



Legal Seminar 9 November 2010 Making Equality Rights Work in Practice

DISCUSSION PAPER WORKSHOP 1

Access to Justice / Enforcement - including Costs and Legal Aid

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The present discussion paper is based on the conclusions of a draft report recently prepared by Milieu for the European Commission: 'Comparative study on access to justice in gender equality and anti-discrimination law'. It does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities.

Introduction

Recourse to justice is the ultimate method of enforcing the EU anti-discrimination legislation in order to ensure equal treatment in the EU. Relevant Directives establish a number of key principles as regards access to justice:

- **Requirement for an effective, proportionate and dissuasive remedy:** case-law on gender equality; Directive 2000/43/EC (Article 15), Directive 2000/78/EC (Article 17), Directive 2004/113/EC (Article 14), Directive 2006/54/EC (Article 25).
- **Provisions on defence of rights**, which include rights of associations: Directive 2000/43/EC (Article 7), Directive 2000/78/EC (Article 9), Directive 2004/113/EC (Article 14), Directive 2006/54/EC (Article 17).
- **Reversal of the burden of proof:** Directive 2000/43/EC (Article 8), Directive 2000/78/EC (Article 10), Directive 97/80/EC on the burden of proof in cases of discrimination based on sex (repealed and replaced by Directive 2006/54/EC, Article 19), Directive 2004/113/EC (Article 9).

The case-law of the Court of Justice has established two additional principles:

- National rules relating to **time limits** for bringing actions are admissible provided that they are not less favourable than time limits for similar actions of a domestic nature and that they do not render the exercise of rights impossible in practice¹.
- **No upper limits for compensation:** fixing a prior upper limit may preclude effective compensation and the exclusion of an award of interests to compensate for the loss sustained is not allowed².

¹ *Elsie Rita Johnson v Chief Adjudication Officer* (ECJ, December 1994); and referred to in the preamble of Directive 2006/54/EC.

² *Marshall v Southampton and South West Hampshire Area Health Authority* (ECJ, 1993) and referred to in the preamble of Directive 2006/54/EC.

The draft report prepared by Milieu reviews the situation in the Member States and the EFTA/EEA countries, as regards access to justice in cases of discrimination on grounds of gender, race or ethnic origin, religion or belief, disability, age and sexual orientation, including the identification of best practices³.

1. A multiplicity of rules leading to confusion among victims and practitioners

As the national reports show, in many Member States, anti-discrimination law is not unified. Member States lack consistency in how they treat the various equality grounds covered by EU legislation. A hierarchy often exists between the grounds of discrimination, and anti-discrimination provisions, are frequently spread across a number of legal acts. This makes it **difficult to have a clear overview of what is considered discrimination** according to national law, and for an individual to identify when s/he is a victim of discrimination.

Many national experts reported the need for a consistent and uniform approach towards gender equality and anti-discrimination in both the substantive and procedural legal frameworks. The **multiplicity of rules** noted is seen to create confusion amongst potential claimants and amongst those representing them in choosing the appropriate channel to seek a remedy. This can also result in contradictory decisions by different adjudicating authorities.

Procedures for bringing discrimination cases can also be complicated and confusing. The multitude of rules results in a lack of awareness of their rights for victims of discrimination, while the multitude of procedures makes it difficult for them to choose the best route for redress.

Questions for discussion:

- Could the adoption of a more comprehensive legislation at EU level help to address inconsistencies and gaps in the national legal frameworks?
- What could be done to simplify legal procedures?

2. Unpredictable costs and lengthy procedures for inadequate remedies

Timing is one of the major obstacles to access to justice by victims of discrimination. **Time limits** to initiate a claim, especially before the equality bodies, can be very short, and it can take time for a claimant to become aware of discrimination, to seek legal advice and establish the facts of the case in order to decide whether a lawsuit is worthwhile.

³ The study addresses:

- Procedural guarantees, such as the burden of proof, rules concerning standing before the courts, the role of associations and other entities in judicial proceedings, time limits and duration of procedures, costs of judicial procedures and existence of legal aid.
- Requirements for an effective, proportionate and dissuasive remedy, in particular the type of sanctions or compensation provided for under the law.
- The effectiveness of the legal framework in practice.

The **length** taken to resolve anti-discrimination claims is also identified as a major obstacle to access to justice. In most countries, the law does not provide for a time limit for the judge or a public body to decide on a case, which results *de facto* in very long proceedings. Even in countries where time limits are set by law, it is often not possible to abide by the deadlines in practice, due to the workload and/or scarce resources available for the courts and public bodies. Some countries have tried to address these issues by adopting legislation on compensation in case of lengthy proceedings.

The **costs of a judicial procedure** are also a disincentive for victims of discrimination to seek redress before courts. Procedural fees usually depend on the value of the claim, and are in general rather low, though they can be very high in certain cases. Some adaptations have been made to the specificities of discrimination in some countries, such as exemptions in certain cases, such as for employment matters or in criminal proceedings.

The **costs of legal representation** are a much more important issue. In many countries, it is not compulsory to be represented by a lawyer before all or some courts, but a person who is not represented by an attorney is less likely to obtain adequate satisfaction before the judge. In countries where legal representation entails high costs, victims may settle more quickly, may accept reduced damages, or be reluctant to appeal first instance decisions. In almost all countries, the losing party pays principle applies also in discrimination cases and this can make victims reluctant to seek redress before the court. The loser pays principle becomes an increased problem when court fees (and thus also the procedural risks) are particularly high. Moreover, even where the principle does not apply and each side bears their own costs in tribunals, these can be very significant for people without access to legal aid.

In most countries, the sanctions are not considered to have a sufficient deterrent effect, and the compensations are limited. The effect of the cost and length of proceedings coupled with the low amount of compensation generally awarded could dissuade victims from bringing their cases forward.

Questions for discussion:

- Is it a solution to orient victims of discrimination towards the more accessible and less costly procedures (equality bodies, mediation, lower courts) whenever possible?
- How can the problem of inadequate remedies be addressed?

3. The mechanisms facilitating access to justice and their limits

A fundamental principle is that access to justice should not be impaired by high legal costs and difficulties in proving discrimination; and the mechanisms adopted in EU and national law to address these issues do not seem to provide the results expected when looking at practice.

All countries have transposed the rule on the **shifting of the burden of proof** and this is reported as a significant asset in assisting victims of discrimination. However, the implementation of the shifting of the burden of proof is not always consistent and watertight. Moreover, what constitutes *prima facie* evidence or what amounts to 'facts from which it may be presumed that there has been direct or indirect discrimination' is not always clear and lends itself to a variety of interpretations and modes of application in the different countries.

In practice, proving discrimination requires the plaintiff to establish a number of facts before the burden is shifted. But the discriminatory conduct is seldom formulated on paper or expressed orally in front of witnesses. It may also be disguised as other behaviour. Moreover, despite the requirement to shift the burden of proof in national anti-discrimination legislation, civil procedural laws do not expressly provide for this departure from the general rules. Finally, a number of reports commented on the lack of awareness among judges and other members of the legal profession with respect to the existence of the reversed burden of proof as well as with respect to the means of its application.

In many countries, the lack of availability of **legal aid** is another deterrent to bringing a case to court. Legal aid is only available to a limited proportion of the population and usually not available outside of judicial proceedings. Victims may not be aware of what they are entitled to and who to turn to for help. The combined effect of the costs of legal action and the absence of easily accessible legal aid make the financial issue one of the major obstacles for effective proceedings. Moreover, it is likely that budgets for State-funded legal assistance will be vulnerable to being frozen or reduced in the context of the current economic climate.

Question for discussion: Would better information on legal aid and specialized legal assistance be sufficient to offer alleged victims of discrimination the financial and legal support they usually need and to encourage them to seek justice?

4. The role of associations and other entities in enforcement of discrimination law

The role of **equality bodies, Ombudsmen or other entities** is to facilitate individuals and groups who consider themselves to have been wronged to obtain redress. But the remit of equality bodies often does not cover all grounds and all areas of discrimination. A particular problem is the failure to oblige Member States to establish or designate bodies for the promotion of equal treatment in the areas covered by Directive 2000/78/EC (religion or belief, disability, age and sexual orientation).

The powers of the equality bodies are also limited (e.g., no powers to impose sanctions). Moreover, the national reports point to a wide variation in the ability of equality bodies to bring claims in their own name, or in support of individual victims of discrimination – in terms of both their legal standing to initiate legal action, and the funding of such bodies.

Many national reports raised the fact that, even though victims having legal standing realise that they may have been discriminated against, it still remains difficult for them to bring a case before the Court on their own. Victims of discrimination often consider that theirs is an isolated case for which no action can be taken or they may fear consequences in their private or professional sphere if they appear before a court or another judicial body (for instance, a victim of discrimination based on sexual orientation must 'come out' in what may be a homophobic environment). In addition, high costs and the complexity of the legal framework and procedures also constitute significant barriers for individuals to seek redress.

For such issues, **associations** have an important role in encouraging and assisting victims in bringing claims. The lack of this kind of support has been identified as a major issue in some countries.

Question for discussion:

- To what extent can access to justice be facilitated through granting organisations dedicated to combating discrimination a full right to bring cases in their own name?
- Should EU legislation be revised to strengthen the obligation on Member States to establish equality bodies for all grounds?
- Should the powers of equality bodies be broadened, in particular to enable them to support claimants in bringing anti-discrimination claims or to serve a quasi-judicial function by imposing sanctions?