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On Structural Injunctions to Remedy Persistent Organizational and Structural Discrimination under EU Equality Law: Race, Sex, and Beyond

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Abstract:

This Article proposes a shift in thinking about the judicial remedies (or "sanctions") under EU equality law, by which we mean the EU's various equal treatment and anti-discrimination directives and the Treaty provisions and general principles to which they give effect. We argue that the currently preferred judicial remedies, such as declarations, compensation, fines, and simple injunctions to obey the law, may be insufficient in cases where the defendant is a recalcitrant institution, the unlawful discrimination involves a complex set of organizational practices, and the harm is continuous and broad. In such cases, the appropriate remedy may be a "*structural injunction*", that is, an injunction that orders more detailed, widespread. and ongoing changes to an offending institution's organization and activities. In this Article, we briefly present the origin, nature, and scope of structural injunctions, show how they may be compatible with the constitutional separation of powers, and argue that EU law may, under certain circumstances, demand that national courts issue such structural injunctions to remedy persistent, institutional, and structural discrimination. The Article thereby seeks to inform the current theory and practice of European equality law in national courts throughout the Member States, as well as the drafting of pending and future legislation in Brussels

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TABLE OF CONTENTS

INTRODUCTION **1**

1. THE *MODERN STRUCTURAL INJUNCTION*: A BRIEF TRANSATLANTIC PRIMER **3**

1.1. Origin and Development of Structural Injunctions: Lessons from the United States 3
1.2. The Structural Injunction in Europe: Authority and Use 5
1.3. "Command-and-Control" v. "Process-and-Goal": Respecting the Judicial Function 9

2. DOES AND SHOULD EU EQUALITY LAW DEMAND STRUCTURAL INJUNCTIONS? **12**

2.1. Access to the Judiciary and the Demand for Practical and Effective Relief 12
2.2. "Effective, Proportionate and Dissuasive": From Damages to (Structural) Injunctions 15
2.3. The Appropriateness of Structural Injunctions: On Collective Redress 17
2.4. Lessons from Strasbourg 20

3. CAN EU LAW REQUIRE NATIONAL COURTS TO ISSUE STRUCTURAL INJUNCTIONS? **22**

CONCLUSION **26**

Introduction

Judicial remedies in Europe need a fresh look. While general statements that national courts must ensure the "effectiveness" of EU law abound, little has been said about what this means beyond access to a courtroom, a declaration in case of illegality or invalidity, and, possibly, some compensation or fine. But can and must courts at times do more, such as issue injunctions prohibiting certain actions or ordering that certain actions be taken? And if so, how far can and must such injunctions go – as a matter of European law – especially where the defendant is a recalcitrant institution, the harm pervasive, and the discrimination complex or even baked into the structure of the offending organization or system?

This is an urgent question, especially for European equality law, by which we mean the various EU equality directives, as well as the Treaty provisions and general principles to which secondary legislation gives effect.[1] As is becoming increasingly clear (if it wasn't all along), discrimination is rarely an individual's isolated act at a discrete time and place, violating norms that are otherwise broadly shared and commonly observed. Instead, the problem tends to be more enduring and pervasive across a broad range of social and economic life throughout the Member States.[2]

In the Netherlands, for example, a recent test revealed that employment agencies were willing to honor 40% of potential clients' requests not to hire ethnic minorities as temporary workers.[3] In Sweden, whites received up to twice as many callbacks for job applications as nonwhite minorities.[4] In France, over half of tested real-estate agencies were willing to facilitate property owners' express discriminatory practices on the basis of race and ethnicity.[5] In Denmark, the suicide rate for LGBT+ persons is twice as high as that for the general population.[6] In the Czech Republic, Hungary, Slovakia, and elsewhere in Europe, Roma face persistent widespread

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[1] *See e.g.*, Equal Treatment Directive 76/207/EEC; Employment Equality Directive 2002/73/EC; Equal Treatment Directive (Recast) 2006/54/EC; Equality Framework Directive 2000/78/EC; Racial Equality Directive (2000/43/EC); and Proposed Equal Pay Directive COM/2021/93, as well as Art. 2, 3 TEU, Art. 8, 10, 19, 157 TFEU, and Art. 21, 23, 47 CFR and their corresponding general principles.

[2] *See, e.g.*, EU Fundamental Rights Agency, *op. cit*., *supra* note **Error! Bookmark not defined.**, pp. 70-72.

[3] Store Support, "Store Support (2019), Inspectorate SZW report on mystery calling study on labour market discrimination (Rapport Inspectie SZW – Mystery calling-onderzoek arbeidsmarktdiscriminatie)", available at https://www.inspectieszw.nl/binaries/inspectieszw/documenten/rapporten/2019/07/11/rapport-mystery-calling-onderzoek-arbeidsmarktdiscriminatie/Rapport+Inspectie+SZW+Mystery+calling-onderzoek+arbeidsmarktdiscriminatie.pdf. *See also* EU Fundamental Rights Agency, Franet National Contribution to the Fundamental Rights Report 2020, pp. 9-10 (discussing SZW study in English), available at https://fra.europa.eu/sites/default/files/fra_uploads/netherlands-frr2020_en.pdf.

[4] Lincoln Quillian et al., "Do Some Countries Discriminate More than Others? Evidence from 97 Field Experiments of Racial Discrimination in Hiring", 6 Sociological Science (2019), 467-496, at 485. The same is true for France. *See id.*

[5] SOS Racisme, *Discriminations raciales au logement, ça suffit!* (2019), p. 9, available at: <https://drive.google.com/file/d/1Aqmk7Wp3Ppf6wZUTM-ho9O8Dpwjr00vo/view>.

[6] *Discrimination on grounds of sexual orientation and gender identity in Europe* (Council of Europe Publishing, 2011), p. 106, *citing* Gransell L. & Hansen H., *Lige og ulige? Homoseksuelle, biseksuelle og transkønnedes levevilkår* (CASA and Landsforeningen for bøsser og lesbiske, 2009), p. 121, available at <https://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf>.

discrimination in employment, education, housing, and healthcare.[7] Across Europe, 28% of Jews report harassment on account of their religion within a year,[8] while one in three Muslims report suffering discrimination, harassment, or police stops when wearing visible religious symbols.[9] And despite the principle of equal pay for equal work having been laid down in the Treaties since 1957, a widespread gender pay gap continues to this day.[10]

Such broad discrimination, especially when structurally embedded in organizational practices, customs, and rules is far more than any one-off declaration, compensation, or fine can fix. In such cases, the remedial charge of EU law to "restore" equality where that guarantee has been breached,[11] and to "nullify" the consequences of any such breach via "effective, proportionate, and dissuasive" sanctions,[12] surely appears daunting. Especially in the face of such stubborn facts, effective remedies demand an act of great imagination and resolve: to help bring about a world that is currently counterfactual and may, indeed, have never existed before. And yet this positive obligation of EU law is one on which the effectiveness of EU law depends.

This is not to suggest that courts alone can or will fix the problem of equality. But they are dutybound to contribute to that effort, insofar as EU law requires, to the full extent of their institutional capacity. And by failing to consider the role that injunctions – especially, the "structural injunctions" we discuss here – may serve, European courts have been fighting discrimination with one hand tied behind their back.

Basic injunctions limit the discretion of actors where declarations, damages, and fines do not suffice to remedy illegal practices. A basic injunction will order an individual actor to take, or refrain from taking, a specific action or type of action. Structural injunctions build on this idea, as they seek to tackle pervasive, institutional, and even structurally embedded discrimination for which compensation or fines similarly do not lead to satisfactory reform. Structural injunctions, as we shall explain, order broad changes to organizational practices that wittingly or unwittingly contribute to the creation or perpetuation of the unlawful harm.

To date, however, structural injunctions have been exceedingly rare in Europe. The thought seems to be that such injunctions somehow exceed the proper judicial domain. This likely reflects a set of constitutional worries, such as the separation of powers, as well as national judicial temperament and culture. In part, it may also derive from a lack of familiarity with structural injunctions, and especially with how such injunctions may be crafted to preserve the separation of powers even as the offending discrimination is addressed. Judicial reluctance to even consider broader injunctions may also derive from a lack of appreciation of what EU equality law demands,

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[7] *See* EU Fundamental Rights Agency, "The plight of Roma sees little change", available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-infographic-frr2019-ch05-roma.pdf; Council Recommendation on Roma equality, inclusion and participation, 2 March 2021, available at https://data.consilium.europa.eu/doc/document/ST-6070-2021-INIT/en/pdf; *See also id.* at p. 20, note 1 (recognizing "structural discrimination").

[8] EU Fundamental Rights Agency, "Experiences and perceptions of antisemitism - Second survey on discrimination and hate crime against Jews in the EU", p. 12, available at < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-experiences-and-perceptions-of-antisemitism-survey_en.pdf>.

[9] EU Fundamental Rights Agency, "Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Muslims - Selected findings", p. 9, available at < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-minorities-survey-muslims-selected-findings_en.pdf>.

[10] *See* SWD(2020)50 final, "Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle on 'equal pay for equal work or work of equal value'", available at: <https://ec.europa.eu/info/sites/info/files/swd-2020-50_en.pdf>.

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especially regarding the obligations on national courts to issue effective remedies that concretely advance justice. The current result is judgements that tend to remedy discrimination with declarations, compensation, and fines, which "do not eliminate the underlying structures" that cause the unlawful harm.[13]

Our aim, therefore, is to introduce the structural injunction, and to explain the nature, scope, and use of this remedy, as well as its compatibility, in principle, with the separation of powers. We further aim to clarify the powerful demand that EU equality law makes on national courts to deploy all necessary and available tools in the judicial toolkit to bring about practical justice, and, therefore, to consider the use of structural injunctions as a tool to live up to this demand.

Our project, then, comes with modest and bold ambition. The modest ambition is simply to help the EU judiciary (especially national courts) understand structural injunctions better as a potential tool to implement substantive holdings on equality. The bold ambition is to argue that EU law may, at times, demand that national courts deploy structural injunctions, as in a case where equality has been legally breached and other judicial remedies will not suffice. In both its modest and broad version, we hope to lay the foundation for the discussion and use of structural injunctions not just in the school desegregation setting, which shall remain our most concrete example here, but in equality settings more generally, and, indeed, wherever else this type of remedy might be necessary and appropriate to remedy a violation of EU law. Finally, whether modest or bold, narrow or broad, we well understand the difficulty of advocating for major change in judicial practice. As such, this Article is intended not as closing a conversation, but as opening a new arena for further investigation and work.

1. The *Modern Structural Injunction*: A Brief Transatlantic Primer

Structural injunctions were developed in the United States in response to recalcitrant school districts who evaded practical reform well after the Supreme Court had declared racial segregation in public schools unconstitutional in *Brown* v. *Board of Education*.[14] Since their origin in that setting, structural injunctions spread to a host of other domains, and they have evolved from an early rigid model to a more flexible approach that is more sensitive to concerns about the proper judicial role. Still rare in Europe, some national courts have begun to explore this modern remedy here as well, while tailoring it to national constitutional sensibilities. Here, too, the hard battle against segregated schools provides the quintessential example, and, for present purposes, a useful point of comparison, both to introduce and to understand the remedy in its various forms.

1.1. Origin and Development of Structural Injunctions: Lessons from the United States

Structural injunctions first came to prominence in the fight against school segregation, which had seen little change in racial school attendance for an entire decade after the foundational constitutional holding in *Brown*.[15] Only with the advent of more ambitious judgments that

[13] Adam Weiss, "Can We Litigate Strategically in the Court of Justice of the European Union?", *European Roma Rights Centre* (14 Aug. 2015), available at <https://www.errc.org/news/can-we-litigate-strategically-in-the-court-of-justice-of-the-european-union>.

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expressly ordered school districts to make concrete changes to their organizational practices did school desegregation promise to become a practical reality.[16]

The proceedings, which Abram Chayes long ago termed "public law litigation,"[17] differ from the traditional lawsuit, where a judge would remedy an isolated act by a single individual against a single victim. In public law litigation, by contrast, the offending actor is a complex organization, the unlawful discrimination tends to be ongoing and sprawling, and the violation cannot be stopped, nor the harm remedied, with the simple flick of a switch. In public law litigation, the judge therefore becomes "the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in the administration and implementation."[18] This public law litigation model was applied well beyond school segregation. Indeed, Chayes saw its features in suits surrounding employment discrimination, prison conditions, housing discrimination, electoral reapportionment, environment management, as well as antitrust, securities fraud, bankruptcy, and union governance.[19]

In addition to potential damages awarded and fines imposed, public law litigation usually culminates in an injunction – and not just a simple injunction to ensure "preventative" relief (*i.e.*, against future repetition of the wrong), but an injunction to vindicate "reparative" and "structural" goals as well.[20] The reparative injunction seeks to stamp out the continuing ill effects of past wrongs, and to bring about, in so far as practicable, a world resembling the one in which the wrong had not taken place. The structural injunction is even more ambitious. It aims at reforming a defendant organization, not only to prevent that existing institution from engaging in some discrete future wrong, but because "[t]he...wrong is the [existing] structure itself." [21] The structural injunction is thus a mandatory "reorganization" of the institution "designed to bring the structure within [legal] bounds."[22]

To stick with the example of school segregation, the problem is not simply correcting a single mistake, as in paying a rejected student for the harm suffered, or in telling an existing school to accept a particular student. Nor is it a matter of merely making the past refusal of admission up to one or more students in some way, or of preventing an existing school from repeating some discretely unlawful refusal of admission. Instead, a structural injunction seeks to take the responsible school system that is intrinsically unconstitutional or illegal in virtue of being set up and organized as a dual, segregated system, and to order organizational changes to transform that system into the lawful, unitary system it legally must be. And indeed, after *Brown*'s grand constitutional holding left schools virtually unchanged for over a decade, real progress toward racial integration came only after courts began issuing structural injunctions that mandated and supervised the practical implementation of concrete desegregation plans, regulating everything from admission practices to student busing.[23]

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[17] Abram Chayes, *The Role of the Trial Judge in Public Law Litigation*, 89 Harv. L. Rev. (1976), 1281-1316.

[18] *Id.*, at 1284.

[19] Chayes, op cit. *supra* note **Error! Bookmark not defined.**, at 1284.

[20] Owen M. Fiss, *The Civil Rights Injunction* (Indiana Univ. Press, 1978), p. 7.

[21] *Id.* at 11. Fiss spoke of "constitutional wrongs" and "constitutional bounds," but the idea is applicable to statutory or Treaty based frameworks as well.

[22] *Id.*

[23] *See, e.g.*, Greenberg xxx

To be sure, the original style of public law litigation has come under fire, with charges that it is at times ineffective or even illegitimate.[24] But structural remedies have nevertheless endured across vast areas of litigation, and, responding to the criticism, they have evolved.[25] From a starting point of command-and-control injunctions, in which the trial court would directly impose detailed organizational features on defendant institutions, judges turned instead to what Charles Sable and William Simon have termed "experimentalist intervention."[26]

As a result of this reform, today's structural injunction is no longer a fixed product but what you might call an *iterative and collaborative process*. It seeks to draw broadly and equitably on input from stakeholders, both public and private, and to devise, assess, and revise the injunctive intervention in a transparent and comparative manner over time. As Sable and Simon put it:

> "In the most distinctive cases, the governing norms are general standards that express *goals* the parties are expected to achieve – that is, outputs rather than inputs. Typically, the regime leaves the parties with a substantial range of discretion as to how to achieve these goals. At the same time, it specifies both standards and procedures for the measurement of the institution's performance...in relation to the parties' initial commitments and in relation to the performance of comparable institutions."[27]

The *modern structural injunction*, as we shall call it here, has thus evolved to increase both the efficacy and the legitimacy of the remedial intervention. It allows the judge to draw on the resources and expertise of stakeholders. It provides for a remedial process that is more transparent and inclusive. And it allows for maximal decentralization and deference to the defendant institution as is compatible with achieving the legally required result. The modern structural injunction has thus become more modest than the old command and control injunction, through which judges would essentially take over the management of a defendant's organization. Today's trial judge is more modest – no longer some kind of law enforcement "hero,"[28] but mostly a competent judicial facilitator.

1.2. The Structural Injunction in Europe: Authority and Use

Structural injunctions are still rare in Europe. Especially when it comes to public institutions, "national courts...usually say it is not their role to tell public authorities how to fix the problem."[29] But useful examples nevertheless exist, and they illustrate not only the possibility of such injunctions, but also their evolution from the old-style of command-and-control injunctions to their more modern form. To maintain the comparison with the United States, we shall consider litigation surrounding school desegregation here as well.

Perhaps the most extensive desegregation orders in Europe have come from courts in Hungary. Litigation in the past has been strong here, not least due to highly active NGOs,[30] and

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[24] For discussions, *see, e.g.,* Charles F. Sable & William H. Simon, "Destabilizing Rights: How Public Law Litigation Succeeds", 117 Harv. L. Rev. (2004), 1016-1101; Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders", 81 N.Y.U. Law Review (2006), 550-630.

[25] *Id.*

[26] Sable & Simon, op. cit. *supra* note 24, at 1019.

[27] *Id.* at 1019.

[28] Margo Schlanger, "Beyond the Hero Judge: Institutional Reform Litigation as Litigation", 97 Mich. L. Rev. (1999), 1994-2036.

[29] Weiss, *supra* note 13.

[30] NGO activism has subsided more recently due to lack of funding as well as an increasingly hostile national government. *See* András Kádár, Member, European Network of Legal Experts in Gender Equality and Non-Discrimination, Email Correspondence of 7 Feb. 2020 (on file with authors).

because Hungarian law allows for *actio popularis* suits, in which an NGO may litigate in the public interest to vindicate the rights of unnamed others. After years of such litigation in which Hungary's courts, like those of many others throughout Europe, would issue little more than fines, declarations, and vague orders to end existing violations,[31] Hungary's highest court in a landmark decision signaled that a structural injunction might be issued.

The Chance for Children Foundation (CFCF) had sued a city (Kaposvár) for maintaining attendance zones that resulted in segregated, lower quality schools for Roma children.[32] In the initial round of litigation,[33] plaintiffs won on the merits, but only received the usual declaratory relief and generic order that the defendant "bring the infringement to an end." [34] In the last instance of that first round of litigation, however, Hungary's Supreme Court took the significant step of noting that "a court can in principle oblige a defendant to terminate an unlawful situation in a way that it prescribes concrete steps."[35] But the suggestion was left deliberately vague. The Supreme Court refrained from any concrete prescription in that first round, because it found the plaintiffs' demand that the defendant be ordered to close the segregated school and distribute the students from that school into surrounding schools not "realistic and executable."[36]

When the city subsequently failed to respond to this judgment, CFCF brought a follow-up lawsuit under the EU Racial Equality Directive against the city and two newly responsible national government institutions[37] for failure put an end to the illegal segregation. Encouraged by the

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[31] *See, e.g.*, *Chance for Children Foundation* v. *Town of Hajdúhadház*, Legfelsöbb Bíróság [Supreme Court] Pvf.IV.20.936/2008/4 (Hung., 2008) (finding liability without desegregation order); *Chance for Children Foundation* v. *Local Council of Miskolc*, Debreceni Ítélőtábla [Debrecen Appeals Court] Pf.I.20.683/2005/7 (2005) (ordering merger of catchment areas without ordering desegregation); *European Roma Rights Ctr.* v. *Ministry of Educ. & Sci.*, Sofiyski Rayonen Sad [Sofia Dist. Crt.] Case No. 11630/2004 (Bulgaria, 2005). *Cf.* Greenberg, op. cit. *supra* note **Error! Bookmark not defined.**, at 943-44 (discussing cases). Occasionally, a court would order one or another student to be admitted to a particular program, but without effecting systemic change. *See* Farkas & Gergely, op. cit. *supra* note **Error! Bookmark not defined.**, at p. 88.

[32] Kádár Correspondence, op. cit. *supra* note 30. [Note on „Roma" term here]

[33] Somogy Megyei Bíróság [Somogy County Court] 24.P.21.443/2208/35 (Hung., 30 Nov. 2009); Pécsi Ítélőtábla [Pécs Appeals Court] Pf.I.20.061/2010/7 (20 May 2010); Legfelsöbb Bíróság [Supreme Court] Pfv.IV.21.568/2010 (24 Nov. 2010).

[34] *See Kúria* [Curia of Hungary] Pfv.IV.20.085/2017/9 (4 Oct. 2017), para 1-3 (summarizing prior litigation) (translation on file with authors).

[35] *Chance for Children Foundation* v. *City of Kaposvár*, Legfelsöbb Bíróság [Supreme Court], Pfv.IV.21.568/2010/5 (Hung., 24 Nov. 2010), *as reported in* András Kádár, "European Network of Legal Experts in the Non-Discrimination Field, Report on Measures to Combat Discrimination Directives 2000/43/EE and 2000/78/EC: Country Report 2010 Hungary", available at <https://www.refworld.org/pdfid/4ed65d172.pdf>.

[36] *Id.*

[37] *See* András Kádár, "Curia Upholds Decision Establishing Segregation in Education and Ordering the Closing Down of Segregated School", *European Equality Law Network* (8 Nov. 2017), available at < https://www.equalitylaw.eu/downloads/4485-hungary-curia-upholds-decision-establishing-segregation-in-education-and-ordering-the-closing-down-of-segregated-school-pdf-140-kb>. Since 2011, education became centralized under the Ministry of Human Resources (EMMI) which, in turn, created the Klebelsberg Center for Maintaining Educational Institutions (KLIK) to run the majority of primary and secondary schools in the country. KLIK was then further decentralized into 59 regional units. *See* Kádár, op. cit. *supra* note 35, p. 12; "Klik Educational District Centers Assume Responsibility for Operating And Maintaining Schools", *The Budapest Beacon* (26 Dec. 2016), available at <https://budapestbeacon.com/klik-educational-district-centers-assume-responsibility-for-operating-and-maintaining-schools/>; "Government Decree Provides for Klik to be Reorganized into 59 Educational District Centers", *The Budapest Beacon* (11 June 2016), available at <https://budapestbeacon.com/government-decree-provides-for-klik-to-be-reorganized-into-59-educational-district-centers/>. "Hungary - Vocational Schools Under New Administration From July 2015", *European Centre for the Development of Vocational Training* (5 Aug. 2015),

Supreme Court's statement, plaintiffs demanded concrete and wide-ranging structural injunctive relief. The trial court, again, held for plaintiffs on liability[38] but, again, rebuffed plaintiffs' request for a more concrete injunction.[39] The trial court noted that desegregation involved just too many political and professional decisions and that, therefore, "desegregation cannot be achieved by judicial decision."[40]

This time around on appeal, however, the court of second instance disagreed. After upholding the lower court's judgement in favor of the plaintiffs on liability, the second instance court noted the EU directive's demand for an "effective remedy," and proceeded to issue a more elaborate injunction.[41] The second instance court ordered that defendants: (1) ban admission of first grade students to the segregated school for the upcoming school year; (2) redraw the compulsory attendance zones accordingly within three months of the judgment; (3) prepare a desegregation plan with the involvement of an expert; (4) publish that plan within five months of the judgment; and (5) pay the applicant's costs of the proceedings.[42] The second instance court justified "the imposition of specific measures" by recalling that defendants had previously been ordered to remedy the unlawful segregation and failed to do so:

> "[F]ollowing a final and binding judgment in a previous action...the defendants had to be aware of the existence of the unlawful situation and of the obligation to take measures to put an end to it. By contrast, no measures have been taken...at effectively eliminating the unlawful situation."[43]

Even though the second instance court ordered some concrete steps to be taken, it nonetheless refused to impose a specific desegregation plan or to specify "mandatory elements" of such a plan. Instead, it left the determination of the actual desegregation plan to the various local administrative and political actors involved:

> "[I]t is for the local actors of national public education and the local government to decide on the actual manner[,] in which information can actually be provided to the member institution in dispute or to the pupils and parents of the host institutions, to prepare teachers, what support system is appropriate, whether it is necessary to provide school bus services, or whether other forms of support for community transport are sufficient. The determination of the specific measures necessary to put an end to the unlawful situation shall be the obligation and liability of the...defendants...."[44]

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available at <https://www.cedefop.europa.eu/en/news-and-press/news/hungary-vocational-schools-under-new-administration-july-2015>.

[38] Kaposvári Törvényszék [Kaposvár Regional Court] 11.P.21.553/2013/70 (Hung., 11 Nov. 2015), available at <http://cfcf.hu/sites/default/files/MX-M264N_20151116_142154.pdf>.

[39] *Kúria* [Curia of Hungary] Pfv.IV.20.085/2017/9, op. cit. *supra* note 34, para 15 (high court's summary of prior litigation).

[40] *Id*.

[41] *Pécsi Ítélőtábla* [Pécs Appeals Court] Pf.III.20.004/2016/4 (Hung., 13 Oct. 2016), available at <http://cfcf.hu/sites/default/files/kaposvarIIfok.pdf>. *See* Kúria [Curia of Hungary] Pfv.IV.20.085/2017/9, op. cit. *supra* note 34, para 30 (summarizing prior litigation)

[42] *Kúria* [Curia of Hungary] Pfv.IV.20.085/2017/9, op. cit. *supra* note 34, para 16 (summarizing prior litigation). The Second Instance Court also rejected the claim that desegregation would violate the parents' freedom to choose the school for their child, as the parent's right to choose "may be restricted in order to ensure the fundamental rights and equal opportunities of the child's particular interest" in receiving an education free from discrimination. *Id.* at para 21.

[43] *Id.* at para 24-25.

[44] *Id.* at para. 29.

The *Kúria* (or Curia), Hungary's highest court and institutional successor to the Supreme Court,[45] upheld the structural injunction on this second round of litigation. Important for our present discussion, Hungary's procedural law did not expressly provide for such an elaborate injunctive measure. Hungary's laws simply provided that a victim may request, in addition to a determination of the violation, "that the defendant be ordered to cease the infringement[,] and...to terminate the harmful situation."[46] But noting that the legislation "does not contain an exhaustive list on how this can be done," the Curia concluded from this simple legislative text that an injunction of the kind issued by the court of second instance was both lawful and appropriate.[47]

The Curia well understood that the previous high court judgment (which, given the institutional succession, was effectively its own previous judgment) had refrained from allowing specific desegregation measures in the first iteration of the litigation. But, as the Curia explained, the earlier refusal of a structural injunction was because the Supreme Court, at the time, "did not see any reason" for doing so.[48] Facts, however, had changed since that last round of litigation. Echoing the court of second instance, the Curia noted: "[T]his situation has changed in substance" because the Supreme Court had previously "ordered the defendants to put an end to the unlawful situation" and yet the defendants have "failed to comply with this obligation on the merits", such that "the unlawful situation persist[s]."[49] Under the circumstances of continued violation in the face of a court judgement, the more detailed injunction issued by the second instance court was both lawful and proper.[50]

Even in this civil law system, then, the more elaborate, structural injunction was issued, and it was issued based on the generic statutory authorization that courts can enjoin a defendant to stop a violation and terminate unlawful harm.[51] By way of comparison, it may be useful to recall that in the United States, structural injunctions also first emerged by compounding more basic injunctive relief. The structural injunction did not spring to life in the United States as a radical new category of legal action. Instead, it gradually emerged as courts in civil rights cases confronted recalcitrant defendants who persisted in their institutionalized discriminatory action.[52] While the structural injunction may thus be far more effective than the sum of its compounded parts, the legal

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[45] The controversial 2012 reorganization of the Supreme Court into the *Kúria* is well beyond the scope of this article. *See, e.g.*, Case C-286/12, *Commission* v. *Hungary*, EU:C:2012:687; ECtHR, *Case of Baka* v. *Hungary*, Appl. No. 20261/12, judgment of 23 June 2016; Gábor Halmai, "The Early Retirement Age of the Hungarian Judges" in Fernanda Nicola & Bill Davies (Eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge Univ. Press, 2017), pp. 471-488. While we do not intend to gloss over the illiberal actions of the current government, the particular sequence of court judgments we discuss in the text are highly instructive despite those developments. Indeed, positive productive consideration of these judgements as a model for other courts, as we do here, may even contribute to a progressive rule of law engagement with that Member State.

[46] *Kúria* [Curia of Hungary] Pfv.IV.20.085/2017/9, op. cit. *supra* note 34, para 42 (discussing Sec. 84 of the Act of 1959).

[47] *Cf. Munkaügyi Bíróság* [Metropolitan Administrative and Labour Court] 6.K.33.048/2015/17 (Hung., 25 Jan. 2016) (reaching similar conclusion about possibility of injunctions), as reported in András Kádár, "Country report: Non-Discrimination: Hungary (2020)", *EC Directorate-General for Justice and Consumers*, pp. 98-99. Case available at <http://birosag.hu/ugyfelkapcsolati-portal/anonim-hatarozatok-tara>.

[48] *Id.*

[49] *Id.*

[50] *Id.* at paras 42-48.

[51] For another general authorization of equitable relief, see, e.g., Article 27(1) of Government Decree No. 137/2000 (Romania), which provides that anyone "who considers themselves the victim of discrimination may seek before the court compensation and the restoration of the status quo ante or the elimination of the situation to which the discrimination gave rise . . ."

[52] *See, e.g.,* James M. Altman, "Implementing a Civil Rights Injunction", 78 Columbia L. Rev. (1978), 739-770.

authorization of its various parts should generally suffice. And, indeed, in the suit against the city of Kaposvár and the national ministry of education, statutory authorization for a judicial order "to cease the infringement and...to terminate the harmful situation" proved sufficient, as long as the injunction did not otherwise overstep judicial bounds.

1.3. "Command-and-Control" v. "Process-and-Goal": Respecting the Judicial Function

The Curia's opinion in the Kaposvár ligitation illustrates not only the *iterative* but also the *collaborative* nature of the ongoing remedial process. Even on the second iteration, while the injunction specified some concrete actions, in most respects the injunction imposed certain goals, along with an inclusive process by which these goals must be achieved.

Recall from the U.S. experience, that in contrast to the simple generic order to cease a violation or terminate a harm, structural injunctions were said to come in two types: "command-and-control" injunctions, which judicially micro-manage the defendant, and "experimentalist" injunctive regimes, which rely on specifying various processes and goals. For present purposes, we find it less useful to classify an injunction as a whole as belonging to one or the other category, and prefer to focus instead on the individual elements involved. For ease of comprehension, we call the first type, "*command-and-control*" elements, and the second, "*process-and-goal*" elements.

Structural injunctions may thus contain – and usually do contain – both elements. For example, the injunction the Curia upheld contained the *command-and-control* element of ordering an immediate ban on first grade admissions, and the *process-and-goal* element of ordering the defendants to devise a desegregation plan with the help of an expert and publishing that plan within 5 months of the judgment. We find disaggregating the injunction in this way especially useful to understand the progression of litigation, that is, how the remedy evolves in a *collaborative and iterative process* over time. It will also help pinpoint just how structural injunctions can stay within judicial bounds.

This temporal progression is well illustrated in more recent litigation. When the CFCF won a judgment against the Ministry of Education for the latter's failure to take action to combat widespread segregation in dozens of schools in Budapest and around the country,[53] the trial court immediately ordered the Ministry to take extensive and detailed action. In particular, the trial court ordered the defendants to:

1. stop admissions to first grade in 13 segregated schools,
2. establish new school district boundaries,
3. devise desegregation plans with the help of experts within three months of the judgment,
4. publicize the desegregation plans,
5. monitor the desegregation plans for 5 years and publicize the results,
6. change inspection protocol to trace student populations by perceived ethnicity,
7. pay a fine of around EUR 150,000, and
8. use that fine to pay for the judicially ordered monitoring.[54]

[53] Our focus is on remedies here, so we note only in the margins that ECHR and EU law in several ways go beyond U.S. constitutional, and in some cases even beyond U.S. statutory law, in their substantive prohibition of discrimination. This makes European anti-discrimination law a potentially stronger weapon against discrimination than U.S. law, as interpreted by the current U.S. Supreme Court, if only the EU judiciary were to embrace effective remedies for those substantive violations.

[54] *CFCF* v. *Ministry of Education and Culture* (EMMI), *Fővárosi Törvényszék* [Budapest Regional Court] 40.P.23.675/2015/84 (Hung., 18 Apr. 2018), available at <http://cfcf.hu/sites/default/files/23675-2015-84-I%20%C3%ADt%C3%A9let%20Es%C3%A9lyt%20a%20H%C3%A1tr%C3%A1nyos%20-

This trial court, too, relied on the EU Racial Equality Directive's requirement of effective, proportionate, and dissuasive remedies, to conclude that the "persistence...of segregation over a long period time" demanded an injunctive remedy.[55] In light of that history, the trial court held that a generic injunction merely ordering an end to the segregation would not have been enough.[56] It was therefore "necessary to avoid...entrusting the defendant[,] who had failed to eliminate segregation for the past 15 years, to bring the infringement to an end as a result of an 'empty' or too general order."[57]

In so doing, however, the trial court may nonetheless have gone too far, too fast. To be sure, the violation seems to have persisted for many years. But the trial court did not identify any previous judicial order the defendants had failed to implement during that time. And yet, its ambitious structural injunction immediately instituted significant *command-and-control* elements alongside *process-and-goal* elements.

In banning new admissions to the first grade of the segregated schools, ordering the redrawing of district lines, and determining exactly how the public fine would be spent, the court jumped straight to *command-and-control*. These three elements ordered specific action, leaving virtually no discretion to the defendant. At the same time, the order contained four *process-and-goal* elements: to develop a desegregation plan, publish that plan, gather information according to certain standards, and monitor the implementation of the desegregation plan.[58] Each of these latter four merely specified a goal, along with the process to reach that goal, while leaving ample discretion to the defendant on how to get from here to there. For instance, as part of the *process-and-goal* elements, the court did not order any specific desegregation plan, but left the defendant discretion to formulate its own effective plan. The only restriction was the procedural obligation to craft a plan with the input of an expert, further allowing that such expert be the individual whom plaintiffs had "recognized" and the defendant had previously engaged "voluntarily."[59]

On appeal, the second instance court found every one of the *command-and-control* features too much to uphold, while affirming all of the *process-and-goal* elements of this structural injunction.[60] Having agreed with the trial court's assessment on liability, the second instance agreed that structural injunctive relief and the payment of the fine were appropriate. But it objected to the *command-and-control* specifics of the trial court's order, such as banning new first grade students to all entering classes at all currently segregated schools and redistributing those students to the other schools by redrawing school attendance boundaries. The second instance also saw no legal basis for the trial court to designate the specifics of how a particular public fine should be spent. The trial court could presumably have ordered the monitoring – a "process" obligation that would indeed cost money – but without instructing the government on which funds to use for that monitoring. Moreover, while the monitoring effort, as such, could presumably also have been ordered, the trial court had (perhaps inadvertently) overridden the distribution of labor set forth in

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%20Nemzeti%20Er%C5%91forr%C3%A1s%20_.pdf> (English translation on file with authors). *See* Kádár, op cit. *supra* note 47, at 53.

[55] *CFCF* v. *EMMI*, supra, at 22.

[56] *See* Kádár, op. cit. supra note 47, at 53-54.

[57] *Fővárosi Törvényszék* [Budapest Municipal Court] 40.P.23.675/2015/84, op. cit. *supra* note 54.

[58] Payment of the fine itself falls into neither category, as ordering the payment of a fine alone would not count as an injunctive remedy.

[59] *Id.*

[60] *Fővárosi Ítélőtábla* [Budapest Regional Court of Appeal] 2.Pf.21.145/2018/6/I (Hung., 14 Feb. 2019), *reported in* EU Agency for Fundamantal Rights, *Franet National Contribution to the Fundamental Rights Report 2020 (Hungary)*, pp. 100-104. *Cf.* Kádár, op. cit. *supra* note 47, pp. 98-100, 126-128.

positive law, by which the competent government office, not the Ministry itself, was legally obligated to do the monitoring. Finally, on ordering the gathering of information according to certain standards, the second instance court objected only that the injunction was overbroad, in that the order would have altered all data gathering for all schools throughout the entire country, not just for those schools or districts with proven discrimination. There had been no justification on the part of the trial court that the data gathering for all schools throughout the entire country was necessary to eradicate the violation for the problematic schools or to safeguard equality in schools elsewhere. Overall, then, the trial court was right to issue a structural injunction. But it had ignored both the *collaborative* and *iterative* aspects of a proper remedial phase, and overstepped its judicial rule by deploying extensive *command-and-control* measures and, especially, by jumping to some of them too soon.

We see here that a structural injunction is most appropriate, and diffuses separation-of-powers concerns, by considering the ongoing importance of the defendant's institutional discretion. The *modern structural injunction* properly issues *command-and-control* elements only as necessary while using as many *process-and-goal* elements as can (still) be reasonably expected to work. Structural injunctions – at least those resembling the *modern type* we describe here – are not judicially masterminded takeovers that micro-manage defendant institutions. Instead, they are a collaborative effort among all stakeholders over time under the watchful authority of a court, which has jurisdiction over the defendant in light of the liability judgment but is nonetheless mindful of the judicial role in the constitutional constellation of powers.[61]

The watchful authority of the court may be temporally extended, as in the United States and in some European jurisdictions, by "retaining" jurisdiction over the culpable defendant for the life of the injunction (or consent decree), *i.e.,* until the violation has been cured.[62] Or such watchful authority may be engaged, as in other European jurisdictions, by first issuing an initial injunction based on a liability judgment, and then allowing plaintiffs to sue the defendant again for further relief but via an easier summary procedure for failing to honor the original injunction.[63] In addition, even absent any common law "contempt of court", the possibility of fines (including recurring

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[61] *Cf.* Fiss, op. cit. *supra* note 20, at 13; and Sable, op. cit. *supra* note 24, at 1089.

[62] *See, e.g.*, *Bd. of Ed. of Oklahoma City* v. *Dowell*, 498 U.S. 237 (1991); Arbeidsrechtbank Brussel [Brussels Labor Court], No. 18/963/A (Belgium, 28 Nov. 2019), available at <https://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/arbeidsrechtbank-brussel-28-november-2019>
(retaining jurisdiction). Scotland's Court of Session similarly invoked its equitable powers of "*nobile officium*" to retain jurisdiction over the case and the defendant government in the Brexit litigation, as facts developed over time. *See Dale Vince et al* v. *Advocate General*, P845/19 & P900/19, [2019] CSIH 51. Even the Court of Human Rights in Strasbourg can retain jurisdiction. *See* Valerio Colandrea, "On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of the *Assanidze*, *Broniowski*and *Sejdovic* Cases", 7 Human Rights L. Rev. (2007), pp. 396-411.

[63] In Hungary, for instance, enforcement of a judgment and order is a "separate, stand-alone court procedure...governed by Act LIII of 1994 on Judicial Enforcement." See Zoltán Csehi, "Litigation and Enforcement in Hungary", Thompson Reuters Practical Law (1 Mar. 2012), available at: < https://uk.practicallaw.thomsonreuters.com/8-502-1116?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>, at para 24. *See* Email Reply of András Kádár (7 Feb. 2020) (on file with authors).

fines,[64] *astreinte*,[65] *Zwangsgeld,*[66] *Dwangsom,*[67] etc.) and other coercive civil law measures, may appropriately motivate respondents along the way.[68] In any event, a judicial finding of liability in certain cases justifies the imposition of a *modern structural injunction* that favors *process-and-goal* over *command-and-control* elements to craft concrete organizational change without judicial overreach. In a collaborative and iterative remedial process, the court thereby draws on the productive input of all those who must come together to make practical change happen.

2. Does and Should EU Equality Law Demand Structural Injunctions?

So far, we have illustrated the basic origin, nature, and scope of the modern structural injunction. We have also seen how a national court might use such an injunction judiciously where a defendant institution is recalcitrant, the discrimination is embedded in a complex organizational structure, and the harm is broad and pervasive. And we have shown how it might be used in a relatively modest manner that respects the comparative knowledge base of the judge versus the parties, and the continued role of political and administrative actors in the remedial process. But does EU law demand that national courts even consider issuing such an injunction? And should such an injunction be used?

2.1. Access to the Judiciary and the Demand for Practical and Effective Relief

As a general matter, the remedial demands of the European equality directives, and the Treaty provisions and general principles to which they give effect, are broad, and must consistently be read that way. In principle, this should go for access to court not only to obtain a declaration of illegality, compensation, and fines, but also, where appropriate, effective "equitable" (*i.e.*, injunctive) relief. We see this expansive understanding in the caselaw of the Court of Justice, which historically focused on sex-based, as opposed to race-based, discrimination, and in the EU legislature's confirmation of the Court's judgments.

Sex equality has been at the forefront of the Union's remedial demands on national courts ever since the Court in *Johnston*[69] held the remedial provisions of the Equal Treatment Directive 76/207/EEC[70] gave effect to a general principle of Community law. Considering Article 6 of that directive, which provided merely that "Member States shall introduce into their national legal systems such measures as are necessary" to enable victims "to pursue their claims by judicial process," the Court explained:

> "[T]he requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the member states. That

[64] *See, e.g.*, *X and Y* v. *Helsinki Police*, YHDENVERTAISUUS- JA TASA-ARVOLAUTAKUNTA [Equality Board], 2018:337 (Finland).
[65] *See, e.g.*, Arbeidsrechtbank Brussel [Brussels Labor Court], No. 18/963/A (Belgium, 28 Nov. 2019), available at <https://www.unia.be/nl/rechtspraak-alternatieven/rechtspraak/arbeidsrechtbank-brussel-28-november-2019>.
[66] *See, e.g.*, § 11, *Verwaltungsvollstreckungsgesetz* (Germany).
[67] *See, e.g.,* Art. 611a *Wetboek van Burgerlijke Rechtsvordering* (Code of Civil Procedure) (Netherlands).
[68] *Cf., e.g.,* Michael Chesterman, "Contempt: In the Common Law, but Not the Civil Law", 46 Int. & Comp. L. Q. (1997), pp. 521-560.
[69] Case 222/84, *Johnston*.
[70] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, art. 6, 2000 O.J. (L 39) 40.

> principle is also laid down in Articles 6 and 13 of the [European Convention of Human Rights, which] must be taken into consideration in Community law."[71]

As a result, Article 6 of the Equal Treatment Directive "does not allow" Member State evidentiary provisions to undermine effective judicial review – even where the latter are common throughout a Member State's national law.[72] Moreover, despite Article 6 being formally addressed to Member States, and leaving to them a choice of how to render access to the judiciary effective, Article 6 was directly effective. It could accordingly "be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order."[73]

Beyond access to court and evidentiary rules regarding liability, *Von* Colson had already underscored the key importance to providing *practical* judicial relief: "It is impossible to establish *real equality* of opportunity without an appropriate system of sanctions."[74] The 1976 Directive's simple reference to allowing individuals "to pursue their claims by judicial process," therefore, meant that Member States must provide remedies "sufficiently effective to achieve the aim of the Directive."[75] This included "adequate" sanctions to "guarantee real and effective judicial protection" and with "real deterrent effect".[76]

The emphasis, then, was on getting practical results. Nominal damages, such as compensating only for the expense incurred as part of the application process, would not suffice.[77] The point from the beginning was to focus on the "real" effect of Member State procedures and remedies, and to insist that Member States choose "sufficiently effective" remedies to achieve the equality directive's aims in full. As *Marshall*[78] emphasized, the overarching objective of the Equal Treatment Directive 76/207/EEC, was "to arrive at real equality of opportunity", which demanded remedial measures to "restore such equality when it has not been observed."[79] And this requirement, in turn, could be traced back to the fundamental principle that Union law (including the duty of sincere cooperation)[80] demands Member States to "nullify" the consequences of any breach of Community law.[81]

How to restore such equality would "necessarily entail that the particular circumstances of each breach of the principle of equal treatment be taken into account."[82] Depending on the

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[71] *Id.* at para 18.
[72] *Id.* paras 15 & 21. The provision at issue in Johnston required treating a certificate from the Secretary of State as "conclusive evidence that the conditions for derogating from the principle of equal treatment are fulfilled" and thereby precluded effective judicial review. *Id.* at para 20.
[73] *Id.* at operative para 1.
[74] Case 14/83, *Von Colson*, at para 22 (emphasis added).
[75] Case 14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen*, *EU:C:1986:206*, at para 18.
[76] *Id.* at para 23.
[77] Case 79/83, *Dorit Harz* v. *Deutsche Tradax GmbH*, EU:C:1984:155. *See also* D. Curtin, "Effective Sanctions and the Equal Treatment Directive: the *Von Colson* and *Harz* Cases", 22 CML Rev. (1985), 505-532.
[78] Case C-271/91, *M. Helen Marshall* v. *Southampton and South-West Hampshire Area Health Authority*, EU:C:1993:335.
[79] *Id.* at para 24.
[80] Art. 4(3) TEU. *Cf.* Art. 5 TEEC; Art. 86 ECSC.
[81] The idea was used that same year by the Court in Cases C-6 & 9/1990, *Francovich et al.* v. *Italian Republic*, EU:C:1991:428, at para 36. It goes back at least to Case 6/60 Jean-E. *Humblet* v. *Belgian State*, EU:C:1960:48, at 569 (invoking the predecessor duty of sincere cooperation under Art. 86 ECSC). For more recent articulations, *see* Joined Cases C 22/13, C 61/13 to C 63/13 and C 418/13, *Raffaella Mascolo et al.* v. M*inistero dell'Istruzione, dell'Università e della Ricerca*, para 79; Case C-212/04, *Konstantinos Adeneler et al.* v. *Ellinikos Organismos Galaktos (ELOG)*, EU:C:2006:443, para 102; and Case C-201/02, *The Queen on the application of Delena Wells* v. *Secretary of State for Transport, Local Government and the Regions*, EU:C:2004:12, para 64.
[82] *Id*. at para 25.

breach, therefore, equitable relief or damages may be necessary, given that "a situation of equality could not be restored without either reinstating the victim of discrimination or, in the alternative, granting financial compensation for the loss and damage sustained."[83] Where either was appropriate and the Member State had chosen the latter, damages must enable the harm "actually sustained" to be made "good in full."[84] In the case of damages, this emphasis on the real practical effects of judicial relief and the complete restoration of equality meant setting aside any statutory ceiling on damages, as well as the national tribunal's jurisdictional limitation precluding an award of interest.

It bears emphasis that *Marshall* left no doubt that direct effect would kick in, even though the directive granted Member States discretion to choose among different remedies. Recall that there had been some tension in the caselaw up to this point: *Johnston,* which addressed evidentiary rules, held Article 6 to be directly effective; *Von Colson*, by contract, which squarely addressed sanctions, had noted only a duty of conforming interpretation, *i.e.*, to conform to the demands of EU law "in so far as [the national court] is given discretion to do so under national law."[85] *Marshall* clearly resolved this tension in favor of direct effect for sanctions as well. As the Court explained, the combination of the substantive right to equal treatment and the directive's procedural and remedial demand that Member States allow individuals to pursue their claims by judicial process, were sufficiently clear and precise to "give rise, on the part of a person who has been injured as a result of discriminatory dismissal, to rights which that person must be able to rely upon before the national courts as against the State and authorities which are an emanation of the State."[86] Once the Member State had opted for damages over an injunction (an allowable decision under the circumstances of that particular case), the national court no longer had any choice but to make the chosen remedy effective and to "set aside" any conflicting national law.[87]

Even in a subsequent discrimination case among private parties, *Draehmpaehl,*[88] the Court similarly held the Equal Treatment Directive "precludes" limiting damages to six months' pay, at least where a qualified individual was rejected on discriminatory grounds, and such a limit did not exist elsewhere in national law.[89] Germany's implementing rules thus violated the cardinal requirements that national courts, at a minimum, treat EU law equivalent to their own similar law, and that national courts, in any event, render EU law effective.[90] The Court was not asked, and did not clarify, however, whether by "precluded" it meant the national court was only required to interpret national law in so far as possible to conform to the demands of the Directive, as *Von Colson* had suggested, or whether the national court was required to go further and set aside the conflicting national rule, as *Marshall* seemed to demand. But there was no suggestion that a

[83] *Id*.
[84] *Id.* at paras 25-26.
[85] Case 14/83, *Von Colson*, at para 28.
[86] Case C-271/91, *Marshall,* at para 35.
[87] *Id.* at para 38.
[88] Case C-180/95, *Nils Draehmpaehl* v. *Urania Immobilienservice OHG*, EU:C:1997:208.
[89] *Id.* at para 43.
[90] *See generally, e.g.*, Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG* v. *Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para 5; Case 45/76, *Comet BV* v. *Produktschap voor Siergewassen*, EU:C:1976:191, paras 13 & 16; Koen Lenaerts, "National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness", 46 Irish Jurist (2011).

conforming interpretation of national law was possible.[91] The overall message simply was to get an effective remedy done.

In developing such a "broad, purposive approach" to equality measures[92] - and a practical approach to the accompanying remedies – the Court has not been going it alone. To the contrary, it acted in steady dialogue with the Union's political branches, which often confirmed the developing caselaw – for instance, by embedding the Court's holdings in amended versions of the relevant directives.[93] At times, the EU legislature has even gone beyond the Court's decisions, removing potential caveats contained in the initial judicial articulation of the relevant principle. In this vein, for instance, the recast Equal Treatment Directive 2006/54 positively embraced the Court's earlier decisions, without, however, conditioning the right to real and effective compensation on any national equivalence, *i.e*., on the existence of any similar provisions elsewhere in domestic law.[94]

The Union legislature has thus embraced the Court's broad, purposive interpretation of the various equality measures to enlist the national judiciary in the EU's effort to "restore", or bring about, equality in practice.[95] The Union's more recent measures in this arena, such as the Racial Equality Directive, Employment Equality Directive, and the Recast Equal Treatment Directive, all reiterate the critical importance of access to an effective judicial process to vindicate equality.[96] They emphasize the obligation of Member States to abolish all laws that run contrary to the obligations of these Directives.[97] And, perhaps most important, they all have come to demand, expressly, that all sanctions and penalties be "effective, proportionate and dissuasive."[98]

2.2. "Effective, Proportionate and Dissuasive": From Damages to (Structural) Injunctions

The requirement that sanctions for breach of EU law must be "effective, proportionate and dissuasive" comes from the Greek Maize case, in which Greece violated its duty of sincere

[91] This taps into a consistent ambiguity in the Court's judgments – the declaration that EU law "precludes" a certain national rule without further indicating whether the consequence is to interpret that rule away to the extent possible, or to set the rule aside even when such a conforming interpretation is not possible. The Court is only clear on this point when the referring court expressly presses for an answer to that question – or when the CJEU senses that the referring court will only set aside national law if expressly told to do so and the CJEU further believes national law must indeed be set aside. In the usual referral, a holding of "preclusion" is all an eager national court needs in order to do justice in the case at hand. For more on the question of the horizontal effect of remedies, see section 2.1 below.

[92] *Cf*. Catherine Barnard, *EU Employment Law* (Oxford Univ. Press, 2012), p. 394.

[93] *See, e.g.*, Directive 2006/54/EC, Recitals 1, 33; Directive 2002/73/EC, Recitals 16-19 (rehearsing CJEU's holdings).

[94] *See* Art. 18, Directive 2006/54 ("Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.")

[95] *Cf.* Martijn van den Brink, "Justice, Legitimacy and the Authority of Legislation within the European Union", 82 The Modern Law Review (2019), pp. 293-318 (urging consideration of legislative role in shaping principles of EU law).

[96] *See, e.g.*, Recitals 19, 20, 26, and Arts. 7 & 15, Racial Equality Directive.

[97] *See, e.g., id.* Art. 14.

[98] *See* Art. 15, Racial Equality Directive; Art. 17, Employment Equality Directive; Art. 25, Recast Sex Equality Directive. The directives seem to use the terms "sanctions" and "penalties" interchangeably, and we do not attribute any special significance to that difference in terminology for purposes of our current discussion.

cooperation by not instituting criminal or disciplinary actions against those who owed Community agricultural levies.[99] Without any procedural or remedial demands set forth in the underlying regulations, the duty of sincere cooperation alone required that Member States "must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, *in any event*, make the penalty effective, proportionate and dissuasive."[100]As Christa Tobler has shown, the important closing phrase soon made its way across various areas of EU law, including, first,[101] second,[102] and third[103] pillar law, until the Treaty of Lisbon formally eliminated that distinction.[104]

Moving from gender to race discrimination, the concrete consequences of the requirement of such remedies figured prominently in the *Feryn* case.[105] The Center for Equal Opportunities and Opposition to Racism brought a case against a Belgian sales and installation company, whose director had publicly stated the company was recruiting but could not employ "immigrants", because its customers were reluctant to give an immigrant access to their homes. The case was referred to the CJEU principally to determine whether the Racial Equality Directive[106] required identification of an actual victim, given that no such concrete victim of the discrimination had come forward. The CJEU held that an employer's public declaration not to recruit employees of a certain ethnic or racial origin is likely to dissuade those candidates from applying and, as such, constitutes direct discrimination within the meaning of Article 2(2)(a) of the Racial Equality Directive. The existence of such direct discrimination was therefore not dependent on an actual complainant who was the present victim of the discrimination.[107]

The Court further held that, despite the absence of an identifiable victim,[108] the Racial Equality Directive's requirement that remedies must be effective, proportionate, and dissuasive

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[99] Case C-68/88, *Commission* v. *Greece*, EU:C:1989:339.
[100] *Id.* at para 24 (emphasis added).
[101] *E.g.*, Art. 2 of Regulation 2988/95 (EC, Euratom) on the protection of the European Communities' financial interests, OJ 23.12.1995, L 312/1; Preamble to the Convention on the protection of the European Communities' financial interests, OJ 27.11.1995, C 316/48); Art. 8 of the Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, OJ 23.03.2002, L 80/29; Art. 14 of Regulation 793/2004/EC amending Council Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, OJ 30.04.2004, L 138/50; Art. 5 of Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access, OJ 28.11.1998, L 320/54; Art. 20 of the Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 17.7.2000, L 178/1.
[102] *E.g.*, Art. 4a of Joint Action 98/742/JHA on corruption in the private sector, OJ 31.12.1998, L 358/2.
[103] *E.g.*, Art. 5 of the Council Framework Decision 2002/475/JHA on combating terrorism, OJ 5.7.2002, L 164/3.
[104] *See* Christa Tobler, *Remedies and Sanctions in EC non-discrimination law - Effective, proportionate and dissuasive national sanctions and remedies, with particular reference to upper limits on compensation to victims of discrimination* (European Commission, 2005), p. 13.
[105] Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding* v. *Firma Feryn NV.*, EU:C:2008:397.
[106] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22, 24 (Racial Equality Directive).
[107] Case C-54/07, *Feryn*, at para 25.
[108] The 2021 implementation report on the Racial Equality Directive reveals that difficulties in the implementation of the Racial Equality Directive seem to persist in cases without an identifiable victim. In several Member States (e.g. AT, BE, CZ, IT, LT, LU, LV, RO and SI), national legislation provides that (under some conditions) penalties may be imposed in the absence of a specific victim. However, in the absence of such provisions in the other Member States, remedies are not always available in cases without an identifiable victim. European Commission, Report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons

could include injunctions as well as declaratory relief, and fines as well as compensatory damages, depending on the circumstances of each case:

> "If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings."[109]

In short, nothing in the arsenal of a court – including injunctions – is off the table when attempting to restore the equality of opportunity that has been breached.

Injunctions, including structural injunctions, may become especially necessary where other forms of relief are insufficient for the proper "moral recognition of the harm."[110] As Anna Wallerman Ghavanini explains, the Court more recently found an order of compensation without declaration of illegality insufficient because such a bare monetary order failed to address, let alone properly remedy, the underlying discrimination.[111] In the case of moral harm, a judicial order of payment without condemnation fails to provide appropriate judicial relief. Similarly, we can say that even if victims are paid for the harm they suffer, and even if a court labels such discrimination a moral harm, a court may – under certain circumstances – still not have provided appropriate relief. In the case of a recalcitrant offender, taking moral harm seriously means more than rendering the persistent discrimination an ongoing cost of doing business, even if declaring the ongoing practice of discrimination unlawful adds a reputational cost to such ongoing business. Taking such harm on the part of a recalcitrant offender seriously, means reasonably exercising injunctive powers whenever practicable to bring about an end to the unlawful discrimination itself.

2.3. The Appropriateness of Structural Injunctions: On Collective Redress

Some might object that positive EU law demands only strictly individualized redress, such as individual compensation or a limited order of, say, admission, acceptance, or service of the individual complainant(s) who suffered discrimination. The thought may be that any broader, structural-type injunctions seem more like a collective remedy suitable for group actions, which EU law neither creates nor demands.

To be sure, the various equality directives do not appear to demand that Member States provide for any formal aggregated cause of action, requiring simply that Member States ensure access to court "to all persons who consider themselves wronged."[112] Nevertheless, some

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irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'), COM(2021)139 final, 19.03.2021, at p. 10.

[109] *Id.* at para 39.

[110] Anna Wallerman Ghavanini, "Remedies for non-material damages: Striking out in a new direction? *Braathens*", CMLR 59(2022), 151-170, at 166.

[111] *Id.* See Case C-30/19, *Braathens*, EU:C:2021:269; Cf. Case C-81/12, *Asociaţia Accept* v. *Consiliul Naţional pentru Combaterea Discriminării*, EU:C:2013:275, para. 63 (court cannot rely on relief elsewhere but must itself remedy the violation it has found).

[112] See, e.g., Art. 7 RED, Art. 9 Equality Framework Directive, Art. 17 Recast Sex Equality Directive. Cf. Christopher McCrudden, "International and European Legal Norms Regarding National Legal Remedies for Racial Inequality" in Sandra Fredman et al. (Ed.), *Discrimination and Human Rights: The Case of Racism* (Oxford Univ. Press, 2001), pp. 251-308, at pp. 295-296 (considering legislative history of RED).

collective element may still be contained under this rubric. Under the Racial Equality Directive, for example, Member States "should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members."[113] And according to all the principal equality directives, Member States shall ensure the participation of legal organizations in judicial and administrative proceedings, on behalf or in support of a complainant, as long the complainant consents and the legal entity has "in accordance with the criteria laid down by . . . national law, a legitimate interest" in ensuring compliance with the directive.[114] Implementing the various equality directives, fifteen Member States have allowed for discrimination cases brought by legal entities acting in the public interest, with two more allowing registered entities to bring similar claims on behalf of victims of discrimination.[115] Thirteen Member States clearly provide for class actions in case of discrimination, with four more possibly allowing the same depending on judicial interpretation.[116] Only 6 Member States currently appear to allow none of these.[117]

Wherever national law allows for aggregated actions, or an action in the public interest, a structural injunction to reform the defendant's institutional practices would seem, in principle, to fall within the scope of potential remedies for the aggregated claims that have been adjudicated in court.[118] As we know from *Feryn*, it is of no moment that the relevant EU law itself did not require Member States to allow the particular proceeding.[119] Once the action is authorized under Member State law and the national court finds the defendant liable, that court must provide effective judicial relief. And when the problem of discrimination is broader than, say, correcting a rogue manager who publicly proclaims discriminatory views, the remedy must go beyond declaration, compensation, publicity, and a prohibition of repetition.

Such broader institutional discrimination demanding a structural injunction may come in various forms. The most notorious, of course, is that of deliberate institution-wide or system-wide direct discrimination.[120] Although compensation, coupled with publicity and a general injunction

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[113] Recital 16 RED. *CITE other directives?*

[114] Art. 7 RED, Art. 17 Recast SED, Art. 9 Equality Framework Directive.

[115] *See* Isabelle Chopin & Catharina Germaine*, A Comparative Analysis of Non-Discrimination Law in Europe 2019* (European Commission, 2020), pp. 93-94.

[116] *Id.*

[117] *Id.*

[118] Whether EU law further demands structural reform even in a case involving only an individual claimant is a more difficult question we do not answer here. Suffice it to note that the tempting minimalist answer that an individual action should beget only compensation to that individual, or an injunctive order directing only that individual's acceptance or service – and hence be limited to compensation, fines, and non-structural injunctive relief – is far from certain. After all, equality rights are not intended to allow individuals to obtain a judicially ordered exception to the defendant's continuing discrimination, nor would such a judicially ordered exception from ongoing pervasive discrimination result in proper equality even for that exceptionally treated individual alone.

[119] Case C-54/07, *Feryn*, para 38; Case C-81/12, *Accept*, para 62. See also the recent case C-507/18, *NH v Associazione Avvocatura per i diritti LGBTI - Rete Lenford*, in which the CJEU confirmed that public statements ruling out recruitment of homosexual persons, even in the absence of an identifiable injured party, may amount to discrimination. The CJEU held that "Directive 2000/78 must be interpreted as not precluding national legislation under which an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having in particular a certain sexual orientation … has standing to bring legal proceedings for the enforcement of obligations under that directive and, where appropriate, to obtain damages, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party." *Id.* at para. 65.

[120] *See, e.g.*, Jack Greenberg, "Report on Roma Education Today: From Slavery to Segregation and Beyond", 110 Columbia L. Rev. (2010), 919-1001. Note that we use the term "structural discrimination" here to include not only unintentional effects of otherwise neutral principles, rules, and actions within an institution, organization, or system

prohibiting the discriminatory practices going forward may be considered, these are highly unlikely remedies to prevent future violations or to bring the organization itself into compliance.[121] Nor will the lingering effects of such widespread discrimination be remedied so easily. Structural intervention that reorganizes such institution or system may be the only way to help "restore," or bring about, the equality the directive demands.

Structural discrimination demanding structural remedies may also come – and indeed today, often comes – in less deliberate forms, such as when a structure, organization, institution, or system operates as a whole to produce discrimination more indirectly.[122] Here, a structural injunction may be even more appropriate, as it can help tease out and address the various elements that, only when taken together, bring about the unlawful discrimination.[123] Individual actors may have good intentions and be entirely unaware of their own implicit biases,[124] while the organization as a whole is structured without the internal controls necessary to prevent these biases from producing a toxic result. A simple lack of stringent protocols for evaluation, for example, may allow implicit private biases to flow unchecked into final decisions in hiring or policing decisions.[125] Even in the absence of any personal private biases, implicit or otherwise, a diagnostic system developed by the majority and tested principally in majority settings may not account for the cultural, linguistic, or social backgrounds of minorities being evaluated.[126] Otherwise well-meaning policies, such as providing financial incentives for special services for people with mental disabilities, may further fuel a violation.[127] Location and transportation decisions, even when innocently made, can have dramatic results to increase or sustain segregation, especially in the face of residential segregation.[128] Even a legal commitment against parsing data along racial or ethnic lines due to an otherwise laudable moral rejection of race and racism may prevent detecting, and hence combatting, unlawful discrimination where such discriminatory practice nevertheless

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but also to the intended effects of intentionally discriminatory principles, rules, and actions whenever they are embedded in, or dispersed throughout, various elements of an organization, institution, or system. *Cf. Najcevska*, *supra* note **Error! Bookmark not defined.**.

[121] *Cf.*, *e.g.*, Weiss, *op cit.*, *supra* note 29; Lilla Farkas & Dezideriu Gergely, *Racial discrimination in education and EU equality law* (Pub. Office of the European Union, 2020).

[122] Indeed, this tends to the be more common use of the term "structural discrimination." *See, e.g.*, Council Recommendation, *op. cit.*, *supra* note 7, at p.20 note 1 ("Systemic or structural discrimination is understood as being evident in the inequalities that result from legislation, policy and practice, not by intent but resulting from a range of institutional factors in the elaboration, implementation and review of legislation, policy and practice."). As just noted, however, we generally use the term "structural discrimination" more expansively throughout this Article. *See supra* note 120, and accompanying text.

[123] We leave aside here the doctrinal question whether discrimination based on implicit bias or other elements or combinations of elements described in this paragraph are better treated as a form of direct discrimination. For purposes of our present focus on the proper sanction *after* a finding of liability, the substantive question of whether liability was found as a matter of direct or indirect discrimination is less relevant. We tease out the different kinds of discrimination to illustrate that a structural injunction may be appropriate in either case and, indeed, perhaps even more so when the causes of discrimination are diffuse.

[124] *See*, *e.g.*, Christine Jolls & Cass R. Sunstein, "The Law of Implicit Bias", 94 Cal. L. Rev. (2006), 969-996.

[125] Zimová, op. cit. supra note **Error! Bookmark not defined.**. *Cf.*, *e.g.*, Dan Olof-Rooth, "Automatic associations and discrimination in hiring: Real world evidence", 17 Labour Economics (2010), 523-534.

[126] *Id.* at 43.

[127] *Id.* at 39 & 78.

[128] *Cf. Parents Involved in Cmty. Schools* v. *Seattle School Dist. No. 1 et al.*, 551 U.S. 701 (2007) (Kennedy, J., concurring); Anurima Bhargava, "The Interdependence of Housing and School Segregation", Joint Center for Housing Studies of Harvard University (2018), available at <https://www.jchs.harvard.edu/sites/default/files/A_Shared_Future_Chapter_24_Interdependence_of_Housing_and_School_Segregation.pdf>.

persists.[129] Only if *all* of the defendant's rules, processes, decisions, and practices that conspire to cause the organization's unlawful discrimination are within the reach of a comprehensive, structural injunction, can there be any hope that judicial intervention will provide effective, proportionate and dissuasive relief.

2.4. Lessons from Strasbourg

With the Charter of Fundamental Rights,[130] the right to non-discrimination and the general principle of effective judicial remedies first articulated in *Johnston* have been codified as positive fundamental rights.[131] The Lisbon Treaty elsewhere recognizes the duty of national courts to provide effective remedies as part of the constitutional architecture of the Union.[132] These remedial provisions only amplify the Court's jurisprudence on the remedial duties of national courts. Article 47 CFR, for example, underscores that effectiveness is not just an abstract value of EU law, but that effectiveness of EU law is a concrete fundamental right of every individual.[133] And Article 19(1) TEU, in turn, underscores that the compound judicial system of the Union, which comprises the courts the Union creates plus the courts of the Member States, must work seamlessly to provide a coherent and complete system of judicial enforcement of all the rights and obligations under Union law.[134] Finally, the Lisbon Charter clarifies that because the right to an effective remedy and fair trial corresponds to similar rights spelled out in Articles 13 and 6(1) ECHR, respectively,[135] the remedial rights under EU law must be interpreted in the light of the jurisprudence of the Strasbourg court.[136]

This takes on special importance for litigating equality rights, especially the kind of cases in which discrimination is not one-off or episodic but deeply embedded in the ongoing practices or structure of an organization. Under Articles 6 and 13 of the ECHR, the European Court of Human Rights, too, insists on real relief that is "effective in practice as well as in law."[137] Also similar to the Luxembourg court's demand that remedies be tailored to the particular circumstance at hand, the Strasbourg court has noted that "[t]he nature of the right at stake has implications for

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[129] *Cf. Conseil Constitutionnel*, No. 2007-557 DC (France, 2007), available at <http://www.conseil-constitutionnel.fr/conseil- constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc- du-15-novembre-2007.1183.html>, *with* Cour de Cassation, No. K 10-15873 (France, 2011), available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction =rechJuriJudi&idTexte=JURITEXT000024993730>. *See also* Iyiola Solanke, *Making Anti-Racial Discrimination Law: A Comparative History of Social Action and Racial Anti-Discrimination Law* (Routledge, 2009); Mathias Möschel, "Race in mainland European legal analysis: towards a European critical race theory", 34 Ethnic and Racial Studies (2011), 1648-1664.

[130] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 01.

[131] *See*, e.g., *See, e.g.,* Arts. 21 (non-discrimination), 23 (equality between women and men) CFR; Art. 47(1) CFR ("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.").

[132] *See* Art. 19(1) TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.").

[133] *Cf.*, *e.g.*, Case C-414/16, Egenberger, EU:C:2018:257; Wallerman Ghavanini, *supra* note 110.

[134] *Cf.* Lenaerts, op. cit., *supra* note 90.

[135] *See* Explanations relating to the Charter of Fundamental Rights, 2007 O.J. (C 303), pp. 17–35, Explanation on Article 47 — Right to an effective remedy and to a fair trial. *Cf.* ECHR, Art. 13; ECHR, Art. 6(1); Case T-49/07, *Sofiane Fahas* v. *Council of the European Union*, EU:T:2010:499, para 59.

[136] Cf. Preamble & Art. 52(3) CFR.

[137] ECtHR, *M.S.S.* v. *Belgium and Greece*, Appl. No. 30696/09, judgment of 21 Jan. 2011, para. 288.

the type of remedy a state is required to provide under Article 13 ECHR".[138] But when it comes to persistent, institutionalized, and structurally embedded discrimination, Strasbourg has been on the forefront of recognizing that more than declarations and compensation are needed to "restore...equality when it has not been observed." [139] Even as we remain mindful of important differences between the Convention regime and EU law (including that the defendant in Strasbourg is always the signatory state as a whole), we may take inspiration from Strasbourg, as we detect certain parallels in its caselaw to the demands of the modern structural injunction.

For example, the European Court of Human Rights has long stated that its orders awarding damages and costs to claimants place an obligation on the defendant beyond paying the stated sums to the successful applicant in the case:

> "[A] judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects."[140]

This suggests that in addition to paying compensation, the defendant must also end the underlying discriminatory practice, redress its effects, and carry out these actions "subject to the supervision by the Committee of Ministers".[141] In short, a liability judgment to compensate the applicant includes an implicit, and far broader, command of legal action to the defendant, and this broader command must be carried out under the continued observance by the Strasbourg review mechanism. As the Committee of Ministers explained: "[T]he undertaking of the High Contracting Parties to abide by the Court's judgments...implies, *inter alia*, an obligation to take general measures in order to prevent effectively new violations of the Convention similar to those found in the Court's judgments."[142] Functionally, these implicit elements of a Strasbourg judgment seem rather similar to an injunction. And in what further resembles the "process-and-goal" elements of the *modern structural injunction* discussed earlier, offending states executing a decision under the Strasbourg regime "must present, within six months, an action plan accompanied by a precise schedule to enable supervision."[143]

Whether in national court or under the Strasbourg regime, putting an end to the violation and redressing, as far as possible, its effects, is surely a tall order where the discrimination is not caused by an isolated act or actor. A proper remedy requires not only stopping the widespread unlawful behavior but also taking countervailing action – including, where appropriate, "positive"

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[138] *See* ECtHR, *Budayeva and others* v. *Russia*, Appl. No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, judgment of 20 Mar. 2008, para 191.

[139] Case C-271/91 *Marshall* [1993] ECR I-4367, para 24.

[140] ECtHR, *D.H. and others* v. *Czech Republic*, Appl. No. 57325/00, judgment of 13 Nov. 2007, at para 216 (citing earlier decisions). *Cf.* ECtHR, *Broniowski* v. *Poland*, Appl. No. 31443/96, judgment of 28 Sept. 2005, at para 192.

[141] *Cf.* Art. 46 ECHR. *See generally*, Elisabeth Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (Council of Europe, 2002).

[142] ResDH(2004)39, *Interim Resolution concerning the judgment of the European Court of Human Rights of 23 September 1998 in the case of A. against the United Kingdom* (2 June 2004). Cf. *A. against the United Kingdom Judgment of 23 September 1998 - Revised Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights in the light of the developments since the adoption by the Committee of Ministers of Interim Resolution ResDH(2004)39 on 2 June 2004*, Ministers' Deputies Information document CM/Inf/DH(2008)34 (28 Aug. 2008).

[143] Jean-Paul Jacqué, "The European Court of Human Rights, The Perpetual Motion?" in Guinchard and Granger (Eds.), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (2017), §2.03[A] [Execution of Judgments].

action. Simple cessation of the offending practices, even when coupled with compensation to the named applicants for past wrongs, may not suffice to restore equality, especially after a long history of widespread and institutionally embedded discrimination. As the Strasbourg Court has emphasized, a broad longstanding practice of discrimination generates "positive obligations" for the defendant "to undo" that history.[144] In the face of "institutionalised racism" within a particular government department or institution, for example, this may include altering internal organizational practices, such as police taking "all possible steps to investigate" even the suspicion of discrimination within is ranks and policies before taking coercive action, and to do so with far greater vigilance than might have been warranted in the absence of a proven history of discrimination.[145]

In summary, and without taking the analogy too far, the Strasbourg court may serve as further inspiration, given that it confirms our understanding of EU law's demands of an effective remedy. The Strasbourg court has emphasized that remedial obligations go beyond paying monetary compensation to individual victims, as this is often an insufficient response to counteract longstanding discrimination, and especially continuing discrimination that is structurally embedded in an institution's organization, practices, or rules. In such cases, additional, positive measures, including restructuring the institution's organization, practices, or rules that proved deficient may be required. The point is not just to make up the harm to the applicant before the court in some narrowly technical or monetary sense, but to demonstrate that the underlying offending practice has been stopped, and that its ill effects have been erased insofar as possible. And to ensure that all this is done, the Strasbourg mechanism retains jurisdiction and, after rendering legal judgment, demands a concrete plan for improvement and supervises its implementation.

3. Can EU law require National Courts to Issue Structural Injunctions?

We have argued that equality directives must be read broadly to demand "real and effective" judicial protection including "effective, proportionate and dissuasive" sanctions that are "commensurate to the seriousness" of the violation and "restore" equality. To be sure, EU law allows Member States a choice among various remedies, but only to the extent effectiveness is ensured.[146] And given the various treaty provisions and general principles, this overall remedial requirement emanates not only from the directives, but from EU primary law to which the directives give expression. All this would seem to mean that where other remedies do not suffice, national courts are under an EU law obligation to issue injunctions, including, where necessary, structural injunctions.

In this final section, we address whether such an EU law mandate clashes impermissibly with inherent national constitutional limitations on the judiciary.[147] This question arises regardless

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[144] ECtHR, *Horváth and Kiss* v. *Hungary*, Appl. No. 11146/11, judgment of 29 Jan. 2013, para 127.

[145] *See* ECtHR, *Lingurar* v. *Romania*, Appl. No. 48474/14, judgment of 16 Apr. 2019, para 80.

[146] *See, e.g.*, Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd* v. *Justitiekanslern*, ECLI:EU:C:2007, [2007] ECR I-2271.

[147] In part, these questions implicitly invoke the purported principle of "national procedural autonomy". For a critical discussion, see Daniel Halberstam, "Understanding Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach", *Cambridge Yearbook of Eur. L. Stud.* 23(2021), pp. 128–158 (explaining the principle as an outgrowth of conferral and related considerations of legislative purpose, subsidiarity, proportionality, and respect for national constitutional identity); Michael Dougan, *National Remedies before the Court of Justice* (Hart, 2004) (proposing a sectoral approach); Takis Tridimas, *General Principles of EU Law* (Oxford Univ. Press, 2006), pp. 420-422 (general overview); cf. Michal Bobek, "Why there is no Principle of 'Procedural Autonomy' of the

of whether the purported requirement derives from European anti-discrimination law as currently written (as we argue it does), or whether an explicit requirement to provide for such structural injunctions were to be incorporated into new legislation, as is currently proposed, for example, in revisions to the Equal Pay Directive.[148]

We maintain that as long as a national court enjoys basic injunctive powers, it has all the tools necessary to craft a more elaborate structural injunction. We may recall that in the United States, the structural injunction was not a radically novel creation but constructed bit by bit from the elements of more basic injunctive practice. Likewise, in the European jurisdiction that has ordered broad structural injunctions, this complex and innovate mandate was based on nothing more than the court's basic authority to order the defendant "to cease the infringement and...to terminate the harmful situation[.]"[149] It's not hard to see why. For example, even if a court were nominally to have power or practical experience only regarding negative, *i.e.*, prohibitory injunctions, a positive structural injunction can usually be crafted just as well. A court could, for instance, prohibit a respondent from any future activity that employs an existing unlawful structure or organization. Only after the respondent had restructured the unlawful organization to bring that structure into compliance – or only when the respondent has at least come forward with a feasible plan for such positive restructuring – would the broader, prohibitory injunction on the respondent's otherwise unlawful activity be eased so as to allow the respondent to resume activities.

The requisite basic injunctive practice, in turn, is common throughout the Member States of the Union – at least in one form or another. In the area of environmental law, for example, the 1998 Aarhus Convention expressly requires signatory states to provide access to justice for members of the public whose rights or interests have been adversely affected by unlawful acts or omissions within the scope of that convention.[150] As part of such proper access to justice, the Convention specifies that each signatory state "shall provide effective remedies, including injunctive relief as appropriate[.]"[151]

The Aarhus Convention – to which all Member States are signatories – thus confirms that even from the perspective of the Member States, injunctions are not some separate or esoteric form of judicial action, but that injunctions are "includ[ed]" in the basic idea of "effective remedies." Accordingly, when it comes to interpreting the right to an "effective remedy" under the remedial Articles of the Equality Directives as well as Article 47 CFR – all of which give expression to a general principle of EU law – we may draw on the Aarhus Convention to understand the requirement of "effective remedies" as including injunctive relief.[152] Moreover, in the course of implementing the Aarhus Convention, the Member States have further demonstrated that the practice of injunctive relief is indeed compatible with each of their constitutional systems. To be sure, difficulties and hinderances to the full effective access to justice, including injunctions,

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Member States" in Bruno de Witte & Hans Micklitz (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011) (rejecting any such limitation).

[148] See Proposal op. cit. *supra* note **Error! Bookmark not defined.**.

[149] *See Kúria* [Curia of Hungary] Pfv.IV.20.085/2017/9 (4 Oct. 2017) (translation on file with authors), at para 42 (discussing Sec. 84 of the Act of 1959 as basis for order to craft and implement a desegregation plan.)

[150] Art. 9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, available at <https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf>.

[151] *Id.* at Art. 9.4.

[152] *Cf.* Case C-44/79, *Hauer* v. *Land Rheinland Pfalz*, EU:C:1979:290, para 15 (drawing inspiration for general principles from international treaties on which Member States have collaborated).

continue to exist.[153] Nevertheless, in the area of environmental law, every single Member State of the Union currently allows for some form of injunctive relief.[154] This forms a kind of "existence proof" against the argument that an EU law demand for injunctive relief in national courts exceeds the organizational capacity of national judiciaries.

That national courts can, where appropriate, go beyond strictly individual concerns and issue broader injunctions to address, where appropriate, collective or group harm should already be implicit in environmental remedies. It was nevertheless made explicit by the EU Injunctions Directive. Issued the same year the Aarhus Convention was signed, the EU's Injunctions Directive harmonized aspects of injunctive practice in the area of consumer protection.[155] In particular, the directive provided a mechanism for the protection of the "collective interests" of consumers, independent of individual actions or individual harm.[156] In so doing, the Injunctions Directive required all Member States to provide their courts with power to hear certain representative actions and to issue, in the course of such actions, injunctive orders "requiring the cessation or prohibition of any infringement."[157]

Spelling out injunctions in the Injunctions Directive with regard to consumer protection did to suggest the absence of an EU law demand for injunctions elsewhere. The innovation of the Injunctions Directive was not the injunctions themselves, but merely that national courts allow for certain representative actions to vindicate "collective interests."[158] To be sure, the Injunctions Directive itself does not answer whether representative actions or injunctions aimed at remedying collective harm offend national constitutional sensibilities. The Injunctions Directive itself might have been challenged on that ground. But it was not. Instead, every Member State promptly implemented the Injunctions Directive to provide for an injunction procedure vindicating collective interests in line with what EU law required.[159]

In the light of the Member States' participation and implementation of the Aarhus Convention and their implementation of the Injunctions Directive, Member States cannot claim

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[153] *See, e.g.*, Jan Darpö, "Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union", available at <https://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf>

[154] *See, e.g.*, Yaffa Epstein, "Access to Justice: Remedies - Article 9.4 of the Aarhus Convention and the requirement for adequate and effective remedies, including injunctive relief", available at <https://unece.org/DAM/env/pp/a.to.j/AnalyticalStudies/Remedies_ReportYE_100311.pdf> (discussing all Member States except Bulgaria); E-Justice, "Access to Justice in Environmental Matters", <https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do> (summaries in English available for all Member States except Croatia, Spain, Italy, and Portugal). For an earlier comprehensive Aahus compliance study on access to justice in environmental matters, see Esther Pozo Vera, "An inventory of EU Member States' measures on access to justice on environmental matters", available at: <https://ec.europa.eu/environment/aarhus/pdf/conf/milieu.pdf>. The full Milieu study is available at <https://ec.europa.eu/environment/aarhus/study_access.htm>.

[155] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, 1998 O.J. (L 166) 51, 55. The directive has been successively revised, replaced, and expanded, most importantly by Directive 2009/22/EC and Directive (EU) 2020/1828.

[156] Recital 2 Directive 98/27/EC.

[157] Art. 2 Directive 98/27/EC. *Cf.* Art. 2 Directive 2009/22/EC (same); Art. 7 & 8 Directive (EU) 2020/1828 (requirement for injunctive measures in national courts in representative actions).

[158] Recital 2 & Art. 1 Directive 98/27/E. Cf. *See*, *e.g.*, Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Text with EEA relevance), Recital 5 and Arts. 1 & 3, 2020 O.J. (L 409) 1, 27 (only later adding collective redress for damages).

[159] *See* COM/2008/0756, "Report from the Commission concerning the application of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest", at pp. 1-2.

that applying a similar injunctive practice to vindicate collective interests in equality law would violate core national constitutional strictures. The successful implementation of the Injunctions Directive for the past two decades, and indeed its successive amendment not to contract but to expand its reach,[160] further confirms that the basics of injunctive practice – even in the context of vindicating collective interests – are inherent in, and fully compatible with, the existing fundamental requirements enshrined in national constitutions.

National courts may build on these basic injunctive powers to craft the more complex orders needed for structural injunctions, even if that means reaching beyond the narrow infringement itself. They may issue orders to protect the legitimate interests that have been, or may be, adversely affected by the unlawful act. Indeed, courts may even enlist otherwise innocent parties whose actions, combined with those of the guilty respondent, conspire to harm the legitimate interests of the victim.

This, too, has already been confirmed elsewhere in EU law.[161] The E-Commerce Directive, for example, clarifies that Member States shall ensure that "national court actions...allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved."[162] In the implementation throughout the Union of the E-Commerce Directive, then, we have further confirmation that injunctions include not only orders to "terminate any alleged infringement" but also to "prevent any further impairment of interests involved." The emphasis on the prevention of further impairment of "interests", as opposed to merely allowing for injunctions to prevent future repetition of the "infringement", properly highlights the broader, practical focus of injunctions.[163] It specifically highlights the requirement to draw otherwise innocent third parties – in the case of E-Commerce directive, so-called "intermediaries" – whose actions and services are used in the course of an infringement to harm protected interests, in fashioning such protective and remedial measures.[164] The acknowledged and already accepted object of injunctive practice is thus not narrowly to halt only the unlawful actions themselves. It extends more broadly to preventing the effects of an existing or threatened violation from harming legitimate interests.

Just to be clear: the conclusion is not that Member States already engage in the practice of structural injunctions elsewhere and must therefore do so here.[165] The conclusion pressed here is

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[160] *See, e.g.*, Commission Report, op. cit. *supra* note 159, at p. 2; COM(2018) 184, "Proposal for a Directive of the European Parliament and of The Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC".

[161] *See, e.g.*, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), art. 18, 2000 O.J. (L 178) 1, 16; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive), art. 8, 2001 O.J. (L 167) 10, 19; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (IP Rights Enforcement Directive), arts. 9-11, 2004 O.J. (L 157) 45, 86.

[162] Art. 18, E-Commerce Directive.

[163] *Cf.* Case C-324/09, *L'Oréal SA and Others* v. *eBay International AG and Others*, EU:C:2011:474, paras 128-133.

[164] *Cf.* Martin Husovec, *Injunctions Against Intermediaries in the European Union: Accountable But Not Liable?* (Cambridge Univ. Press, 2017).

[165] We thus do *not* rely on the principle of equivalence, which, in any event, does not even demand that national courts apply the most favored procedures to EU law available anywhere in national law. *Cf. supra* note 90; Michal Bobek, "Why there is no Principle of 'Procedural Autonomy' of the Member States" in Bruno de Witte & Hans Micklitz (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011) (noting difficulties of the inquiry into finding truly "equivalent" procedures). Our suggestion is thus *not* that Member States

different, and larger: even where national courts do not currently engage in broad structural injunctions, they have all the tools they need to do so. And they have the tools to do so consistent with their national constitutions.

When responsibly crafted, structural injunctions may thus build on existing injunctive practice and remain within the boundaries of the national judicial function. That is why EU law may insist on such injunctions whenever necessary to render equality law effective. Experience in other domains suggests that national courts may build on basic existing judicial practices and powers, even when this means overcoming previously held concerns regarding judicial limitations in the absence of the EU law demand. We've been through this time and again from the very beginning of the Community.[166] Regarding remedies in particular, in *Factortame* national courts expanded on their existing practice of enjoining both private and public actors to overcome previous national limitations on issuing injunctions against the implementation of acts of Parliament itself.[167] And in *Brasserie du Pecheur*, the German Federal Supreme Court acknowledged general separation of powers concerns about judicially crafting liabilities for an act of the German legislature, but nonetheless held that EU law both required and authorized national judges to give effect to just such liability.[168] Similarly, here, issuing structural injunctions to restore equality builds responsibly on national courts' existing injunctive practice. A structural injunction is thus not some free-form, rogue judicial remedy.[169] It properly responds to the positive substantive requirement of equality in the directives and in the Charter, as well as to the requirement in the directives to restore such breached equality by means of "effective, proportionate and dissuasive" sanctions, and to the "right to an effective remedy" under the Charter, all of which give positive expression to general principles of EU law.

Conclusion

Breaches of equality throughout the Union often exceed what the currently limited judicial interventions of declarations, compensation, fines, and limited injunctions to obey the law can fix. In giving expression to the general principle and fundamental right of equality, however, and expressly demanding "effective, proportionate and dissuasive" sanctions – which similarly gives expression to the general principle and fundament right to an effective remedy – the equality directives call upon national courts to deploy *all* measures within their institutional capacity to "restore" or bring about the equality that has been compromised. Such effective, proportionate,

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already provide for structural injunctions elsewhere and must therefore extend them to EU equality law as well. We argue, instead, that basic injunctive practice is both compatible with, and present in, national constitutional traditions, and that this basic injunctive practice suffices, in principle, to provide all the building blocks necessary for courts to craft a more elaborate structural injunction. Hence, where EU law demands that national courts issue structural injunctions, as we argue EU equality law, in principle, does, national courts who live up to that duty can find a way of doing so without offending their national constitutional identity.

[166] See, e.g., Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*, EU:C:1963:1; Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*, EU:C:1978:49; *S.p.a. Granital* v. *Amministrazione delle Finanze dello Stato*, Judgment of June 8, 1984, Corte Cost., Italy, 29 Giur. Cost. I 1098.

[167] *See* Josef Drexl, "Was Sir Francis Drake a Dutchman?—British Supremacy of Parliament after Factortame", 41 Am. J. of Comp. L. (1993), 551-571.

[168] *Bundesgerichtshof* [BGH] [Federal Court of Justice] 24 Oct. 1996, 134 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 30 (Ger.).

[169] For a rejection of this criticism in the U.S. context, see, e.g., Mark Tushnet, "'Sir, Yes, Sir!': The Courts, Congress and Structural Injunctions", 20 Const. Comment. 2003), 189-203.

and dissuasive measures must, in principle, include not only compensation and fines, but also injunctions. And they must include, in principle, not only simple injunctions that order an individual to be accepted, hired, served, or payed, or that a defendant otherwise obey the law, but also broader structural injunctions that mandate concrete action to reform the rules, processes, and practices of the defendant's institution that come together to create the harm. We have also discussed the considerations that should broadly come into play whether, in an individual case, such an injunction would be appropriate.

Let us close by returning to gender discrimination for a final example here. The persistent pay gap in Europe along gender lines seems ripe for structural remedies. After finding a large employer liable for maintaining a persistent and systematic institution-wide pay gap, a court could issue a structural injunction involving, say, pay transparency measures, gender neutral job classifications and job reviews, pay reports and pay audits disclosed to employees and other relevant stakeholders, the allowance of employee pay inquiries, and other organizational measures to help cure the organizational aspects of the violation (even where such measures are not already specifically required under national law).[170] And, indeed, it would be wise to do so not by judicially micromanaging the defendant and order each every one of these organizational measures, but by putting these options on the table and requiring the employer to propose, publish, implement, and monitor a feasible remedial plan with the input of relevant stakeholders.

Just recently, we witnessed a political step embracing structural judicial measures to combat persistent, institutional, and structural discrimination along these lines. The Commission's proposal for a new equal pay directive emphasizes the "structural" nature of the nagging problem of equal pay,[171] and proposes to make explicit EU law's demand that national courts "must be able to require the defendant to take structural or organisational measures to comply with its obligations relating to equal pay."[172] The political insight is to be welcomed and may form part of the dialogue between the judiciary, the legislature, and relevant others on how best to make progress.

But enacting, or even failing to enact, such a positive proposal must not detract from that same requirement of structural relief already embedded throughout European equality law – in the consistent demand for "effective, proportionate and dissuasive sanctions" in the various equality directives we considered here. Nor should such a provision in the proposed Equal Pay Directive itself be drafted, or read, narrowly. Courts should not, for example, be limited to such structural injunctive relief only against a defendant who violated their own obligations under equality law, as the current draft might be taken to suggest.[173] At times, as we have shown here, a structural injunction may reach into surrounding, complicit actors and structures more broadly than that. And finally, given that current positive European equality law gives substantive expression to a general principle and fundamental right to equality, and that the existing remedial provisions give further expression to a general principle and fundamental right to an effective remedy, we should not have to wait for the political branches to spell out the EU law's remedial demand for structural

[170] *Cf., e.g.*, 2014/124/EU, "Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency Text with EEA relevance", (setting forth recommendations for good practices to combat the persistent gender pay gap); Commission Staff Working Document, op. cit. *supra* note 10.

[171] COM(2021)93, "Proposal for a directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms", at p. 2

[172] *Id.* at p. 15 (discussing proposed Art. 15). *See also id.* at p. 28 (proposed Recital 37) & p. 38 (proposed Art. 15).

[173] *See id.* at p. 15 (proposed Art. 15).

injunctions to combat persistent, institutional, and structural discrimination in directive after directive, one by one. It's already there.