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Approaches to Equality and Non-discrimination Legislation
inside and outside the EU

DISCUSSION PAPER - WORKSHOP 5

Legal standing of Organisations

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Introduction

In 2000 the Council adopted two antidiscrimination directives – 2000/43/EC (the Racial Equality Directive) and 2000/78/EC (the Employment Equality Directive). Both of them require that Member States provide for possibilities of interested legal entities to engage on behalf or in support of consenting complainants in judicial or administrative proceedings. This paper provides a short outline on reviews measures, which Member States (EU 27) and candidate countries (Croatia, FYROM and Turkey) have undertaken to implement these requirements. In addition, the paper maps the efforts of Member States and candidate countries go beyond the minimal requirements of the two directives into providing further possibilities for legal entities to engage in proceedings in their own name in the form of *actio popularis*, i.e. in defense of public interest with no specific victim, as well as to file collective/ class lawsuits.

On behalf of victims

The two directives require that NGOs and trade unions be specifically granted standing to represent victims of discrimination in formal proceedings in their own capacity *as legal entities*. Not all Member States and candidate countries seem to fully comply with this requirement. In most countries, NGOs and trade unions are the two broad categories of legal entities having standing. In one Member State (Hungary) ethnic communities' self-governments have standing too, on a par with NGOs and trade unions. These legal entities are empowered to act on the basis of either general laws or under special antidiscrimination laws.

Whether as a matter of legislation, or in judicial interpretations, Member States and candidate countries have set some requirements for legal entities authorized to represent complainants. One such requirement is incorporation. As a rule, regular incorporation under the generally applicable rules is enough. Another requirement is having equality as a statutory aim. In some states this requirement is alternative to having human rights protection as a statutory aim or equality as an actual activity. A third basic requirement is for 'legitimate interest'.

Where a statutory aim (as a specific proxy of legitimate interest) is not a requirement, legitimate interest as a broader notion is. Some countries have introduced permanency requirements for NGOs. In others the rules on standing vary across protected grounds and protection is uneven across material fields. Still other countries limit standing to act on behalf of complainants only if the latter are NGO/trade union members.

For the most part states have provided for legal representation of complainants by legal entities in civil and administrative judicial proceedings. In a few states standing is also granted in criminal proceedings. Some states provide for a very limited standing of legal entities in court because of general procedural rules restricting representation to attorneys.

As a rule, legal entities can only seek remedies on behalf of the victim they represent, and those are the generally applicable remedies available to victims. However, in one case (Belgium), an NGO can also seek compensation for itself.

In support of victims

In addition to legal standing to act “on behalf”, both directives require that Member States provide for possibilities of legal entities to act “in support” of complainants in combating discrimination. This means procedural possibilities for legal entities to act in their own name, alongside claimant, as a third party to a case. At least seven countries, all Member States, seem to not fully comply with this requirement. Those states that have provided for such possibilities have done so under general laws or under antidiscrimination laws.

States have provided standing for legal entities to act in support of claimants for the most part in civil and administrative judicial proceedings. Six states have allowed such action also in criminal proceedings. Equality body proceedings are also encompassed in the scope of standing.

As in the case of acting “on behalf”, states have set similar requirements for legal entities authorized to act “in support” of complainants. Those include incorporation, an equality statutory aim or activity, legitimate interest and, in a few cases, also permanency and special expertise. As a rule, claimant consent is required when acting in his/her support too, although in three cases (Slovakia, Bulgaria, Hungary) there is no such requirement.

States allow acting in support of claimants either as direct intervenors or in the more neutral form of *amicus curiae*. *Amicus* brief providers, as a rule, only comment in principle on the legal issues.

In some countries, such as Malta, intervenors are entitled to claim in their own right the same remedies as victims can. In others, such as Austria, intervenors have no standing to claim any remedies in their own right.

In practice, although significant under the law, third-party intervention possibilities for victim support appear largely underused by legal entities in most states. Case law is scarce, or absent.

Actio popularis

In addition to acting on behalf or in support of claimants, many Member States and candidate countries have entitled NGOs and/or trade unions to pursue equality protection in their own name where a discriminatory act infringes the public interest by injuring an unspecified multitude of people. For this type of public interest action (*actio popularis*), identification and involvement of a specific victim is not needed. Authorization by or consent of a victim or group of victims is irrelevant.

In some cases legal entities are allowed to seize equality bodies with allegations of discrimination without reference to an individual victim as a matter of law, or practice. In other cases *actio popularis* is allowed only in courts. There are also countries where both venues are available. Five countries allow for some involvement of legal entities in pursuit of the public interest in criminal proceedings.

Some of the key requirements for representative and support standing apply in the case of *actio popularis* too. These include incorporation, statutory aim, legitimate interest and, in some cases, permanency. In addition, a number of countries have set an additional requirement for this type of legal action: showing that a specific category of people is disadvantaged by the impugned act/practice and/or that the number of persons affected is significant.

In some countries, the available remedies in *actio popularis* are the same as those available to actual victims. They include declaration of a breach, injunctive relief (orders to stop/abstain from a breach, restoration, etc.), fines, and, in few cases, compensation. Exceptionally, Romanian law also allows for punitive damages.

In the practice of implementation of *actio popularis* the situation across Member States and candidate countries is uneven. In some countries, NGOs actively take advantage of their *actio popularis* standing, litigating against institutional disadvantage. In others, there is scarcely any case law.

Collective/ class lawsuits

In at least 15 states legal entities have standing to seek collective redress, beyond regular joinder of individual cases in the form of various forms of group action, including collective lawsuits (multiple claims) and class action (claims on behalf of an undefined group of claimants). Group action, as opposed to simple party joinder, is defined by the fact that group members agree to have their claims brought for them on behalf of a representative entity, while in the case of joinder victims remain parties to the proceedings as direct claimants.

A number of Member States and candidate countries have entitled associations to litigate a claim on behalf of a class. In some countries, collective redress is provided for under antidiscrimination law; in others – under general civil procedure, or both. In a third group, it features under special consumer protection law.

In some countries, class action is provided for under general civil procedure law inclusively, for any rights, therefore, fully applicable to all aspects of equality (e.g. Denmark). In others, class action is only available for consumer rights, overlapping with equality protection as concerns discrimination in goods and services provision.

Basic institutional requirements for entities' standing across states include incorporation for purposes of defense of the relevant victim/rights category (statutory aims) and having sufficient capacity to handle the case, in terms of good faith, expertise and financial capability.

For class action, the opt-in model is prevalent (where class members need to proactively join the litigation in order to be considered part of the class for purposes of being bound by the judgment). In some countries, class members who failed to join in still benefit from the class action judgment – by being able to use it in subsequent individual proceedings for damages as an established basis for the tortiousness of the act and respondent's liability.

As a rule, in collective lawsuits injunctive relief is available, as well as declaratory relief. Compensation is also available in a number of countries featuring a typical class action system. In some, a compensatory relief court order is not binding (e.g. Italy). In others, such as the Netherlands and Belgium, relief is only declaratory, and compensation is excluded.

For class action, the judge typically retains discretion concerning the appropriate structural redress measures. In some countries, publication of the judgment is available as a remedy too (e.g. Italy, Spain, Greece, Belgium). Greece offers one of the most sanctioning regimes for class action consumer protection, featuring punitive damages and injunctive measures, such as confiscation of goods.

Discussion questions:

- 1) Why are the existing opportunities for legal entities to engage in antidiscrimination litigation on behalf or in support of complainants, or independently from specific victims, underused in practice?
- 2) Why do trade unions act far less than NGOs?
- 3) Why are there significant differences in the use of the existing opportunities by legal entities in the different Member States and candidate countries?