• INSIGHT | TRUST | PASSION •

LEGAL BRIEFING – Dispute Resolution & Restructuring

by Sotiris Foteas – Partner

& Myrto-Amaryllis Lappa -Trainee Lawyer

24 June 2021

Equal Treatment and anti-discrimination remedies: ECJ in the search of a special teleology

s.foteas@aklawfirm.gr

m.lappa@aklawfirm.gr

I. In its recent judgement in the *Braathens Regional Aviation* case **(C-30/19)**, the European Court of Justice (ECJ) has set an interesting precedent regarding the impact of the equal treatment and non-discrimination principles on the national systems of extra-contractual liability and the overall concept of monetary compensation. In this context, the ECJ has pronounced against the compatibility with the EU law of a national provision precluding the judicial affirmation of such discrimination due to the mere payment of the compensation. More precisely, the Court has considered as incompatible with the secondary EU law a provision of the Swedish law setting this payment as a "negative prerequisite" of the admissibility of the remedy exercised by the person suffered the discriminatory event. According to the national law, any relevant Court proceedings initiated to seek claims for the damage occurred would have to cease as being deprived from any further purpose, in the occasion that a monetary amount was already paid to the victim of the discrimination and regardless of the declaration of such discrimination.

II. Factual and legal background: *The case was brought before the ECJ by the Supreme Court of Sweden (Högsta domstolen) and involved proceedings between an air passenger, represented by the Swedish Ombudsman for combating discrimination (Diskrimineringsombudsmannen), and the airline Braathens Regional Aviation AB ('Braathens').*

According to the Ombudsman, Braathens, prior to the departure of a domestic flight in July 2015, subjected the passenger to an additional security check, which was alleged to constitute direct discrimination for reasons relating to physical appearance and ethnicity, being as such a less favorable treatment than the one vis-à-vis other passengers in a comparable situation. The Ombudsman sought compensation for the person suffered such discriminatory behavior. Braathens admitted the claim for payment of compensation before the Stockholm District Court, while nevertheless disputed the existence of unlawful discrimination.

The question that was brought on appeal before the Supreme Court and subsequently referred to the ECJ was consequently whether the award of damages, in an amount exceeding a purely nominal value, to a person having been subject to unlawful discrimination can be considered to be a sufficient remedy, where it was neither admitted nor established that the alleged discrimination had indeed occurred.

On 25th April 2021, the ECJ answered this question in the negative, holding that national rules preventing the applicant from obtaining a civil court ruling on the existence of discrimination, either an admission from the defendant or a declaration by the court that such compensation is being paid exactly because of discrimination, are contrary to Article 7 (defence of rights) and Article 15 (sanctions) of Directive 2000/43 against discrimination on grounds of racial or ethnic origin, both interpreted in the light of Article 47 of the Charter of Fundamental Rights.

In relation to Article 7 of Directive 2000/43 the Court held that a right to have the alleged discrimination established by a court (if not recognised by the defendant) derives "necessarily" from the obligation to make available enforcement proceedings to persons claiming to have suffered negative discrimination. The term "enforcement of obligations" in that Article must not be interpreted narrowly in a way that excludes declaratory actions. Therefore, the payment of a sum of money per se, even where it is the sum claimed by the claimant, is not such as to ensure effective judicial protection for a person who requests a finding that there was a breach of his right to equal treatment deriving from that Directive in particular, where the primary interest of that person is not economic but rather to obtain a ruling on the reality of the facts alleged against the defendant.

Moreover, in relation to Article 15 of Directive 2000/43, the Court held that the absence of a link between the compensation and the declaration of a breach of the right to equal treatment undermines both the compensatory and deterrent function of the sanction. The payment of a sum of money is insufficient to meet the claims of a person who seeks primarily to obtain recognition, by way of compensation for the non-material damage suffered and the requirement to pay a sum of money cannot ensure a truly deterrent effect as regards the author of the discrimination. Within this framework, Braathens admitted the claim for payment of compensation though only to demonstrate "its good will" and avoid potentially lengthy and costly proceedings requiring it to defend itself against the allegation of discrimination.

In addition, the Court rejected the defendant's argument, that the Swedish legislation at issue protected party autonomy and promoted amicable settlements. In fact, a mechanism that closes judicial proceeding for the mere fact that the defendant accepts to pay compensation, deprives the applicant from the right to have the court examine whether discrimination has occurred and does not take into account the applicant's moral harm.

III. Assessment: The above ruling phenomenally appears to introduce a rupture into the traditional perception of compensation as acceptable means of restitution. Why should a Court decision be regarded as necessary, to the extent that a restitution is granted before and without any court proceedings?

The answer lies in the overall assessment of the protective scope of the relevant principles. The Court has introduced a concept emphasizing on the declaratory and dissuasive dimension of the protected right. Regardless of the right to seek a monetary amount as proper restitution of a non-pecuniary damage, the victim is thus entitled to something more: a special right to "attach" this restitution to the existence of the discrimination and the breach of the relevant protective legislation. Only under such explicit judicial declaration of this linkage, does the protective scope of the infringed rules produce full effectiveness and the rights or principles provided therein reflect their envisaged deterrent effect vis-à-vis the potential authors of discriminatory acts.

Searching behind the Court's rationale, one could reasonably invoke the supremacy of the equal treatment principle over the common legislation. Rights protected by sources of constitutional and supra-constitutional force shed light to the provisions of extra-contractual liability and deserve to be recognized explicitly as being worth of protection through compensation mechanisms. It is an expression of "reflection" of constitutional rights to the interpretation of inferior provisions. And this is of course a construction revealing the teleological structure of the liability rule: protection of the right in its secondary function of prevention (deterrence).

On the same page, a pure civilistic approach is also workable. The mechanisms set to prevent discriminations and enforce equal treatment fall within the scope of pure liability systems rather than punitive damage concepts, thus requesting causality between an infringement of provisions of law and the (moral) damage occurred. The nexus between the unlawful conduct and the damage is thus an indispensable element of the liability mechanism. To trace this causal link, it is vital to define both the unlawful conduct and the nature of the damage. Specification of its specific requirement is a prerequisite for the liability to be properly established.