

Equinet Report Summary

Preventing and Reacting to Discrimination through Sanctions and Remedies

by Vincenzo Tudisco and Emma Lantschner



Co-funded by
the European Union

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Short introduction

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.”

The EU non-discrimination law envisages the requirements of sanctions under Article 15 of the Racial Equality Directive (RED) and under Article 17 of the Employment Equality Directive (EED):

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); Article 18 (compensation or reparation) and Article 25 (penalties) of Directive 2006/54/EC; and Article 10 of Directive 2010/41/EU (compensation and reparation).

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 the perpetrator.

The broader interpretation of sanctions is however prevailing among scholars and is transpiring from the eventually adopted wording of the 2000 Equality Directives, 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.” One can therefore conclude that the term “sanctions” as used in the Directives also encompasses forms of redress for victims of discrimination. 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.

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 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 2000 Equality Directives specify that sanctions must be effective, proportionate, and dissuasive. These three principles have also been used by other European organizations. However, for the purpose of this report, the three requirements for sanctions may be described as follows:

- **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.

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 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.

Structure of the report

In order to address these issues, Equinet has commissioned a research study 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 design of the questionnaire. The researchers received 18 questionnaires from 16 countries.

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 and into law in practice 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.

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.” 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.

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.”

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 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 multioffensive 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.

A series of more specific recommendations follows.

- **Prevention first**

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**

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 lumpsums 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.

- **Combined and forward-looking sanctions**

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.

- **Collective redress**

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**

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 and more**

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 the 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.

Equinet Member Equality Bodies

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gov.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gov.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.crpdp.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.*

