Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 14 May 2020[1]

Case C-30/19

Diskrimineringsombudsmannen
v
Braathens Regional Aviation AB

(Request for a preliminary ruling
from the Högsta domstolen (Supreme Court, Sweden))

(Reference for a preliminary ruling — Directive 2000/43/EC — Equal treatment between persons irrespective of racial or ethnic origin — Article 7 — Defence of rights — Article 15 — Sanctions — Action for compensation for discrimination — Admission mechanism — Refusal by the defendant to acknowledge the existence of discrimination despite the express claim made by the applicant — Link between the sanction and discrimination — Article 47 of the Charter of Fundamental Rights of the European Union — Right to effective judicial protection — No possibility of obtaining a finding of discrimination)

I. Introduction

1. This request for a preliminary ruling from the Högsta domstolen (Supreme Court, Sweden) concerns the interpretation of Directive 2000/43/EC,[2] prohibiting discrimination on grounds of racial and ethnic origin, and relates to the right of a person who considers himself a victim of such discrimination to have a court examine whether, and, where appropriate, find that, that discrimination has occurred. More specifically, the request for a preliminary ruling seeks to ascertain whether such a person has that right in the context of an action for damages where the defendant agrees to pay the compensation sought, but does not admit any form of discrimination.

2. That issue is raised in a dispute between an air passenger, represented by the Diskrimineringsombudsmannen (Swedish authority responsible for combating discrimination, 'the Ombudsman'), and the airline Braathens Regional Aviation AB ('Braathens').

3. The present case raises in particular the question whether a national procedural mechanism — under which a defendant may bring a dispute to an end by admitting a claim for compensation for discrimination without acknowledging the existence of discrimination and without the applicant being able to obtain an examination or finding of discrimination from a court — allows that applicant fully to assert his or her rights under Directive 2000/43, read in the light of the Charter of Fundamental Rights of the European Union ('the Charter').

1 Original language: French.

2 Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

4. For reasons which I shall set out in this Opinion, I consider that this question should be answered in the negative.

5. The present case requires the Court to examine the discretion enjoyed by the Member States in establishing their procedural rules given the requirements of Directive 2000/43, read in the light of the Charter.

6. Following my assessment, I shall propose that the Court should hold that a person who considers that he or she has been discriminated against on grounds of ethnic origin must, if this is not acknowledged by the defendant, be able to obtain from a court an examination of whether that discrimination occurred and, where appropriate, a finding that it did. A procedural mechanism for settling disputes cannot deprive that person of that right.

II. Legal context

A. EU law

7. Recitals 19 and 26 of Directive 2000/43 state:

'(19) Persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

…

(26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.'

8. According to Article 1 of that directive, entitled 'Purpose':

'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

9. Article 2 of that directive, entitled 'Concept of discrimination', provides, in paragraph 1 thereof:

'For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.'

10. Article 7 of that directive, entitled 'Defence of rights', provides:

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

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

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.'

11. Article 8 of Directive 2000/43, entitled 'Burden of proof', states:

'1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

…

3. Paragraph 1 shall not apply to criminal procedures.

…'

12. Article 15 of that directive, entitled 'Sanctions', provides:

'Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. …'

B. Swedish law

13. Under Paragraph 4(1) of Chapter 1 of the diskrimineringslagen (2008:567) (Law on discrimination), discrimination is to include, inter alia, a situation in which a person is placed at a disadvantage because he or she is treated less favourably than another person is or would be treated in a comparable situation, where the difference in treatment is based on sex, gender identity or expression, ethnicity, religion or opinions, disability, sexual orientation or age.

14. Paragraph 12 of Chapter 2 of that law prohibits discrimination, inter alia, by a person who, outside his or her own private or family circle, supplies goods, services or housing to the general public.

15. Chapter 5 of the Law on discrimination lays down the penalties incurred by any person discriminating against another person. Those penalties are compensation, referred to as 'compensation for discrimination', and the revision or annulment of contracts and other legal instruments.

16. It is apparent from the second subparagraph of Paragraph 1 of Chapter 6 of the Law on discrimination that disputes concerning the application of Paragraph 12 of Chapter 2 of that law are to be examined by the ordinary courts in accordance with the provisions of the rättegångsbalken (1942:740) (Code of Judicial Procedure) relating to civil proceedings in which an amicable settlement of the dispute is permitted.

17. Under Paragraph 1 of Chapter 13 of that code, an applicant may, in the circumstances set out in that provision, bring an action for enforcement to obtain an order requiring a defendant to fulfil an obligation to act and, in particular, to pay him or her a sum of money by way of compensation for discrimination.

18. Paragraph 7 of Chapter 42 of that code provides that a defendant must, at the hearing, immediately submit his or her defence. Failing that, a defendant may, at that stage, decide to admit the applicant's claim. Admission of the claim brings the proceedings to an end. The admission may be based on a particular factual or legal plea relied on by the applicant but may also not be linked to the pleas in support of the applicant's claim.

19. In accordance with Paragraph 18 of Chapter 42 of the Code of Judicial Procedure, following admission by the defendant of the applicant's claims, the court may deliver a judgment on the basis of that admission.

20. Under the first subparagraph of Paragraph 2 of Chapter 13 of that code, an applicant may bring an action for a declaration that a specific legal relationship exists where there is uncertainty concerning that legal relationship and this adversely affects him.

III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

21. In July 2015, a passenger of Chilean origin residing in Stockholm (Sweden) and travelling on an internal flight from Gothenburg to Stockholm ('the passenger') operated by Braathens was, by decision of the captain, subject to an additional security check together with another passenger.

22. The Ombudsman brought proceedings before the Stockholms tingsrätt (District Court, Stockholm, Sweden) seeking an order that Braathens pay the passenger compensation for discrimination in the amount of 10 000 Swedish kronor (SEK) (approximately EUR 1 000). In support of his action, the Ombudsman claimed that the passenger had been directly discriminated against by Braathens in breach of Paragraph 12 of Chapter 2 and Paragraph 4 of Chapter 1 of the Law on discrimination. According to the Ombudsman, Braathens had taken the passenger to be an Arab and a Muslim, had subjected him for that reason to an additional security check and, consequently, had placed him at a disadvantage for reasons relating to physical appearance and ethnicity, by treating him less favourably than other passengers in a comparable situation.

23. Before that court, Braathens admitted the claim for payment of the compensation sought, while disputing the existence of any discrimination.

24. The Ombudsman argued that the Stockholms tingsrätt (District Court, Stockholm) should not give a ruling on the basis of that admission without examining the substance of the alleged discrimination. In the event that that court nevertheless decided, in the context of the action for enforcement,[3] not to examine the substance of the case, the Ombudsman claimed, first, that that court should deliver a declaratory judgment finding that Braathens is required to pay compensation for discrimination on account of its discriminatory behaviour or, secondly, that that court should simply declare by such a judgment that the passenger had been discriminated against by the airline.

3 This is a civil law action seeking to enforce the obligation to make good the damage caused.

25. The Stockholms tingsrätt (District Court, Stockholm) ordered Braathens, in paragraph 1 of the operative part of its decision, to pay the sum of SEK 10 000 to the passenger together with interest and, in paragraph 2 of the operative part, to pay the costs. In paragraph 3 of the operative part, it declared inadmissible the form of order sought by the Ombudsman seeking a declaratory judgment. It took the view that disputes which involve civil rights and obligations freely entered into by the parties, such as the present dispute, should, in the event that the applicant's claims are admitted, be decided without an examination of the substance, emphasising that it was bound by Braathens' admission.

26. The Svea hovrätt (Court of Appeal, Stockholm, Sweden) dismissed the appeal brought by the Ombudsman, considering that that appeal was inadmissible as regards paragraphs 1 and 2 of the operative part of the judgment at first instance, that that judgment complied with the Swedish rules of civil procedure and that, in view of its admission, Braathens' position concerning the claim of discriminatory behaviour was irrelevant. That court also dismissed the appeal as regards paragraph 3 of the operative part, relating to delivery of a declaratory judgment.

27. The Ombudsman brought an appeal against the judgment of the appeal court, requesting that the Högsta domstolen (Supreme Court) make a reference to the Court of Justice for a preliminary ruling, set aside that judgment, overturn the judgment of the Stockholms tingsrätt (District Court, Stockholm) and refer the case back to that court for an examination of the substance of at least one of his claims for a declaratory judgment, in addition to the claim for enforcement seeking payment of the compensation for discrimination. Braathens contended that those claims should be rejected.

28. The referring court explains that the purpose of the Law on discrimination is to combat discrimination and to promote equal rights and opportunities for persons irrespective of sex, gender identity or expression, ethnicity, religion or opinion, disability, sexual orientation or age. That mandatory law covers several fields of activity, applies to both the public and private sectors, was drafted taking into account the grounds of discrimination covered by the United Nations and Council of Europe Conventions and, in particular, various EU instruments, such as Directive 2000/43, and, according to its travaux préparatoires, is intended to provide for strong and dissuasive sanctions in the event of discrimination.

29. That court adds that, in the context of the transposition into Swedish law of Directive 2000/43, in particular Article 15 thereof, the penalties incurred under that law by anyone discriminating against another person are compensation, referred to as 'compensation for discrimination', and the revision or annulment of contracts and other legal instruments. In particular, any person who infringes the prohibition laid down in Paragraph 12 of Chapter 2 must pay such compensation. The compensation should, in each particular case, be determined in such a way as to constitute reasonable compensation for the victim and to help combat discrimination in society, so as to ensure a dual function of compensation and prevention.[4] The referring court states that disputes concerning the application of Paragraph 12 fall within the jurisdiction of the ordinary courts, adjudicating in accordance with the provisions of the Code of Judicial Procedure relating to civil proceedings in which an amicable settlement of the dispute is permitted, since the parties have the freedom to dispose of their rights.

30. The Högsta domstolen (Supreme Court) also points out certain procedural aspects deriving from national law. It explains that a defendant may decide to admit the applicant's claim for compensation without being required to state its reasons or base the decision on a plea in law relied on by the applicant. Accordingly, it is possible for the admission not to be linked to the pleas in support of the applicant's claim. Such an admission is, in practice, intended to bring the proceedings to an end

4 The Swedish Government, the Ombudsman and Braathens have stated that, in accordance with the case-law of the Högsta domstolen (Supreme Court), the compensation is divided into two parts: first, compensation by way of reparation for the loss and, secondly, an increase for the purposes of prevention. The compensation by way of reparation for the loss must be set at an amount which is deemed necessary to compensate for the discrimination. There is no limit to that amount. The increase for the purposes of prevention is, in principle, equal to the compensation by way of reparation for the loss, and therefore results in a doubling of that compensation.

without there being any need to further examine the case. The court must allow the admission without an actual examination of the facts or point of law. It is therefore not possible to draw from such a judgment any definitive conclusion as to the merits of the applicant's arguments relating to the circumstances of the dispute.

31. The Högsta domstolen (Supreme Court) adds that the purpose of the action for a declaration provided for in Paragraph 2 of Chapter 13 of the Code of Judicial Procedure is to determine whether a legal relationship exists between the parties. That action is discretionary, however. A court may examine such an action if there is uncertainty as regards that relationship and this adversely affects the applicant, in particular by making his or her economic activity more difficult to plan. Accordingly, the examination of such an action must appear appropriate in the light of the facts, since the court must strike a balance between, first, the applicant's interest in bringing proceedings and, secondly, the inconvenience which the defendant might suffer on account, inter alia, of the probability of further proceedings.

32. The referring court states that, in the main proceedings, the courts of first and second instance delivered a judgment ordering Braathens to pay the compensation sought on the basis of its admission and that there was, according to those courts, no possibility of examining the question of the existence of discrimination in the context of declaratory proceedings.

33. The referring court entertains doubts as to that result, having regard to the requirements of Article 15 of Directive 2000/43 concerning sanctions for discrimination, read in the light of the obligation on the Member States to ensure that everyone has the right to an effective remedy before a tribunal for the purpose of being heard in the event of an infringement of the rights and freedoms guaranteed by EU law, pursuant to Article 47 of the Charter. The referring court considers that it is important to ascertain whether a court must be able to examine the question of the existence of discrimination at the request of the person who considers himself or herself to have been wronged and whether the answer depends on whether or not the alleged perpetrator admits that the discrimination occurred.

34. In those circumstances, the Högsta domstolen (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In a case concerning an infringement of a prohibition laid down in [Directive 2000/43] where the person wronged claims compensation for discrimination, must a Member State, if so requested by the person wronged, always examine whether discrimination has occurred — and where appropriate conclude that that was the case — regardless of whether the person accused of discrimination has or has not admitted that discrimination has occurred, in order for the requirement in Article 15 [of that directive] for effective, proportionate and dissuasive sanctions to be regarded as satisfied?'

35. Written observations were submitted by the Ombudsman, Braathens, the Swedish and Finnish Governments and the European Commission. With the exception of the Finnish Government, those parties and interested parties were represented at the hearing which took place on 11 February 2020.

IV. Analysis

A. Preliminary observations

36. The action brought by the Ombudsman on behalf of the passenger seeks an order that Braathens pay the passenger compensation for discrimination. An important aspect of that action is that it does not simply seek payment of a sum of money, but also seeks to obtain either an admission from Braathens that that sum is being paid *because* of discrimination or, otherwise, a declaration by the court that the passenger's right to equal treatment has been infringed.

37. Braathens refuses to acknowledge any discrimination, however. It has declared that it is willing to pay and indeed has paid the compensation sought, though only to demonstrate 'its good will' and avoid potentially lengthy and costly proceedings requiring it to defend itself against the allegation of discrimination.

38. In spite of that refusal to acknowledge the existence of discrimination, the courts of first and second instance noted that, under national procedural rules, the dispute is brought to an end by admission of the claim brought by the Ombudsman, whose action is regarded as restricted to the claim for compensation, although he also requested a finding of discrimination. Those courts therefore ordered the payment of compensation, but rejected the Ombudsman's requests for a finding that the passenger's right to equal treatment had been infringed.

39. I would point out that it is apparent from the observations submitted to the Court that a declaratory action seeking to obtain such a finding is discretionary [5] and not 'usual' in the case of disputes concerning discrimination. [6] In such disputes, since compensation for discrimination can, in principle, be determined directly, a declaratory action — which often involves a two-stage process of, first, finding discrimination and, secondly, determining compensation — is generally considered inappropriate [7] and therefore inadmissible. It is regarded as appropriate only if, for example, the extent of the material or non-material damage cannot be determined when the action is brought and that action cannot be delayed for reasons relating to the limitation period. [8]

40. In short, under Swedish law, as interpreted by the courts of first and second instance in the main proceedings, a person who considers himself or herself a victim of discrimination based on racial or ethnic origin, within the meaning of Article 2 of Directive 2000/43, cannot in practice obtain in legal proceedings, in addition to compensation, a finding that that discrimination actually occurred, where

5 See point 31 of this Opinion.

6 In his written observations, the Ombudsman states that he presented his claims knowing perfectly well that they could not normally be permitted under the national procedural rules. It is also apparent from the discussions at the hearing before the Court that the possibility of obtaining a declaratory judgment in an action for compensation for discrimination has not been the subject matter of any decision before the Högsta domstolen (Supreme Court) to the knowledge of the parties to the main proceedings and the Swedish Government.

7 See point 31 of this Opinion.

8 The Ombudsman gives two examples of cases in which an applicant who considered that he or she had suffered non-material damage tried unsuccessfully to obtain a declaratory judgment or to have his or her action examined on the substance. In *the first case*, the applicant had sought to have the State declared non-contractually liable for an infringement of his personal data protection rights, as guaranteed by EU law. The court seised held that, as regards *non-material damage*, an *action for a declaration* was *not appropriate* and invited the applicant to lodge an application for enforcement seeking compensation for that damage (decision of the Svea hovrätt (Court of Appeal, Stockholm) of 10 January 2008 in Ö 9152-07, *J.S.* v *staten genom Justitiekanslern*). The *second case* concerned sexual harassment between a student and a teacher at a public sector university. After initially contesting the *action for enforcement* seeking the payment of compensation, the State chose to admit, though only in the abstract, the claim brought by the Ombudsman on behalf of the student, requesting that the court expressly indicate that the State did not acknowledge the alleged harassment. Although the Ombudsman stated that the student's primary interest was not economic, he was *unable to obtain from the court a substantive examination* of whether the student had been the victim of harassment. A reference to the Court for a preliminary ruling was rejected and a judgment was delivered at first instance without the student — who was regarded as the successful party — being able to bring an appeal (judgment of the Stockholms tingsrätt (District Court, Stockholm) of 5 October 2017, *Diskrimineringsombudsmannen mot staten genom Justitiekanslern* (T 16908-15)).

the alleged perpetrator of that discrimination agrees to pay the compensation sought while contesting any discrimination. The central question which arises in the present case is whether a procedural mechanism for ending proceedings, such as admission, can lead to such an outcome without undermining the requirements of Directive 2000/43.

41. I would point out that the Ombudsman's appeal before the referring court concerns only the situation where a person who considers himself or herself a victim of discrimination obtains compensation from a defendant *without* the latter *acknowledging* that he or she behaved in a discriminatory way. The appeal does not concern the situation where a defendant acknowledges the existence of such discrimination. In the latter situation, the Ombudsman takes the view that, since an applicant obtains satisfaction of all his or her claims, the national courts are no longer required to examine whether discrimination actually occurred and it is not appropriate to seek a ruling from the Court on that point.

42. Given the context of the dispute in the main proceedings, I consider that it is appropriate to examine the question referred for a preliminary ruling solely from the perspective that the alleged perpetrator of the discrimination has not acknowledged its existence.

43. In order to assess the Member States' discretion at the procedural level in implementing Directive 2000/43, it is necessary to examine the requirements of that directive.

B. The requirements of Directive 2000/43

44. As is apparent from its preamble, Directive 2000/43 is intended to protect all natural persons against discrimination on grounds of racial or ethnic origin, and in so doing to ensure observance of a fundamental human right. Directive 2000/43 is thus a specific expression, within the field that it covers, of the general prohibition of discrimination laid down in Article 21 of the Charter.[9] As is clear from recital 12 and Article 3 of that directive, that right extends to the widest variety of fields in society. In that context, Articles 7 and 15 of that directive, concerning the applicable remedies and sanctions, play a central role in ensuring observance of the right to equal treatment by requiring Member States to lay down adequate means of legal protection[10] for victims of such discrimination.

45. Article 7 of Directive 2000/43 requires Member States to provide for judicial or administrative procedures in order that persons who consider themselves wronged by failure to apply the principle of equal treatment to them may assert their rights under that directive.

46. According to Article 15 of that directive, Member States must provide for effective, proportionate and dissuasive sanctions, which may comprise the payment of compensation to the victim.

47. Those two provisions are connected, as is apparent from the landmark judgment in *von Colson and Kamann*,[11] which concerns the interpretation of Directive 76/207/EEC[12] on the prohibition of discrimination between men and women. That judgment interprets, in particular, Article 6 of that directive, which is concerned with the right of victims of discrimination to pursue their claims and is couched in terms similar to those used in Article 7 of Directive 2000/43.

9 See, by analogy, as regards Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), judgment of 23 April 2020, *Associazione Avvocatura per i diritti LGBTI* (C-507/18, EU:C:2020:289, paragraph 38).

10 See recital 19 of Directive 2000/43.

11 Judgment of 10 April 1984 (14/83, EU:C:1984:153).

12 Council Directive 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 (OJ 1976 L 39, p. 40).

48. The Court held in that judgment that Member States are required, under Article 6 of Directive 76/207, to introduce into their legal systems such measures as are necessary to enable all persons who consider themselves wronged by discrimination to pursue their claims by judicial process, and explained that those measures must be sufficiently *effective* to achieve the objective of the directive and that it must be possible for the persons concerned to rely on those measures in an *effective* way before the national courts. By way of example, the Court stated that such measures may include provisions ensuring adequate financial compensation, backed up where necessary by a system of fines. [13]

49. The Court added that the sanction must, moreover, have a *real deterrent effect* on the person responsible for the discrimination. [14]

50. That judgment and the case-law which followed it were taken into account by the EU legislature when adopting new equal treatment directives, [15] including Directive 2000/43.

51. Accordingly, the EU legislature, for the sake of clarity, no longer laid down a single provision but instead laid down two separate provisions, in this instance Articles 7 and 15 of Directive 2000/43. Those provisions concern, respectively, the 'defence of rights', including judicial or administrative procedures, and 'sanctions'. [16]

52. The Court has defined the characteristics of those concepts in its case-law. I would note that the same terms, effectiveness and efficiency, are used to describe both the defence of rights [17] and sanctions. [18]

53. With regard to the defence of rights, the Court generally refers to the right to effective judicial protection. [19]

54. The Court has interpreted a provision drafted in identical terms to Article 7 of Directive 2000/43, that is to say Article 9 of Directive 2000/78. [20] It held that Article 9 of Directive 2000/78 lays down a right to an effective remedy like that contained in the first paragraph of Article 47 of the Charter. [21] Under the latter provision, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to a remedy before a tribunal.

13 Judgment of 10 April 1984, *von Colson and Kamann* (14/83, EU:C:1984:153, paragraph 18).

14 Judgment of 10 April 1984, *von Colson and Kamann*, (14/83, EU:C:1984:153, paragraph 23).

15 See Directive 2000/78, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37), Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (OJ 2010 L 180, p. 1).

16 Those provisions are set out, respectively, in Articles 9 and 17 of Directive 2000/78, in Articles 8 and 14 of Directive 2004/113, in Articles 17, 18 and 25 of Directive 2006/54 and in Articles 9 and 10 of Directive 2010/41. Although there are some differences in the terms used from one directive to the next, those differences are not significant in the context of the present analysis.

17 See judgments of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383, paragraph 23); of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraphs 22 and 24); of 22 April 1997, *Draehmpaehl* (C-180/95, EU:C:1997:208, paragraph 39); of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397, paragraph 37); of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 63); and of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraph 31).

18 See judgments of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraph 22); of 22 April 1997, *Draehmpaehl* (C-180/95, EU:C:1997:208, paragraph 25); of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397, paragraph 38); and of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 73).

19 See, as regards Directive 2000/43, judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397, paragraph 37).

20 Judgment of 8 May 2019, *Leitner* (C-396/17, EU:C:2019:375).

21 See, to that effect, judgment of 8 May 2019, *Leitner* (C-396/17, EU:C:2019:375, paragraph 61).

55. I would point out that, although the right in question is a fundamental right enshrined in primary law on which any person may rely, the EU legislature considered it necessary to reaffirm that right in Directive 2000/43, as in the other equal treatment directives, by providing that it is to be implemented by procedural means. Those procedural means echo the remedies which Member States must provide pursuant to the second subparagraph of Article 19(1) TEU in order to ensure effective legal protection in the fields covered by Union law.

56. The Court thus held in the judgment in *Leitner*[22] that compliance with the principle of equality requires, so far as concerns persons who have been the subject of discrimination, in that instance on grounds of age, 'that effective judicial protection of their right to equal treatment be *guaranteed*'.[23]

57. It follows that a person who considers himself or herself a victim of discrimination on grounds of ethnic origin must, under Article 7 of Directive 2000/43, be able to assert before a court his or her right to equal treatment in order for that court to examine whether there was discrimination and to ensure observance of that right.[24]

58. The legislature has also strengthened the judicial protection of a person who considers himself or herself a victim of discrimination by facilitating, with respect to that person, the taking of evidence. Article 8 of Directive 2000/43 thus provides that, when a person who considers himself or herself a victim of discrimination establishes facts from which it may be presumed that there has been discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment.

59. As regards the sanctions laid down in Article 15 of Directive 2000/43, the Court has pointed out, with regard to similar provisions, that Member States must, in the first place, ensure that the victim is able to obtain *full compensation*[25] for the loss and damage sustained. Consequently, the compensation cannot be capped.[26]

60. The sanctions must, in the second place, have a real *deterrent* effect.[27] They therefore cannot be purely symbolic[28] and must be commensurate to the seriousness of the breaches,[29] while respecting the principle of proportionality.[30] Publicity measures are regarded as capable of having a deterrent effect.[31] Sanctions may also have a punitive function.[32]

22 Judgment of 8 May 2019 (C-396/17, EU:C:2019:375, paragraph 62).

23 Emphasis added.

24 The right of access to justice in order to assert the right to equal treatment is set out in the Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(1999) 566 final). It is consistent with settled case-law on the right to an effective remedy; see, most recently, judgment of 26 March 2020, Review of *Simpson* v *Council* and *HG* v *Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 55).

25 See judgments of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraphs 26, 31 and 34), and of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraphs 33 and 37).

26 See judgment of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraphs 30 and 32).

27 See judgments of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383, paragraph 23); of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraph 24); of 22 April 1997, *Draehmpaehl* (C-180/95, EU:C:1997:208, paragraph 40); of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 63); and of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraph 31). I note that this two-fold function of sanctions is itself reflected in two separate provisions of Directive 2006/54, that is to say Articles 18 and 25, entitled respectively 'Compensation or reparation' and 'Penalties'. The term 'sanction' or 'penalty' is thus now reserved for measures having only a deterrent function.

28 See judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 64).

29 See judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 63).

30 See judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 63).

31 See judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 68).

32 See judgment of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraph 40).

61. I would point out that, although the judicial protection and sanctions must be real and effective, Member States are, by contrast, at liberty to choose the measures which to them seem appropriate, provided that those measures allow Member States to achieve the results sought by EU law.[33]

62. In the present case, it is precisely the extent of that freedom of choice which is at issue in the light of the obligations imposed by the EU legislature in Directive 2000/43.

63. It is apparent from the explanations given by the referring court that a system of sanctions such as that at issue in the main proceedings is intended, on the one hand, to make good the loss and damage sustained by the victim and, on the other hand, to penalise the person responsible for the discrimination by deterring him from behaving in a discriminatory manner in future. Moreover, provision is made for a legal remedy, the action for enforcement, for the purpose of applying those sanctions.

64. Braathens, the Swedish Government and the Commission infer from the above that such a system of sanctions and remedies, which includes the procedural mechanism for ending proceedings known as admission, fulfils the requirements laid down by Directive 2000/43.

65. For my part, like the Ombudsman, and in contrast to Braathens, the Swedish Government and the Commission, I consider that conclusion to be erroneous.

C. The effects of Directive 2000/43 on procedural autonomy

66. I would recall that, according to the principle of procedural autonomy and in accordance with settled case-law, in the absence of EU rules to ensure judicial protection of the rights which individuals derive from EU law, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding those rights.[34]

67. That freedom of the Member States is subject to the principles of equivalence and effectiveness, that is to say, first, the requirement to ensure that those procedural rules are no less favourable than those governing similar domestic actions and, secondly, the requirement that those rules do not render impossible or excessively difficult the exercise of rights conferred by EU law.

68. The Court has gradually found it necessary, in many cases, to apply another test, that of effective judicial protection, now guaranteed in Article 47 of the Charter.[35] That test consists in examining whether the national law concerned ensures effective judicial protection by allowing the person concerned to assert before a court his or her rights under EU law. That test is regarded as being a more restrictive one. It allows limitations only pursuant to Article 52(1) of the Charter, that is to say, on condition that those limitations are provided for by law and respect the essence of the rights and freedoms recognised by the Charter as well as the principle of proportionality.

33 See judgments of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383, paragraph 26); of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraph 23); of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397, paragraph 37); of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 61); and of 17 December 2015, *Arjona Camacho* (C-407/14, EU:C:2015:831, paragraph 30).

34 See, inter alia, judgments of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral* (33/76, EU:C:1976:188), and of 13 March 2007, *Unibet* (C-432/05, 'the *Unibet* judgment', EU:C:2007:163, paragraph 39).

35 See, inter alia, judgments of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688), and of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838).

69. One and/or the other test will normally be applied depending on whether or not the rules examined concern the right to effective judicial protection for the purposes of Article 47 of the Charter. [36]

70. In so far as the present case concerns rules of secondary law relating to sanctions and remedies seeking to ensure effective judicial protection, it is the test of effective judicial protection which must, in my view, be applied.

71. I nonetheless consider that the two tests should not be set against one another in such a case, since the concept of 'effectiveness' in the context of the principle of procedural autonomy is consistent with the concept of 'effective judicial protection'.

72. Member States are thus free to adopt the procedural rules which to them seem appropriate, subject to the requirements deriving from Directive 2000/43.

73. I would point out, in that regard, that Articles 7, 8 and 15 of Directive 2000/43, read in the light of Article 47 of the Charter, contain express or implied regulatory requirements.

74. In the first place, in accordance with Articles 7 and 15 of that directive, Member States are required to make provision for remedies and compensatory and penalty measures to ensure effective judicial protection. In the second place, Article 8 of that directive expressly lays down a procedural rule relating to the burden of proof.

75. I shall examine below the practical effects which this has on the measures adopted by Member States under that directive in relation to sanctions (Section 1) and legal remedies (Section 2) and, more generally, on their power to provide for mechanisms to facilitate the settlement of disputes, based on the principle that the subject matter of an action is defined by the parties (Section 3).

1. The Member States' 'freedom' to adopt sanctions

76. It follows from settled case-law, to which reference has been made in footnote 33 of this Opinion, that Member States have some discretion in choosing the sanctions which they consider appropriate. As regards Directive 2000/43, the Court held in *Feryn* [37] that it does not prescribe a specific sanction, but leaves Member States free to choose between the different solutions suitable for achieving its objective.

77. In that judgment, which concerned discrimination in the selection of job applicants, the Court stated, in paragraph 39, that the sanctions may include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, take the form of a prohibitory injunction ordering the employer to cease the discriminatory practice, and, where appropriate, a fine, or even take the form of the award of damages to the body bringing the proceedings. [38]

78. It follows that a Member State may, in particular, provide for the payment of damages as a sanction and that a finding of discrimination is only one of the other possible sanctions available to it.

36 By way of illustration, see, *first*, with regard solely to application of the procedural autonomy test, judgments of 27 February 2003, *Santex* (C-327/00, EU:C:2003:109), and of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662); *secondly*, with regard solely to application of the test of effective judicial protection, judgments of 15 September 2016, *Star Storage and Others* (C-439/14 and C-488/14, EU:C:2016:688), and of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838); and, *thirdly*, with regard to the application of both tests, judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146).

37 Judgment of 10 July 2008 (C-54/07, EU:C:2008:397, paragraph 37).

38 Judgment of 10 July 2008, *Feryn* (C-54/07, EU:C:2008:397).

79. However, it is clear from that judgment that the sanction imposed is closely linked to the existence of discrimination.[39] That judgment cannot be interpreted as meaning that compensation could constitute an effective sanction under Article 15 of Directive 2000/43, where an infringement of the right to equal treatment is neither acknowledged by the alleged perpetrator of the discrimination nor found to exist by an administrative or judicial authority.

80. I consider that the absence of a link between the payment of compensation and infringement of the right to equal treatment, in the form of an acknowledgement or finding that the infringement occurred, undermines both the compensatory and deterrent function of the sanction.

(a) The compensatory function of the sanction

81. The Court held in the judgment in *Marshall* that it is possible for financial compensation to be the measure adopted in order to restore equal treatment, in that case between men and women, pointing out that such compensation must be adequate for the loss and damage sustained.[40]

82. How, though, can there be compensation *for the* loss and damage sustained if the loss and damage are neither acknowledged nor found to exist?

83. That question arises in particular where non-material damage is concerned, as in the present case. It would appear that payment of a monetary amount is generally not sufficient in itself to compensate for the loss and damage sustained. As the Ombudsman argues, the main interest of the passenger and of most victims of discrimination whom the Ombudsman represents is not economic.

84. If a defendant pays the amount claimed while refusing to admit the existence of damage, the victim admittedly receives a sum of money, but that sum is not linked to the loss and damage sustained and is therefore dissociated from the victim's actual experience. If, against the wishes of the applicant, a court states in its judgment that no discrimination is acknowledged[41] and expresses no view as to whether or not the alleged discrimination occurred, that discrimination has no existence in law.

85. The need to establish a link between the sanction, in this case compensation, and the existence of discrimination is supported by the case-law of the European Court of Human Rights ('the ECtHR').

86. Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), the meaning and scope of those rights is to be the same as those laid down by the said Convention.

87. The right to effective judicial protection, enshrined in Article 47 of the Charter, reflects the rights set out in Articles 6 and 13 ECHR, relating respectively to the right to a fair trial and the right to an effective remedy.[42] Moreover, the right to equal treatment irrespective of racial or ethnic origin, which Directive 2000/43 seeks to protect and which is enshrined in Article 21 of the Charter, echoes Article 14 ECHR.[43] Consequently, reference to the case-law of the ECtHR is relevant in this field.

39 The close link between the right and the compensatory measure is emphasised by van Gerven, W., in his article 'Of rights, remedies and procedures', CMLRev, 2000, Vol. 37, p. 525: 'The close link between right and remedy lies in the fact that a right must necessarily give rise to a remedy which allows the right to be enforced through the judicial process'.

40 See, to that effect, judgment of 2 August 1993, *Marshall* (C-271/91, EU:C:1993:335, paragraphs 30 and 34).

41 In the present case, the judgment at first instance contains such a statement.

42 See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) concerning Article 47 thereof

43 See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) concerning Article 21 thereof.

88. The ECtHR has held that a person who considers himself or herself a discrimination 'victim', within the meaning of Article 34[44] ECHR, and who seeks reparation for this in the form of compensation loses his or her victim status only if two conditions are fulfilled. Not only must that person receive the compensation sought, but the national authorities must also have acknowledged the alleged breach of the ECHR.[45]

89. I consider that case-law to be relevant to victims of discrimination for the purposes of Directive 2000/43. The concept of 'person who considers himself wronged' in the context of that directive corresponds to the concept of 'alleged victim' of discrimination for the purposes of the ECHR.[46]

90. Application of that case-law of the ECtHR to a case such as that in the main proceedings would mean that in order to obtain effective compensation for the loss and damage sustained that person must be able to request that a court find that he or she has been a victim of discrimination. That case-law thus highlights the importance of finding that there is a link between the compensation paid to a person who considers himself or herself wronged because the principle of equal treatment has not been applied to him or her and the infringement of that person's right to equal treatment.

91. The position of the Swedish Government and Braathens that the case-law of the ECtHR is not relevant in a dispute between two private persons, in this case a private company and an individual, because it concerns only relationships between the State and an individual, cannot be accepted.

92. First, the conclusions to be drawn from the case-law of the ECtHR concerning the prohibition of infringements of fundamental rights are also intended to apply to relationships between private individuals through the doctrine of 'positive obligations' which the ECHR imposes on the States Parties — in particular, the positive obligation to ensure that an individual is not discriminated against by another individual in the exercise of the rights provided for by that Convention.[47] Secondly, in any event, the limitations provided for in the ECHR as to the scope of a right provided for by that Convention[48] cannot apply to equivalent rights contained in the Charter, in so far as no such limitations are laid down as regards the latter rights. Moreover, the Court has interpreted Articles 21 and 47 of the Charter in numerous disputes between individuals.[49]

93. It follows that, in the case of a dispute concerning discrimination on the grounds of ethnic origin, an applicant such as the passenger must be able to obtain a finding that the compensation claimed from a private company, such as the airline in question in the main proceedings, is on account of such discrimination. If the latter admits the claim for compensation without acknowledging the discrimination, an applicant who considers himself or herself wronged must be able to ask the court to determine whether there has been discrimination.

44 Under Article 34 ECHR, the ECtHR may receive applications from any person claiming to be the victim of a violation by one of the 'High Contracting Parties of the rights set forth in the Convention or the protocols thereto'.

45 See, inter alia, decision of the ECtHR of 25 November 2004, *Nardone v. Italy* (CE:ECHR:2004:1125DEC003436802, § 1 of the Section, 'Law'), and judgment of the ECtHR of 7 June 2012, *Centro Europa 7.S.R.L and Di Stefano v. Italy* (CE:ECHR:2012:0607JUD003843309, § 81 and the case-law cited, as well as §§ 87 and 88).

46 I note that recital 24 of Directive 2000/43 and its travaux préparatoires use the term 'victim'.

47 See, to that effect, judgment of the ECtHR of 12 April 2016, *R.B. v. Hungary* (CE:ECHR:2016:0412JUD006460212 , § 81).

48 I would point out, for example, that the principle of prohibition of discrimination laid down in Article 14 ECHR applies only in conjunction with one of the other rights and freedoms recognised by that Convention. Moreover, in accordance with the second sentence of Article 52(3) of the Charter, there is nothing to prevent EU law from providing for more extensive rights.

49 Although I suggest that the Court should not directly apply Articles 21 and 47 of the Charter, but interpret Directive 2000/43 in the light of those articles, I would point out that the Court has held that those articles have direct horizontal effect and accordingly may be open to such direct application in a dispute between two private persons. See judgments of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 76), and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 76).

94. The link between the compensation and the existence of discrimination, in the form of an acknowledgement or finding of discrimination, is important not only in order that the victim may obtain adequate compensation, but also in order that the sanction may perform its second function, that is its deterrent function, in accordance with Article 15 of Directive 2000/43.

(b) The deterrent function of the sanction

95. Considerations similar to those which I have set out in part (a) concerning the need for a link between the sanction and the right which has been infringed, in the form of an acknowledgement or finding that the infringement occurred, apply in order to ensure that the sanction fulfils its deterrent function as regards both the defendant and other persons responsible for similar discrimination.

96. Indeed, how could the payment of a sum of money have a sufficiently deterrent effect on the defendant, by inducing him not to repeat his discriminatory behaviour and thereby preventing further discrimination on his part or on the part of others, if he does not acknowledge that his behaviour was discriminatory and the court does not find that there has been discrimination?

97. The Finnish Government submits that the person responsible for the discrimination acknowledges his or her actions by paying increased compensation and is thus deterred from repeating the same discriminatory behaviour in future. However, that acknowledgement is necessarily absent where, as in the present case, the defendant refuses to admit any discrimination and the amount claimed has no significant economic impact on him or her.[50]

98. If the sanction is not clearly linked to discriminatory behaviour, it is plain that the deterrent effect will be considerably reduced. The person responsible for the discrimination might be tempted to disregard it in future and to repeat the same behaviour, since he or she will not have been penalised 'for' discrimination.

99. If, in an action for damages, a defendant was able, by paying compensation, not to acknowledge the existence of any discrimination and if that discrimination could not be found by a court, the measures imposed by Directive 2000/43 would, to a large extent, be deprived of their practical effect and would not serve to combat discrimination effectively, since such discrimination could be disregarded.

100. In such a situation, a defendant could in a sense 'pay' to discriminate, since his discriminatory behaviour would be neither acknowledged nor found to have occurred.

101. Conversely, an acknowledgement or finding that the fundamental right to equal treatment has been infringed is likely to induce a defendant not to repeat the same discriminatory behaviour in future. The deterrent effect may be further strengthened by a notice, or even publicity, in that connection.

102. Consequently, I invite the Court to hold that there must be a link between the sanction and the existence of discrimination, either by means of an acknowledgement of the discrimination by the person responsible for it or through a finding of discrimination by a judicial or administrative authority, so that the sanction may perform to the full its compensatory and deterrent functions in accordance with Articles 7 and 15 of Directive 2000/43.

50 Without taking a view on the adequacy of the level of the sanction, I note that Braathens itself highlighted that the amount of compensation claimed is very low.

2. The 'freedom' to establish legal remedies

103. The foregoing considerations concerning an acknowledgement or finding of discrimination are also relevant as regards verifying the existence of real and effective remedies in accordance with Article 7 of Directive 2000/43. They constitute two facets of the same problem, since undermining the provision of effective sanctions impairs the effectiveness of the remedies.

104. As I stated in point 71 of this Opinion, the concept of 'effectiveness' is consistent here with the concept of 'effective judicial protection'.

105. Although, in principle, Member States have the freedom to choose the legal remedies and procedural rules governing them, this is on condition that those remedies do not jeopardise the right to effective judicial protection provided for in Article 7 of Directive 2000/43, read in the light of Article 47 of the Charter.

106. According to Braathens, it is clear from the *Unibet* judgment that Member States are not required to introduce an autonomous legal remedy for establishing whether national law is compatible with EU law. It infers from this that a legal remedy such as the action for enforcement provided for under Swedish procedural law and the related procedural rules, in this case the admission mechanism, are consistent with EU law.

107. In that regard, I would note that it is true that EU law has not sought to create any legal remedies other than those established by national law. However, it follows from that judgment that this is subject to the proviso that legal remedies are available under national law, if only indirectly, for ensuring respect for the rights which individuals derive from EU law.[51]

108. It is apparent from the documents before the Court that if the defendant admits the applicant's claim for compensation, while denying that his own behaviour was discriminatory, the applicant is, in practice, deprived of the right to have a court, even indirectly, examine whether, or find that, discrimination has occurred.

109. It is, of course, for the referring court to ascertain whether that is indeed the effect of national law. I note, in any event, that, according to the explanations given by that court in its order for reference, an action for a declaration seeking to obtain a finding of discrimination is discretionary and that it is for a court to decide whether that action is appropriate, with the result that a person who considers himself or herself wronged does not have a *right*[52] to have a court examine whether, and, where appropriate, find that, discrimination has occurred.

110. The fact remains that such a situation does not provide a person who considers himself or herself wronged a guarantee of access to the courts in order to obtain a finding of discrimination, in accordance with Article 7 of Directive 2000/43 and Article 47 of the Charter.[53]

111. The applicable test is strict. A person who considers himself or herself wronged must have a right of access to the courts. That access to the courts constitutes the essence of the right to effective judicial protection referred to in Article 7 of Directive 2000/43 and Article 47 of the Charter, and accordingly a procedural mechanism for ending proceedings which results in discrimination being neither recognised nor established does not satisfy the test laid down in Article 52(1) of the Charter.[54]

51 See, to that effect, the *Unibet* judgment, paragraphs 42 and 65.

52 See, to that effect, judgment of 25 April 2013, *Asociația Accept* (C-81/12, EU:C:2013:275, paragraph 69), from which it is apparent that the mere existence of an action for damages, under the domestic law in question, cannot, as such, make good any shortcomings, in terms of effectiveness, of the sanction, if, because of the relevant rules of national law, it is not possible for that action to succeed.

53 See, to that effect, judgment of 8 May 2019, *Leitner* (C-396/17, EU:C:2019:375, paragraph 62), and point 56 of this Opinion.

54 See point 68 of this Opinion.

112. Besides the fact that a procedural mechanism for ending proceedings may create an obstacle to access to the courts as required in Article 7 of Directive 2000/43 and Article 47 of the Charter, I note that if such a mechanism brings the action to an end without the defendant having acknowledged the existence of discrimination, that mechanism is also likely to prevent the effective application of Article 8 of Directive 2000/43, which is intended to strengthen the judicial protection.

113. I would recall that, under that article, when persons who consider themselves wronged establish before a court or other competent authority facts from which it may be presumed that there has been discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment.

114. However, a person who considers himself or herself wronged is not even able to establish such facts before a court, since his or her action ends at the admission stage.

115. Although the Ombudsman took the view that, given the issue of discrimination raised by the passenger, the latter deserved the Ombudsman's support, the court having jurisdiction did not examine whether that passenger had established facts capable of giving rise to a presumption of discrimination. The courts of first and second instance considered that the applicant's claim had been upheld, with the result that there was nothing further to be examined. The passenger was therefore unable to put forward his case concerning the existence of discrimination.

116. In such a situation, it must be held that Article 8 of Directive 2000/43 is deprived of its practical effect and that a person who considers himself or herself wronged is denied the possibility of being heard in relation to one of his or her essential claims.

117. Braathens, the Swedish Government and the Commission further argue that, in order to assess whether procedural rules, such as those at issue in the main proceedings, ensure the effectiveness of EU law, it is necessary to place those rules in the context of the entire national legal system concerned and to take into account, in particular, the existence of other legal remedies,[55] in the present case those provided for in matters of criminal law to combat unlawful discrimination.

118. In that regard, I would point out that Directive 2000/43 does not apply to criminal proceedings[56] and also that the referring court made no reference to such proceedings, but highlighted the civil law remedies for implementing that directive. The possibility of bringing criminal proceedings was nevertheless discussed at the hearing, following a question to be answered in writing, sent by the Court to the Swedish Government. That government stated that unlawful discrimination is subject to criminal proceedings. It explained that if the Public Prosecutor's Office does not bring criminal proceedings after an individual has lodged a complaint with the police, that individual may bring a private prosecution. The Ombudsman does not dispute the possibility of criminal proceedings, but points out that the likelihood of a successful prosecution is low, taking into account the commitment of public resources which limits the number of cases that can be prosecuted and given the difficulty for a private individual to adduce the required evidence.

119. However, irrespective of how easy or difficult it is to gain access to such proceedings, I would point out that the availability of such a remedy does not suggest that a person who considers himself or herself wronged has effective judicial protection for the purposes of Article 8 of Directive 2000/43.

55 They rely, in that regard, on the *Unibet* judgment, paragraph 54.

56 The rules of evidence in criminal matters are not affected by Directive 2000/43, as is apparent from Article 8(3) thereof.

120. Indeed, in criminal proceedings there are certain constraints in terms of the taking of evidence which Directive 2000/43 specifically sought to avoid applying to a victim of discrimination in the context of a civil law action.[57] It thus expressly reversed the burden of proof *in his or her favour* in order to assist that person in obtaining a finding that an infringement of his or her right to equal treatment has occurred.

121. Consequently, the availability of criminal proceedings cannot, in any event, compensate for the absence of a civil law remedy — complying with the rules of evidence laid down in Article 8 of Directive 2000/43 — for obtaining a finding of discrimination, in the event of admission of a claim without acknowledgement of discrimination by the defendant.

3. The 'freedom' to determine a mechanism for the rapid resolution of disputes based on the principle that the subject matter of an action is defined by the parties

122. Finally, Braathens takes the view that the admission mechanism provided for in the law of the Member State concerned is intended to ensure the proper administration of justice in that it allows disputes to be resolved rapidly in accordance with the principle that the subject matter of an action is defined by the parties. That mechanism is particularly useful in 'small claims' disputes, given the amounts involved, and helps to prevent the court system from becoming overburdened, by making it possible to settle a dispute amicably.

123. The aim of ensuring the proper administration of justice is indeed a legitimate objective under EU law,[58] but I consider that the foregoing analysis may be fully reconciled with that objective.

124. EU law recognises each of the procedural tools referred to by Braathens. The principle that the subject matter of an action is defined by the parties, according to which it is for the parties to take the initiative in pursuing proceedings and from which it follows that the power of the court to raise points of its own motion is limited by its obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it, has been accepted as a procedural tool common to most Member States.[59] Provision is made for amicable settlements in Article 7 of Directive 2000/43 by reference to the possibility for the Member States to provide for conciliation procedures. Moreover, amicable settlement is expressly encouraged in the regulation dealing with small claims.[60]

125. However, those tools in no way preclude the interpretation of Directive 2000/43 proposed in the present analysis.

126. The principle relied on by Braathens that the subject matter of an action is defined by the parties must be applied in the light of the rights conferred by Directive 2000/43.

127. It follows that, where a person who considers himself or herself wronged, such as the passenger, seeks compensation for discrimination and an acknowledgement of that discrimination, an amicable settlement may be concluded only on condition that, at the very least, the other party accepts both parts of his or her claim.

57 See also the referring court's statements in point 29 of this Opinion.

58 See judgments of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 64), and of 6 September 2012, *Trade Agency* (C-619/10, EU:C:2012:531, paragraphs 57 and 58).

59 See, to that effect, judgments of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraph 21), and of 7 June 2007, *van der Weerd and Others* (C-222/05 to C-225/05, EU:C:2007:318, paragraph 35).

60 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ 2007 L 199, p. 1). See, also, the Court's considerations in its judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 64), according to which national provisions seeking the quicker and less expensive settlement of disputes and a lightening of the burden on the court system pursue legitimate objectives in the general interest.

128. The subject matter of his or her claim cannot be limited to the payment of compensation without undermining the objective of Directive 2000/43. As has been shown, the right to obtain from a court a finding of discrimination in the event of a dispute in that respect lies at the heart of that directive, examined in the light of Article 47 of the Charter, and touches on the essence of the right which it is intended to protect. Limitation of that right is therefore contrary to one of the requirements of Article 52(1) of the Charter.[61]

129. In the absence of any agreement, it follows from the analysis of Directive 2000/43, read in the light of Article 47 of the Charter, that an applicant must be able to assert his or her right to equal treatment before a court by having that court examine whether, and, where appropriate, find that, discrimination has occurred.

V. Conclusion

130. I therefore propose that the Court should answer as follows the question referred for a preliminary ruling by the Högsta domstolen (Supreme Court, Sweden):

The provisions of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in particular Articles 7, 8 and 15 thereof, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, in a case relating to infringement of a prohibition of discrimination on grounds of ethnic origin in which the person who considers himself or herself wronged seeks compensation for discrimination, that person has the right, if the alleged perpetrator of the discrimination agrees to pay the compensation but refuses to acknowledge the discrimination, to have a court examine whether, and, where appropriate, find that, that discrimination has occurred. A procedural mechanism for ending proceedings, such as admission, cannot lead to a different result.

61 *A contrario*, for a situation where the essence of the right to effective judicial protection is not affected by a national procedural rule, see judgment of 18 March 2010, *Alassini and Others* (C-317/08 to C-320/08, EU:C:2010:146, paragraph 65).