



UNIVERSITY OF GOTHENBURG
SCHOOL OF BUSINESS, ECONOMICS AND LAW



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Seeking effectiveness: remedies and sanctions in discrimination cases

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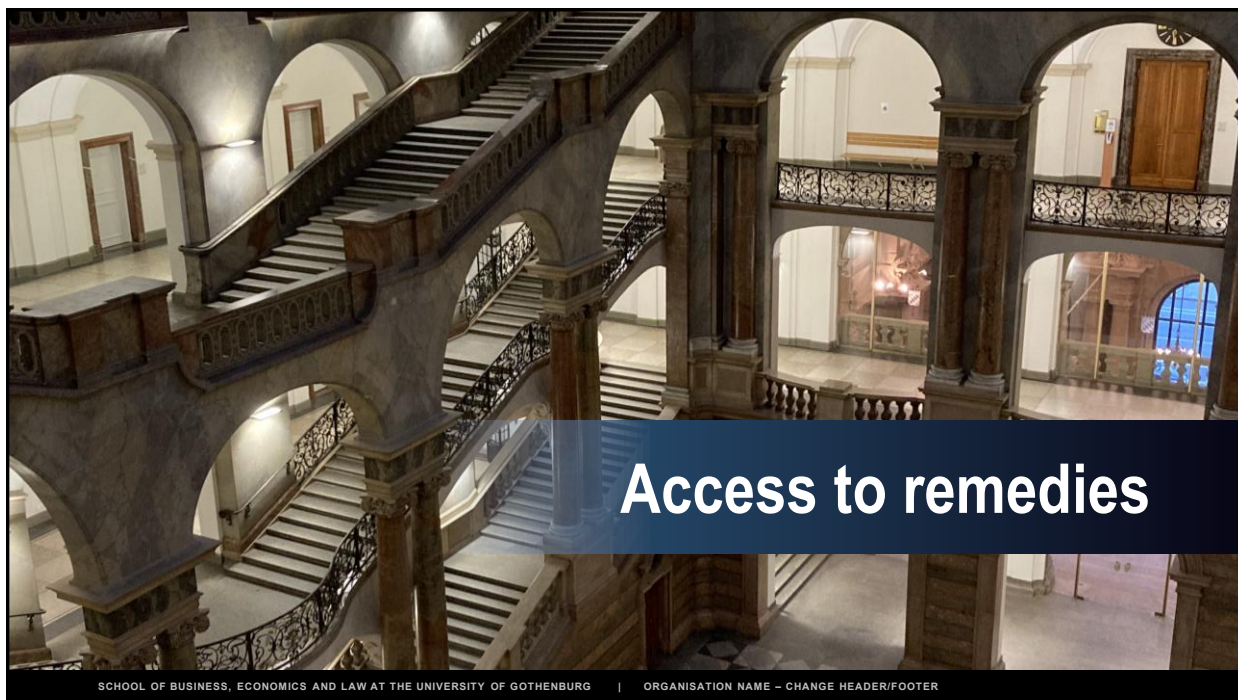
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Overview

- Access to judicial (and other) remedies
 - Access to what and for whom?
- Effective, proportionate, and dissuasive sanctions
 - Especially on compensation
- The interplay between EU law and national law
 - The role of the national judge

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Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

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Types of remedies

‘... judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures...’

- Article 47 CFR: “the right to an effective remedy *before a tribunal*”
- Administrative and alternative procedures can complement judicial remedies
 - Cf *Alassini* (C-317/08): Mandatory ADR as condition for access to court compatible with effective judicial protection (subject to proportionality assessment)

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 - Implications for access to evidence
 - *Kelly* (C-104/10): Not necessary unless compromising the objective of burden of proof rule
 - *Meister* (C-415/10): Evidentiary effects of non-disclosure
 - Access required under Pay Transparency Directive (Art 20)

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 - Access required under Pay Transparency Directive (Art 20)
 - Pay Transparency Directive:
 - Limitation periods minimum 3 yrs (Art 21)
 - Allocation of legal costs; exception to loser pays rule at national courts' discretion (Art 22)

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Standing for organisations: A right to what?

- 'engage, either on behalf or in support of the complainant'...
- AG Sharpston (C-507/18): 'the right to enforce rights'

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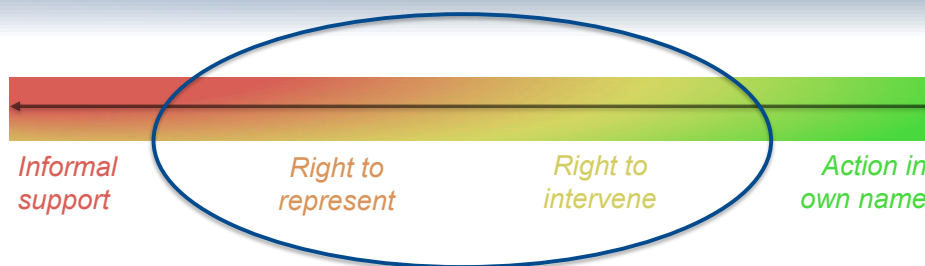
- ‘engage, either on behalf or in support of the complainant’...
- AG Sharpston (C-507/18): ‘the right to enforce rights’
- Equality Bodies Directives: Right to ...
 - ... submit observations **and**
 - ... represent victims, **or**
 - ... intervene in support of victims, **or**
 - ... act in own name.

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Standing for organisations: Which organisations?

- 'associations, organisations or other legal entities'
 - *Reasoned opinion against Sweden: Social partners and ombudsmen insufficient*
- Pay Transparency Directive: 'associations, organisations, equality bodies **and** workers' representatives **or** other legal entities'

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 - *Reasoned opinion against Sweden: Social partners and ombudsmen insufficient*
- Pay Transparency Directive: 'associations, organisations, equality bodies **and** workers' representatives **or** other legal entities'
- Definition of legitimate interest (and other requirements?) left to national legislation
 - AG Sharpston (C-507/18): 'the number of members of the Associazione [... is] completely irrelevant'

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Standing for organisations: Relation to the victim(s)

- ...'on behalf or in support of the complainant, with his or her approval'...

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Standing for organisations: Relation to the victim(s)

- ...'on behalf or in support of the complainant, with his or her approval'...
- Directives 'in no way preclude' organisation action without complainant
 - AG Sharpston (NH): '*not* governed by EU law'; national procedural autonomy
 - *Asociatia Accept* (C-81/12): (Single) victim unwilling to appear
 - *Firma Feryn* (C-54/07): Definable collective
 - NH (C-507/18): Undefinable collective

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Increasingly sophisticated sanctions regimes

- From the 2000 Directives...
 - *'Effective, proportionate, and dissuasive' sanctions, which 'may comprise' compensation to victim*

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Increasingly sophisticated sanctions regimes

- From the 2000 Directives...
- ... to a two-pronged approach on compensation and penalties ...
 - *'Real and effective' compensation or reparation which is 'dissuasive and proportionate' and not capped.*
 - *'Effective, proportionate, and dissuasive' penalties, which 'may comprise' compensation to victim*

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- ... to a two-pronged approach on compensation and penalties ...
- ... refined and developed through the Pay Transparency Directive
 - *'Full' 'real and effective' compensation or reparation which is 'dissuasive and proportionate' and negates the effects of discrimination. No upper limit allowed.*

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 - ‘Full’ *‘real and effective’ compensation or reparation which is ‘dissuasive and proportionate’ and negates the effects of discrimination. No upper limit allowed.*
 - *Injunctions and recurring penalties*
 - *‘Effective, proportionate, and dissuasive’ penalties with ‘real deterrent effects’ which ‘shall include fines.’*

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Effective, proportionate and dissuasive sanctions

- Sanctions fulfil several functions (see Wladasch 2015):
 - Compensatory/reparative
 - Punitive
 - Preventative
 - Socio-preventative (deterrent and/or awareness-raising)
- Proportionality tempers effectiveness and dissuasion
- No silver bullet solution
- Effects can be achieved through combination of sanctions

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Pecuniary compensation must be adequate

- *von Colson* (C-14/83): Sanctions must be proportionate to damage sustained and not merely symbolic
- *Marshall* (C-271/91): Damage must be compensated 'in full' and with interest
- *Draehmpaehl* (C-180/95): No upper limits allowed
- *Arjona Camacho* (C-407/14): Punitive damages are not necessary

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Increasing emphasis on non-pecuniary sanctions

- *Firma Feryn* (C-54/07): Sanctions 'may, where necessary, include' a finding of discrimination in conjunction with 'an adequate level of publicity' (name and shame)

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- *Braathens* (C-30/19): Moral recognition is an indispensable element in an effective and dissuasive sanctions regime

Non-pecuniary sanctions fulfil compensatory and dissuasive functions

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National procedural autonomy

- In the absence of Union rules, it is for the Member States to designate the courts having jurisdiction and lay down the procedural rules governing actions for safeguarding rights which individuals derive from EU law

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- A two-fold function of national rules:
 - Implementation of Directives
 - Filling the gaps (time limits, forms of actions and remedies, standing requirements, etc)

Requirements on national law and national judges

- Compatibility with
 - Secondary legislation
 - Article 47 of the Charter of Fundamental Rights

Article 47 CFR: Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Requirements on national law and national judges

- Compatibility with
 - Secondary legislation
 - Article 47 of the Charter of Fundamental Rights
 - *What role for the Rewe principles of effectiveness and equivalence?*

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Requirements on national law and national judges

- Compatibility with
 - Secondary legislation
 - Article 47 of the Charter of Fundamental Rights
 - *What role for the Rewe principles of effectiveness and equivalence?*
- It is for the national judge to ensure compatibility through
 - Harmonious interpretation, or
 - Disapplication of national law

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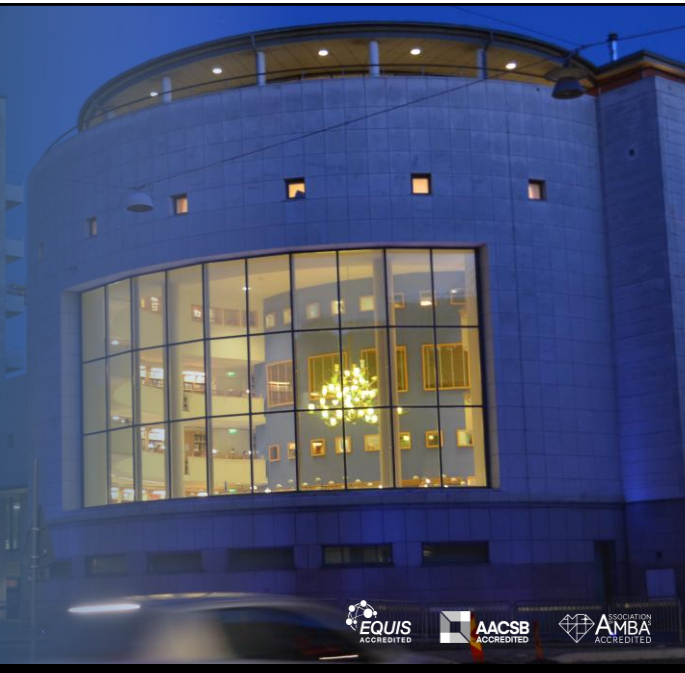
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Effects of EU legal provisions on contrary national law

	<i>Basis for harmonious interpretation</i>	<i>Aid for interpreting secondary law</i>	<i>Stand-alone standard of review</i>	<i>Possible justification</i>	<i>Direct effect</i>	<i>Exclusionary effect (dis-application)</i>
<i>Directive provisions</i>	Yes	–	Yes	As provided for	Vertical	Yes, if direct effect
<i>Article 47 CFR</i>	Yes	Yes	Yes	Article 5(1) CFR	Vertical + horizontal	Yes
<i>Rewe principle of effectiveness</i>	Yes	No	Yes	Procedural 'rule of reason'	No	Yes

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Questions?

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