



# Analytical Report 2016

Effective judicial protection  
in the framework of Directive 2014/54/EU



Written by Stefano Giubboni and Sophie Robin-Olivier  
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*Contact: Iva Rusan, Francisco Perez-Flores*

*E-mail: [EMPL-FRESSCO@ec.europa.eu](mailto:EMPL-FRESSCO@ec.europa.eu)*

*European Commission  
B-1049 Brussels*

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Effective judicial protection  
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## **FreSsco - Free movement of workers and Social security coordination**

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### **Authors:**

Prof Stefano Giubboni

Prof Sophie Robin-Olivier

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## EXECUTIVE SUMMARY

A free-standing fundamental right expressly recognised as such in Article 47 of the Charter of Fundamental Rights of the European Union, the principle of effective judicial protection has an overarching and pervasive constitutional relevance in guaranteeing Member State's compliance with EU law. Ever since the seventies, as is shown in chapter 1 of this report, this principle has been progressively elaborated by an impressive amount of case law of the Court of Justice of the European Union (CJEU) around four basic conceptual pillars.

The first pillar lays the very foundations of the fundamental right of access to a judicial process as a free-standing EU right. The effectiveness of the rights conferred to individuals by EU law necessarily implies that, in case of violation, those individuals have appropriate remedies and means for redress before a court or a tribunal capable of guaranteeing such rights (*ubi ius, ibi remedium*). Therefore, the fundamental right to have access to a fair and impartial tribunal and a due process in fact constitutes the necessary conceptual premise of the very idea of effective judicial protection.

At the same time, in an essentially decentralised system of enforcement of rights, such a conceptual foundation of the principle of effective judicial protection has to be accommodated with the presumption of national competence to determine the remedies and procedural conditions and rules for implementing EU law. This is the second structural dimension of the principle of effective judicial protection in the established case law of the CJEU. In the absence of EU rules on procedural conditions and remedies, it is for national domestic legal systems of each Member State to designate the courts having jurisdiction, to determine the procedural conditions governing actions at law, and to ensure the protection of the rights which citizens derive from Union law.

As the analysis carried out in chapter 1 of this report shows, the whole historical thread of the CJEU's case law can be retraced to the effort to strike a balance between these two potentially conflicting limbs of the fundamental principle of effective judicial protection (a fundamental right and general principle of EU law strongly pushing toward a uniform implementation of EU law, on the one hand, and the need to preserve a sound sphere of national procedural autonomy, on the other hand). The CJEU has sought to strike a balance by setting reasonable limits to that presumption of national procedural autonomy (the third structural dimension in our analysis), and by determining the legal basis for such limiting EU intervention (the fourth analytical dimension of the principle).

In the absence of harmonisation measures concerning the remedies to be relied upon by individuals in case of violation of EU rights, the competence to set the procedural conditions necessary for the effective judicial protection of such rights lies within the legal systems of the Member States (principle of national procedural autonomy). However, such a procedural autonomy is neither unconditional nor absolute. On the contrary, it must be exercised so that the remedies available for the protection of rights recognised by the Union's legal system are at least equivalent to those provided for the protection in court of similar rights attributed by the national legal system (principle of equivalence) and in the manner which guarantees that the exercise of such rights, under the procedural conditions concretely applicable, does not turn out to be impossible or overly difficult (principle of effectiveness). In addition, when harmonisation measures exist or specific limits and rules are deducible from EU substantive law, the procedural conditions for the exercise of EU rights must comply with such measures and rules.

Chapter 1 of this report sets the general scene and the broad lines of such balancing exercise carried out by the CJEU. The focus is thereby primarily on the principles of effectiveness and equivalence as general external limits to the presumption of national procedural autonomy. Such general requirements of the principle of effective judicial protection are specifically assessed by making reference to some key elements ever-

recurring in the CJEU case law: national rules on standing; substantive kind of remedies available to individuals; the adequacy and appropriateness of the compensation provided for by the national legal system; the existence of interim reliefs in case of urgent need for redress; time limits to activate remedies; the scope of national courts' authority to consider EU law on their own motion.

The analysis thus carried out in chapter 1 cannot be summarised by formulating general abstract rules, but rather by stressing the contextual or context-sensitive approach of the CJEU. This implies that the very conformity of a national system of remedies to the EU effectiveness and equivalence requirements cannot be assessed *in abstracto*: as the CJEU has often emphasised, it has to be evaluated in the concrete context of the case, by taking due account of all the relevant aspects of the national measures concerned, and of the legal system within which they apply.

In the second chapter of this report, the case law is envisaged from a different angle, in order to distinguish categories of national rules reviewed by the CJEU according to their ability to pass muster or not when contested for their incompatibility with the right to effective judicial protection. These national rules could, for the vast majority, be grouped in five sub-categories, corresponding to various aspects of the right to effective judicial protection. These five sub-groups correspond to the aspects of that right, which give rise to most of the cases brought before the CJEU. Member State legislations reviewed by the CJEU mostly concern: access to a court or tribunal; the scope of judicial review; the right of the defence; time limits and remedies. In all of these categories, in spite of procedural autonomy, many national rules were condemned, or, if not, very precise indications were given to the State concerned on the conditions under which its legislation would comply with the EU right to judicial protection. However, Member States' courts are usually left to their own devices, and the CJEU rarely interferes when the matter is reviewed concerning the requirement of equivalence: no strict scrutiny applies, and the CJEU only insists that national courts should make sure equivalence is respected.

More precisely, what comes out of comprehensive examinations of the national legislations reviewed, and this comes as no surprise, is that many aspects of Member States' legislation concerning time limits for initiating proceedings were challenged and, although the CJEU often considered that they were not inconsistent with the principle of effective judicial protection, a series of specific provisions, and in many cases, reforms, of British, German, French, Italian or Luxemburg legislation concerning limitation periods were condemned. Similarly, although there are less cases concerning this matter, the cost of proceedings, court fees in particular, are usually not condemned. Nevertheless, British, German or Italian laws were efficiently challenged for making access to courts excessively difficult, for claimants having to bear high costs. Very few legislations were contested for not preventing victimisation (adverse treatment resulting from actions in courts). But when this was the case, national legislations were condemned without hesitation. Concerning the notion of remedies (conceived extensively to be sure), it appears that legislations of a number of Member States were reviewed by the CJEU, and, quite surprisingly, the CJEU's decisions implied changes to national rules, although, unless specific EU legislation regulate remedies, this is a field considered to be essentially dominated by procedural autonomy. UK, Austrian, German, Greek, French, Italian and Spanish law were, in turn, required to evolve in order to ensure the type of remedies that effective judicial protection requires, according to the CJEU.

Among all requirements imposed by EU law to national procedural rules, some are more relevant than others for the main beneficiaries of Directive 2014/54/EU, i.e. Union citizens exercising their right to free movement of workers within the European Union and the members of their family, including jobseekers: the right of access to a court or tribunal where judicial control takes place; a sufficient extension of the scope of judicial review (to avoid, namely, that the claimant has to bring its case to different courts); the protection of the fundamental right to be heard; the existence of not excessively restrictive, or regressive, time-limits; and effective and dissuasive remedies in case EU law is violated.



In chapter 3 about protection against victimisation, information obtained from national experts shows that there are various possibilities for EU workers to claim protection against retaliation when actions in courts to contest discriminations based on nationality leads to adverse treatment: anti-discrimination law, and labour law, allow workers to seek redress in a number of Member States. Very often, independent bodies in charge of combatting discriminations can assist them. As a comparison, few NGOs are involved in this domain, and trade unions are rarely very active. In sum, although actions are often available for victims of discriminations on the ground of nationality, there is, quite clearly, a lack of information, and concern, among public and private authorities, about the risk of adverse treatment for EU workers claiming their rights in national courts.

## REPORT OUTLINE

The principle of effective judicial protection is a fundamental tenet of the European rule of law. It was developed by the case law of the Court of Justice of the European Union (CJEU) in the mid-seventies and formally recognised constitutionally by the Lisbon Treaty, which codified and enshrined its most relevant aspects, both with the general provision included in Article 47 of the Charter of Fundamental Rights of the European Union (the Charter) and with the more specific provision in Article 19 TEU (*cf. e plurimis Lenaerts 2011; Pernice 2013*). On the one hand, at a general level, Article 47(1) of the Charter (*Right to an effective remedy and a fair trial*) states that “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”. The elements of such right are defined in the following paragraphs. On the other hand, and more specifically, Article 19 TEU, after having defined the CJEU general competencies in its first paragraph, comprehensively frames the decentralised system for the protection of EU rights, and requires in particular that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law” (Article 19 (2)).

In accordance with the mandate received, this report intends to outline a comprehensive analytical framework of the ways in which the principle of effective judicial protection has been interpreted by the vast case law of the CJEU. The evolution of the CJEU’s case law, which has gone through significantly different phases, is marked with the attempt, in the application of the principle, to balance two requirements that are potentially in a dialectical tension between one another (Neville Brown 1997): on the one hand – in a functional connection with the fundamental principles of the direct effect and of the primacy of EU law (De Witte 2011) – the need to ensure an effective protection of the rights guaranteed by Union law (*cf. e.g. Dougan 2004; idem 2011; Schütze 2016, p. 394 et seq.*); on the other hand – lacking general measures of harmonisation of remedies in an essentially decentralised system of implementation and enforcement of rights (Blast 2010) – the need to allow Member States to benefit from an adequate sphere of procedural autonomy in arranging the guarantees necessary for that purpose. The standards characterising the contents of the principle of effective judicial protection in the case law of the CJEU have over time been drawn up essentially by balancing these two different needs: the first one essentially aiming at guaranteeing a uniform implementation of Union law, by virtue of the primacy it enjoys over national legal systems; and, *vice versa*, the second one aiming at allowing an autonomous development of the systems of remedies in Member States, according to the different national traditions and political preferences.

In this perspective, the report intends to provide a framework of the essential standards and contents of the principle of effective judicial protection, as elaborated by the case law of the CJEU, especially with the aim of submitting information to the European Commission for the evaluation of the implementation, by Member States, of Article 3 of Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers. Such provision (*Defence of rights*) is especially important within the overall regulative architecture of the Directive, as it is specifically directed at ensuring the effective protection of rights conferred on workers (and their family members) who are exercising the fundamental freedom of movement attributed to them by Union law.

In view of these analytical goals, the report will be structured as follows:

- 1) The first chapter will consist in sketching the general doctrines on the principle of effective judicial protection and its effects on national legal systems. In particular, the overall development of the case law of the CJEU will be considered, in its various historical phases, in order to outline, on a more general and systematic level, the essential contents and standards of protection required by Member States in order to

meet the overarching EU requirement of remedies sufficient to ensure effective legal protection in the fields covered by Union law (Article 19 (2) TEU).

2) The second chapter will elaborate a more specific taxonomy of the remedies and forms of protection of rights in national legal systems by identifying, in the light of the CJEU case law, the ones that have passed the CJEU scrutiny and, *vice versa*, those that were found inadequate for the actual guarantee of the principle of effective judicial protection.

3) The third chapter will provide a comparative summary of the reports received from FreSsco national experts on the issue – of particular relevance in view of the implementation of Article 3 of Directive 2014/54/EU – concerning the remedies provided for by Member States for the guarantee of an adequate protection against victimisation.

4) The fourth chapter will consist in the detailed indication of the doctrinal and jurisprudential sources of the analysis thus conducted.

Furthermore, an executive summary of the report is added at the beginning of the report, recapping the main findings of the analysis carried out.

# 1. THE DOCTRINE OF EFFECTIVE JUDICIAL PROTECTION IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

## 1.1. Conceptual origins of the principle of effective judicial protection

The Court of Justice of the European Union (CJEU) began to elaborate the principle of effective judicial protection – originally as a corollary of the more general principle of effectiveness linked to direct effect (*Van Gend en Loos v Administratie der Belastingen*<sup>1</sup>) and primacy (*Costa v E.N.E.L.*<sup>2</sup>) of EU law – starting from the leading case *Rewe v Landwirtschaftskammer für das Saarland*<sup>3</sup>. The applicant in this case filed for the reimbursement with interests of the taxes on imports levied by Germany and in contrast with the Treaty. In the main proceedings of this case (cf. e.g. O’Keefe, 1995), the CJEU stated, for the first time, that “in applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law. Accordingly, in the absence of Community rules on this subject, it is for the national domestic legal systems of each Member State to designate the Courts having jurisdiction to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature”. Therefore, the CJEU pointed out that “in the absence of such measures of harmonisation the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules. The position would be different only if the conditions and times-limits made it impossible in practice to exercise the rights which the national courts are obliged to respect. This is not the case where reasonable periods of limitation of actions are fixed”.

The conceptual foundations of the principle of effective judicial protection, in fact, are all enclosed in this original jurisprudential *fiat*. First of all, the effectiveness of the rights conferred on individuals by Union law necessarily implies that, in case of violation, the individuals may rely on these rights in law through appropriate remedies that ensure their full and effective exercise (*ubi ius, ibi remedium*). Without EU harmonisation measures, or in the absence of common rules pertaining to the forms of action and the remedies to be used in case of violation of the rights attributed to individuals by Union law, the competence to set the procedural conditions necessary for the effective judicial protection of such rights lies within the legal systems of the Member States (principle of national procedural autonomy). The procedural autonomy thus guaranteed to national legal systems in the absence of harmonisation measures is, however, not unconditional or absolute: on the contrary, on the one hand it must be exercised so that the remedies available for the protection of rights recognised by the Union’s legal system are at least equivalent to those provided for the protection in court of similar rights attributed by the national legal system (principle of equivalence) and, on the other hand, so that the exercise of such rights, for the procedural conditions concretely applicable, does not turn out to be impossible or overly difficult (principle of effectiveness *stricto sensu*). However, when harmonization measures do exist or in any way specific limits and rules are deducible from EU substantive law, the procedural conditions for the exercise of EU rights must comply with such measures and rules.

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<sup>1</sup> *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1.

<sup>2</sup> *Costa v E.N.E.L.*, C-6/64, EU:C:1964:66.

<sup>3</sup> *Rewe v Landwirtschaftskammer für das Saarland*, C-33/76, EU:C:1976:188.

As Dougan (2004, p. 4) effectively puts it, “*These principles can be organised around four basic structural concepts: first, the fundamental right of access to judicial process; secondly, the presumption of national competence to determine the remedies and procedural conditions rules; thirdly, the limits to that presumption applicable under Community law (consisting primarily in the substantive Treaty provisions, plus the principles of equivalence and effectiveness); and finally, the legal basis for such Community intervention*”. The analysis of the structural elements of the principle of effective judicial protection will therefore be carried out, for the sake of analytical clarity, by making a distinction between these four dimensions, however not without first observing that the key element, consisting in the access to judicial protection, presents its own conceptual autonomy – especially in the light of Article 47 of the EU Charter of Fundamental Rights – as it can be qualified as a free-standing fundamental Union right, the scope of which goes beyond its instrumental relevance in guaranteeing the principle of effectiveness (see recently *Toma*<sup>4</sup>; cf. Reich 2005; Prechal, Widdershoven 2011; Ravo 2012).

### **1.2. The fundamental right to have access to effective judicial protection**

The first dimension of the principle of effective judicial protection is also its very own constitutional foundation, since the right to have access to a fair and impartial trial constitutes its necessary premise. Long before the right to have access to an effective judicial protection had been expressly enshrined in Article 47 of the EU Charter of fundamental rights, the CJEU constantly affirmed the right’s close link to the general principles of Union law, with which the CJEU itself is bound to ensure the compliance pursuant to the constitutional traditions common to the Member States and to the provisions of the international treaties which the former are a part of, especially of Article 6 of the European Convention for the protection of Human Rights and Fundamental Freedoms (cf. e.g. Lenaerts 2011; Pernice 2013; Hofmann 2013). Already in *Johnson* the CJEU affirmed that “*The requirement of judicial control [...] reflects a general principle of law which underlies the constitutional traditions common to the Member States. The principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognised in their joint Declaration of 5 April 1977 [...] and as the Court has recognised in its decisions, the principles on which that Convention is based must be taken into consideration in Community law*”.<sup>5</sup> By virtue of this general constitutional base, which was itself incorporated into the Treaty by Article 6 TEU, the CJEU was able to state that such fundamental requirement of judicial control – at a first and fundamental level – requires that Member States guarantee the access to their respective national courts in order to guarantee the protection of the rights conferred by Union law (cf. among the various judgments in such sense *Commission v Germany*<sup>6</sup>; *Heylens*<sup>7</sup>; *P van derWal*<sup>8</sup>; *Dounias*<sup>9</sup>; *Église de Scientologie*<sup>10</sup>; *Krombach*<sup>11</sup>; *Unibet*<sup>12</sup>).

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<sup>4</sup> *Toma*, C- 205/15, EU:C:2016:499.

<sup>5</sup> *Johnson*, C-222/84, EU:C:1986:206, paragraph 18.

<sup>6</sup> *Commission v Germany*, C-178/84, EU:C:1987:126.

<sup>7</sup> *Heylens*, C-222/86, EU:C:1987:442.

<sup>8</sup> *van der Wal v Commission*, C-174/98 and C-189/98, EU:C:2000:1.

<sup>9</sup> *Dounias*, C-228/98, EU:C:2000:65.

<sup>10</sup> *Église de Scientologie*, C-54/99, EU:C:2000:124.

<sup>11</sup> *Krombach*, C-7/98, EU:C:2000:164.

<sup>12</sup> *Unibet*, C-432/05, EU:C:2007:163.

The CJEU has progressively developed the essential contents of such fundamental guarantee of access to justice. In all circumstances that are relevant for EU law, it requires that Member States ensure access to an independent and impartial tribunal for all claimants. Under such profile, Article 47 of the EU Charter of Fundamental Rights contemplates a wider guarantee than the one which can be derived from Articles 6 and 13 of the European Convention for the protection of Human Rights and Fundamental Freedoms, therefore guaranteeing, at least in principle, a higher standard of protection (Article 53 CFREU). In fact, while Article 6 of the Rome Convention expressly imposes that access to judicial protection is applied to the determination of civil rights and obligations and criminal charges, without considering (at least formally) the disputes of a public-administrative law nature, Article 47 of the Charter of Nice – developing a principle already stated in the *Johnson* judgment – generally refers to any right attributed by Union law, regardless of the type of controversy taken into account (*cf.* Dashwood *et al.* 2011, p. 291).

Access to an independent and impartial court involves, in the first place, that the authority to whom the dispute is referred, besides presenting an impartial status with respect to the disputing parties, also holds effective powers to review the decision contested. As the CJEU stated in *Commission v Austria*,<sup>13</sup> an administrative authority, even though composed of independent experts, but lacking any real decision-making power in reviewing the decision contested (this case concerned the exclusion of a certain product from the list of medical products covered by the health insurance system of the Member State concerned), does not satisfy such a requirement. Nonetheless, already in the *Johnson* judgment the CJEU had had the chance to rule on a similar issue. It stated – in that case – that the system of certificate-plus-ouster-clause, provided for by national law (and in the light of which the certificate issued by the competent authority was eligible of making full proof of the existence of a reason for the derogation from the implementation of the principle of equal treatment between men and women), did not respect the fundamental right to have access to an independent and impartial tribunal, as it deprived the person concerned of the actual possibility to contest the decision that went against EU law. The equally abovementioned judgment in *Heylens*,<sup>14</sup> and more recently the well-known decisions in *P Kadi and Al Barakaat International Foundation v Council and Commission*<sup>15</sup> and in *ZZ*,<sup>16</sup> even though in very different contexts, all assert the same fundamental principle that is now sanctioned in Article 47 of the EU Charter of Fundamental Rights: under no circumstance – not even on grounds of national security – is it allowed to exclude the party concerned from the right to activate the necessary judicial control and use the appropriate remedies for the protection of the rights conferred to that party by Union law.

Moreover, access to an independent and impartial tribunal implies that claimants enjoy a fair hearing before the competent court. This means – as stated for example in *Steffensen*,<sup>17</sup> and in *Evans*<sup>18</sup> – that the claimants are recognised the right to provide evidence, *i.e.* the concrete possibility of carrying out a proper defence, by proving their motivations and proving their allegations in court, albeit in compliance with the procedural rules laid down by the national legal system (subject to the constraint of the dual requirement equivalence and effectiveness). In both cases, in order to fix the standard of effective protection of the right to have a fair and impartial trial, below which the national procedural system must not fall, the CJEU expressly recalled the case law of

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<sup>13</sup> *Commission v Austria*, C-424/99, EU:C:2001:642.

<sup>14</sup> *Heylens*, C-222/86, EU:C:1987:442.

<sup>15</sup> *P Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/15 and 415/05, EU:C:2008:461.

<sup>16</sup> *ZZ*, C-300/11, EU:C:2013:363.

<sup>17</sup> *Steffensen*, C-276/01, EU:C:2003:228.

<sup>18</sup> *Evans*, C-63/01, EU:C:2003:650.

the European Court of Human Rights (ECtHR) in relation to Article 6 of the Rome Convention.

In particular, in *Steffensen*, referring to the case law of the Court of Strasbourg on Article 6 of the Rome Convention, the CJEU was able to provide rather articulate indications on how national courts must enforce the right to a fair hearing, following the canons of the adversarial principle developed by the ECtHR. Therefore, it is appropriate to make reference to the main motivational passages of such judgment. First of all, the CJEU recalled the case law of the ECtHR where it was stated that, on the grounds of Article 6(1) of the ECHR, evidence obtained in breach of national norms cannot be excluded “as a matter of principle and in the abstract”, inasmuch as it is for the national courts to evaluate and decide upon the relevance of the evidence. Nonetheless, it is emphasised that according to the same provision, also the way in which the evidence was taken contributes to determine the fairness of a hearing.<sup>19</sup> Still in the wake of the case law of the ECtHR, and on the grounds of Article 6(1), the CJEU pointed out that the parties must be given the possibility to comment effectively on the observations on a piece of evidence they may have submitted to the court, especially if the evidence is of a technical nature and is likely to be decisive. Therefore, it is for the national court to decide whether an evidence “pertains to a technical field of which the judges have no knowledge and is likely to have a preponderant influence on its assessment of the facts”, which would allow the party to comment effectively on the evidence without infringing the adversarial principle. “In addition, the national court must consider whether such evidence must be excluded in order to avoid measures incompatible with compliance with fundamental rights, in particular the right to a fair hearing before a tribunal as laid down in Article 6(1) of the ECHR”. It is still for the national court to verify the compliance with both the principles of equivalence and the principle of effectiveness of national provisions on the taking of evidence.<sup>20</sup>

More recently, in *Unitrading*,<sup>21</sup> the CJEU clarified that, where national law does not specifically regulate the issue of evidence in customs proceedings, the parties interested must be allowed to make use of any form of evidence that is admitted by the law of the Member State for cases of a similar nature, always in compliance with the principles of equivalence and effectiveness. And somehow linked to the right to evidence, as a necessary requirement to ensure access to an effective judicial protection, is also *Kone AG v OBB Infrastruktur*.<sup>22</sup> This case dealt with rules provided for by the Austrian legal system concerning the causal relationship to be demonstrated by the claimant in order to obtain compensation for the damage incurred by the party within the context of a case of unfair competition (the so-called umbrella pricing). In this case, while referring to the principle of procedural autonomy reserved to the Member State, the CJEU stated that “The full effectiveness of Article 101 TFEU would be put at risk if the right of an individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with the member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms ...”.<sup>23</sup>

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<sup>19</sup> *Steffensen* EU:C:2003:228, paragraph 36. In particular, the CJEU here refers to the following ECtHR judgments: *Mantovanelli v France*, judgment of 18 March 1997, Reports of Judgments and Decisions 1997-II, § 33 and 34; and *Pélissier and Sassi v France*, judgment of 25 March 1999, Reports of Judgments and Decisions 1999-II, § 45.

<sup>20</sup> *Steffensen* EU:C:2003:228, paragraph 2.

<sup>21</sup> *Unitrading*, C-437/13, EU:C:2014:2318.

<sup>22</sup> *Kone AG v OBB Infrastruktur*, C-557/12, EU:C:2014:1317.

<sup>23</sup> *Kone AG v OBB Infrastruktur* EU:C:2014:1317, paragraph 33.

Naturally, as for any other fundamental right recognised by the CFREU, the right to have access to an effective judicial protection is also not absolute and unconditional, as it can be subject to reasonable limitations for the protection of rights or interests sharing the same constitutional relevance. In assessing the legitimacy of the limitations posed by the national exercise of the fundamental right now recognised by Article 47 of the Nice Charter, the CJEU, referring to the standards developed in the application of Article 6 of the Rome Convention, has always paid great attention – in balancing the different constitutional interests at stake – at evaluating the overall circumstances of each single case at stake.

Thus, in several, even recent, cases the CJEU has expressly considered the legitimacy of certain limitations or restrictions that were reasonable and proportionate to the exercise of the fundamental right to have access to an independent and impartial tribunal. In this sense, a significant example is offered by *Alassini and Others*,<sup>24</sup> relating to a dispute falling within the protection of consumer rights, traditionally characterised – as we will see further below – by a very strict approach of the CJEU (*cf.* recently, among others, *Trstenjak*, *Beysen* 2011; *Patti* 2016). In this case, exercising the competence provided for by Directive 2002/22/EC, Italy had introduced an out-of-court settlement procedure in its legislation, as a condition of eligibility of the action aiming at invoking the rights of the user/consumer against the provider of the universal telephone service. In this case, the CJEU ruled that EU law does not preclude a norm which provides for the admissibility of an action before the courts to be conditional upon the attempt to establish an out-of-court settlement procedure. Indeed, the prior implementation of a procedure as such infringes neither the principles of equivalence and effectiveness nor the principle of effective judicial protection, providing that a number of conditions are met. In particular, the decision of the out-of-court procedure cannot result in a binding decision, it cannot invalidate the right to bring legal proceedings and cannot give rise to costs, unless “very low”, for the parties. Moreover, the procedure has to be accessible not only by electronic means and it should be possible to adopt interim measures in urgent cases.<sup>25</sup>

There are other similar cases where the CJEU has considered that it was justifiable to limit the access to judicial protection even for vulnerable or weak categories of persons protected by Union law, such as workers and employees. In *Mono Car Styling SA*<sup>26</sup> concerning Belgian legislation suspected of creating an undue obstacle regarding evidence in the matter of a collective dismissal procedure, the CJEU stated that, according to Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies – and in particular Article 6 read in conjunction with Article 2 – national rules can limit the individual right of action of workers, aimed at ensuring compliance with the obligations provided for by the Directive, by imposing upon the worker the obligation to raise objections with the employer first and the obligation to inform him or her of his or her intention to query whether the information and consultation procedure has been complied with. According to the CJEU, the principle of effective judicial protection is not infringed by a national rule that “*establishing procedures which permit workers’ representatives to ensure that the employer has complied with all the information and consultation obligations set out in Directive 98/59, impose limits and conditions on the individual right of action which it also grants to every worker affected by collective redundancy*”. However, the CJEU points out that Article 2 of Directive 98/59/EC sets a floor for the obligations of the employer proceeding with collective redundancies. Indeed, the national court has to interpret national norms in such a way that the obligations binding upon the employer are not reduced below what is provided for by Article 2 of the Directive.

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<sup>24</sup> *Alassini and Others*, C-317-320/08, EU:C:2010:146.

<sup>25</sup> *Alassini and Others*, C-317-320/08, EU:C:2010:146, paragraph 67.

<sup>26</sup> *Mono Car Styling SA*, C-12/08, EU:C:2009:466.



This same kind of balancing of interests is discernible in other decisions of the CJEU (see *e.g. Commission v Greece*,<sup>27</sup> *Tele 2 Telecommunication*,<sup>28</sup> *Janecek*,<sup>29</sup> *Križan and Others*,<sup>30</sup> and *ClientEarth*.<sup>31</sup> For the purpose of this report, the recent judgment in *DEB*<sup>32</sup> and in *Pohotovost*<sup>33</sup> may be deemed to be of particular interest and therefore must be considered with greater attention.

In *DEB*, the question of the referring national court concerned the interpretation of EU law and, more specifically, the principle of effectiveness. It was asked whether it should be interpreted as meaning that, in the context of a procedure for pursuing a claim seeking to establish State liability under EU law, the principle precludes a national rule under which the pursuit of a claim before the courts is subject to making an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment. The referring German court essentially asked whether the fact that a legal person is unable to qualify for legal aid could render the exercise of its rights impossible in practice in the sense that that legal person would not be able to gain access to a court because it would be impossible for it to make the advance payment in respect of the costs of proceedings and to obtain the assistance of a lawyer. The question referred thus concerned a legal person's right to have effective access to justice. The CJEU first referred to the case law on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and specifically the second paragraph of Article 47 of the CFREU. The CJEU subsequently stated that it deemed it necessary to recast the question referred so that it may relate "*to the interpretation of the principle of effective judicial protection as enshrined in Article 47 of the Charter, in order to ascertain whether, in the context of a procedure for pursuing a claim seeking to establish State liability under EU law, that provision precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment*".

In responding to the preliminary question, the CJEU therefore proceeded to a careful review of the case law of the ECtHR. It thereby noted that, on several occasions, it repeatedly stated that the right to have access to a court is not absolute, even though it had nevertheless stated that the right to have access to a court constitutes an element which is inherent in the right to a fair trial under Article 6(1) and that it is important in this regard for a litigant not to be denied the opportunity to present his or her case effectively before the court. In particular, the CJEU observed that, as argued by the European Court of Human Rights, legal aid is necessary for a hearing to be fair depending on the specific case and, in particular, on the possible consequences of the proceedings for the applicant, the complexity of the legal matters at stake and the applicant's capacity of legal self-representation. With regard to legal aid in the form of dispensation from proceedings costs, the ECtHR has deemed it necessary to determine whether the very core of the right to a fair trial was undermined, whether the aim was legitimate and the means reasonable.

On those grounds, in *DEB* the CJEU ruled that it is for the national court to assess the conditions for granting legal aid. Indeed, the national court has to determine whether they undermine the very core of the right to an effective judicial protection, whether their

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<sup>27</sup> *Commission v Greece*, C-156/04, EU:C:2007:316.

<sup>28</sup> *Tele 2 Telecommunication*, C-426/05, EU:C:2008:103.

<sup>29</sup> *Janecek*, C-237/07, EU:C:2008:447.

<sup>30</sup> *Križan and Others*, C-416/10, EU:C:2013:8.

<sup>31</sup> *ClientEarth*, C-404/13, EU:C:2014:2382.

<sup>32</sup> *DEB*, C-279/09, EU:C:2010:811.

<sup>33</sup> *Pohotovost*, C-470/12, EU:C:2014:101.

aim is legitimate and whether they are proportionate to reach the legitimate aim. The CJEU gives clear instructions to national judges on how to conduct this assessment: “*the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the relevant law and procedure; and the applicant’s capacity to represent himself effectively*”. The proportionality of the norm has to be evaluated by considering the amount of the costs of the proceedings, also in relation to the extent to which they would hamper the access to the courts. As far as legal persons are concerned – as for the proceeding at stake – the national judges will have to address the form of legal person, whether the legal person is profit-making or non-profit-making, and what possibility partners or shareholders have to finance the legal proceedings.

In *Pohotovost* in essence the question was whether Directive 93/13/EEC on unfair terms in consumer contracts, read in conjunction with Articles 38 and 47 of the CFREU, must be interpreted as precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of an arbitration award. In this case the CJEU likewise carried out an articulate survey on the standards of protection of the right to have access to effective judicial protection, as they were elaborated by the Court of Strasbourg. And in considering those interests, likewise the CJEU concluded that Council Directive 93/13/EEC of 5 April 1993, in particular Articles 6(1), 7(1) and 8 of that Directive, read in conjunction with Articles 38 and 47 of the Charter of Fundamental Rights of the European Union (CFREU), “*must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in proceedings for enforcement, against the latter, of a final arbitration award*”.

The review proposed so far appears sufficient to conclude the following, in assessing the standard of guarantee of the fundamental right to have access to effective judicial protection: the CJEU mainly refers to case law by the ECtHR both to determine the essential content of the right and to scrutinise the legitimacy of the limitations that the national legal system – in performing the procedural autonomy reserved to the Member State – places upon the exercise of that right, by weighing the interests at stake according to the balancing technique in the specific case (a vivid example of *ad hoc* balancing). In its first constitutional dimension of access to due process, the right to an effective judicial protection has been constructed by the CJEU as a free-standing fundamental right, subject to the reasonable and proportional limitations that Member States can establish in order to pursue other legitimate constitutional interests. Such limits cannot *per se* deprive the claimants of the essential content of the fundamental right protected by Article 47 CFREU (*cf.* again Lenaerts 2011; Safjan, Düsterhaus 2014).

### **1.3. The presumption of national competence to determine the rules on remedies and procedural conditions for the exercise of the right to effective judicial protection**

Ever since the *Rewe* judgment,<sup>34</sup> in the absence of EU harmonisation measures or substantive provisions included in the Treaty, every Member State, in its own sphere of procedural and regulatory autonomy, has to define the procedural conditions and the types of remedies and sanctions applicable in cases of violation of the rights conferred to individuals by Union law (*cf. ex muliis* Gerven 2000; Adinolfi 2012; Strozzi, Mastroianni 2013, pp. 315 *et seq.*). The presumption of national competence to determine the rules on remedies and procedural conditions stops where the Union legal order has directly regulated remedies and sanctions, in particular by establishing a system of enforcement of Treaty rights that is totally or partly harmonised or even centralised (the latter hypothesis being actually limited to quite exceptional cases in which the Union exercises

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<sup>34</sup> *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

exclusive competences). Moreover, presumption of national competence is generally limited – as we will see in the following paragraph – by the requirements of equivalence and, above all, of effectiveness developed by consolidated case law of the CJEU.

We want to make some remarks here on the case – indeed quite rare, although already addressed by the CJEU in some occasions – in which the Member State has completely omitted to exercise its own procedural autonomy, essentially omitting to arrange any kind of remedy for the protection of rights attributed to the individuals by EU law. Such a normative gap may be considered both as a violation of the right to have access to an effective judicial protection and as a radical defect of the requirement of effectiveness by the remedial system of the Member State concerned. The main problem put forward by this hypothesis is in what way the national court competent for the matter – in fulfilling its duty of loyal cooperation according to Article 4 (4) TEU (*cf.* Klamert 2014, pp. 125 *et seq.*) – must remedy such omission by the national legislature of its own Member State. In this regard, in fact, it is not at all clear which conclusions should be drawn by the national court.

Certainly, the basic rule that, in principle, the national court must follow in this case is that, in the event of a violation of a fundamental principle with direct effect, such as the principle of effective judicial protection, the national rule must be set aside, therefore eliminating the obstacle that prevents the individual from having access to an adequate remedy. But as Dougan effectively observes (2004, p. 9), “*Clearly, where the competent court find its jurisdiction improperly inhibited by the presence of an ouster clause (in situations like Johnson), or the fairness of its hearing is distorted by certain evidential rules (in cases like Steffensen), such domestic legislation must simply be set aside as incompatible with the binding requirements of Community law. But what if the Member State has failed to designate any tribunal competent to adjudicate upon the claimants’ rights? Would the ordinary (general, civil or administrative) courts be obliged to assume jurisdiction and deal with the dispute for themselves?*”. The answer to that question is actually more uncertain.

In general we can say that when a national court – by virtue of the obligation to interpret national law in conformity with Union law (according to the *Marleasing* doctrine<sup>35</sup>) – is still able to fill in the remedial lacuna of the domestic legal system by submitting the case to the general principles of such legal system, and therefore remaining within the regulatory and procedural autonomy reserved to the Member State, it will be necessary to set aside the rule that is incompatible with the principle of effective judicial protection. In other words, in these cases the lacuna must be treated as a derogation – in contrast with Union law – to the general rule of the national legal system which, otherwise, guarantees access of the individual to the effective judicial protection of his or her EU rights, with the consequence that, when setting aside that derogation, the rule is restored according to EU law. According to Dougan (2004, p. 10), this hypothesis could very well be fitted to the case ruled by the CJEU in the *Borelli v Commission* judgment,<sup>36</sup> where it is apparent “*that, if it proved necessary to guarantee the fundamental right of access to judicial process, domestic courts should be prepared to disregard procedural restrictions which denied them jurisdiction to entertain claims based on the Treaty*” (in this case the CJEU stated that national courts are entitled to rule on the lawfulness of an opinion issued by national authorities on matters of European competence, in the same way as they would review similar measures adopted by national authorities).

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<sup>35</sup> *Marleasing*, C-106/89, EU:C:1990:395.

<sup>36</sup> *Borelli v Commission*, C-97/91, EU:C:1992:491.

The *Dorsch Consult* judgment<sup>37</sup> also seems attributable to this line of reasoning (here, in fact, the issue concerned a *deficit* in the transposition of Directive 92/50/EC on public procurements and the CJEU, although not directly deciding and leaving the decision to the national court, nevertheless concluded that Article 41 of Council Directive 92/50/EEC cannot be interpreted as giving competence in relation to public service contracts to appeal bodies of the Member States competent for receiving cases of public works contracts and public supply contracts).

But if this gap can be filled only through a positive exercise of the regulatory procedural autonomy reserved to the Member State, the only remedy available to the individual in the violation of the right to have access to effective judicial protection seems to be the recourse to general action of liability against that State on the basis of the *Francovich* doctrine<sup>38</sup> (cf. for all in this sense Craig, De Búrca 2015, pp. 251 *et seq.*) The assessment is therefore inevitably connected to the specific circumstances of the case. On a general level, we should limit ourselves to endorse the conclusion suggested by Dougan (2004, p. 12), who rightfully suggests to distinguish “*between situations where the Member State has failed totally in its obligation to identify an appropriate court, such that Community law can intervene only indirectly through a Francovich action for reparation, and case where national law does make it possible to identify some appropriate tribunal, as regards which Community law need simply neutralise specific limitations imposed upon competence to dispose of the claim*”.

#### **1.4. Limits to the presumption of national procedural autonomy (the principles of equivalence and effectiveness in action)**

The most relevant general limits in the case law of the CJEU posed to the procedural autonomy of Member States in framing the system of remedies that can be activated by individuals in order to assert their EU rights are, nevertheless, those deriving from the requirements of equivalence and effectiveness. Therefore, we must analytically examine these two essential requirements. We start with the requirement of effectiveness, being that in relation to that requirement the CJEU has provided – in its very articulate case law – the most significant indications for the purpose of this report.

##### **1.4.1. The effectiveness requirement**

The requirement of effectiveness *stricto sensu* is at the core of the case law of the CJEU since the leading case *Rewe*<sup>39</sup> (cf. Schermers 1983, pp. 115 *et seq.*; Tesauo 1993; Kilpatrick, Novitz, Skidmore 2000; Lipari 2009). In the original formulation set forth by the CJEU in *Rewe*, the remedies offered in their procedural autonomy by the national legislatures would not have satisfied the effectiveness requirement only in so far as they “*made impossible the practice of the exercise which the national courts are obliged to protect*”.<sup>40</sup> In that original formulation, the effectiveness requirement was in fact fashioned – in terms that could be defined minimalist and quite low-demanding towards

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<sup>37</sup> *Dorsch Consult*, C-54/96, EU:C:1997:413. In that case, the CJEU ruled that “*It does not follow from Article 41 of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts that, where that directive has not been transposed by the end of the period laid down for that purpose, the appeal bodies of the Member States having competence in relation to procedures for the award of public works contracts and public supply contracts may also hear appeals relating to procedures for the award of public service contracts. However, in order to observe the requirement that domestic law must be interpreted in conformity with Directive 92/50 and the requirement that the rights of individuals must be protected effectively, the national court must determine whether the relevant provisions of its domestic law allow recognition of a right for individuals to bring an appeal in relation to awards of public service contracts. In circumstances such as those arising in the present case, the national court must determine in particular whether such a right of appeal may be exercised before the same bodies as those established to hear appeals concerning the award of public supply contracts and public works contracts.*”

<sup>38</sup> *Francovich*, Cases C-6/90 and 9/90, EU:C:1991:428.

<sup>39</sup> *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

<sup>40</sup> *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188, paragraph 5.

Member States (cf. Schütze 2016, p. 405) – as a requirement of “*practical possibility, meaning that national rules and procedures should not make the exercise of an EU right impossible in practice*” (Craig, De Búrca 2015, p. 228).

Therefore, in that initial developmental stage of the CJEU’s case law<sup>41</sup> the presumption of procedural autonomy of the Member State met limits rather blandly, as the effectiveness requirement was considered to be satisfied provided only that the action for the protection of the EU right did not prove virtually impossible. The formulation of the principle of effectiveness, nonetheless, soon started to become much more stringent, as it is “*immediately apparent in the Court’s changing language*” (Dougan 2004, p. 29). Already in the early eighties a certain, new formulation spread, according to which the remedies provided by the national legislature should not have made the exercise of rights deriving from Union law “*virtually impossible or excessively difficult*”.<sup>42</sup>

In literature it is customary to divide the evolution of the case law of the CJEU on the effectiveness requirement of the remedy provided under national law in three main historical phases (cf. Dougan 2011; Craig, De Búrca 2015, pp. 231 et seq.; Schütze 2016, pp. 404 et seq.). The first phase – epitomised by cases *Rewe* and *Comet* – is characterised by an attitude of substantial judicial restraint of the CJEU, which limits the recourse to the effectiveness requirement to merely ensuring the practical possibility of action for the protection of the right conferred to the individual by Union law. In this historical phase, the procedural autonomy conferred to Member States is maximal, being limited *ab externo* only by the principle of equivalence and by the principle of effectiveness, intended as the practical possibility of exercising the right to judicial protection.

The second phase is characterised by a significant mutation in the CJEU’s attitude and by an approach that is commonly defined in terms of judicial activism (see e.g. Arnulf 2011; Adinolfi 2012). As we will see more in detail in the analysis that follows, in this phase the CJEU tends to frame the essential standards of the contents of the principle of effectiveness in a positive and substantive way, meaning that it implies “*that a remedy should not only compensate the victim for a potential loss or injury to a right, but also deter potential wrongdoers for violating it in the first place*” (Reich 2005, p. 112). In the case law of the second half of the eighties and early nineties, the CJEU developed a proactive and substantial approach, requiring that the remedy – to be effective – must meet certain criteria of appropriateness, proportionality and dissuasiveness. There are many famous cases that are attributable to this phase of evolution of the CJEU’s case law, and many pertain to the fundamental rights of workers and consumers, from *Von Colson*<sup>43</sup> to *Johnston*,<sup>44</sup> to *Heylens*<sup>45</sup> and *Marshall II*<sup>46</sup>.

The third and most recent phase of the CJEU’s case law (which according to some was ushered already in *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging*<sup>47</sup>), though not dismissing a rigorous evaluation of the principle of effectiveness, seems to be characterised by a more careful approach, which Dougan (2004, p. 30) has effectively defined as “*a form of selective deference to the national procedural autonomy: sometimes consolidating the achievements of its middle period, and even striking out on bold new initiatives worthy of the hey-day of the effective judicial protection case-law; but often shying away from fresh invitation to bolster the domestic standards of judicial*

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<sup>41</sup> See also, just paradigmatically, *Comet BV v Produktschap voor Siergewassen*, C-45/76, EU:C:1976:191.

<sup>42</sup> *San Giorgio*, C-199/82, EU:C:1983:318.

<sup>43</sup> *Von Colson and Kamann v Land Nordrhein-Westfalen*, C-14/83, EU:C:1984:153.

<sup>44</sup> *Johnston v Chief Constable of the RUC*, C-222/84, EU:C:1986:206.

<sup>45</sup> *Heylens*, EU:C:1987:442.

<sup>46</sup> *Marshall II*, C-271/91, EU:C:1993:335.

<sup>47</sup> *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging*, C-338/91, EU:C:1993:857.

*protection or sometimes even blunting the impact of its more adventurous middle-period judgments*". The prevalent orientation in the most recent phase could be defined as contextual, as it is directed at identifying a point of balance and dynamic equilibrium between the principles of effectiveness and procedural autonomy of Member States in the individual specific cases. This makes it very difficult to carry out a unitary and systematic reconstruction of the case law of the CJEU, as it emphasises the necessarily case-based and contextual nature of the judicial elaboration of the requirement of effectiveness, with its inevitable incoherence and oscillations (*cf.* critically Schütze 2016, p. 404, who goes so far as to talk about a "disastrously unclear" case law). In the following part, we will analyse the case law on the principle of effectiveness that has congealed, over time, around the main thematic areas useful for our purposes. We will do so in the attempt to verify which is the state of the art of such case law on the aspects that we consider to qualify the principle of effective judicial protection the most.

## **Standing**

The issue of *standing*, inherently connected to the first dimension of the right to have access to effective judicial protection, was actually historically debated by the CJEU mostly in reference to the actions under the Treaty in respect of the acts set forth by the EU institutions (see *e.g.* Bast 2010; Strozzi, Mastroianni 2013). Nonetheless, the CJEU has had the opportunity to intervene in the issue of the *locus standi* with reference to the right to take legal action and to have access to the remedies provided for by national laws for the guarantee of the exercise of the rights recognised to individuals by Union law. This has occurred especially in ambits where the need for an effective judicial protection was particularly perceived.

In this regard, the judgment in *Unibet*<sup>48</sup> may be of peculiar interest as – among other things – it raised, in essence, the question whether the principle of effective judicial protection of an individual's rights under EU law must be interpreted as requiring it to be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Union law if other legal remedies permit the question of compatibility to be determined as a preliminary issue. In this case, developing a contextual and selective-self-restraint approach typical of the more recent phase of its case law, the CJEU above all recalled that, under the principle of cooperation laid down in Article 10 EC (now 4 TEU), it is for the Member States to ensure judicial protection of the rights of an individual under Community law. In the absence of EU rules governing the matter, the CJEU reaffirmed that it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions to safeguard rights which individuals derive from Union law. Furthermore, the CJEU said that although the Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the CJEU, it was not intended to create new remedies in the national courts to ensure the observance of EU law other than those already laid down by national law. It would be the opposite only if it were apparent, from the overall architecture of the national legal system in question, that there is no legal remedy which made it possible, even indirectly, to ensure respect for the rights of an individual under EU law. Thus, in principle, while it is for national law to determine an individual's standing and legal interest in bringing proceedings, EU law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right. In that regard, the detailed procedural rules governing actions for safeguarding the rights of an individual under Union law must be no less favourable than those governing similar domestic actions (principle of

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<sup>48</sup> *Unibet* EU:C:2007:163.

equivalence) and must not render the exercise of rights conferred by EU law practically impossible or excessively difficult (principle of effectiveness).

Each case which raises the question whether or not a national procedural provision is effective must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective of ensuring effective judicial protection of the rights of an individual under EU law. In the light of this, the CJEU ruled that "*The principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Community law, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a matter for the national court to establish*". Nevertheless, the CJEU concluded that "*Effective judicial protection is not ensured if the individual is forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law*".

In this respect it must be noted that in certain ambits – typically the one concerning the protection of consumer rights – it is the Union's secondary law that directly provides rules on *locus standi* which are open to the protection of common interests (such as e.g. in Directive 93/13/EC on unfair terms in consumer contracts). On closer inspection, this also seems to be the case for Article 3 (2) and (3) of Directive 2014/54/EU, since Member States are required to allow forms that we could broadly define as the empowerment of collective actors for the purposes of effectively defending the rights guaranteed to workers who exercise their fundamental freedom of movement within the Union.

### ***Types of remedies***

In compliance with Member States' procedural autonomy, and where Union law does not contain specific harmonisation rules, it is well established that national law in itself should not provide specific and new types of remedies in order to allow individuals to benefit from the protection of rights conferred upon them by Union law. The rule according to which Member States do not have the obligation to introduce new and specific remedies has nonetheless been significantly limited and qualified especially in the phase of greater activism of the CJEU. And it is worth noting that it happened in famous judgments – already recalled above – where the discussion revolved around the protection to be guaranteed to workers in the event of discriminatory treatment.

It is well-known that, in the important and often cited case *Von Colson*,<sup>49</sup> the adequacy of the extent of the compensation provided for by German law, in case of violation of the rights guaranteed to workers by the Equal Treatment Directive 76/207/EEC, was at stake. The worker against whom the discrimination prohibited by the Directive had been ascertained complained in particular about the absolute inadequacy of the remedy provided for at that time by German law. It consisted only of a reliance loss, i.e. a reimbursement of the (travel) expenses incurred to take part in the interview convened for the recruitment at the workplace where the claimant aspired to work. In this case, the CJEU famously stated that "*although [...] full implementation of the directive does not*

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<sup>49</sup> *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153

require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover, it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must in any way be adequate in relation to the damage sustained".<sup>50</sup> "In consequence it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to purely nominal amount, such as, for example, the reimbursement of expenses incurred by them in submitting their application, would not satisfy the requirements of an effective transposition of the directive".<sup>51</sup>

In *Von Colson*, the inadequacy of the remedy – which could not even be properly considered of a compensatory nature, as it entailed the mere reimbursement of the expenses incurred – actually appeared self-evident. Consequently, the CJEU was able to indicate, as real and effective protection complying with the Equal Treatment Directive, at least a full damage compensation. Although it must be noted that not even in such circumstance did the CJEU go as far as to impose upon the Member State the obligation to introduce a specific substantive remedy (e.g. in the form of a reinstatement order or a *restitutio in integrum*). In the CJEU's wording, in fact, "Directive No. 76/207/EEC [...] leaves the Member States free to choose between different solutions suitable for achieving its objective". Nonetheless, the CJEU underlines that if a Member State provides for compensation to be awarded in case of breach of the right to equal treatment, the national court has to make sure that the compensation will be effective and with a deterrent effect, hence it cannot be purely nominal.

Therefore, even where the principle of effective judicial protection was applied rigorously, as in the *Von Colson* judgment on the anti-discriminatory protection of the worker, the procedural autonomy recognised to Member States still implied a wide substantial freedom in choosing the type of remedy applicable for the protection of the rights guaranteed by Union law. Nonetheless, it is worth recalling that, faced with the choice of the Member State to implement the Equal Treatment Directive by providing the rights-holders with a compensatory-type remedy, the CJEU firmly and unmistakably ruled in favour of the need for a full compensation of the damage suffered by the victim of the discriminatory behaviour. In other words, in the event of discrimination – a prototypical case of breach of a fundamental right of Union law – the Member States that legitimately choose the compensatory remedy, instead of remedies aimed at the specific enforcement of the victim's rights, must at least ensure that the compensation accorded to the right-holder be full, therefore making a full recovery possible for the victim. This approach has coherently inspired the CJEU's case law on remedies against discriminations (see e.g. *McDermott and Cotter*,<sup>52</sup> *Kowalska*,<sup>53</sup> and *Terhoeve*<sup>54</sup>).

Perhaps the most resounding case in which the CJEU has stated this principle may still be considered the already evoked *Marshall II* judgment.<sup>55</sup> This case specifically called into question the legitimacy of the maximum amount of compensation, set by the legislation of the United Kingdom as the maximum compensation for the damage undergone by the victim of discriminatory behaviour. In this decision, the CJEU clarified that although Directive 76/207/EEC, the purpose of which is to put into effect in the Member States the principle of equal treatment for men and women as regards the various aspects of employment, in particular working conditions (including the conditions governing dismissal), when providing a remedy for breach of the prohibition against discrimination,

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<sup>50</sup> *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, paragraph 23.

<sup>51</sup> *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153, paragraph 24.

<sup>52</sup> *McDermott and Cotter*, Case 286/85, EU:C:1987:154.

<sup>53</sup> *Kowalska*, C-33/89, EU:C:1990:265.

<sup>54</sup> *Terhoeve*, C-18/95, EU:C:1999:22.

<sup>55</sup> *Marshall II*, C-271/91, EU:C:1993:335.



leaves Member States free to choose between the different solutions suitable for achieving the objective of the Directive, it nevertheless entails that if financial compensation is to be awarded where there has been discriminatory dismissal in breach of Article 5(1), such compensation 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. Accordingly, a person injured by a discriminatory dismissal has the right to be compensated for the loss and damage suffered and the reparation cannot be limited to a maximum fixed amount, established a priori, nor can the sum due be reduced because of an effluxion of time. Therefore, on the grounds of Article 6 of Directive 76/207/EEC – which determines in a sufficiently precise manner the injured person's rights – the injured person may act in order to set aside the national provision imposing such limits.

### **Compensation and interests**

The *Marshall II* judgment faced another question that is quite recurrent in the disputes on the adequacy of the compensatory remedies, like the one on the existence of the obligation to pay interests in order to make the victim's compensation effective.

In *Marshall II* the CJEU considered that the obligation to pay interests, taking the effluxion of time in due account, is an essential element to ensure the effectiveness of the compensatory remedy and in particular its deterrent effect. Instead, in the first phase of its case law, although in the context of cases where the compensation for sums levied in violation of Union law was claimed, the CJEU had left a substantial freedom of choice to Member States regarding the provision of the obligation to pay interests (cf. *Humblet*,<sup>56</sup> *Roquette Frères v Commission*<sup>57</sup>).

As shown by *Evans*<sup>58</sup> the attitude currently prevailing in the case law still follows the criterion affirmed in *Marshall II*, even though sometimes presenting an apparent mitigation of the rigour with which it had been affirmed in that path-breaking decision (see, e.g., *Ex parte Sutton*<sup>59</sup>). Therefore, especially in the area of anti-discriminatory protection reserved to workers by Union law, of which Directive 2014/54/EU is also a concrete expression, we can assume that where the remedy provided by the Member State is compensatory in nature, its effectiveness requires that the amount of time passed to the detriment of the victim is taken into account, with an adequate compensation through the payment of interests.

Especially when the national legislature, in using its discretion, chooses to exclude reinstatement or *restitutio in integrum* techniques of protection, like the transformation in open-ended contracts of fixed-term contracts unlawfully and abusively reiterated in breach of Directive 1999/70/EC in the public sector, the compensation – in order to satisfy the requirements of effectiveness and deterrence of the sanction – needs, at least, to allow the full compensation of the damage suffered by the worker. The CJEU was able to affirm this principle in several rulings relating, in particular, to the Italian legislation concerning the remedies enforceable in case of abuse of fixed-term contracts by public administrations. In this case, the CJEU admitted that Article 5 of the agreement attached to Directive 1999/70/EC does not necessarily impose on the Member State the obligation to include a sanction for the transformation or conversion of the contract, since the public sector is characterised by sound grounds of specialty compared to the private

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<sup>56</sup> *Humblet*, C-6/60, EU:C:1960:48.

<sup>57</sup> *Roquette Frères v Commission*, C-26/74, EU:C:1976:69.

<sup>58</sup> *Evans* EU:C:2003:650.

<sup>59</sup> *ex parte Sutton*, C-66/95, EU:C:1997:207.

one (see e.g. *Marrosu and Sardino*,<sup>60</sup> *Impact*<sup>61</sup>). Nonetheless, the CJEU has reaffirmed that the principle of equivalence, effectiveness and deterrent effect of the remedy regime chosen would be violated if the national legal order, in practice, did not allow the worker to obtain an adequate compensation for the damage suffered (cf. among others, most recently, *Papalia*,<sup>62</sup> and *Mascolo and Others*<sup>63</sup>).

The jurisprudential line that basically requires a full and not limited compensation for the damage suffered by the victim of the breach of Union law can also be found in other spheres of EU law and in particular in the field of competition law. In *Courage and Crehan*<sup>64</sup> for example the CJEU affirmed that “*The full effectiveness of Article 81 of the Treaty (now Article 101 TFEU) and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. Article 85 of the Treaty therefore precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract*”. In *Manfredi*<sup>65</sup> the CJEU confirmed that, in the absence of EU rules governing a certain material field of law, it is for the domestic legal system of each Member State to set the criteria to determine the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC (now Article 101 TFEU), provided that the principles of equivalence and effectiveness are observed. Therefore, firstly, in accordance with the principle of equivalence, if it is possible to award specific damages such as exemplary or punitive damages, in domestic actions similar to actions founded on the EU competition rules, it must also be possible to award such damages in actions founded on EU rules. However, EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them. Secondly, it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition, that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.<sup>66</sup>

### **Interim relief**

The traditional interpretation according to which, in the absence of harmonisation measures, Union law does not impose to provide for a particular type of remedy was also strongly qualified and circumscribed in the famous judgment in *R v Secretary of State for Transport, ex parte Factortame Ltd and others*.<sup>67</sup> In this case – confronted with the classical English rule “*no interim relief against the Crown*” – the CJEU essentially allowed the national court to create a new remedy, totally unknown to its own legal system until then (cf. Tesouro 1993; Sharpston 1997). In developing a particularly rigorous reading of

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<sup>60</sup> *Marrosu and Sardino*, C-53/04, EU:C:2006:517.

<sup>61</sup> *Impact*, C-268/06, EU:C:2008:223.

<sup>62</sup> *Papalia*, C-50/13, EU:C:2013:873.

<sup>63</sup> *Mascolo and Others*, C-22/13, C-61/13 to C-63/13 and C-418/13, EU:C:2014:2401.

<sup>64</sup> *Courage and Crehan*, C-453/99, EU:C:2001:465.

<sup>65</sup> *Manfredi*, C-295/04 to C-298/04, EU:C:2006:461.

<sup>66</sup> Yet again, in *Muñoz* (paragraph 30-32) the CJEU pointed out that “*The full effectiveness of the rules on quality standards [...] imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor*”.

<sup>67</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd and others*, C-213/89, EU:C:1990:257.

the *Simmenthal* doctrine,<sup>68</sup> the CJEU famously stated “that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (judgment of 9 March 1978 in *Simmenthal*, cited above, paragraphs 22 and 23)”.<sup>69</sup> Consequently, according to the CJEU, the national court must set aside a national norm, when the national norm is the sole obstacle preventing the court to grant interim relief during a dispute concerning Community law, in order to grant full effectiveness to Community law, also given that the national court that asked a preliminary ruling to the CJEU must be able to grant interim relief until “it delivered its judgment following the reply given by the Court of Justice”.<sup>70</sup>

It is worth recalling that the basic *ratio* that supports this path-breaking decision was subsequently developed and extended by the CJEU to allow the national court to adopt measures of interim relief also in those cases where the contestation revolved around the legitimacy of the acts of EU institutions adopted in violation of the rights attributed to the individual by Union law. In *Zuckerfabrik*<sup>71</sup> the CJEU also famously ruled, *inter alia*, that Article 189 of the EEC Treaty (now Article 288 TFEU) “must be interpreted as meaning that it does not preclude the power of national courts to suspend the enforcement of an administrative measure adopted on the basis of a Community regulation”, and national courts, taking in due account the Community’s interests, can suspend the enforcement of a national measure implementing Community law only under certain conditions: if the court has serious doubts about the validity of the EU measure, if the validity of the EU measure has not been discussed already by the CJEU, if “there is urgency and a threat of serious and irreparable damage to the applicant”.

### **Time limits**

The CJEU’s case law on the compatibility of the principle of effective judicial protection of the time limits provided by national laws for the exercise of the actions aimed at the enforcement of the rights guaranteed by EU law is quite complex and it undoubtedly presents significant oscillations over time. As already mentioned, in a first phase of evolution of its case law the CJEU kept a very permissive attitude towards the choices made by the national legislatures regarding the time limits for the remedies to be implemented by the individuals, in a logic of low interference in the procedural autonomy of Member States. In the same leading case *Rewe*,<sup>72</sup> the CJEU considered legitimate a short expiry term (30 days), provided for by national law for the reimbursement of sums unlawfully collected by German tax authorities in contrast with the Treaty. On that occasion, the CJEU, on the one hand, considered that the provision of a time limit for the exercise of the action for the protection of the individual satisfies a legitimate public interest as important as legal certainty; on the other hand, it held that a time limit of 30 days, as the one provided for by German law, should be considered reasonable, and in any event able to not make it virtually impossible to exercise the right for the reimbursement of the sums in question.

The criterion for basic assessment which the CJEU has always complied with – ever since that first decision – consists in evaluating the reasonable character of the time limit

<sup>68</sup> *Simmenthal*, C-106/77, EU:C:1978:49.

<sup>69</sup> *Simmenthal* EU:C:1978:49, paragraph 20.

<sup>70</sup> *Simmenthal* EU:C:1978:49, paragraph 21-23.

<sup>71</sup> *Zuckerfabrik*, C-143/88 and 92/89, EU:C:1991:65.

<sup>72</sup> *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188.

provided for by national law in relation to all the specific circumstances of the case. The CJEU had the chance of reaffirming such criterion in several other occasions, when it considered the limitation periods provided for by the national legislature to be reasonable (see among others Case *Köbler*,<sup>73</sup> *Ecotrade*,<sup>74</sup> *Barth*,<sup>75</sup> *Q-Beef*,<sup>76</sup> and *Pohl*<sup>77</sup>). In this respect, the case law of the CJEU surely presents a basic continuity of interpretative statements.

Nonetheless, especially in the intermediate phase of its case law, in several cases the CJEU set more stringent limits to the procedural autonomy which the Member States benefit from in introducing limitation periods (see Arnulf 1997). In this perspective, the most debated case is the one decided with the *Emmott* judgment,<sup>78</sup> where the CJEU went so far as to say that, although abstractly reasonable in its duration (three months), the time limit for the action provided for by national law was a violation of the principle of effectiveness in the access to judicial protection, as the right holder had been induced by the public administration to postpone the exercise of that action reasonably relying on the *bona fide* conduct of the same administration. In its ruling, the CJEU boldly stated that where an individual starts proceedings against the authority of a Member State with the aim to enforce the rights provided for by Article 4(1) of Directive 79/7/EEC, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, which is directly applicable, Community law precludes the competent authorities of the Member State from relying on procedural rules which would have the effect of extending the proceedings so long as the Directive has not been transposed.

Subsequently, the CJEU reduced the potentially far-reaching implications of the ruling in *Emmott*, which *in abstracto* seemed to be able to imply that, every time that a Member State failed to correctly transpose a directive or otherwise failed to comply with EU law, no time limit would be enforceable against the beneficiary of the right who had the intention of invoking a legal proceeding for an action aimed at obtaining a remedy capable of protecting his or her interest (*cf.* Dougan 2004, pp. 29-32 and 47). In the subsequent case law (see already *Johnston II*<sup>79</sup>), the CJEU, in fact, meant to restrict the consequences of *Emmott* to the peculiar characteristics of the fact taken into consideration in that case, in which the administration of the Member State had basically deceived the right-holder on the fact that she could have exercised her right in absence of time limits which, however, were later objected, therefore infringing the holder's legitimate expectation.

However, after the *Emmott* judgment, although with the clarifications and qualifications subsequently introduced by the case law, it can be safely assumed that "*reasonable limitation periods may be rendered incompatible with EU law when the effective protection of EU rights is negatively affected by other factors, for example; where the date on which the period begins to run is unclear; or commences before the applicant knew or should have known of the violation; when the limitation period applies retroactively; where the operation of the time limit makes it effectively impossible to obtain a refund or to deduct VAT; or the national court has too much discretion to determining whether proceedings were brought promptly*" (Craig, De Búrca 2015, pp.

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<sup>73</sup> *Köbler*, C-224/01, EU:C:2003:513.

<sup>74</sup> *Ecotrade*, C-95/07 and 96/07, EU:C:2008:267.

<sup>75</sup> *Barth*, C-542/08, EU:C:2010:193.

<sup>76</sup> *Q-Beef*, C-89 and 96/10, EU:C:2011:555.

<sup>77</sup> *Pohl*, C-429/12, EU:C:2014:12.

<sup>78</sup> *Emmott*, C-208/90, EU:C:1991:333.

<sup>79</sup> *Johnston II*, C-410/92, EU:C:1994:401.

242-243, who respectively refer to *Bulicke*,<sup>80</sup> *Marks & Spencer*,<sup>81</sup> *Banca Antoniana Popolare Veneta*,<sup>82</sup> *EMS-Bulgaria Transport*,<sup>83</sup> and *Uniplex (UK)*<sup>84</sup>.

The time limits requirement for an effective judicial protection comes to the fore also under a different angle, that is to say not only (or simply) from the (negative) point of view of banning undue time restrictions on the holders' rights to bring an action before a national court, but rather as a fundamental (positive) right to have the case dealt with within a reasonable time by the competent judicial authority. As a matter of principle, such a fundamental positive right is expressly enshrined in Article 6(1) ECHR, insofar as it provides that, in the determination of a person's civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. As a general principle of EU law, such a right has, moreover, been reaffirmed in Article 47 of the Charter due to its strict – and positive – connection with the principle of effective judicial protection (see e.g. *Masdar (UK) v Commission*<sup>85</sup>).

The CJEU has, in a quite significant number of cases, examined the question of the length of the proceedings in actions brought against Commission decisions imposing fines for the infringement of competition law (see, inter alia, *Thyssen Stahl v Commission*<sup>86</sup>). In such a context, the CJEU has constantly and consistently held that the reasonableness of the period for delivering a judgment is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties (see e.g. *Efkon v Parliament and Council*<sup>87</sup>). The CJEU has held in that regard that the list of relevant criteria is not exhaustive and that the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in the light of each of them, where the duration of the proceedings appears justified in the light of one of them. Thus, the complexity of the case or the dilatory conduct of the applicant may be deemed to justify a duration which is prima facie too long (*Limburgse Vinyl Maatschappij and Others v Commission*<sup>88</sup>). In *Der Grüne Punkt*,<sup>89</sup> for instance, the Grand Chamber stated that the length of the proceedings before the Court of First Instance, which amounted to approximately five years and ten months, could not be justified by any of the particular circumstances of the case.

It seems safe to assume that the same rather contextual principles apply when it comes to assessing the reasonableness of the length of proceedings initiated before a national court by an individual with the view of having his or her complaints dealt with (and appropriate remedy offered) within a reasonable time limit. Thus, even in such a context, the assessment of the reasonableness of the length of the proceedings under national law has to be carried out *in concreto*, bearing in mind the particular circumstances of the case at hand.

<sup>80</sup> *Bulicke*, C-246/09, EU:C:2010:418.

<sup>81</sup> *Marks & Spencer*, C-62/00, EU:C:2002:435.

<sup>82</sup> *Banca Antoniana Popolare Veneta*, C-427/10, EU:C:2011:844.

<sup>83</sup> *EMS-Bulgaria Transport*, C-284/11, EU:C:2012:458.

<sup>84</sup> *Uniplex (UK)*, C-406/08, EU:C:2010:45.

<sup>85</sup> *Masdar (UK) v Commission*, C-47/07 P, EU:C:2008:726, paragraph 50.

<sup>86</sup> *Thyssen Stahl v Commission*, C-194/99 P, EU:C:2003:527, paragraph 154.

<sup>87</sup> *Efkon v Parliament and Council*, C-146/08 P, paragraph 54.

<sup>88</sup> *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 188.

<sup>89</sup> *Der Grüne Punkt*, C-385/07 P, EU:C:2009:456.

### ***The authority of national courts to consider EU law ex officio***

Another significant line of cases where the CJEU has deeply affected the procedural autonomy of the Member States is the one on the authority of national courts to consider EU law on their own motion, also when the national procedural rules do not allow so in principle. Most of these cases developed over disputes concerning consumer rights, the effective judicial protection of which was actually put at risk by the circumstance that the weaker party of the contractual relationship, even when he or she had availed him or herself of the defence of a lawyer, had omitted to properly invoke the specific protection granted to consumers in legal proceedings aimed at enforcing EU law (*cf.* Trstenjak, Beysen 2011; Patti 2016).

A recent example is offered by *Faber*.<sup>90</sup> The claimant had taken legal action to enforce her rights deriving from the sale of consumer goods, but had essentially omitted to qualify as a consumer, therefore preventing the national court from applying the law in her favour as stemming from Directive 1999/44/EC.<sup>91</sup> In this case, the CJEU ruled that this Directive must be interpreted as meaning that a national court before which an action has been brought relating to a contract which may be covered by that Directive has been brought, is required to determine whether the purchaser may be classified as a consumer within the meaning of that directive, even if the purchaser has not relied on that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose or may have them at its disposal simply by making a request for clarification. Article 5(3) of Directive 1999/44/EC must be interpreted as a provision of equal standing to a national rule which ranks, within the domestic legal system, as a rule of public policy and the national court must of its own motion apply any provision which transposes it into domestic law.

There are many cases (starting from *Van Schijndel and Van Veen v Stichting Pensioensfonds voor Fysiotherapeuten*<sup>92</sup>) where – especially in contexts where Union law protects the weaker party in a contractual relationship – the CJEU considered that the principle of effective judicial protection requires that the national court must apply EU laws on its own motion, also by setting aside the national procedural rule that would eventually hinder or impede it (*cf. e.g. Peterbroeck*,<sup>93</sup> *Kraaijeveld and Others*,<sup>94</sup> *Fazenda Púbrica*,<sup>95</sup> and *van der Weerd and Others*<sup>96</sup>). An important statement of principle in favour of the *ex officio* enforceability of consumer rights was made by the CJEU ever since the judgment in *Océano Grupo Editorial SA*,<sup>97</sup> where the CJEU ruled that a contract between consumer and seller or supplier has to respect the requirement of good faith and it cannot cause an imbalance in the parties' rights, "to the detriment of the consumer". Article 3 of Directive 93/13/EEC on unfair terms in consumer contracts precludes from including in a contract between consumer and seller or supplier a clause, not individually negotiated, which confers exclusive jurisdiction in the territory where the seller or supplier has his or her main place of business.<sup>98</sup> According to the CJEU, it is for

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<sup>90</sup> *Faber*, C-497/13, EU:C:2015:357.

<sup>91</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

<sup>92</sup> *Van Schijndel and Van Veen v Stichting Pensioensfonds voor Fysiotherapeuten*, C-430/93 and 431/93, EU:C:1995:441.

<sup>93</sup> *Peterbroeck*, C-312/93, EU:C:1995:437.

<sup>94</sup> *Kraaijeveld and Others*, C-72/95, EU:C:1996:404.

<sup>95</sup> *Fazenda Púbrica*, C-446/98, EU:C:2000:691.

<sup>96</sup> *van der Weerd and Others*, C-222/05 to 225/05, EU:C:2007:318.

<sup>97</sup> *Océano Grupo Editorial SA*, C-240-244/98, EU:C:2000:346.

<sup>98</sup> *Océano Grupo Editorial SA* EU:C:2000:346, paragraph 24.

the national court to interpret national norms – independently from the date the norm was adopted – in conformity with the Directive.<sup>99</sup>

#### **1.4.2. The equivalence requirement**

The other general condition which the Member States' procedural autonomy is subject to is the equivalence requirement, through which the CJEU evidently translates the general principle of non-discrimination in respect of the remedies provided for by national law to protect the rights deriving from Union law. The equivalence requirement demands that the instruments and remedies for the protection of the rights conferred to individuals by EU law must be fundamentally equivalent to the ones that the Member State accords to the rights protected by national law. Similar cases, therefore, require the guarantee of a similar protection, in the sense that the remedies made available by the legislation of the Member State must be the same or at least have equal strength and protective efficacy, both when the rights at stake derive by EU law and by national law.

The application of the principle of equivalence as the specific manifestation of the principle of non-discrimination has historically not given rise to controversies of particular importance, at least compared to the ones provoked by the application of the principle of effectiveness in a strict sense (among others, see Dougan 2011, pp. 422 et seq.). The most significant problem – in cases where such criterion is questioned – is to identify the *tertium comparationis*, i.e. to determine the situations of identity or at least of analogy exists, capable of requiring the application of the same remedies, or at least of remedies equal in nature (and effectiveness). The operational logic of the non-discriminatory judgment – requiring that similar cases are treated in a similar way – in fact demands to preliminarily determine when such similarity or analogy occurs (the so-called equivalence test).

In *Edilizia Industriale Siderurgica srl (Edis) v Ministero delle Finanze*,<sup>100</sup> in that regard the CJEU was able to clarify that the principle of equivalence, which entails that the same procedural rules shall apply for the same types of charges or dues, independently of which law is concerned – whether Communitarian or national – does not imply an obligation upon Member States to extend their most favourable rules on “*governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law*”.<sup>101</sup>

Once the equivalence of the situations to protect and, thus, the existence of comparability is determined, a difference in treatment could be accepted when it is justified in the light of the criteria usually followed by the CJEU's case law in any anti-discrimination analysis. For example, in *Levez*,<sup>102</sup> after reaffirming that the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar, the CJEU stated that, however, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought, like the main action in the present case, in the field of employment law. In order to determine whether the principle of equivalence has been complied with in the present case, the national court – which alone has direct knowledge of the procedural rules governing actions in the field of employment law – must consider both the purpose and the essential characteristics of allegedly similar domestic actions. Furthermore, whenever it fails to be determined whether a procedural rule of national law is less favourable than

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<sup>99</sup> *Océano Grupo Editorial SA* EU:C:2000:346, paragraph 29 and 32.

<sup>100</sup> *Edilizia Industriale Siderurgica srl (Edis) v Ministero delle Finanze*, C-231/96, EU:C:1998:401.

<sup>101</sup> *Edilizia Industriale Siderurgica srl (Edis) v Ministero delle Finanze* EU:C:1998:401, paragraph 36 and 37.

<sup>102</sup> *Levez*, C-326/96, EU:C:1998:577.

those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.

On those grounds, the CJEU ruled that “1. Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, there being no possibility of extending that period, where the delay in bringing a claim is attributable to the fact that the employer deliberately misrepresented to the employee the level of remuneration received by persons of the opposite sex performing like work. 2. Community law precludes the application of a rule of national law which limits an employee's entitlement to arrears of remuneration or damages for breach of the principle of equal pay to a period of two years prior to the date on which the proceedings were instituted, even when another remedy is available, if the latter is likely to entail procedural rules or other conditions which are less favourable than those applicable to similar domestic actions. It is for the national court to determine whether that is the case”.

Moreover, the CJEU is always ready to admit that, when the difference in treatment responds to an objective justification, dependent on factors that are not linked with the EU or the national nature of the remedy questioned, such difference may be considered in the light of the principle of equivalence (e.g. see *Jensen and Korn*).<sup>103</sup>

### **1.5. Legal basis for EU intervention on the national procedural autonomy of Member States**

In the final segment of the first part of our analysis regarding the legal basis in the light of which the Union is able to directly limit the procedural and remedial autonomy of Member States, it is worth addressing the provision of Article 3 of Directive 2014/54/EU. This provision is, indeed, of specific relevance for the purposes of this report, as shown in the following section, where answers provided by the FreSsco national experts on the measures adopted by Member States – in particular in relation to the protection against victimisation of workers who exercise their fundamental freedom of movement within the Union – are assessed and compared, in order to provide an overview of the involvement and engagement of collective actors with regard to the rights provided by the Directive.

Article 3 of the Directive (*Defence of rights*) reads as follows:

*“1. Member States shall ensure that after possible recourse to other competent authorities including, where they deem it to be appropriate, conciliation procedures, judicial procedures, for the enforcement of obligations under Article 45 TFEU and under Articles 1 to 10 of Regulation (EU) No 492/2011, are available to all Union workers and members of their family who consider that they have suffered or are suffering from unjustified restrictions and obstacles to their right to free movement or who consider themselves wronged by a failure to apply the principle of equal treatment to them, even after the relationship in which the restriction and obstacle or discrimination is alleged to have occurred has ended.*

*2. Member States shall ensure that associations, organisations, including the social partners, or other legal entities, which have, in accordance with the criteria laid down in their national law, practice or collective agreements, a legitimate interest in ensuring that this Directive is complied with, may engage, either on behalf of or in support of, Union workers and members of their family, with their approval, in any judicial and/or administrative procedure provided for the enforcement of the rights referred to in Article 1.*

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<sup>103</sup> *Jensen and Korn*, C-132/95, EU:C:1998:237.



*3. Paragraph 2 shall apply without prejudice to other competences and collective rights of the social partners, employees' and employers' representatives, where applicable, including the right to take action on behalf of a collective interest, under national law or practice.*

*4. Paragraph 2 shall apply without prejudice to national rules of procedure concerning representation and defence in court proceedings.*

*5. Paragraphs 1 and 2 of this Article shall apply without prejudice to national rules on time limits for enforcement of the rights referred to in Article 1. However, those national time-limits shall not render virtually impossible or excessively difficult the exercise of those rights.*

*6. Member States shall introduce in their national legal systems such measures as are necessary to protect Union workers from any adverse treatment or adverse consequence as a reaction to a complaint or proceedings aimed at enforcing compliance with the rights referred to in Article."*

Article 3(2) read in conjunction with Article 6 on the duty to provide comprehensive, easily accessible and free of charge information to Union workers and employers, represents a crucial element of the protection of Union citizens exercising their right to free movement of workers within the European Union and the members of their family, including jobseekers. The dissemination of information and an extensive involvement of collective actors, entitled with the right to either support or act on behalf of the injured person in administrative and/or judicial proceedings, are powerful tools to foster the implementation of Directive 2014/54/EU.

For the purposes of the present report, it is important to evaluate the type of constraint that Article 3 determines on the procedural and remedial competences of Member States in the transposition of the Directive in their respective national legal systems. Such provision is a measure of partial harmonisation that affects the content of the remedies that Member States, in implementing the Directive, must translate into their respective legal systems in order to allow the beneficiaries of the provisions of the Directive an effective protection of their rights before the national court. Since this harmonisation measure is only partial, it does not eliminate the wide margin of procedural autonomy that Member States benefit from in regulating the actual system of remedies necessary for this purpose; nonetheless, it reduces it. The procedural autonomy of Member States is explicitly preserved by the provision, although at the same time, it is limitedly directed towards two main substantial objectives of protection of the beneficiaries of the Directive.

A first specific objective of substantial protection refers to the powers of action that must be attributed to collective actors, including trade unions, either on behalf of or in support of Union workers and members of their family, with their approval, in any judicial and/or administrative procedure provided for the enforcement of the rights referred to in Article 1. The judicial or administrative procedures under which the intervention of these collective actors is provided continue to be regulated by national law, which, in this perspective, continues to have a wide sphere of discretion regarding the *quomodo* of such actions. Nevertheless, the national legislatures are not free in determining the *an* of such remedies, deciding whether or not to introduce these into their respective legal systems, since some form of intervention of collective actors – when it is absent – must necessarily strengthen the protection rights of workers (and their family members) who exercise the freedom of movement within the EU. In accordance with the general principle of effectiveness, the procedural autonomy of Member States is limited also in relation to the *quid* of the collective protection thus expected, since it must comply with the minimum requirement of effectiveness in order to contribute to the *effet utile* of the guarantee of the rights conferred upon individuals by the Directive. As a necessary precondition for Union workers, and their family members, to be able to enforce the rights provided for by EU law, they must be fully aware of both their fundamental right of

freedom of movement – and related rights such as the right to equal treatment – and their right to be supported and/or receive legal assistance by collective actors.

Article 3 and, especially, the legal requirement stemming from Article 3(2), read in conjunction with Article 6, titled “*Access to and dissemination of information*”, is likely to provide an effective tool for the beneficiaries of the Directive.

Article 6 of the Directive reads as follows:

*1. Member States shall ensure that the provisions adopted pursuant to this Directive and to Articles 1 to 10 of Regulation (EU) No 492/2011, are brought to the attention of the persons concerned throughout their territory, in particular Union workers and employers, by all appropriate means.*

*2. Member States shall provide, in more than one official language of the institutions of the Union, information on the rights conferred by Union law concerning the free movement of workers that is clear, free of charge, easily accessible, comprehensive and up-to-date. This information should also be easily accessible through Your Europe and EURES.*

Article 6 imposes a twofold positive duty upon Member States, which concerns not only the dissemination of information regarding Directive 2014/54/EU, but also the information about the rights conferred by Regulation (EU) No 492/2011. Therefore, according to Article 6(1), the content of both provisions transposing in the national legal systems the right to be employed and enjoy equal treatment in the territory of a Member State different from the Member State of residence, and the procedural rights conferred by the 2014 Directive has to be disseminated.

With regard to the beneficiaries of this positive duty, besides a general reference to “*persons concerned*”, the EU legislature emphasises the need to bring the national provisions, implementing the measures at stake, to the attention of two main actors: the Union worker and the employer. This obligation, read in the light of Article 3(2), implies that the employer has to be made aware of the role conferred to social partners and, more broadly, to collective actors with respect to Union workers.

The second paragraph of Article 6 referring, more broadly, to “*information on the rights conferred by Union law concerning the free movement of workers*” imposes, upon Member States, the obligation to take care of the translation of this information, which has to be provided in at least two official languages of the EU. This information has to fulfill certain substantial and paramount criteria: they have to be “*clear, free of charge, easily accessible, comprehensive and up-to-date*”.

However, it is legitimate to wonder to what extent information could be considered clear for the Union worker, or his or her family members, speaking one of the official languages in which the information has not been translated. In this respect, the intervention of “*associations, organisations, including the social partners, or other legal entities*”, which are likely to have the necessary means at their disposal to translate and spread the information about the rights conferred by EU law, becomes crucial both for enforcing the right of Union workers to be informed and for initiating an administrative and/or legal proceeding. In fact, the linguistic gap risks to represent the first and overwhelming obstacle to the exercise of procedural rights.

As to the *quomodo* of this twofold positive duty, the Directive seems to leave a wide discretion to the Member States, in particular with regard to the national provisions implementing both the Directive and the Regulation, which have to be disseminated “*by all appropriate means*”. However, less discretion is left when it comes to the information concerning Union workers’ rights. Indeed, beyond the channels adopted by each State, the information on the rights conferred by EU law have to be accessible “*also*” through two EU sites designed to support European job mobility, i.e. *Your Europe and EURES*.

The same observation can be made with reference to the other specific measure provided for by the Directive, *i.e.* the measure of protection against the victimisation of migrant workers, who exercise their rights according to the Directive. In that case also, the procedural forms for the actual implementation of that important aspect of effective judicial protection of the recipients of the Directive is left to national legislatures, in respect of their procedural autonomy. However, some form of appropriate and effective protection against victimisation, whether it derives from the application of general rules or is drawn up as a specific remedy, must be provided by the national legislature in order to attain the correct transposition of the Directive.

### **1.5.1. Involvement of NGOs and social partners in addressing victimisation**

Overall, NGOs and social partners appear to be relatively little involved in addressing victimisation of EU workers. Indeed, in most cases associations and organisations are broadly addressing discrimination and victimisation, without a focus on workers attempting to enforce their rights under the freedom of movement. In some countries, any involvement of social partners and NGOs in addressing victimisation against EU workers has explicitly been denied. This concerns Italy, Lithuania, Luxemburg, Sweden and Latvia, where it is emphasised that the situation may be due to a general weak role of trade unions; Liechtenstein, where the focus of trade unions is more on posted workers; and Romania, where NGOs seem active in addressing discrimination, but not victimisation. Also in Poland, social partners and NGOs are not involved in addressing victimisation. Moreover, it is underlined that *"the phenomenon of victimisation of employees is not a subject to a public debate"*. In the Czech Republic, *"there are NGOs involved in addressing victimisation of victims of crimes"*, in addition, *"social partners or NGOs are not involved in addressing victimisation of migrant workers."* In Slovenia, victimisation is not part of the social dialogue at all. In Spain, *"social partners and NGOs are involved in addressing secondary victimisation regarding what they consider the more vulnerable population, i.e. victims of gender-based violence, human trafficking, third country nationals, minors"*. In France, *"victimisation remains ancillary, among Union and NGOs' actions to tackle discriminations. In addition, discriminations on the ground of nationality are not the major focus for Unions these days"*.

As to those countries where NGOs and social partners are apparently more involved in addressing victimisation, it can be observed that this engagement takes various forms and it rarely involves specifically EU workers' victimisation. For instance, in Denmark trade unions are addressing victimisation when it relates to a *"collective treatment"*. In Malta and Iceland, victimisation is discussed in collective bargaining and often addressed by collective agreements. While in a number of other Member States, NGOs and trade unions actively advertise on protection against victimisation, through leaflets and/or websites on discrimination that also consider the specific offense of victimisation (BE, FI). In Greece, social partners' initiatives, mostly coming from the Greek General Confederation of Labour (GSEE), mainly consist in putting political pressure. Furthermore, several small or medium-sized NGOs generally targeting victimisation can be found.

In Malta, Norway, the United Kingdom, and Croatia NGOs and/or trade unions assist and support victimised workers and offer their advice. For instance, in the United Kingdom the Trade Union Congress is involved in providing both general and individual advice, through specific unions. Similarly UK NGOs, such as the Citizens Advice, advise on discrimination and victimisation.

As far as Portugal is concerned, *"social partners/NGOs are involved in addressing victimisation"*. In Germany, the General Act on Equal Treatment requires the involvement of social partners (especially where there is a collective agreement in place) and NGOs in addressing discrimination and victimisation. In Ireland, victimisation is addressed by some specific organisations, but *"not much in case of EU workers"*.

Human rights institutes are active in Iceland and the Netherlands. The Icelandic Human Rights Centre (ICEHR), together with the Icelandic Confederation of Labour, has actively promoted equal rights and addressed victimisation. According to the 2015 country report on non-discrimination, in 2008/2009, the Netherlands Institute for Human Rights conducted a study on the issue of victimisation, which highlighted how sensitive the issue is and how much the fear of victimisation influences the choice not to file complaints to end discrimination. Indeed, the report, on the grounds of previous and more specific studies, emphasised that complaints against discrimination often had serious negative consequences and a formal prohibition of victimisation is not sufficient to tackle the phenomenon. Institutions and confidential procedures should be put in place to assist the worker suffering victimisation, especially in collecting the evidence needed to demonstrate retaliation.<sup>104</sup>

### **1.5.2. Trade union and NGO substitution in judicial and administrative proceedings**

Beyond the various ways in which trade unions and NGOs can address victimisation in their daily work, associations, organisations, including social partners or other legal entities, can engage in judicial and/or administrative procedure on behalf or in support of EU workers and their family members in the event of victimisation.

Thus, social partners can represent workers in administrative and/or judicial proceedings (BE, BG, DE, ES, HR, HU, IS, LT, LU, MT, PL, PT, SE, SK, UK and CY). In Hungary, trade unions can only represent workers in administrative proceedings. As far as Poland is concerned, social partners can participate in both administrative and judicial proceedings, and the *Code of Administrative Procedure (Kodeks postępowania administracyjnego)* states that social organisations can be parties of an administrative procedure, as well as initiate it.

In Belgium, a statute of 30 July 2010 provides for *“interest groups”* to participate in administrative and judicial proceedings. Moreover, all of the Regional statutes specify that this right applies to trade unions. In particular, the Decree of the Walloon Region of 6 November 2008, lists among the actors authorised *“trade unions, organisations representing employers, and organisations representing self-employed workers”*, while the Decree of 12 December 2008 of the French-speaking Community includes trade unions *“provided their statutory purposes are jeopardised”* and the Decree of 19 March 2012 of the German-speaking Community includes trade unions and organisations representing employers.

In Iceland, social partners can act on behalf of workers both in actions before the Monitoring Committee on Freedom of Employment and Residence of Workers within the EEA, and the Labour Court. While in actions addressed to the general district courts *“the worker must be a party to the case if he or she claims remedies but workers’ unions often engage attorneys to represent workers”*. In administrative courts, unions can take action on behalf of workers.

Under Maltese law, any organisation, including social partners or other legal entities which have a legitimate interest in ensuring that the provisions of the regulations are complied with, can either engage directly, on behalf, or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure. Similarly, in Cyprus, under both the norms implementing Equal Treatment Directives, and, more specifically, according to Section 14 on Representation by Organisations, *“employees’ organisations or other organisations or legal persons which have a legitimate interest in*

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<sup>104</sup> The European network of legal experts in gender equality and non-discrimination, reporter Rikki Holtmaat, *‘Non-discrimination: Country report The Netherlands’*, Reporting period 1 January 2014 - 31 December 2014, p. 88.

ensuring that the provisions of the Law are complied with, may exercise, upon the approval of the plaintiff, procedural rights on behalf or in support of the plaintiff.

In Portugal, *"according to Article 5 of the Labour Procedure Code, trade unions can engage in judicial and/or administrative procedures on behalf or in support of workers and members of their families in general in the event of victimisation and, therefore, also of Union workers"*. In Spain, *"a trade union can bring an action as plaintiff (demandante directo), on behalf of a worker (representación) or in support of a Union worker (coadyuvante)"*, provided they are authorised.

The collective element is extremely important in Luxemburg and Croatia. In Luxemburg, *"trade unions, which are nationally representative or representative in a very important sector of the economy may bring complaints before any judicial or administrative court regarding the rights of the victim of the discrimination under the condition that discrimination damaged direct or indirect collective interests, even if the trade-union does not justify a material or moral interest"*. Indeed, if the offence has been committed against a single person the association can substitute to the victim only if he or she declares explicitly in writing that he or she does not object. In Croatia, the organisation can bring a claim for the protection of rights of a group or class of persons, *"unidentified by name"*. *"The plaintiff has to have a legitimate interest in the protection of the rights of the members of this group, which means that the association or organization initiating the proceedings needs to prove that one of its goals is either the protection of the rights and interests of the group in question or that, within the scope of its activities, it is generally engaged with anti-discrimination, including the protection of the right of the group in question to equal treatment"*.

In a number of countries (DE, LT, SI, SK and UK), it is specified that trade unions can only represent their members. For instance, in the German legal system *"according to § 11 paragraph 2 No 3, 4 and 5 Arbeitsgerichtsgesetz (ArbGG; code of procedure of labour courts), certain associations of employees, trade unions, associations of employers as well as their umbrella organisations as well as comparable organisations are entitled to represent their members before labour courts and thus may start court proceedings with the consent of the claimant. Moreover, associations are entitled to act as counsels"*. The same applies to administrative litigations (before the Federal Administrative Court).

In two of the countries considered, rather than a proper substitution, the plaintiff may be joined in the proceeding by an organisation, institution, association or other – therefore also a trade union – upon acceptance of the court receiving the action (as in Croatia, under the Anti-Discrimination Act), or he or she can delegate a trade union barrister (as it is the case in Slovenia). In Luxembourg, according to the law transposing Directive 2006/54 on equal treatment of women and men in matters of employment and occupation, trade unions may also, but not only, intervene in pending proceedings, if the solution of the case may present a collective interest for its members, except if the person who initiated the legal action notifies his or her explicit disagreement in writing.

In Austria, Italy, Liechtenstein, France, the Netherlands and Switzerland trade unions are not allowed by law to initiate and take part in a proceeding on behalf of workers in cases of victimisation, not even if the workers are members of the Union. For instance, in Italy *"according to a well-established tradition, the Italian judicial system is based on the general principle of individual locus standi in judicial disputes, including labour law disputes: unions cannot go to the court on behalf of their members"*. *"As regards EU migrant workers, such general 'individualistic' judicial tradition implies that no role is recognised upon association, unions, and other organisations."* Interestingly, in France *"the Labour Code makes it possible for associations or unions to engage judicial actions on behalf of victims of discriminations. But the law does not allow them to do the same in cases of victimisation"*.

In the Netherlands, trade unions can only give legal advice, while in Austria, “*there are general rules under the ASGG (Arbeits- und Sozialgerichtsgesetz – Labour and Social Court Act) stipulating that trade unions (and other social partners, which are recognised to be representative and, thus, are entitled to negotiate and conclude collective agreements with their respective opponents) as well as ‘Betriebsräte’ (workers’ legal representatives at company level) are entitled to enter declaratory actions as soon as they can prove that a legal question is raised of which at least three workers may be concerned*”.

With particular regard to NGOs, in Latvia, where nothing is stated about trade unions, NGOs can represent the interest of individuals before national courts. In Luxemburg, following the transposition of Directive 2006/54/EC national non-profit associations, “*whose mission in its statutes is to combat discrimination between women and men, may bring complaints before any judicial or administrative court regarding the rights of the victim of discrimination, unless the offence is strictly persona, under the following conditions:*

- *it must have legal personality for at least one year by the time of the complaint,*
- *it must have been approved by the Ministry of Justice,*
- *discrimination must have damaged direct or indirect collective interests, even if the association does not justify a material or moral interest. ”*

The Polish civil procedure only allows NGOs whose statutory activities are not about conducting a business, to participate, in cases referred to in the Civil Code procedure, in a court proceeding to protect the rights of citizens. In Slovenia, a discriminated person can authorise someone who has passed the bar exam and is working for the Counsel or an NGO, dealing with discrimination and protection of human rights, to represent him or herself in the proceedings. Moreover, the Counsel or a representative of an NGO can only provide support during the proceedings. In Slovakia, the collective element is essential for the NGO to be authorised to bring a claim directly, otherwise the claimant can always be represented by the NGO. In Switzerland and Liechtenstein, NGOs can only be part of judicial proceedings in cases of gender discrimination.

### **1.5.3. Further channels to grant equal treatment**

Other bodies, beyond social partners and NGOs, in particular independent bodies created to combat discriminations, are allowed to bring a claim in the interest of an EU worker, under administrative or civil law, or are anyway engaged in tackling victimisation (or more broadly discrimination).

In France, an independent body, named *Défenseur Des Droits*, is charged “*to combat discriminations, direct or indirect, which are prohibited by the law or an international convention that France ratified and to promote equality*” and it is allowed to take actions (also in courts) to fight victimisation, either spontaneously or when a victim requests its intervention. In Germany, “*the Federal Anti-Discrimination Agency (§§ 25 et seq. Allgemeines Gleichbehandlungsgesetz) may act in cases of discrimination on the grounds mentioned in the Anti-discrimination Act*”.

In the Netherlands, the Institute for Human Rights (*College rechten van de mens*) has partially a different function: it “*explains, monitors and protects human rights, rights embedded in national policies and legislation promotes respect for human rights (including equal treatment) in practice, and increases the awareness of human rights in the Netherlands*”. Therefore, an EU worker who has been discriminated against or victimised can lodge a complaint with the Institute for Human Rights.

In Poland, the Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*) is both authorised to initiate proceedings in civil cases and request information about the status of the case conducted by courts, as well as the prosecutor's office and other prosecution

authorities. Moreover, *“it can request court files and public prosecutor files, as well as files from other prosecution authorities for inspection in the Commissioner's Office after the end of the proceedings and a decision”*, and take part in any pending case. In Slovenia, it is the Counsel for equal treatment that can *ex officio* initiate a procedure, if he or she is informed about the existence of a case of discrimination by, *inter alia*, an anonymous report, report of a third person.

In Finland, both the Non-Discrimination Ombudsman and *“community fostering equality”* may bring a claim before the National Non-Discrimination and Equality Tribunal with the consent of the injured party. Likewise in Latvia and Croatia, the Ombudsman may represent a victim of discrimination in civil proceedings.

In Belgium, the body allowed to engage in a proceeding on discrimination is an independent public institution, the Inter-federal Centre for Equal Opportunities (renamed Unia), while, in Ireland it is up to the Human Rights and Equality Commission, which can refer to the Workplace Relations Commission.

In Italy, Legislative decrees No 215 and 216 of 2003 (implementing the “Race” Directive 2000/43/EC and the “Framework” Equality Directive 2000/78/EC) allow certain associations, included in a specific list approved by the Ministry of Labour, *“to initiate judicial proceedings on behalf of workers; either directly, in case of collective discriminations, or upon a specific individual mandate in case of individual disputes”*. However, *“special rules and mechanisms do not apply to the discrimination of EU migrant workers, since they are only provided for different grounds of discriminations”*.

## **2. A TAXONOMY OF NATIONAL PROCEDURAL RULES REVIEWED BY THE CJEU**

This part of the report identifies and classifies provisions of national laws, of which the conformity with effective judicial protection was reviewed by the CJEU. We excluded cases which were specific to a particular field of law, when they appeared irrelevant to the protection of EU migrant workers' rights, but included them when the solution could be transposed to other fields, and thus possibly applied, *mutatis mutandis*, to cases concerning free movement of workers.

The following taxonomy distinguishes cases that passed the CJEU's scrutiny (2.1) from those which were considered inconsistent with the principle of effective judicial protection (2.2). Within each of these two larger categories of measures, national rules are grouped according to the particular aspect of the principle of effective judicial protection which they concern: access to a court or tribunal (1), scope of the judicial review (2), right of the defence (3), time limits (4) and remedies (5).

### ***2.1. National procedural rules considered compatible with the principle of effective judicial protection***

#### **2.1.1. Access to a court or tribunal**

- In the implementation of Directive 72/166/EEC<sup>105</sup> procedures set up in the UK for dealing with an application for compensation submitted by victims of damage or injury caused by an unidentified vehicle is compatible with the principle of effectiveness when, *although the competent body to deal with cases is not a court, it is nevertheless required to determine the amount of the compensation under the same conditions as those under which a court would*, pursuant to the provisions in force in the UK. In addition, the victim may, first, apply for re-examination of the decision taken. Second, the victim has a right of appeal to an arbitrator, who is appointed under conditions which ensure that he or she is independent and that he or she makes his or her award after making his or her own assessment of the information in the file. The arbitrator may require additional investigations, on which the victim is entitled to submit his or her comments. Third, under the general rules on arbitration laid down by the Arbitration Acts, the victim may, in certain cases, appeal against the award to the High Court of Justice. That right of appeal is automatically available to a victim who alleges a serious irregularity affecting the arbitration. That right is also available to the victim, albeit subject to leave being granted by the High Court, if he or she alleges infringement of a rule of law, which may include the question whether there was any evidence to support any particular conclusion of the arbitrator or whether any particular conclusion was one to which no arbitrator could reasonably have come upon the evidence considered. Fourth, a victim may, subject to obtaining leave from the competent court, subsequently appeal to the Court of Appeal and then to the House of Lords. The procedural arrangements laid down by national law are justified by objectives of rapidity and cost limitation for the victim, and does not render it practically impossible or excessively difficult to exercise the right to compensation conferred on victims of damage or injury caused by unidentified or insufficiently insured vehicles, and thus comply with the principle of effectiveness, as long as it guarantees that, at all stages, victims are made aware of any matter that might be used against them and have an opportunity to submit their comments thereon.<sup>106</sup>

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<sup>105</sup> Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability .

<sup>106</sup> *Evans* EU:C:2003:650.



- The Irish legislation respects the right to an effective remedy when it allows an applicant for asylum either to lodge an *appeal against the decision* of the determining authority before a court or tribunal such as the Refugee Appeals Tribunal, and to bring an appeal against the decision of that tribunal before a higher court such as the High Court, or to contest the validity of that determining authority's decision before the High Court, the judgments of which may be the subject of an appeal to the Supreme Court.<sup>107</sup>
- The principles of equivalence and effectiveness do not preclude Spanish procedural rules under which actions for an injunction by consumer protection associations must be brought before the courts where the defendant is established or has its address and whereby *no appeal lies against a decision declining territorial jurisdiction* handed down by a court of first instance.<sup>108</sup>
- The Austrian legislation, which applies *different procedural rules to different types of proceedings such as civil proceedings, on the one hand, and administrative proceedings*, on the other does not violate the principle of equivalence.<sup>109</sup>
- The principle of equivalence does not preclude a situation where there is no possibility for Romanian courts to *revise a final decision of a court or tribunal made in the course of civil proceedings*, when that decision is found to be incompatible with an interpretation of EU law upheld by the CJEU after the date on which that decision became final, even though such a possibility does exist as regards final decisions of a court or tribunal incompatible with EU law made in the course of *administrative proceedings*.<sup>110</sup>
- The provisions of the Convention defining the Statute of the European Schools and of the Conditions of Employment for Part-time Teachers, according to which the Complaints Board has exclusive jurisdiction to rule on a dispute, does not adversely affect the right of the interested parties to effective judicial protection. So far as the Complaints Board of the European Schools is concerned, it satisfies all of the *requirements which must be met in order for a body to be recognised as 'a court or tribunal'* for the purposes of Article 267 TFEU, in particular that it is established by law, is permanent, its jurisdiction is compulsory, its procedure is *inter partes*, it applies rules of law and it is independent, with the exception of the requirement that it be a court or tribunal of one of the Member States.<sup>111</sup>

### ***Locus standi***

- Belgian law ensures effective judicial protection of the collective information and consultation rights enshrined in Directive 98/59/EC. It provides a procedure whereby *workers' representatives* can ensure compliance by the employer with all the information and consultation obligations set out in the Directive (on collective redundancies) and also grants an individual right of action to workers, subject to limits and specific conditions.<sup>112</sup>
- Slovakian legislation, which does not allow a *consumer protection association* to intervene in proceedings for enforcement of a judicial decision or a final arbitration award, does not breach the principle of effectiveness.<sup>113</sup>

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<sup>107</sup> *D. and A.*, C-175/11, EU:C:2013:45.

<sup>108</sup> *Asociación de Consumidores Independientes de Castilla y León*, C-413/12, EU:C:2013:800

<sup>109</sup> *ÖBB Personenverkehr*, C-509/11, EU:C:2013:613.

<sup>110</sup> *Tarsia*, C-69/14, EU:C:2015:662.

<sup>111</sup> *Oberto and O'Leary*, C-464/13 and 465/13 EU:C:2015:163.

<sup>112</sup> *Mono Car Styling*, C-12/08, EU:C:2009:466.

<sup>113</sup> *Pohotovosť* EU:C:2014:101.

### ***Specific out-of-court procedures***

- The principles of equivalence and effectiveness or the principle of effective judicial protection do not preclude the Italian legislation which imposes, in respect of actions relating to electronic communications services between end users and providers of those services, concerning the rights conferred by the Universal Service Directive (Directive 2002/22/EC), *prior implementation of an out-of-court settlement procedure*, provided that this procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.<sup>114</sup>

- The mandatory preliminary application of a Portuguese *administrative procedure*, in the event that the revenue authorities suspect the existence of an abusive practice, when the special procedure, subject to a limitation period of three years, is characterised by a preliminary hearing within 30 days for the taxpayer concerned, the submission by the taxpayer of all the evidence that he or she considers to be relevant and the obtaining of an authorisation from the head of the department, or the official to whom he or she has delegated the relevant power, responsible for the application of anti-abuse rules. Furthermore, in accordance with that provision, reasons must be given for the decision adopted. It follows from those elements that the national procedure in question is favourable to the person suspected of having committed an abuse of rights, inasmuch as it seeks to guarantee the observance of certain fundamental rights, in particular the right to be heard.<sup>115</sup>

### ***Levels of jurisdiction***

- Concerning requests of a refugee status (according to Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status), Luxemburg law complies with the principle of effective judicial protection when it affords an individual *a right of access to a court but not to a number of levels of jurisdiction*, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application.<sup>116</sup>

- Spain does not violate the principle of effective judicial protection if its legislation does not afford a right of access to a second level of jurisdiction but only to a court or tribunal.<sup>117</sup>

### ***Centralisation of actions before one single court***

- The Bulgarian jurisdiction rule, which results in concentrating before a single court the disputes relating to decisions of a national authority responsible for the payment of agricultural aid under the common agricultural policy, does not, in principle, infringe the principle of effectiveness.<sup>118</sup>

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<sup>114</sup> *Iacono*, 2010, C-317/08, C-318/08, C-319/08 and C-320/08, EU:C:2008:510.

<sup>115</sup> *Surgicare*, C-662/13, EU:C:2015:89.

<sup>116</sup> *Samba Diouf*, C-69/10, EU:C:2011:524.

<sup>117</sup> *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099.

<sup>118</sup> *AgroKonsulting-04*, C-93/12, EU:C:2013:432.

### **Means of redress**

- The UK can *exclude claims to obtain State liability* for violating EU law ("Francovich claims") where *alternative means to redress exist* but the claimant failed to use them or to do so within the applicable time limits.<sup>119</sup>

### **Costs arising from legal proceedings**

- Austrian regulations which do not permit the successful party in proceedings before national courts to recover its proportion of the *costs occasioned by a preliminary reference* do not render the exercise of EU law rights virtually impossible or excessively difficult.<sup>120</sup>

- Within the context of proceedings for the enforcement of a judicial decision relating to the repayment of a tax levied in breach of EU law, provisions of the Romanian Code of Fiscal Procedure, which provide for *exemptions from the payment of court stamping fees and the lodging of a security applicable to the requests made by the public authorities*, are compatible with EU law, whereas applications which are submitted by natural or legal persons governed by private law are not, in principle, exempted.<sup>121</sup> This solution would only be called in question if access to the court was hindered disproportionately because of the obligation to pay court costs that are too high, in relation either to the procedure in which the person obtained the judicial decision recognising his or her right to repayment of a tax levied in breach of EU law or to the enforcement proceedings relating to that decision, or because that person was improperly denied legal aid. The Romanian legislation is not considered to place those persons in a clearly less advantageous position compared with their opponents and therefore does not call into question the fairness of that procedure.

### **Court fees**

- Court fees to be paid in Italy for bringing an action in administrative proceedings relating to public procurement (which do not exceed 2% of the value of the contract concerned) are not liable to render practically impossible or excessively difficult the exercise of rights conferred by EU public procurement law.

Similarly, the principle of effectiveness is respected when the introduction of procedural steps which are independent of the application initiating proceedings and which are designed to considerably extend the subject matter of the dispute gives rise to the payment of additional fees.

The levying of multiple and cumulative court fees within the same administrative judicial proceedings is justified as it contributes to the proper functioning of the judicial system, since it amounts to a source of financing for the judicial activity of the Member States and discourages the submission of claims which are manifestly unfounded or which seek only to delay the proceedings.<sup>122</sup>

- Costs arising from legal proceedings can be challenged in the light of the right to an effective remedy guaranteed by Article 47 of the Charter only where those costs

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<sup>119</sup> *Factortame*, C-46/93 and 48/93, EU:C:1996:79.

<sup>120</sup> *Clean Car autoservice*, C-472/99, EU:C:2001:663.

<sup>121</sup> *Toma*, C-205/15, EU:C:2016:499.

<sup>122</sup> *Orizzonte Salute*, C-61/14, EU:C:2015:655.

represent an insurmountable obstacle or where they make it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order. In a national system, in which VAT applied to lawyers' services reached 21%, the amount of VAT does not, by far, constitute the largest part of the costs of legal proceedings. The CJEU cannot hold that the charging of VAT on the services supplied by lawyers creates, by itself, an insurmountable obstacle to access to justice or that it makes it in practice impossible or excessively difficult to exercise the rights conferred by the EU legal order.<sup>123</sup>

### **2.1.2. Scope of the judicial review**

- Rules concerning disputes between private parties, according to which Dutch courts have a duty of passivity, and cannot consider new arguments, not considered in the first instance, of their own motion are not incompatible with the right to effective judicial protection.<sup>124</sup>

- In actions for judicial review of national decisions revoking marketing authorisations for medicinal products, British courts do not have to substitute their own assessment of the facts and scientific evidence for the assessment of the competent authority: when *complex assessments* are at stake, judicial review can be limited to avoiding manifest error, misuse of powers or the authority clearly exceeding the limits to its discretion.<sup>125</sup>

- Austrian law, under which claims on the basis of a violation of Equal Treatment Directive 2006/54/EC brought to an administrative authority can be contested before an administrative court enjoying limited competence to review facts, thus failing to provide a fair hearing before an independent tribunal, is not violating the obligation to ensure judicial protection, if the claimant can bring his or her action for compensation against the state before civil courts, which exercise full jurisdiction. This is sufficient to ensure judicial protection.<sup>126</sup>

- The exercise of the rights conferred by EU law is not made impossible in practice or excessively difficult merely by the fact that a procedure for the judicial review of decisions of the German administrative authorities does not allow complete review of those decisions. However, any national judicial review procedure must enable the court or tribunal hearing an application for annulment of a decision to effectively apply the relevant principles and rules of EU law when reviewing the lawfulness of the decision.<sup>127</sup>

- Judicial review that is limited as regards the assessment of certain questions of fact is compatible with EU law, on condition that it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision.<sup>128</sup>

### **2.1.3. Right of the defence**

- Concerning financial costs incurred in connection with legal proceedings, the principle of equality of arms does not entail the obligation for Member states to put the parties on an equal footing.<sup>129</sup> Thus, charging VAT at the rate of 21% on the services supplied by lawyers, and the fact that imposing that tax and exercising the right of deduction may

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<sup>123</sup> *Ordre des barreaux francophones et germanophones*, C-543/14, EU:C:2016:605.

<sup>124</sup> *Van Schijndel and Van Veen v Stichting Pensioensfonds voor Fysiotherapeuten*, C-430/93 and 431/93, EU:C:1995:441.

<sup>125</sup> *Upjohn*, C-120/97, EU:C:1999:14.

<sup>126</sup> *Schneider*, C-380/01, EU:C:2004:73.

<sup>127</sup> *HLH Warenvertrieb and Orthica*, C-211/03, C-299/03 and C-316/03 to C-318/03, EU:C:2005:370.

<sup>128</sup> *East Sussex County council*, C-71/14, EU:C:2015:656.

<sup>129</sup> *Ordre des barreaux francophone et germanophone*, C-305/05, EU:C:2007:383.

confer, in respect of the same amount of fees, a financial benefit on the individual who has the status of taxable person as compared with a non-taxable individual, is not considered a pecuniary advantage likely to affect the procedural balance of the parties.

- In order to avoid situations of denial of justice, the Czech law can enable proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seized of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.<sup>130</sup>

- Although the right of the accused to appear in person at his or her trial is an essential component of the right to a fair trial, that right is not absolute. A judgment given in default of appearance, such as that given by the High Court of Justice in the UK, is acceptable if it cannot be obtained until, first, the applicant serves the claim form and the particulars of claim, containing a detailed description of the pleas in law and the material facts, to which the judgment itself impliedly refers, and, second, the defendant, although he or she has been informed of the legal proceedings instituted against him or her, does not appear or does not express his or her intention to submit a defence within the period prescribed. In that procedural system, the adoption of such a default judgment is intended to ensure the swift, effective and cost-effective handling of proceedings brought for the recovery of uncontested claims, for the sound administration of justice. Such an objective is likely, in itself, to justify a restriction of the right to a fair trial in so far as that right requires that judgments be reasoned.<sup>131</sup>

- The right to effective judicial protection is not violated by the Austrian legislation which provides that, where the statutory nine-month period for disclosing accounting documents is exceeded, a minimum periodic penalty of € 700 is to be imposed immediately on the capital company whose branch is located in the Member State concerned, without prior notice and without the company first being given an opportunity to state its views on the alleged breach of the disclosure obligation.<sup>132</sup>

- The Spanish legislation according to which the accused may waive the right to appear in person at his or her trial of his or her own free will, either expressly or tacitly, is not violating EU law, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, the right to a fair trial is not violated, even where the accused did not appear in person, if he or she was informed of the date and place of the trial or was defended by a legal counsellor to whom he or she had given a mandate to do so.<sup>133</sup>

### ***The right to be heard***

- Regulation (EC) No 44/2001 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), interpreted in the light of Article 47 of the Charter does not preclude procedures against an absent defendant, in which the latter is deprived of the opportunity to defend him or herself effectively, when the defendant has the opportunity to ensure respect for the rights of the defence by opposing recognition of the judgment issued against him or her.<sup>134</sup>

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<sup>130</sup> *Hypotecni Banka*, C-327/10, EU:C:2011:745.

<sup>131</sup> *Trade Agency*, C-619/10, EU:C:2012:531.

<sup>132</sup> *Texdata Software*, C-418/11, EU:C:2013:588.

<sup>133</sup> *Melloni*, C-399/11, EU:C:2013:107.

<sup>134</sup> *Hypotecni Banka*, C-327/10, EU:C:2011:745; *G*, C-292/10, EU:C:2012:142.

- The rights of the defence, and, in particular, the right to be heard during an administrative procedure adopting a *decision to extend a detention measure* only requires a review by Dutch courts which consists in ascertaining, in the light of all of the factual and legal circumstances of each case, whether the infringement at issue actually deprived the party of the *possibility of arguing his or her defence better*, to the extent that the outcome of that administrative procedure could have been different.<sup>135</sup>

- The right to be heard *prior to the adoption of a return decision* does not imply that the authority concerned is required to warn an illegally staying third-country national, prior to the interview organised with a view to that adoption, that it is contemplating adopting a return decision against him or her, to disclose to him or her the evidence on which that authority intends to rely to justify that decision, or again to allow him or her a period for reflection before admitting his or her observations. Rather, this right should be interpreted as *meaning that this third-country national must have the opportunity to effectively submit his or her point of view* on the subject of the illegality of his or her stay and reasons which might, under national law, justify that authority refraining from adopting a return decision.

#### 2.1.4. Time limits

- German law, according to which action for the recovery of unlawfully levied charges must be done within a one-month or 30-day limit, ensures the application of the fundamental principle of legal certainty, protecting taxpayers and the administration, and, therefore, cannot be considered incompatible with EU law.<sup>136</sup>

- French law that limits to three years actions to reclaim import duties, without taking into account cases of "force majeure" is considered reasonable and a legitimate legislative choice.<sup>137</sup>

- The Danish rule imposing a five-year limitation period for recovering charges levied contrary to a directive is considered a reasonable limitation period, compatible with the principle of effectiveness.<sup>138</sup>

- British law providing a six-month time limit, from the end of the employment contract, for a woman to challenge a discriminatory refusal of membership of an occupational pension scheme is not in itself a violation of EU law.<sup>139</sup> Only because the claimants were employed on a series of short-term contracts, and the six-month limit was running from the end of each contract, was the principle of effectiveness violated and the court required the limitation period to run from the end of the claimants' overall employment relationship.

- EU law does not preclude the German rule, which requires civil servants to take steps, within relatively narrow time limits – before the end of the financial year – to assert a claim to financial payments, in relation to the principle of non-discrimination based on age.<sup>140</sup>

- In the application of asylum law (Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status), Luxembourg

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<sup>135</sup> *G. and R.*, C-383/13 PPU, EU:C:2013:533.

<sup>136</sup> *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188 and *Comet BV v Produktschap voor Siergewassen* EU:C:1976:191.

<sup>137</sup> *Bessin and Salson*, C-386/87, EU:C:1989:408.

<sup>138</sup> *Fantask*, C-188/95, EU:C:1997:580; *Haahr Petroleum*, C-90/94, EU:C:1997:368; *Texaco and Olieelskabet Danmark*, C-114/95 and 115/95, EU:C:1997:371.

<sup>139</sup> *Preston and Others*, C-78/98, EU:C:2000:247.

<sup>140</sup> *Specht and Others*, C-501/12 to C-506/12, C-540/12 and C-541/12, EU:C:2014:2005.

can impose a time limit for bringing an action of fifteen days for an accelerated procedure, whilst it is one month for a decision adopted under the ordinary procedure. Such time limit is not considered, generally, to be insufficient in practical terms to prepare and bring an effective action and can be considered reasonable and proportionate in relation to the rights and interests involved. However, national courts have to determine whether that time limit is, in a given situation, insufficient in view of the circumstances.<sup>141</sup>

### **Reduction of the existing time limit**

- Although Member States cannot alter their national rules on limitation periods so as to specifically limit the opportunity for individuals to exercise a particular category of EU law rights, the requirements of effective judicial protection are not infringed, where a Member State revises the limitation periods applicable to a certain category of claim in the light of a relevant ruling from the CJEU, provided that: (a) the new procedural rules do not specifically target the exercise of those EU law rights which formed the subject matter of the CJEU's previous judgment, but instead apply to entire categories of similar rights under EU/domestic law; (b) the revised limitation periods correspond to the procedural rules which apply to comparable rights under purely domestic law, in accordance with the principle of equivalence; and (c) the new procedural rules remain reasonable in the sense of the *Rewe/Comet* case law, in accordance with the principle of effectiveness.<sup>142</sup>

### **Application of different time limits**

- A claim for a restitution of subsidies wrongly demanded is not similar to a claim for recovery of taxes wrongly collected: the Italian legislation applying different limitation periods is compatible with the principle of equivalence.<sup>143</sup> The same solution was applied in a case concerning French law.<sup>144</sup>

- The principle of effectiveness is not infringed in the case of an Italian limitation period allegedly more advantageous for the tax authorities than the limitation period in force for individuals.<sup>145</sup>

- EU law does not preclude the Belgian legislation which grants an individual a longer limitation period to recover charges from an individual acting as an intermediary, to whom he or she unwarrantedly paid the charges and who paid them on behalf of that first individual for the benefit of the state, whereas, if that first individual had paid those charges directly to the state, the action of that individual would have been restricted by a shorter time limit, by way of derogation from the ordinary rules governing actions between private individuals for the recovery of sums paid but not due, on condition that the individuals acting as intermediaries may effectively bring actions against the state for sums which may have been paid on behalf of other individuals.<sup>146</sup>

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<sup>141</sup> *Samba Diouf* EU:C:2011:524.

<sup>142</sup> *Aprile*, C-228/96, EU:C:1998:544, and *Dilexport*, C-343/96, EU:C:1999:59, concerning Italian legislation reducing the limitation period from ten or five years to three years.

<sup>143</sup> *Edis*, C-231/96, EU:C:1998:401; *Spac*, C-260/96, EU:C:1998:402; *Aprile* EU:C:1998:544; *Dilexport*, C-343/96, EU:C:1999:59.

<sup>144</sup> *Roquette Frères*, C-88/99, EU:C:2000:652.

<sup>145</sup> *Ecotrader* EU:C:2008:267.

<sup>146</sup> *Q-Beef*, C-89 and 96/10, EU:C:2011:555.

### ***The legality of time limits when they affect the possibility to contest a violation of EU substantive law***

- European Union law allows a Member State to rely on a limitation period in order to resist an application for a special length-of-service increment, which, in breach of provisions of European Union law, was not granted, even if that Member State has not amended the national rules in order to render them compatible with those provisions. Austrian authorities can rely on the expiry of a reasonable limitation period unless the conduct of national authorities combined with the existence of a limitation period results in totally depriving a person of the opportunity to enforce his or her rights before the national courts.<sup>147</sup>

- EU law does not preclude a Member State from relying on the expiry of a reasonable limitation period as a defence in legal proceedings brought by an individual for the purpose of safeguarding rights conferred by a directive, even though the Member State did not transpose that directive correctly, on condition that, by its conduct, that Member State was not responsible for the delay in bringing the action. A breach of EU law does not affect the starting point of the limitation period.<sup>148</sup>

- In the case of a five-year limitation period, which began on 1 January 1998, to expire on 31 December 2002, whereas the conflict of Belgian law with EU law was established by the CJEU only after favourable national limitation periods had expired, was not considered as to totally deprive interested persons of the opportunity to enforce their rights under EU law before the national courts.<sup>149</sup>

#### **2.1.5. Remedies**

- British law requiring litigants to mitigate their own losses is not inconsistent with the right to a remedy.<sup>150</sup>

#### ***Anti-trust law***

- Compensation in case of violation of anti-trust rules can be made dependent on the participation of the claimant to the unlawful agreement.<sup>151</sup> British law can bar the provision of the usual remedy in damages to a particular claimant, on the (potentially legitimate) grounds of *in pari delicto potior est conditio defendentis*.

#### ***Anti-discrimination law***

- In order for the loss and damage sustained as a result of discrimination on grounds of sex to be the subject of genuine and effective compensation or reparation in a way which is dissuasive and proportionate, the Spanish legislation, which has chosen the financial form of compensation, must introduce in its national legal systems, in accordance with detailed arrangements which it determines, measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained, but they do not have to provide for the payment of *punitive damages*.<sup>152</sup>

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<sup>147</sup> *Barth* EU:C:2010:193.

<sup>148</sup> *Iaia and Others*, C-452/09, EU:C:2011:323.

<sup>149</sup> *Q-Beef*, C-89 and 96/10, EU:C:2011:555.

<sup>150</sup> *Brasserie du pêcheur*, C-46/93 and C-48/96, EU:C:1996:79.

<sup>151</sup> *Courage and Crehan* EU :C :2001 :465.

<sup>152</sup> *Camacho*, C-407/14, EU:C:2015:831.



### ***The limitation applying to the payment of interests***

- In case wrongly withheld social security benefits are claimed, British legislation is not prevented from not providing for the payment of interests: the opposite solution applies for compensation, which is different from restitution of wrongly withheld monies.<sup>153</sup>
- The Member States are free, in order to compensate for the loss suffered by victims as a result of the effluxion of time, to choose between awarding interests or paying compensation in the form of aggregate sums which take account of the effluxion of time.<sup>154</sup>

### ***Laws restricting the back-period in respect of which claimants may obtain compensation***

- Dutch rules limiting the scope of recoverable compensation within a given period of time apply.<sup>155</sup>
- UK law according to which no claimant could get severe disablement allowance in respect of any period more than twelve months before the claim is not considered to render impossible the exercise of the claimant's rights under Directive 79/7/EEC on equal treatment.<sup>156</sup>
- The same solution applies to British rules concerning undue agricultural levies which limit the scope of recoverable compensation within a given period of time.<sup>157</sup>
- The payment of arrears in the context of claims for equal pay can be limited unless the employer did provide the claimant with inaccurate or deliberately misleading information, such that the claimant could not ascertain whether and to what extent there is unlawful discrimination.<sup>158</sup>

## ***2.2. National procedural rules violating the principle of effective judicial protection***

### ***2.2.1. Access to a court or tribunal***

- A British statute permitting derogations from the principle of equal treatment between men and women, in relation to acts intended to safeguard national security or protect public safety, and providing that a certificate issued by national authorities constitutes conclusive evidence that the act in question complied with the terms of the derogations violates the right for victims to pursue their claims by judicial process, included in the directive on equal treatment. Individuals were deprived of the opportunity to assert their rights to equal treatment, a violation of the right to effective judicial control.<sup>159</sup>
- Redress before an administrative body without true decision-making powers is incapable of satisfying the principle of access to judicial process.<sup>160</sup> When an application

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<sup>153</sup> *ex parte Sutton* EU:C:1997:207.

<sup>154</sup> *Evans* EU:C:2003:650.

<sup>155</sup> *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging* EU:C:1993:857.

<sup>156</sup> *Johnston II* EU:C:1994:401.

<sup>157</sup> *FMC and Others*, C-212/94, EU:C:1996:40.

<sup>158</sup> *Levez* EU:C:1998:577.

<sup>159</sup> *Johnston v Chief Constable of the RUC* EU:C:1986:206.

<sup>160</sup> *Commission v Austria* EU:C:2001:642.

for inclusion of a medicinal product in the list of products covered by the national health insurance system is rejected, the Austrian legislation cannot only provide that, at the applicant's request, the decision is referred to an independent advisory board consisting of technical experts, which could then issue recommendations to the competent domestic authority (if appropriate) urging the latter to reconsider its refusal.

- The right of access to judicial procedure is violated when an authorisation is needed to provide a service, and the decision whether or not to grant it is not based on objective criteria, known in advance, to ensure that the administration is not using its discretion arbitrarily, and on a procedural system easily accessible and capable of dealing impartially with requests within a reasonable time. In addition, there must be a possibility to challenge refusals of authorisation in judicial or quasi-judicial proceedings.<sup>161</sup>

- The right to effective judicial protection includes a right for an individual to take action, even if enforcement of a regulation, under British law, is reserved to the public authority with the monopoly to impose fines for breach of quality standards.<sup>162</sup>

- Application for a full residence permit with a view to the establishment on the territory of a Member State as a self-employed person, in accordance with the Association Agreements between the Communities and, respectively, Bulgaria, Poland and Slovakia, must be based on a procedural system which is easily accessible and capable of ensuring that the persons concerned will have their applications dealt with objectively and within a reasonable time. Furthermore, refusals to grant a permit must be capable of being challenged in judicial or quasi-judicial proceedings.<sup>163</sup>

- In order to ensure effective judicial protection of the rights laid down in Directive 98/5/EC (facilitating practice of the profession of lawyer on a permanent basis in a Member State), the body called upon to hear appeals against decisions refusing registration of a lawyer, referred to in Article 3 of that Directive, must be a court or tribunal as defined by EU law.<sup>164</sup> The Directive precludes an appeal procedure in which the decision refusing registration must be challenged at first instance before a body composed exclusively of lawyers practising under the professional title of the host Member State and on appeal before a body composed for the most part of such lawyers, where the appeal before the supreme court of that Member State permits judicial review of the law alone and not the facts.

- The legislation of Bulgaria does not conform to the principle of effectiveness when an administrative procedure that has resulted in the adoption of a prohibition on leaving the territory, which has become final and has not been contested before the courts, may only be reopened – in the event that this measure is clearly contrary to EU law – in circumstances exhaustively listed in a statute, despite the fact that such a prohibition continues to produce legal effects with regard to its addressee.<sup>165</sup>

- A legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection as enshrined in Article 47 of the Charter.<sup>166</sup>

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<sup>161</sup> *Smits and Peerbooms*, C-157/99, EU:C:2001:404.

<sup>162</sup> *Munoz*, C-253/00, EU:C:2002:497.

<sup>163</sup> *Panayotova and Others*, C-327/02, EU:C:2004:718.

<sup>164</sup> *Wilson*, C-506/04, EU:C:2006:587.

<sup>165</sup> *Byankov*, C-249/11, EU:C:2012:608.

<sup>166</sup> *Schrems*, C-362/14, EU:C:2015:650, concerning US law.

### ***Limit to the principle of res judicata***

- If the applicable domestic rules of procedure provide the possibility, under certain conditions, for an Italian court to come back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law.<sup>167</sup>
- Although the CJEU has recognised the importance of the principle of *res judicata*, both in the legal order of the European Union and in national legal systems, Germany cannot rely on compliance with this principle when it limits the temporal scope of national provisions implementing a directive (concerning public participation and access to justice) in such a way that it affects administrative decisions which have become enforceable.<sup>168</sup>

### ***Costs arising from judicial proceedings***

- In environmental matters, judicial proceedings are considered prohibitively expensive for a claimant, not only on the basis of that claimant's financial situation but also if an analysis of the amount of the costs makes it appear objectively unreasonable.<sup>169</sup> The fact that the claimant has not been deterred, in practice, from asserting his or her claim cannot be considered sufficient, under British law, to establish that the proceedings are not prohibitively expensive for him or her. Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.
- The charging of multiple court fees to an individual who brings several court actions concerning the same award of a public contract or that individual having to pay additional court fees in order to be able to raise supplementary pleas concerning the same award of a public contract within ongoing judicial proceedings violates the principle of effectiveness if the subject matter of those actions is not separate or does not amount to a significant enlargement of the subject matter of the dispute that is already pending.<sup>170</sup>

### ***Right to an aid***

- The principle of effective judicial protection precludes, in principle, a German rule under which the pursuit of a claim before the courts is subject to making an advance payment in respect of costs, and a legal person does not qualify for legal aid even though it is unable to make that advance payment.<sup>171</sup>

### ***Locus standi***

- The right to effective judicial protection precludes a Greek rule interpreted as meaning that the members of a temporary association, tenderer in a public procurement procedure, are deprived of the *possibility of seeking, individually, compensation for the loss* which they suffered individually as a result of a decision adopted by an authority

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<sup>167</sup> *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067.

<sup>168</sup> *Commission v Germany*, C-137/14, EU:C:2015:683.

<sup>169</sup> *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221.

<sup>170</sup> *Orizzonte Salute*, C-61/14, EU:C:2015:655.

<sup>171</sup> *DEB* EU:C:2010:811.

other than the contracting authority, involved in that procedure in accordance with the applicable national rules, which is such as to influence the conduct of that procedure.<sup>172</sup>

- The Hungarian legislation concerning the exercise of rights of action before a court or tribunal having jurisdiction to review the lawfulness of acts of a regulatory authority, which does not make it possible to confer on an operator, whose rights, under EU law, have been infringed by a decision of that regulatory authority, *locus standi* for the purpose of bringing an action against a decision of that regulatory authority is not compatible with Article 47 CFREU.<sup>173</sup>

### **Protection against retaliation**

- British law violates the right of access to a court if a protest against a breach of the principle of equal treatment between men and women is not protected with a guarantee against retaliatory measures taken by the employer aimed at deterring actions in courts.<sup>174</sup>

- A German rule that allows the compulsory transfer by the employer of a worker to another service as a reaction to the latter requesting the benefit of a Directive (Directive 2003/88 on working time) violates the fundamental right to effective judicial protection, guaranteed by Article 47 CFREU.<sup>175</sup> Fear of a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process (and would consequently be seriously liable to jeopardise implementation of the aim pursued by the Directive).

### **State liability**

- The Italian legislation excluding state liability, in a general manner, for damage caused to individuals by an infringement of EU law attributable to a court adjudicating at last instance, because the infringement in question results from an interpretation of provisions of law or an assessment of facts or evidence carried out by that court, violates EU law. It is not possible either for Italian legislation to limit such liability solely to cases of intentional fault and serious misconduct on the part of the court, if such a limitation leads to the exclusion of the liability of the Member State concerned in other cases where a manifest infringement of the applicable law was committed.<sup>176</sup>

### **2.2.2. Scope of the judicial review**

- Contesting provisional acts must be possible if they affect the claimant's legal interests. In the field of taxation, when refundable sums are being retained as a precautionary measure (risk of tax evasion) pending the final administrative decision on the person's fiscal status, there must be effective judicial review of this measure.<sup>177</sup>

- A Dutch provision requiring judicial passivity during the course of an appeal against an arbitration award does not guarantee effectiveness, since the situation amounted to a

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<sup>172</sup> *Loutraki*, C-145/08, EU:C:2010:247.

<sup>173</sup> *E.ON Földgáz Trade*, C-510/13, EU:C:2015:189.

<sup>174</sup> *Coote v Granada Hospitality*, C-185/97, EU:C:1998:424.

<sup>175</sup> *FuB*, C-243/09, EU:C:2010:609.

<sup>176</sup> *Traghetti del Mediterraneo*, C-173/03, EU:C:2006:391.

<sup>177</sup> *Garage Molenheide*, C-286/95, 340/95 and 401/95 and C-47/96, EU:C:1997:623.

total closure of the possibility for a court to make a preliminary reference because an arbitration authority is not a court allowed to request a preliminary ruling.<sup>178</sup>

- Judicial review of the legality of the withdrawal, by an Austrian authority, of its invitation to tender for a public service contract was limited to assessing whether that decision was arbitrary. Because EU legislation aims at *strengthening review procedures* in that field, the review should extend to the compatibility of the withdrawal with substantive rules of EU law.<sup>179</sup>

- The principle of effectiveness requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the Irish legislation transposing Directive 1999/70/EC on fixed-term contracts, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine the applicant's claims arising directly from the Directive itself in respect of the period between the deadline for transposing the Directive and the date on which the transposing legislation entered into force, if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the Directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him or her by EU law.<sup>180</sup>

- Spanish law requiring a fixed-term worker protected by Directive 1999/70/EC to bring a new action, where appropriate before a different court, in order to determine the appropriate penalty where misuse of successive fixed-term employment contracts has been established by a judicial authority, does not comply with the principle of effectiveness insofar as it results in procedural disadvantages for that worker in terms, *inter alia*, of cost, duration and the rules of representation.<sup>181</sup> In *Florentina Martínez Andrés*. The CJEU ruled that "*Clause 5(1) of the framework agreement on fixed-term work, concluded on 18 March 1999, which is set out in the annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, from being applied by the national courts of the Member State concerned in such a manner that, in the event of abuse resulting from the use of successive fixed-term employment contracts, a right to maintain the employment relationship is granted to persons employed by the authorities under an employment contract governed by the rules of employment law, but that right is not conferred, in general, on staff employed by those authorities under administrative law, unless there is another effective measure in the national law to penalise such abuses with regard to the latter staff, which it is for the national court to determine.*" Moreover, "*the provisions of the framework agreement on fixed-term work which is set out in the annex to Directive 1999/70, read in conjunction with the principle of effectiveness, must be interpreted as precluding national procedural rules which require a fixed-term worker to bring a new action in order to determine the appropriate penalty where abuse resulting from the use of successive fixed-term employment contracts has been established by a judicial authority, to the extent that it results in procedural disadvantages for that worker, in terms, inter alia, of cost, duration and the rules of representation, liable to render excessively difficult the exercise of the rights conferred on him by EU law.*"

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<sup>178</sup> *Eco Swiss*, C-126/97, EU:C:1999:269.

<sup>179</sup> *HI*, C-92/00, EU:C:2002:379.

<sup>180</sup> *Impact* EU:C:2008:223.

<sup>181</sup> *Florentina Martínez Andrés* EU:C:2016:680.

### 2.2.3. Right of the defence

#### ***The obligation to motivate decisions***

- In a case concerning free movement of persons, the CJEU affirmed that the right of access to a judicial procedure is violated if French administrative authorities did not disclose reasons for their decision.<sup>182</sup>
- The observance of the right to a fair trial requires that all judgments be reasoned to enable the defendant to see why a judgment has been pronounced against him or her and to bring an appropriate and effective appeal against it.<sup>183</sup>
- Directive 2004/38/EC on free movement of citizens, read in the light of Article 47 CFREU, requires the UK court with jurisdiction to ensure that failure by the competent British authority to disclose to the person concerned, precisely and in full, the grounds on which a decision to refuse that person access to the territory is based and to disclose the related evidence to him or her is limited to that which is strictly necessary, and that the person is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence.<sup>184</sup>
- Similarly, in cases of detention or maintaining a person in detention before removal from the territory of a Member state, the right to an effective remedy implies the obligation to communicate the reasons of the decision *in writing*: this is necessary both to enable the person concerned to defend his or her rights under the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his or her applying to the court having jurisdiction, and also to put that court fully in a position to carry out the review of the legality of the decision in question.<sup>185</sup>

#### ***The right to be heard***

- An applicant for a refugee status and for subsidiary protection must be able to make known his or her views before the adoption of any decision that does not grant the protection requested. In the Irish system, the fact that the applicant has already been duly heard when his or her application for refugee status was examined leads to that procedural requirement being dispensed with in the procedure relating to the application for subsidiary protection. This solution does not comply with the obligation to state sufficiently specific and concrete reasons to allow the person concerned to understand why his or her application is being rejected, which is a corollary of the principle of respect for the rights of the defence.<sup>186</sup>
- Under Belgian law, a plea alleging infringement of national law raised for the first time before the national court hearing an appeal on a point of law is admissible only if that plea is based on public policy. When a plea alleging infringement of the right to be heard, as guaranteed by EU law, is raised for the first time before that same court by an EU citizen who was deprived of his or her right of residence and expelled, it must be held to be admissible, and the court cannot reject it (as Belgian contended), if that right, as

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<sup>182</sup> *Heylens* EU:C:1987:442

<sup>183</sup> *ASML*, C-283/05, EU:C:2006:787.

<sup>184</sup> *ZZ* EU:C:2013:363.

<sup>185</sup> *Mahdi*, C-146/14 PPU, EU:C:2014:1320.

<sup>186</sup> *M.*, C-277/11, EU:C:2012:744.

guaranteed by national law, satisfies the conditions required by national law for it to be classified as a plea based on public policy.<sup>187</sup>

### **Rules concerning evidence**

- The requirement of a fair hearing, which implies that the parties enjoy an adequate opportunity to participate in proceedings before the competent court, covers also the manner in which evidence was taken. In particular, parties must be afforded a real opportunity to comment effectively upon evidence submitted to the court, especially where that evidence pertains to a technical field beyond the knowledge of the judges. If a German court finds that, in the circumstances of a case, using analysis on foodstuff made by a national authority would infringe the right to a fair hearing, EU law would then require the evidence to be excluded.<sup>188</sup>

- The interception of telecommunications and seizure of emails, for the tax authorities in Hungary to establish the existence of an abusive practice concerning VAT are only legal under EU law if, firstly, these measures were means of investigation provided for by law and were necessary in the context of the criminal procedure and, secondly, the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary.<sup>189</sup> In addition, to satisfy the general principle of observance of the rights of the defence, the taxable person must have had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the taxable person did not have that opportunity or that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 CFREU, it must be disregarded and the court must annul the decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an *inter partes* procedure, that it was obtained in accordance with EU law.

- When, under Dutch law, a person liable for custom debt has to refute the relevance of indirect evidence used by the customs authorities, and it is impossible or excessively difficult for such evidence to be produced, since *inter alia* that evidence relates to data which the person liable could not possess, national courts violate the principle of effectiveness (and Article 47 CFREU) if they do not make use of all procedures available to it under national law, including that of ordering the necessary measures of inquiry.<sup>190</sup>

#### **2.2.4. Time limits**

- Belgian legislation limiting actions to obtain repayment of the admission fee to universities, *after the CJEU decided that the fee was illegal*, and allowing only those who had commenced procedure at the date of the decision to claim recovery was condemned for rendering virtually impossible the exercise of the Treaty right to equal treatment.<sup>191</sup>

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<sup>187</sup> *Bensada Benallal*, C-161/15, EU:C:2016:175

<sup>188</sup> *Steffensen* EU:C:2003:228.

<sup>189</sup> *WebMindLicenses*, C-419/14, EU:C:2015:832.

<sup>190</sup> *Unitrading* EU:C:2014:2318

<sup>191</sup> *Barra v Belgian State*, C-309/85, EU:C:1988:42.

- The same solution was applied to a French law fixing a shorter time limit for actions to recover unduly levied taxes commenced after the decision of the CJEU condemning the tax.<sup>192</sup>
- Limitation periods in Irish law, applicable to actions for equal treatment in social security and employment, must be set aside where the defendant has engaged in misleading conduct which effectively prevented the individual from initiating the claim in the proper time limit.<sup>193</sup>
- A 60-day limitation period on raising new pleas, including EU law arguments, before the Belgian Court of Appeal against first instance decisions of the national tax administration is not, in itself, prohibited, but contextual elements of the system can make it illegal.<sup>194</sup>
- A limitation period, in Italy, limiting the time to initiate action to obtain state liability for violating EU law to one year, whereas a five-year limitation applied for ordinary actions for non-contractual damages does not respect the principle of equivalence.<sup>195</sup>
- When *the reduction of the limitation period* does not specifically concern the consequences of a decision of the CJEU but *has retroactive effects*, it is a violation of the principle of effectiveness if no transition period exists, as was the case for British law reducing the limitation period from six to three years, for the reimbursement of unlawfully levied taxes.<sup>196</sup>
- The solution was confirmed concerning Italian law: the principle of effectiveness presents an absolute bar to the retroactive application of a new period for initiating proceedings which is shorter and, as the case may be, more restrictive for taxpayers than the period previously applicable, where such application concerns actions for the recovery of domestic taxes contrary to EU law which have not yet been commenced by the time the new period comes into force, but which relate to sums paid whilst the old period was still applicable. The new limitation period must be reasonable and include transitional arrangements.<sup>197</sup>
- A limitation period of 60 days, although not contrary to EU law in principle, was so in the specific case in which Italian authorities involved in an invitation to tender made representations which persuaded the claimant not to launch legal proceedings, creating a context of uncertainty: applying the limitation would have rendered the exercise of the claimant's rights excessively difficult.<sup>198</sup>
- Because the right at stake is considered particularly important, German law limiting to two months the actions by workers to claim wages from the guarantee institution, in case of insolvency, cannot apply to claims for salary: time limits should not be that short that they deprive claimants of rights under EU law.<sup>199</sup> The fact that the institution had a much longer time to assert its subrogated rights from the insolvent employer contributed to the solution.
- The principle of effectiveness precludes a fifteen-day limitation period for bringing an action for nullity and reinstatement beginning from the time the letter of dismissal is

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<sup>192</sup> *Deville*, C-240/87, EU:C:1988:349.

<sup>193</sup> *Emmott* EU:C:1991:333.

<sup>194</sup> *Peterbroeck* EU:C:1995:437.

<sup>195</sup> *Palmisani*, C-261/95, EU:C:1997:351.

<sup>196</sup> *Marks & Spencer* EU:C:2002:435.

<sup>197</sup> *Grundig italiana*, C-255/00, EU:C:2002:525.

<sup>198</sup> *Santex*, C-327/00, EU:C:2003:109.

<sup>199</sup> *Pflücke*, C-125/01, EU:C:2003:477.



posted to contest the dismissal of pregnant workers and workers who have recently given birth or are breastfeeding, such as the one laid down in the Luxembourg Labour Code.<sup>200</sup>

- The requirement for transitional arrangements is not satisfied by a national legislative provision which curtails the limitation period for actions to recover sums paid but not due so that, instead of six years from discovery of the mistake giving rise to payment of the tax, that period is six years from the date of payment of the tax, and which provides for its immediate application to all claims made after the date of its enactment as well as to claims made between that date and an earlier date, such as the date the proposal to adopt that provision was announced, which is also the date on which the provision took effect. British legislation made it impossible in practice to exercise a right previously available to taxpayers to recover tax paid but not due.<sup>201</sup>

### 2.2.5. Remedies

- As regards a discriminatory refusal of employment, where German law chooses to offer a remedy by way of financial compensation (rather than requiring the employer to re-advertise the position), any damages offered by national law must be "adequate" in relation to the losses sustained. Nominal compensation such as the reimbursement of travel costs incurred in attending an interview manifestly fails to fulfil that criterion.<sup>202</sup>

- The principle of effectiveness is violated if Greek law does not provide for a sanction in case of infringement of EU law that is *both equivalent to the sanction for violation of domestic rules and effective, proportionate and dissuasive*.<sup>203</sup>

- The principle of equivalence was violated in different Member States (Italy, Austria) where conditions for the repayment of charges levied by the state in breach of EU law were less favourable than those for the repayment of other taxes raised by a public body contrary to purely domestic law.<sup>204</sup>

- The UK violates the principle of effectiveness if no interim relief is provided against acts of central government when EU law rights are at stake.<sup>205</sup>

- In application of Directive 76/207/EEC on equal treatment, the victim of discrimination must obtain full compensation for his or her losses, including interests, to take into account losses suffered through the effluxion of time.<sup>206</sup>

- A maximum compensation (two week's pay) granted, in British law, to compensate for a violation of Directive 77/187/EEC on transfers by the employer is not an *effective and dissuasive sanction*.<sup>207</sup>

- British law cannot totally exclude loss of profit as a head of damage for which reparation may be awarded in the case of a breach of EU law. Especially in the context of

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<sup>200</sup> *Pontin*, C-63/08, EU:C:2009:666.

<sup>201</sup> *Test Claimants*, C-362/12, EU:C:2013:834.

<sup>202</sup> *Von Colson and Kamann v Land Nordrhein-Westfalen* EU:C:1984:153.

<sup>203</sup> *Commission v Greece*, C-68/88, EU:C:1989:339.

<sup>204</sup> *Prisco*, C-216/99 and 222/99, EU:C:2002:472; *Ansaldo Energia*, C-279/96 to C-281/96, EU:C:1998:403; and *Weber's Wine World and Others*, C-147/01, EU:C:2003:533.

<sup>205</sup> *Factortame* EU:C:1996:79.

<sup>206</sup> *Marshall II* EU:C:1993:335.

<sup>207</sup> *Commission v UK*, C-382/92, EU:C:1994:233.

economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.<sup>208</sup>

- In claims to compensate for a violation of the freedom of establishment (taxes paid by foreign companies less favourable than for national companies), for British courts not to award interests for loss suffered through the effluxion of time would be a violation of EU law.<sup>209</sup>

- When British law applies a tough conception of the *duty to mitigate damages*, effectiveness is affected.<sup>210</sup>

- If the sole form of legal remedy for disputing the compatibility of Swedish provisions with EU law is to contest administrative or criminal proceedings and any penalties that may result from the violation of these rules, this is not sufficient to secure effective judicial protection.<sup>211</sup>

- Unlimited and unconditional authorisation to invoke banking secrecy, in German law, could seriously infringe the fundamental right to an effective remedy and, ultimately, the fundamental right to intellectual property, enjoyed by the holders of those rights.<sup>212</sup>

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<sup>208</sup> *Brasserie du pêcheur* EU:C:1996:79.

<sup>209</sup> *Metallgesellschaft and Others*, C-397/98 and C-410/98, EU:C:2001:134.

<sup>210</sup> *Metallgesellschaft and Others* EU:C:2001:134.

<sup>211</sup> *Unibet* EU:C:2007:163.

<sup>212</sup> *Coty Germany*, C-580/13, EU:C:2015:485, applying Directive 2004/48/EC on the enforcement of intellectual property rights.

### 3. NATIONAL LAW DEVELOPMENTS ON PROTECTION AGAINST VICTIMISATION

Protection against victimisation is essential to guarantee compliance with the principle of effective judicial protection. Victimisation can be generally defined as a form of retaliation, *i.e.* any adverse treatment or adverse consequence suffered by a person because of a complaint or proceeding initiated with the aim to enforce compliance with the rights conferred by law. Indeed, as a precondition for a case of victimisation to exist, the person allegedly suffering victimisation must have attempted to enforce a right – the mechanism used to enforce the right can vary depending on the legal system – in his or her direct interest, or – possibly – in the interest of someone else. In a leaflet on anti-discrimination rights, published in 2015, the Commission explains that “*victimisation is when someone treats you badly because you have complained, or helped someone else to complain, about discrimination. For example, if you are dismissed or refused promotion because you have filed a discrimination complaint against your boss or given evidence as a witness in a discrimination case*”.<sup>213</sup>

EU law has addressed the issue of victimisation mainly in the context of anti-discrimination law. With regard to employment relations, it is worthwhile to mention Directive 2000/78/EC of 27 November 2000, which establishes a general framework for equal treatment in employment and occupation. Article 11 states:

*“Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment”.*

Furthermore, Article 24 of “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) provides for an obligation on Member States to “*introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees’ representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment*”.

As far as the freedom of movement for workers is concerned, the concept of victimisation appears for the first time in Directive 2014/54/EU. Although the European legislature does not expressly mention the term “victimisation” it intends, with Article 3(6), to condemn victimisation in the specific context of the enforcement of rights stemming from the rules of free movement of workers.

Article 3(6) states that “*Member States shall introduce in their national legal systems such measures as are necessary to protect Union workers from any adverse treatment or adverse consequence as a reaction to a complaint or proceedings aimed at enforcing compliance with the rights*” conferred on them by EU law on the free movement of workers, *i.e.* by Article 45 TFEU and by Articles 1 to 10 of Regulation (EU) No 492/2011. It is argued that “*although such measures are not specified, they could range from reinstatement (after dismissal) to sanctions or compensation, it could even be a punishable*

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<sup>213</sup> European Commission. (2015) Know your rights - protection from discrimination. Available at: [http://ec.europa.eu/justice/discrimination/files/rights\\_against\\_discrimination\\_web\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/rights_against_discrimination_web_en.pdf).

*offence*", in any case, in line with the general principles of European Union law, such measures "have to be proportional and effective".<sup>214</sup>

In this part of the report, a review is provided of the national legal systems of the EU and EFTA Member States. The information analysed and compared was collected based on a questionnaire addressed to FreSsco national experts. The questionnaire consisted of a number of open questions on remedies envisaged by the Member States of the European Economic Area (EEA), to guarantee an effective protection against victimisation of Union workers and their families, in the light of Article 3(6) of Directive 2014/54/EU. Moreover, in order to comprehend the effectiveness of the protection against adverse treatment at the workplace for Union nationals, some questions were intended to shed light on the role of social partners and NGOs in both judicial proceedings and in addressing, in their daily work, the plague of victimisation.

The report does not intend to provide an exhaustive and meticulous assessment of the numerous legal systems considered, but rather to review and emphasise certain features of the countries considered, in a comparative perspective.

### **3.1. Legal frameworks**

#### **3.1.1. The legal framework applicable to protect Union workers against victimisation**

As of August 2016, only few countries have implemented Directive 2014/54/EU (AT, BG, MT and SI). In Austria, Section 7 *AVRAG (Arbeitsvertragsrechts-Anpassungsgesetz, Employment Contract Law Amendment Act)*, which will enter into force on 1 January 2017, is explicitly headed "**Benachteiligungsverbot**" (discrimination ban) and states that "*workers exercising their right to free movement (under Art 45 TFEU and Art 1-10 Reg 499/2011) must not be dismissed or discriminated in any other way by their employer because of a complaint (including judicial and administrative actions) with respect to rights conferred by the principle of free movement*". In addition, the Austrian legal framework provides for a general protection against victimisation in both the Equal Treatment Act (*GIBG - Gleichbehandlungsgesetz*), implementing Directive 2000/78/EC, and the Labour Relations Act (*ArbVG - Arbeitsverfassungsgesetz*), which rules that a worker is allowed to file a complaint for a dismissal caused by a claim, not obviously unfounded, aimed at enforcing rights granted by labour law (dismissal on illegitimate grounds).

Bulgaria has implemented Directive 2014/54/EU with the Law on Labour Migration and Labour Mobility, adopted on 26 April 2016, in force since 21 May 2016. This Law rules on access of EU nationals to the Bulgarian labour market, "*fully excluding the risks of discrimination*". Besides the law implementing Directive 2014/54/EU, the Bulgarian legal system applies to the EU citizens, and their family members, the protection against retaliation, granted by general norms. In this respect the major regulations are the Labour Code, the Social Security Code and the Protection against Discrimination Act.

Malta has implemented Directive 2014/54/EU through the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations, 2016, which rules: "*victimisation shall constitute prohibited conduct under these regulations and shall be tantamount to discrimination under the Act*" (§ 7).

Lastly, in Slovenia the Protection against Discrimination Act, in force since 24 May 2016, implements Directive 2014/54/EU. Article 11 of the statute defines victimisation as: "*exposure of a discriminated person or a person, which helps him/her, to inconvenient*

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<sup>214</sup> Brinkmann, G. (2015). Equal Treatment on the Ground of Nationality for EU Migrant Workers. *European Journal of Migration and Law*. 17, 239–257.

*consequences due to measures taken in order to prevent or eliminate discrimination*". Under Slovenian law, victimisation is a form of discrimination, hence the legal framework on discrimination applies also to victimisation and, as a consequence, victimisation is not characterised by specific procedural rules. Under the new statute, discrimination includes acts perpetrated in numerous phases of the employment relationship, from the access to employment to its termination. The list includes, *inter alia*, the protection of trade union membership. In Slovenia, general provisions complement the legal framework protecting Union workers against victimisation. For example, Article 6 of the Labour Relations Act, called "*prohibition of discrimination and victimisation*", states that "*discriminated persons and persons helping the person being discriminated must not be exposed to inconvenient/unpleasant consequences due to taking an action which aims to achieve equal treatment/prohibition of discrimination*".

The German case is quite peculiar. Germany, besides the General Equal Treatment Act, which has a pretty wide scope of application, provides for specific protection against Union workers' victimisation, albeit it has not transposed Directive 2014/54/EU. According to the FreSsco national experts, the German legal system already complies with the obligations stemming from Article 3 (6) of Directive 2014/54/EU, thanks to § 612a *BGB* (*Bürgerliches Gesetzbuch* – German Civil Code), which "*also applies to entitlements following from EU law*" and envisages a "*prohibition of victimisation*": "*The employer may not discriminate against an employee in an agreement or a measure because that employee exercises his rights in a permissible way*". Nevertheless, given that the subjective scope of application of this norm is limited to actual employees, the legal framework needs to be complemented by applying § 138 *BGB* – on the prohibition of legal transactions contrary to public policy – to jobseekers. Even more specific rules can be found in § 84 (3) *BetrVG* (*Betriebsverfassungsgesetz* – Works Constitution Act), which protects both the right of every employee to make an internal complaint and the right not to suffer any prejudice as a result of having made a complaint.

In the rest of the Member States, already existing regulations apply to cases of victimisation of Union workers. They are mainly norms provided for by anti-discrimination law and/or labour law (BE, CH, CY, CZ, DE, DN, EL, ES, FI, FR, HR, HU, IE, IS, IT, LI, LT, LU, LV, NL, NO, PL, PT, RO, SE, SK, UK).

In certain legal systems, mostly those where there are no specific rules addressing workers' victimisation, both anti-discrimination law and labour law seem to be relevant (CZ, FI, HR, HU, IE, and SK). For instance, in Finland and the Czech Republic, the applicable norms are those granting protection to workers against discrimination and victimisation, which can be found in the Non-discrimination Act.

According to the information collected, in a number of legal systems, labour law plays a central role. Indeed, in these countries, a case of adverse treatment or adverse consequence suffered by a European Union worker, because of the attempt to enforce a right provided for by EU norms on freedom of movement for workers, falls – mainly – within the scope of labour law (FR, IT, LT, LV, PT). In Lithuania, "*all legal protection is based on general protection of workers*". In particular, victimisation is addressed in the Lithuanian Labour Code (Article 129), which states: "*A legitimate reason to terminate employment relationships shall not be participation in the proceedings against the employer charged with violations of laws, other regulatory acts or the collective agreement, as well as application to administrative bodies*"<sup>215</sup>. In Latvia, the labour law norm providing for protection against victimisation also applies to Union workers. Likewise, in the Italian legal system "*even in the absence of rules on victimisation specifically dealing with workers having claimed their free movement rights, a number of*

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<sup>215</sup> The revised Labour Code that will come into force as of 1 January 2017 will provide for specific rules on victimisation of workers.

*general labour law provisions can be evoked to the extent that they deal with the issue of victimisation. The most important of these relates to the discipline of dismissal law".* Indeed, the protection against a retaliatory dismissal caused by a claim filed by the employee against the employer can be applied also to Union workers. Similarly, in France Article L1134-4 of the French Labour Code would apply, and the dismissal would be considered null. In Portugal, where victimisation is considered a form of discrimination, Articles 51 *et seq.* of the Labour Procedure Code applies, and it rules that "every worker may bring a claim before the labour courts based on discrimination suffered by him or her."

In a large number of EU Member states (BE, DK, CY, LU, NL, SE, RO and UK) norms protecting workers seeking redress in the event of retaliation following a complaint based on the rights conferred by free movement of workers have to be found in anti-discrimination law.

In Belgium, a statute of 30 July 1981 on the general prohibition of nationality discrimination and the protection against victimisation applies. It stipulates that "*when a complaint was lodged regarding employment relations and supplementary social security, the employer (or the other person who gives instructions) may not adopt any measure that would detrimentally affect the person who has lodged the complaint or in whose favour a complaint was lodged, except for reasons that are separate from the complaint*". Its scope of application is broad and covers, for instance, access to employment, conditions of employment and work and membership of trade unions. The statute of 30 July 1981, however, does not cover matters regulated by the Communities and Regions, and is therefore complemented by a number of Decrees and Ordinances.<sup>216</sup>

In Romania, the currently applicable law<sup>217</sup> is the Romanian anti-discrimination law, *i.e.* Governmental Ordinance 137/2000 regarding the prevention and the punishment of all forms of discrimination (GO 137/2000), as amended, which forbids discriminations on several grounds, such as nationality, and defines victimisation "*as any adverse treatment triggered by a case lodged with the courts of law regarding infringement of the principle of equal treatment and non-discrimination*".

The Swedish discrimination legislation contains a prohibition against adverse treatment (Chapter 2, paragraphs 18 and 19 *Diskrimineringslagen* 2008:567), while the Danish law on equal treatment (*forskelsbehandlingsloven. Lbkg. No 1349 as of 16/12/2008*) ensures access to a quasi-judicial procedure in the event of adverse treatment. In the United Kingdom, the legal framework is provided by The Equality Act (2010), which protects against discrimination based on nationality and addresses victimisation at Article 27, which frames it as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

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<sup>216</sup> Decree of the French-speaking Community of 12 December 2008; Decree of the German-speaking Community of 19 March 2012; Decree of the Walloon Region of 6 November 2008; Ordinance of the Region of Brussels of 4 September 2008; Decree of the Commission of the French-speaking Community of 9 July 2010.

<sup>217</sup> A draft law transposing Directive 2014/54/EU will probably be adopted in Autumn 2016.

*(c) doing any other thing for the purposes of or in connection with this Act;*

*(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

In Cyprus, Luxemburg and the Netherlands protection against adverse treatment of Union workers is granted by the legislation transposing Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. For instance, in Luxemburg *"Article 4 of Law 28 November 2006 protects persons against events of adverse treatment following protest, refusal committed against an act or conduct contrary to the principle of equal treatment, reaction to a complaint, legal action aimed at enforcing the principle of equal treatment or even witness actions"*. In the Netherlands, the General Act on Equal Treatment (2002) provides for both general norms against victimisation and a specific protection against victimisation in case of dismissal. When it comes to sanctions in cases of victimisation either the equal treatment law or general civil law norms may apply.

In Iceland, where there is no obligation to implement Directives on equal treatment at the workplace, since this country is only a party to the EFTA, and Directive 2014/54/EU has not been transposed yet, labour law applies and EFTA workers have to rely on general rules and remedies. Specific rules on victimisation exist under the Gender Equality Law: *"Act No 10/2008 on the Equal Status and Equal Rights of Women and Men, as amended, contains a prohibition against dismissals of employees for demanding redress on the basis of the act"*. Similarly in Liechtenstein, victimisation is addressed solely by the *"Act on Gender Equality (Gesetz über die Gleichstellung von Frau und Mann, GLG LILEX 105.1)"*<sup>218</sup> according to which a worker who claims discrimination on the ground of gender is protected against retaliation. In Norway, the Ethnicity Anti-Discrimination Act applies. Paragraph 10 of that Act states that *"it is prohibited to retaliate against anyone who has submitted a complaint regarding breach of this Act, or has stated that a complaint may be submitted"*. While in Switzerland, the last EFTA country to be considered, no special rule has been adopted to implement Directive 2014/54/EU, since the existing procedures and the general rules on anti-discrimination are deemed sufficient to comply with the obligations.

Lastly, in Poland the norm of the Civil Code on equal treatment applies, while, in Spain, *"there are no rules specifically protecting EU nationals from victimisation following a complaint or proceedings regarding free movement. However, there is a fundamental right in the Spanish Constitution that would also apply in this case of victimisation"*: the right to an effective judicial protection (Article 24).

Some national reports also considered the possible application of criminal law (BG, DE, FI, NL and SI). However, the FreSsco experts often emphasise the specificity of the victimisation covered by criminal law. For example, under German law *"in the context of criminal law, the concept of 'secondary victimisation' is used to describe the situation that a victim of a crime suffers for a second time because of the criminal proceedings"*. While in other cases, criminal code norms seem to apply to the offence we are discussing, for instance, in Finland the *"Criminal Code (rikoslaki 39/1889, translation available at <http://www.finlex.fi/en/laki/kaannokset/1889/18890039> provides in Chapter 47 Section 3 on work discrimination and in Section 3a on extortionate work discrimination that an employer may be sentenced to a fine or to imprisonment of six months or at the most two years"*.

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<sup>218</sup> According to the legal experts consulted, the Act on Gender Equality implements EU Anti-discrimination Directives.

### **3.1.2. Personal scope of application**

As to the personal scope of application, some reports explicitly mentioned that the legal framework at stake is applicable not only to the person suffering the original offence, but also to third parties involved in or supporting the original claim (BE, DE, FI, HU, IE, LU, NL, NO, RO, SI, UK). For instance, in Germany, Norway and Romania the prohibition of victimisation applies to persons who provide support to the employee or testify as witnesses. Also in Belgium, the Law of 30 July 1981 protects the victim of alleged discrimination as well as *"witnesses who have described the facts they have seen or heard in a signed and dated document and brought them to the attention of the person with whom the complaint is lodged, and the witnesses appearing before the judge"*. Interestingly, *"during the parliamentary works, it was proposed in vain to extend this protection to the colleague of the alleged victim who supports him or her without acting as a witness."*

In comparison, in the Netherlands, the provision against victimisation with regard to an employment relationship concerns not only *"the employee, because he or she has judicially or extra-judicially taken action, but also the employee helping someone else, like a colleague"*.

## **3.2. Procedural remedies**

### **3.2.1. Judicial proceedings and time limit**

As to the judicial procedures available, all of the 31 countries grant the possibility to initiate judicial proceedings in case of victimisation of Union workers. In order to enforce the right not to suffer adverse treatment, following a complaint based on the rights conferred by the free movement of workers, given – and various – time limits have to be respected.

In four countries (IE, MT, FI and UK), the legal framework envisages a specific time limit for judicial proceedings on victimisation. In Ireland, a claim under the Employment Equality Act against decisions of the Workplace Relations Commissions can be filed to the Labour Court *"after the end of the period of six months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence"*. Moreover, *"Section 77(12) permits an appeal from a decision of the Director General of the Workplace Relations Commission to the Labour Court not later than 42 days from the date of a decision"*. While in Malta, the time limit to bring the matter before the competent court of civil jurisdiction under the Exercise of Rights Conferred on Workers (Freedom of Movement) Regulations 2016, is twenty-four months. The same time limit applies in Finland, where *"a person who considers having been victimised may claim compensation and claim for the discriminatory terms to be declared void in a district court within two years from the acts contrary to the prohibition of victimisation (Section 26 of the Non-discrimination Act)"*. In the United Kingdom, the time limit to bring an employment tribunal claim for victimisation is much stricter: only three months.

In most countries (AT, BE, BG, CY, CH, DE, DK, EL, ES, HR, IT, IS, LT, NL, PL, PT, RO, SE, SI and SK), a specific time limit to enter a legal action in case of victimisation is not provided and the time limit depends on the nature of the claim and on whether the claim is based upon labour law, civil law, administrative law and, in few cases, criminal law. For instance, in Sweden the time limit to be respected by the claimant is consistently different if the case concerns anti-discrimination legislation (two years) or the claim is based upon employment protection law. Moreover, it also differs if the action is taken to demand the declaration of annulment of the employer's act (two weeks) or to claim damages (four months). In Austria, actions based on the Equal Treatment Act have to be filed within six months if the worker only claims compensation payments, while if the worker is claiming a declaration of nullity of the dismissal, the time limit is fourteen days.



In the Netherlands, a distinction is made between cases concerning dismissal and other cases. In order to challenge a retaliatory termination of the employment contract, the time limit is two months from the date of the dismissal. Otherwise, *“the general limitation period of five years applies”*. Whenever criminal law applies, the time limit varies depending on which claim is advanced. In Cyprus, a distinction is made between civil actions, where the time limit is generally ten years, and tort law, which provides for the action to be filed within six years. In Spain the plaintiff also has the possibility to appeal for remedy before the Constitutional Court (*Recurso de amparo*). However, it is more common for workers to bring claims before the Social Courts, in which case *“the time limit depends on the period of prescription for the retaliation suffered. For instance, if the retaliation were dismissal, the time limit would be twenty days”*.

In Italy, where a Union worker who has been victimised can rely upon labour law norms, *“a double time limit is provided in order to challenge the validity of the dismissal: within 60 days, the worker must inform in writing the employer of his or her intention to dispute the dismissal; and within the following 180 days he or she must file the claim in court”*. Also in Portugal the protection is granted by the Labour Procedure Code: a worker, and therefore also a European Union worker, can bring a claim before the labour court against a retaliatory dismissal, within one year from the date of the event. In France, as for all other actions before the French labour courts concerning the execution and termination of work contracts, the time limit is two years. In Bulgaria, where the employment legislation is also relevant, the plaintiff has two months’ time to file a complaint against unfair dismissal, while, for all other labour disputes, the limitation period is three years. Differently, in Romania, anti-discrimination law applies – as in Denmark – and a worker has to bring his or her case to court within a three-year time limit to obtain annulment of the effects of the discriminatory act or behaviour. In Norway, there is no specific time limit to file a complaint based upon the Equality and Anti-discrimination Act, *“but the claim for compensation for loss will have to respect the general regulations on expiry”*.

Lastly, two legal systems apply a general time limit to cases of judicial claims for victimisation of EU workers, *i.e.* two years in Latvia and five years in Croatia.

### **3.2.2. Burden of proof**

In most of the legal systems considered in this report, a EU worker suffering adverse treatment or adverse consequence following a complaint based on the rights conferred by the principle of free movement of workers enjoys the reversed burden of proof in judicial proceedings. Therefore, it is up to the employer to prove the absence of retaliation and provide full evidence (AT, BE, BG, HU, HR, ES, FI, HR, LV, NL, NO, PT, RO, SE, SI and SK) – under anti-discrimination law, labour law or norms implementing Directive 2014/54/EU, depending on the country. For instance, in Austria, Finland, Ireland, Latvia, Portugal, Romania, Sweden, Slovenia and Spain, the employee has to provide *prima facie* evidence. That is, the claimant must describe the facts showing that he or she has suffered victimisation. In Latvia, the employee must also illustrate the *“conditions of victimisation”*, while in Portugal, he or she has to indicate *“the worker, if any, for which he or she was discriminated”*. In Germany, *“there are no specific rules on this with regard to the prohibition of victimisation. Hence, the general rules apply, meaning that the employee has to prove the conditions of the claim”*. However, given the difficulty that a worker may encounter in proving victimisation, *“the rules on prima facie evidence (Anscheinsbeweis) may be applied”*, which means that if facts can be established which render causality probable, *e.g.* a close temporal link, it is up to the employer to disprove the assumption of causality.

The burden of proof lies with the Union worker in Iceland, Malta, Poland, as well as in France, Italy and Latvia, which implies that it is a matter for the employee dismissed to prove the adverse treatment. In France, however, *“labour courts can investigate and compel the employer to deliver elements of proof to establish the facts”*.

### 3.2.3. Administrative procedures

The answers to the question *“Does national legislation ensure access to administrative procedures to seek redress in case of adverse treatment following a complaint based on the rights conferred by the free movement of workers?”* are various, thus showing profound differences in the administrative procedures available in the Member States, differences that also reflect the diversity in applicable laws in case of retaliation of EU workers initiating complaints on the basis of the free movement of workers.

In a number of countries, a quasi-judicial body, mainly represented by an Ombudsman dealing with anti-discrimination cases, is considered a valuable option to address victimisation cases of Union workers through administrative procedures (CY, DK, FI, HR, LT and NO).

In Cyprus, the Commissioner for Administration qualifies as Ombudsman. In Finland, compliance with non-discrimination norms is supervised by the Non-Discrimination Ombudsman, who may provide assistance to the victims of discrimination in pursuing their complaints concerning discrimination and take action to reconcile a matter of victimisation. Moreover, it can issue an opinion to prevent continuation or repetition of a violation. Also in Norway, the Equality and Anti-Discrimination Ombudsman may receive complaints, and its decisions can be taken to the Anti-Discrimination Tribunal. Likewise in Lithuania, if the adverse treatment is related to discrimination, the workers may apply to the Equal Opportunities Ombudsperson’s institution, but only for matters that do not belong to the courts’ exclusive competence. However, differently from Norway, consultations of the Ombudsmen cannot be contested in court as it is considered not as a personal legal act but as expertise, which the court must take into account in the event of a hearing, together with all other findings.

In Iceland, *“complainants seeking to protect rights conferred by the free movement of workers are also able to seek redress before administrative appeal committees against administrative decisions of national authorities or, as the case may be, appeal to the respective ministry depending on the substantive matter of the claim. When administrative procedures have been exhausted, the worker may send a complaint to the Parliamentary Ombudsman. The worker may also bring his or her case before the courts, seeking to have the administrative decision annulled or amended.”* In Denmark, cases concerning discrimination against foreign workers are dealt with by a quasi-judicial board system, named the Danish board on equal treatment (*Ligebehandlingsnævnet*).

In many Member states, the only relevant possibility under administrative law is to challenge the administrative decisions in court. Indeed, in Austria, Sweden, France, Italy and Poland an appeal against an administrative decision can be filed to the Administrative Court, while in Cyprus the jurisdiction belongs to the Supreme Court. The option to appeal against an administrative decision is offered also in other Member States, as, for instance, in Malta, where an administrative decision can be challenged either before the Administrative Review Tribunal or the First Hall Civil Court, depending on the nature of the decision.

In the Netherlands and Slovenia, administrative enforcement is possible only if it concerns civil servants. However, in the Netherlands, *“there is no general provision protecting civil servants from victimisation in the context of free movement of workers”*. In Slovenia, several commissions are established and they are competent for the civil servants, at different state organs or municipalities. Their decisions can be challenged before the Labour and Social Court.

In Bulgaria, the Czech Republic, Greece, Hungary, Latvia, Luxembourg, Spain and Slovenia the role of the Labour Inspectorate is highlighted, inasmuch as it represents the public authority competent for checking the respect of rights at work, including those provided for by EU law and applicable to Union workers. For instance, in Hungary, where the *“Hungarian Labour Inspectorate which supervises the gainful activity, the*

*employment relationship from the labour law aspect”, “there is no general reference to the equal treatment principle, so the labour inspectorates supervises the general commitments and obligations with regard to the employment, among others the wages and also the obligations and conditions under which an EU national migrant worker is employed (Art 3 i).”* This means, according to the Hungarian expert, that the authority has competence to oversee the compliance with rights stemming from either Article 45 TFEU or Articles 1 to 10 of Regulation 492/2011/EU.

Furthermore, a number of legal systems provide for the possibility to find relief through special public bodies (BG, DE, FR, HU, IE, IS, LI, LT, MT, PT, RO, SI and UK), established mainly with the aim to tackle discrimination. For instance, in Germany the competent authority to intervene in discrimination cases is the Federal Anti-Discrimination Agency (*Allgemeines Gleichbehandlungsgesetz*). However, nationality can be included among the grounds of discrimination tackled by the Agency, only through an extensive interpretation of “*ethnic origin*”, which is covered by the general anti-discrimination law. Moreover, if an administrative authority disadvantages a person because he or she has lodged a complaint based on the rights conferred by the free movement of workers, such an action would be unlawful and could be challenged before the administrative court. In Denmark, complaints related to discrimination have to be filed to the Danish board on equal treatment, which is almost a quasi-judicial body. Its decisions can be appealed in court. In Slovenia, a victimised person could turn to the Counsel of Equal Treatment, while in Malta to the Commissioner of the National Commission for the Promotion of Equality. In Iceland, a person suffering an adverse treatment that falls under the scope of the Employment Equality Act “*may seek redress by referring the case to the Director General of the Workplace Relations Commission*”, whose decision can be challenged before the Labour Court. In the United Kingdom, the administrative procedure is conducted by the Advisory, Conciliation and Arbitration Service (ACAS), which tries to find a settlement between the parties, before bringing the claim before the Tribunal.

#### **3.2.4. Alternative dispute resolution mechanisms**

Besides purely judicial and administrative procedures, certain legal systems envisage the possibility to rely upon other dispute resolution mechanisms to solve a case of victimisation at the workplace. Mainly two alternative systems are found in the countries considered: internal complaint procedures (BE, DE, ES, SI and SK) and/or complaints filed with specific institutions (BE and UK). Moreover, these additional dispute resolution mechanisms can constitute a prerequisite for applying to the competent court (SI and UK). For instance, in Slovenia, under the Labour Relations Act “*the employee can in written form demand from the employer that he or she fulfils his or her obligations or eliminates a breach. If the employer does not fulfil his or her obligation or eliminates a breach in eight working days, the employee can bring an action at the competent Labour and Social Court in the next thirty days*”. Also in the United Kingdom, the first mandatory step to be made before bringing any Tribunal claim is to submit an Early Conciliation Form to the Advisory, Conciliation and Arbitration Service (ACAS). Usually, the Tribunal appoints an official from the ACAS, who will try to find a settlement between the parties. “*If Early Conciliation is unsuccessful an application can be made to a Tribunal and may then be referred to the Employment Appeal Tribunal*”.

Both in Slovakia (under the Slovak Labour Code) and in Germany (under the Work Constitution Act), the employee has the right to file an internal complaint if he or she feels that he or she has been discriminated against or if the principle of equal treatment has not been respected. Under both legislations the employer is obliged to receive the complaint and give a reply within a reasonable time. Under German law, the worker can “*call on a member of the works council for assistance or mediation*” and it is specified that “*the employee shall not suffer any prejudice as a result of having made a complaint*”.

In Belgium a reasoned complaint, dated, signed, notified by registered letter and listing the grievances can be filed by the alleged victim with the undertaking or the department employing him or her, in conformity with the applicable procedures. Moreover, “a reasoned complaint”, complying with the same formalities, “can be introduced in the interest of the alleged victim by the Directorate-General Control on the social laws with the Federal Public Service Employment, Labour and Social Dialogue, in favour of the victim, against the undertaking or service employing him”.

### **3.3. Forms of reparation**

#### **3.3.1. Restitution**

Among the forms of reparation, in a number of countries it is provided that the Civil Court, or the administrative body, can generally demand termination of the discrimination/victimisation and removal of its effects (BE, CZ, ES, FI, FR, HR, HU, IE, LI, LV, MT, PL, PT, SI, SK and UK).

For instance, in Hungary “Article 17 of the Anti-Discrimination Act provides for several remedies. It is *inter alia* possible to bring an action for the elimination of discrimination or its effects (a ‘restitutional anti-discrimination claim’); the authority can forbid the continuation of the violation, while the court can order the restoration of the original status”. In Poland, the plaintiff can demand before the court the “omission of the action and removal of its effects”, while in administrative procedures, only the removal of the administrative decision is allowed. Also in Portugal, the elimination of discrimination can be imposed by an administrative Act.

In the United Kingdom and Slovenia, the competent institution also has the power to make sure that there will be no further cases of discrimination. Indeed, in the United Kingdom “the Tribunal can recommend that an employer takes action to correct the situation or limit the damage to the applicant and can make recommendations that an organisation take steps to eliminate or reduce the effect of discrimination on other current and future employees”. While in Slovenia, the Counsel – therefore the administrative authority – can issue and “order of elimination of a breach determined by inspection control by the set deadline”; a “proposal for adoption of adequate measures for prevention of further discrimination or elimination of consequences of discrimination within the set deadline”; or a “prohibition of further discrimination”. Similarly, in the Czech Republic, Finland, Ireland, Latvia, Lichtenstein, Malta, Slovakia and Spain the competent institution can order the cease of retaliation and/or forbid continuing or repeating victimisation.

In a few countries, it is highlighted that if the competent court recognises that a dismissal was retaliatory, and therefore unlawful, it can impose reinstatement of the worker suffering retaliation (AT, BE, DE, FR, IT and LT).

In the Italian legal system, since 2012, retaliatory dismissal is one the few cases in which reinstatement is still provided. “Until 2012, indeed, reinstatement was the default remedy for all the dismissals occurred in undertakings employing more than 15 workers. After the 2012 reform, reinstatement is only provided for discriminatory and retaliatory dismissals. As concerns all the other cases – different from retaliatory dismissals – in which an adverse treatment is at stake, the employer’s decision would be null and void and ordinary civil law remedies would apply”. “Article 18 of the 1970 workers’ statute (as modified by Law 92/2012) lists a number of cases in which wrongful dismissals are sanctioned through a judicial order of reinstatement on the job of the worker wrongfully dismissed. Dismissals, which have been determined by an illicit reason, are among such limited cases (*motivo illecito determinante*). Within the general notion of “illicit reason”, case law typically includes retaliatory dismissals inflicted against employees who have filed a claim against their employer”, and although this is not specifically related to free movement rights’ claims, it can certainly apply to them as well. Also in Lithuania, the court shall reinstate the worker dismissed without a “valid reason”, albeit there are

certain cases in which reinstatement is not allowed (e.g. due to economic, technological, organisational or similar reasons). In Belgium, "where the employer infringes the prohibition on victimisation, and the measure has *not taken place after the end of the employment relationship, the victim or the interest group can request his or her reinstatement in his or her job*". However, the employer cannot be obliged to reinstall the employee, not even by a judge.

In Germany, "*legal acts – like contracts or the notification to dismiss an employee – in violation of the prohibition of victimisation of workers are void*". Moreover "*factual acts – like directives of the employer – are illegal*".

Among the actions that can be taken to protect the worker and remove the effects of adverse treatment, France, Iceland and Poland also include the annulment of administrative decisions. In Iceland, "*the remedies claimed before administrative tribunals are that the initial administrative decision be annulled or amended in order to grant the substantive rights claimed by the worker*". Likewise in Poland, administrative decisions causing discrimination can be eliminated (but no compensation is provided).

### 3.3.2. Compensation

Most Member states provide for some kind of economic compensation (AT, BE, CH, CY, CZ, DE, ES, FI, FR, HR, HU, IE, IS, IT, LI, LT, MT, NL, NO, PT, RO, PL, SE, SI, SK, RO and UK).

In general terms, many countries (AT, BE, CY, CZ, DE, ES, FI, HR, HU, LI, SE, SI, PL and RO) mention that an EU worker suffering retaliation has a right to receive compensation. For instance, as far as the Czech Republic is concerned, it is stated that the person suffering retaliation has a right to "*financial remedies*". In Romania "*the injured party may seek compensation*", similarly in Poland "*on the terms provided for in the Civil Code, he or she may also demand pecuniary compensation*". According to Spanish law, the Union worker has a right to "*effective reparation and compensation of the damages*". While in Germany, "*damages may be claimed under the BGB*".

Both In Italy and in Cyprus, if civil law infringements occur a worker has the right to be compensated under civil law. Moreover, In Cyprus, in case of action before the Supreme Court "*the person in whose favour a decision under Section 146 has been made, may bring proceedings before a court for the recovery of damages or for being granted another remedy to recover just and equitable damages to be assessed by the court*".

In Finland, "*compensation for victimisation is not meant to cover damages but to compensate the violation of the non-discrimination principle*". Furthermore, there is no need for premeditation or negligence to be proved. However, compensation as a specific remedy to victimisation "*is not to preclude receipt of compensation by virtue of any other legislation*", as under the Tort Liability Act, or the Employment Act, which provides that in case of unjustified dismissal the employee has the right to receive compensation. According to Section 24 of the Act, the compensation "*must be equitably proportionate to the severity of the act.*" The severity is assessed by taking into account the type, extent and duration of the infringement and the law does not set a limit to the monetary compensation at stake. A Union worker who suffered retaliatory dismissal can claim both compensation for victimisation and compensation for unjustified termination of the employment contract.

In Slovenia, the Union worker can claim compensation under anti-discrimination law before the Civil Court. The amount that can be claimed is not unlimited, but it ranges between €500 and €5,000. The elements taken into account when determining the amount of the monetary compensation are: "*the duration of discrimination, the exposure to severe forms of discrimination and the circumstances of the case*". According to Belgian labour law, both when the person unfairly dismissed is reinstated in its former

position or when not *"the employer breaching the prohibition on victimisation must award him or her compensation"*.

In the UK, the amount of damages is fixed by law, depending on the seriousness of the violation. Indeed, *"compensation for discrimination cases generally falls into three 'Vento brackets', depending on the seriousness of the case: very serious (awards between £15,000 and £25,000), serious cases (awards between £5,000 and £15,000), less serious cases (awards between £500 and £5,000)"*. In Ireland, if the Circuit Court issues an order for compensation *"for the effects of the prohibited conduct concerned"*, *"no enactment relating to the jurisdiction of the Circuit Court shall be taken to limit the amount of compensation or remuneration which may be ordered by the Circuit Court by virtue of these provisions"*. The Workplace Relations Commission may also issue an *"order for compensation for the effects of the prohibited conduct concerned (up until a fixed maximum amount)"*.

Besides the cases mentioned above, where at least a general economic compensation is granted to the worker suffering victimisation, specific typologies of economic reparations are found in a number of the legal systems addressed. In particular, in certain national reports it is specified for which type of losses the reparation can be granted: material damage, loss of earnings and moral damage.

The concept of *material damage* is expressed in different ways depending on the legal systems. For instance, in Portugal and Liechtenstein *"material"* losses and damages can be claimed, and in Croatia reparatory damages include the restoration of *"pecuniary"* losses, while in Norway the worker can claim compensation for *"economic"* losses, and in the Netherlands the reparation may concern *"financial"* losses.

In some countries there is a possibility to be compensated for the loss of earnings, which are due to the retaliatory act of the employer. In particular, in Lithuania, *"if a worker is dismissed without a valid reason, the court shall award him or her the average wage for the entire period of involuntary idle time from the day of dismissal from work until the day of execution of the court decision"*. In Belgium, only when the employer re-employs the victim, he or she must pay the wages lost due to the dismissal or the modification of the employment conditions as well as the social contributions due thereon. When the worker is not re-employed in its former position, compensation is anyway due and it amounts to six months' gross wages or the actual amount of the damages. The employer is obliged to pay a compensation, which amounts to six months' gross wage or the actual amount of damage, even where no request is made for reinsertion, in the following circumstances:

- a court considers the discrimination which is the object of the complaint to be proven;
- the victim terminates the employment relationship because he or she is victimised;
- the employer terminates the employment relationship for an urgent reason, deemed ill-founded by a court.

In France, *"if the worker decides not to be reinstated, the labour court must award an allowance corresponding at least to the wages of the last six months and the severance package due"*. Both in Liechtenstein and in Switzerland, *"the compensation for gender discrimination is fixed by taking into account all circumstances and calculated on the basis of the probable salary"*. However, in Switzerland, the compensation must not exceed an amount equivalent to six month's salary.

Under the Irish Equality Employment Act, *"the Circuit Court may provide redress in the following forms as appropriate: (a) an order for compensation in the form of arrears of remuneration (attributable to a failure to provide equal remuneration) in respect of so much of the period of employment as begins not more than six years before the date of the referral; (b) an order for equal remuneration from the date of the referral"*. A last

example is provided by Iceland, where illegal dismissal can be repaired by *“monetary payments that commensurate to the salary the worker would have received for the remainder of his or her legal notice period”*.

In some States, separation for moral damage, also known as non-economic or immaterial damage, is expressly granted (HR, IE, IS, LI, LV, NL, NO, PT, RO, SE, SI, SK and UK). In particular, in the United Kingdom compensation must be provided for *“injury to feelings”* or *“if the employer’s behaviour was insulting or malicious”* and for *“damage to health, for example, psychological trauma”* (for distinctions based on the seriousness of the damage see above). In Romania, from the limited number of cases that can be found on compensation for moral damages, it can be concluded that moral damage is generally compensated up to €10.000.

In Iceland, moral damage may include emotional suffering, distress and loss of repute, all of which can all be repaired by monetary compensation.

In Slovakia, if the violation of the equal treatment principle has caused a *“significant injury to the dignity and reputation of the discriminated person or made impossible for the discriminated person to achieve social recognition”*, he or she may claim monetary compensation for immaterial damage. In Latvia, the amount of compensation due for moral harm has to be determined by the court at its discretion.

In Slovenia, under the Labour Relations Act, in the event of discrimination or harassment at the workplace, the employer is liable for non-material damages, including also *“mental pain”*. *“Interestingly, when determining the amount of the monetary compensation/satisfaction for non-material harm/damage, the amount should be effective and proportional to the harm/damage incurred by the candidate or the employee, but also it should try to dissuade the employer from further repetitive breaches”*.

### **3.3.3. Publication of the judgment, punitive damages and administrative or criminal sanctions**

Further systems to ensure satisfaction and guarantees of non-repetition are: publication of the judgment, punitive damages and administrative sanctions. In both Croatia and Slovenia, an order of publicity of the discrimination case is included among the ways to provide satisfaction to the victim and guarantee the non-repetition of the offence. In the case of Slovenia, it is emphasised that *“in regard to publishing of a judgment, it is granted, upon the court’s discretion, that the publishing is necessary in order to eliminate the consequences of discrimination or in order to prevent discrimination in other similar cases. The judgment is published in anonymous form”*.

Punitive damages, typical of the common law systems, are granted in the United Kingdom where the payment of *“exemplary damages to punish particularly serious conduct on the behalf of the respondent”* can be imposed. However, also Finland and Slovenia seem to provide for the right to receive further compensation, beyond what is necessary to recover the economic or non-economic losses suffered. Indeed, in Slovenia the compensation, under the Labour Relations Act, should also aim *“to dissuade the employer from further repetitive breaches”*. While in Finland, under the Anti-discrimination Act *“compensation for victimisation is not meant to cover damages but to compensate the violation of the non-discrimination principle”*.

In certain countries (CZ, ES, FI, HU, LT, LV, NL, PL, PT, RO and SI) fines – not only under administrative law – can be imposed upon the employer retaliating against an EU worker. In the Czech Republic, Finland, Hungary, Latvia, Lithuania, Slovenia, Spain and Romania fines can be imposed where administrative law applies. For instance, in the Czech Republic, *“if the employer commits an administrative offense in the sense of victimisation*

*of employees, there is a fine settled by Section 11 and 24 of Act No 251/2005 Coll. up to 1,000,000 CZK (some €37,000)". In Slovenia, "the fine for victimisation of a person who helps another discriminated person, or for a breach of prohibition of discrimination, is €3,000 to €20,000. If these actions present a severe form, the fine can also be between €3,000 to €30,000".*

In the Romanian legal system, when the National Council for Combating Discrimination finds that discrimination took place it can issue an administrative sanction (administrative warning or fine). If the victim is an individual, the amount of the fine is within the range of € 250 an €7,500 (RON 1,000 and €30,000); if the victims are a group or a community, the fine is within the range of €500 and €25,000 (RON 2,000 and €100,000). In Lithuania, the Administrative Ombudsperson can impose administrative penalties, while in Finland the power to impose a conditional fine is given to the National Non-Discrimination and Equality Tribunal.

In Poland, the application of criminal law to an infringement of the employee's rights may give rise to a fine. Similarly in the Netherlands, among the remedies provided for in criminal proceedings fines ranging from €8,200 to €20,500 can be included.

As far as the Netherlands and Poland are concerned, the court can even order imprisonment of the employer. In the former country, the Criminal Code provides for a restriction of liberty that may range from two months up to two years, in alternative or in addition to a fine, while in Poland *"in case the norms of the penal code apply for the infringement of employment rights, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to two years"*.

Similarly in Finland, the *"Criminal Code provides that an employer may be sentenced to a fine or to imprisonment"* for unreasonable work discrimination.



## 4. BIBLIOGRAPHICAL REFERENCES

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