

Recent case-law of the CJEU: enforcement aspects

Prof. Dr. Christa Tobler, LL.M.
Europa Institutes of the Universities of Basel
(Switzerland) and Leiden (The Netherlands)

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Prof. Dr. Christa TOBLER, LL.M.
christa.tobler@unibas.ch

christa.tobler@unibas.ch

Universities of Basel (Switzerland) and Leiden (The Netherlands)
http://www.europa.unibas.ch

http://www.europa.unibas.ch

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Overview

Issues briefly presented

- General enforcement elements
- Specific provisions in modern Directives
- Case-law (actually, only one case in 2012 on these issues)

For the case-law, the presentation relies on the report written by Colm O'Cinneide (University College London) for the European Commission (Expert Network) and entitled:

"The evolution and impact of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC"

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General context

Enforcement elements to remember

- Starting point: principle of sincere cooperation (*pacta sunt servanda*), Art. 4(3) TEU.
- Some specific elements:
 - Indirect and direct effect of EU law.
 - Right to an effective, proportionate and dissuasive remedy.
 - Right to damages from the Member State.
 - Duty of levelling up in individual and successful discrimination cases (subsequent levelling down on a general level is possible ...).
- All of these were developed through case-law of the CJEU.
- Some where codified in the most recent generation of social non-discrimination law; plus provisions in the Charter of Fundamental Rights.

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Specific provisions: overview

Issues regulated in modern Non-discrimination Directives

- Usually, there is a specific chapter on 'Remedies and Enforcement', plus there are relevant provisions in the part on 'horizontal provisions'.
- Important issues that are covered:
 - Defence of rights: right to a judicial procedure (e.g. Art. 7 of Directive 2000/43/EC).
 - Burden of proof (e.g. Art. 8 of Directive 2000/43/EC).
 - Right to an effective, proportionate and dissuasive remedy (e.g. Art. 15 of Directive 2000/43/EC).
 - Penalties.
- Again, most of this is codified case-law, originally developed in the context of Art. 6 of the so-called Second Equal Treatment Directive (sex discrimination law).

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Recent case-law: *Meister* (1)

Facts

- Ms Meister, a Russian national, applies for a job as an "experienced software developer". Even though she satisfies all the requirements, she is unsuccessful. The job is re-advertised.
- Ms Meister alleges that she has been subject to discrimination on the grounds of sex, age and ethnic origin.
- In this context, Ms Meister seeks access to information from the employer about the selection procedure, including whether another person has been employed, and if so, based on what qualifications. She needs to in order to make her case (evidence).

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Recent case-law: *Meister* (2)

Legal issues

- Do the provisions of the Directives 2000/43/EC, 2000/78/EC and of 2006/54/EC give an alleged victim of discrimination a right to receive this information?
- If so, where the information given is not conforming, does this give rise to a presumption that discrimination exists?
- The national court seized with the case turns to the CJEU for help in interpreting EU law (preliminary ruling procedure): Case C-415/10 *Meister*, decided on 19 April 2012.

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Recent case-law: *Meister* (3)

The Court's interpretation of the Directive (1)

- Starting point: the rule on the shifting of the burden of proof in the Directives.
- The Court applies its gender equality case-law on this matter, in particular *Kelly* (note the link between the different sub-fields of non-discrimination law!). Accordingly, EU law does not give alleged victims of discrimination a specific right to receive the information sought.
- However, a refusal by the defendant to make the information available 'may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination', which would result in a shift of the burden of proof.

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Recent case-law: *Meister* (4)

The Court's interpretation of the Directive (2)

- The fact that the employer did not dispute that the claimant satisfied the requirements for the post, the fact that she was not invited to an interview and the decision to re-advertise the post could also be taken into account in establishing the existence of a presumption of discrimination.
- The Court also explicitly confirms that a presumption of indirect discrimination could be established to exist on the basis of statistical evidence.

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Recent case-law: *Meister* (5)

Colm O'Cinneide's conclusion

"The judgment in *Meister* thus provides valuable clarification of the type of evidence that can establish a presumption of discrimination and thus give rise to a shift in the burden of proof: it is likely to become a significant point of reference for domestic courts applying the burden of proof provisions of the 2000 Directives for some time to come."

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Thank you for your attention!

For further information

- Basel:
 - Website: www.europa.unibas.ch
 - e-mail: christa.tobler@unibas.ch
- Leiden:
 - Website: <http://www.law.leidenuniv.nl/org/publiekrecht/europainstituut>
 - e-mail: r.c.tobler@law.leidenuniv.nl

Equality for everyone: legal challenges ahead

Recent case law of the CJEU

Evelyn Ellis
Universities of Birmingham and Western Australia

Cases since the beginning of 2011

- C-236/09 *Test-Achats*
- C-147/08 *Römer*
- C-391/09 *Runevic-Vardyn*
- C-310/10 *Agafiei*
- C-177/10 *Rosado Santana*
- C297 & 298/10 *Hennigs and Mai*
- C-447/09 *Prigge*

Cases since the beginning of 2011 (cont.)

- C-123/10 *Brachner*
- C-32/11 *Tyrolean Airways*
- C-586/10 *Kůčůk*
- C-109/09 *Kumpan*
- C-104/10 *Kelly v UCD*
- C-415/10 *Meister*
- C-141/11 *Hörnfeldt*

Why so many age discrimination cases?

- Random element
- Age easy to prove
- Many older workers in recessionary times
- Woolly wording of the Article 6(1) defence
- How many cases on the other grounds are being litigated?
- Are they better regulated by national law?
- Is there a lack of information?
