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Abstract Discrimination is an attack on human dignity and highly inefficient as well. The European Union anti-discrimination directives demand "effective, proportionate and dissuasive" protection against discrimination. Above and beyond full compensation for all losses, punitive damages are also necessary to ensure dissuasion. At the moment there is some reluctance to mete out punitive damages. For reasons unknown it seems perfectly normal for cartels to be ordered to pay hundreds of millions in punitive damages, or for tabloids to be ordered to pay huge sums of money to movie stars whose privacy was infringed, but for victims of discrimination in employment to be content with puny rather than punitive awards.

Keywords Anti-discrimination · Compensation · Punitive damages

[1] Gender: Recast Directive 2006/54, race/ethnic origin: Directive 2000/43, religion/belief/disability/age/sexual orientation Directive 2000/78.

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1 Introduction

The anti-discrimination directives[1] aim to effectively guard the core European principle: human dignity. As Vladimir Spidla, the former European Union Commissioner and former prime minister of the Czech Republic said: "What distinguishes us from totalitarian countries is human dignity".[2]

The anti-discrimination directives are not just some directives like any other. They are essential for protecting an individual's dignity against discrimination. Hence the effective implementation of anti-discrimination laws is of the utmost importance if the European Union wants to stay a beacon of freedom rather than merely be an island of prosperity.

If the European Union's equal treatment rules are to have an impact on everyday life, they must be effectively enforceable. They must be capable of eliminating deeply ingrained attitudes, such as the idea that employers need to be protected against "greedy plaintiffs". In my own country, Germany, the case-law indicates that such attitudes are still prevalent, and anti-discrimination rules are still widely ignored. Fortunately, this attitude of reluctance is beginning to change, thanks to the case-law of the European Court of Justice—now codified in Articles 18 and 25 of the Recast Directive, Article 15 of Directive 2000/43 and Article 17 of Directive 2000/78—that compensation to victims of discrimination must be "effective, proportionate and dissuasive". This article attempts to examine that doctrine.

2 Punitive damages

An employer who discriminates against an employee or a job applicant commits a breach of contract and/or a tort. In either case, the laws of the member states (one assumes) obligate the employer to compensate the victim. Such compensation can comprise elements other than financial compensation—for instance reinstatement or a public apology—but in most cases the victim is interested primarily in money. This article therefore focuses on financial compensation for the victim's loss.

Discrimination can cause material loss, such as the loss of a (potential) job, underpayment and loss of earning capacity. It can also cause non-material loss, such as hurt feelings or depression. Both types of loss can be compensated for, to a certain extent at least, in the form of a monetary award. Such awards are common in all European Union jurisdictions. However, are they sufficient to deter employers from discriminating or, as the case may be, from continuing a pattern of discrimination in the future? Will a multinational company really be motivated to change its policies because a judge in one member state orders it to pay a few thousand euros? My contention is that this is not the case and that the European Court of Justice acknowledges this by requiring member state courts, where necessary, to apply a penalty that has been common in the United States for decades, but which European legislators and courts seem to be reluctant to accept in employment disputes—namely, punitive damages. For some reason, we find it perfectly normal for cartels to be ordered to pay hundreds

[2] 3. German Antidiscrimination Congress, Bonn, 18.07.2008, http://www.dgadr.org.

of millions in punitive damages, or for tabloids to be ordered to pay huge sums of money to movie stars whose privacy was infringed, but for victims of discrimination in employment to be content with puny rather than punitive awards.

3 Why are punitive damages necessary?

The aim of the European Union directives is to guarantee a Europe free from discrimination. In the workplace this means that employees must be hired, paid and promoted based on facts alone, not on the basis of bias.

Contrary to widely held belief, the elimination of discrimination does not hamper, but actually improves companies' efficiency, for a number of reasons. First, the absence of discrimination makes it easier to recruit the best employees and enhances the public image of a company. This can open new markets and help to win new clients. The following example makes the inefficiency of decisions based on discrimination evident. Let us suppose that an employer is looking for a mid-level manager. One hundred people send in applications. Using bias instead of facts, the employer rejects 50 women, 10 migrants, 10 disabled people and 15 applicants aged over 50. This leaves no more than 15 applicants to choose from. It is not until the field has thus been narrowed down from 100 to 15 applicants that the employer in this example begins to apply facts to its decision-making. The chances are that it has already rejected the best applicant.

Secondly, there is evidence that companies that have eliminated discrimination have a significantly reduced employee turnover. On average a replacement employee in a non-executive position costs around 125 % of 1 year's wages.[3]

Thirdly, by ending discrimination, employers will improve the motivation of their employees. Employees who see that they will be paid and promoted according to their own achievements, will feel fairly treated and will work with more dedication. A study in Germany shows that sick days and motivation are closely related. Employees with higher motivation have on average four sick days less each year than their less highly motivated colleagues.[4] Poorly motivated employees will do just enough, whereas highly motivated ones will show all they can do.

Fourthly, the said European Union directives recognise harassment as a form of discrimination. In Germany there are 3.5 million victims of workplace harassment every year.[5] The cost of discrimination and bullying (often referred to in Germany and some other countries as "mobbing" or "straining"[6]) to employers in Germany is

[3] Benner, S. [1], p. 44; Arlinghaus, O./ Eickmeier, K. [2], p. 172.

[4] The Gallup Organization [3], p. 74.

[5] Ramacher, M. [4], p. 36.

[6] In Germany, Italy and perhaps other countries as well "mobbing" is used as a synonym for workplace harassment. Normally this is defined as degrading behaviour lasting at least 6 months and occurring several times each week. "Straining" is a similar term which describes comparable behaviour of at least a single occurrence which puts a particular onus on the victim for at least 6 months. Both phenomena have to occur in conjunction with the victim's workplace duties. See Ege, H. [5] p. 70; "straining" acknowledged in judgements of Italian Labour Courts: Bergamo, 21 April 2005, file number: 711/02 R.G.; Sondrio, 22 July 2006, file number: 264/2004 R.G.

estimated to total over € 100 billion per year.[7] This figure is exclusive of the cost of the associated social services (health insurance funds, pension institutions, social security services, etc).

In brief, discrimination is inefficient. However, even supposing discrimination were efficient, would we want to tolerate it? And if we want to accept discrimination for the sake of business figures, what will be next? Child labour? Discrimination is degrading. It is immoral and, what is more, it is against the law.

4 Effective, proportionate and dissuasive

Sanctions for discrimination must be *effective, proportionate and dissuasive.*[8]

4.1 Judicial protection

To be effective, they have to give the victims of discrimination "real and effective judicial protection".[9] That means the victim's loss must be compensated for in full. This loss can consist of:

- material damages *e.g.*,
  - lost earnings;
  - legal costs;
  - loss of earning capacity;
- immaterial damages.

Let me investigate each of these components.

4.1.1 Lost salary

There is no cap for compensation for lost earnings in terms of the duration of the loss.[10] Allow me to illustrate this with the following hypothetical example. Tony is fired on reaching his 45th birthday because he is "too old". He had wanted to retire at age 65. His annual salary was € 60,000. His maximum material loss, if we ignore lost pay raises and losses in retirement income, is 20 years x € 60K = € 1,200,000. If Tony finds another job, the money he earns there has to be taken into account. In theory, Tony could sue for € 60,000 each year (or for € 5,000 every month) for the next 20 years, minus his earnings elsewhere. This would lead to decades of lawsuits. Instead, the court can estimate the future loss and award a one-off payment. This is a more reasonable solution than spending decades on litigation. The problem with this approach, however, is that it involves making an estimate as to how long the victim's

[7] € 148 billion: Ramacher, M. [4], p. 66; more than € 100 billion: Anselm, M. [6].

[8] Articles 18 and 25 of the Recast Directive 2006/54, Article 15 of Directive 2000/43, Article 17 of Directive 2000/78.

[9] ECJ Case 14/83 Von Colson [1984] ECR 1984 I-01891, at § 23, ECJ Case 177/88 Dekker [1990] ECR I-3941, ECJ Case C-271/91 Marshall II [1993], ECJ Case C-180/95 Draehmpaehl [1997] ECR I-02195.

[10] in Germany: Berlin Higher Labour Court, 26 November 2008, case 15 Sa 517/08.

employment would have lasted had the discrimination not occurred. A case—one out of many, but a rather insightful one—where a court was called on to make such an estimate is the English case of *Vento v. Chief Constable* of *West Yorkshire*.[11] In that case, which concerned a policewoman who lost her job at age thirty as a result of sexual harassment, the court calculated the income she probably lost as a result of the harassment at £165,829. It did so "on the basis that there was a 75 % chance of Ms Vento working in the police force for the rest of her career".

In brief, what *Vento* tells us is, first, that although estimating the likely duration of lost earnings is a subjective matter—in essence, no more than educated guesswork—it is an exercise that needs to be undertaken. Secondly, making a serious estimate of probable lost earnings will in many cases, as in *Vento*, lead to a high level of compensation.

In Germany, the theory is similar. In the event that a job (and hence the income that goes with the job) is lost, the lost income must be compensated for on the basis of an estimate.[12] In making this estimate, one of the determining factors is how long employees such as the victim commonly tend to retain their job. This is as the German parliament intended matters to be when it debated the Anti-Discrimination Act on 29 June 2006.[13] In determining how long the victim would probably have retained his or her job, the courts have reduced the victim's burden of proof. In 1994, the *BAG* ruled that the relevant statutory provisions reduce the victim's burden of proof "not only in respect of the amount of damages but also in respect of the question whether there are damages at all".[14] In 2000, the *BGH* held that[15] "when determining a victim's likely professional development in the absence of the event that caused the loss, Article 252 BGB requires the court to make an estimate based on the normal course of events, taking account of the specific circumstances of the case, in particular as they relate to the victim's education and professional experience. Although it is up to the victim to provide the court with as concrete facts and arguments as possible, this requirement must not be overstretched [...]. In the event no facts can be established that allow the court to determine with any measure of certainty whether the victim's career would in all likelihood have been successful or not, the court will need to proceed from the assumption that the victim's professional success would have been average [...] Article 287 (1) ZPO requires the court to determine whether a loss has occurred and how serious that loss is, taking account of all of the circumstances of the case and the court's own convictions. This provision of the law does not merely reduce the victim's burden of proof but also its duty to present all the facts supporting his claim. Even where relevant facts are lacking, the court must make such an estimation, provided sufficient facts have been established to enable the court to do this [...]".

[11] Court of Appeal (Civil Division), 20 December 2002 re *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102.

[12] See Article 252 BGB and Article 270 ZPO. Case law: BAG 12 November 1985, case 3 AZR 576/83; BGH 6 June 2000, case V1 ZR 172/99; BAG 29 September 1994, case 8 AZR 570/93.

[13] Plenarprotokoll 16/43 p. 4151, 4152 f.

[14] BAG 29 September 1994, case 8 AZR 570/93.

[15] BGH 6 June 2000, case VI ZR 172/99.

A good means to estimate losses caused by discrimination is the Kattenstein formula. This formula is based on fourteen million data sets. It takes into account, *inter alia*, the normal staff turn-over rate, deduction of accrued interest and missed promotions.[16] The following example illustrates how the Kattenstein Formula can be used to determine a claim:

Monthly wage (€)	5,000
Age	45
Retirement age	65
Interest rate p.a.	2.50 %
Estimated salary index-linkage p.a.	3.60 %
Lost pension accrual p.a.	0.27 %
Raise of salary due to promotion p.a.	0.47 %
Probability of keeping the job p.a.	86 %
Remaining duration of employment (months)	240
Volume of employment	100 %
Reduction for unemployment pay I	59.80 %
Reduction for unemployment pay II (€)	800
Claim for damages	€ 233,960.48

4.1.2 Legal costs

Under German law there is no compensation for legal costs in the first instance in Labour Courts.[17] European Union Directive 76/207 previously provided, and now Directive 2006/54 provides, that "Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation in accordance with the applicable national rules". In applying this directive, the European Court of Justice has stressed that compensation awarded to victims of discrimination has "to be made good in full".[18] This includes full compensation for legal costs. Given this (case) law, the German provision excluding compensation for legal costs may not stand up if challenged in the European Court of Justice.

4.1.3 Loss of earning capacity and career opportunities

Besides lost salary and legal expenses, a victim of discrimination may be faced with losses in the form of reduced productivity and/or loss of abilities.

These damages are to be expected in cases of intensive and degrading bullying.[19] They can be permanent or long-lasting. Hence the financial losses may be higher than

[16] Alenfelder, K. M. [7], p. 5–8.

[17] See Article 12 a ArbGG.

[18] ECJ Case C-271/91 Marshall II [1993] ECR I-4367, § 26.

[19] Ege, H. [5], p. 70; acknowledged in judgements of Italian Labour Courts: Bergamo, 21 April 2005, case 711/02 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.

the lost salary. The damage can be determined by an expert in a way similar to the way in which non-material damages are determined in cases involving bullying.[20]

Let me give an example. Tony is 45 years of age and works as a mid-level manager (salary: € 60,000). He has been bullied by his superiors and colleagues for 5 years because of his religion. He is the only Roman Catholic in the company. Finally he collapses and his doctor advises him to leave the company. He suffers from depression, he feels insecure and avoids meeting people. His doctor expects these handicaps to be permanent. He loses the ability to work in an executive position (*e.g.*, as the head of a department) and his achievement potential is permanently down to fifty per cent. After 4 years he finds a new job, again at an annual salary of € 60,000. His estimated loss of earnings according to the Kattenstein Formula is € 233,960 (see table above). However, this sum equals only around 4 years' wages. The permanent loss of abilities is not taken into account. The employee "sells" his abilities and efficiency in his job. If these "goods" are damaged he loses economic value—he receives no salary or lower salary. This material loss has to be compensated for in full. Here Tony loses any chance of promotion and bonuses.

4.1.4 Immaterial damages

Compensation for non-material damages is mainly for psychological suffering. The amount to be awarded depends on the severity of the discrimination and its psychological and medical impact.[21]

As for Germany, when determining the extent of damages for non-material injury, the courts have for a long time taken into account the need for damages to have a dissuasive effect. This approach is technically incorrect. A distinction needs to be made between non-material damages, the purpose of which is to compensate primarily for the injustice done, focusing on the victim and his or her sufferings, and on the other hand the preventive effect of an award for damages, where the focus is on the defendant and on potential future perpetrators of discrimination. It strikes me as erroneous to lump compensation for the victim and the preventive effect of damages together in one award for "non-material damages". Both elements need to be separated.

It may be that the idea of punitive damages is alien to many in Germany, but this is precisely what the European Union directives and the case-law of the European Court of Justice require. The German case-law in respect of privacy protection (see below) is more in line with the European Union's rules, even though that German case-law avoids qualifying the awards in question as being "punitive". Rather, the courts refer collectively to compensation for non-material damage as well as awards aimed at prevention jointly as "compensation". This lack of precise terminology needs to be redressed. Only when the different elements of an award are identified can the award be determined in accordance with European Union rules.

[20] Ege, H. [8]; acknowledged in judgements of Italian Labour Courts: Agrigento, 1 February 2005, case 2700/2003 R.G.C.; La Spezia, 4 July 2005, case 503/2004; Sondrio, 9 March 2006, case 194/2004 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.; Bergamo, 8 August 2006, case 1785/2001 P. G.; Bergamo, 14 June 2007, case 882/03 R.G.

[21] Ege, H. [8].

Thus the suffering of the victim has to be compensated for. Then a sum has to be added, which is enough to guarantee deterrence. The required sum can be determined by an expert.[22]

4.2 Deterrence

One can distinguish between two types of deterrence:

- measures aimed at dissuading the perpetrator of the discrimination from continuing or, as the case may be, repeating his behaviour (*specific prevention*);
- measures aimed at dissuading other employers from discriminating against their employees in a similar manner (*general prevention*).

4.2.1 Interpretation of "deterrent effect" and "dissuasive"

Neither the judgments of the European Court of Justice in *Von Colson*, *Marshall* and *Draehmpaehl* nor Directives 2000/43, 2000/78 or 2006/54 provide any clue as to what is meant by, respectively, "deterrent effect" and "dissuasive". One way to determine the meaning of "deterrent effect" and "dissuasive" is to look them up in a dictionary or thesaurus (synonyms of "deter"' being warn, frighten, intimidate) or to investigate in which contexts these expressions are used.

One field where the concept of deterrence is often applied is in international politics. There, the concept has been defined as "the use of threats by one party to convince another party to refrain from initiating some course of action". Clearly, whatever the exact meaning of deterrence in a legal context, it is something serious, more than a slap on the wrist.

4.2.2 European Union anti-trust law

An idea of the meaning of "deterrent effect" can, perhaps, be derived from the law and case-law on Regulation 2003/1 and its predecessor Regulation 17. These regulations deal with violations of European Union anti-trust law. Article 23(2) of Regulation 2003/1 allows the Commission to impose fines on companies for infringement of competition rules, up to a certain maximum related to total turnover in the previous year. In fixing the amount of the fine, "regard shall be had both to the gravity and to the duration of the infringement". In its 1983 judgment in the *Pioneer case*, the European Court of Justice held that "it was open to the Commission to raise the level of fines so as to reinforce their deterrent effect".[23] In 2005, the European Court of Justice held that the need to ensure the deterrent effect of the fines is one of the factors in assessing

[22] Ege, H. [8]; acknowledged in judgements of Italian Labour Courts: Agrigento, 1 February 2005, case 2700/2003 R.G.C.; La Spezia, 4 July 2005, case 503/2004; Sondrio, 9 March 2006, case 194/2004 R.G.; Sondrio, 22 July 2006, case 264/2004 R.G.; Bergamo, 8 August 2006, case 1785/2001 P. G.; Bergamo, 14 June 2007, case 882/03 R.G.

[23] ECJ joined Cases 100/80-103/80 Musique Diffusion francaise and others-v-commission [1983] ECR I-1825, at § 104.

the gravity of the infringement.[24] In 2006, the Commission adopted "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003". Its introduction states that "fines should have a sufficiently deterrent effect, not only to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence)." The guidelines relate the fine to the turnover of each of the infringing parties. This allowed the commission to impose, *inter alia*, the following fines:

- 2001: € 462 million against Hofmann-La Roche[25]
- 2004: € 497 million against Microsoft[26]
- 2006: € 280 million against Microsoft[27]
- 2008: € 899 million against Microsoft[28]
- 2009: € 1,060 million against Intel[29]
- 2011: € 320 million against Thyssen-Krupp[30]

Is it far-fetched to compare discrimination to transgressions of competition law? Clearly there are major differences. A company that infringes the anti-trust rules faces two separate sanctions:

(i) claims for compensation for lost profits lodged by the victims (judicial protection); and
(ii) a fine imposed by the European Commission (and/or the domestic cartel authority) in the public interest (general and specific deterrence).

The victims of anti-trust behaviour cannot claim more than their actual, proven loss. Unlike their American counterparts they cannot claim treble damages. This is why the European Commission, as a sort of third party, imposes fines. This difference alone makes anti-trust law hard to compare with anti-discrimination law. In discrimination cases, there is no third party similar to the European Commission that can impose a fine at all,[31] let alone on the basis of a regulation or some other European Union or national law. Perhaps this difference is attributable to the fact that discrimination in employment as a rule involves no more than one or a few easily identifiable victims[32] whereas violation of anti-trust rules usually affects the general public or an amorphous group of companies whose identity need not have been known in advance.

[24] ECJ joined Cases C-189/02, C-202-02, C-205/02 and C-208/02 Dansk Rotindustri [2005], at §260.

[25] European Commission 21 November 2001, OJ L 6 p. 1.

[26] European Commission 24 May 2004, OJ L 32 p. 23.

[27] European Commission 12 July 2006, OJ C 138 p. 10.

[28] European Commission 27 February 2008, OJ C 166 p. 20.

[29] European Commission 13 May 2009, OJ C 227 p. 13.

[30] ECJ joined cases T-138/07, T-141/07, T-142/07, T-145/07, T-146/07, T-144/07, T-47/07, T-148/07, T-149/07, T-150/07, T-154/07, T-151/07 [2011] OJ C 155, 7.7.2007.

[31] In most if not all European countries unlawful discrimination is subject to criminal prosecution. However, discrimination in employment is rarely prosecuted.

[32] The recent Supreme Court decision in the WalMart class action (Supreme Court of the United States, 20 June 2011, no. 10-277 re Wal-Mart Stores Inc. v. Dukes Ltd) demonstrates that the victims of discrimination in employment, even if the discrimination is structural, do not constitute a sufficiently homogenous group to qualify as a "class".

Be this as it may, the rationale behind the European Union's power to impose fines on anti-trust malfeasants is the same as that behind the requirement that the member states sanction discrimination by means of (effective, proportionate and) dissuasive measures. For this reason, the fines levied against cartels can serve as an inspiration for plaintiffs in discrimination cases.

4.2.3 Infringement of personal rights

In Germany a number of higher courts have had to decide cases where personal rights were infringed.[33] No award of any compensation for loss was made in the judgments in question. Rather, the judgments stressed the importance of deterrence in order to guarantee human dignity, given that without such deterrence, personal rights (which serve to protect human dignity) would wither away.

The courts stressed that an award had to have a preventive effect on the perpetrator. Moreover, the judgments stated that the courts must take into consideration the intensity of the infringement and the financial advantage gained by the perpetrators. The idea of prevention and deterrence was new at the time, but when the legislative Bill (that in 2006 became the new Anti-Discrimination Act) was debated, its Explanatory Memorandum referred to two of these judgments.[34]

In other cases in which non-material compensation (in respect of physical or psychological pain) was awarded, the judgments did not provide for deterrence, simply awarding compensation to the victim. The courts in those cases rejected the idea of deterrent compensation. Consequently, the amounts awarded were very limited.

Following the said two judgments, starting in 1996, the German civil courts affirmed the need for dissuasive compensation in cases where personal rights were violated by the media. Well-known examples are where the courts awarded:

- €1,200,000 for the publication of a photograph of Boris Becker without his consent;[35]
- € 400,000 for publication of fictitious articles and faked photos of Crown Princess Viktoria of Sweden;[36]
- € 256,000 for publishing nude pictures of a German singer after she had revoked her agreement;[37]
- approximately € 80,000 for imitating a German singer for a commercial;[38]

[33] Federal Constitutional Court (*Bundesverfassungsgericht*) 8 March 2000, case 1 BvR 1127/96; Federal Civil Court (*Bundesgerichtshof*) 5 December 1995, case VI ZR 332/94, misleading press article about breast cancer of Caroline of Monaco; 12 December 1995, case VI ZR 223/94, photos of a child of Caroline of Monaco were taken and published without her consent.

[34] Both judgments in cases where Princess Caroline was the plaintiff: see *Bundesgesetzblatt* Drs. 16/1780 page 46.

[35] München County Court, 22 February 2006, case 21 O 17367/03; revised by the Federal Civil Court for other reasons (freedom of the press was deemed more important than the infringement on the rights of the person by means of a normal and very small photograph), 29 October 2009, case I ZR 65/07.

[36] Hamburg Appelate Court, 30 July 2009, case 7 U 4/08.

[37] Hamburg County Court, case 324 O 280/01.

[38] Karlsruhe Appelate Court, 30 January1998, case 14 U 210/95.

- approximately € 79,000 for the use of a picture of Boris Becker for an advertisement;[39]
- € 76,000 for publishing a photograph of Princess Caroline's five-year old daughter;[40]
- approximately € 75,000 for publishing a nude picture of a German author;[41]
- € 70,000 for alluding to a 16 year old student's purported involvement in commercial pornography by a German television host in his show;[42]
- € 70,000 for re-enacting a scene in a Marlene Dietrich film—The Blue Angel—for a commercial, this sum being awarded to Marlene's heirs).[43]

At the moment the concept of actual dissuasive compensation is a new, if not alien, concept for most German labour courts.

In the cases referenced above the courts awarded the plaintiffs far higher sums than are usually awarded for psychological pain under German law. Why? Because in these cases the perpetrators attacked the core of the German Constitution: human dignity (personal rights). This core has to be effectively guarded against any attack from whoever this may come. Therefore compensation has to be deterrent in order to prevent further attacks (general and specific prevention). Any discrimination is an attack on the victim's human dignity—just as any libellous media coverage is. Hence this writer feels that the German judgments referenced above are directly applicable in discrimination cases.

Since Article 1 of the European Union Charter of Fundamental Rights uses the same words as Article 1 of the German Constitution, the German verdicts offer an idea on how the concept of "deterrent effect" in the anti-discrimination directives could and should be interpreted, particularly given that this interpretation is consistent with the European Union interpretation of deterrence under anti-trust law.

4.2.4 The victim's perspective

Having reviewed legislation and case-law, let me now turn to a practical issue, namely that, without generous compensation, why should a victim care to make a claim? German victims of discrimination face many obstacles:

- the Anti-Discrimination Act is a relatively new law and some of its provisions are unclear;
- victims are faced with years of legal battles (potentially three instances and 5 years of litigation);
- they will have to prove things which only they themselves will have seen and heard;
- in many cases they will be denounced as liars, as being paranoid, or as being greedy;

[39] München County Court I, case 21 O 12437/99.

[40] Federal Civil Court, 06 October 2004, case VI ZR 255/03.

[41] Hamburg County Court, case 324 O 68/01.

[42] Hamm Appelate Court, case 3 U 168/03.

[43] München Appelate Court, 17 January 2003, case 21 U 2664/01.

– some of my own clients have had to take tranquilisers before even being able to read letters from their former employers and their lawyers;
– they will lose their jobs, for example because things often tend to get rather unpleasant in the work place;
– they will have a hard time finding new jobs because their references are lacking;
– if they win, they are awarded no more than token compensation—frequently something in the region of € 1,000 to € 2,000.

Why make the effort?

4.2.5 Honouring international obligations

Another aspect of this problems consists of international treaty obligations, *e.g.*, the United Nations Convention on the elimination of all forms of discrimination against women,[44] the Convention on the Rights of Persons with Disabilities,[45] the European Convention on Human Rights[46] and of course the Universal Declaration of Human Rights.[47] These treaties have been ratified by most member states of the European Union. They are binding for these countries. Every judge has to respect them while interpreting national law.

Punitive damages on the perpetrators of discrimination may be deemed draconic or too harsh by some. But we have to consider the applicable United Nations treaties which are commitments which must be honoured.

These treaties state that every kind of discrimination has to be eliminated. Furthermore, discrimination is a direct attack on human dignity. The Universal Declaration of Human Rights states that "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[48] In Article 2 the Declaration adds that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[49] Article 8 even guarantees effective remedies, stating that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".[50]

Consequently the International Convention on the Elimination of All Forms of Racial Discrimination emphasises: "that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage

[44] Adopted 18 December 1979.

[45] Adopted on 13 December 2006, entry into force 3 May 2008.

[46] European Convention on Human Rights.

[47] The Universal Declaration of Human Rights—UN, 10.12.1948.

[48] The Universal Declaration of Human Rights, Preamble.

[49] The Universal Declaration of Human Rights, art. 2 (1).

[50] The Universal Declaration of Human Rights, art. 8.

universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".[51]

Discrimination "is a violation of the inherent dignity and worth of the human person" as the United Nations Convention on the Rights of Persons with Disabilities states.[52] Thus every state party has to take all "appropriate measures to eliminate discrimination" in order to end any kind of discrimination,[53] and to this end the state party has "to take measures to the maximum of its available resources"[54] The government has to ensure "effective legal protection against discrimination" and to "guarantee […] equal and effective legal protection against discrimination".[55]

The United Nations stresses the importance of ending discrimination—which shows that party states have to end discrimination by all legal means. But—as we can clearly see—party states have widely ignored this obligation. To give just one example, female employees in Germany still have only slim chances of winning promotion, and on top of that receive wages around 23 % lower than those of male colleagues.[56]

The most effective way is to ensure real deterrence. Punitive damages have to be awarded. The strictness of this requirement is the counterpart of the harshness and impact of denying a human being its innate dignity.

4.2.6 How to calculate deterrent compensation

After these preliminary remarks a calculation remains to be made. Which sum is necessary to guarantee real deterrence? Let me give an example:

The perpetrator has a business volume of € 10 billion. The court awards compensation of € 10,000. This is 0.001 % of turnover. To grasp what this means for such a company we have to compare it with numbers that normal people such as judges and lawyers can understand. The easiest way is to relate this example to average income, which in Germany is around € 30,000 per year. This is the "business volume" of an average citizen. 0.0001 per cent of this is 3 cents. How can such a sum be a deterrent? Nonetheless this seems to be precisely what some judges (without reasoning their decision) think.[57]

As noted before, sanctions for discrimination must not only be effective (judicial protection), they must also be proportionate and dissuasive. Surely this means that the deterrent part of an award needs to be tailored to the perpetrator's circumstances.

[51] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, which entered into force on 4 January 1969.

[52] Convention on the Rights of Persons with Disabilities, Preamble (h); Convention on the elimination of all forms of discrimination against women, Preamble.

[53] Convention on the Rights of Persons with Disabilities, art. 4 (1) (e); Convention on the elimination of all forms of discrimination against women, art 11 (1).

[54] Convention on the Rights of Persons with Disabilities, art. 4 (2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), art 2 (b).

[55] Convention on the Rights of Persons with Disabilities, art. 5 (2); similar: Convention on the elimination of all forms of discrimination against women (CEDAW), art 2 (c).

[56] Corbett, D. [9].

[57] See, for example, Wiesbaden Labour Court, 18 December 2008, case 5 Ca 46/08.

A real deterrent for employers could be to award victims of discrimination compensation equalling 1 or 2 % of their annual turnover. However, this could lead to extremely high and disproportionate sums. A suggestion for solving this problem would be to award a minimum of 1 year's wages or 1 year's average income (in Germany: approximately € 30,000) for each incident of discrimination. This suggestion was supported in the German parliament (*Bundestag*) at the time the Bill that led to the Non-Discrimination Act was debated.[58] Given that there were no other suggestions during the parliamentary debates, it can be argued that it is the "will of the legislator" that German victims of discrimination should be awarded no less than 1 year of salary. Moreover, the European Court of Justice decided in 1997 that 3 months' wages are insufficient as "deterrent compensation" in a situation where a job applicant is rejected on discriminatory grounds, unless the company provides evidence that the applicant would have been rejected anyway.[59]

If the (average) income is too low, higher sums than 1 year's wages are necessary. For example, in some European Union member states the average income is so low that it will not hurt a big international company. The question therefore remains whether 1 year's salary is really a deterrent, especially when applied to big enterprises.

4.3 Examples from Germany

In the past, German judges awarded low sums (around 1.5 months wages) for discrimination. This clearly is insufficient. Now the courts are slowly increasing the amounts. Several courts have awarded 6–12 months wages.[60]

Some of my own cases (aggregate amounts):

- € 500,000: gender and age discrimination, employer's offer for a settlement made in 2009, discrimination having occurred during employment
- € 250,000: gender discrimination, employer's offer for a settlement made in 2011, discrimination having occurred during employment
- € 200,000: gender discrimination, settlement made in 2011, discrimination having occurred during employment
- € 200,000: age discrimination, settlement made in 2008, discrimination having occurred during employment
- € 135,000: age discrimination, settlement made in 2010, discrimination having occurred during employment

[58] During the final debate on the Bill on 29 June 2006 the MP Sylvia Schmidt (SPD) said that in such cases dissuasively high awards for immaterial damages, by which she meant punitive damages, should be "no less than the equivalent of an annual salary and in no event less than € 30,000"; Christine Lambrecht, Legal Expert SPD group German Parliament, session 29 June 2006, plenary minutes 16/43 p. 4036, 4037; Silvia Schmidt, Member of Parliament, 29 June 2006, plenary minutes 16/43 p. 4151, 4152 f.

[59] ECJ Case C-180/95 Draehmpaehl [1997] ECR I-02195, at § 26. Only in cases of discrimination of applicants who would have been rejected anyway because of their poor qualifications 3 months wages was deemed sufficient.

[60] E.g. Hamm Higher Labour Court, 26 February 2009, case 17 Sa 923/08; Neumünster Labour Court 09 December 2009, case 3 Ca 1055 b /2009; bullying: 12 months wages: Cottbus Labour Court 08 July 2009, case 7 Ca 1960/08.

- € 100,000: age discrimination, settlement made in 2009, discrimination having occurred during employment
- € 100,000: age and gender discrimination, settlement made in 2005, discrimination having occurred during employment
- € 80,000: age and gender discrimination, settlement made in 2010, discrimination having occurred during employment
- € 75,000: gender discrimination, settlement made in 2012, discrimination having occurred during employment
- € 75,000: ethnic discrimination, settlement made in 2011, discrimination having occurred during employment
- € 75,000: age discrimination, employer's offer for a settlement made in 2011, discrimination having occurred during employment
- € 70,000: gender discrimination, proposal of the court made in 2011, discrimination having occurred during employment
- € 50,000: gender discrimination, settlement made in 2009, discrimination having occurred during employment
- € 50,000: discrimination of disabled people, settlement made in 2008, discrimination having occurred during employment
- € 38,000: racial discrimination, settlement made in 2012, discrimination having occurred during employment
- € 34,000: workplace harassment, settlement made in 2011, discrimination having occurred during employment
- € 33,000: discrimination on grounds of belief, settlement made in 2008
- € 30,000: bullying, judgment made in 2009, in addition to compensation for the loss of the job and outstanding salaries, discrimination having occurred during employment
- € 25,000: age discrimination, settlement made 5 years after end of the employment and in addition to compensation for the loss of the job, 2010, discrimination having occurred during employment
- € 23,000: gender discrimination (14.5 month's wages), settlement made in 2009, discrimination against a job applicant
- 11 month's wages awarded in 2009 as compensation and continuation of the fixed-term employment contract: gender discrimination having occurred during employment[61]

In most cases, the settlements included a confidentiality clause. I am therefore restricted in what I can write. I can, however, give the following examples:

4.3.1 Mrs L.

Mrs L worked in a nursing home as a senior nurse. She was praised for her excellent work. Then a new manager took over. From the first day he started to bully her. He revoked most of her managerial authority, even though she had proven herself outstandingly efficient. He ignored her warnings regarding health risks for patients.

[61] Neumünster Labour Court, case 3 Ca 1055 b/09, 2009.

He wrongly accused her of having removed documents and he offended her with anti-female statements. Finally he terminated her contract. She underwent medical treatment for, *inter alia,* clinical depression, for several years.

We filed the case in 2008, applying for compensation both from her employer and from the manager personally. In 2009 the judge awarded our client compensation of € 30,000, adding that additional compensation would have to be paid in the event any future damages would arise. Both the company and the manager were held liable for all these damages.

The judgment stressed the need for general and specific prevention. The company was relatively small, employing around forty people, and the company was situated in a less affluent region of Germany (the Eastern part). For this reason, € 30,000 was seen as being sufficiently deterring. On appeal, a confidential settlement was reached.[62]

4.3.2 Mrs M.

Mrs M. worked as a physical therapist. She had a 1 year fixed-term contract. At the end of the year she was pregnant. She told her boss about it and he told her that, because of the pregnancy, he would not offer her a permanent contract, adding, "surely you will understand that." She did not—and asked my firm to sue her employer. Her boss had been sufficiently accommodating enough to tell his reasons not only to my client (who, as the plaintiff, was not allowed to testify) but to her husband as well. The company hired another physical therapist. This was a clear case of direct gender discrimination (maternity).

In accordance with her request, the court awarded her a permanent contract, non-material damages (11 months' wages) and her full salary for the intervening period between dismissal and judgment.[63]

4.3.3 Mr X.

Mr X worked for 20 years for a German corporation. When he turned 60, he was asked to resign and enjoy life. He did his work as well as before, but the employer wanted to give the company a "younger face". The employer demoted him from middle management and a plush office to a cubicle near the entrance of the building and he was instructed to review unimportant data and to write superfluous reports. Finally, at 63, we filed an application to the court. One year later the employer paid him € 200,000.

5 Blacklisting

An effective way to combat discrimination in the workplace would be to blacklist discriminating companies and to bar them from applying for public sector tenders and subsidies. This would force the companies to abstain from any discrimination in order

[62] Cottbus Labour Court, file number: 7 Ca 1960/08, 08.07.2009; news article about the case in German: Preikschat [10].

[63] Labour Court Neumünster, case 3 Ca 1055 b/09, 2009.

to avoid such severe consequences. In the United States such a blacklist already exists. It is managed by the Office of Federal Contract Compliance Programs.[64]

Even more effective would be demanding a certificate of non-discriminating practice from any company which wants to partake in a public sector tender or asks for subsidies. Why should we spend tax money on companies which engage in discrimination by awarding them public tenders or subsidies? At least the government should keep up the idea of a society free from discrimination. Surely doing business with the perpetrators, and even awarding them subsidies, is hypocritical, as it involves passing legislation against discrimination whilst at the same time supporting discriminating companies.

6 Conclusion

Discrimination is immoral. It is a direct attack on human dignity and is inefficient as well. Low awards are useless and encourage discrimination. At the same time such awards discourage victims. Only full compensation for all material and non-material damages as well as punitive damages will end discrimination. REAL deterrence needs to be "painful". Only high awards guarantee an end to discrimination. The European Union directives and the rulings of the European Court of Justice clearly show the way forward. With these, effective protection against discrimination is possible. For now, however, the courts have to fulfil these obligations. Protection against discrimination is in the hands of judges. Will they deter the perpetrators or the victims? Low levels of compensation will result in a high level of discrimination. It is therefore up to each and every court to decide for itself whether to be the accessory of the perpetrator or the protector of the victim.

References

1. Benner, S.: Risiken der Diskriminierung. Fachhochschule Nordhessen, Bonn (2008)
2. Arlinghaus, O., Eickmeier, K.: Praxishandbuch Turnaround Management: Liquidität sichern. Kosten senken. Springer, Wiesbaden (2007)
3. The Gallup Organization: Engagement Index 2004. Gallup, Potsdam (2004)
4. Ramacher, R.: Das Allgemeine Gleichbehandlungsgesetz unter Berücksichtigung der Kosten von Diskriminierung und Mobbing in der Bundesrepublik Deutschland. Fachhochschule Nordhessen, Bonn (2011)
5. Ege, H.: Oltre il Mobbing. Straining, stalking e altre forme-di conflittualità sul posto di lavoro. Franco Angeli, Milan (2005)
6. Anselm, M.: Die hohen Kosten der Angst, Die Welt. http://www.welt.de/print-welt/article146192/Die_hohen_Kosten_der_Angst.html (17.08.2006)
7. Alenfelder, K.M.: Materieller Schaden wegen Diskriminierung. Zeitschrift für Antidis-kriminierungsrecht **2/2007**, 5–8 (2007)
8. Ege, H.: La valutazione peritale del danno da Mobbing. Giuffrè, Milan (2002)
9. Corbett, D.: Female executives in Germany are not spared the gender pay gap, Deutsche Welle. http://www.dw-world.de/dw/article/0,6482088,00.html (25.03.2011)
10. Preikschat, D.: Forsterin durchleidet Mobbing-Martyrium in DRK-Pflegeheim, Lausitzer Rundschau. http://www.lr-online.de/regionen/forst/Forsterin-durchleidet-Mobbing-Martyrium-in-DRK-Pflegeheim;art1052,2601305,0 (12.07.2009)

64 https://www.epls.gov.