
A GUIDE TO THE ANTI-DISCRIMINATION ACT

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List of used abbreviations:

ADA – Anti-discrimination Act

CA – Criminal Act

CEDAW – Convention on the Elimination of All Forms Discrimination against Women

CERD - Convention on the Elimination of All Forms of Racial Discrimination

CPA – Civil Procedure Act

CPHRFF - Convention for the protection of human rights and fundamental freedoms (ECHR)

CPRA – Consumer Protection Act

EA – Execution Act

ECJ – European court of Justice

ECHR - European Court of Human Rights

ECR - European Court Reports

ECRI – European Commission against Racism and Intolerance

EQUINET – European Network of Equality Bodies

GEA - Gender Equality Act

LA – Labour Act

OJ - Official Journal

TEC – Treaty establishing the European Community

TEEC – Treaty establishing the European Economic Community

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

6. PROCEEDINGS BEFORE THE COURT

(Prof. dr. Alan Uzelac)

6.1. INTRODUCTION

According to the ADA, mechanisms for the protection from discrimination can be divided in two groups, depending on whether we are talking about activities aimed at preventing discrimination (preventive action) or activities aimed at reacting to already existing instances of discrimination (restitutional and repressive action). The first group comprises informative, educational and preventive action and out-of-court legal protection (which is the focus of the institutional framework in Chapter IV), and the second comprises misdemeanour, penal and civil liability deliberated in relevant types of legal proceedings.¹ Title V of the ADA (Proceedings before the court) deals exclusively with civil-law protection as the most important and direct aspect of the protection of rights of victims of discrimination, with regards to which the ADA contains special provisions concerning court proceedings.

The possibility to request legal protection through civil litigation in the case of unequal treatment was provided for by the general provisions of the Civil Procedure Act before the Anti-discrimination Act was passed. Everyone is entitled to address a competent court in case their elementary constitutional and legal rights have been violated. The court will then deliberate in regular legal proceedings whether a right has been violated (cf. Art. 1 of the CPA). Special provisions on the prevention of discrimination are provided for in labour legislation.² These comprise some special procedural provisions.

However, until the ADA was passed, court protection from discrimination was not efficient enough in practice. This is why this Act, following recent European practice, is aimed at making a step forward. In drafting the provisions concerning the proceedings before the court, special focus was given to two EC Council Directives dealing with particular bases of discrimination.³ Recommendations from these directives (but with an even wider scope) provide broad-scale procedural possibilities for the participation of civil society organizations in anti-discrimination judicial proceedings as well as provisions on the burden of proof.⁴ They have provided a basis for the concept of collective protection against discrimination through associational action, which is the most far-reaching example of public-interest court action (so-called *actio popularis*) in Croatian law so far. At the same time, general procedural possibilities provided for by some previously adopted special acts, such as the Labour Act (provisions on the shift of the burden of proof) and the Consumer Protection Act (associational action), have been extended.

6.2. INDIVIDUAL ANTI-DISCRIMINATION COURT PROCEEDINGS

A) TYPES OF INDIVIDUAL COURT PROCEEDINGS FOR PROTECTION OF THE RIGHT TO EQUAL TREATMENT

The protection of the right to equal treatment is often connected to the protection of other rights. This is why anti-discrimination protection can be exercised in two ways, in proceedings deliberating rights violated by discrimination or in judicial proceedings specially dealing with discrimination. In this sense, Article 16 of the ADA authorises potential victims of discrimination to seek protection either through proceedings in which a specific right is decided on as the main issue or through special court action for protection against discrimination. With this, two discrete procedural possibilities are provided to those who feel that a right of theirs has been violated as a result of discrimination:

1. Filing a lawsuit seeking the protection of a individual right (e.g. a right from labour or civil obligations), claiming that the right has been violated on account of discrimination (*incidental anti-discrimination protection*) or
2. Filing a lawsuit seeking that the instance of discrimination be decided on as the main issue (special individual anti-discrimination action).

B) INCIDENTAL ANTI-DISCRIMINATION PROTECTION

The authors of the procedural provisions of the ADA found it important that the regulation of a special route for anti-discrimination protection does not eliminate or hamper the possibilities for the protection of the rights of discrimination victims that have existed so far. Bringing arguments concerning unequal treatment as the potential motivation for the violation of a right before the court as well as relying on the ADA should not serve as a basis for the refusal of jurisdiction or the necessity to file a special anti-discrimination law-suit. This is why all kinds of court proceedings aimed at protecting rights under other acts can still be initiated after the ADA was passed, either under the general procedural provisions of the Civil Procedure Act or under special procedural provisions applicable to specific cases (such as special court proceedings in labour or commercial disputes).

In incidental proceedings the issue of potential discrimination is deliberated as the so-called preliminary (pre-judicial or incidental) issue. The incidental issue is defined as the question of the existence of a right or legal obligation that the court needs to decide on in a lawsuit. It needs to be answered before the court can decide on the merits of the main cause of action.⁵ The question of whether it has come to discrimination in a given case is not (only) a question of fact, but a complex legal issue that needs to be decided on in accordance with the provisions of the ADA.

In incidental proceedings, the court decision on whether it has come to discrimination or not will not be part of the pronouncement, but of the reasons. This question will not be the basis for collateral estoppel nor for a final and binding decision. Therefore, the fact that the existence of discrimination is simultaneously deliberated in other proceedings, either as the main or as the incidental issue, will not be an obstacle per se for the continuation and resolution of the proceedings already initiated. If a court has already made a final and binding decision on the question of the existence of discrimination, such a decision will, of course, also be binding in the proceedings in which the issue of discrimination

is incidental. On the other hand, however, the incidental decision on the existence of discrimination will only be binding for the court and parties in that particular lawsuit, because the effect of the legal validity will only relate to the dispositive (operative) part of the judgment, and not its reasons.

Despite the fact that proceedings devoted to the incidental issue mostly pertain to procedural provisions of other regulations, the ADA provides for two additional procedural specificities.

The first is the provision on the urgency of all proceedings in which the existence of discrimination is deliberated (Art. 16 Par. 3), which refers to proceedings in which this issue appears as the incidental issue as well. The fact that the imperative of urgency does not only refer to special anti-discrimination proceedings is a result of both the position of this provision within the so-called common provisions (superscription of Article 16) and the wording of the norm, which prescribes allegations of discrimination be investigated as soon as possible (statements on which the claim is based, regardless of the claim itself).

The other norm, „which is applicable in incidental deliberations of statements related to unequal treatment as well, is the provision on the burden of proof from Art. 20 of the ADA. The standard of proof and regulations on the distribution of the burden of proof must be equally applied in all legal proceedings in which the same issue is decided on, regardless of the way a given case is deliberated (incidentally or as a separate claim). It is in this sense that the statement on the burden of proof is formulated (see further in the text under 2b. vi.)⁶.

Some other specificities follow from the correlation of general rules and particular requirements of anti-discrimination protection. For instance, in proceedings in which the issue of discrimination appears as a preliminary issue, the possibility from Article 213 of the CPA, according to which the court is authorised to suspend the proceedings if it decides not to resolve the preliminary issue itself, should certainly be viewed in a different way. Though in such cases the court would retain its discretionary right to decide which is more appropriate – to resolve the preliminary issue itself or to suspend the proceedings and let the issue be resolved in another proceeding as the main issue – the imperative of urgency prescribes that the proceedings be suspended only in exceptional cases, when waiting for the valid court decision cannot cause longer delays in of the proceedings (for instance when a decision on the existence of discrimination has already been made and is only pending appeal). Also, since the provision on urgency not only contains the instruction to urgently resolve cases, but to prioritize as well, the court should arrange proceedings in appropriate order, so that the allegations of discrimination are resolved first, not leaving them for the end of the proceedings (arg. from Art. 16 Par. 3 of the ADA).

C) SPECIAL INDIVIDUAL ANTI-DISCRIMINATION ACTION

I. General

Article 17 of the ADA introduces a new action for protection of the right to equal treatment: the special (individual) anti-discrimination lawsuit. This lawsuit comprises several discrete antidiscrimination actions, or special antidiscrimination claims:

- a. Action for determination of discrimination (*declaratory anti-discrimination claim*);
- b. Action for prohibition of discrimination (*prohibitive anti-discrimination claim*);
- c. Action for the elimination of discrimination or its effects (*restitutional anti-discrimination claim*);
- d. Action for damages caused by discrimination (*reparational anti-discrimination claim*);
- e. Action for the publication of the determination of discrimination (*publicational anti-discrimination claim*).

II. On the particular antidiscrimination claims

Declaratory anti-discrimination action is legal action seeking a ruling determining a violation of the plaintiff's right to equal treatment. The legal protection provided with this claim is preventive in character: a court ruling determines the discriminatory nature of the defendant's actions. A decision on the claim eliminates doubt and is binding for all future relations between the parties. In all future proceedings between the plaintiff and the defendant, a valid ruling determining discrimination will have the effect of *res judicata*. In the Act, the possibilities for the declaratory anti-discrimination claim are wide: one can file a lawsuit not only to determine that it has come to a violation of the right to equal treatment, but also if the defendant's actions could indirectly lead to discrimination. These actions can be understood both in an active (the doing, undertaking of actions), as well as passive sense (failure to undertake actions). The adoption of the declaratory anti-discriminatory claim is the precondition for the adoption of the publicational claim.

Prohibitive anti-discrimination claim is legal action seeking the prohibition of activities violating or potentially violating the plaintiff's right to equal treatment. The claim is convicting (condemnatory) in character, and, if adopted, seeks passivity from the defendant – to refrain from further action. While deciding on such a claim, the court can exercise its authority by shortening the deadlines for complying imposed on the defendant or by deciding that the appeal shall not withhold enforcement (see further in the text under vi.).

Restitutional anti-discrimination action is legal action seeking that the defendant carry out actions that will eliminate the discrimination or its results. The goal of such a claim is to restitute the situation to the condition in which it was before the right to equal treatment was violated. The claim is convicting (condemnatory) and seeks action on the part of the defendant. With this claim, the court can execute its authorities from Article 22 of the ADA as well.

Reparational anti-discrimination action is legal action seeking damages caused by an unlawful violation of the right to equal treatment. It is aimed at seeking damages that cannot be compensated by

complying with the obligation to reconstitute the situation to the primary condition (see restitutory claims). One can seek both pecuniary and non-pecuniary damages (mental suffering).⁷ This claim is condemnatory in nature as well.

Publicational anti-discrimination action is legal action seeking that the ruling determining that it has come to a violation of the right to equal treatment be published in the media at the expense of the defendant. In order to be admissible, this claim must cumulate with (at least) a declaratory anti-discrimination claim, and the court will adopt it only if the declaratory claim is adopted, i.e. if it determines that it has come to discrimination. Another condition for the publication of the judgment (alternatively) is that the discrimination manifested itself through the media (e.g. through public media appearances of particular persons), or that the media have reported on the discriminative actions. In the latter case it is necessary that the court deems that the publication of the judgement contributes to the compensation of non-material damage (i.e. that the publication alone is necessary for the satisfaction of the plaintiff), or that it would contribute to the prevention of further discriminative action. If it adopts the claim, the court will, in principle, order the publication of the ruling in its entirety. Only in exceptional cases, if there is no prejudice to the legal protection provided and where appropriate for the protection of the right to privacy, the court can decide that specific personal data be removed from the text of the ruling, or that the ruling be published in parts. The court should order that the judgement be published in the medium and in the way that would be most appropriate. In case it has come to the instance of discrimination through the media, the court should order that the ruling be published in the same media, in a way identical or comparable to the original publication. The specificity of a court decision on the publication of the anti-discrimination claim is that it takes effect not just among the parties to the procedure (*inter partes*), but is binding for third parties (*ultra partes*) as well, pursuant to an explicit provision of the ADA. For instance, a publisher of the medium in which the judgement needs to be published is obliged to publish it in accordance with the „court sentence, regardless of whether he was a party to the judicial proceedings concerned. In return, the medium publishing the ruling is entitled to all relevant costs and compensation, which are for the defendant to bear (arg. from Art. 17 Par 1, Subpar. 4. and Art. 17 Par 6 of the ADA).

III. Objective cumulation

All antidiscrimination claims are decided on in legal proceedings, with the subsidiary application of the provisions of the Civil Procedure Act (Art. 17 Par. 2 of the ADA). In one lawsuit, several anti-discrimination claims can be jointly brought before the court (cumulated). The plaintiff can, for instance, only request that discrimination be determined, but she/he can also file a lawsuit simultaneously seeking the determination of discrimination, the prohibition of future discrimination, the elimination of the results of discrimination, damages, as well as the publication of the ruling. The question which claims will be brought before the court in a specific lawsuit depends entirely on the disposition of the plaintiff, with minimal limitations. The plaintiff can, for instance, only bring an indemnity claim, or a claim for the prohibition of discrimination (where the existence of discrimination will be decided on as the preliminary issue, see above under 2.b). Out of the various combinations, the only one excluded is bringing an independent claim for the publication of the ruling, which can only be brought along with declaratory anti-discrimination action.

Along with the possibility of cumulation of various anti-discrimination claims, in order to avoid any doubt, the ADA explicitly provides for the cumulation of anti-discrimination claims with other actions. At the same time it prescribes privileged conditions for objective cumulation. An anti-discrimination claim can be brought before the court together with any other claim to be decided upon in legal proceedings if all the claims are interrelated and if the same court has the subject-matter jurisdiction over them. In addition, the condition of the same subject-matter jurisdiction only has to be met for the other claims, because anti-discrimination claims can cumulate with them regardless of whether they are to be resolved in regular or in special civil proceedings (specific qualified jurisdiction by attraction). This means, for instance, that one can bring anti-discrimination claims before a municipal court in regular civil proceedings, as well as in special (e.g. labour or family) disputes and in a commercial dispute before a commercial court, along with specific claims from these lawsuits. In all these disputes the proceedings will be conducted according to regulations relevant for the cumulate claims (e.g. according to regulations for the resolution of labour-disputes), along with the deviations deriving from the procedural provisions of anti-discrimination legislation (see Art. 17 Par. 3 of the ADA). In order to avoid any doubt, the Act explicitly excludes the possibility of cumulating anti-discrimination claims with trespass relief. This clearly follows from the principle that in possessory litigation (litigation protecting only the factual state of affairs) one cannot bring before the court claims for the protection of a right (petitory claims).

IV. Jurisdiction

Over individual anti-discrimination claims under Article 17 of the ADA, a municipal court will have subject-matter jurisdiction (Art. 18 Par 1 of the ADA). In case they are brought before the court along with other claims for which another court could have jurisdiction (e.g. a commercial court), then that court will have jurisdiction (see above under iii.). As far as territorial jurisdiction is concerned, the plaintiff can choose whether she/he will file a lawsuit before the court which has territorial jurisdiction over the defendant (the court of general territorial jurisdiction, the court of the permanent residence of the defendant), be it the court which has territorial jurisdiction over the plaintiff (the court where the plaintiff has residence or temporary residence of a more permanent nature), or the court where the injuries occurred or instance of discrimination took place. The intention was to accommodate the plaintiff with this broad-scale choice of preferred (elective) jurisdictions in order to ease access to court protection and enable the choice of forum which is most convenient for the plaintiff. In litigations in which other claims are brought before the court along with the protection from discrimination, courts which have territorial jurisdiction over the other cumulated claims can be added to this list of possible jurisdictions.

V. Parties in anti-discrimination proceedings

Parties in special individual anti-discrimination proceedings are on one side alleged victims of discrimination, as the plaintiff, and on the other, as the defendant, persons from whom the anti-discrimination protection is sought, generally persons for whom it is claimed that they are violating constitutional and legal guarantees of equal treatment and placing a certain person in a less favourable position on one of the bases defined in Art. 1 of the ADA.

The plaintiff will most often be a natural person, considering that the majority of distinctive characteristics listed in Art. 1 (gender, race, ethnicity etc.) can refer only to natural persons. Yet, the definition of discrimination in Art. 1 is very extensive, and includes placing in a less favourable position a person who is related to the person that actually possesses one of the relevant characteristics (cf. Art. 1 Par 2), which means that the possibility cannot be excluded that, in exceptional cases, legal entities will have active legitimation to bring anti-discrimination claims before courts as well. This is further indicated by the interpretation from Art. 16 Par 1, which prescribes that “any person who considers that his/her right has been violated on account of discrimination” has the right to seek anti-discrimination protection.

The defendant is a person for whom it is claimed that he/she has violated or jeopardised the plaintiff's right to equal treatment. It can be any legal entity or natural person (e.g. employer, institution, civil society organisation, political party, trade union, official, person undertaking activities of harassment under Art. 3 etc.). The scope of persons with passive legitimation is connected with the scope of the ADA defined in Art. 8, in which explicit mention is made of all State bodies, bodies of local and regional self-government units, legal persons vested with public authority and all legal and natural persons. In case a claim is made that a State body has undertaken an action of discrimination (e.g. administrative authorities or a court) the lawsuit will need to be filed against the Republic Of Croatia, since its bodies do not have the capacity to be sued. The same goes for local and regional self-government units, in which case it is the relevant unit that has passive legitimation, and not its sections (the county or town, and not its office or service).

According to general procedural regulations, a lawsuit can be filed jointly by several plaintiffs or against several defendants if the formal and subject-matter conditions for co-litigation have been met (see Art. 196 of the CPA). In case a claim is made against discrimination of a wider scale, with a great number of potential plaintiffs, the ADA provides for an alternative – the possibility of bringing a “class action for protection against discrimination (see below under 3.b).

VI. Participation of third parties in the proceedings

The ADA introduces an additional procedural specificity – the possibility for third parties to participate in individual anti-discrimination proceedings (see Art. 21 of the ADA). The possibility for particular organizations to participate in proceedings as intervenors on the side of public interest (so-called *sui generis* intervenors) is not foreign to Croatian legislation, but has mostly been limited to the field of family law, in the form of social welfare centres participating in proceedings as intervenors⁸. Following EU recommendations⁹, anti-discrimination proceedings now provide for the most extensive and comprehensive possibility so far for relevant organisations, bodies and services to intervene in proceedings as a “friend of the court” (*amicus curiae*). From the legal formulation, explicitly indicating the possibility of a “body, organisation, institution, association or another person” intervening in the proceedings, it follows that the capacity to intervene is recognized for organizations that do not necessarily have legal capacity. What is important is that, within the scope of its activities, the potential intervener deals with the protection of the right to equal treatment related to the group whose rights are deliberated in the proceedings. This condition is met by all civil society organisations engaged with the promotion and protection of interests of groups possessing particular bases of discrimination from Art. 1 (e.g. women's rights organization, ethnic minority organisations, organi-

sations promoting religious, political or other beliefs, patients' rights organizations etc.). Since it is not necessary that the intervener only deals with the protection of the rights and interests of one particular group (it can advocate the rights of several groups within the scope of its activities, including the specific group in question, such as a particular minority), organisations generally dealing with human rights and anti-discrimination protection would also have a legitimate interest to intervene.¹⁰ Seeing as over 30,000 civil society organisations exist in Croatia, 270 of which are engaged with human rights protection and the promotion of rights of specific groups, the range of potential interveners is extensive, especially considering organisations other than civil society organisations can intervene.¹¹ The ADA prescribes the possibility of a particular State or other body intervening, primarily providing for the possibility of the Office of the Ombudsperson or one of the specialized ombudspersons (e.g. Ombudsperson for gender equality or disabled persons) intervening.

As opposed to general rules on intervention, a court can only allow the intervention with the plaintiff's consent. The plaintiff's opposition has the effect of absolute prohibition, which means that the court has no discretionary authority to allow intervention. Provisions of the CPA apply for the intervention of third parties under the ADA (Art. 17 Par 2 of the ADA). This means that the intervener can intervene in the procedure from the very beginning of the litigation or later, during the course of the proceedings, until an effective decision is rendered¹²; that it is authorised to make motions and undertake the same litigation actions (e.g. submit statements of facts or legal remedies) as the plaintiff can, within the same deadlines valid for the plaintiff. Seeing as the intervener can only join the plaintiff's side (arg. from Art. 21 Par 1 of the ADA), it will, just as a regular intervener, only have legal interest in undertaking activities in favour of the person bringing the anti-discrimination claim. In anti-discriminatory litigations, the activities of specific intervenors under the ADA will not have any weight if the plaintiff explicitly opposes them. Otherwise, it is deemed that the plaintiff agrees with the undertaken activities, if they are not inconsistent with hers/his.

It should be noted that the standard norms of the CPA also apply for the costs of the intervention¹³, which means that these costs are part of the total litigation costs, and that they are to be compensated by the party that has lost the litigation. Seeing as, in anti-discrimination litigation, several organisations can intervene, this can lead to a significant increase in costs to be paid by the losing party. In case of the plaintiff losing, on whose side the interveners got involved to begin with, this could lead to an inequitable result. This should, therefore, be taken into account from the start, and potential interveners could state in advance that they will not request that the plaintiff cover the costs in case he/she loses (or the plaintiff could request such a statement from them before giving her/his consent for the intervention).

VII. Burden of proof

One of the most significant instruments aimed at increasing the efficiency of court anti-discrimination protection is the provision on the shift of the burden of proof. It is one of the norms explicitly prescribed by EU directives¹⁴. According to the standard principles of procedural law, the person that needs to prove the fact that is in his/her favour has the burden of proof (*onus probandi*), which means that she/he is obliged to prove the critical fact to a level of certainty¹⁵. If this does not occur, the court will, applying the principles of the burden of proof, assume the rule that the fact that has not been proven does not exist. This can lead to the loss of the litigation (*actore non probante, reus absolvitur*).

Seeing as in the context of anti-discrimination protection it is exceptionally difficult to prove with certainty that unequal treatment took place on one of the bases of discrimination, the ADA differs from standard claims for the presentation of evidence for particular facts. According to Art. 20, the party bringing an anti-discrimination claim is not obliged to prove discrimination to a level of certainty, but only has to “make it probable that discrimination has taken place”. If this condition is met, it is up to the respondent (the alleged discriminator) to prove that there was no discrimination. If the respondent does not prove to a level of certainty that there was no discrimination, the court is obliged to rule that the right to equal treatment was violated.

The standard of probability which needs to be proven should be interpreted within the meaning of EU directives as so-called *prima facie* evidence¹⁶. In other words, the person bringing an anti-discrimination claim should prove that he/she was put in a less favourable position and that it could be possible (according to regular principles of experience and based on the evidence in the specific case) that this is the result of direct or indirect discrimination¹⁷. If no conclusive evidence is produced that the plaintiff was put in a less favourable position on account of other reasons, and not the prohibited discriminatory ones, the court will have to rule that discrimination took place.

The principle of the shift of the burden of proof is one of the rare principles (along with the principle of urgency from Art. 16 Par 3) which is not to be used only in judicial proceedings. That is, this norm will apply “in court and other procedures” (Art. 20 Par 1 of the ADA), which indicates that the principle of the shift of the burden of proof applies to administrative proceedings as well. On the other hand, this principle does not apply to all judicial proceedings, since according to Art. 20 Par. 2. its application is ruled out in misdemeanour and criminal proceedings. This is to protect the constitutional rights of the defendant, wherein the principle of the so-called presumption of innocence (in dubio pro reo) applies. EU directives rule out the application of the shift of the burden of proof in criminal cases as well.¹⁸

VIII. Other special procedural principles of the ADA

As far as the principle of the urgency of providing anti-discrimination court protection is concerned, the ADA provides for several norms aimed at significantly improving and accelerating reaction to possible discriminatory actions. On the one hand, the legal requirements necessary for the court to pronounce interim measures in proceedings have been alleviated, and on the other, the court has been authorised to shorten the deadlines for complying with obligations imposed on the defendant or to decide that the appeal shall not withhold enforcement.

As far as the interim measures are concerned, which could be particularly necessary in more severe cases of alleged discrimination, the court can pronounce them at the request of the party at any time during the course of the proceedings, even before they are initiated. The court will adopt this request if two conditions are met. The first is that the plaintiff has made it probable that her/his right to equal treatment has been violated. This condition will be met if, judging by available information, there is a serious possibility that the defendant has undertaken discriminatory action (so-called *prima facie* probability of discrimination). The other is that there is, according to the assessment of the court, a need for pronouncing an interim measure in a specific case, for at least one of three reasons: 1. to eliminate the threat of irreparable damage; or 2. because a particularly severe violation of the right to

equal treatment took place; or 3. to prevent violence. These reasons (e.g. particularly severe violation) differ from the standard requirements for issuing interim measures under the Execution Act¹⁹, and authorise the court more extensively to provisionally intervene and order or prohibit certain action before it finally rules on the merits of the plaintiff's claim. The court could, for instance, prohibit the defendant from undertaking activities which could cause damages, temporarily return an employee to the work-place or order payments of compensation during the course of a labour-dispute²⁰, as well as undertake other measures temporarily regulating the dispute between the parties²¹.

When in special anti-discrimination action the court adopts a prohibitive or the restitutive claim or orders the publication of a ruling in the media (see Art. 17 Par 1 Subpar. 2 and 4 of the ADA), the court is authorised to shorten or completely exclude the voluntary execution period (the deadline for voluntarily complying with the obligations imposed on the defendant) in rulings pending appeal. In case the court decides that the appeal does not withhold the enforcement, the defendant is obliged to comply with the obligations imposed on her/him (e.g. to suspend the discriminatory action, restate the previous state) immediately, regardless of the fact that on his/her appeal is yet to be deliberated by a higher court. Eliminating the suspensive effect of appeals can be especially effective in preventing the use of legal remedies for the purpose of delaying proceedings, and in situations in which the alleged violation might have particularly severe results, which during time only become more severe, it has a preventive effect. The potential court order that the court ruling pending appeal be published at the cost of the defendant has a similar effect.

To avoid any doubt, in Art. the ADA prescribes that, in anti-discrimination proceedings, secondary appeal shall always be allowed. This clearly follows from the importance of these proceedings for the uniform application of the law, which is one of constitutional tasks of the Supreme Court. This is why it is logical that, in all anti-discrimination proceedings, secondary appeals should ensure the harmonisation of the application of the law and the equality of citizens before the law.

6.3. COLLECTIVE ANTI-DISCRIMINATION COURT PROCEEDINGS

A) IN GENERAL

One of the typical difficulties in cases with a great number of potential victims is that, according to standard principles of judicial proceedings, it is necessary to establish independently that a right has been violated for every person bringing such a claim. This leads to a large number of judicial proceedings which last long, drain the resources of both the court and parties and lead to the possibility of different rulings being passed in similar cases. Provisions on co-litigation only partially alleviate this difficulty, since, according to them, when several parties participate in proceedings in the same role, each needs to undertake discrete actions, and the court needs to establish for each of them independently whether they meet the legal requirements. The institution of the so-called class action, which exists in some countries, has not existed in Croatia²². Following general world and European trends²³ in finding new instruments for the protection of collective or diffuse interests, the model of the "so-called associational claims (Verbandsklage) has only recently been available in Croatia. Until the ADA was passed, however, it only existed as an instrument for the protection of

consumer rights.²⁴ Now this model has been extended to anti-discrimination actions, which significantly enhanced the range of possibilities for the collective protection of rights (so-called abstract judicial protection), and, for human rights organisations, it opened up new space for the promotion of anti-discrimination protection through a conducting strategic litigation.

B) ASSOCIATIONAL ACTION FOR PROTECTION AGAINST DISCRIMINATION

I. Procedural legitimization

The specificity of associational action lies in the possibility that judicial proceedings can be initiated by persons and organisations as the plaintiff even though they do not themselves claim to be a victim of the violation of right, but bring the claim in the name of the protection of the right of a group or class of persons unidentified by name. Seeing as they do not initiate the proceedings in their own interest, but in the interest of someone else (which can partially be identified with general, public interest) associational action can be considered a subtype of public interest claim (so-called *actio popularis*, a claim in the name of the people).

The ADA explicitly prescribes that “associations, bodies, institutions or other organisations set up in line with law and having a justified interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment may bring a legal action“ (Art. 24 Par 1). This procedural legitimization overlaps, to a great extent, with the definition of those with active legitimization for intervention in individual anti-discrimination action, whereby the only difference is in the stronger emphasis on the legitimization of the organisations generally dealing with human rights. Despite the minor difference in the wording, we feel that there is practically no difference between the definitions of the procedural subjects in Art. 21 Par. 1 and Art. 24 Par. 1.²⁵ The difference, however, lies in the other requirements that need to be met. Since in joint legal claims, the organisation or body is the one independently initiating the legal proceedings and have the status of a party, they do not depend on the disposition of the potential victims to give them their consent to file the suit. For the court to allow a joint claim, however, the plaintiff needs to prove to a level of probability that the defendant’s actions could discriminate against a greater number of persons most of which belong to a specific group, which can be associated with one of the distinctive characteristics (gender, ethnic belonging, religion, sexual orientation, age etc.). The plaintiff has to have a legitimate interest in the protection of the rights of the members of this group, which means that the association or organization initiating the proceedings needs to prove that one of its goals is either the protection of the rights and interests of the group in question (for instance, the protection of the rights of HIV patients in a dispute over their potential discrimination) or that, within the scope of its activities, it is generally engaged with anti-discrimination, including the protection of the right of the group in question to equal treatment. As far as the capacity of State bodies and bodies of local government is concerned, their right to sue is regulated in the same way as their right to intervene in individual anti-discrimination actions. According to the provisions of the ADA, various sections of the State system have *ius standi in iudicio*, from the Office of the Ombudsperson to the Office for human rights, and potentially, even ministries dealing with, for instance, gender equality or the protection of elderly citizens could have active legitimization.

II. Claims

Claims that can be brought in joint antidiscrimination action are mostly the same as the ones in individual action, with one significant difference. One can bring a declaratory anti-discrimination claim (a claim seeking that it be determined that the defendant's actions discriminated against members of a specific group), a prohibitional anti-discrimination claim (a claim for the prohibition of the discriminatory action), a restitutorial anti-discrimination claim (a claim for activities to be undertaken, which will eliminate the discrimination and its consequences) as well as a publicational claim (a claim for the publication of a ruling determining discrimination). When filing a joint action, however, one cannot bring a claim for damages. If the defendant brings such a claim, the court should reject it as inadmissible.

III. Jurisdiction and proceedings

In the first instance, county courts have subject-matter jurisdiction over joint actions (Art 24 Par 3). The fact that joint actions are per definition aimed at protecting the rights of a great number of people and that the context of the protection of the right to equal treatment seeks a higher level of court practice harmonisation justify this raised jurisdiction. This also corresponds to the jurisdiction of the county courts over other types of proceedings, such as the procedure for the court injunction of the operations of an association, initiated by the competent Office of the State Attorney.²⁶ As far as territorial jurisdiction is concerned, an elective jurisdiction is prescribed: the plaintiff can choose between the court of her or his general territorial jurisdiction, the court that has jurisdiction where the act of discrimination took place or the Zagreb County Court. These possibilities underline the strategic aspect of joint anti-discrimination action, facilitating the plaintiff's access to court protection by providing her/him with a choice of forum.

As far as other issues are concerned (e.g. pronouncement of interim measures, eliminating the suspensive effect of appeals, burden of proof, audit etc.) the same rules shall apply as for individual anti-discrimination action. However, it should be noted that the provision on the cumulation of claims is not appropriate for joint action since the plaintiffs are not identical, associations bringing the claim do not have procedural legitimation to bring other claims and since there is no subject-matter jurisdiction for handling these claims.

IV. Effects of a final and binding ruling

When a final and binding ruling is made on a joint action, the question is what its meaning and effects are. Since joint action represents a form of a collective protection of rights, joint action, in case discrimination is determined, does not only have effects for the parties in the proceeding – the association, body or other organisation as the plaintiff and the natural person or legal entity that violated the right to equal treatment as the defendant – but for all members of the group discriminated against. In this sense, a ruling determining discrimination (but not a ruling rejecting the claim) would have a prejudicial effect for all future disputes between the victims of discrimination and the discriminator. This is particularly important since with associational action one cannot seek damages, which means that damages would need to be sought individually by everyone whose rights have been violated. Due to the prejudicial effect of the ruling, the court would be bound in

the individually initiated disputes over damages, if it determines that the plaintiff is a member of the group in question, by the determination of discrimination, and would not need to deliberate the defendant's liability, but only the existence and amount of damages paid to the plaintiff.²⁷ In the same sense, the extended effects of the ruling would enable all (even all future) members of the group to rely on it, and a ruling on a prohibitional claim would bind the discriminator to refrain from similar actions in all future cases. Execution on the basis of the ruling could be sought not only by the plaintiff (association or other organisation), but by any member of the group in question.²⁸ Though the subjective *res iudicata* limits are extended in associational actions, in the sense that the ruling has an *ultra partes* effect, the fact that such an action was brought does not prevent individual plaintiffs from bringing parallel individual anti-discrimination actions. In case a ruling is rendered for the individual claim that is different from the subsequent ruling on the joint action when it comes to determining discrimination, this could be the basis for the request to reopen the proceedings (arg. From Art 421 Par. 1 Subpar. 9 of the CPA).

1. Misdemeanour sanctions are regulated by Title VI of the Act, while criminal sanctions remain outside the scope of the ADA, but within the Criminal Code (see Art. 174 of the CC). Criminal and misdemeanour proceedings as such are lead according to provisions of relevant procedural acts, and the ADA does not intervene in their regulation.
2. Cf. Art. 2 to 2.d of the Labour Act and Grgurev, I., *Zabrana diskriminacije u radnom pravu*, Zagreb: School of Law (diss.), 2006.
3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, published 2 December 2000, OJL 303; and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJL 180.
4. Cf. Art. 9, Par. 1 to 2 and Art. 10 of Directive 2000/78/EC and Art. 7 and 8 of Directive 2000/43/EC.
5. See Article 12 of the CPA. More about the preliminary issue in: Dika, M., "Prethodno pitanje u parničnom postupku", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 26:2005, pp. 1-51; Triva/Dika, *Građansko parnično procesno pravo*, Zagreb, Narodne novine, 2004, pp. 96-100.
6. Also Dika, M., *Sudska zaštita u antidiskriminacijskim stvarima*, in: Projekt (lecture notes), 2009, under 4.5.1. and 4.5.5.
7. On damages, its forms and presentation of evidence, see Crnić, I., *Povrede prava osobnosti i neimovinska šteta*, in: Projekt (lecture notes), pp. 3-38.
8. Under earlier provisions, the State Attorney could act as an intervenor in some proceedings as well.
9. Cf. Art 9, Par. 2 of Directive 2000/78/EC obligating Member States to ensure all associations, organizations and other bodies with a legitimate interest in anti-discrimination the possibility of participating in judicial or administrative procedures on the side of the plaintiff.
10. Comparing the authorized organizations under Art. 17 and 24 of the ADA, Horvat critically notes that the range of civil society organizations whose right to intervene is recognized is less extensive than the range of organizations that can file a associational action. This, however, is not completely true. Intervention from Art. 21 refers to proceedings under Art. 17, which are different from proceedings from Art. 24 of the ADA, both according to the form of participation and jurisdiction. Joint action is a form of protection of collective interests and the public interest in anti-discrimination protection, while individual anti-discrimination claims are specific cases of discrimination against members of a particular group. This is the reason for the difference in the wording, which, however, do not lead to a significant difference in the scope of these norms. The wording "within the scope of its activities" needs to be interpreted widely as it is not disputable, for instance, that the Human Rights Centre, within the scope of its activities, deals with the protection of the Roma from discrimination. Cf. Horvat, A., *Novi standardi hrvatskoga i europskoga antidiskriminacijskog zakonodavstva*, *Zbornik Pravnog fakulteta u Zagrebu*, 58:2008, p. 1490.
11. Data from the National Program for the protection and promotion of human rights 2008-2011.
12. Cf. Art. 206, Par. 2 of the CPA. The intervenor could also intervene by bringing a claim independently, but considering it needs the plaintiff's consent for the intervention, it would have to submit the plaintiff's relevant statement with the claim. As far as the pronouncement of extraordinary legal remedies is concerned, the intervenor could only submit them if it intervened in the proceedings before a legally effective decision has been rendered on the claim (Art. 208, Par. 2 of the CPA).
13. Some versions of the ADA draft Act contained a special provision on the costs of the intervention of specific intervenors under Art. 21 of the ADA, but it was ultimately not adopted.
14. Cf. Art. 8, Par. 1 of Directive 2000/43/EC: "*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.*"
15. Cf. Art. 221a of the CPA.
16. Also Dika, M. *Sudska zaštita u antidiskriminacijskim stvarima*, in: Projekt (skripta), 2009, under 4.5.5.
17. On examples from European case law, see more on Rodin's article in this Guide
18. Cf. Art. 10, Par. 3 of Directive 2000/78/EC and Art. 8, Par. 3 of Directive 2000/43/EC.
19. Cf. Art. 298 and Art. 296 of the EA.
20. See Art. 299, Par 1, Subpar. 6 and 10.
21. Art. 299, Par 2.
22. More on collective court protection in Yaezell, S., *From medieval group litigation to the modern class action*, New Haven, 1987.
23. On European trends and the circle of States that have accepted some form of collective court protection, see Horvat, A., cited above, pp. 1488-1490.
24. See Consumer Protection Act, Art. 132
25. See above, footnote 10.
26. See Art. 35 of the Associations Act.
27. See Dika, M., *Udružna tužba kao instrument apstraktno zaštite potrošača*, *Hrvatska pravna revija*, October 2003, pp. 37-43; Dika/Triva, cited above, p. 828 (in relation to the Consumer protection Act). Subsequently, in amendments to the CPRA from 2009, explicit provisions were added to the Act on the effects of the court ruling on third parties and the binding force of the ruling in proceedings concerning the protection of collective consumer rights (cf. Art. 138 and 138a of the CPRA).
28. Arg. from Art. 138 of the CPRA. Provisions on the legal effect of rulings in proceedings concerning the collective protection of rights should be contained in acts systematically regulating civil and execution proceedings, but since procedural issues concerning the collective protection of rights is new and thus only partially and fragmentarily regulated, norms that have casuistically resolved particular issues in specific areas in which instruments of collective protection of rights have appeared for the first time should be applied *argumento a simile*, until these procedural issues are regulated generally and comprehensively.

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Convention on the Rights of Persons with Disabilities

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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ILO Equal Remuneration Convention (No. 100)

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