Czech Public Defender of Rights. A survey conducted by the Czech Public Defender of Rights in 2020 on practices of decision-making of Czech courts in discrimination cases shows that a financial compensation for moral damages is usually not awarded to victims of discrimination at all, or is disproportionately reduced with reference to applicable laws. Sanctions therefore lack a preventive and compensatory effects. The Defender recommended a change of legislation. See Public Defender of Rights, 'Decision-making of Czech courts in discrimination disputes 2015-2019', 2020.

This issue emerged when asking about whether compensation could be considered as sufficient even for general and special preventive aims. **Most respondents** replied that compensation alone could work only if appropriately high to be really dissuasive, which in most countries is not the case. In addition, **some Equality Bodies** reported that the risk of conviction is extremely limited,[117] therefore reducing dissuasiveness even more. A compensation that would really have a special and general preventive effect would therefore have to contain a punitive element that might go beyond the reparation of the damage sustained by the victim and therefore raise issues of proportionality, at least in respect of the individual victim. If one takes into account, however, also the social damage that each and every act of discrimination produces, such punitive elements of a compensation seem justified and could possibly add up to a level of compensation that could be truly dissuasive. In legal systems where this "public interest perspective" is reserved to public law courts and institutions, it will remain necessary to make sure that the dissuasive element of a sanction is secured by administrative procedures before courts or Equality Bodies, while criminal law should be reserved to the most serious cases.

Combined and forward-looking sanctions

The above has shown that one sanction/remedy might not be in a position to guarantee the observance of the three principles of effectiveness, proportionality, and dissuasiveness. This applies in particular in cases of low compensation, as just described, but also in cases of warnings. Indeed, the CJEU has specified in *Accept* that a warning alone could not be considered an appropriate sanction if generally foreseen only for minor offences and that non-pecuniary sanctions (such as a warning) surpass the level of symbolic sanction "if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages."[118] This alludes already to the fact that, as we have seen previously[119], combined sanctions are formally available in a **number of countries**,[120] but often different authorities have to be approached in order to get at a set of sanctions that in combination can be seen as effective, proportionate, and dissuasive. As the **Slovenian** Advocate of the Principle of Equality reports, "authorities often 'rely' on the possibility that victims would use other legal means or on the outcome of other ongoing proceedings. (….) The biggest problem is how to achieve dissuasiveness."

Dissuasiveness can be achieved not only by including high levels of compensation or penalties in a set of sanctions. Combined sanctions ideally include forward-looking elements aimed at preventing further violations from the same or other potential perpetrators. Interlocutors agreed that current legislation does not provide for appropriate forward-looking sanctions that would contribute to systemic change and

[117] Questionnaire by Unia, Belgium.
[118] Op. cit. CJEU, 25 April 2013, *Asociaţia Accept...*, para. 68.
[119] Please see "Law in the books: sanctions and remedies formally foreseen in Europe".
[120] Belgium, Finland, Georgia, Germany, Kosovo, Romania, Slovakia, Slovenia, and Sweden.

education or, where the possibilities to award such sanctions exist, judges are rather reluctant to use them because they are not deemed to be in the interest of the individual and are difficult to enforce.

Collective redress[121]

Enforcement of the non-discrimination regime not only relies on individual victims to come forward (which is problematic for several reasons, including court fees, time, and fear), but sanctions often miss to achieve a general preventive aim as they are tailored to the victim and overlook the systemic nature of the discrimination. For these reasons, interlocutors suggested that *actio popularis* should be more widely allowed and appropriate sanctions connected to such claims should be envisaged.[122] In this regard, the CJEU has for instance stated that, in cases where there is no direct victim, sanctions may consist in a finding of discrimination "in conjunction with" an adequate level of publicity (the cost of which must be paid by the perpetrator); in a prohibitory injunction ordering the employer to cease the discriminatory practice and a fine (where appropriate); or in the award of damages in favour of the body bringing the proceedings.[123] Other research has found, that courts – for various reasons – seem to be reluctant to grant damages to *actio popularis* litigants and recommends to expressly allow for this possibility in legislation, adding that the amounts granted must be used for non-discrimination or other public interest work of the litigator.[124]

Litigators interviewed for this research have criticized the fact that court decisions in *actio popularis* cases are often only declaratory. Furthermore, when individuals affected by the situation in question come forward, they need to apply for compensation separately. Ideally, it would be possible for the complaining association to subsequently submit the necessary data of the persons affected (if there are any) to permit a decision on compensation under the same procedures before the same authority.[125] An issue that emerged with regard to class action is the fact that signatures are required, while victims would like to protect their identity. It was also reported that there is reluctance among judges to order general measures that would

[121] When speaking about collective redress, we refer to actio popularis and class action as: actio popularis is a claim *by organisations acting in the public interest on their own behalf, without a specific victim to support or represent*; whereas class actions are *claims on behalf of an undefined group of claimants or identified claimants and multiple claim*s. See Op. cit. Chopin, Germaine, 'A Comparative Analysis...', p 93.

[122] On the advantages of *actio popularis* from a procedural and substantive point of view see András Kádár, 'Actio popularis – potentials and challenges. Actio popularis litigation in promoting the equal treatment of the Roma', *European Equality Law Review*, Issue 1 (2022), 1-21, 1-4.

[123]Op. cit. CJEU, 10 July 2008, *Centrum voor...*, para. 39. On the possibility to obtain damages for an association bringing an action in the public interest, see Op. cit. CJEU, 23 April 2020, *NH v Associazione...*, paras 59-65.

[124] Op. cit. Kádár, 'Actio popularis – potentials and challenges...', p 18.

[125] See also the information provided in the questionnaire by the Slovenian Advocate of the Principle of Equality: "Under Article 57 of the Collective Actions Act a civil action is available in case of a large number of persons who cannot be identified. This action is available only to the Advocate of the Principle of Equality or to non-governmental organizations with a special status of operating in the public interest (note that these cannot be the unions, religious communities etc.). Such lawsuit can request the cessation or prohibition of the initiation of discriminatory actions. It remains unclear whether this claim can be combined with claim for full compensation."

require proactive steps (such as the adoption of an action plan including the provision of a budget for its implementation) from the perpetrator, as they might be difficult to be enforced.[126]

While this is already difficult in cases brought in the public interest, such general measures are not granted in individual cases, because, as mentioned above, they are not seen to be in the interest of the complainant. Thus, while collective redress mechanisms are definitely a promising tool to address systemic discrimination, the kinds of sanctions that can be awarded in theory and are imposed in practice as well as rules concerning their enforcement need to be further strengthened.

The need to establish forms of collective redress for cases of non-discrimination has actually been proposed at the international level. ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination reads under para. 25 that

> The law should provide that organisations such as associations, trade unions and other legal entities which have, according to the criteria laid down by the national law, a legitimate interest in combating racism and racial discrimination, are entitled to bring civil cases, intervene in administrative cases or make criminal complaints, *even if a specific victim is not referred to*. If a specific victim is referred to, it should be necessary for that victim's consent to be obtained.[127]

The Explanatory Memorandum clarifies that this paragraph is particularly relevant in cases where a victim is afraid of retaliation. In addition, the possibility for these organisations to bring cases of racial discrimination without reference to a specific victim is "essential for addressing those cases of discrimination where it is difficult to identify such a victim or cases which affect an indeterminate number of victims".[128] Besides *actio popularis*, class actions could contribute to improve the possibility to redress the victims of discrimination.

The role of Equality Bodies

There are **many different opinions** among Equality Bodies and other interlocutors on the role that Equality Bodies should play with regard to sanctions and remedies in discrimination cases. Points of views range from seeing Equality Bodies' role mainly in supporting victims in court or bringing complaints themselves, to proposing tribunal-type models or public enforcement agencies similar to data protection authorities. While it is difficult to imagine the creation of a uniform system throughout Europe, it is worthwhile

[126] Interlocutors from the European Roma Rights Centre (ERRC) said that "national courts are blind for systemic issues" and underlined the important role of the ECtHR in this context.
[127] Op. cit. ECRI GPR No. 7, para 22. Emphasis added.
[128] Ibid.

recalling some of the challenges faced by the various types of bodies when it comes to sanctions. For those bodies that can issue decisions, these are often non-binding. While non-binding decisions may *de facto* prove appropriate in terms of compliance rate, binding decisions are deemed to provide a better guarantee against (especially, but not only) public authorities potentially disregarding their implementation.[129] Nonetheless, Equality Bodies endowed with binding decision-making powers do not always have the power to issue sanctions, therefore requiring other institutions to be involved.[130] Lack of resources may limit Equality Bodies' capacity to follow up on the implementation of their decisions, even if they are legally binding. Moreover, more powers effectively used by Equality Bodies, especially if decisions are targeting the executive, the public administration or political figures, may also entail more pressure by political authorities,[131] therefore making standards and, with that, ensuring the independence of Equality Bodies essential.

The enforcement of sanctions issued by Equality Bodies may be problematic. The questionnaire by the **Albanian** Commissioner for the Protection from Discrimination lists among obstacles and shortcomings the "unwillingness to pay fines by violators of the law and the legal obligation of the institution to go through procedures for the execution of fines through Bailiffs." Special attention is to be paid to sanctions against public entities. While no particular legal limit is established with regard to cases against public entities (sometimes more severe sanctions are envisaged by law), there are obstacles concerning the enforcement of sanctions and remedies against public authorities. In this regard, the questionnaire by the **Slovenian** Advocate of the Principle of Equality refers to a "lack of good example of public bodies (non-compliance)". The same applies in **Albania** especially with regard to elected officials[132]. Insufficient enforcement is also connected to insufficient monitoring through statistics about discrimination cases.

Data collection and training

Some of the above issues might be partly explained in **some countries** by a short tradition of non-discrimination legislation,[133] (at least when it comes to the discrimination grounds covered by the two 2000 Equality Directives and the specific innovations coming along with them) and by the fact that lawyers and judges might require additional training in non-discrimination law.[134] The lack of national statical data about non-discrimination cases contributes to the lack of information and awareness. According to the responses provided in the survey, **most countries** do not possess a comprehensive database on court cases that collects non-discrimination complaints and their outcomes. As an exception, the **Finnish** Ministry of

[129] Interview Albania.
[130] For instance, the Advocate of the Principle of Equality (Slovenia).
[131] Interview Albania.
[132] Interview Albania.
[133] Questionnaire by the Czech Public Defender of Rights.
[134] Questionnaires by the French Defender of Rights and the Slovenian Advocate of the Principle of Equality.

Justice provides statistics and other information on non-discrimination cases.[135] The **Austria**n database, while collecting some data, only contains civil and criminal cases decided by the high courts.[136] In **Germany**, the Federal Anti-Discrimination Agency produces a non-discrimination case law overview (published quarterly), where relevant judgments are selected.[137] The questionnaire of the **Albanian** Commissioner for the Protection from Discrimination highlighted the need to collect data on court cases for the purpose of identifying trends in non-discrimination cases, which would contribute to taking appropriate measures to prevent and tackle them.

Having such databases might furthermore lead to a better understanding of the requirements of effectiveness, proportionality, and dissuasiveness by national courts and Equality Bodies. While some flexibility should be guaranteed in order to take into account different legal frameworks and cultures of European countries, the still persisting ambiguities concerning the definitions of these three principles are considered to be contributing to their insufficient application. Some interlocutors considered further EU level guidance on this issue desirable.

Good practices

Interestingly, when Equality Bodies were asked about good practices existing in their countries regarding sanctions and remedies in discrimination cases, **only very few** reported about such cases. Others focused more on procedural issues regarding what kind of redress mechanisms are or should be available for victims of discrimination (e.g. mediation and reconciliation powers for Ombuds institutions[138]); the need for legal means to address systemic discrimination (like having access to constitutional court review of legislation, or collective complaints available to Equality Bodies and NGOs in case the victims are not known or identifiable[139]) or the financing of local non-discrimination offices that can complement the litigation activities of Equality Bodies.[140] A structured dialogue with civil society to increase knowledge of the protection against discrimination and willingness to report cases of discrimination to the Equality Body has been mentioned as good practice.[141] A system in which Equality Bodies constitute a specialized redress mechanism that can issue legally binding decisions and sanctions has been considered as desirable

[135] Finland, Statistics on discrimination 2021, available at https://yhdenvertaisuus.fi/en/experiences-and-observations-of-discrimination. This webpage provides also reports and articles on discrimination cases (in Finnish).
[136] Austria, Federal Legal Information System database available at https://www.ris.bka.gv.at/
[137] Germany, Federal Anti-Discrimination Agency, Overview of case law on anti-discrimination law – Status, Available at: https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Rechtsprechungsuebersicht/rechtsprechungsuebersicht_zum_antidiskriminierungsrecht.html
[138] Mentioned by the Finnish Ombudsman for Equality and the Office of the Greek Ombudsman.
[139] Mentioned in the questionnaire by the Slovenian Advocate of the Principle of Equality, a possibility not applied so far in the Slovenian context.
[140] As is the case with the 18 anti-discrimination bureaus in different regions in Sweden.
[141] Questionnaire by the Swedish Equality Ombudsman.

especially if combined with the possibility for legal assistance, strategic litigation in individual cases, filing collective claims and challenge systemic discrimination in legislation.[142]

When it comes to good practices regarding sanctions and remedies, in Romania, it is reported that both the National Council for Combating Discrimination and courts, have gradually increased the level of sanctions and remedies applied or awarded in discrimination cases.[143] Most of the remaining answers regarding good practices focused rather on how to determine effective, proportionate, and dissuasive compensation.

The **Belgian** Equality Body Unia reported about the possibility of *cumulating compensation* in cases of multiple discrimination. The same situation can give rise to protection and thus compensation under different laws if:

- the different laws serve a different purpose,
- there is no legal provision prohibiting the cumulation of compensation,
- the award of damages does not have the same legal cause (i.e. a different set of facts),
- the person concerned demonstrates that the damages for which compensation is sought are different.

Under this last condition, the judge evaluates whether there is a separate damage, whether there is at a moral level a different form of damage to the integrity of the applicant. A case in point was the decision taken by the Labour Tribunal Antwerp on 29 September 2020, decided in appeal by the Labour Court Antwerp on 28 June 2021.[144] The case concerned a woman with a hearing impairment who was pregnant when applying for a job. The Tribunal ruled that the woman was discriminated on the basis of her disability during the recruitment procedure and with regard to the decision of non-recruitment. On this basis, the Court imposed two separate sums of money as compensation based on the Antidiscrimination Act. In addition, the Tribunal found a violation of the Gender Act and awarded the lump sum of 6 months gross salary a third time. In appeal, the Labour Court confirmed that there had been discrimination based on both Acts but imposed only one compensation on the basis of the Antidiscrimination Act. It further confirmed that a cumulation of damages for disability and gender discrimination was possible. First, the laws did not prohibit the cumulation of compensation. Then, although the two laws are closely intertwined, the Court ruled that they should be considered as separate. Finally, although the end result of the violation of the two protected criteria is the same (the non-recruitment), the Court concluded that morally speaking there is a different form of damage to the applicant's integrity, and thus required different remedies.

[142] Questionnaire by the Slovenian Advocate of the Principle of Equality.
[143] Questionnaire by the Romanian National Council for Combating Discrimination.
[144] See also Belgium, Labour Tribunal Brussels, 1 June 2006; Belgium, Labour Tribunal Brussels, 26 October 2016; Belgium, Labour Tribunal Namur, 28 March 2006; Belgium, Labour Tribunal Tournai, 26 January 2007.

While this legal situation and case law is promising, it remains unclear, however, whether cumulation is possible in cases of multiple discrimination also when the grounds of discrimination are covered in only one piece of legislation, as is for instance the case of disability and religion, which in the case of Belgium are both covered by the Antidiscrimination Act. If this was not the case, multiple discrimination would result in a cumulation of compensation only if one of the discrimination grounds is relating to gender.

Swedish legislation provides for the payment of compensation for immaterial damages caused by discrimination. When such compensation is decided "particular attention shall be given to the purpose of discouraging such infringements of the Act."[145] In two judgments of 2014, the Supreme Court gave some guidance on how such discrimination compensation should be assessed.[146] In these judgments, the Supreme Court introduced the term "prevention surcharge", which according to the Court should be seen as a sort of "punishment". As a guideline, the Court stated that the prevention surcharge should be as large as the reparation. It could also be higher if:

- the perpetrator has benefitted from the act,
- the violation has a recurring pattern, or
- there is reason to expect particularly far-reaching care from the person holding a certain position.

Although the Court did not lay down any upper limit, the doubling of the compensation has become a commonly applied practice. While this has been considered a step forward and compensation has thereby become somewhat more effective and dissuasive, it is still not considered truly dissuasive for financially well-off enterprises. The reason is that amounts, including the punitive part of the compensation, are calculated based on the injury suffered by the individual, thereby neglecting to properly consider the social damage caused by the discrimination in question.

In **France**, the use of the so-called Clerc method has been mentioned as a good practice to determine the level of compensation in labour cases. This mechanism allows to establish discrimination on the one hand and to quantify the financial damage resulting from the discrimination on the other. To show that the rejection of a salary increase or promotion is caused by discrimination, a panel of employees who do not have the characteristics on the basis of which discrimination has allegedly occurred needs to be established to demonstrate that they have experienced a more favourable development, or have not been subject to arbitrary decisions related to the prohibited ground, as compared to the plaintiff. To establish the damage, certain information from the members of this panel is collected (working contracts, pay slips, annual evaluations, or number of trainings) and modelled on a graph. The compensation is then calculated by dividing by 2 the difference in remuneration between the average remuneration of non-discriminated

[145] Chapter 5, section 1, para. 1 of the Swedish Discrimination Act.
[146] Sweden, Supreme Court of Sweden, Cases NJA 2014 p 499 I and II, 26 June 2014, n T5507-12, https://lagen.nu/dom/nja/2014s499 (in Swedish)

employees and the remuneration of the discriminated employee, multiplied by the number of months of the period the discriminatory act lasted for.[147] To this amount, to compensate for the prejudice to future pension entitlements caused by the lower salary, a 30% is added. The amount can be further increased to compensate for non-pecuniary damage due to the lack of professional recognition. This method is used by the Court of cassation and regularly applied by lower instance judges. The Court of cassation has further made clear that a compensation going beyond the material damage of a victim is acceptable.[148] The limitation of the Clerc method is that it requires the establishment of a panel of non-discriminated employees for comparison, which is impossible in smaller companies and increasingly difficult as cohorts change more frequently and are less stable. In addition, it can be used to calculate compensation for discrimination with regard to salary and promotion but it is ineffective in accounting for punctual discriminatory actions by an employer against an employee.[149]

While all these examples of good practices deal with the issue of compensation, in general, there is agreement among **all Equality Bodies and interviewees** that the levels of compensation that can be/are awarded are not dissuasive. In order to achieve a special and general preventive effect, **Belgian** Unia mentioned the publication of decisions finding discrimination as being a powerful tool. Similarly, the "name and shame" sanction that can be used by the **French** Defender of Rights has been seen as a good and effective practice. In addition, **most** interlocutors agreed that it should be possible to order structural measures. While such structural measures cannot, for instance, be asked for in front of a court of law, Unia's negotiated solutions always try to achieve three aims:

- the recognition from the perpetrator of having discriminated;
- the reparation of the damage inflicted to the victim;
- the acceptance of structural measures in order to prevent future violations.

If the perpetrator is not willing to agree on an adequate compensation, Unia still has the possibility of bringing the case to court. This possibility very often leads to a perpetrator accepting the payment of compensation within a negotiated solution. Thus, the three-tier structure of a negotiated sanction

[147] The difference in remuneration is halved to take account of the fact that even if the person had not been discriminated there is no guarantee that he or she would have achieved a certain level of remuneration.
[148] France, Court of Cassation Soc., n° 18-21.862, 29 January 2020 published in the bulletin: "Any dismissal of an employee because of her pregnancy is null and void. … the employee who requests their reinstatement is entitled to the payment of an indemnity equal to the amount of the remuneration they should have received between their eviction from the company and their reinstatement, without deduction of any replacement income they may have received during this period".
[149] France, CHHUM AVOCATS, 'French Labour Law - Salary/Wage Discrimination: Compensation by the Clerc Method : The Principle of Full Reparation', *CHHUM AVOCATS (Paris, Nantes, Lille)* (blog), 26 January 2020, https://www.chhum-avocats.fr/publications/chhum-avocats-french-labour-law-nbsp-salarywage-discrimination-compensation-by-the-clerc-method-the-principle-of-full-reparation For further information on the Clerc method see Nicolas Hatzfeld, 'An Exemplary Legal Battle against Union Discrimination at the Peugeot-Sochaux Plant (1995-2000)', trans. Patricia Finn, *Travail et Emploi*, no. Hors-série (30 December 2017), pp 31–54; Vincent-Arnaud Chappe, 'La preuve par la comparaison : méthode des panels et droit de la non-discrimination', *Sociologies pratiques* 23, no. 2 (22 November 2011), pp 45–55; Vincent-Arnaud Chappe, 'Taking Trade Union Discrimination to Court: A Sociology of Support and Resources for Legal Action', *Sociologie Du Travail* 56 (1 November 2014), pp 69–87

combined with the possibility of escalating the case in front of a court contributes to making the sanctions that result from such a process effective, proportionate, and dissuasive.

With regard to fines, good practices may be identified in **France**, where specific non-discrimination fines may be issued for the failure to comply with accessibility obligations and for the failure to publish gender equality plans in line with the gender equality index. In the case that the organisation does not implement corrective measures within three years, it may incur in a fine up to 1% of its wage bill.

A promising new legal development has taken place in **Spain,** where a new Comprehensive Law for Equal Treatment and Non-Discrimination[150] has been approved in June 2022. In terms of remedies, it provides for a presumption of moral damages when discrimination is proven. This takes into account that discrimination is always causing mental distress to the individual and a social harm. Furthermore, the law provides for a positive obligation on the authorities charged with monitoring the application of the law to ensure that the infringement never happens again, especially in cases in which the discriminator is a public authority. Multiple discrimination and harassment are qualified as very severe infringements, which result in a penalty fee between EUR 40.001 and 500.000. The concrete penalty fee imposed within the ranges foreseen will have to be adequate and proportionate to the gravity of the infraction, in a way that it is not more convenient for the offender to pay the fine rather than avoiding breaching the law. Penalty fees paid will be invested in the promotion of equality and non-discrimination, sensibilization and the fight against intolerance. Finally, the law provides for the possibility to impose accessory sanctions in cases of very severe infringements, such as the closure of the establishment in which the discrimination occurred, the cessation of the economic or professional activity carried out by the perpetrator for 5 to 10 years, or the suppression, cancellation, or total or partial suspension of the official aid received or requested by the perpetrator. In addition to these provisions relating to court procedures, the law prescribes the establishment of a new Independent Equality and Non-Discrimination Authority with conciliation and litigation powers. It remains to be seen how the law will be implemented but from the legislative point of view it covers a number of the above raised challenges encountered across Europe.

[150] Spain, Comprehensive Law for Equal Treatment and Non-Discrimination, Law 15/2022 of 12 July 2022, BOE No 167 of 13 July 2022.

Preventing and Reacting to Discrimination through Sanctions and Remedies

Chapter III: Exploring other fields of law for effective, proportionate, and dissuasive sanctions: data protection and consumer protection

This chapter assesses how data protection law and consumer protection law deal with the issues that we identified above as shortcomings and obstacles in non-discrimination law. It will first assess how these two areas of law interpret and apply the principles of effectiveness, proportionality, and dissuasiveness. The following sections assess how these areas of law regulate compensation, combined and forward-looking sanctions, collective redress, and independent authorities' powers and how these rules are applied in practice. This results in a reflection on the peculiarities of these fields of law and on their comparability with non-discrimination law to then draw some learnings as to how the sanctions regime in non-discrimination law can be improved in the final chapter of this report.

The interpretation and application of the principles of effectiveness, proportionality, and dissuasiveness

The requirement of providing for effective, proportionate, and dissuasive sanctions is not uniquely foreseen in non-discrimination law, but it is rather contained in many different legal acts concerning, for instance, competition law;[151] budgetary surveillance in the euro area;[152] protection of the environment through criminal law;[153] financing, management, and monitoring of the common agricultural policy;[154] dissemination of terrorist content online;[155] and protection of persons who report breaches of Union law.[156]

Special attention, however, should be paid to data protection law and to consumer protection law because they are particularly advanced fields. More specifically, with regard to the three requirements, the General Data Protection Regulation (GDPR) reads that:

> Article 83. (General conditions for imposing administrative fines)
> Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be *effective, proportionate and dissuasive*. […]

[151] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Article 13 and Article 16.
[152] Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Article 8, para. 2.
[153] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, Article 5.
[154] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013, Article 59, Article 85, and Article 89.
[155] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online, Article 18.
[156] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, Article 23.

Article 84. (Penalties)

1. Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 83, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be *effective, proportionate and dissuasive*. [...][157]

The Directive on Consumer Rights refers to penalties, reading that:

Article 24, para 1 (penalties)

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be *effective, proportionate and dissuasive*.[158]

The following subsection therefore focuses on how these principles of effectiveness, proportionality, and dissuasiveness have been interpreted in these two areas of law.

Data protection

The European Data Protection Board (EDPB), composed of representatives of the EU national data protection authorities and the European Data Protection Supervisor (EDPS), provides guidelines, recommendations, and best practices.[159] In May 2022, the EDPB published its “Guidelines 04/2022 on the calculation of administrative fines under the GDPR”,[160] which contain a chapter on “Effectiveness, proportionality and dissuasiveness”. The Guidelines define the three principles as follows:

Effectiveness

Generally speaking, a fine can be considered effective if it achieves the objectives with which it was imposed. This could be to reestablish compliance with the rules, to punish unlawful behavior, or both. Moreover, Recital 148

[157] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), emphasis added.

[158] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, pp 64–88 (as amended by Directive (EU) 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, pp 7–28), emphasis added.

[159] See GDPR, Recital 139, Article 68ff.

[160] EDPB, ‘Guidelines 04/2022 on the calculation of administrative fines under the GDPR’, 12 May 2022.

> GDPR emphasizes that administrative fines should be imposed "in order to strengthen the enforcement of the rules of this Regulation."[161]

The Guidelines read that, in order to evaluate effectiveness, the supervisory authority gives due regard to the circumstances of the case and to those requirements listed under Recital 148 of the GDPR:

> ...the nature, gravity and duration of the infringement, the intentional character of the infringement, actions taken to mitigate the damage suffered, degree of responsibility or any relevant previous infringements, the manner in which the infringement became known to the supervisory authority, compliance with measures ordered against the controller or processor, adherence to a code of conduct and any other aggravating or mitigating factor.

Proportionality

> The principle of proportionality requires that measures adopted do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[162]

The Guidelines clarify that the fine must be proportionate both to the severity of the infringement and to the size of the undertaking. In exceptional circumstances ("there has to be objective evidence that the imposition of the fine would irretrievably jeopardise the economic viability of the undertaking concerned"[163]), the supervisory authority may reduce the fine on the basis of the principle of the inability to pay. The specific social and economic context must be considered in light of economic viability, proof of value loss, and other factors such as cyclical crisis of the sector concerned and effects on the increase of unemployment.

Dissuasiveness

[A] dissuasive fine is one that has a genuine deterrent effect. In that respect, a distinction can be made between general deterrence (discouraging others from committing the same infringement in the future)

[161] Ibid, p 37, para. 135.
[162] Ibid, p 38, para. 137. Definition based on the CJEU, Judgment of the General Court (Fifth Chamber) of 26 October 2017, *Marine Harvest*, Case T-704/14, EU:T:2017:753, para. 580, referencing case CJEU, Judgment of the General Court (Third Chamber) of 12 December 2012, *Electrabel v Commission*, Case T-332/09, EU:T:2012:672, para. 279.
[163] Op. cit. EDPB, 'Guidelines 04/2022...' , para. 140.

and specific deterrence (discouraging the addressee of the fine from committing the same infringement again). When imposing a fine, the supervisory authority takes into account both general and specific deterrence.

> A fine is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Union law. What is decisive in this regard is not only the nature and level of the fine but also the likelihood of it being imposed. Anyone who commits an infringement must fear that the fine will in fact be imposed on them. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.[164]

A fine may be increased if the supervisory authority does not deem it sufficiently dissuasive. Moreover, in some cases, a deterrence multiplier may be imposed.

These interpretations of effectiveness, proportionality, and dissuasiveness show elements of interest for non-discrimination law. With regard to effectiveness, administrative fines should be imposed “in order to strengthen the enforcement of the rules” of the GDPR, therefore indicating a collective interest of the rules in themselves. In addition, the GDPR establishes clear and detailed rules under Recital 148 and Article 83 para. 2 about the circumstances of the case that supervisory authorities take into account in order to evaluate effectiveness. Such rules ensure common grounds to guarantee effective sanctions across EU countries. Concerning proportionality, the Guidelines specify that it should be considered both with regard to the severity of the infringement and to the size of the undertaking. The reference to the size of the undertaking contributes to issuing proportional sanctions tailored to the perpetrator, which possibly also have dissuasive effects. The interpretation for a dissuasive effect is also interesting for non-discrimination law because it mentions the likelihood of a sanction being imposed. Such an element is indeed missing in the non-discrimination field, which is overly reliant on victims coming forward, thus – in the current situation of underreporting – sanctions are unlikely to be imposed. In addition, as the survey has shown, judges tend to award fines at the lower end of the spectrum, so even if higher administrative fines would be foreseen in legislation there is currently little likelihood of dissuasive sanctions being imposed. Finally, dissuasiveness may be adjusted with a deterrence multiplier when the supervisory authority does not deem the sanction appropriate for preventing further violations. Given the currently low levels of fines, a deterrence multiplier may contribute to develop the individual and general preventive aims.

It is noteworthy, when compared to non-discrimination law, that these rules apply to administrative fines, therefore to sanctions in a strict sense. As we discussed above in the introduction, the 2000 Equality

[164] Ibid. p 39, paras. 142-143.

Directives envisage effectiveness, proportionality, and dissuasiveness, not only for sanctions in the strict sense, thus targeting the perpetrator, but also for compensation to the victim. In the GDPR, Article 82 (Right to compensation and liability), para. 1 reads:

> Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

Interestingly, this paragraph does not mention the three principles. Paragraph 4 refers to "effective compensation" but does not require proportionality and dissuasiveness. This means that the above rules do not apply to remedies, which, as will be shown below[165], are considered unsatisfactory for data subjects.

The fact that in data protection there are separate norms addressing administrative, criminal, and civil sanctions makes it somewhat easier to fulfil the criteria of effectiveness, proportionality, and dissuasiveness, as indeed all three kinds of sanctions are imposed with different objectives in mind and therefore have to be evaluated against their specific orientation (perpetrator-centred and protection of a public good/victim-centred and protecting the individual). The fact that "dissuasiveness" is not mentioned as a requirement for compensation in data protection shows that this is indeed the criterion most difficult to achieve for this type of sanction.

It is also important to note that the principles of effectiveness, proportionality, and dissuasiveness are directly applicable in data protection law given that the legal source, a regulation, aims at uniform legislation. This is not the case either for non-discrimination or consumer protection, where some of the directives aim at minimum harmonisation.[166] This has effects on the application of the three principles, as it will be further explained in the following sections.

Consumer protection

Like in data protection, perpetrator-centred sanctions and victim-centred remedies seem to be dealt with separately. In fact, in the various pieces of EU secondary legislation regulating consumer protection,[167]

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[165] In the section titled "Compensation" in this chapter.

[166] Paola Iamiceli et al., Fundamental Rights In Courts and Regulation (FRICoRe), 'Guidance for Trainers', May 2022, p 46.

[167] From a procedural point of view, the most relevant are: Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, pp 22–39; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, pp 30–36; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304, 22.11.2011, pp 64–88; Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, pp 1–26; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, pp. 1–22.

proportionality and dissuasiveness usually apply to administrative sanctions and to a more limited extent to the remedies.[168] There are however exceptions. Recently, for instance, the Unfair Commercial Practice Directive (as amended by Directive (EU) 2019/2161)[169] reads under Article 11a:

> Consumers harmed by unfair commercial practices, shall have access to *proportionate and effective remedies*, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.

The text refers not only to effectiveness but also to proportionality. Dissuasiveness is again missing, which might indicate that a compensation that makes fully good the harm produced by an infringement might still not be high enough to be really dissuasive or that, simply, compensation is considered as a remedy that is exclusively focused on the victim/consumer, leaving punitive and preventive aims to other sanctions in administrative and criminal law. Interestingly in this regard, the same Directive establishes under Article 13 that penalties shall be effective, proportionate, and dissuasive and lists non-exhaustive and indicative criteria that should be taken into account by Member States:

- the nature, gravity, scale and duration of the infringement;
- any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- any previous infringements by the trader;
- the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;
- any other aggravating or mitigating factors applicable to the circumstances of the case.

Member States should ensure the imposition of fines through administrative procedures and/or judicial proceedings (Article 13, para. 3). The paragraph further establishes that the maximum amount of those

[168] Op. cit. Iamiceli et al., Fundamental Rights..., p 48.
[169] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, pp 22–39.

fines should be at least 4% of the trader's annual turnover in the Member State or Member States concerned. If the annual turnover is not available, Member States may foresee fines, the maximum amount of which shall be at least EUR two millions.

The Directive on consumer rights establishes that penalties must be effective, proportionate, and dissuasive (Article 24), while no reference is made with regard to remedies.[170] The same applies for the Directive on credit agreements for consumers, which foresees the three principles only for penalties (Article 23).[171] The Directive on representative actions for the protection of the collective interests of consumers mentions the three principles with regard to penalties under Article 19, which further specifies that "penalties can, inter alia, take the form of fines".[172]

These examples demonstrate that, similarly to data protection, the rules in place in consumer protection provide more detailed guidelines as to how the three principles are to be interpreted. More precisely, however, we report below three explanations of the principles of effectiveness, proportionality, and dissuasiveness as they are understood in consumer protection law, on the basis of the case law of the CJEU.

Effectiveness

> …effectiveness may be referred to as a principle enabling an *adequate* remedial response to a violation in terms of both (1) the remedy's aptness to *in fact* perform the function for which the remedy is designed (preventive, penal, compensatory, restitutionary, etc.) and (2) the absence of obstacles (mainly procedural) that *in fact* prevent the attainment of these objectives, e.g. by causing a delayed remedial response, or requesting too high a burden of proof, etc. The *factual and practical dimensions* of effectiveness sit at the very core of this principle.[173]

[170] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, pp 64–88.
[171] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, pp 66–92 (as amended by Regulation (EU) 2019/1243 of the European Parliament and of the Council of 20 June 2019 adapting a number of legal acts providing for the use of the regulatory procedure with scrutiny to Articles 290 and 291 of the Treaty on the Functioning of the European Union, PE/65/2019/REV/1 OJ L 198, 25.7.2019, pp 241–344).
[172] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, pp 1–27.
[173] Explanation by Cafaggi and Iamiceli based on the case law of the CJEU, Court of Justice (Judgment of the Court (Third Chamber) of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, Case C-295/04, EU:C:2006:461, para. 95, on the effectiveness of damages; CJEU, Judgment of the Court of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland*, Case C-33/76, EU:C:1976:188; CJEU, Judgment of the Court of 16 December 1976, *Comet BV v Produktschap voor Siergewassen*, Case C-45/76, EU:C:1976:191). See Fabrizio Cafaggi and Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions', *European Review of Private Law* 25, no. 3 (1 June 2017): 577–78. See also Article 4 of

Proportionality

> …the principle of proportionality [is] framed within the tripartite test of adequacy, necessity, and proportionality *stricto jure.* To be proportional, a measure should be (1) apt for the purpose for which it is provided; (2) its scope should be necessary in the sense that no other less intrusive means exist to attain an equivalent result; and (3) it should be strictly proportional with respect to both the size and the relevance of the infringement, on the one hand, and the size, quality, intensity of the effects generated by the remedy, on the other.[174]

Dissuasiveness

> The principle of dissuasiveness mostly concerns the ability of the remedy to discourage future infringements. […] In order to be dissuasive a remedy must, at least, (tend to) deprive the infringer of the *benefits* obtained (or due to be obtained) from the infringement, taking into account the costs/incentives for the victim(s) to enforce the remedy and the effects of the remedy on an individually harmful or multioffensive situation. Infringers' benefits are not merely monetary but may be linked with the opportunity to operate in a market, to set the standards within a supply chain or in a market, or to promote a brand. This explains why […] the principle of dissuasiveness applies to more remedies than simply monetary fines, including invalidity, injunctions and many forms of collective redress.[175]

These explanations raise further elements to be considered in non-discrimination law. First, effectiveness requires that procedural costs and burdens would not be such to undermine a compensation's aptness to in fact perform this function, therefore linking sanctions and access to justice in general. Second, proportionality should consider both the size and the relevance of the infringement and the size, quality, intensity of the effects of the remedy. With regard to non-discrimination, this is relevant with regard to the

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the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp 1–19 .

[174] Explanation by Cafaggi and Iamiceli based on ECJ 17 December 1970, Internationale Handelsgesellschaft mbH, Case C-11/70; CJEU 11 July 2002, Käserei, Case C-210/00, para. 59; the definition of proportionality in the Opinion of Advocate General Kokott, 14 October 2004, Berlusconi and Others, Joined Cases C-387/02, C-391/02 and C-403/02, EU:C:2004:624; Court of First Instance 25 May 2004, Distilleria Palma, T-154/01, EU:T:2004:154. See Op. cit. Cafaggi and Iamiceli, 'The Principles of Effectiveness, …' p 578.

[175] Explanation by Cafaggi and Iamiceli based on the Opinion of Advocate General Kokott, C-387/02, para. 89. S Op. cit. Cafaggi and Iamiceli, 'The Principles of Effectiveness, …' pp 578-579. The term "multioffensive" used in this explanation implies harmful to a larger amount of people.

social/collective effects of infringements. Third, in addition to the likelihood of the sanction being imposed (data protection, above), dissuasive sanctions should also consider the costs and the incentives for victims to enforce the remedy and the effects of the remedy on individual or multi-offensive infringements.

Compensation

Although sanctions systems in non-discrimination cases are mainly victim-centred, this research has shown that compensation is not satisfactory mainly due to low levels awarded, which do not fulfil the requirements of effective, proportionate, and dissuasive sanctions. This section enquires how compensation works in data protection and consumer protection.

Data protection

Besides the right to an effective judicial remedy against a controller or processor (Article 79), the GDPR envisages the right to compensation under Article 82, para. 1

> Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered.

Recital 146 adds that "the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives" of the GDPR and that data subjects should receive "full and effective compensation". Compensation must be claimed before competent courts if the organisation does not agree to pay it following the claim of the individuals. Supervisory authorities have no powers in this regard. In practice, compensation in civil proceedings is not deemed to be satisfactory for data subjects with regard to procedural requirements and the levels of compensation. This is due to the fact that it is difficult to prove causality and damages and that many claims for damages are either rejected[176] or result in very low amounts, such as EUR 100[177] or 50.[178] The Court of Justice will soon provide clarification with regard to some of the issues concerning compensation in data protection based on three questions referred to it by an Austrian court. The questions focus (1) on the necessity of the existence of suffered harm by the applicant for the award of compensation under Art. 82 GCPR (in addition to an infringement of the GDPR), (2) on whether other EU requirements must be considered besides the principles of effectiveness and equivalence, and (3) whether "the award of compensation for non-material

[176] Examples of cases in which the claim was reject are The Netherlands, Court of Amsterdam, Rechtbank Amsterdam, C/13/688682 / HA ZA 20-863, 29 December 2021, ECLI:EN:RBAMS:2021:7647; -Germany, LG Frankfurt (27. Zivilkammer), 2-27 O 100/20, 18 September 2020 ECLI:DE:LGFFM:2020:0918.2.27O100.20.00; UK, High Court of Justice Queen's Bench Division, Media Entertainment Nv v. Sapar Karyagdyyev and Alfonso Gonzalez Garcia, [2020] EWHC 1138 (QB); Germany, LG Hamburg, 324 S 9/19, 4 of September 2020; UK, Supreme Court, Lloyd (Respondent) v Google LLC (Appellant), [2021] UKSC 50.
[177] Germany, LG München (3. Zivilkammer), 3 O 17493/20, 19 January 2022.
[178] Germany, LG Koblenz, Amtsgericht Diez, 8 C 130/18, 4 November 2020.

damage presupposes the existence of a consequence of the infringement of at least some weight that goes beyond the upset caused by that infringement".[179] According to the opinion of the Advocate General, criticized by a European consumer organisation,[180] Article 82 should be interpreted as meaning that

> for the purposes of the award of compensation for damage suffered by a person as a result of an infringement of that regulation, a mere infringement of the provision is not in itself sufficient if that infringement is not accompanied by the relevant material or non-material damage.
> The compensation for non-material damage provided for in the regulation does not cover mere upset which the person concerned may feel as a result of the infringement of provisions of Regulation 2016/679. It is for the national courts to determine when, owing to its characteristics, a subjective feeling of displeasure may be deemed, in each case, to be non-material damage. [181]

With regard to additional requirements besides effectiveness and equivalence, the Advocate General, excludes the application of the principles of equivalence but also of dissuasiveness given that in the GDPR "civil liability performs a 'private' compensatory function, whereas fines and criminal penalties have a public deterrent and, as the case may be, punitive function."[182]

Consumer protection

The Unfair Commercial Practice Directive (as amended by Directive (EU) 2019/2161)[183] reads under Article 11a:

> Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial

[179] Austria, Request for a preliminary ruling from the Oberster Gerichtshof, UI v Österreichische Post AG, Case C-300/21, 12 May 2021.
[180] BEUC, The European Consumer Organisation, 'Consumers' right to compensation for privacy damages under threat', 13 October 2022, available at https://www.beuc.eu/press-releases/consumers-right-compensation-privacy-damages-under-threat.
[181] CJEU, Opinion of Advocate General Campos Sánchez-Bordona delivered on 6 October 2022, Case C-300/21, *UI v Österreichische Post AG*, Case C-300/21, EU:C:2022:756, para. 117.
[182] Ibid., para. 88.
[183] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, pp 22–39.

> practice, the damage suffered by the consumer and other relevant circumstances.

This provision has the purpose of encouraging private enforcement of the Unfair Commercial Practices Directive by consumers but, unlike other provisions of the Directive, only provides minimum harmonisation.[184] In fact, although EU level initiatives have been taken in order to facilitate compensation for consumers (Injunctions Directive,[185] Regulation on Consumer Protection Cooperation,[186] Small Claims Regulation,[187] and tools for alternative dispute resolution), they often refrain from taking action. This is due to low individual amounts of compensation, financial concerns, and psychological disincentives.[188] In 2008 the Commission explained that consumer collective redress was to be strengthened due to the obstacles in individual redress.

> 8. Currently, when consumers affected by a malpractice want to pursue a case, they face *barriers in terms of access, effectiveness and affordability*....
> 9. Consumers can always go to court to obtain individual redress. Mass claims could then in principle be resolved with a large number of individual claims. But there are barriers which de facto impede European consumers from obtaining effective redress. These are in particular *high litigation costs and complex and lengthy procedures*. One out of five European consumers will not go to court for less than EUR 1000. Half say they will not go to court for less than EUR 200. High ***costs*** and the ***risk of litigation*** make it uneconomic for a consumer to pay court, lawyer and experts fees *that may exceed the compensation*. Procedures are so complex and lengthy that consumers may find themselves entangled without any clear perception of when (or if) their case will be satisfactorily resolved. Only 30% of consumers think that it is easy to solve disputes through courts. [189]

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[184] Marco B. M. Loos, 'The Modernization of European Consumer Law (Continued): More Meat on the Bone After All', *European Review of Private Law* 28, no. 2 (1 May 2020), p 410.
[185] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, pp 30–36. This Directive will be repealed on 25 June 2023 and be replaced by the Directive on representative actions for the protection of the collective interests of consumers.
[186] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, pp 1–26.
[187] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, pp 1–22.
[188] Stefan Wrbka, *European Consumer Access to Justice Revisited* (Cambridge, UK: Cambridge University Press, 2014), p 33.
[189] European Commission, 'Green Paper On Consumer Collective Redress', COM/2008/0794 final, emphasis added.

These considerations are similar to those pointed out by the interviewees of this report when talking about non-discrimination and data protection, showing that individual compensation mechanisms should be improved in all these three areas of law. In addition, developing forms of collective redress, as indicated by the Commission, may represent a way forward. In its most recent report on the application of the two 2000 Directives, the Commission underlined the "decisive role [of organisations' legal standing] in cases of *collective discrimination* harming people who are not directly or immediately identifiable". It further mentioned that "the CJEU has long recognised that EU law also prohibits discrimination where there is no identifiable individual victim", referring in this context also to Commission Recommendation 2013/396/EU. It has, however, not called for any legal initiatives in this direction with a view of addressing the shortcomings it had identified.[190]

Combined and forward-looking sanctions

The analysis provided in Chapter II demonstrated that one sanction/remedy typically may not be sufficient for the observance of effectiveness, proportionality, and dissuasiveness. Combining sanctions is particularly necessary in case of compensation, as dissuasiveness would only be met, when the amount is sufficiently high. The same applies for warnings when envisaged only for minor offenses or having a symbolic function, which would be the case if they lack a sufficient degree of publicity or fail to assist in establishing discrimination in an action for damages.[191] This situation presents itself differently in data protection law and consumer protection law due to the fact that they regulate sanctions in the strict sense (which must observe all the three principles) and remedies (which must be effective and proportional) separately, therefore allowing the respective judging authority to focus either on the social and public interest or the private interest. Particularly interesting is however to find forward-looking sanctions that could be useful for non-discrimination law.

Data protection

The corrective powers of data protection supervisory authorities are listed under Article 58, para. 2 of the GDPR.[192] Letter a) reads that supervisory authorities may "issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation". These preventive warnings would be useful in non-discrimination, for instance, in the case of a planned use of an algorithmic decision-making system that might have discriminatory effects. Letter d) envisages the power

[190] European Commission, Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM/2021/139 final, 8.
[191] Op. cit. CJEU, 25 April 2013, *Asociaţia Accept...*, para. 68.
[192] For the powers of data supervision authorities, please see below, Chapter 3, "Independent authorities' powers".

> to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period

This sanction could be useful in regards to, for instance, forcing a company to adopt a diversity strategy or equality plan, which would have forward-looking effects because it imposes systematic measures that would prevent discrimination from happening. According to letter (e), supervisory authorities may “impose a temporary or definitive limitation including a ban on processing”. The ban on processing could be adapted to non-discrimination law as a ban on the operation of a business. Given the impact that such a sanction could have on an organisation, this could contribute to individual and general preventive effects. Finally, letter (g) foresees the power

> to withdraw a certification or to order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or to order the certification body not to issue certification if the requirements for the certification are not or are no longer met.

Certification mechanisms and data protection seals and marks allow organisations on a voluntary basis and via a transparent process to demonstrate the compliance with the GDPR on the basis of criteria established by competent supervisory authorities or by the European Data Protection Board. The certification is valid for maximum three years and may be renewed, under the same conditions, if the requirements are still met. Certification is important because it allows an organisation to have a “public-facing accountability tool” that could be used to demonstrate its compliance with the GDPR to individuals, other organisations, and supervisory authorities.[193] Letter (g) allows supervisory authorities to withdraw a certification or order the certification body not to issue it. This corrective power is therefore based on certification mechanisms, which constitute a preventive measure. While certifications are used by some Equality Bodies, this is not a common practice. EU non-discrimination law could establish an “equality certification” to be used by organisations to demonstrate their compliance with criteria of equality and non-discrimination. Such an EU-level certification system, however, would have to be further discussed and prepared, taking into account all potential risks.

[193] Website of the Data Protection Commission (Ireland), available at https://www.dataprotection.ie/index.php/en/organisations/gdpr-certification

Consumer protection

Consumer protection envisages sanctions under the Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws[194] that could be interesting to learn from, especially in the case of online discrimination. Among the enforcement powers of competent authorities,[195] Article 9, para. 4, letter g) reads:

> (g) where no other effective means are available to bring about the cessation or the prohibition of the infringement covered by this Regulation and in order to avoid the risk of serious harm to the collective interests of consumers:
>
> i. the power to remove content or to restrict access to an online interface or to order the explicit display of a warning to consumers when they access an online interface;
>
> ii. the power to order a hosting service provider to remove, disable or restrict access to an online interface; or
>
> iii. where appropriate, the power to order domain registries or registrars to delete a fully qualified domain name and to allow the competent authority concerned to register it;
>
> including by requesting a third party or other public authority to implement such measures;

These sanctions could prove dissuasive because they could allow judges, administrative authorities, or Equality Bodies to have additional tools against online discrimination and to promptly intervene in case of potentially discriminatory content even with the power to order to delete a fully qualified domain. Such measure would therefore have effects on the functioning and reputation of websites.

Collective redress

In 2013 the EU Commission issued a recommendation to promote the development of collective redress in different areas of law, expressly referring to consumer protection, competition, environment protection, data protection, financial services legislation and investor protection.[196] The initiative was due to several

[194] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, pp 1-26 (as amended by Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1 OJ L 136, 22.5.2019, pp 1–27 and by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, PE/27/2019/REV/1, OJ L 136, 22.5.2019, pp 28–50).

[195] For competent authorities, please see below, Chapter 3, “Independent authorities’ powers”.

[196] Commission, Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law 2013/396/EU. Recital 7 lists these areas “[a]mongst those areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value […].”

reasons.[197] First, infringements in competition law, data protection, and consumer protection may affect many people and distort the market. Second, in these areas (as pointed out above) individual claims meet relevant obstacles, which could be addressed with collective claims. Third, collective redress is considered as a way for improving the compensatory aim of sanctions, therefore improving dissuasiveness and compliance. Moreover, collective actions better address violations affecting groups of individuals given that "by definition [they] seek systemic changes".[198]

Although there have been some steps in consumer law to bestow NGOs with collective litigation competences already since the 1980s,[199] they became much more pronounced with the adoption of the 2013 Recommendation. While also data protection law adopted specific requirements to develop collective redress at the EU level, the Recommendation has so far not been used as a basis to develop collective redress mechanisms in EU non-discrimination law – and this although the Recommendation states that its principles "should be applied horizontally and equally … also in any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant".[200]

Data protection

Article 80 para. 2 of the GDPR, referring to representation of data subjects, reads:

> Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, *independently of a data subject's mandate*, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.[201]

[197] Listed in Sara Benedí Lahuerta, 'Enforcing EU Equality Law through Collective Redress: Lagging Behind?', *Common Market Law Review* 55, no. 3 (June 2018), p 784.
[198] Lilla Farkas, 'Collective Actions under European Anti-Discrimination Law', *European Anti-Discrimination Law Review*, no. 19, November 2014, p 39.
[199] Op. cit. Benedí Lahuerta, 'Enforcing...', p 792. See Directive 84/450/EEC, Article 4(1); Directive 93/13/EEC on unfair contract terms, O.J. 1993, L 95/29, Article 7; Directive 98/27/EC on injunctions for the protection of consumers' interests, O.J. 1998, L 166/51, Arts. 1–3; Directive 2005/29/EC on unfair commercial practices, O.J. 2005, L 149/22, Article 4; Regulation 2006/2004/EC on consumer protection cooperation, O.J. 2004, L 364/1, Arts. 4(2), 8(3).
[200] Recital 7.
[201] Emphasis added. Frenzel in Paal/Pauly writes that the part "if it considers that the rights of a data subject … have been infringed" only requires that a data processing violates norms that protect third parties, without reference to specific persons. In his interpretation, the provision must thus be "teleologically reduced" and applies to situations when there is no person claiming compliance with legal requirements. This would be a classic actio popularis "Feryn style", and seems to be confirmed also by the CJEU in C-319/20 Meta Platforms Ireland Limited (judgment of 28 April 2022) where it held that an organisation or other entity cannot be "required to carry out a prior individual identification of the person specifically concerned by data processing that is allegedly contrary to the provisions of the GDPR." (para 68) Furthermore, "under Article 80(2) of the GDPR, the bringing of a representative action is also not subject to the existence of a specific infringement of the rights which a person derives from the

Bodies, organisations, and associations are to be understood broadly, although the applicant must be a legal person (according to para. 1 it has "statutory objectives which are in the public interest") and must be "active in the field of data protection" and not-for-profit.[202] Under paragraph 1, not-for-profit bodies, organisations, and associations require the mandate of data subjects. Paragraph 2, on the contrary, does not require any mandate and is broad enough to allow for different solutions.[203] Recital 142 clarifies that "that body, organisation or association may not be allowed to claim compensation on a data subject's behalf independently of the data subject's mandate."

Article 80 has allowed privacy organisations and associations to contribute proactively to find violations of data protection law and to report them to supervisory authorities.

Consumer protection

The EU Directive on Representative Actions for Consumers allows qualified entities to seek an injunctive measure, a redress measure, or both, on behalf of a group of consumers through representative actions (including cross-border representative actions).[204] "Qualified entities" means "any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions in accordance with [the] Directive" (Article 3(4)). The requirements of the Directive are envisaged under Article 4, which prescribes that qualified entities must be legal persons; have a legitimate interest in protecting consumers' interests; non-profit-making characters; not subject to insolvency or declared insolvent; independent from interests other than consumers' (especially from traders); and guarantee appropriate levels of publicity with regard to the previous requirements and the sources of their funding, their organisational, management and membership structure, their statutory purpose, and their activities. In addition to consumer protection, this Directive has effects in other areas such as data protection, financial services, travel and tourism, energy, and telecommunications (Recital 13). In theory, such group actions in consumer protection could be relevant also in the context of discrimination, especially in the access to goods and services, hate speech, or AI related equality breaches.

data protection rules." (para 70). In fact, the action can be initiated when the representative organisation "considers" an infringement to have taken place, and not only when it can prove actual harm suffered by the data subject. There have been other authors that considered it problematic that third parties can dispose of the personal rights of the persons concerned. (Bergt in Kühling/Buchner). None of the commentaries alludes to the possibility to grant the right to launch proceedings if the violation affected only one data subject. Eike Michael Frenzel, Art. 80, in Boris P. Paal and Daniel A. Pauly, Datenschutz-Grundverordnung, C.H.Beck (3rd edition, 2021); and Matthias Bergt, Art. 80, in Jürgen Kühling and Benedikt Buchner, Datenschutz-Grundverordnung, C.H.Beck (2017).

[202] Alexia Pato, 'The Collective Private Enforcement of Data Protection Rights in the EU', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2019), p 3.

[203]Ibid, p 3.

[204] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, pp 1–27.

However, the application of these provisions in the non-discrimination context is subject in practice to judicial interpretation.[205]

Injunctive measures, described by Article 8 of the Directive on Representative Actions for Consumers as provisional or definitive measures "to cease a practice or, where appropriate, to prohibit a practice, where that practice has been deemed to constitute an infringement", seem particularly appropriate to address structural forms of discrimination, which is what *actio popularis* normally aims at. This requires, however, that they are sufficiently specific, and do not only call for a certain practice to come to an end.[206]

Redress measures mentioned by the Directive on Representative Actions for Consumers may comprise compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law (Article 9, para. 1).

Class action in consumer law does not require the representative to have a personal and direct interest nor prior authorisation from the members of the group. If the claim is admissible before the competent court, two types of involvement of the consumers may take place: a) opt-in, the consumers must expressly declare that they want to belong to the group (mandatory in cases of moral and physical harm); b) opt-out, the consumers automatically belong to the group (if no other express objection is communicated).[207] After the claim is declared admissible, the group representative and the defendant of the company must negotiate. If the negotiation is not successful, there will be a legal proceeding.

As the questionnaire by **Belgian** Unia suggests, these forms of collective redress may represent models for non-discrimination law. The data protection and consumer protection models are broad so as to allow Member States to adapt collective redress to their own legal tradition. Based on the above reasons (mainly based on improving access to justice in sanctions systems that depend on victims coming forward), non-discrimination law should establish as well general rules on collective redress, therefore allowing Member States to choose the model that best suit their legal system. Irrespective of which collective redress mechanism is included in non-discrimination law, it is important that such possibilities allow the judging authority to issue sanctions that address the collective/public interest in preventing discrimination from being repeated[208]). This implies that they should include forward-looking sanctions. In the case the collective redress mechanism does not allow victims to claim compensation in the same procedure, should they come forward, a simplified (and ideally free of charge) procedure should be established for claiming compensation on the basis of the judgment of the collective complaint.

Independent authorities' powers

[205] Op. cit. Chopin, Germaine, 'A Comparative Analysis...', p 93.
[206] Op. cit. Kádár, 'Actio popularis – potentials and challenges...', p 14-15.
[207] National legislation will establish when and which mechanism will be used in each case.
[208] See above, Chapter 2, "Non discrimination legislation in practice", especially "Non-discrimination legislation in practice".

Chapter 2 identified the shortcomings and the challenges affecting the role that Equality Bodies can play in non-discrimination sanctions regimes. Common issues are related to the fact that their decisions are often non-binding; they do not always have the power to issue sanctions even if their decisions are binding; they lack resources, influencing their capacity to follow up on the implementation of their decisions; and the enforcement of their decisions is not satisfactory (especially vis a vis public authorities).

The following sub-sections analyse data protection supervisory authorities and consumer protection competent authorities. The first are regulated by the GDPR which envisages investigative, corrective (including legally binding sanctions), and authorisation and advisory powers. The latter are characterised by more flexibility and their role and powers depend on the specific field and area of expertise and on the private or public enforcement model approach chosen by the respective Member State.

Data protection

The role of data protection supervisory authorities has undergone relevant changes under the GDPR. The role of supervisory authorities shifted from 'gatekeepers' (under the Data Protection Directive) to active players tasked with powers of investigation, monitoring, and sanctioning (under the GDPR).[209]

Member States establish one or more supervisory authorities responsible for the enforcement of the GDPR. Supervisory authorities should be completely independent[210] and should be provided with the financial and human resources, premises, and infrastructure in order to efficiently conduct their tasks (including mutual assistance and cooperation with other supervisory authorities).[211] Member States should guarantee their supervisory authority/authorities with a separate, public annual budget.[212]

Article 57 of the GDPR lists the tasks of supervisory authorities. These include monitoring and enforcement, public awareness, advice to national institutions, providing information to data subjects, cooperation with other supervisory authorities, complaints-handling, investigative powers, adopting standard contractual clauses, establishing and maintaining a list in relation to the requirement of data protection impact assessment, and tasks related to codes of conduct.

[209] Paolo Balboni et al., 'Accountability and Enforcement Aspects of the EU General Data Protection Regulation - Methodology for the Creation of an Effective Compliance Framework and a Review of Recent Case Law', *Indian Journal of Law and Technology* 15 (2019): 188. The innovations of the GDPR are analysed in Sebastian J. Golla, 'Is Data Protection Law Growing Teeth: The Current Lack of Sanctions in Data Protection Law and Administrative Fines under the GDPR', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 8 (2017).
[210] GDPR, (117)-(118), Article 52. Specific rules for the appoint of supervisory authorities are contained under Article 53-54 of the GDPR.
[211] GDPR, (120), Article 52, para. 3.
[212] GDPR, (120), Article 52, para. 4.

Awareness-raising activities are directed towards the public and consist of specific measures for both controllers and processors (including micro, small, and medium-sized enterprises) and for natural persons (in particular, in the educational context).[213]

As mentioned above, data protection supervisory authorities have investigative powers, corrective powers, and authorisation and advisory powers (Article 58 GDPR). Investigative powers include orders to provide information, investigations in the form of data protection audits, reviews on certifications, notifications, access to all personal data and to all information necessary for the performance of their tasks, and access to premises. Corrective powers are listed under Article 58, para. 2:

(a) to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;
(b) to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation;
(c) to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;
(d) to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;
(e) to order the controller to communicate a personal data breach to the data subject;
(f) to impose a temporary or definitive limitation including a ban on processing;
(g) to order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19;
(h) to withdraw a certification or to order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or to order the certification body not to issue certification if the requirements for the certification are not or are no longer met;
(i) to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;

[213] GDPR, Recital (129).

(j) to order the suspension of data flows to a recipient in a third country or to an international organisation.

Authorisation and advisory powers are directed towards controllers and national institutions. Supervisory authorities are also responsible for the enforcement and monitoring of their own decisions (One-Stop-Shop mechanism).

Noteworthy is the corrective power listed in Article 58(2)(i): the possibility to impose an administrative fine, “in addition to, or instead of” other measured referred to in this paragraph. Not only this allows to combine sanctions if the circumstances of the individual case so require, but the fines that can be imposed can be considered really dissuasive. Depending on the type of obligations infringed, supervisory authorities may issue fines up to EUR 10 million and, in case of undertakings, up to 2% of the annual turnover (whichever is higher) or EUR 20 million and, in case of undertakings, up to 4% of the annual turnover (Article 83, paras. 4 and 5). In any case, if several provisions are violated the total amount may “not exceed the amount specified for the gravest infringement” (Article 83, para. 3). High fines (up to EUR 20 million or 4% of the annual turnover) may also be imposed in cases of non-compliance with an order by the supervisory authority as referred to in Article 58(2). The administrative fines are imposed while taking into account specific factors: nature, gravity, and duration of the infringement; intentional or negligent character of the infringement; potential action to mitigate the damage; the adoption of specific technical and organizational measures; previous infringements, cooperation with the authority to remedy; the repetition of the violation; the degree of cooperation with the supervisory authority to remedy the violation; the categories of personal data affected; the manner in which the infringement was found; the compliance with previous corrective measures; the adherence to a code of conduct or an approved certification mechanism; and other aggravating or mitigating factors that may be relevant (such as the financial benefit gained for the infringement).[214]

Another power of data protection supervisory authorities which could be of interest also for Equality Bodies is related to the data protection impact assessments foreseen in Article 35. In case of non-compliance with requirements envisaged for such impact assessments (such as the failure to carry them out when required or correctly), the competent supervisory authority can impose fines up to EUR 10 million or, in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher. A similar power could be foreseen for Equality Bodies in the context of possible Equality Impact Assessments.

Interviewees observed that data protection authorities are overwhelmed with the amount of tasks and the number of complaints and that they lack sufficient resources. They are underfunded and lack highly skilled

[214] Article 83 GDPR.

employees with regard to law, IT, ethics, legal design, and data visualization knowledge. This is the case even when there are legal requirements for Member States to secure their independence, funding, and resources (among others).

While a system similar to that of data protection authorities for the field of non-discrimination would go very far from the currently existing system and might meet resistance from Member States and some Equality Bodies alike,[215] Equality Bodies could be endowed with some of the corrective powers foreseen for data protection supervisory authorities. Data protection audits (i.e., equality audits in the context of non-discrimination law) and (as already mentioned above[216]) reviews on certifications and the possibility to withdraw them would be interesting additions to the powers of Equality Bodies, as they would contribute to combining preventive measures with sanctions, which might even have a forward-looking dimension.

Consumer protection

Being regulated by different sources, consumer protection is characterised by having different national competent authorities depending on a specific field or area of expertise. Every country, therefore, has more than one competent authority, which has different powers according to chosen enforcement model approach (private or public). This is due to the fact that consumer protection legislation allows Member States more flexibility when implementing EU law into national legislation.

Some rules are established under the 'Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws',[217] which envisages stronger powers for national competent authorities to detect irregularities and to take action against rogue traders in cases of infra-Union infringements, widespread infringements, and widespread infringements with a Union dimension. In particular, the Regulation establishes rules and conditions under which competent authorities cooperate and coordinate actions (Consumer Protection Cooperation, CPC). 'Competent authorities' is understood as "any public authority established either at national, regional or local level and designated by a Member State as responsible for enforcing the Union laws that protect consumers' interests" (Article 3(6)). Competent authorities have both investigation (on their own initiative) and enforcement powers (Article 9). Relating to the latter, under Article 9, para. 4 of the Regulation, each competent authority has:

[215] See above, Chapter 2, "Non discrimination legislation in practice", especially "Non-discrimination legislation in practice", "The role of Equality Bodies".
[216] See above, Chapter 3, "Exploring Other Fields of Law for Effective, Proportionate, and Dissuasive Sanctions: Data Protection and Consumer Protection", especially "Combined and Forward looking sanctions".
[217] Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345, 27.12.2017, pp 1–26, (as amended by Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1 OJ L 136, 22.5.2019, pp 1–27 and by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, PE/27/2019/REV/1, OJ L 136, 22.5.2019, pp 28–50).

(h) the power to impose penalties, such as fines or periodic penalty payments, for infringements covered by this Regulation and for the failure to comply with any decision, order, interim measure, trader's commitment or other measure adopted pursuant to this Regulation.

These penalties must be effective, proportionate, and dissuasive "in accordance with the requirements of Union laws that protect consumers' interests" and with a special regard to the nature, gravity, and duration of the infringement.[218] Chapter VI of the regulation sets rules on the coordinated enforcement mechanisms for widespread infringements and for widespread infringements with a Union dimension. Competent authorities therefore cooperate in case of infra-Union infringements in the framework of the Consumer Protection Cooperation Network (CPC), which is an enforcement mechanism that provides the means to exchange information, to work together, and to coordinate their action.

The Commission Notice "Guidance on the interpretation and application of Directive 2011/83/EU"[219] of 2021 contains directions on penalties (11.3) with regard to "criteria for the imposition of penalties" and "penalties in the context of CPC coordinated enforcement actions". The Note recalls the criteria contained under Article 24 para. 2 of the Directive on Consumer Rights and clarifies that such criteria are applicable by competent authorities and judges for imposing penalties 'where appropriate' both domestically and in cross-border situations:

(a) the nature, gravity, scale, and duration of the infringement;
(b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
(c) any previous infringements by the trader;
(d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
(e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;
(f) any other aggravating or mitigating factors applicable to the circumstances of the case.

The Commission Notice further interprets each of the criteria. For instance, it reminds that other principles should be taken into account, such as *non bis in idem,* and that intention is not a necessary condition for the imposition of penalties.

[218] Article 9, para. 4 of the Consumer Protection Cooperation Regulation.
[219] European Commission, Commission Notice, 'Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights', OJ C 525, 29.12.2021, pp 1–85.

As in data-protection, specific rules are established both on the powers that independent authorities should have and on the criteria to consider for the imposition of fines. Similarly, investigative and corrective powers of Equality Bodies should be more clearly defined, borrowing also from powers assigned to data protection supervisory authorities or consumer protection competent authorities. In case of tribunal type Equality Bodies, the power to issue legally binding decisions should be coupled with the power to issue sanctions. In this regard, guidance with regard to the criteria for the imposition of fines, following the example of data protection law and consumer protection law, could contribute to issue effective, proportionate, and dissuasive sanctions with common standards across Europe. Guidance in this direction has been given by ECRI's non-binding GPR No. 2[220] as well as the equally non-binding Commission Recommendation on Standards for Equality Bodies.[221] The proposal for legislative standards for Equality Bodies, published by the European Commission on 7 December 2022, when adopted, may go a long way in clarifying the necessary powers in a legally binding manner.

Data collection and training

After the identification of the main shortcomings and obstacles of sanctions regimes in Chapter II, it was concluded that these may partly be explained in some countries through the short tradition of non-discrimination legislation and by the fact that lawyers and judges might require additional training in non-discrimination law. In addition, the general lack of national databases about non-discrimination cases, their outcomes, and the sanctions imposed contributes to the lack of information and awareness.

While short- tradition in applying certain legal rules and the need to provide additional training may apply also in other areas of law,[222] good practices exist with regard to statistics in data protection. In fact, although these are private initiatives, it is possible to find a number of tools to better understand the enforcement of the GDPR, such as the GDPR Enforcement Tracker, the Global Data Privacy and Security Handbook, the GDPR Fines, Penalties & Enforcement Tracker, and the Enforcement and Breach Tracker. Moreover, GDPRhub collects and summarizes decisions from data protection authorities and courts, facilitating the identification of potential good practices. A public, systematic, and disaggregated data collection of the kinds and levels of sanctions and remedies awarded in discrimination cases should be envisaged at national and EU levels for a better comparative understanding of sanctions and possibly mutual learning about effective, proportionate, and dissuasive sanctions.

[220] ECRI, General Policy Recommendation No. 2 (revised) on equality bodies to combat racism and intolerance at national level, adopted on 13 June 1997 and revised on 7 December 2017.
[221] The non-bindingness in particular of the Commission’s Recommendation on Standards for Equality Bodies has been seen as limiting its practical relevance also in Sara Benedí Lahuerta, ‘Equality Bodies: advancing towards more responsive designs?’ *International Journal of Law in Context* 17 (2021), pp 390–412.
[222] Issue emerged during the interview with an expert of data-protection, especially after the entry into force of the GDPR.

Chapter IV: Conclusions and recommendations

Data protection and consumer protection share with non-discrimination law "their fundamental rights status, their relevance for both individual and public interest, and the weaker position of prospective complainants compared to the larger bargaining power of the usual respondents."[223] Notwithstanding these commonalities, especially concerning their fundamental rights status, a violation of data protection or consumer protection norms may lead, if not to higher compensation, to significantly higher fines as compared to a violation of non-discrimination law. One could ask whether this difference is related to the rationale of data protection and consumer protection, on the one hand, and non-discrimination, on the other. Consumer protection and data protection are crucial for the good functioning of the internal market.[224] While non-discrimination law, initially focusing on the prohibition of any discrimination on the grounds of nationality (ECSC) and sex (EEC), also started from conceiving non-discrimination as instrumental to remove barriers to trade and free movement and to eliminate distortions in competition, and thus as a means to the end of constructing the internal market, it has evolved into a field of law that aims "to combat discrimination based on personal characteristics as an autonomous objective."[225] This objective consists on the one hand of protecting the individual dignity of persons that have been discriminated against and on the other of combatting the structural and institutional root causes of discrimination. In fact, the underlying drivers for a discrimination are less to create an advantage in the market (although this can of course also be a motivation), but the existence of deeply rooted negative stereotypes, certain moral conceptions, or ideas about hierarchies and roles, often reinforced by the ideological orientation of governments, individual political parties, or religious institutions. One could therefore see a difference between non-discrimination law on the one hand and consumer and data protection law on the other in the fact that the latter is of a more technical nature, whereas the former rather aims at societal change.

When looking at the provisions in EU legislation dealing with sanctions in these fields of law, it appears that data protection and consumer protection law have a more differentiated approach to perpetrator and victim compared to non-discrimination law, as they are dealing with sanctions to be foreseen for the perpetrator separately from the issue of compensation to the victim. This has an impact on the guidance that is given on the interpretation of the principles of effectiveness, proportionality, and dissuasiveness, both in the respective norms as well as by additional guidelines. In fact, dissuasiveness is not foreseen as a criterion for compensation, apparently accepting that an individual compensation, which has to be proportionate to the harm suffered, might be easily financially absorbed by a perpetrator. Dissuasiveness is thus more clearly defined with respect to the kinds of sanctions aiming at the perpetrator, like administrative fines. Issuing sanctions that respect the principles required by EU legislation is therefore

[223] Op. cit. Benedí Lahuerta, 'Enforcing...', p 815.
[224] Ibid, p 810.
[225] Dagmar Schiek, Lisa Waddington, and Mark Bell, eds., *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law: Ius Commune Casebooks for the Common Law of Europe* (Oxford: Hart Publishing, 2007), pp 2-4.

somewhat more straightforward in data protection and consumer protection (effective and proportionate for compensation; effective, proportionate, and dissuasive for the administrative and criminal sanctions) as compared to non-discrimination law, where the three criteria appear in the provision on sanctions which covers both, victim and perpetrator focus.

These differences notwithstanding, from the interpretations of the three principles in data protection and consumer protection law, the following elements could be taken into account with a view to improving the sanctions regime in the field of non-discrimination law. When considering the effectiveness of a sanction, whatever its orientation (victim or perpetrator focused), the aim must be to strengthen the overall enforcement of the underlying rules, including a collective interest in their proper implementation. A sanction targeting the perpetrator can be considered effective, if it achieves the objective for which it was imposed (re-establish compliance, punish unlawful behaviour, or both). Furthermore, compensation can only be considered effective if it is not outweighed by procedural costs. Finally, a list of clear and detailed circumstances to be taken into account when establishing the amounts of sanctions would provide guidance for courts/administrative authorities/Equality Bodies in the calculation of sanctions and would contribute to creating common grounds. Proportionality refers to the size and relevance of the infringement (including as regards the social and collective effects of infringements); the size, quality, and intensity of the effects of the remedy; and, in relation to fines, the size and financial possibilities of the undertaking. This last point also contributes to dissuasiveness and therefore has an effect on individual and general prevention. Dissuasiveness of a sanction is understood also in the sense of likelihood of being imposed; the costs and the incentives for victims; and the effects of the remedy on individual or multi-offensive infringements. In addition, it includes a deterrence multiplier that in case of administrative fines allows judges, administrative authorities, or Equality Bodies to adjust sanctions for individual and general prevention.

After having identified the persisting challenges regarding sanctions and remedies in the fields of non-discrimination and having provided an overview of how these issues are dealt with in data protection and consumer protection law, this report closes with a set of recommendations as to how sanctions in the non-discrimination field should be amended. The recommendations are based on good practices identified in non-discrimination law as well as other solutions practiced in data protection and consumer protection law.

Prevention first

All interlocutors agreed that preventing discrimination from happening in the first place should be prioritized, and that sanctions can only be seen as a last resort. While appearing beyond the scope of this research, it is nevertheless important to highlight, that the non-discrimination regime requires strengthening in this prevention realm, which can again be connected to the issue of sanctions. Article 35

GDPR on data protection impact assessment could serve as a model. If private enterprises or public authorities were required under certain circumstances to carry out an Equality Impact Assessment (as it is the case already in several European countries), this would provide a competent authority with the possibility of issuing fines if they are not adopted.[226] Similarly, the use of an equality certification mechanism similar to the data protection certification mechanism encouraged by Article 42 GDPR would contribute to the prevention of discrimination especially if linked to the possibility of withdrawing the certification in case the requirements are no longer met.

Recommendations for consideration

The use of Equality Impact Assessments should be included in non-discrimination legislation, both for public bodies in assessing their legislation and policies, as well as for private enterprises under certain circumstances. Similarly, the development and introduction of a comprehensive and reliable equality certification mechanism should be encouraged.

Pecuniary sanctions

While data protection and consumer protection law are more evolved as compared to non-discrimination law when it comes to regulating and providing guidance for sanctions addressing the perpetrator (e.g. Guidelines 04/2022 on the calculation of administrative fines under the GDPR), they seem to be equally weak when it comes to providing appropriate reparation to individual victims. The research has shown that individual compensation does not seem effective in any of these areas of law – even if the main aim pursued by the most commonly applied sanctions in the non-discrimination field is to compensate the victim for the harm suffered. It is significant that compensation is sometimes so low that victims are not even able to cover court fees. This does not only make compensation not effective but also not dissuasive as it considerably lowers the likelihood of the sanction being imposed or, in this case, the likelihood of the compensation to be claimed. Sanctions systems are particularly critical with regard to moral damages, which are rarely awarded. They are difficult to prove, although one can reasonably assume that a moral damage always occurs in cases of discrimination.[227] The new **Spanish** legislation, which has introduced a presumption of moral damages when discrimination is proven, could serve as an example in this context. Multiple discrimination must lead to higher sanctions, as is for instance practiced in **Belgium** with the cumulation of compensation. Concerning intersectional discrimination Unia's proposal is not to rule out an

[226] On the issue of Equality Impact Assessment see further Op. cit. United Nations Office of the High Commissioner for Human Rights and Equal Rights Trust, *Protecting Minority Rights...*, pp 117-119; as well as Equinet, *Compendium of Good Practices on Equality Mainstreaming. The Use of Equality Duties and Equality Impact Assessments*, 2021.

[227] The CJEU seems to suggest in *Braathens* that to obtain recognition of the fact that he or she has been the victim of discrimination can, as such, be seen as compensation for the non-material damage suffered. See Op. cit. CJEU, 15 April 2021, *Diskrimineringsombudsmannen...*, para. 49.

increase/cumulation, but to argue for this if elements are available to justify it, which can take into account the severity of the disadvantage and damage suffered.

Victims often need to approach different authorities in order to receive not only a declaratory decision that discrimination has happened but also to be awarded compensation. Punitive damages are rarely foreseen and applied as they are seen to increase the compensation to the victim in a disproportional manner.

Recommendations for consideration

Procedural costs must be such that they do not function as a disincentive for a victim to ask for compensation and do not reduce the compensation to a level that would not be able to make the damage sustained fully good.

If discrimination is proven, moral damages should be taken into account by judging authorities by default. Legislation could consider the introduction of minimum lump-sums with the possibility for the victim to prove a higher amount for the moral damage suffered.

Multiple and intersectional discrimination should be considered as criteria for higher compensation.

Punitive damages linked to the financial capacity of the perpetrator should be considered across the board to take account of the public interest in complying with equality legislation. In cases where national legislation would not allow for such damages to be awarded to the victim, this share of the sanction could go to funds for victims/NGOs litigating for them and/or to Equality Bodies.

The amount of pecuniary sanctions to be imposed on the perpetrator should be calculated taking into account the financial turnover/capacity of the perpetrator. A deterrence multiplier could be applied in the case the sanction is still not deemed to be dissuasive enough.

Further guidance regarding the circumstances to be considered when determining the amount of pecuniary sanctions could be provided by learning from other fields of law or from the practice in non-discrimination law in place in different countries.[228]

[228] According to the interlocutors for this report, at the EU level, guidelines could be provided by the European Commission in the form of a recommendation, by Equinet for Equality Bodies, the EU Agency for Fundamental Rights, or the Court of Justice of the European Union in dialogue and cooperation with national courts.

Going beyond pecuniary sanctions: Combined and forward-looking sanctions

In most of the cases one sanction alone does not fulfil the requirements of effectiveness, proportionality, and dissuasiveness. The research has shown in particular that the sanctions regime as it stands is not effective and dissuasive for individual perpetrators and potential other perpetrators, therefore failing to properly address individual and general preventive aims. Furthermore, pecuniary sanctions (whether compensation or fines imposed on the perpetrator) might also not properly address systemic discrimination patterns. General measures are rarely imposed as they are not seen to serve the interest of the victim. For victims, however, it is often at least equally important that a similar violation does not happen in the future as it is for them to get compensation for their own damages. In general, it can also be said that the sanctions regime is mainly backward-looking, and that more general, forward-looking measures are either not foreseen or rarely imposed. There is, therefore, a need for adjudicating authorities to have the possibility to impose a set of sanctions and remedies that combines backwards and forward-looking effects.

Data protection and consumer protection law provide examples of forward-looking sanctions that could be readapted for non-discrimination law. Building on these examples, forward-looking sanctions in non-discrimination law could impose creative and structural measures for preventive purposes (such as bans on certain activities and bans on public fundings) and specifically for systemic change and education (training, codes of conduct, cooperation with civil society organizations). Further examples of forward-looking sanctions are desegregation plans in the field of education; architectonical adaptation to allow access to persons with disabilities; "preventive warnings" for actions that could constitute discrimination; diversity strategy or equality plan for companies; bans on the operation of a business; and orders of removal of discriminatory content and other similar measures suitable in an online context. Moreover, legislation should envisage the possibility for judging authorities to enforce measures that require positive steps, including by obliging perpetrators to demonstrate their progress in the implementation of the decisions as well as the possibility to impose non-compliance penalties.

It will be for national legislation to decide whether there should be one authority (special tribunal, equality body, or regular courts) to be endowed with the power to impose a set of sanctions that reflects the above ideas of combined and flexible sanctions. In case the task is given to more than one authority, efforts should be made to create some sort of coordination between the different authorities to alleviate the victim as much as possible from the burden of activating several different procedures. This will add dissuasiveness to a sanctions regime because it will increase the likelihood of sanctions being imposed.

Recommendations for consideration

Courts, administrative authorities, and/or Equality Bodies should be provided by procedural law with the possibility to adapt the sanctions to concrete cases in a flexible way, including by imposing a set of sanctions and remedies that would combine backwards and forward-looking effects, as well as positive measures if required. They should be endowed with the possibility to impose non-compliance penalties.

Legislation should alleviate as much as possible the burden on the victim to approach more than one authority in order to achieve a set of sanctions that can be considered effective, proportional, and dissuasive.

Shifting the burden away from individual victims: collective redress

This research has shown that the enforcement of non-discrimination law is heavily reliant on individual victims coming forward and bringing complaints about discrimination in front of different authorities. This system is, as such, not dissuasive for potential perpetrators as for various reasons victims of discrimination are reluctant to report their cases.

Therefore, measures should be taken so as to facilitate collective forms of redress for Equality Bodies and interested organisations. Data protection and consumer protection may provide models for non-discrimination law. As in these fields of law, such rules should be sufficiently broad so as to allow Member States to adapt them to their own legal tradition. Irrespective of which collective redress mechanism is included in non-discrimination law (*actio popularis* or class action), judging authorities should have the possibility to award (punitive) damages as well as to issue sanctions that address collective/public interests and that are forward-looking, including prohibitory injunctions and positive measures. In addition, when collective redress mechanisms do not envisage compensation in the same procedure, should individuals come forward, a simplified (and ideally free of charge) procedure based on the judgment/decision resulting from collective redress should allow victims to claim compensation.

Recommendations for consideration

Non-discrimination law should provide for collective forms of redress for Equality Bodies and interested organisations. Such legislation should allow the award of damages to the complainant, the imposition of injunctions and forward-looking sanctions as well as means to enforce such sanctions.

Independent bodies

The powers of independent authorities in data protection and consumer protection law are also interesting for non-discrimination law. Undoubtedly, the high administrative fines that can be imposed on perpetrators in case of a violation of data protection or consumer protection norms have a strong dissuasive effect on potential perpetrators and could be considered also in the field of non-discrimination. A system by which such fines are used to contribute to the financing of the supervisory authorities risks being perceived by perpetrators as being driven by authorities' attempts to boost their budget. Nevertheless, such a system could prove useful in the context of chronically underfinanced Equality Bodies. Alternatively, such fines could be invested in the promotion of equality and non-discrimination, awareness-raising and the fight against intolerance, as foreseen by the new **Spanish** legislation. The possibility for independent authorities in consumer protection law to impose injunctions in cases of violations of consumer rights provisions, combined with the possibility of forcing the perpetrator to end the violation through penalty payments, have a dissuasive effect. Finally, both data protection and consumer protection law establish specific rules and additional guidance on the criteria to take into account for the imposition of fines.

Noteworthy are also the large investigative and corrective powers attributed to the data protection supervisory authorities, going beyond the imposition of administrative fines. Interesting for the non-discrimination field could particularly be the possibility to carry out data protection audits (thus equality audits), as well as reviews on certifications (even if such certifications are foreseen only on a voluntary basis – see Article 42 GDPR) and to potentially also withdraw them.

While clearer guidance as to minimum powers to be assigned to different types of Equality Bodies would strengthen their possibility of contributing to an effective sanctions regime, for tribunal type Equality Bodies, the power to issue legally binding decisions should be coupled with the power to issue sanctions.

Recommendations for consideration

While leaving room for Member States to decide whether to give their Equality Bodies decision-making functions, their investigative and corrective competences should be more clearly defined at EU level, borrowing from the competences assigned to supervisory authorities in the field of data protection.

In case of tribunal type Equality Bodies, the power to issue legally binding decisions should be coupled with the power to issue sanctions.

Further guidance with regard to the circumstances to be taken into account when determining the amount of fines should be provided (see also above under Pecuniary sanctions).

Data collection, training, levelling-up

What could further be taken as an inspiration from data protection is the existence of tools tracking the enforcement of the GDPR, including the levels of fines and penalties imposed and the decisions from courts, administrative authorities, and Equality Bodies, therefore facilitating the identification of potential good practices. Systematic and disaggregated data-collection of the kinds and levels of sanctions and remedies awarded in discrimination cases would enable an evaluation of the sanctions regime in light of the principles of effectiveness, proportionality, and dissuasiveness, and the use of such data for awareness raising among right holders and duty bearers. These data should include levels of material and moral compensation awarded; variation of the level of compensation across grounds; the levels of applied fines and whether they are closer to lower or upper limits; prevalence of repeat discrimination (so as to measure dissuasiveness); the frequency of combined sanctions, including such having a forward-looking dimension.

Such information could also be used in the training of adjudicating personnel to further sensitize them for the requirements foreseen for the sanctions they impose.

Finally, Member States should pursue symmetric protection across Europe with regard to discrimination based on disability, sexual orientation, religion or belief, and age. This would extend redress possibilities for victims and guarantee that sanctions and remedies observe the principles of effectiveness, proportionality, and dissuasiveness with regard to all grounds, including in cases of intersectional and multiple discrimination.

Recommendations for consideration

- A tracking tool that collects systematic and disaggregated information on the sanctions and remedies imposed and that summarizes decisions from courts, administrative authorities, and Equality Bodies should be envisaged at national and EU levels, facilitating the identification of potential good practices.
- Specific training to adjudicating personnel should ensure that sanctions imposed respect the requirements of being effective, proportionate, and dissuasive.
- The Council should adopt the Horizontal Directive and enshrine the concepts of intersectional and multiple discrimination in EU law.

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Preventing and Reacting to Discrimination through Sanctions and Remedies

Annexes

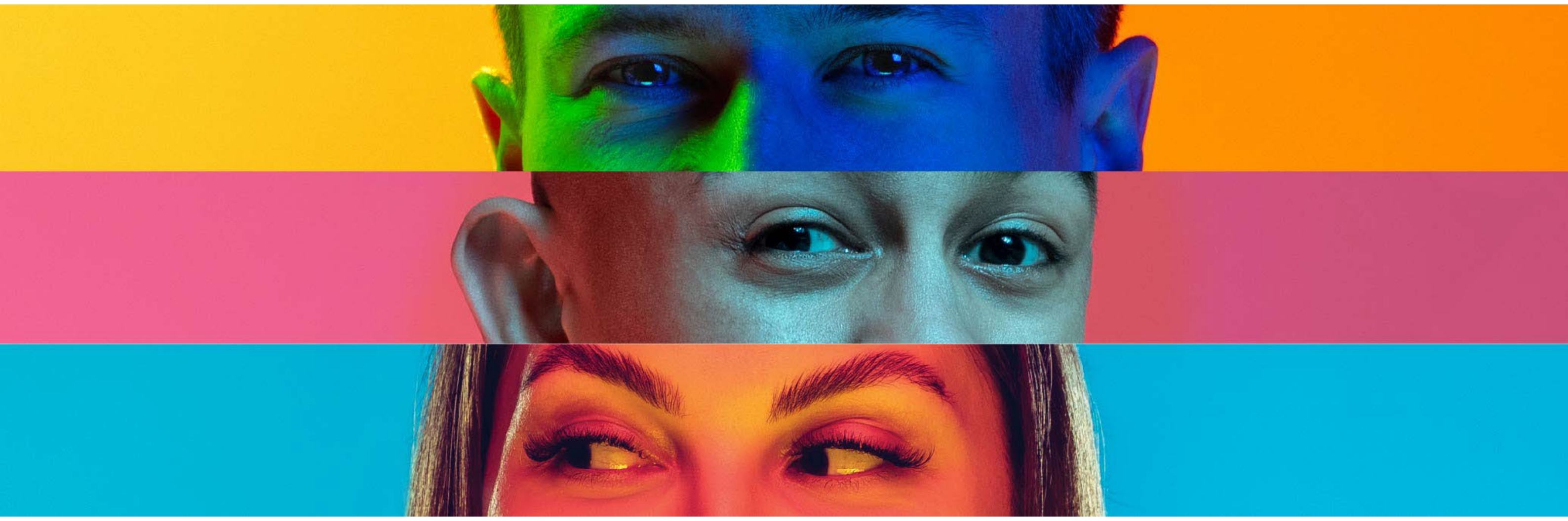

Table 1. Sanctions and remedies available in discrimination cases[229]

	AL	AT	BE	CZ	FI	FR	GE	DE	EL	XK	LT	MT	RO	SK	SL	SE
Obligation to stop discriminatory practises/ structures/ procedures	–	–	–	–	–	–	–	–	–	–		–	–	–	–	
Reinstatement without discrimination	–	–		–		–	–	–	–	–		–	–	–	–	–
Compensation for material damages	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–
Compensation for immaterial damages	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–	–
Compensation as alternative to reinstatement	–	–		–	–		–		–	–		–			–	–
Punitive damages			–	–					–	–	–			–		–
Posting/publication of decision	–	–	–		–	–	–		–	–		–	–	–	–	
Warnings		–	–			–	–		–	–	–		–		–	
Non-compliance penalty (penalty for not implementing a judgment/decision)	–		–	–	–		–	–	–	–	–	–	–		–	–
Declaration of the act as void	–		–		–	–	–		–	–		–	–	–	–	–
Public apology[230]	–			–	–				–	–			–	–	–	
Suspension of a license or of business activities	–	–				–	–		–	–			–		–	
Removal of the right to receive public benefits, public contracts, and/or public funding						–			–	–					–	

[229] Please note that the Maltese National Commission for the Promotion of Equality did not answer to this question. Therefore in this table, MT refers only to the Maltese Commission for the Rights of Persons with Disability (CRPD).
[230] The NDO in Finland has the policy of requiring the settlements to be accessible and include a public apology.

	AL	AT	BE	CZ	FI	FR	GE	DE	EL	XK	LT	MT	RO	SK	SL	SE
Obligation to implement non-discrimination policies and/or plans	▬				▬		▬	▬	▬	▬		▬	▬		▬	▬
Administrative fine	▬	▬	▬	▬	▬	▬	▬		▬	▬	▬		▬		▬	
Financial penalties (criminal sanction)			▬	▬	▬	▬	▬		▬	▬	▬		▬	▬	▬	▬
Imprisonment		▬	▬	▬	▬	▬	▬		▬	▬	▬		▬	▬	▬	▬
Community work		▬	▬	▬	▬		▬			▬	▬		▬	▬	▬	▬
Loss of civil and political rights			▬			▬	▬		▬	▬					▬	
Loss of honorary titles and awards			▬	▬	▬					▬				▬		
Loss of military ranks			▬	▬	▬					▬				▬		
Bans on certain activities	▬			▬	▬	▬			▬	▬				▬	▬	
Property confiscation				▬		▬	▬			▬				▬	▬	▬
Forfeiture of items				▬		▬				▬				▬	▬	
Expulsion				▬					▬	▬					▬	▬
Ban on residence				▬			▬		▬	▬					▬	

Table 2. Aims of sanctions pursued in Europe[231]

	AL	AT	BE	CZ	FI	FR	GE	DE	EL	XK	LT	MT	RO	SK	SL	SE
Compensatory	▬	▬	▬	▬	▬	▬	▬	▬		▬				▬	▬	▬
Punitive			▬		▬		▬	▬	▬	▬			▬	▬	▬	▬
Preventive			▬		▬		▬	▬	▬	▬	▬	▬	▬	▬	▬	▬
Social-preventive			▬			▬	▬			▬	▬	▬	▬	▬	▬	▬

231 The Maltese National Commission for the Promotion of Equality did not answer to this question. The responses provided by Lithuanian Office of the Equal Opportunities Ombudsperson and the Romanian National Council for Combating Discrimination are based on the activity of the Equality Body and not on the overall system.

Equinet Member Equality Bodies

ALBANIA
Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA
Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA
Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gv.at

BELGIUM
Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM
Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA
Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA
Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA
Ombudswoman of the Republic of Croatia
www.ombudsman.hr

CROATIA
Ombudsperson for Gender Equality
www.prs.hr

CROATIA
Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS
Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC
Public Defender of Rights
www.ochrance.cz

DENMARK
Danish Institute for Human Rights
www.humanrights.dk

ESTONIA
Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND
Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND
Ombudsman for Equality
www.tasa-arvo.fi

FRANCE
Defender of Rights
www.defenseurdesdroits.fr

GEORGIA
Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY
Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE
Greek Ombudsman
www.synigoros.gr

HUNGARY
Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND
Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY
National Office against Racial Discrimination - UNAR
www.unar.it

KOSOVO*
Ombudsperson Institution
www.oik-rks.org

LATVIA
Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA
Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG
Centre for Equal Treatment
www.cet.lu

MALTA
Commission for the Rights of Persons with Disability
www.crpd.org.mt

MALTA
National Commission for the Promotion of Equality
www.ncpe.gov.mt

MOLDOVA
Council on Preventing and Eliminating Discrimination and Ensuring Equality
www.egalitate.md

MONTENEGRO
Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS
Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA
Commission for Prevention and Protection against Discrimination
www.kszd.mk

NORWAY
Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND
Commissioner for Human Rights
www.rpo.gov.pl

PORTUGAL
Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL
Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL
High Commission for Migration
www.acm.gov.pt

ROMANIA
National Council for Combating Discrimination
www.cncd.ro

SERBIA
Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA
Slovak National Centre for Human Rights
www.snslp.sk

SLOVENIA
Advocate of the Principle of Equality
www.zagovornik.si

SPAIN
Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.igualdad.gob.es

SPAIN
Institute of Women
www.inmujer.es

SWEDEN
Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN
Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND
Equality Commission for Northern Ireland
www.equalityni.org

** This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*

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