

# Conference Synthesis Report

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## **The other side of the law: Enforcement of anti- discrimination legislation**

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## Additional resources

- [Find all about the event, including the agenda and PowerPoint presentations.](#)
- [Find out more about Equinet and Equality Bodies.](#)

## Contents

Introduction .....	3
State of the art .....	4
Diving deeper into the challenges of anti-discrimination law enforcement .....	7
Equinet Report “Preventing and Reacting to Discrimination through Sanctions and Remedies” .....	8
Learnings and comparisons with other branches of law .....	9
Conclusion.....	11

## Introduction

Discrimination based on race, gender, age, disability, religion, and other protected grounds is a persistent issue in the contemporary world. To combat this problem and foster a fair and inclusive society, which is an essential prerequisite to build peaceful democratic societies, anti-discrimination legislation is key. However, the effectiveness of these laws heavily depends on their implementation and enforcement.

Without effective prohibition, prevention and eventual punishment of discrimination, there can be no real equality. In cases of proven discrimination, sanctions and remedies are central and closely connected to [access to justice](#). Indeed, as stated in 1984 by the Court of Justice of the European Union (CJEU) in the famous case [Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen](#), “It is impossible to establish real equality of opportunity without an appropriate system of sanctions”, preventive measures are not enough. Nevertheless, scholarly literature and reports have widely addressed obstacles and challenges concerning the application of effective, proportionate, and dissuasive sanctions, and of compensation either foreseen in law and/or issued by courts which often result to be disproportionately low and lack dissuasiveness. For instance, in 2015 the Equinet report [The Sanctions Regime in Discrimination Cases and its Effects](#) had already underscored the lack of guidance on the nature of sanctions, related minimum standards or responsibilities of the bodies in charge of issuing such sanctions, thereby leaving much discretion on what to consider as authentically “effective, proportionate and dissuasive”. Proposals for advancements were discussed within an Equinet roundtable in 2020, and further published in a related synthesis report, [Future of Equality Legislation in Europe](#), focusing – among other things – on ways to develop the full potential of the sanctions regime and to move from a reparative model towards a deterrent model.

Given that enforcement of the non-discrimination regime is too often heavily reliant on victims coming forward, it is necessary to think of an enforcement and sanctions regime that is less dependent on individuals exposing themselves; and is able to produce effects before discrimination occurs.

The necessity to reflect on the importance of strong enforcement tools is the rationale behind Equinet’s engagement in the field and its commissioning of a report published in 2022, titled [Preventing and Reacting to Discrimination through Sanctions and Remedies](#), which investigates the

strengths and weaknesses of sanctions and remedies regimes – as envisioned in existing EU anti-discrimination law – by comparing them to those available in other branches of law, i.e., data protection and consumer protection law, and thereby drawing conclusions and recommendations.

The report was presented and thoroughly discussed amongst experts – including scholars and legal practitioners – within an Equinet conference, held on 12 October 2023, that served as an authoritative venue to further delve into the means and methods to strengthen enforcement in anti-discrimination law, the reasons why such objective is of the utmost importance, and what role Equality Bodies may play in the game. The overall objective was to assess the current state of enforcement mechanisms across Europe, their profound lack of homogeneity, and provide insights into how this vital aspect of anti-discrimination law can be improved. A synthesis of the main subjects of the discussions held is presented in the following pages.

## State of the art

When the implementation of the EU anti-discrimination *acquis* started, there was a restricted focus on equal treatment between women and men in the workplace coupled with a lack of awareness and thorough understanding of the notion of discrimination, as well as of the application of procedural rules, to be considered as important as substantive ones. However, while this has changed over time and the EU anti-discrimination architecture has grown in value and relevance, the system still lacks effectiveness [due to a number of reasons](#), including, *inter alia*:

- consistent underreporting;
- uneven protection against discrimination since applicable secondary Union law includes protection gaps potentially leading to an artificial hierarchy of grounds;
- the exclusion of multiple and intersectional discrimination;
- heavy burden on individuals submitting complaints or starting long and costly legal proceedings;
- inadequate sanctions regime, unable to guarantee effective redress and/or deterrent.

Among these, [underreporting](#) is one of the major challenges of effective enforcement and is to be analysed by considering structural obstacles faced by victims coming forward. These may entail issues such as having the perception that reporting would not change anything, that one's concern

would not be taken seriously enough, or the hesitance to disclose sensitive personal details which may cause trauma or distress. Importantly, there is also a wide lack of knowledge on how and when to report violations and submit complaints, including through Equality Bodies.

Accordingly, despite a general acknowledgment of the unlawfulness of discrimination across the EU nowadays, context-specific considerations are still to be made. [Within certain contexts](#), levels of awareness concerning organizations providing support or advice to victims of discrimination (including Equality Bodies) may depend on the following:

- people’s familiarity with the legal system they live in (with strong disadvantages for migrants and ethnic minorities);
- level of education;
- uneven mandates, powers, independence and resources granted to Equality Bodies (which may render them more or less known to the large public);
- level of trust in public institutions.

As many noted, the core issue remains the [individualistic essence of the existing human rights and anti-discrimination model](#) and the subsequent need to move towards a new model, no more individual-centred, but rather collective-centred, that may function in a preventive manner. The existing system does not function sufficiently well beyond the individual case, and does not draw enough attention to collective discrimination, thus moving from individual to group identities. Indeed, when there is no specific individual affected by discrimination or someone who wants to file a case, as stated by the CJEU in 2013 in [Asociația Accept v Consiliul Național pentru Combaterea Discriminării](#), “Non-governmental organisations whose aim is to protect human rights or who have a legitimate interest in combatting discrimination have *locus standi* where there is discrimination in their sphere of activity and which is detrimental to a community or group of persons”. In other words, organizations with legitimate interests have the right to pursue [strategic litigation](#), which will only be granted to Equality Bodies across the EU under the [Proposals for EU Directives on Standards for Equality Bodies](#).

EU anti-discrimination law provides sanctions under Art. 15 of the [Racial Equality Directive](#), Art. 17 of the [Employment Equality Directive](#) – and, similarly, in EU law concerning the equal treatment between men and women – according to which “sanctions, which may comprise the payment of

compensation to the victim, must be **effective, proportionate and dissuasive**". The [Directive on equal treatment between men and women in the access to and supply of goods and services](#) devotes Art. 14 to penalties; the [one on equal opportunities and equal treatment of men and women in matters of employment and occupation](#) mentions "real and effective compensation or reparation" in Art. 18 as well as "effective, proportionate and dissuasive penalties" in Art. 25. Likewise, the [Directive on equal treatment between men and women engaged in an activity in a self-employed capacity](#) includes "compensation or reparation being dissuasive and proportionate and (...) shall not be limited by the fixing of a prior upper limit" in Art. 10.

Moreover, while the specific design is left to the discretion of national legislators, EU case-law has progressively provided additional standards: sanctions should be adequate in relation to the damage caused ([Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen](#)), are not meant to be merely symbolic or serve as warnings, nor have financial upper limits ([Asociația Accept v Consiliul Național pentru Combaterea Discriminării](#)). They should not be made dependant on a proof of fault ([Dekker v Stichting Vormingscentrum voor Jong Volwassenen](#)) or on the existence of an individual victim ([Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV](#)). They should have a concrete deterrent effect ([Dekker v Stichting Vormingscentrum voor Jong Volwassenen](#)) and might include punitive damages ([María Auxiliadora Arjona Camacho v Securitas Seguridad España, S.A.](#)) as well as the applicant's right to a court's examination and adjudication whether discrimination has occurred ([Diskrimineringsombudsmannen v Braathens Regional Aviation AB](#)).

Despite this guidance provided at the supranational level, different levels of complexity of legal frameworks and related awareness, access and protection persist. In addition, there may be a lack of guiding case-law at the national level, high thresholds for evidence in order to make the burden of proof shift. Legal uncertainties are also enduring, as well as more practical aspects such as costs, length of processes, uncertainty and low amount of sanctions and compensation, making the individual choice to pursue this path unlikely.

Nonetheless, Equality Bodies have a potential role in supporting individuals who choose to report violations, by – for instance – investigating cases, raising awareness, cooperating with NGOs and civil society building up alliances in favour of victims, elaborating guidance and recommendations on sanctions and remedies. Therefore, if well-resourced and equipped, **Equality Bodies may play the**

important role of gate-openers in guiding individuals and groups throughout the process of denouncing discrimination and seeking out protection.

## Diving deeper into the challenges of anti-discrimination law enforcement

As indicated in the EU Fundamental Rights Agency (FRA)'s opinion [Equality in the EU 20 years on from the initial implementation of the Equality Directives](#), it is urgent to “call into question the effectiveness of the measures and institutional arrangements Member States have put in place to enforce non-discrimination legislation, including the rules they have laid down as regards the effectiveness, proportionality and dissuasiveness of sanctions in cases of discrimination”. The opinion underscores uneven protection against discrimination in EU legal provisions in core areas of life, low levels of rights awareness and subsequent underreporting – including to Equality Bodies – that is inextricably linked to the perceived ineffectiveness of redress. It is particularly worrying that Equality Bodies receive low rates of reporting and are distrusted; a worryingly low figure shows that only 4% of all reports of discrimination are made to an Equality Body. The lack of uniform powers amongst Equality Bodies represents an additional layer of complexity; this is why FRA supports the [Proposals for EU Directives on Standards for Equality Bodies](#), which would set common, minimum standards for Equality Bodies across the EU, and enhance their powers and resources to achieve their mandates effectively and independently.

Access to justice for rights holders remains a critical challenge, especially for communities that are among those mostly discriminated against and stigmatized in Europe, e.g., Roma people, who have extremely limited or non-existent access to justice. Uncertainty, length and cost of legal proceedings are often a too heavy burden; this is why filing discrimination cases should be more accessible or free of charge (as within Equality Bodies), given the loss of dignity, the violation, the emotional cost, trauma and suffering that discrimination may cause. As pointed out by speakers during the conference, these considerations cannot be translated into a mere amount of money equal to compensation, which will simply never be enough. Indeed, NGOs like the European Roma Rights Centre (ERRC) heavily emphasize their engagement in developing awareness-raising campaigns aimed at supporting and encouraging people to claim discrimination and sue perpetrators.

From an international perspective, including an analysis of non-EU countries with different legal systems, while challenges previously discussed equally apply, obstacles may be even more



fundamental, such as opaqueness of legal systems, lack of trust in democracy and institutions, etc. Through relevant partnerships, for instance, Equal Rights Trust (ERT) developed a [Practical Guide to Developing Comprehensive Anti-Discrimination Legislation](#) as well as a comparative study on the implementation of the International Labour Organization ([ILO Discrimination \(Employment and Occupation\) Convention, of 1958 \(No. 111\)](#)) looking at why, despite its adoption, the prohibition of discrimination in the workplace is still “a promise not realized”.

Given this general picture, the lack of uniformity amongst EU legal systems constitutes an additional challenge. Courts across Europe receive a low number of cases that rarely reach the level of constitutional courts, thus producing no relevant change in the law, which is of vital importance, especially in case national legislators are reluctant to act. High thresholds in access to courts constitute, in this sense, a significant obstacle, as well as the desire to stop after the first instance judgment, in case this is not favourable to the victim. It is indeed advisable – even though to be considered in relation to emotional costs – to appeal and eventually exhaust domestic remedies to access supra-national ones, thus potentially contributing to the elaboration of general *opinion iuris*. [Raising awareness and educating judges and lawyers](#) on equality and non-discrimination is hence essential in this regard.

## **Equinet Report “Preventing and Reacting to Discrimination through Sanctions and Remedies”**

As anticipated, [Preventing and Reacting to Discrimination through Sanctions and Remedies](#), by Vincenzo Tudisco and Emma Lantschner, provides a comprehensive analysis of the state of anti-discrimination law enforcement in Europe, by discussing definitions and aims of sanctions and remedies, their various displays at the national level including challenges, obstacles and good practices, as well as by comparing anti-discrimination law with other branches of law and thereby providing a set of recommendations and conclusions.

It is useful to mention a few important considerations that the report may add to the present discussion. Given a thorough premise on interpretative issues and the four potential aims of sanctions (i.e., compensatory, punitive, preventive and social-preventive), the report distinguishes criminal, civil and administrative sanctions and concludes that administrative law is best-placed to produce sanctions which focus more on punitive, preventive, and social-preventive aims. However, many 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, in line with the so-called **restorative justice model**. As a result, the most commonly applied sanctions are compensation (for material and immaterial damages) and obligation to stop discrimination, thus making the compensatory aim of sanctions the prevailing one. Nevertheless, victims do not perceive such systems as being effective, proportionate, and dissuasive, but rather ineffective, inadequate and paternalistic for several reasons such as a) low levels of compensation; b) difficulty to prove moral damages; and c) extremely limited risk of conviction.

For the above-mentioned reasons, it is therefore essential to re-think a sanctions regime which is not only victim-centred, but also equally perpetrator-centred, and which mostly relies on the structural adoption of so-called **combined and forward-looking sanctions**. These are formally available in a number of countries, but often rarely implemented because different authorities have to be approached in order to get a set of sanctions that in combination can be seen as effective, proportionate, and dissuasive, i.e., ideally including high levels of compensation or sanctions as well as forward-looking elements aimed at preventing further violations from the same or other potential perpetrators.

## **Learnings and comparisons with other branches of law**

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. Special attention, however, is to be paid to particularly advanced fields in this regard, i.e., **data protection law and consumer protection law**.

First of all, considering the interpretation of the principles of proportionality, effectiveness and dissuasiveness, the [General Data Protection Regulation \(GDPR\)](#) sets clear and specific rules to assess effectiveness, and the [Guidelines 04/2022 on the calculation of administrative fines under the GDPR](#) specify that proportionality should be considered with regard to both the severity of the infringement and the size of the undertaking. The dissuasive effect is interpreted by the supervisory authority considering both general deterrence (discouraging others from committing the same infringement in the future) and specific deterrence (discouraging the addressee of the fine from committing the same infringement again).

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 law, where directives aim at minimum harmonisation.

Regarding consumer protection, the [Directive on Consumer Rights](#) establishes that penalties must be effective, proportionate, and dissuasive (Art. 24), while no reference is made to remedies. The same applies to the [Directive on Credit Agreements for Consumers](#), which foresees the three principles only for penalties (Art. 23). Similarly to data protection, the rules in place in consumer protection law provide more detailed guidelines as to how the three principles are to be interpreted.

Furthermore, given that a sole sanction and/or remedy typically may not be sufficient for the observance of effectiveness, proportionality, and dissuasiveness, these branches of law foresee combining sanctions. Data protection supervisory authorities have corrective powers – listed in Art. 58(2) of the GDPR – that comprise warnings, orders to comply, temporary or definitive limitations including to ban processing, withdraw a certification or order the certification body to withdraw a certification issued, or not issue a certification. Consumer protection law envisages sanctions under the Regulation on [Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws](#). These may be: power to remove content or to restrict access to an online interface or to order the explicit display of a warning to consumers, order a hosting service provider to remove, disable or restrict access to an online interface, and order domain registries or registrars to delete a fully qualified domain name and to allow the competent authority concerned to register it. This approach would be beneficial to adopt in the enforcement of anti-discrimination law to ensure effectiveness, proportionality, and dissuasiveness because it would allow judges, administrative authorities or Equality Bodies to have additional tools against online discrimination and to promptly intervene in case of potentially discriminatory content.

These are only some of the notable differences in the understanding and application of sanctions and remedies between anti-discrimination, data protection and consumer protection law. From this comparison, non-discrimination law experts may gather important reflections and learnings in order to push for cross-fertilization amongst different areas of law as part of EU law common practice. It is however clear that – despite the increasing public awareness and understanding of how the data protection framework, in particular, could be used for fundamental rights protection – strong political will to push for structural change, timing and momentum are key.

## Conclusion

Although data protection, consumer protection and anti-discrimination law share commonalities – such as their relevance for both individual and public interest or their fundamental rights status – reality shows that 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. As thoroughly explained in [Preventing and Reacting to Discrimination through Sanctions and Remedies](#), the reason for such profound difference is to be found in the different rationales and subsequent status of these branches of law, i.e., one being tied to the principles of non-discrimination and societal change, the others having a more technical and practical nature and being related to the preservation of a free, liberal, internal market.

The way forward is therefore long and complex but may benefit from the present discussion, including tools to prevent and react to challenges and obstacles as well as learnings stemming from the comparison with other branches of law, and may thus lead us to formulate a set of recommendations.

First of all, to ensure the existence of peaceful, democratic societies that are free from discrimination, it is [crucial to close significant gaps in legislation](#). This should include covering all grounds, fields and forms of discrimination, but also and thereby enshrining the concepts of intersectional and multiple discrimination in EU law, including through the adoption of the [Equal Treatment Directive](#), also known as Horizontal Directive. Moreover, [multiple and intersectional discrimination](#) should constitute an aggravating factor in case of proven discrimination and thereby providing a higher amount of compensation and fines. It is equally essential to move towards the adoption of equality impact assessments, equality duties and equality certifications in non-discrimination law, both for public and private entities.

Furthermore, at a practical level, costs must be such that they do not function as a disincentive for victims to file discrimination cases and ask for compensation. It is thus crucial to ensure equal access to legal aid, create funds covering cost risks, and reduce or even [eliminate costs](#) in certain instances where these cannot be borne. Equality Bodies need to see their litigation powers reinforced, in this sense, to support victims at no (excessive) cost.

Pecuniary sanctions are important and should be calculated by taking into account the financial capacity of the perpetrator; however, a sanctions regime that solely relies on this kind of sanctions is

backward-looking. To move towards a forward-looking sanctions regime, **combined sanctions** should be increasingly applied and adapted to concrete cases in a flexible way, including backward and forward-looking effects as well as positive measures if required.

Finally, given that the enforcement of non-discrimination law is heavily reliant on individual victims coming forward and that tackling discrimination when there is no identifiable victim is of the utmost importance, it is crucial to increase the possibility for **collective redress**, i.e., *actio popularis* or class action, including by Equality Bodies and CSOs, thereby shifting the burden away from individual victims.

By doing so, we may work towards the concrete enhancement of the anti-discrimination law enforcement regime. In particular, thanks to the implementation of the **Proposals for EU Directives on Standards for Equality Bodies**, Equality Bodies may be granted the powers to be ultimately key actors in ensuring that protection from discrimination is a reality in every corner of Europe.