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How EU law shapes opportunities for preliminary references on fundamental rights: discrimination, data protection and asylum

Edited by Elise Muir, Claire Kilpatrick, Jeffrey Miller
and Bruno de Witte

European University Institute
Department of Law

**HOW EU LAW SHAPES OPPORTUNITIES FOR PRELIMINARY
REFERENCES ON FUNDAMENTAL RIGHTS: DISCRIMINATION,
DATA PROTECTION AND ASYLUM**

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Abstract

This publication explores the impact of procedural provisions inserted in EU fundamental rights legislation (in particular non-discrimination law) that are aimed at facilitating access to court in support or on behalf of victims. The papers investigate the interplay between: 1. 'collective actors' understood in the broad sense to cover civil society organisations and independent organisations such as equality bodies intended to represent individuals; 2. the actual litigation on EU fundamental rights law before domestic courts as it unfolds before the CJEU by way of preliminary references; and 3. the rules on access to domestic courts (shaped, to some extent, by EU legislation) as providing legal opportunity structures for preliminary references to the CJEU.

Keywords

collective actors (Fundamental Rights and equality bodies, NGOs, unions); EU legislative access to justice requirements; EU Fundamental Rights and discrimination litigation; preliminary references

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Introducing the role of collective actors and preliminary references in the enforcement of EU fundamental rights law

*Claire Kilpatrick & Bruno De Witte**

This collection of papers is situated at the confluence of two burgeoning fields of European Union law: the field of European equality law, where it seeks to contribute to the scholarship that explores the conditions for equality law to have a transformative effect in European societies; and the field of the enforcement of EU law, where it enters the debate on the limits of individual litigation and the promise of alternative enforcement mechanisms and of public interest litigation.

The contributions to this collective working paper were originally presented at a workshop that took place at the European University Institute on 24 February 2017. The aim of this publication is to explore the impact of procedural provisions inserted in EU fundamental rights legislation (in particular non-discrimination law) that are aimed at facilitating access to court in support or on behalf of victims. The papers investigate the interplay between:

1. ‘collective actors’ understood in the broad sense to cover civil society organisations and independent organisations such as equality bodies intended to represent individuals,
2. the actual litigation on EU fundamental rights law before domestic courts as it unfolds before the CJEU by way of preliminary references,
3. and the rules on access to domestic courts (shaped, to some extent, by EU legislation) as providing legal opportunity structures for preliminary references to the CJEU.

The question of the enforcement of EU law before domestic courts has traditionally been examined from the vantage points of the principles developed by the Court of Justice in this regard: the principles of primacy and direct effect as the background conditions for such enforcement; and the principles of effectiveness and equivalence shaping more specifically the conditions for access to court at the national level. These general principles are well established and well-studied. More recent research has also examined the way in which EU legislation may influence the conditions for access to courts to enforce EU law. Procedural provisions intended to facilitate the enforcement of a given policy are more and more often inserted in specific EU instruments. The increasing attention to this remedial dimension is well illustrated by a comparison of the Data Protection Directive of 1995 and its successor, the General Data Protection Regulation of 2016. As shown by Orla Lynskey in her contribution, the former contained only limited provisions on its domestic judicial enforcement, whereas the latter text contains important additional provisions on effective remedies and collective action. Occasionally, the EU legislator has enacted directives that are exclusively aimed at improving the effective enforcement of a branch of EU law, as with the Directive on consumer injunctions,¹ the Directive on enforcement of intellectual property rights², the Directive on damages for infringements of competition law³ and the Directive on enforcement of the posted workers rules.⁴ The increasing number of such piecemeal enforcement regimes has prompted comparative reflection on the differences and similarities between

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¹ Directive 2009/22, OJ 2009, L 110/30.

² Directive 2004/48, OJ 2004, L 195/45.

³ Directive 2014/104, OJ 2014, L 349/1.

⁴ Directive 2014/67, OJ 2014, L 159/24.

them.⁵ Beyond those piecemeal and sector-specific attempts at harmonising the conditions for effective enforcement of EU law, the European Commission has promoted a discussion on the development of ‘horizontal’ reforms of enforcement, as for example in its Recommendation of 2013 on collective redress.⁶

EU anti-discrimination law is one of the prime areas in which harmonization of substantive law has been accompanied by harmonization of domestic procedures. There is abundant writing on the substantive side of EU equal treatment law, including also some research on the strategies developed by collective actors to make use of these EU-based rights to equal treatment. In contrast, the actual legal mechanisms through which domestic actors are empowered to access national courts for enforcing these rights have been more rarely examined. Aiming at filling this gap, the papers in this collection engage with the following set of common questions: What can we learn from the past ten to fifteen years of experience with those procedural rules introduced in domestic legal orders by EU equality legislation and by other fundamental rights legislation? What is the practical impact of the procedural provisions inserted side by side with substantive rights in EU fundamental rights legislation? Do they indeed have an impact on access to court and the litigation process? Does this influence the preliminary ruling procedure? And are we witnessing the development of a European brand of public interest litigation? It is worth exploring a little further some design features of the project.

It is clear that collective actors (equality bodies, NGOs and trade unions) can and do take fundamental rights claims to court, leading to preliminary references, without any special EU legal support. The well-known example of the litigation strategy of the UK gender equality agency, the Equal Opportunities Commission, in the 1990s did not derive from any particular EU equality law provisions supporting collective actors. EU gender equality law at that time provided only that:

Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process after possible recourse to other competent authorities.⁷

However, the new generation of EU discrimination law of the 2000s⁸ changed the procedural and institutional landscape in two specific ways this project aims to probe.⁹ Both seek to facilitate litigation by supporting or encouraging the involvement of a broad range of actors next to individual victims. Both are modelled on, and can be illustrated by, the relevant provisions in the Racial Equality Directive. The first might be called a collective actor defence of rights requirement:

⁵ See e.g. M. Eliantonio & E. Muir (eds.), Special issue on the incidental proceduralisation of EU Law, 8 *Review of European Administrative Law* (2015) nr 1; F.G. Wilman, *Private Enforcement of EU Law before National Courts: The EU Legislative Framework* (2015).

⁶ Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law, COM(2013)3539.

⁷ Equal Treatment Directive, Article 6 (Directive 76/207/EEC, OJ 1976 L 39/40); see also the Equal Pay Directive, Article 6 (Directive 75/117/EEC, OJ 1975 L 45/19): ‘Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.’

⁸ Race Equality Directive (Directive 2000/43/EC, OJ 2000 L 180/22); the Framework Equal Treatment Directive covering age, disability, religion/belief and sexual orientation (Directive 2000/78/EC, OJ 2000 L303/16); Gender Equality Employment Directive (Directive 2006/54, OJ 2006 L 204/30) which recast EU gender equality law and replaced the multiple earlier Directives covering gender equality in employment and occupation; Gender Equality Goods and Services Directive (Directive 2004/113/EC, OJ 2004 L 373/37); Gender Equality Self-Employment Directive (Directive 2010/41/EU, OJ 2010 L 180/1) which replaced and repealed Directive 86/378/EEC.

⁹ Other related innovations in the new generation of equality and discrimination directives are not specifically investigated such as the requirements to encourage dialogue with relevant stakeholders (see eg Articles 21 and 22 of the Gender Equality Employment Directive).

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.

This provision is replicated in all the new generation of equality directives.¹⁰ It is worth noting that it does not extend to allowing collective actors to act on behalf of complainants without their approval.

The second kind of provision requires the existence of an equality body which can provide independent assistance to victims in pursuing discrimination complaints.¹¹ EU law accordingly requires the creation of a new collective actor where such a body does not already exist. However, this requirement applies only in relation to race and gender and not to the multiple grounds covered in the Framework Equal Treatment Directive: age, religion or belief, disability and sexual orientation. In addition, it does not lay down a requirement that such bodies are allowed to initiate legal proceedings.

These new EU legislative collective actor requirements have a capacity to lead to change in two key ways. First, they have a capacity to act as a policy anchor or inspiration for similar requirements in areas of EU law seen by those involved in the policy process as related in some relevant way. At domestic level, to give just two examples that resonate with the findings of the project, this can occur by ‘over-implementing’ the directives so as to provide for an equality body in areas other than race and gender or by allowing that equality body to participate in legal proceedings. At EU level, as noted above, there has been a recent spread of related procedural requirements. The hypothesis driving the selection in this project is that ‘fundamental rights’ may be a frame viewed as a relevant one to spur the diffusion of such requirements, a frame whose relevance is evidently enhanced by the contemporaneous creation of the EU Charter of Fundamental Rights. This can be because equality and non-discrimination may be seen as *like* other fundamental rights, such as the right to data protection or the right to asylum, both explored in this project. It can also be because procedural rights themselves are interpreted as fundamental rights: the requirements to ensure access to court and effective judicial protection, as fundamental rights informing such procedural requirements, may lead to their protection and further development. Links to human rights, especially the ECHR, can further strengthen this.¹² That is to say, the fundamental rights frame can lead to spill-overs and the reinforcement of procedural protections in legislative and judicial processes. This feature is reflected on further by Elise Muir in her concluding contribution.

Second, these new collective actor requirements in EU equality legislation have a capacity to change not just the law on the books, the transposition of the directives’ requirements, but also equality law

¹⁰ Article 7(2) Race Equality Directive; Article 9(2) Framework Equal Treatment Directive; Article 17(2) Gender Equality Employment Directive; Article 8(3) Gender Equality Goods and Services Directive; Article 9(2) Gender Equality Self-Employment Directive.

¹¹ Article 13 Racial Equality Directive: “1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights. 2. Member States shall ensure that the competences of these bodies include: - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination...”. For gender, this requirement was first introduced in Directive 2002/73 which amended the 1976 Equal Treatment Directive and is now contained in Article 20 of the 2006 Gender Equality Employment Directive, Article 13 of the Gender Equality Goods and Services Directive and Article 11 of the Gender Equality Self-Employment Directive.

¹² Article 47 EUCFR (right to an effective remedy and a fair trial). For an early important use by the Court of Justice of the ECHR to underpin equality procedural protection, see Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651. For instance, the Court of Justice has made it clear that the limits on collective actors in EU equality legislation do not prevent Member States granting them more extensive rights, such as allowing equality bodies to initiate legal proceedings or allowing collective actors to act without the approval of the complainant (see C-54/07 *Feryn*, para 39 and C-81/12 *Accept*, para 37).

practices and litigation at domestic level. Yet a *capacity* to change is no more than that; the project is interested in exploring when and how these requirements *actually* played a role in new equality law practices by collective actors. The distinctive angle or ‘hook’ the project has chosen to ‘get at’ the transformative impact, or lack thereof, of these new EU collective actor requirements is the identification of preliminary references involving collective actors. Of course, new EU equality collective actor requirements may create extensive equality law innovations and litigation at domestic level which do not lead to preliminary references to the Court of Justice of the European Union. And the decision to make such references lies with the national court. Why then focus on preliminary references involving collective actors? There are two main reasons. First, the search for such preliminary references involving collective actors provides a shared point of departure for opening a wider range of questions. In relation to discrimination law these include the domestic transposition of EU collective actor legislative requirements. What changes were made at national level as a result of these EU requirements? Did those changes lead to more use of discrimination litigation, or a preliminary reference strategy, by collective actors? Are some kinds of collective actors, such as equality bodies, more active participants in litigation than others? What else led to preliminary references? What else are collective actors doing? This starting-point then leads to a richer understanding not just of which collective actors and national judicial procedures shape litigation and preliminary references but also which other actors or factors shape fundamental rights litigation, how collective actors interact, and what else they do alongside or instead of litigation. Hence the first reason for the choice of preliminary references is that they provide a useful jumping-off point for rich and careful domestic contextual inquiry into the impacts of EU collective actor legislative requirements. Providing accounts of EU discrimination practices from six EU Member States, Belgium, Bulgaria, France, Germany, Denmark and Italy, invites comparative reflection and further refinement of the conditions under which specific collective actors engage in litigation leading to preliminary references. Academic and political resistances to EU discrimination law, vividly depicted by Latraverse for France and Möschel for Germany, as well as the fragility of collective actors in times of austerity and rule of law crises in a number of EU states, are important features to consider as limiting factors.

The second reason is that preliminary references in and of themselves raise specific and interesting questions with regard to collective actors. First, where a collective actor is involved in a preliminary reference, there is often a set of specific strategic reasons for seeking a preliminary reference, as well illustrated in the examples of the *Rosselle* (C-65/14) reference on pregnancy discrimination from Belgium in the analysis by Kolf and Muir and the Danish disability reference in *Ring and Werge* (C-335 and 337/11) in the analysis by Atanasova and Miller. Second, collective actors involved in preliminary references will have a right to intervene before the CJEU only if they are formally a party, including being a third party, in the domestic proceedings. A spectacular example of this, explored by Lilian Tsourdi in her contribution, is the interventions before the CJEU by Amnesty, AIRE, the UNHCR and the UK Equality and Human Rights Commission in the *NS and M.E* cases (C-411/10 and C-493/10) on the return of asylum seekers to Greece which could occur because they were formally third parties in the UK court proceedings leading to the reference. Where collective actors are not formally a party to the domestic proceedings detecting their presence is not straightforward and requires investigating behind the scenes. Hence reading the preliminary ruling of the Court of Justice in *Kamberaj* (C-571/10), in a reference raising issues of nationality and race discrimination, one would have no idea that it was a pilot case emerging from strategic litigation involving four NGOs, trade unions and their lawyers who participated extensively in the Italian domestic proceedings as uncovered by Passalacqua in her contribution. Third, the mixed roles of equality bodies in some states, as quasi-judicial instances alongside other equality roles, can lead to peculiar interactions with the design of the preliminary reference procedure. In the Bulgarian race equality context, as explored by Farkas, it led to an equality body’s preliminary reference being rejected because it was not a court (*Belov*, C-394/11) but that equality body subsequently found itself as a defendant in a preliminary reference in connected legal proceedings after its quasi-judicial determination was challenged before a court (*CHEZ*, C-83/14). Fourth, although it is the national court which makes the decision to refer, in practice the contributions

to this research project show that collective actors can play a substantial role in steering that decision and drafting the questions referred to the Court of Justice. Hence, this project casts interesting light on the ‘reality’ of collective actor involvement in preliminary references. It also raises questions about the exceptionally limited space the preliminary reference procedure affords collective actors which are not formally parties in the domestic proceedings at the Court of Justice stage of the proceedings.

All the papers, except the last three, deal with EU anti-discrimination law. A review of the CJEU case law on anti-discrimination since 2000 (i.e. the year in which the relevant rules were first introduced in EU equality law) reveals that a number of countries stand out by the number of cases involving a collective actor and having led to a preliminary ruling by the CJEU, whereas in other countries nothing of the kind has happened. In the first contribution, Alvaro Oliveira sketches the collective enforcement of anti-discrimination law from a comparative perspective. The next two papers deal with relatively small Member States in which collective action has repeatedly been successful in bringing antidiscrimination cases to the CJEU by means of preliminary references, namely Belgium (paper by Elise Muir & Sarah Kolf) and Bulgaria (paper by Lilla Farkas); whereas in Belgium, the cases concern a variety of grounds of discrimination, in the case of Bulgaria the collective actors have focused on the protection of Roma against discrimination on the ground of their ethnicity. A second pair of papers examine the cases of France (by Sophie Latraverse) and Germany (by Mathias Möschel), two large countries from which hardly any preliminary references involving collective actors have emerged, despite the fact that litigation on non-discrimination is generally quite frequent there; the authors of these two papers examine the reasons why collective actors have not been able, or have not sought, to involve the CJEU by means of preliminary references. The following two papers deal with two countries that are situated in between the two other groups, Denmark and Italy. Whereas the Danish case (analysed by Atanasova and Miller) is characterized by the active role played by one type of collective actor, namely the trade unions, the Italian case (presented by Virginia Passalacqua) is characterized by the focus on non-discrimination on grounds of nationality as a tool to protect immigrant minorities. Two further papers of this collection are devoted to exploring the real or potential impact of procedural rules on access to court in other branches of EU law with strong fundamental rights dimensions, namely data protection (Orla Lynskey) and asylum law (Lilian Tsourdi). In the final contribution, Elise Muir draws the conclusions emerging from the individual papers as to the phenomenon of collective enforcement of EU law in the interplay between national and European courts.

What difference does EU law make? The added value of EU Equality Directives on access to justice for collective actors

*Álvaro Oliveira**

This paper examines the impact on national legislation of the provisions of EU Equality Directives on access to courts by collective actors, such as associations and trade unions.

First, it recalls the historical origin of these provisions, which can be put in the framework of the virtuous dynamic of EU equality law, where protection from discrimination is progressively reinforced and extended step-by-step.

Subsequently, the paper explains that most Member States had to change their legislation in order to comply with the new Equality Directives, notably regarding access of associations to courts. However, the changes were not of the same scale in all Member States. The impact of the Directives was generally stronger in Southern countries and those that acceded to the Union in 2004 or afterwards. Several among these countries lagged behind in granting collective actors, such as associations, the right to access courts. However, it was also the case that, when they transposed the Directives, often those Member States went beyond the strict minimum necessary to comply with them.

In conclusion, the analysis made in this paper indicates that the provisions of the EU Equality Directives on access of collective actors to justice had a significant impact on national legislation in EU Member States. Together, these directives constitute one important factor, among many others, in facilitating the practical access to courts for victims of discrimination.

Introduction

What is the added value of EU equality directives¹? This paper focuses specifically on the rules of the directives on access to justice by private collective actors, such as trade unions and associations concerned with equality.² The role of governmental agencies, such as state equality bodies, will also be analysed here, but only to provide a more general context.³

First, the paper starts with an historical note. It highlights the virtuous dynamic of EU equality law, where protection from discrimination is progressively reinforced and extended step-by-step. This is usually the result of a constructive dialogue between the EU legislator and the Court of Justice of the European Union (the “EU Court of Justice” or “EU Court”).

* ISCTE – University Institute of Lisbon, currently on long-term leave of absence. The author is currently working for an EU institution, but the content of this paper does not reflect the official opinion of the European Union. Responsibility for the information and views expressed therein lies entirely with the author. This text is based on a paper originally presented in February 2017 at the E.U.I. The author would like to thank Elise Muir for her guidance and suggestions, as well as to Gina Babinec and Fabian Luetz for useful comments.

¹ I refer to Directive 2000/43 on equal treatment irrespective of racial or ethnic origin, OJ L 180, 19/7/2000, p.22; Directive 2000/78 on equal treatment in employment based on religion or belief, age, disability and sexual orientation, OJ L 303, 2/12/2000, p. 16; Directive 2004/113 on equal treatment between men and women in access to goods and services, OJ L 373, 21/12/2004, p. 37, and Directive 2006/54 on equal treatment between men and women in employment and occupation (recast), OJ L 204, 26/7/2006, p. 23.

² Article 7(2) of Directive 2000/43, article 9(2) of Directive 2000/78, article 8(2) of Directive 2004/113 and article 17(2) of Directive 2006/54.

³ See section 3 below.

The origin of EU equality rules on the role of private collective actors is also part of this positive dynamic of increased protection against discrimination. However, since these rules resulted from lobbying by civil society, they constitute an exception to the usual bilateral dialogue between the EU legislator and the EU Court of Justice – a process during which EU institutions influence each other, and working towards a shared objective, provide the impetus for new developments in EU equality law.

Secondly, the paper examines the impact that EU Directives had in this respect on national legislation.

Most Member States had to change their legislation in order to comply with the new equality directives, notably regarding associations' access to courts. However, the changes were not the same everywhere. This paper identifies three groups of Member States: a) those in which the Directives had a significant impact on national law, b) those in which they had a certain, but not considerable impact and c) those in which they did not have a significant impact.

The impact of the Directives was generally stronger in Southern countries and in those that acceded to the Union in 2004 or afterwards. Several among these countries lagged behind in granting collective actors, such as interested associations, the right to access courts. However, it was also the case that, when they transposed the Directives, often those Member States went beyond the strict minimum necessary to comply with them.

In this section, reference will be made to the other papers in this series examining in detail national legislation and case law regarding access to courts in individual Member States.

Finally, this issue is put into a larger context, considering other rules of EU equality law, such as those on equality bodies and on the burden of proof, as well as other factors influencing the practical access of victims of discrimination to the courts.

A historical note

The virtuous dynamic

In EU equality law there is usually a virtuous dynamic that develops the protection against discrimination step-by-step. The protection is not only progressively reinforced as time goes by; it is also extended from one area of social life to another and from one ground of discrimination to others.

The plot usually goes like this. The legislator adopts general rules prohibiting discrimination, either in the Treaties or in directives. The EU Court of Justice is then obliged to interpret their precise meaning and effect. To respect the intention of the legislator and to make such rules meaningful, the Court usually strengthens their effect and adopts a broad interpretation. Later the legislator codifies the rules and principles developed by the Court in statutory law. Moreover, when some rules are adopted regarding one ground of discrimination, for example sex, it appears justified to apply them also to other grounds of discrimination, for example race, and eventually the legislator follows suit.

Of course, this is a movie, not a photograph. The dynamic is not always perfect and, as for any human creation, the existing law can certainly be improved.⁴ But it is submitted that in EU equality law this positive trend is quite clear.⁵ The following are a few examples.⁶

⁴ See, for example, Erica Howard, *The EU Race Directive : Time for Change ?*, International Journal of Discrimination and the Law, 2007, Vol. 8, p. 237.

⁵ This seems to contrast with the USA, where the Supreme Court has occasionally adopted a restrictive interpretation of equality statutory law, and in certain cases the legislator (Congress), has subsequently adopted legislation to counter such judgments by reinforcing the reach and scope of previously adopted legislation.

⁶ For a more detail account of these historical developments see Bruno de Witte, *From a "Common Principle of Equality" to "European Antidiscrimination Law"*, American Behavioral Scientist 53(12) 2010, p. 1715 and Elise Muir, *Procedural*

In the original EEC Treaty, entered into force in 1957, Article 119⁷ established in general terms the principle that men and women should receive equal pay for equal work. In 1976, in the second *Defrenne* case, the Court ruled that that Treaty article had direct effect and could thus be invoked directly by workers in national courts – even if this conclusion was not technically obvious.⁸

In 1981, the Court ruled that Article 157 prohibited not only direct sex discrimination, but could also forbid indirect sex discrimination. In the case, part-time work was paid at an hourly rate lower than full-time work. The Court ruled that this was not *per se* discriminatory on the basis of sex. However, since most part-time workers were women, and since it was difficult for women to work full-time, that difference in salary could be indirectly discriminatory on the grounds of sex.⁹

In 1989, in *Danfoss*,¹⁰ the Court went one step further and ruled that the burden of proof should be shared between the claimant and the defendant. When the claimant presents evidence that indicated the possibility of discrimination, the defendant should prove that the behaviour at stake was not discriminatory. In that case, a trade union complained that a company's pay system resulted in women having an average pay lower than men. The point was that the company gave to workers individual salary supplements in a non-transparent way. The Court ruled that the employer had to make its pay system transparent and had to indicate the criteria it applied to give out supplements. Only in this manner could the courts check whether discrimination had occurred. Otherwise, women "would be deprived of any effective means of enforcing the principle of equal pay".

In December 1997, the EU legislator adopted the directive on the burden of proof,¹¹ bringing into statutory law the rule that was originally created by the Court.

The two Anti-discrimination Directives adopted in 2000¹² consolidate the rules of the previous directives and the previous case law and go beyond them.

They were adopted within a specific political context. On the one hand, they were the result of an important phase in European political integration. The Treaty of Maastricht, which entered into force in 1999, extended the competences of the EU regarding immigration, while giving it powers to adopt legislation against discrimination. Meanwhile, in 1999, a Convention had drafted the Charter of Fundamental Rights of the European Union.¹³ Prohibiting race discrimination in EU law can be seen as the counterweight to closing borders to immigration from third countries.

On the other hand, with the federal elections in 1999, a new-right majority took power in Austria. It was made up of the ÖVP, the Christian-democrats, a party accustomed to being in power, but also the "Freedom Party" of Jörg Haider, a politician known for his philo-nazi and anti-semitic statements.

In this context, when the Anti-discrimination Directives were adopted, they carried a specific function: they were supposed to make a strong statement against racism, xenophobia and right-wing extremism.

Rules in the Service of the "Transformative Function" of the EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along, Review of European Administrative Law, 8 (1) 2015, p.153.

⁷ Now Article 157 of the TFEU.

⁸ Case 43/75, *Defrenne v. Sabena* (1976) ECR, 455. See the analysis made by Evelyn Ellis and Philippa Watson in *EU Anti-Discrimination Law*, OUP, Oxford, 2012, at p.246.

⁹ Case 96/80, *Jenkins v. Kinsgate (Clothing Productions) Ltd* (1981) ECR 911.

¹⁰ Case 108/88 (1989) ECR 3199.

¹¹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14, 20.1.1998, p. 6.

¹² Directive 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC on equal treatment in employment and occupation, quoted above.

¹³ The Charter was solemnly proclaimed by the EU institutions originally in 7 December 2000 and was given full legal effect by the Treaty of Lisbon, which entered into force on 1 December 2009.

The protection that the Directives created should be meaningful, in order to show that EU governments were serious about their commitment to fight discrimination.

For that purpose, while inspiration was drawn from many sources and the Directives included new ideas, they also consolidated concepts taken from previous EU directives and from the case law of the Court on equality. The 2000 Directives, for example, list the different types of prohibited discrimination, which include direct and indirect discrimination. They also include a rule on the sharing of the burden of proof, originally created by the Court in the cases on sex equality and later incorporated into the directive on the burden of proof.¹⁴

When the anti-discrimination directives were adopted in 2000, they were the best car in town. Of all of the EU law instruments against discrimination, they contained the most detailed and most effective protections.

It was only logical that in 2002 the legislator amended the directive on sex equality in employment¹⁵ including therein several rules used in the 2000 Anti-discrimination Directives – including provisions on access to courts by associations and the establishment of equality bodies. Protection against sex discrimination should not be weaker than that of any other ground.¹⁶

Along the same line, in 2014 some aspects of the protections provided by the 2000 Directives, such as the right of associations to participate in court procedures, as well as the existence of equality bodies, were extended to free movement of workers.¹⁷

The origins of the rule on access to justice by collective actors

The rule in the Anti-discrimination Directives on access to courts by collective actors was not the result of the case law of the Court, but of lobbying from civil society. In this sense, although the rule participates in the positive dynamic of increased protection against discrimination, it introduces an external element, and therefore constitutes an exception to the usual pattern of bilateral dialogue, in which the EU legislator and the EU Court of Justice influence each other, and ultimately determine the trajectory of EU law.

The rule of the Directives stems from a proposal presented in 1993 by a network of NGOs and independent experts (the “Starting Line Group”) for a Council Directive concerning the Elimination of Racial Discrimination, developed later in 1998 in a proposal that also concerned religious discrimination.¹⁸ The proposal received the support of hundreds of NGOs and of the European Parliament.¹⁹

Article 4 of the Starting Line proposal suggested that:

¹⁴ See above at footnote 12.

¹⁵ Directive 2002/73 of 23 September 2002 amending Council Directive 76/207/EEC 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, L 269, of 5.10.2002, p. 15. Later, in July 2006, Directive 76/207 was repealed and replaced by Directive 2006/54.

¹⁶ Recital 6 of Directive 2002/73 refers to the fact that, while Directive 76/207 did not define direct and indirect discrimination, Directives 2000/43 and 2000/78 did so and it was “appropriate to insert definitions consistent with these Directives in respect of sex”.

¹⁷ Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014, p. 8.

¹⁸ See Conor A Gearty, *The Internal and External ‘Other’ in the Union Legal Order : Racism, Religious Intolerance and Xenophobia in Europe*, in “The EU and Human Rights”, Philip Aston (ed.) OUP, Oxford, 1999, at p. 350.

¹⁹ In a 1993 resolution (OJ C 342, of 20.12.93, p.19) and again in a 1994 resolution (OJ C 323, of 20.11.94, p. 154, para. 9) the Parliament asked the Commission to use the proposal as a basis to prepare a draft directive to be presented to the Council.

organisations concerned with the defence of human rights and in particular with the combating of racism and xenophobia shall be able to institute or support legal actions in civil, administrative and criminal courts enforcing the rights granted under this Directive and provisions in national law granting protection against racial and religious discrimination in areas (covered by the Directive).²⁰

The final provision²¹ adopted by the Council was a bit less ambitious.²² It stated:

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 complainants, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.²³

Different from what the Starting Line proposed, the Directives provide that it is for the Member States to decide whether associations have a legitimate interest in the enforcement of the Directive. Moreover, associations must obtain the approval of a victim of discrimination to act in court.

Nevertheless, this provision was a novelty in EU law at the time of its adoption in 2000. It constituted undisputable progress in the protection against discrimination. But did it make a difference? Did it have any meaningful impact on national legislation?

The impact on national legislation – the added value

This section examines the impact on national legislation of the Equality Directives' provisions on access to courts by private collective actors, such as associations or foundations concerned with equality. Did the Directives make any difference in this respect? Did national laws have to be changed to comply with the Directive? How much did they change?

As a preliminary point, it should be noted that the European Commission scrutinized the legislation of all Member States to ensure that it complied with the directives in general, including the rights of associations to have access to courts.

A specific situation relates to position of trade unions. Before 2000, when Member States already prohibited discrimination (most prohibited sex discrimination, for example), normally they allowed trade unions to go to court to defend the interests of their members. Therefore, when examining below the impact that the Directives had on national legislation, I will concentrate on the rights of associations other than trade unions, such as human rights associations, or associations of people united by their characteristics – such as ethnic origin, disability or sex.

²⁰ Article 4(4) d) of the “Starting Line proposal”. For a comparison of the text of this proposal and the Commission’s proposal, see:

http://www.migpolgroup.com/wpkn/wpcontent/uploads/2016/10/98.CombatingRacismIntheEuropeanUnionwithLegalMeans-AComparisonoftheStartingLineandtheEUCommissionsproposalforaRaceDirective_2000.pdf

²¹ Article 7(2) of Directive 2000/43 and article 9(2) of Directive 2000/78. They are identical or very similar to those adopted later in article 8(2) of Directive 2004/113 on sex equality in access to goods and services, article 17(2) of Directive 2006/54 on sex equality in employment and occupation, and later article 3(2) of Directive 2014/54 on exercise of rights in free movement of workers.

²² The text of Article 7(2) of the Commission proposal, COM (1999) 565, was simpler: “Member States shall ensure that associations, organisations or other legal entities may pursue, on behalf of the complainant with his or her approval, any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.”

²³ See also recital 19 of the Directive 2000/43 : “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.”

The situation varied considerably across the European Union.²⁴ For the sake of simplicity, in this paper Member States are divided into three groups. In the first group we can include those where the Directives had a considerable impact on national law. In the second group of Member States, the Directives had some impact on national law, but they did not make a radical change to it. In the third group of countries, the Directives did not make much of a difference in this specific aspect.

Below, I examine the situation in fourteen Member States.²⁵ Their selection was made taking into account those with the largest populations and that could best represent the variety of legal traditions and socio-economic realities within the European Union. When explaining their legislation, I will refer to the other papers in this series that examine in detail national legislation and case law regarding access to courts in individual Member States.

The reader may think that, in some cases, the classification of some Member States in a specific group is not clear-cut. Indeed, this is not an exact science and this is only my personal opinion. In any event, the description below contains an explanation of the reasons for my classification.

Considerable impact

In some Member States there were no, or almost no, rules on access of associations to courts in discrimination cases. Therefore the transposition of the Directives had a very significant impact on national legislation. Some of these countries went also beyond the minimum necessary to transpose the Directives.

In **Belgium**, as explained in the paper of Elise Muir & Sarah Kolf, the rights of associations to go to court in discrimination cases pre-dated the adoption of the 2000 Anti-discrimination Directives. The 1981 law against racism²⁶ and later the 1993 law creating the Belgian racial equality body²⁷ (the “Centre for the equality of chances and combat against racism”) provided the right for interested associations and trade unions to go to courts in discrimination cases, but to criminal courts only. The Centre could also bring cases to criminal courts, going beyond what Directive 2000/43 would require much later in 2000.

In 2003 a new law²⁸ transposing Directives 2000/43 and Directive 2000/78 made litigation before civil courts accessible both to the Centre and to associations. It also enlarged the competence of the Centre to include the grounds of discrimination covered by Directive 2000/78, which was not required by the latter.

In **Bulgaria**, the Protection Against Discrimination Act provides for the rights of interested associations to act on behalf of victims of discrimination in court proceedings when the victims request them to do so. Associations can also act in support of victims by joining pending proceedings as an interested party.²⁹ These rights did not exist before the adoption of the Act in 2003.

²⁴ For a brief description of the current situation see *A comparative analysis of non-discrimination law in Europe 2016*, by Isabelle Chopin and Catherine Germaine, at p.87: <http://www.equalitylaw.eu/downloads/3987-a-comparative-analyses-of-non-discrimination-law-in-europe-2016-pdf-1-2-mb>

²⁵ Belgium, Bulgaria, Czech Republic, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Spain, The Netherlands and the United Kingdom.

²⁶ Law of 30 July 1981 on the repression of acts inspired by racism or xenophobia.

²⁷ Law of 15 July 1993 creating the Centre for the equality of chances and combat against racism. Today the name of the Centre is *Unia*.

²⁸ Law of 30 July 1981 on the repression of acts inspired by racism or xenophobia.

²⁹ Article 11.

In the **Czech Republic**, associations can now act on behalf and in support of claimants of discrimination in court proceedings. This was possible after the adoption of the related provisions of the Anti-Discrimination Act of 2009.³⁰

In **Greece**, before the 2000 Anti-discrimination Directives, the law did not ensure that associations or other interested organizations could engage in legal proceedings in individual cases of discrimination. This was provided by the Law 3304/2005, transposing the two Anti-discrimination Directives, which established the right of associations to support a complainant, on condition that, (a) they have a legitimate interest in ensuring the application of the principle of equality and (b) the victim gives her or his consent. This right was a novelty in Greek law, but resulted in a rather minimalistic transposition of the Directives.

In **Italy**, thanks to the Directives, associations now have the right to access courts, both on behalf and in support of victims of discrimination. This is the most protective interpretation of the provisions of the Directives, because, strictly speaking, they only require that associations be able to “engage, either on behalf or in support of the complainants, with his or her approval” in enforcement procedures. Moreover, in Italy associations may also act in court regarding discrimination affecting an undetermined group of people. Such extensive rights were provided by the Italian legislation transposing the concerned directives.³¹ The transposition of Directive 2000/78 was initially incomplete and the Commission had to initiate infringement procedures against Italy on this point, which ended with an amendment to the initial legislation.

On the other hand, Italy seems to be the only EU Member State where associations fighting race and ethnic discrimination face more barriers to access courts than associations working on other grounds. Special conditions apply to them: to have access to courts they have to be included on a special list approved by the government, which implies, among several other conditions, that they must have been established for one year, have a democratic structure, be non-profits and have the promotion of equality as their main aim. Similar restrictions apply to disability-concerned associations,³² but not to associations concerned with discrimination based on sex, age, or sexual orientation.

As Virginia Passalacqua notes in her paper in this series, at this moment the main anti-discrimination provisions in Italian law are the result of the transposition of EU Equality Directives – with the exception of Immigration Law of 1998, which prohibits discrimination based on nationality, race, religion and ethnic origin, which is still in force. The problem is that the rules on access to courts are provided by each specific piece of anti-discrimination legislation. This fragmentation of rules of procedure creates uncertainty. For example: the *locus standi* of associations in cases of race discrimination does not apply to cases of nationality discrimination, which is sometimes very much related to race or ethnic discrimination. Therefore, in some cases, associations that brought to court cases of nationality discrimination have had their *locus standi* challenged.

In **Poland**, associations now have the right to engage in court proceedings, both on behalf of and in support of victims of discrimination. This was provided by an amendment³³ to the Code of Civil Procedure adopted in July 2004, soon after the EU accession. To benefit from these rights, associations must aim at the promotion of equality and protection from discrimination and have to obtain the written

³⁰ Article 71(2) of the Protection Against Discrimination Act.

³¹ See Article 5 of Decree 215/2003 transposing Directive 2000/43; Article 5 of Decree 216/2003 (as amended by Article 8-septies of Law 101 of 6/6/2008) transposing Directive 2000/78 and Article 38 of Decree 198/2006 regarding sex discrimination.

³² Article 4 of the Disability Act 67/2006.

³³ It entered into force in February 2005. See Articles 8, 61 and 462.

consent of the claimant. The Code applies in cases regarding consumer protection, labour law and social security. Similar rights exist in administrative proceedings.³⁴

In **Portugal**, Article 52(3)³⁵ of the Constitution and Law 83/95 created a right of *actio popularis*, but it applies only to specific areas, such as infringements against public health, the environment, cultural heritage or consumers' rights. Law 134/1999, which predates the 2000 Directives, prohibited discrimination based on race, colour, nationality or ethnic origin. However, it did not provide for the right of associations to go to court. This was partially remedied by Law 18/2004, which transposed partially Directive 2000/43. Its Article 5 provided for the right of interested associations to access courts on behalf or support of a claimant, with his/her approval. However, this law did not solve completely the problem, since it did not apply to employment. Associations could not access courts in labour proceedings (either concerning private or public employment). In judicial proceedings related to private employment, only trade unions could intervene and only in relation to their members.

Therefore, in 2007 the EU Commission initiated infringement proceedings on this point against Portugal, which eventually adopted a new law in 2011 which settled the issue. Article 8 of Law 3/2011 now allows for interested associations to intervene on behalf of a victim of discrimination, with his/her approval in related proceedings (without limitation). This applies both to the grounds of the 2000 Directives and to sex discrimination.

Finally, in **Romania**, Article 28 of the Anti-discrimination Law³⁶ of 2000 created legal standing for NGOs with an interest in combating discrimination. They can either appear in court as parties in cases involving discrimination within their field of activity and which prejudice a community or a group of persons, or, in the alternative, in cases involving discrimination of one person, on condition that the latter gives the NGO authorisation to do so. In practice they can either assist victims of discrimination, or act on their behalf in court.

As Lilla Farkas points out in her paper on Bulgaria and Romania, during the transposition of the Directives, both countries levelled up procedural requirements. Domestic procedural rules go now beyond the requirements of the EU Equality Directives. EU law facilitated access to courts and to equality bodies on grounds beyond racial or ethnic origin. As she explains, these improvements explain in part the origin of several preliminary rulings before the EU Court of Justice originating from these two countries. They arose out of a mix of collective enforcement and enforcement involving the national equality body.

A certain, but not radical impact

For an important group of Member States the Directives did not mean completely radical change. Typically, they already provided some rights for associations and did not strengthen these rights considerably. Nevertheless, in several of these Member States, the rights of associations were explicitly included in the equality legislation, thereby establishing this right in a clearer manner than before.

In **France**, Article 31 of the *Nouveau Code de Procédure Civile*, a provision originally from 1975, already recognised the general standing of any legal person, such as an NGO, who had a legitimate interest in a civil procedure. However, the transposition of the Equality Directives regulated this right in a more detailed manner. For example, Directives 2000/43 and 2000/78 were initially transposed by the Law no. 1066-2001 of 16 November 2001, which provided that trade unions and NGOs existing for more than five years could intervene in court in any action where one worker or a candidate for a job

³⁴ Provided the issue at stake is related to the objectives of the association and there is a public interest in its participation in the proceedings. This last condition is examined by the administrative body concerned, but the decision may be appealed, Polish Code of Administrative Procedure, Article 31(1).

³⁵ Article adopted by the 1989 Revision of the Constitution, although the Constitution itself is from 1976.

³⁶ Governmental Ordinance 137/2000.

alleged to be a victim of discrimination, with their consent (Article L122-45-1 of the Labour Code). This rule applied also to sex discrimination and its basic content is still in force today (Article 1134-7 of the current Labour Code).

In **Germany** associations have a limited right to support victims in court and cannot bring proceedings on their behalf. Article 23 of the AGG,³⁷ the anti-discrimination law of 2006, establishes that interested associations can provide legal advice to a claimant in court hearings, unless procedural law requires that a lawyer represents him or her. In essence, associations can assist victims in first instance proceedings only. Moreover, this limited right is only available to non-profit and permanent associations with at least 75 members, or an association comprised of seven associations. This rule applies to all grounds of the 2000 Directives and to sex discrimination.

Additional rights are provided in Germany for associations concerned with persons with disabilities. The Federal Act on Equal Opportunities for Disabled People of 2002 allows those associations to act on behalf of victims of disability discrimination and permits a sort of *actio popularis*. These associations can act in the public interest without identifying a specific victim. But this Act focuses on accessibility for persons with disabilities in relation to public bodies.

In his paper on Germany, Mathias Möschel argues that the German legal and political communities had mostly hostile reactions to the introduction of the AGG. In his view, this approach influenced the transposition of the Directives, with a restrictive legal framework that limited the use of equality legislation by collective actors. He explains that, with the exception of one association with a strategic litigation approach (the *Büro zur Umsetzung von Gleichbehandlung e.V.*), in general anti-discrimination associations “have not really been active to use that little room granted to them.”

In **Hungary**, it was only with the entry into force of the Equal Treatment Act adopted in 2003 that the rights of associations were fully guaranteed. The Act provides that interested associations may represent victims of discrimination in proceedings to enforce the equality law. In administrative procedures, they are entitled to the rights of the claimant, which means that they can support, but not initiate the proceedings. Associations may also bring claims to courts regarding the situation of a large undefined group of people.³⁸

In **Spain** the Organic Law on Judicial Authority, of 1985 already provided that courts “shall protect rights and legitimate interests, both individual and collective” and for that purpose “legitimacy will be conferred on corporations, associations and groups which are affected or are legally empowered to defend and assist them.” This general right was later explicitly inscribed in laws applicable to associations concerned with equality. Law 62/2003 of 30 December 2003, which transposed both Anti-discrimination Directives, provided in its Article 31 for the right of associations to participate in judicial proceedings on behalf (not in support) of a claimant with his/her authorization. This article applies to race and ethnic origin discrimination only and only to fields other than employment. Along the same lines, Organic Law 3/2007 of 22 March 2007 for the effective equality between women and men, which transposed Directive 2006/54 on sex equality in employment, provides in its Article 12(2) that associations have the right to participate in related judicial and administrative procedures, but the details that govern an association’s rights vary according to the applicable procedural law.

Not a significant impact

In **the Netherlands**, the Civil Code has provided since 1994 that a foundation or association with full legal capacity can bring a claim to court to protect interests that are similar to its statutory objectives.³⁹

³⁷ Law of 25 February 2003 on the fight against discrimination.

³⁸ Articles 18 and 20 of the Equal Treatment Act of 2003.

³⁹ Article 3:305a on “Collective actions”.

They can therefore act of behalf of victims of discrimination, if, for example, they aim to combat discrimination or defend the rights of a group of people, such as persons with disabilities. With the authorization of the victim, they can also support in court victims of discrimination. Lastly, according to Article 12(2)(e) of the General Equal Treatment Act, which dates also from 1994, they can ask the equality body to start investigations to determine whether discrimination took place or is taking place.

Finally, in the **United Kingdom** too the Directives do not seem to have made much of a difference in this regard. On the one hand, there are no restrictions under procedural law for associations to support victims of discrimination, for example, by providing legal advice and financial assistance. However, they cannot engage in proceedings on behalf of those victims. In any event, associations play an important role in access to courts by victims. It has been reported that complainants in the employment tribunal are regularly represented by the equality body, local equality councils, trade unions, complainant aid organisations, citizens advice bureaux and other similar organisations.⁴⁰

Conclusions of the analysis above

Logically, the impact of the Directives on national legislation depended on two factors: what rules existed before and what rules were adopted during the transposition of the Directives.

Some countries already provided for the right of associations to intervene in court and did not feel there was a need to change their legislation. Other countries did not provide for such rights, and had to introduce new provisions. However, some of these latter countries, when they adopted new legislation, decided to go beyond minimum compliance with the Directive. In many cases, they ended up providing more extensive rights for associations than countries that already had some rules in place when the Directives were adopted.

For example, many of the countries that acceded in 2004 or afterwards to the EU now provide that associations have the right to intervene either on behalf or in support of claimants. This means that the associations have the two possibilities. They may choose one or the other. By contrast, for example in the United Kingdom, associations can only support victims of discrimination.

An overall examination of the situation in the Member States analysed above indicates the following.

The impact of EU Law on national legislation seems to have been generally stronger in Southern Member States and in Member States that acceded to the EU in 2004 or afterwards. Concerning the latter, the adoption of anti-discrimination legislation was one of the requirements to accede to the European Union and was subject to the accession negotiations within the “Social Chapter”. Improving the right of associations to access courts did not involve any expense (at least not immediately) or major economic impact, contrary to other requirements during the negotiations. Often, the new legislation was seen also as part of a more general progressive trend in the protection of human rights.⁴¹ Several among these “new” or Southern countries ended up having rules that provided associations with broader rights to access courts than several older or Northern Member States.

My analysis above, somehow confirmed by the discussions in the workshop in the E.U.I. in February 2017, indicates that the more remote the Member State was from Brussels, the more the chances were that the transposition of the Directives had a greater impact in their law.

In this context, Belgium is a relative atypical case. Here the transposition of the Directives created a clearly positive dynamic and finished by having an important impact on national legislation. The new

⁴⁰ Barbara Cohen, 2002 report on the Transposition of Directive 2000/43/EC, European Group of non-governmental experts in the field of combating racial and ethnic discrimination.

⁴¹ Note the comments of Lilla Farkas, in her paper on Bulgaria and Romania, referring to the fact that the Romanian law transposing the Directives was drafted with the participation of civil society and having international law on human rights as a source of inspiration.

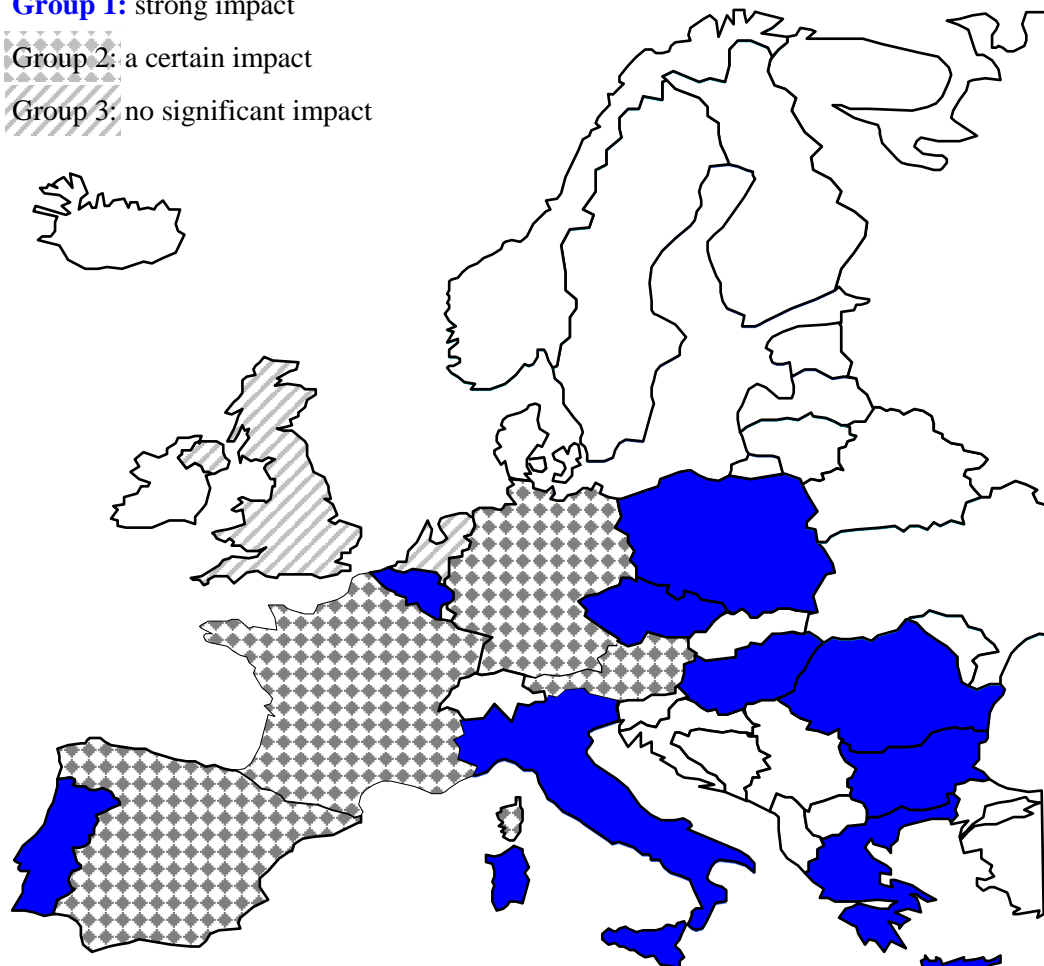
legislation went far beyond what was required by EU law, although the country had already a tradition as a pioneer in granting access to courts for associations.

The map below illustrates the impact on national legislation of the provisions of the EU Equality Directives on access of associations to courts.

Group 1: strong impact

Group 2: a certain impact

Group 3: no significant impact



The bigger picture – burden of proof, equality bodies and beyond

The present issue should be put into context. The impact of the specific EU equality rules on private collective actors cannot be understood in isolation. It must be examined taking into consideration, for example, the impact of other rules of EU Equality Directives, such as those on the sharing of the burden of proof and on the role of equality bodies.

If we consider the changes brought by the EU Equality Directives on national legislation, the impact of the EU rules on the burden of proof was perhaps as important, if not more so, than that of the rules on access of associations to the courts. Almost all Member States had to change their legislation in order

to transpose the rules on the sharing of the burden of proof.⁴² Some studies have been done on this subject,⁴³ but it would certainly be important to deepen the research on this important topic.

Moreover, the impact of the Directives was also very important regarding the obligation to establish an equality body, with competence to assist victims of discrimination.

Article 4(4) e) of the Starting Line proposal⁴⁴ suggested that:

Member States shall ensure that: (...) In each Member State appropriate bodies shall be established to which complaints of any activities which are contrary to the principle of equal treatment (...) may be submitted; such bodies shall be required to investigate all complaints made to them and shall be granted all necessary powers to investigate any complaint. Such bodies shall reach conclusions on all complaints, which conclusions shall be public, save that where appropriate the body may exclude from any public document information enabling identification of a complainant.

Article 13 of Directive 2000/43/EC established a slightly softer version of this provision, but one that is still quite meaningful:

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
 - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
 - conducting independent surveys concerning discrimination,
 - publishing independent reports and making recommendations on any issue relating to such discrimination.

As mentioned above, in 2002 an amendment to Directive 2002/73 also provided for the creation of equality bodies in the field of gender equality.⁴⁵

The importance of equality bodies for the enforcement of equality rights cannot be underestimated. Their efficiency depends on several factors, including the resources available to them and therefore varies considerably among Member States.

However, in several Member States equality bodies have played a crucial role in facilitating access to justice for victims of discrimination. In some cases, they are indeed the main entity in the country bringing cases to courts. Although, strictly speaking, this is not required by the Directives, several equality bodies in the EU have the right to participate themselves in court proceedings, bringing a case to court, or supporting a victim of discrimination.⁴⁶

⁴² See *A comparative analysis of non-discrimination law in Europe 2016*, by Isabelle Chopin and Catherine Germaine, at p.96, mentioned above. For a more in-depth analysis, see also *Reversing the burden of proof: Practical dilemmas at the European and national level*, by Lilla Farkas and Oragh O'Farrell, report of the European Network of Legal Experts in the Non-discrimination field for the European Commission, Brussels, 2014: http://ec.europa.eu/justice/discrimination/files/burden_of_proof_en.pdf

⁴³ *Idem*.

⁴⁴ Quoted above.

⁴⁵ New article 8a of Directive 76/207/EEC, introduced by Directive 2002/73/EC, above quoted.

⁴⁶ According to the report *Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC*, by Margit Ammer et al (eds.), 2010, at least 12 equality bodies in the European Union have the right to bring a case to court, while six (some among the former) have the right to represent victims in court, at p.83.

The importance of the role of equality bodies after the adoption of the Equality Directives is confirmed in several papers in this series.

As explained by Elise Muir & Sarah Kolf, Belgian equality bodies have been at the vanguard of important litigation before the EU Court of Justice. This was clear in cases such as *Feryn*⁴⁷ and *Achbita*⁴⁸ (respectively, brought to court and supported by the race equality body), *Rosselle*⁴⁹ (brought to court by the gender equality body⁵⁰). Meanwhile, the case *Test-Achats*⁵¹ was brought to court by a consumer protection association.

A similar situation took place in Bulgaria and Romania, as explained by Lilla Farkas. Several preliminary ruling procedures before the EU Court of Justice originating from these two countries were the result of a mix of collective enforcement and enforcement involving the national equality body. The well-known case *Chez* (Nikolova),⁵² for example, involved sustained public interest litigation, with the use by NGOs of the procedural tools provided by the transposition of Directive 2000/43/EC for collective enforcement and with the participation of the Bulgarian equality body.

Likewise, as described by Sophie Latraverse, the action of the French equality body⁵³ has been absolutely crucial for overcoming resistance to EU anti-discrimination legislation in France and, together with very active NGOs, for promoting enforcement of discrimination laws. Since its creation in 2005, the body has had a stable and “comprehensive strategy to support plaintiffs, facilitate enforceability, multiply cases, and thereby contribute to the building of a corpus of jurisprudence” of civil and administrative courts, which is important for the enforcement of discrimination laws.

This does not mean that it is enough that equality bodies or interested associations are active and have access to courts for equality laws to be enforced.

Access to courts is of course also determined by other factors beyond the reach of current EU law that result in obstacles to access to justice. These obstacles may include, among others, national court fees, availability of legal aid, and the lack of a strong legal litigation culture in most countries in continental Europe.

More generally, legal and court proceedings are of course only the tip of a big iceberg. There is still certainly a lot to do to change the current situation. Discrimination is a widespread phenomenon in Europe and many victims do not report the instances of discrimination they suffer.

According to the Eurobarometer report on *Discrimination in the EU in 2015*, among the people interviewed, 21% people said that they personally felt discriminated against or harassed in the 12 months preceding the survey. Moreover, they believed that discrimination was widespread on the grounds of ethnic origin (64%), sexual orientation (58%), religion or belief, disability (both 50%), old age (42%), and gender (37%).

⁴⁷ Case C-54/07, *Feryn*, ECLI:EU:C:2008:397.

⁴⁸ Case C-157/15, *Achbita*, ECLI:EU:C:2017:203.

⁴⁹ Case C-65/14, *Charlotte Roselle v INAMI and UNM*, ECLI:EU:C:2015:339.

⁵⁰ The *Institut pour l'égalité des femmes et des hommes*, established in 2002.

⁵¹ Case C-236/09 *Association belge des Consommateurs Test-Achats v Council*, ECLI:EU:C:2011:100.

⁵² Judgment of 16 July 2015, in Case C-83/14, *CHEZ Razpredelenie* (Nikolova), ECLI:EU:C:2013:48. See the note on the case “A good chess opening: Luxembourg's first Roma case consolidates its role as a fundamental rights court” by Álvaro Oliveira and Sarah-Jane King, *European Law Review*, 2016, vol. 41, Issue 6, p. 865.

⁵³ Initially the *HALDE*, Haute Autorité de lutte contre les discriminations et pour l'égalité, later integrated into the *Défenseur des Droits*.

More interestingly, the same survey indicates that if they were the victim of discrimination or harassment, only 6% of the respondents would prefer to report their case to the courts, and only 5% to an NGO or association.⁵⁴

Conclusion

This paper started with an historical note, explaining what I call the virtuous dynamic of EU equality law, through which protection from discrimination is progressively reinforced and extended, step-by-step. The origin of the rules of the EU Equality Directives on the role of private collective actors and their access to courts can be explained in the framework of that virtuous dynamic. However, since those rules resulted from lobbying by civil society, they constitute an exception to the usual bilateral dialogue between the EU legislator and the EU Court of Justice, during which the institutions influence each other, and together influence the direction of EU equality law.

Subsequently, the paper examined the impact of these directives on national legislation. Most Member States had to change their legislation in order to comply with the new Equality Directives. However, the impact was not the same in all Member States, which is confirmed by other papers in this series on individual Member States. This paper identified three groups of Member States: a) those in which the Directives had a significant impact on national law, b) those in which they had a certain but not considerable impact and, c) those in which they did not have a significant impact.

The impact of the Equality Directives on national legislation was generally stronger in Southern Member States and Member States that acceded to the EU in 2004 or afterwards. This was not only due to the fact that before the Directives these countries lagged behind in granting collective actors the right to access to courts. It is also explained by the fact that, when they transposed the Directives, they took advantage of the opportunity to go clearly beyond the strict minimum necessary to comply with the Directives. Several among these “new” or Southern countries ended up having rules providing associations with broader rights to access to courts than several older or Northern Member States.

In other words: my analysis above, confirmed by the discussions in the workshop in the E.U.I. in February 2017, indicates that the more remote the Member State was from Brussels, the greater the chances were that the transposition of the Directives had a greater impact on the national law.

In any event, access to courts by associations must be put into a broader context. In order to examine the impact of the Directives generally on access to courts by victims of discrimination, it is important to consider other (new) rules of EU equality law, such as those on indirect discrimination, equality bodies and on the burden of proof. More generally, access to courts is also determined by factors beyond the reach of current EU law, such as rules on court fees, availability of legal aid at national level, and the (lack of) a legal litigation culture in most countries in continental Europe.

In conclusion, the analysis made in this paper seems to indicate that the provisions of the EU Equality Directives on access of collective actors to justice in discrimination cases had a significant impact on national legislation. Together, these directives constitute one important factor, among many others, in facilitating the practical access to courts for victims of discrimination.

⁵⁴ They would prefer to report their case to the police (35%), an equal opportunities organisation (17%), a lawyer (17%), or a trade union (9%), although, of course, in practice these groups do not work in isolation. For example: it is common for a victim of discrimination who is a trade union member to have recourse to an in-house or outside lawyer. See *Special Eurobarometer 437: Discrimination in the EU in 2015* – which can be found here : https://data.europa.eu/euodp/en/data/dataset/S2077_83_4_437_ENG

Belgian equality bodies reaching out to the CJEU: EU procedural law as a catalyst

*Elise Muir & Sarah Kolf**

Introduction

Belgium stands out in terms of the number and high profile of cases brought by collective actors in the field of anti-discrimination law that have reached the Court of Justice of the European Union (CJEU).¹ In *Feryn*,² *Rosselle*,³ *Test-Achats*⁴ and more recently *Achbita*,⁵ Belgian collective actors - civil society organisations and independent organisations such as equality bodies - have sought to push equality law forward through litigation, reaching beyond domestic courts through the preliminary ruling procedure provided in Article 267 of the Treaty on the Functioning of the European Union (TFEU). These cases not only inform EU substantive law on equal treatment, but also provide food for thought regarding the mechanisms that enhance the effectiveness of a fundamental rights policy designed at a supranational level. What are the key features of the procedures and processes through which collective actors activate the various layers of norms and players involved in the governance of fundamental rights in the EU? Do procedural requirements regarding access to justice imposed by EU law actually facilitate public interest litigation?

An examination of the set of events that led to the rulings identified above reveals that the provisions of EU law on access to courts for collective actors in anti-discrimination cases have had a significant impact on facilitating litigation. EU anti-discrimination legislation has indeed been characterised by the presence of procedural rules on access to courts for a long time.⁶ Since 2000, these rules seek to facilitate

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¹ Empirical research coordinated by Elise Muir and available on request to the author reviewed CJEU cases involving collective actors from 2000, when the relevant rules were first introduced in EU equality law, until 1 March 2016. This research revealed that a number of countries, such as Belgium, stand out regarding the number of cases involving a collective actor that have led to a preliminary ruling by the CJEU.

² CJEU Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008.

³ CJEU Case C-65/14, *Charlotte Rosselle v. Institut national d'assurance maladie-invalidité and Union nationale des mutualités libres*, 25 May 2015.

⁴ CJEU Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministres*, 1 March 2011.

⁵ CJEU Case C-157/15, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*, 14 March 2017.

⁶ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/19, Art.2; see also Council Directive 76/207/EEC 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 [1976] OJ L39/40, Art.6; Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L6/24, Art.6; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L225/40, Art.10; Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood [1986] OJ L359/56, Art.9; see also Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work

litigation by supporting the involvement of a broad range of actors to assist individual victims.⁷ Two provisions common to the relevant EU equality directives play a central role to that effect; they are modelled on Articles 7(2) and 13 of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,⁸ known as the Race Equality Directive. According to Article 7(2), Member States shall ensure that legal entities which have a legitimate interest in ensuring that the provisions of the Directive are complied with may litigate. Importantly, ‘legitimate interest’ is to be defined in accordance with national law and access to justice is only required for legal entities acting on behalf or in support of victims and with their approval; there is no requirement to create a right to bring self-standing collective legal actions. Article 13 of the Race Equality Directive refers to the Member States’ duties to designate a body or bodies for the promotion of equal treatment. The competences of these bodies shall include the provision of independent assistance to victims of discrimination in pursuing their complaints; there is no requirement that the equality bodies be granted access to justice. It shall be noted that Article 13 is reproduced in similar terms (for our purposes) in all equality directives except for Directive 2000/78 (also known as the ‘Employment Equality Directive’), which covers discriminations on grounds of sexual orientation, disability, age and religion/belief in employment.⁹ As will be discussed below, these rules have been influential in involving collective actors in the litigation of discrimination cases in Belgium.

Yet, these EU law requirements are not the only factors that explain this form of public interest litigation. Access to courts in the cases examined below did not solely derive from EU requirements. Instead, EU law acted as a catalyst in a legal landscape that was already broadly favourable to public interest litigation. The collective entities used existing expertise to make the most of the opportunities created by EU law. Before investigating the variety of elements that have made it possible for collective entities to benefit from EU equality law in *Feryn*, *Achbita* and *Rosselle* (sections 3 & 4), we point out some key features of the Belgian legal context from which the cases have emerged. These features are also well illustrated by the *Test-Achats* case (section 2).

The emphasis placed on collective actors as a result of EU law requirements, transposed into a country with a legal culture already familiar with, and accepting of, the concept of collective redress, has been a catalyst for a particularly fruitful use of the preliminary ruling procedure (section 5). In the three cases brought by collective actors owing to procedures facilitated by EU law, institutionalised and specialised actors in the form of equality bodies have had a decisive influence on the use of the preliminary reference procedure and the nature of the legal questions that reached the CJEU. As emerges from this case study, the involvement of collective actors in litigation usefully complements classic forms of institutional enforcement¹⁰ and can be significantly influenced by EU legislation promoting the role of collective actors if implemented in a favourable legal culture.

of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348/1, Art.12.

⁷ Such provisions were introduced in EU equality directives as from 2000 (the so-called Art.19 TFEU Directives with Directive 2000/43 covering race, and Directive 2000/78 covering sexual orientation, disability, age and religion/belief) and then included in other Directives in 2002 (Directive 2002/73 amending the sex equality in employment Directive (76/207), 2004 (Directive 2004/113 on sex equality in access to goods and services), 2006 (Directive 2006/54 Employment Equality Directive recasting EU sex equality law) and 2010 (Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity).

⁸ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

¹⁰ See further: M. Dawson & E. Muir, ‘Individual, institutional and collective vigilance in protecting fundamental rights in the EU: Lessons from the *Roma*’, 48 (3) *Common Market Law Review* (2011), p. 751-775.

A Belgian legal culture favourable to granting collective entities access to courts

Belgium has a tradition of fairly broad access to courts for collective entities. Two examples related to equality law make this clear. The first one relates to access to criminal courts; the other to the rules on standing before the Belgian constitutional court.

Collective entities have had access to court in criminal cases involving discrimination well before the adoption and implementation of the EU equality directives. The first Belgian equality body, the “Centre pour l'égalité des chances et la lutte contre le racisme” or “Centrum voor gelijkheid van kansen en voor racismebestrijding”¹¹ (the ‘Centre’ or CGKR) existed before EU law required the creation of equality bodies.¹² It initially specialized in racism and xenophobia and had the power to bring cases before criminal courts on such matters in accordance with a law from 1981.¹³ Similarly, legal entities other than the Centre (associations having a special interest and trade unions) were entitled to appear in criminal courts.¹⁴ In many ways, the CGKR could in fact have served as a model for EU equality bodies. Along with the British Commission for Racial Equality, the CGKR was one of the first bodies created to combat racism in Europe.¹⁵ In 2003, a new law amended the 1993 law as part of an effort to implement the Race Equality Directive, which made litigation before civil courts in disputes relating to employment, as exemplified in *Feryn* and *Achbita*, possible.¹⁶ After another important reform in 2013, which will be addressed later, the Centre was renamed “Unia” in 2016¹⁷. For the purpose of this paper, any reference to the “Centre” or “CGKR” should be understood to apply also to its successor Unia, unless otherwise stated.

Another illustration is Article 142 of the Belgian Constitution, pursuant to which every person demonstrating a legitimate interest can refer a matter to the Constitutional Court. This provision has been complemented by a law from 1989 which specifies in its Article 2(2) that an action for annulment can be brought by every physical or legal person demonstrating an interest.¹⁸ Thus, legal persons have been granted access to the Constitutional Court for a long time, and it is not uncommon for collective entities such as NGOs and trade unions to take part in actions before the Court.¹⁹ The Constitutional Court has taken a relatively flexible approach to the requirement that entities must demonstrate an interest in the lawsuit to bring a case before it.²⁰

Among EU equality lawyers, a well-known example of reliance on Article 142 of the Belgian Constitution is the *Test-Achats* case.²¹ The “Association Belge des Consommateurs Test-Achat” (“*Test-Achats*”), a Belgian consumers organisation, brought an action before the Constitutional Court to annul the Law of 21 of December 2007 modifying, with regard to the treatment of gender in insurance matters,

¹¹ The Centre for equality of chances and combat against discrimination.

¹² Law of 1993 - Loi créant un Centre pour l'égalité des chances et la lutte contre le racisme (Moniteur Belge 19.02.1993).

¹³ See art.3 (5) Law of 1993.

¹⁴ Law of 1993, art.7.

¹⁵ See overview on the Centre's website, available at: [http://www.myria.be/files/historique_centre_pour_roadshow_\(1\).pdf](http://www.myria.be/files/historique_centre_pour_roadshow_(1).pdf).

¹⁶ See abstracts from this Directive in the Introduction.

¹⁷ Unia, « Le Centre interfédéral pour l'égalité des chances devient Unia » (19 February 2016), available at: <http://www.unia.be/fr/articles/le-centre-interfederal-pour-legalite-des-chances-devient-unia#Nouveau-nom-nouvelle-visibilite>.

¹⁸ Loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle.

¹⁹ For instance, a case brought by 10 associations before the Belgian Constitutional Court led to a reference for a preliminary ruling to the CJEU: CJEU Case C-543/14, *Ordre des barreaux francophones et germanophone and Others v. Conseil des ministres*, 28 July 2016. These human rights associations (inter alia) expressly suggested to the Constitutional Court to ask questions regarding the conformity of some aspects of the VAT directive (regarding services provided by lawyers) with the right to an effective remedy and the principle of equality of arms.

²⁰ E.g. Constitutional Court, case n°133/2013, 10 October 2013.

²¹ CJEU, *Test-Achats*.

the Law of 10 May 2007 against discrimination between women and men. The relevant provision of EU law was Directive 2004/113 on sex equality on access to goods and services.²² According to *Test-Achats*, the Belgian provision implementing the derogation provided for in Article 5 §2 of that directive was contrary to the principle of equal treatment between men and women. This derogation entitled Member States to authorize risk evaluations based partly on gender to have an impact on premiums and benefits. The CJEU invalidated Article 5 §2 of Directive 2004/113; the derogation was deemed to be incompatible with the principle of equal treatment. Indeed, women and men were considered to be in a comparable situation with respect to premiums and benefits, so that a difference in treatment was contrary to the aim of the directive and to Articles 21 and 23 of the Charter of Fundamental Rights.²³

Both the historical background of the CGKR and its right to litigate criminal cases and the domestic constitutional background of *Test-Achats* show that the Belgian legal order has for several decades allowed collective actors to litigate. This is not to say however that collective actors are always granted access to Belgian courts. The Constitutional Court itself explained that it opts for a relatively flexible approach to rules on standing; in contrast ordinary civil courts apply stricter standards.²⁴ Yet, as we shall see below, EU equality law itself has contributed to opening access to justice in civil law cases. It may finally be recalled that Belgian courts are familiar users of the preliminary ruling procedure,²⁵ as illustrated by the reference from the Constitutional Court itself in *Test-Achats*. This element contributes to explaining the high number and high profile nature of the cases involving Belgian equality bodies that have been brought before the CJEU.

Equality bodies at the forefront of equality litigation reaching the CJEU

An overview of the cases brought before the CJEU since the entry into force of the requirements for Member States to provide procedural avenues for collective entities to support litigation²⁶ allows us to single out the following three Belgian cases. All three cases involved collective entities whose access to courts were influenced by EU equality law. The first two cases introduced, *Feryn*²⁷ and *Achbita*²⁸, related to the Race Equality Directive and the Employment Equality Directive, respectively, and involved the Centre for equality of chances and the combat against racism (CGKR). Although Belgian equality bodies do not provide for dispute resolution mechanisms, they may mediate and litigate, as occurred in both of the cases under examination. Yet, the facts of each of the cases differed and so did the type of involvement of the CGKR.

Feryn was an undertaking specialized in the sale and installation of up-and-over and sectional doors. As an employer, *Feryn* applied a recruitment policy that the CGKR believed was discriminatory. The CGKR itself brought legal actions before a labour tribunal against the public statements of the director of *Feryn* to the effect that his undertaking was looking to recruit fitters, but that it could not employ ‘immigrants’ because its customers were reluctant to give them access to their private residences to perform work. The case was referred to the CJEU by the appeal court. The CJEU ruled that such declarations constituted direct discrimination pursuant to the Race Equality Directive.

²² 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 [2004] OJ L373/37.

²³ CJEU, *Test-Achats*, para. 39.

²⁴ Constitutional Court, case n°133/2013, 10 October 2013.

²⁵ Although the total number of preliminary references is lower than Germany, Italy, France and the Netherlands if we take the total number of references introduced since the beginning ;see: CJEU, Annual Report 2016 Judicial activity, p. 108.

²⁶ See *supra* footnote 3.

²⁷ CJEU, *Feryn*.

²⁸ CJEU, *Achbita*.

The background of the *Achbita* case - and the role of the CGKR - was slightly different. In 2003, Samira Achbita was a receptionist for G4S Secure Solutions NV, an undertaking providing security and guarding services as well as reception services. Employees were not allowed to wear religious, political or philosophical symbols while working. This rule was unwritten until 2006. It was then introduced in the code of conduct for employees after the applicant indicated she intended to wear an Islamic headscarf during working hours. G4S explained that this would breach the undertaking's neutrality image. Because she refused to comply, Samira Achbita was dismissed. She introduced a claim in damages before the first instance labour court. The CGKR then joined the proceeding to support Samira Achbita after she had initiated the claim. The first instance court and the appeal courts rejected the claim. The applicant went to the Court of Cassation, who referred the case to the CJEU. This was the very first CJEU case involving a claim of religious discrimination.²⁹ The Court stated that a prohibition on wearing an Islamic scarf which arises from an internal rule formulated in neutral terms did not constitute direct discrimination. It might however constitute indirect discrimination within the meaning of the Employment Equality Directive unless it is objectively justified by a legitimate aim, such as a policy of neutrality pursued by the employer in the exercise of its fundamental right to conduct a business.

The third case involves another equal treatment body, the "Institut pour l'égalité des femmes et des hommes" or "Instituut voor de Gelijkheid van Vrouwen and Mannen" (the 'Institute' or IEFH)³⁰. The Institute was established in 2002 to deal with equal treatment between women and men. The co-existence of the Institute, working on gender, and the Centre, working on racism at that time³¹, was intended to enhance the visibility of their respective mandates.³² Like the CGKR, the IEFH has the right to litigate in employment cases. Ms Rosselle began working as a teacher in Ternat, and was appointed as an established public servant by the Flemish Community in September 2008. Effective 1 September 2009, she obtained non-active status for personal reasons in order to teach in language immersion classes in the French Community as a salaried employee. Ms Rosselle continued to work as a salaried employee until her maternity leave started on 11 January 2010. She gave birth on 2 February 2010. On 23 February 2010, the mutual sickness fund to which Ms Rosselle was affiliated rejected her request for maternity allowance on the grounds that she had changed her status on 1 September 2009 by becoming a salaried employee after having been an established public servant. Under Belgian law, in order to be eligible to receive a maternity allowance, a minimum contribution period of six months had to be completed, a condition which Ms Rosselle had not fulfilled as a salaried employee. On the advice of the IEFH, Ms Rosselle brought an action against that decision before the Tribunal du Travail de Nivelles (Labour Court, Nivelles), invoking *inter alia* Directive 92/85 on pregnancy and maternity. The IEFH intervened to support the applicant from the very beginning (as explained further below).

In *Rosselle*, the Belgian tribunal asked the CJEU whether the relevant domestic provisions infringed Directive 92/85 on pregnancy and maternity and Directive 2006/54 on equal treatment between men and women in employment³³ because they failed to provide an exemption from the minimum contribution period for a public servant assigned non-active status for personal reasons who was on maternity leave, whereas such an exemption was provided for a public servant who had resigned or been dismissed. The Court answered affirmatively with respect to Directive 92/85, but considered that it was not necessary to rule on Directive 2006/54.³⁴ The applicant (and thus the Institute) won the case and the case stopped

²⁹ Ibid.

³⁰ The Institute for the equality of women and men.

³¹ This was before the competences of the CGKR were broadened (see section 4). As a result of the political compromise from 2002 to maintain two separate entities, the IEFH remains self-standing today.

³² N. Ouali & I. Carles, 'L'usage des lois visant à lutter contre les discriminations raciales en Belgique : une perspective de genre', available at: <http://www.ulb.ac.be/is/gem/RapportR&G.pdf>, p. 20.

³³ Directive 2006/54/EC 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 (recast) [2006] OJ L204/23.

³⁴ CJEU, *Rosselle*, para. 50.

immediately after the CJEU ruling. The defendant complied as soon as the Court ruled, so there was no need to continue the litigation at the domestic level.

It is remarkable that in all three settings identified above, litigation was made possible almost exclusively owing to the involvement of the relevant equality bodies. In *Feryn*, the CGKR acted as a self-standing entity in a situation characterised by the absence of identified victims. The *Feryn* case was therefore entirely driven by the equality body, which was the only complainant. It has been pointed out that such a case could not have been brought by an average citizen; it was genuinely complex and required substantial financial resources.³⁵

In *Rosselle*, the IEFH took over the defence of the claimant from the very beginning; and in *Achbita*, the CGKR joined the proceedings before domestic courts after they had started in order to support the claimant. In both cases, the intervention of the CGKR and the IEFH were crucial. Neither victim would have had sufficient financial means to afford a lawyer. Ms Rosselle was represented by IEFH's lawyer during the entire proceedings. Moreover, the IEFH took the initiative to introduce the judicial action at the very beginning. Mrs *Achbita* was in a similar situation. She did not have the necessary financial resources to take part in the proceeding before the CJEU and did not submit observations herself, but she allowed the Centre to intervene in the proceedings and to do so.³⁶ The rules of procedure before the Court allow collective actors to take part in proceedings as any other party; 'parties' to the dispute are determined with reference to domestic law, as well as the rules of representation and attendance.³⁷ Not only did collective actors thereby play a crucial role in these legal disputes, but their involvement was actually facilitated by EU law, as we shall now see.

EU law on access to courts for collective actors: a catalyst in the Belgian context

The procedural requirement enshrined in EU anti-discrimination directives played an undeniable role in allowing the public interest litigation under examination to unfold before the CJEU. Nevertheless, the interplay between Belgian and EU procedural law in this context has been both complex and nuanced.

The collective entity involved in the *Feryn* and *Achbita* cases, the CGKR, existed prior to the adoption and implementation of EU rules, but could only go to criminal courts. The equality body was reformed in 2003 as part of an effort to integrate the Race Equality Directive into national law.³⁸ EU equality law, in so far as it tackles discrimination through civil law channels, fed into to a process of change that had two related effects. Firstly, it led to broadening the competences of the CGKR to cover grounds other than racism and xenophobia, such as discrimination on grounds of race - which is legally distinct from racism³⁹- religion, belief, age or disability. This broadening of the competences of the Centre was implemented without affecting those of the IEFH.⁴⁰ Secondly, the reform gave the Centre access to

³⁵ Interview with I. Aendenboom, lawyer at Unia.

³⁶ *Supra*.

³⁷ Art.23 of the Statute of the Court of Justice; Art.104 II of the Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, in force until 2012; Art.96 of the Rules of Procedure of the Court of Justice of 25 September 2012.

³⁸ See section 2 above.

³⁹ See also other grounds covered in the Employment Equality Directive and beyond. Art.23 Law of 2003 - Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme (Moniteur Belge, 17.03.2003, Err. Moniteur Belge, 13.05.2003).

⁴⁰ In practice, this has led to a need for cooperation between these bodies, especially when it comes to cross-grounds discriminations: in its annual activity report for 2006, the Institute pointed out the need to formalize this collaboration; however, no formalization took place and cooperation regarding complaints addressed by victims still occurs on an informal basis.

forms of litigation and related procedures⁴¹ beyond the narrow realm of criminal law. The Centre was empowered to litigate in employment cases, and exercised this right in *Feryn* and *Achbita*.

The involvement of the IEFH in the *Rosselle* case resulted from a similar set of reforms. The case involved old areas of EU substantive law - sex equality in employment has been regulated by EU law since the Treaty of Rome and maternity leave since the early 1990s – but the rules on access to justice⁴² were introduced in 2002 by Directive 2002/73, which modernized Directive 76/207 on equal treatment in employment between men and women and introduced the specific procedural rules quoted above in this field.⁴³ The Belgian Institute specialised in equal treatment between women and men was established by a law from 2002, postdating by a few months the adoption of Directive 2002/73. The 2002 Belgian law gave the Institute access to justice.⁴⁴ This 2002 law was further modified in 2007⁴⁵ with procedural elements including Article 34 on the ability for the specialized body to take legal action. This is the article that was used in *Rosselle*.⁴⁶ The very existence of the IEFH, and its ability to litigate, are therefore simultaneous to reforms triggered by EU law.

The involvement of the CGKR and the IEFH in these cases is thus closely intertwined with processes driven by EU equality law. However, in both instances the domestic rules on access to courts go beyond the requirements of EU law.⁴⁷ The IEFH and the CGKR have standing to bring claims in court although such standing is not required as such by EU law. Instead, EU law acted here as a catalyst: EU requirements enhanced the involvement of collective actors in litigation in a legal culture already favourable to involving collective actors in litigation. The EU's procedural requirements provided an impetus to boost the potential of new rules beyond EU law minimum standards.

Such a catalysing function has been endorsed by the Belgian Constitutional Court. It has relied on the rules of procedure contained in the EU equality directives to give legitimacy to Belgian rules on standing for collective actors, some of which pre-dated or went beyond the EU law requirements. In 2004, the 2003 law on discrimination and racism was partly annulled by the Constitutional Court.⁴⁸ In the context

⁴¹ Art.25 et seq. as well as art.31 of the Law of 2003.

⁴² See section 1.

⁴³ By way of reminder: Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC 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 (Text with EEA relevance) [2000] OJ L269/15 reformed EU sex equality law and in particular the employment equality Directive (76/207) to align it with the Art.19 TFEU Directives. Art.1 (6) and (7) introduce in sex equality law support for litigation by collective actors and the creation of a specialized body.

⁴⁴ Loi du 16 décembre 2002 portant création de l'Institut pour l'égalité des femmes et des hommes (Moniteur Belge, 31.12.2002) - Modifiée par l'article 2 de la loi du 27 février 2003, (Moniteur Belge, 24.03.2003), par la loi du 10 mai 2007 (Moniteur Belge, 30.05.2007), art.4 (6) and/or 4 (5). (Note that other entities with a special interest such as trade unions (no general NGOs or fundamental right NGOs, only organisations representing employees) also had standing from at least 1999 in matters of equal treatment between women and men; this was then broadened. See Art. 20 of the Law of 7 May 1999 - Loi sur l'égalité de traitement entre hommes et femmes en ce qui concerne les conditions de travail, l'accès à l'emploi et aux possibilités de promotion, l'accès à une profession indépendante et les régimes complémentaires de sécurité sociale (Moniteur Belge 19.06.1999).

⁴⁵ Law of 10 May 2007 ("gender" law) on sex equality. This law transposed the Employment Equality Directive 2006/54 (although with reference to all its predecessors such as the 2002 Directive instead).

⁴⁶ Note that Art.35 further gives access to justice to associations for the purposes of the Directive. Also note the Decree of the Walloon Government of 6 November 2008 transposing Directive 2006/54/EC into French Community law. This Decree gives both the Institute (IEFH) and the Centre (see *Feryn*) access to justice for the purposes of the 2006 Directive (arts. 31-32):

⁴⁷ See *supra* section 1, the equality directives do not require legal standing of specialised bodies.

⁴⁸ Constitutional Court, case n°157/2004, 6 October 2004. The law has been partly annulled because of its restrictive scope of application. Initially, the list of prohibited grounds of discriminations did not include the grounds of language and of political belief.

of these proceedings, the validity of Article 31 of the 2003 Law⁴⁹ that related to access to justice for the CKGR and other entities was called into question. The claimant argued that giving access to justice to specialised organisations was detrimental to the public prosecution of crimes and created a difference of treatment among violations of the law.⁵⁰ Dismissing the argument, the Constitutional Court relied *inter alia* on EU law to back up the Belgian rules pre-dating and/or going beyond EU rules, such as those relating to access to justice for collective entities.⁵¹ The Constitutional Court ruled that the challenged provision was based on an objective criterion, which was the specific nature of the disputes these associations are allowed to bring to courts as evidenced by EU law, and was thus justified even with regards to civil action in criminal proceedings.⁵²

Despite these findings on the influence of EU law on access to courts in Belgium, there is no reference to EU law either in the Law of 2003, which broadens the competences of the CGKR, or in the 2002 law establishing the IEFH.⁵³ It is clear however that these laws respectively transpose parts of the Race Equality Directive and Directive 2002/73 on equal treatment between men and women in employment. The actual added value of EU law in these matters (which is not only substantive but also procedural) has therefore long been hidden.⁵⁴ It has been observed that the influence of EU law on domestic equality law may be blurred by national judges' tendencies to refer only to domestic equal treatment legislation without taking into account or mentioning the directives on which it is based.⁵⁵ This contrasts with the idea mentioned earlier of Belgian judges being familiar with the procedure of preliminary ruling. Such side-lining of EU law may however explain the decision of the CGKR in *Feryn* to specifically rely on newly adopted rules giving effect to EU equality law instead of well-established domestic rules, as will now be illustrated.

Belgian equality bodies as strategic users of the preliminary ruling procedure

The equality bodies that benefited from novel avenues for litigation have made very strategic use of the preliminary ruling procedure and arguments based on EU law. The processes that led to the CJEU rulings in all three cases powerfully illustrate this point.

In the *Feryn* case, the Centre had two sets of legal arguments available to it; one relying on domestic law and the other on EU law.⁵⁶ The first option related to domestic criminal law.⁵⁷ Here, an employer had stated publicly his intention to discriminate, which could be covered by the Law of 1993 (Article 5) read in conjunction with the Law of 1981 (Article 1(3)) on making public an intention to discriminate. Yet, this line of arguments was not an obvious choice because the Belgian Constitutional Court had just declared invalid a provision restricting the possibility to make discriminatory public statements for

⁴⁹ See points A11.1-A11.2, A12.1 of the ruling.

⁵⁰ Point B.85.

⁵¹ Art.7 (2) of the Race Equality Directive and Art. 9 (2) of the Employment Equality Directive.

⁵² Point B.86.

⁵³ This is arguably a breach of the relevant directives.

⁵⁴ However, note that the most recent piece of legislation refers to the relevant EU law directives. See for instance Decree of 3 April 2014 approving the cooperation agreement between the Federal Government, the Regions and the Communities of the 12 of June 2013, the Federal Government, the Regions and the Communities signed a cooperation agreement creating the new Centre for equality and to combat discrimination (now called Unia).

⁵⁵ Interview with E. Abella-Martin, lawyer at the IEFH.

⁵⁶ This information was obtained from: I. Aendenboom, Centre for equal opportunities and opposition to racism, Equinet Seminar (Brussels, 30 June 2009), available at: http://www.equineteurope.org/IMG/pdf/the_feryn_case__2_.pdf.

⁵⁷ Law of 30 July 1981.

breach of the freedom of expression.⁵⁸ The second option would allow the Centre to use Belgian civil law before labour courts. This possibility had just been introduced by the Law of February 25th, 2003, adopted in order to transpose the Race Equality Directive. It may be recalled that this was a new procedure in Belgium since criminal law had been the only avenue open to collective actors until 2003.

The Centre chose the second option.⁵⁹ The civil route and reliance on the new directive rather than on the old 1981 Law allowed it to boost the potential of the newly adopted rules implementing EU law. The CGKR chose this new path intentionally and for two reasons. Firstly, the Centre did so ‘essentially to prove the efficiency of the directives as transposed in Belgium law’.⁶⁰ Secondly, this route created the opportunity to encourage the Belgian civil court to refer the case to the CJEU for a preliminary ruling.⁶¹ The Centre then suggested a set of preliminary questions to the domestic court, which appears to have drafted its own version of the questions that were ultimately referred to the CJEU.⁶² The involvement of the Belgian equality body did not only facilitate the enforcement of an equal treatment rule; it also had a clear impact on the substance of the case. Maître Bayart, who represented the CGKR in the *Feryn* case, specialized in employment discriminations, and such expertise was likely relevant in the decision to choose the civil route over the criminal one.

The IEFH also shaped the legal argument in *Rosselle*, intentionally referring to various provisions of EU law and requesting a preliminary reference to the CJEU. In the *Rosselle* case, the applicant had two sets of legal arguments available: Ms Rosselle could have tried to rely on the consistent interpretation of domestic law (horizontal indirect effect) in light of Directive 92/85 on pregnancy and maternity or, following the idea of the lawyer acting for both the IEFH and the applicant, request that the Belgian court pose a preliminary question asking if the domestic rules were in breach of EU law. This second option was chosen, and the question finally asked by the Belgian court to the Court of Justice was the one suggested by the IEFH.⁶³ By its preliminary question, the national court (and the IEFH) requested a dual check on the compliance of the domestic rule with Directive 92/85 on pregnancy and maternity and Directive 2006/54 on equal treatment between men and women in employment. The first argument proved to be the strongest in both the views of the Advocate General and the CJEU. The IEFH hoped that by raising the second argument on the lack of compliance with Directive 2006/54 the courts would recognise that the domestic legislation was discriminatory. The silence of the CJEU on this point was thus a source of disappointment for IEFH’s lawyers.⁶⁴

Although it is difficult to comment on the *Achbita* case as it is still pending before the domestic court, the dynamics behind that case are quite comparable to those in *Feryn* and *Rosselle*. From the point that the CGKR intervened in the proceedings, the case has almost been entirely driven by the equality body. It is the Centre that submitted to the Court of Cassation a very precise list of questions to refer to the CJEU. These questions were rephrased by the Court of Cassation into a single question.⁶⁵ It should be stressed that the outcome of the dispute does not matter anymore for the applicant in practice as she no

⁵⁸ See J. Tojerow, ‘Etat de la question: La nouvelle Législation Fédérale de Lutte contre les Discriminations du 10 mai 2007’, available at: <http://www.iev.be/getattachment/b3b613b4-12d6-461a-93ac-48fad64d788/La-nouvelle-legislation-federale-de-lutte-contre-l.aspx>, p. 4.

⁵⁹ There had been prior mediation efforts: I. Aendenboom, Centre for equal opportunities and opposition to racism, Equinet Seminar (Brussels, 30 June 2009). Also, ‘Le Centre [...] privilégie les solutions non-contentieuses, les poursuites judiciaires ne représentant environ que 5% des cas’, N. Ouali & I. Carles, ‘L’usage des lois visant à lutter contre les discriminations raciales en Belgique : une perspective de genre’, p. 83.

⁶⁰ I. Aendenboom, Centre for equal opportunities and opposition to racism, Equinet Seminar (Brussels, 30 June 2009), p. 3.

⁶¹ Interview with I. Aendenboom, lawyer at Unia.

⁶² It seems from the ruling of the domestic court that it asked a slightly different set of questions than those proposed by the Centre: see *Arbeidshofte Brussel*, 24th January 2007, A.R.Nr. Kortgeding 292, p.24-25.

⁶³ Interview with E. Abella-Martin, lawyer at the IEFH.

⁶⁴ *supra*.

⁶⁵ Interview with I. Aendenboom, lawyer at Unia.

longer lives in Belgium. However, it matters quite a lot for Unia, which expects clarification of the legal situation in Belgium. Indeed, similar cases have been raised at domestic level and legal uncertainties remain.⁶⁶

There is thus little doubt that the collective actors involved in all three cases have played a crucial role in framing each of the disputes in EU law terms and in pushing for the use of the preliminary reference procedure. It is perhaps useful to recall here that all three cases involved equality bodies rather than associations or legal entities with a special interest. Procedures initiated or supported by NGOs or trade unions - in contrast to cases brought by equality bodies - before ordinary (criminal or civil) courts are not very common in Belgium.⁶⁷ It appears from the 2015 annual report of one of the prominent association in the fields covered by the activities of Unia, the *Mouvement contre le racismisme, l'antisémitisme et la xénophobie* or MRAX, that litigating in court is a marginal activity of the organization. MRAX receives a constant, if not increasing number of complaints, but considerably less than today's equivalent of Unia does.⁶⁸ This can be explained by the limited legal resources of MRAX (with only two lawyers in 2015) as well as the possibility that it refers cases to Unia instead of addressing the cases itself.⁶⁹ In the Belgian context, the role of equality bodies is therefore complementary to that of civil society organizations when it comes to litigation.⁷⁰ Similar observations have indeed been made in the French context where a new procedure, the 'action de substitution', has been introduced *inter alia* in order to comply with the procedural requirements of EU equal treatment law.⁷¹ It entitles NGOs and labour unions to take actions on behalf of victims of discriminations. The mechanism is however barely used in practice⁷² and claims are often instead referred to the French equality body ("le Défenseur des droits").⁷³ Unlike Belgian equality bodies however, the Défenseur des droits itself offers dispute resolution mechanisms, but is not entitled to go to court.

It is also remarkable that the CGKR as well the IEFH are somewhat specialized institutions. The IEFH deals, as its name indicates, with equal treatment between women and men. The CGKR has a broader mandate as it covers several grounds of discrimination but it was initially created back in 1993 to deal with racism and xenophobia, both themes are closely linked to the claims of discrimination on ground of race or ethnic origin and religious or belief in *Feryn* and *Achbita*. It may indeed be easier for institutionalized *and* experienced or specialized structures to venture along new procedural routes than for NGOs or trade unions with less resources to do so.

⁶⁶ *supra*.

⁶⁷ One example is that of an association combatting racism, antisemitism and xenophobia (*Mouvement contre le racismisme, l'antisémitisme et la xénophobie*, MRAX) which intervened as *partie civile* in criminal proceedings (on the basis of the law of 1981) against politicians for racist speeches; see 'Le MRAX se porte partie civile contre De Wever, qu'il accuse de propos raciste', (14 January 2016), available at: <http://www.lalibre.be/culture/medias-tele/plainte-du-mrax-contre-luc-trullemans-51b8fc59e4b0de6db9ca6cd1>, <http://www.lalibre.be/actu/belgique/le-mrax-se-porte-partie-civile-contre-de-wever-qu-il-accuse-de-propos-racistes-5697ad523570b38a58243737>.

⁶⁸ N. Ouali & I. Carles, 'L'usage des lois visant à lutter contre les discriminations raciales en Belgique : une perspective de genre', p. 23, note de bas de page 51.

⁶⁹ MRAX, Annual report 2015.

⁷⁰ Compare with the Danish situation where some unions are very active in litigation, see the contribution by A. Atanasova and J. Miller in this edited collection of essays: 'Collective Actors and EU Anti-Discrimination Law in Demark'.

⁷¹ See section 1.

⁷² See for instance L. Pécaut-Rivolier & D. Pons, *Les discriminations collectives en entreprise – Lutter contre les discriminations au travail : un défi collectif*, Rapport du Ministère du travail, de l'emploi, de la formation professionnelle et du dialogue social, Ministère de la justice, Ministère du droit des femmes, December 2013, p. 82.

⁷³ See the contribution by S. Latraverse in this edited collection of essays.

Conclusions and reflections on the collective enforcement of EU equality law

As evidenced in *Feryn*, *Achbita* and *Rosselle*, EU law requirements intended to facilitate access to courts for victims with the support of collective entities have served as catalysts to ultimately make it possible for the CGKR and the IEFH to litigate cases. As pointed out in Section 3, it is likely that the violations of EU law in *Feryn* and *Rosselle*, and, the uncertainties about the interpretation of the directive, in *Achbita* would not have been brought to justice without the involvement of such entities. Procedural requirements enshrined in EU law have indeed contributed to compensating for the vulnerability of victims of discrimination and the difficulties in identifying them, which are key objectives of the rules on access to justice and equality bodies enshrined in the EU equality directives. As evidenced in this contribution, the involvement of these collective actors has not only allowed the claims to proceed in court but has also permitted a particularly strategic use of EU law arguments and the preliminary ruling procedure. The Employment Equality Directive regrettably still does not require the creation of equality bodies to cover discrimination on grounds of religion or belief, age, sexual orientation and disability so that protection gaps in certain member states still exist⁷⁴.

It is perhaps unsurprising that the CJEU itself has welcomed domestic legislation relying on collective enforcement of equality law beyond the requirements of EU law. The *Feryn* ruling was itself partly about the very specificity of litigation by collective entities. The Court of Justice made it clear that the Race Equality Directive does not preclude Member States from granting access to courts for associations with a legitimate interest or equality bodies in conditions more favourable to the efficiency of EU equality law than the provisions of the directive itself (i.e. to litigate without acting in the name of a specific complainant or in the absence of an identifiable complainant).⁷⁵ The Court went as far as to provide concrete examples of sanctions that could be created at domestic level in the context of a procedure (litigation brought by a collective actor alone) that is in fact not required by EU law.⁷⁶ This approach has actually been taken one step further in the *Accept* ruling. The Court of Justice stated that the requirement for collective actors to obtain the approval of the complainant in order to litigate within the meaning of Article 9(2) of Directive 2000/78 does not prevent Member States from providing rights for certain organizations to bring proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant.⁷⁷ Such a right may be combined with a partial reversal of the burden of proof⁷⁸ and sanctions still have to be effective, proportionate and dissuasive.⁷⁹

These findings on the catalysing role of procedural rules enshrined in EU anti-discrimination directives to facilitate public interest litigation should nevertheless come with several words of caution. To start with, the success of the CGKR and the IEFH in activating the various layers of EU equality norms and players may be closely related to the experience that the relevant lawyers had developed in a legal culture that is broadly favourable to the involvement of (institutionalized) collective actors as evidenced in Section 2. The CGKR in particular has a long-standing tradition of litigating cases in the fields of racism and xenophobia, which are closely connected to the disputes in *Feryn* and *Achbita*. The IEFH, which was involved in *Rosselle*, specializes in sex equality. Belgian courts also are remarkably frequent users of the preliminary ruling procedure, thus facilitating the whole process in the cases we have examined in this paper. It may therefore not be easy to extrapolate the conclusions we have reached about Belgium to other legal cultures, and in any case, the provision of solid financial resources for entities entrusted with collective enforcement tasks is a *sine qua non* condition for their efficiency.

⁷⁴ See European Network of legal experts in gender equality and non-discrimination, “A comparative analysis of non-discrimination law in Europe”, 2016, p. 108 *et seq.*

⁷⁵ CJEU, *Feryn*.

⁷⁶ *Ibid* para. 39.

⁷⁷ CJEU Case C-81/12, *Asociatia Accept v. Consiliul National pentru Combaterea Discriminariilor*, 25 April 2013, para. 37.

⁷⁸ Provided for in Art.10 (1) of the Employment Equality Directive: CJEU, *Accept*, para. 38.

⁷⁹ So as to ensure compliance with Art.17: CJEU, *Accept*, para. 62.

There might in that sense be a tension between the diversification of the activities of institutions in charge of the promotion and enforcement of EU law and their efficiency. The main Belgian equality body is still oscillating between two trends. On the one hand, the CGKR has progressively lost its image of “*défenseur des marocains*”⁸⁰ and developed an expertise in fields other than racism, notably with respect to discrimination on the grounds of age and disability.⁸¹ On the other hand, in 2013, a new inter-federal institution has been created to deal with discrimination and equal treatment⁸² (that has then been renamed Unia in 2016, as mentioned above), while a distinct federal structure devotes its activities to migration, fundamental rights of foreigners and human trafficking (called Myria since 3 September 2015).⁸³ The functions of the former CGKR in matters of discrimination have now been taken over by Unia, while some of its tasks regarding migration and the protection of foreigners’ fundamental rights have been handed over to Myria.⁸⁴ Interestingly, this splitting of the Centre’s competences took place against recent trends in Europe to merge specialized bodies into broader human rights or general equality bodies.⁸⁵

The independence of institutionalized collective actors such as equality bodies may be an additional condition for the effectiveness of collective enforcement. The equal treatment directives and the Law of 1993 creating the CGKR provide that equality bodies shall be independent. This is important because there could be diverging interests between the State and the applicants. It is worth noting that in these three cases the Belgian Government submitted observations distinct from the ones submitted by the applicant or the equality bodies before the Court of Justice. It appears (from what is mentioned in the opinions of advocates general and in the judgements of the Court of Justice) that the observations submitted by Belgium were in line with the ones submitted by the Centre in *Feryn* and *Achbita*.⁸⁶ However, the Belgian observations in the *Rosselle* case differed from the ones submitted by the applicant with the support of the IEFH.⁸⁷ This illustrates that the interests of the State may differ from the ones

⁸⁰ As it was colloquially referred to.

⁸¹ Interview with I. Aendenboom, lawyer at Unia. It appears that cases such as *HK Danmark* have had a certain influence in that regard (as well as, to go beyond EU Law, the United Nations convention on the rights of persons with disabilities). The number of cases on age and disabilities dealt with by Unia considerably increased in recent years; CJEU Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, 11 April 2013.

⁸² On 12 June 2013, the Federal Government, the Regions and the Communities signed a cooperation agreement (« accord de coopération »).

⁸³ Law of 17 August 2013 (Moniteur Belge, 5.03.2014).

⁸⁴ Unia, ‘1993-2013: Le Centre a 20 ans!’ (14 February 2013), available at: <http://unia.be/fr/articles/1993-2013-le-centre-a-20-ans>.

⁸⁵ See Bruno de Witte, ‘National Equality Institutions and the Domestication of EU Non-Discrimination Law’, 1 *Maastricht Journal of European and Comparative Law* (2011), p. 157-178.

⁸⁶ See Opinion of Advocate General Maduro in *Feryn*, 12 March 2008, para. 11: “*The CGKR takes the opposite view and argues that the prohibition on direct discrimination concerns the recruitment process as well as the eventual recruitment decision. According to the CGKR, the substantive scope of the Directive has to be determined independently from the question of who is entitled to bring legal action. In other words, the issue of the locus standi of the CGKR has no bearing on the question whether direct discrimination has occurred. The Commission and the Belgian Government share the view of the CGKR*”. See also the Opinion of Advocate General Kokott in *Achbita*, 31 May 2016, para. 41: “*While G4S proceeds on the premise that there is no discrimination at all, and France and the United Kingdom, on the other hand, assume the commission of indirect discrimination, Belgium and the Centrum consider that there is direct discrimination*”, para. 63: “*The parties to the proceedings strongly disagree on the question of whether a ban such as that at issue here pursues a legitimate aim, let alone a legitimate aim within the meaning of either of the aforementioned provisions of the Directive, and the question whether it passes the proportionality test. While G4S answers those questions in the affirmative, the Centrum, Belgium and France answer them in the negative.*”

⁸⁷ See Opinion of Advocate General Sharpston, 18 December 2014, para. 41: “*For these reasons, I do not accept the Belgian government’s argument that Mrs Rosselle did not contribute specifically the social security scheme for salaried employees for at least six months*”, para. 49: “*Unlike the Belgian government, I therefore regard it as immaterial, when considering*

defended by the equality bodies, in particular in cases where the compatibility of domestic law with EU law is called into question, as was the case in *Rosselle*.⁸⁸

Finally, the possibility that EU law requirements may be used to move backwards in terms of protection cannot be excluded. For instance, EU law may have been relied upon to support a step back from the ‘*actio popularis*’ by equality bodies in the Belgian context. Indeed, the rules on access to courts for the CGKR and the IEFH became stricter after 2007. With regard to the CGKR, the 2007 law is narrower than earlier versions, as the approval of the (physical/moral) victims is necessary for the Centre to be allowed to take legal action.⁸⁹ In 2003, these conditions applied only to organisations having a special interest.⁹⁰ The same reform was adopted for the IEFH in 2007: Art. 36 of the Gender Law of 2007 reduces the powers of the Institute by requiring the consent of victims, when they exist, which was not a pre-requisite in Art. 4(6) of the 2002 Law. The new requirements to obtain the approval of victims may signal a move away from Belgium’s tradition of *actio pupolaris*⁹¹ the purpose of which is to allow legal action by associations and legal entities having a sufficient interest in the outcome of the case.⁹²

the possibility of direct discrimination, that in Belgium access to maternity allowance and access to a sickness allowance (including by a male worker) are both contingent to the same minimum contribution period, applied in a similar way”. See also the judgement of CJEU, *Rosselle*, para. 47: “*Lastly, the Belgian government claims that the national legislation at issue in the main proceedings does not require that the worker concerned occupy the same post during the six months prior to confinement, but rather requires that she occupy, for at least six months, one or several posts entitling her to allowances in the context of the social security scheme for salaried employees*”.

⁸⁸ In contrast, *Feryn* and *Achbita* were concerned with the practices of private employers.

⁸⁹ Art.33 of the Law of 10 May 2007 — Loi modifiant la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme et la xénophobie (Moniteur Belge, 30.05.2007).

⁹⁰ Art.31 last recital of the Law of 2003.

⁹¹ Note that the Law of 1981 (criminal procedures in cases of racism and xenophobia) was also restrictive as the Law of 2007.

⁹² No clarifications on this emerge from an investigation of the ‘travaux préparatoires’. Discussion papers commenting on the 2007 reform do not seem to pay much attention to these procedural aspects. (See for instance J. Tojerow, ‘Etat de la question: La nouvelle Législation Fédérale de Lutte contre les Discriminations du 10 mai 2007’; N. Ouali& I. Carles, ‘L’usage des lois visant à lutter contre les discriminations raciales en Belgique : une perspective de genre’; M. Gianni, ‘La lutte contre la discrimination et la promotion de l’égalité : comment mesurer les avancées réalisées ?’, available at: file:///C:/Users/User/Downloads/meaprobe08_fr.pdf.) Perhaps the text of 2003 was a mistake itself as, if compared to the law of 1981, the text (Art.5 last recital) was actually more flexible. So that the 2007 amendment would be coming back to a past situation.

NGO and equality body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector

Lilla Farkas*

*This paper analyses a litigation campaign contesting racial discrimination in access to electricity that led to the *Belov* and *CHEZ* judgments before the Court of Justice of the European Union under the Racial Equality Directive. When transposing the directive, Bulgaria went beyond the minimum requirements concerning enforcement. The Bulgarian equality body has quasi-judicial powers and representative standing. The latter is also available to non-governmental organisations. This facilitated access to justice and triggered strategic litigation both before the equality body and civil courts.*

Introduction

Legal mobilisation contesting racial discrimination in access to electricity led to the *Belov* and *CHEZ* judgments before the Court of Justice of the European Union (CJEU) under the Racial Equality Directive (RED).¹ The cases concerned the following practice. In 1998 and 1999, across Roma districts in Bulgaria, the state-owned electricity company erected electricity poles at a height of 7 m, ostensibly to prevent fraud. Installing metres on these poles rendered it practically impossible to check electricity consumption. Outside Roma districts, electricity metres are placed at a height of up to 1.70 m, usually in the consumer's home. Private electricity providers sanction defaulting customers in Roma districts by collectively cutting energy supply. Roma districts are predominantly, but not exclusively, inhabited by persons perceived as Roma, while many non-Roma districts have Roma residents.

Universal access to electricity was the Bulgarian communist regime's major achievement. Prior to privatization prompted by the EU, non-paying customers were bailed out. Two major groups defaulted as electricity prices rose: factories and the impoverished residents of Roma districts.² Delays in modernizing the grid in Roma districts increased energy loss that was billed to customers.³ The private service providers' responses were heavily influenced by local Turkish minority politics in districts inhabited by Turkish speaking Muslim Roma.⁴ In regions where CHEZ is the main provider, the Roma do not benefit from political representation. At the national level, the fraudulent consumption of electricity is the core anti-Gypsy argument, portraying the Roma as *en bloc* genetically criminal.⁵

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¹ Case C-394/11 *Valeri Hariiev Belov v CHEZ Elektro Bulgaria AD and others*, ECLI:EU:C:2013:48 and Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashchita ot diskriminatsia (Nikolova)*, ECLI:EU:C:2015:480. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

² Stanford PACS, Center on Philanthropy and Civil Society: EVN in Bulgaria (B)* – Engaging the Roma Community, prepared by Barbara Coudenhove-Kalergi and Christian Seelos, 20 August 2012.

³ The regulatory riddle is analysed in detail in Zahariev, B. and Jordanov I., Geography of exclusion, space for inclusion: Non-payment of electricity bills in Roma neighborhoods in Bulgaria in Pallai K. (ed.), Who decides? Development, planning, services and vulnerable groups, OSI-LGI, 2009, Budapest, pp. 55-123.

⁴ In Plovdiv, having lost a case in court, the Austrian owned EVN engaged Daniela Mihaylova in its pilot project aimed at modernizing the electric grids, installing individual metres, linking illegal dwellings to electricity, reforming payment structures and managing outstanding debts. See, “Stolipinovo”, Bulgaria European case study, Renate Lackner-Gass, power point presentation.

⁵ Genetically coded criminal behaviour is a common anti-Gypsy stereotype in the CEE region, anchored in the Roma's overrepresentation in the prison population, as well as among the perpetrators of theft and robbery.

Resolving the debt crisis requires government intervention and a change in consumption habits.⁶ In the former Soviet bloc, Bulgaria experiences the highest level of electricity waste and reliance on this source of energy.⁷

CJEU judgments show that in comparison to other protected grounds, equality bodies play a central role in enforcing racial equality - broadly construed.⁸ This Bulgarian analysis adds flesh to this more general observation. My analysis also seeks to show that the preliminary referral in CHEZ, which began as an individual complainant's private action, was but one element in a test case strategy anchored in collective actions by Roma communities, political leaders and non-governmental organisations (NGOs), before the equality body and civil courts. Administrative courts reviewing the equality body's decisions blocked protection from discrimination. The referrals in both Belov and CHEZ sought to override the decisions of these administrative courts by bringing the CJEU into play.

Procedural and institutional changes triggered by the RED: 'over-implementation'

Despite its numerous procedural innovations, the RED's minimum requirements ask little from Member States and promise little to individuals seeking redress. The RED requires that NGOs and trade unions have a role in legal proceedings, either by acting on behalf or in support of actual victims of discrimination.⁹ This can be ensured by giving them the right to represent individuals in administrative or judicial proceedings, to intervene and/or to act as friends of the court (*amicus curiae*). However, it does not require Member States to grant them the right to represent individual applicants or groups in legal proceedings, or to have representative standing. Article 8 mandates the reversal of the burden of proof in judicial proceedings only. Article 13 RED makes it the duty of Member States to establish a body for the promotion of racial equality by providing independent assistance to victims, issuing independent reports and undertaking independent surveys. Equality bodies do not therefore have to be established as quasi-judicial institutions. Ombuds institutions can generally fulfill the Article 13 criteria. The RED does not foresee a role for equality bodies in legal proceedings.

Although Central and Eastern European (CEE) Member States did not partake in the drafting process, many were among the first to transpose the RED into national law. They transposed the directive prior to accession, in a manner that went beyond the minimum requirements. NGO lawyers engaged with the Council of Europe and EU processes played a central role in drafting domestic anti-discrimination

⁶ Zahariev and Jordanov, 2009, p. 75.

⁷ Lampietti, Julian. 2004. Power's Promise: Electricity Reforms in Eastern Europe and Central Asia. World Bank working paper series; no. 40. Washington, DC: World Bank.

⁸ So far, eight cases have been referred to the CJEU under the RED. Islamophobia which, according to regional monitoring bodies amounts to racial discrimination, has been the subject of two references on religious discrimination. The Belgian equality body, UNIA initiated a collective lawsuit in *Feryn* and intervened on the plaintiff's behalf in *Achbita* (a religious discrimination Islamophobia reference). In *CHEZ*, the Bulgarian equality body, KZD was the defendant before the CJEU. In *Belov*, it made a preliminary reference itself. In the pending case, *Jyske Finans*, the Danish equality body acted on behalf of Mr Huskic before the Equality Board. Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*, ECLI:EU:C:2008:397. Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, and Opinion of Advocate General Wahl delivered on 1 December 2016 in case C-668/15, *Jyske Finans AS v Ligebehandlingsnaevnet, acting on behalf of Ismar Huskic*. For further analysis see, Farkas, L, The meaning of racial or ethnic origin under EU law: between identities and stereotypes, 2017, European Commission, Brussels.

⁹ Article 7(2) RED.

legislation.¹⁰ Some had been members of the expert network that initially assessed compliance.¹¹ In Bulgaria, as in many other CEE Member States, over-implementation was spurred by the Euro-Atlantic integration process that required compliance with international human rights standards. It coincided with standard setting both within the EU and the Council of Europe.¹² For domestic law-makers, over-implementation offered the technical advantage of reconciling discrepancies among protected grounds and fields in the various international treaties.¹³ It was also perceived as a *low-cost investment* with a high political pay-off.¹⁴ For instance, even though not required under EU anti-discrimination law, representative action was introduced in Bulgaria, Hungary, Romania, Slovakia and Croatia.¹⁵ The former three also went beyond the minimum requirements concerning equality bodies, as well as the fields and grounds they cover - the latter being limited to racial or ethnic origin and sex under EU law.¹⁶

Fitting into this overall pattern of 'over-implementation', Bulgarian discrimination legislation provides one of the highest levels of protection in the EU. When Bulgaria acceded to the EU in 2007, it had already transposed the RED by 2002 with its Protection Against Discrimination Act (PADA), which entered into force in 2004. The legislation gave both the equality body and NGOs much more extensive powers than the minimum provided by the RED.

The equality body, the Protection Against Discrimination Commission - Komisija za zashtita ot diskriminacija (KZD) - established in 2005, has hybrid enforcement powers as both an investigatory and promotional body and as a quasi-judicial body. On the investigatory and promotional side, it is an independent public body that reports to Parliament¹⁷ and it can make (legislative) recommendations.¹⁸ It acts on the basis of complaints, communications, or *ex officio*. As a quasi-judicial body, it adopts legally binding decisions, following a public hearing of both parties.¹⁹ It can impose the following sanctions: a fine and/or mandatory remedial or preventive injunctions, an order to apologise and publish its

¹⁰ For instance, the Romanian Open Society Foundation organised an expert group to draft an emergency ordinance on anti-discrimination. Renate Weber, Gabriel Andreescu and Romanita Iordache - all affiliated with the Romanian Helsinki Committee were involved in the process. Skype interview with Romanita Iordache, 19 January 2017. In Hungary, András Kádár, József Kárpáti and the author, based with the Hungarian Helsinki Committee, commented on various drafts of the law.

¹¹ For instance, András Kádár in Hungary, Romanita Iordache in Romania and Margarita Ilieva in Bulgaria.

¹² The adoption of the RED in 2000 was preceded by the adoption of the Framework Convention for the Rights of National Minorities in 1995, Protocol 12 ECHR and the establishment of the European Commission against Racism and Intolerance in 1994.

¹³ UN ground-specific treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination must be reconciled with the International Covenants on Civil and Political Rights, as well as on Economic, Social and Cultural Rights, which in Article 26 and 2.2. respectively ensure equality on the basis of an open list of grounds. Similarly, under Article 14 the European Convention on Human Rights (ECHR) prohibits discrimination on the basis of an open list of grounds, whereas Protocol 12 - not widely ratified - extends to all fields. Conversely, EU anti-discrimination law prohibits discrimination on the basis of a closed list of ground, mainly in the field of employment.

¹⁴ Skype interview with Romanita Iordache, 19 January 2017.

¹⁵ Chopin I. and Germaine-Sahl, C., A Comparative Analysis of Non-Discrimination Law in Europe, The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared, European Commission, October 2016, pp. 88-94 and 114-119. See, also Ilieva M., Legal Standing For Civil Society Legal Entities To Litigate Against Discrimination In The Member States Of The European Union And Candidate Countries, 2014, unpublished, pp. 33-42.

¹⁶ Chopin and Germaine-Sahl, 2016.

¹⁷ PADA Article 40.

¹⁸ PADA Article 47. As the 2016 Legalnet report on Bulgaria notes, there "is no public or institutional perception of a clash between the body's adjudicator functions and its victim's assistance mandate, and no debate. In practice, the assistance mandate is depressed: the body gives victims no assistance other than to explain how the procedure before it works and what they are expected to do in order to participate. It has initiated no court action" Margarita Ilieva, Country Report, non-discrimination, Bulgaria, 1 January-31 December 2015, European Commission, Brussels, p. 70..

¹⁹ PADA Article 65 and 61.

decisions²⁰ as well as sanctioning parties who fail to implement its decisions.²¹ KZD decisions are subject to judicial review in administrative courts.²² In practice, the *quasi-judicial* function may impede the equality body's function as an institutional enforcer. The KZD rarely engages in institutional enforcement, which means that its financial resources are spent on case work reactive to complaints. It has not yet initiated lawsuits and has rarely used the power to intervene. It does not have a litigation strategy. The KZD deals with all the protected grounds enumerated in Bulgarian law and ratified international treaties, which hinders its ability to prioritize certain groups, such as the Roma, one of the most discriminated groups in Bulgarian society.²³

Strategic action is left mainly to NGOs. Their legal action is funded from private charities, membership fees, foreign development organisations or the EU, due to the lack of predictable public financing, adequate legal aid, or *pro bono* services.²⁴ The Bulgarian discrimination law ensures legal standing to NGOs and trade unions to represent victims before the equality body and civil courts, as well as to intervene in judicial proceedings.²⁵ However, going beyond the RED, legal standing is also provided to NGOs and trade unions in representative actions. In addition, any entity can initiate proceedings before the equality body, even without a specified victim.²⁶ The sanctions available in representative actions are limited to declaratory finding and injunctive relief. The burden of proof is reversed both in civil proceedings and before the equality body.

The Belov and CHEZ litigations

The applicants in both cases complained to the KZD contemporaneously and the litigation trajectories were intertwined. On 3 October 2008, Ms Nikolova requested CHEZ to relocate her metre. While this may suggest a test case strategy, it arose from her lawyer's initial strategy to challenge over-billing. Along with other regularly paying consumers in the Roma district, CHEZ charged Nikolova for the illegal electricity consumption of her neighbours. Having lost under civil law, the lawyer switched to a legal strategy championed by Daniela Mihaylova, a discrimination and human rights activist, which had been widely reported in the Bulgarian press.²⁷ On 5 December 2008, Nikolova complained to the KZD of CHEZ's failure to relocate her metre. She contended that the reason for the practice was that most of the inhabitants of Dupnitsa's 'Gizdova mahala' district were of Roma origin, and that she, accordingly, suffered direct discrimination on the grounds of nationality (*narodnost*). The fact that Nikolova herself was not of Roma origin complicated the identification of the protected ground. In April 2010, the KZD found indirect discrimination based on nationality. The case then proceeded from the KZD to judicial review before the Sofia Administrative Court, followed by another review in the Supreme Administrative Court - Verhoven Administrative Sad (VAS). In May 2011, the VAS directed the equality body to reconsider the case, particularly because it had failed to indicate the nationality in comparison to which Nikolova suffered discrimination. In May 2012, the KZD upheld Nikolova's

²⁰ PADA Article 47 and 65.

²¹ PADA Article 82.

²² PADA Article 68(1).

²³ PADA Article 4(1).

²⁴ The Bulgarian Helsinki Committee, the Romani Baht Foundation and the Equal Opportunities Project Initiative have been financed by, among others, the Open Society Foundations and the Sigfried Rausing Trust. Information can be gleaned from the respective NGOs and donors' reports available on their websites. For instance, BHC lists its donors at the bottom of its website: the United States Agency for International Development, Democracy Commission, European Commission, European Refugee Fund and Open Society Institute - Budapest, New York, Sofia. See <http://www.bghelsinki.org/en/about-us/>

²⁵ Bulgarian Administrative Procedure Code, Article 18 (2) and PADA Article 71(2).

²⁶ Although this was subsequently restricted by judicial interpretation in a 2014 Supreme Court decision. PADA Article 50(3). Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013; Decision No. 15637 in case No. 1925/2014

²⁷ Skype interview with Yonko Grozev, 26 January 2017.

complaint again, this time on the basis of her personal situation, namely the location of her business. CHEZ challenged the decision before the Sofia Administrative Court, which in its reference queried whether the ground was common Roma ethnic origin in the district where Nikolova's shop was based.

A short time after Nikolova had lodged her complaint with the KZD, in 2009 Mr Belov also complained to the KZD. He claimed that the ethnic Roma inhabiting the town's Roma districts were subject to discrimination on the grounds of ethnicity. Joined to his complaint was a petition signed by other inhabitants of the Roma district, asking the KZD to order CHEZ to abolish the impugned practice and to impose sanctions.²⁸ In July 2011, the KZD referred Belov to the Court of Justice, seeking to counterbalance the VAS's restrictive interpretation in the electricity cases. According to the VAS, the lack of access to electricity metres did not adversely affect a right or legitimate interest, an essential element of establishing discrimination under the PADA. The KZD asked whether such an interpretation complied with the RED's definitions of direct and indirect discrimination. Furthermore, in light of the shortcomings of the Bulgarian-language version of Article 8(1) RED²⁹ and the VAS's view that the Roma districts were not inhabited solely by Roma, nor were the measures at issue based on ethnicity, the KZD sought guidance on the reversal of the burden of proof. Finally, it pondered whether the measures could be justified, in line with the VAS's general practice. In January 2013, the Belov reference was dismissed. In *Belov*, the Luxembourg Court established its lack of competence due to the administrative character of the referring entity, the Bulgarian equality body.³⁰ Tamás Kádár, legal officer of EQUINET, the European Network of Equality Bodies criticises this decision, because in his view - which is consistent with that of Bulgaria, the European Commission and Advocate General Kokott - in this concrete case, not only does the KZD fulfill the criteria under Article 267 TFEU, but the judgment has a chilling effect on future references in the race field. He underlines that at the domestic level the main fora adjudicating racial discrimination are equality bodies.³¹

In February 2014, the Sofia Administrative Court referred *Nikolova-CHEZ* on the judge's motion.³² The reference springs from the failure to engage with Belov and revisits the questions the KZD had raised before. Even though it was inclined to agree with the KZD's view of the practice as direct discrimination, the referring court was swayed by Advocate General Kokott's Opinion in *Belov*, according to which it amounted to *prima facie* indirect discrimination.³³ It also observed that in similar cases the VAS did not find either direct or indirect discrimination. Following the decision to refer, Open Society Justice Initiative (OSJI) Advisory Board member Yonko Grozev - the Bulgarian Helsinki Committee's previous legal director and presently judge of the ECtHR - took on Nikolova's legal representation as a

²⁸ Belov is represented by Ms Chernicherska, who practices law in the law office Ekimdjiev, Boncheva and Chernicherska. The Plovdiv based law firm is famous across Bulgaria for victories before the ECtHR - including cases brought on behalf of the Roma.

²⁹ It differs from other language versions, requiring that the victim must establish facts from which it may be 'concluded' that there has been discrimination.

³⁰ As AG Kokott noted, the contested issues concerned the KZD's independence, compulsory jurisdiction and the judicial character of its proceedings. Prior to establishing that the KZD's proceedings are of an administrative nature, the CJEU analysed the latter two issues, focusing on judicial character in general, rather than in the concrete case. It interpreted compulsory jurisdiction in a strict sense, i.e. as requiring the KZD's exclusive jurisdiction over disputes, rather than a binding nature of its decisions. It further held that the KZD's decision are of an administrative character, given its power to proceed on its own motion with extensive investigative powers; its power to join persons to the proceedings on its own initiative; its defendant status in judicial review; and its power to revoke a decision if both parties consent. Opinion of AG Kokott, 20 September 2012, Case C-394/11, Valeri Hariev *Belov*

³¹ Kádár, T., *The Standing of National Equality Bodies before the European Union Court of Justice: the Implications of the Belov Judgment*, *Equal Rights Review* No 11 of 2013, pp. 13-25.

³² Skype interview with Yonko Grozev, 26 January 2017.

³³ See, fn. 30, para. 99.

third party supporting the KZD.³⁴ In *CHEZ*, the CJEU held that the placement of the electric metres on 7 meter high poles can be interpreted as giving rise to direct discrimination based on racial or ethnic origin, whereby Ms Nikolova is less favourably treated ‘together with the Roma’.³⁵ It held, however, that the facts could also be interpreted as giving rise to indirect racial discrimination. The judgment has been widely commented upon, eliciting radically opposing views about its impact on the race ground, but also beyond.

The potential to develop EU discrimination law and policy impact justified OSJI’s shouldering of the costs of legal action instituted by a non-Roma shop owner, who ran a profitable business in the poorest Roma district in the region of Dupnitsa. Nikolova’s individual complaint was transformed into a case about collective harm and racial stigma. This links the preliminary reference with anti-Romani discrimination in other fields, such as education, that form the focus of infringement proceedings advocated by OSJI.³⁶ However, when it came to sanctioning *CHEZ*, Nikolova remained the sole beneficiary. Accordingly *Belov* and *CHEZ* suggest that legal expertise in EU law concentrated in legally-focused NGOs have an impact mainly on the legal-conceptual rather than the practical outcome. However, *CHEZ* may also have a beneficial impact beyond the ground of racial or ethnic origin in Bulgaria because in its wake the government introduced a bill to amend the *PADA* definitions of indirect discrimination and unfavourable treatment.³⁷

The domestic litigation campaign

Rather than being isolated cases, *Belov* and *CHEZ* were nestled in a large-scale litigation campaign. Several KZD investigations were triggered by signals from political actors at the municipal level, where access to electricity is an important currency one can offer in exchange for votes. Nikolova’s case is exceptional, not only because she is the single ethnic majority person to challenge the practice, but also the only one who pursued an individual action. It is curious that a preliminary reference was made in her case, but not others.

The immediate threat of losing electricity mobilised the Roma across the country. NGOs reacted with collective legal challenges before domestic civil courts and the equality body. The first proper legal challenge under *PADA* was brought by the Bulgarian Helsinki Committee and the Romani Baht Foundation, concerning power failures in Fakulteta, Sofia.³⁸ The Romani Baht Foundation was established in this 40-70,000 strong Roma district to oversee the implementation of foreign development projects and provide legal aid services with a view to collecting test cases under *PADA*. The core grant was provided by the European Roma Rights Center, which funded test case litigation.³⁹ The Romani

³⁴ Grozev, Maxim Frechtsman - legal officer in charge of identifying test cases amenable for regional level litigation in Europe based with OSJI until his recent appointment to a judicial post in his native Netherlands - and Simon Cox are named as her legal representatives. Delivery is requested to the hands of Grozev and Rupert Skilbeck, OSJI legal director.

³⁵ *CHEZ* judgment, paras. 50. and 60.

³⁶ Based on *D.H. and Others v The Czech Republic*, Application No. 57325/00, Grand Chamber judgment of 13 November 2007

³⁷ Legalnet report ‘ADL draft amendments of definitions of ‘indirect discrimination’ and ‘unfavourable treatment’, 15 July 2016, Margarita Ilieva: “The amendments were introduced as a follow-up to the ruling of the Court of Justice of the European Union in case C-83/14 (the “*Chez*” case). ... The amendments seek to clarify that indirect discrimination by association is banned, and that less favourable treatment is not restricted to rights provided for under laws.”

³⁸ Civil case No 1262/2004, panel 39, Sofia District Court. Several Roma individuals from Filipovtsi - another Roma district in Sofia - took joint legal action prior to *PADA* entering into force for power failure and lack of visual control. The Sofia District Court applied *PADA* and ruled in their favor, Case No 21674/2003, panel 24.

³⁹ See, Mihaylova, D., *Legal Practice under the Bulgarian Protection against Discrimination Act*, Roma Rights, 11 March 2005, Bulgarian Helsinki Committee, *Obektiv*, Special Edition, March 2008, p. 9. and *Human Rights in Bulgaria in 2007*, Annual Report of the Bulgarian Helsinki Committee, pp. 20-21. Interview with Ivan Ivanov, former ERRC staff lawyer, director of the European Roma Information office, 29 November 2016, Brussels.

Baht Foundation and the Bulgarian Helsinki Committee took a representative action concerning at least 31 paying households.⁴⁰ The Sofia District Court found indirect ethnic discrimination. Starting in 2006, with a complaint from Stolipinovo⁴¹, a Roma district in Plovdiv, the equality body received various complaints and signals against service providers. The KZD's practice has been to establish indirect ethnic discrimination. In Nikolova, its approach was different for potentially two reasons. First, the complaint invoked nationality as a ground and initially, the KZD proceeded along this line. Second, when it re-examined the case, it clearly could not identify suitable comparators based on nationality, and it grappled with the fact that Nikolova herself was not of Roma origin. Moreover, she suffered discrimination not as a typical natural person, but as the owner of a business based in a Roma district.

On the other hand, the Bulgarian Supreme Administrative Court developed a restrictive interpretation, rendering legal protection illusory. According to this court, no adverse effect resulted from the lack of access to electricity metres. The Bulgarian Supreme Administrative Court found that, due to the lack of ethnic homogeneity in the Roma districts and of the explicit racial motive of the measures, discrimination could not be established. It regularly upheld justification defences. The KZD referred Belov to counterbalance this interpretation by the Bulgarian Supreme Administrative Court and the Sofia Administrative Court's preliminary reference in CHEZ revisited the same questions.

Conclusions

The paper investigated the rich domestic context of the Belov and CHEZ judgments. Bulgarian lawyers based in non-governmental organisations played a crucial role in the transposition of the Racial Equality Directive before the country's accession to the European Union. Having created an advanced legal opportunity structure, they continued to play a significant role in its strategic enforcement.

The equality body's roles were also central although its hybrid nature led in Belov to its judicial nature being denied and thus deprived it of the capacity to make preliminary references. Nevertheless, the equality body's initial activism, its powers, permanency and funding were important factors in the success of NGO activity. This case study corroborates the view that not only representative standing, but also proceedings before the specialised agency facilitate enforcement, by diminishing the length, as well as the disproportionately high risks associated with individual action. The public financing of equality bodies substantially decreases the costs - which in civil court would be borne by the aggrieved individual or the representative entity.⁴² NGO enforcement before quasi-judicial agencies can benefit from EU law expertise found in both the legally focused NGOs and equality bodies. The KZD's impact has been contained in several ways. First, by the interpretation of the Supreme Administrative Court, which deviated from the civil courts' jurisprudence. Preliminary referrals to the CJEU were key to overcoming this. Second, the KZD has been subject to political intervention, directly, as well as indirectly.⁴³ It is important to note that such interventions occur across the EU.⁴⁴ Thirdly, the equality body also contains its own impact, by not fully using its investigatory and promotional powers.

⁴⁰ For a detailed description see, Mihaylova D. and Iordanov, M., *Access to electricity in Roma settlements in Bulgaria*, Sofia 2015, pp. 30-33.

⁴¹ Decision No. 58 of 29 November 2006, Case No 107/2006 of First Specialized Permanent Panel, *Ibid*, pp. 20-22.

⁴² In reality, perpetrators are hardly ever compelled to pay the full costs of quasi-judicial proceedings, but as a rule, it is equally difficult to recover from them the full costs of legal representation and investigation in judicial proceedings, at least in the CEE region.

⁴³ According to a Legalnet flash report of 5 September 2012, former members of the xenophobic 'Ataka' party - in opposition - moved to repeal PADA and abolish the KZD. According to another flash report of 17 April 2012, a year elapsed before a new president for the KZD was finally appointed on 11 April 2012. On 17 July 2012 the Bulgarian expert reported that although two former members were re-elected, the others "demonstrate no expertise at all in anti-discrimination law. One is a member of the openly racist Ataka party".

⁴⁴ See, for instance, *European Anti-discrimination Law Review* No. 8/2009, Ireland Political development, Future inability of the Equality Authority to carry out its core functions under anti-discrimination directives budget cut and restructuring. The

The transposition of the RED was an essential pre-condition of legal mobilization. Legal challenges had simply not been brought before 2004, even though the challenged practice of inaccessible electricity metres had been in place since 1998. The new legal opportunity structure reflected the RED's broad material scope, while over-implementation provided tools for collective enforcement. The KZD strategically engaged with Roma communities and NGOs, becoming a key interlocutor both at the domestic, as well as the EU level, but the CJEU's *Belov* ruling had a chilling effect on its own initiative activities. The issue was originally framed by domestic NGOs as discrimination in access to electricity and reframed by OSJI as racial stigma. The litigation campaign has not ensured access to electricity for the most vulnerable Roma because it failed to adequately address the regulatory shortcomings of pricing for the economically destitute. However, in certain Roma districts, it enhanced direct political action which then led to changes on the ground.

Hungarian Legalnet expert reported on 22 February 2012 that on 1 February 2012, the Equal Treatment Advisory Board consisting of six members with extensive experience in enforcing the principle of equal treatment was abolished.

Collective actors and EU anti-discrimination law in Denmark

Angelina Atanasova & Jeffrey Miller*

A large body of research confirms that the preliminary reference procedure (Article 267 TFEU), whereby national courts pose questions to the European Court of Justice (CJEU) regarding EU law, has not only been critical to the development of the CJEU's case-law, but also an important driver of European integration in general.¹ Researchers have also uncovered that Member State courts have been willing participants in the preliminary reference process.² But in a more recent series of articles published over the past decade, scholars have noted that the aggregate upward trend in preliminary references masks substantial variations in the rate of references from individual Member States.³ Denmark—indeed all Nordic members of the EU—appear to invoke Article 267 rather infrequently. This finding holds up in studies that control for population size and length of time that a country has been a member of the European Union.⁴

Among others, Marlene Wind attributes Denmark's hesitance to refer cases to the CJEU to its tradition of *majoritarian democracy*—a feature that, in broad strokes, is evident in all Nordic countries. In contrast to *constitutional democracies*, which embrace judicial review of legislation as an essential component of what it means to be a “true” democracy, majoritarian democracy is based on the principle of parliamentary supremacy or sovereignty. Hence, the role of the courts in a majoritarian system is comparatively limited. Judicial review of legislative acts to ensure their conformity with the Danish Constitution, while formally permitted by law, has happened only once in the past 150 years.⁵ The prevailing view in Denmark is that unelected judges should strike down acts of Parliament only under

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¹ See Karen Alter, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW ((2001); Anne-Marie Burley & Walter Mattli, *Europe Before the Court*, 47 INTERNATIONAL ORGANIZATION 41–76 (1993); Mark Pollack, THE ENGINES OF INTEGRATION (2003); Alex Stone Sweet, THE JUDICIAL CONSTRUCTION OF EUROPE (2004); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. REV. 2403–83 (1991).

² See Court of Justice of the European Union, *Annual Report 2016, Judicial Activity* (providing information on the number of preliminary references over time). The 2016 Report and for previous years are available at http://curia.europa.eu/jcms/jcms/Jo2_7000/en/.

³ See Jens Elo Rytter & Marlene Wind, *In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms*, 9 INT'L J. CONST. L. 470-504 (2011); Marlene Wind, *The Nordics, the EU and the Reluctance towards Supranational Judicial Review*, 48 JOURNAL OF COMMON MARKET STUDIES 1039-1063 (2010); Marlene Wind et al., *The Uneven Legal Push for Europe: Questioning Variation When National Courts Go to Europe*, 10 EUROPEAN UNION POLITICS 63-88 (2009); Andreas Follesdal & Marlene Wind, *Nordic Reluctance towards Judicial Review under Siege*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 131 (2009); Marlene Wind, *When Parliament Comes First-The Danish Concept of Democracy Meets the European Union*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 272 (2009); Sten Schaumburg-Muller, *Parliamentary Precedence in Denmark-A Jurisprudential Assessment*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 170 (2009); Uffe Jakobsen, *The Conception of Nordic Democracy and European Judicial Integration*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 221 (2009); Palle Svensson, *Conceptions of Democracy and Judicial Review*, 27 NORDISK TIDSSKRIFT FOR MENNESKERETTIGHETER 208 (2009); Martin Scheinin, *Constitutionalism and Approaches to Rights in the Nordic Countries*, in CONSTITUTIONALISM: NEW CHALLENGES, EUROPEAN LAW FROM A NORDIC PERSPECTIVE 135 (Joakim Nergelius ed., 2008).

⁴ See publications cited, *supra*, fn. 3.

⁵ See Jens Peter Christensen, “The Supreme Court in Today's Society,” in Jens Peter Christensen et al. (eds.) *The Supreme Court of Denmark* (2015) at 29 (noting that this is commonly referred to in Denmark as the “Twind” case).

extraordinary circumstances. Parliament, above all others, is the institution that embodies the legitimate representation of the popular will. Wind *et al.* claim that because Denmark has no tradition of judicial review of legislation, Danish courts (and other Nordic courts) treat the preliminary reference procedure with suspicion.⁶

Wind *et al.* provide a plausible account for the behavior of Danish courts towards the preliminary reference procedure as a whole, but when we scratch beneath the surface, the dichotomous majoritarian democracy/constitutional democracy distinction loses some explanatory power. In the field of primary concern in this paper, EU anti-discrimination law, Danish courts do not appear to demonstrate the reticence typically associated with majoritarian democracies.

The first preliminary reference under Directive 2000/78 was *Mangold*, an age-discrimination case submitted by the Arbeitsgericht München, Germany on 26 February 2004.⁷ Since then, Danish courts have referred 87 cases to the CJEU under the preliminary reference procedure. In 9 of those cases, Danish courts requested guidance in interpreting EU anti-discrimination Directive 2000/78, which accounts for 10,3% of all preliminary references from Denmark since *Mangold*.⁸ This behavior differs substantially from the other Nordic/majoritarian members of the EU (per Wind *et al.*'s typology). During the same time period, in Sweden, out of 81 preliminary references, only one involved Directive 2000/78. Similarly, in Finland, out of 71 preliminary references, only one involved the directive.

As Wind *et al.*'s thesis would predict, the largest number of preliminary references involving Directive 2000/78 have come from Germany and Austria—EU members with strong traditions of judicial review.⁹ But in Germany and Austria, Directive 2000/78 references constitute, respectively, a relatively meagre 3,4% and 4% of these countries' total preliminary references.

The total number of preliminary references submitted by all EU Member States involving Directive 2000/43 is significantly lower – 11, one of which comes from Denmark. We have decided to exclude preliminary references based on Directive 2000/43 from the remainder of our analysis because the number of cases is too small to test reliably. Nevertheless, to provide a more complete picture of activity in the EU anti-discrimination field, we include it in the table below, which summarizes our findings.

⁶ See publications cited, *supra*, fn. 3.

⁷ See Case C-109/00, *Mangold v Helm* [2004].

⁸ All statistics in this section are based on searches conducted using the CURIA database – search by *date of the lodging of the application initiating proceedings* of the CJEU judgements under Directive 2000/78/EC. As a starting date for the search is taken the date when the first decision referred under this Directive was submitted to the CJEU, namely the *Mangold* case, 26/02/2004. Last search in CURIA was conducted on 09/05/2017. As a result, we disregard the *inactive years*—the period between the implementation of the directives in the Member States and the first preliminary reference regarding the interpretation of the directives. Joined cases are represented as separate cases, for example, Joined case 335/11 and 337/11 is counted as 2 cases, and not as a single case. Based on this search criteria, in total there were 90 preliminary requests sent by national courts referring to Directive 2000/78.

⁹ Germany, Austria and Denmark have referred respectively, 37,8%, 11% and 10% of the total number of preliminary references under Directive 2000/78. See *Origins of CJEU Judgements regarding Directive 2000/78 and Directive 2000/43, infra*.

CJEU Judgements regarding Directive 2000/78 and Directive 2000/43 since Mangold

Country	Total number of preliminary references since 26/02/2004	Total number of Directive 2000/78 references since 26/02/2004	% of total references involving Directive 2000/78	Total number of Directive 2000/43 references	% of total references involving Directive 2000/43
<i>Majoritarian Democracies</i>					
Denmark	87	9	10,3%	1	1,1%
Sweden	81	1	1,2%	0	0%
Finland	71	1	1,4%	0	0%
<i>Constitutional Democracies</i>					
Germany	989	34	3,4%	1	0,1%
Austria	254	10	4%	0	0%

Puzzle and Hypothesis

How can we explain Danish courts' uncharacteristic enthusiasm for preliminary references to the CJEU in the field of EU anti-discrimination law? One hypothesis, explored below, derives from the observations of Eliantonio & Muir, who note that there is a growing body of EU initiatives that emphasize procedural access to justice and remedies,¹⁰ and that this development has been particularly visible in the field of EU equality law.¹¹ For example, Directive 2000/78 dedicates an entire chapter (Articles 9-14) to "Remedies and Enforcement." Article 9(1) requires Member States to set forth judicial and/or administrative procedures to enforce the directive; Article 9(2) requires Member States to ensure that associations, organizations, and other legal entities that may have a legitimate interest in the compliance of the directive are permitted to participate in judicial and/or administrative proceedings; Article 12 sets forth that Member States must disseminate information about the directive to persons concerned; and Article 14 states that Member States "shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination . . . with a view to promoting the principle of equal treatment."

Directive 2000/43 includes an additional requirement that Member States "designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin" tasked with providing "independent assistance to victims of discrimination in pursuing

¹⁰ See Mariolina Eliantonio & Elise Muir, *Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law*, 8 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 175-204 (2015).

¹¹ See Elise Muir, *Procedural Rules in the Service of the 'Transformative Function' of EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along*, 8 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 153-76 (2015).

their complaints about discrimination”. (Article 13). Although not obligated by EU law, many Member States have national equality bodies that have mandates that go beyond evaluating and contributing to equal treatment in the areas of race and national origin. The Danish Institute for Human Rights (DIHR)¹² and the Board of Equal Treatment,¹³ whose roles will be discussed in greater detail in the following section, also cover gender, age, disability, sexual orientation, religion and faith.¹⁴

Have the unusually detailed procedural provisions outlined in Directive 2000/78 and 2000/43 resulted in an additional pressure on Danish courts to alter their traditional resistance to making preliminary references in the field of anti-discrimination? The remainder of this paper attempts to shed light on this question.

Road Map

Part I briefly describes the circumstances under which Denmark transposed EU Directives 2000/43 and 2000/78. Part II outlines the procedures for bringing an anti-discrimination claim in Denmark. Part III focuses on the specific procedural rules that govern collective actor participation in Danish anti-discrimination litigation. Part IV provides a summary of the authors’ findings regarding two anti-discrimination cases brought by Danish trade unions which were referred to the CJEU under the preliminary reference procedure. Part V concludes.

In brief, we find strong evidence that the procedural requirements set forth in Directives 2000/43 and 2000/78 to ensure access to justice and an effective remedy have had a transformative effect on anti-discrimination law *at the domestic level*. With muted enthusiasm, Denmark has dutifully incorporated anti-discrimination rights laws into the national legal order, strengthened and expanded the country’s judicial capacity to process anti-discrimination complaints, and gradually expanded the powers of its national equality bodies. However, we are unable to establish a link between the directives’ provisions regarding the role of collective actors and the nature of preliminary references emanating from Denmark. Before and after the transposition of the directives, the principle collective actors pushing for preliminary references to the CJEU in the anti-discrimination field have been—and continue to be—trade unions.

Transposition

Many Danes take a dim view of anti-discrimination laws, regarding them as regrettable foreign imports, inconsistent with the country’s consensus-based policymaking style and culture of equality. Particularly among right-wing voters, the prevailing narrative is that anti-discrimination laws are unnecessary and probably counter-productive.¹⁵

Denmark has a long history of establishing working conditions through collective bargaining. Parliament has been reluctant to interfere in private arrangements through national legislation, and has traditionally

¹² Founded in 1987 and reformed in 2002 as the Danish Institute for Human Rights, the organization’s responsibilities have evolved over time. Its mandate covers the grounds of ethnicity and race, disability and gender equality in all domains, and according to its website, in practice, it addresses “all grounds for discrimination in any domain, taking into account gender, age, disability, sexual orientation, religion and faith, ethnicity and race.” See <https://www.humanrights.dk/about-us/mandate>

¹³ The Board of Equal Treatment, a quasi-judicial body founded in 2009, covers the grounds of sex, race, color, religion or belief, political opinion, sexual orientation, age, disability, national origin, social origin and ethnicity in the field of employment. Outside of the labor market, it deals with complaints only on the grounds of sex, race and ethnicity. See <https://ast.dk/naevn/ligebehandlingsnaevnet/ligebehandlingsnaevnet?page=1175>

¹⁴ See Danish Institute for Human Rights Website, “Mandate”, available at <https://www.humanrights.dk/about-us/mandate>.

¹⁵ See generally, Tore Vincents Olsen, *DISCRIMINATION AND ANTI-DISCRIMINATION IN DENMARK* (2008).

done so only when negotiations between social partners have completely broken down.¹⁶ Parliament's preference to leave labor matters to collective negotiations extends to issues of non-discrimination in the workplace as well. In 1969, a parliamentary committee tasked with researching anti-discrimination legislation concluded that it would be preferable to have trade unions address the issue without legislative meddling. Parliament passed an Anti-Discrimination Act in 1996, but only in the wake of a report issued by the Ombudsman that Denmark's failure to provide legal redress against discrimination in the private workplace violated its international obligations. Revisions of the 1996 Anti-Discrimination Act (in 2004 and 2008) became the main vehicle by which Denmark brought its legislation in line with Directives 2000/43 and 2000/78.¹⁷

The job of transposing Directives 2000/43 and 2000/78 fell to a center-right government coalition that—prior to assuming power—had objected to the contents of the directives when they were discussed in a parliamentary European Committee in 2000. As members of the opposition, the center-right parties could not prevent the Council of Ministers from approving the directives, but as members of the government, they were obliged to transpose them into national law. According to Vincents Olsen, the government's view on the anti-discrimination laws “seemed based on the assumption that the legislation in question had the character of clarification of principles, if not the rules, already in place in Danish society.”¹⁸ In the interviews that the authors conducted for this paper, interviewees consistently reported that Denmark would not have passed new anti-discrimination legislation had it not come under pressure to meet its obligations under EU law.

Processing Anti-Discrimination Claims in Denmark

The Danish judicial system is a three-tier system consisting of 24 district courts, two courts of appeal (the Court of Appeal for the Western Circuit (*Vestre Landsret*) and the Court of Appeal for the Eastern Circuit (*Østre Landsret*) and the Supreme Court (*Højesteret*)). The district courts, courts of appeal, and the Supreme Court all have general authority, meaning they have jurisdiction to hear all types of legal disputes, regardless of the subject matter or nature of the dispute. In cases involving trade and commerce, matters may be dealt with in the first instance by the Maritime and Commercial Court (*Sø- og Handelsretten*), which, technically speaking, holds a status equal to the district courts.¹⁹

Since 2009, the Danish Board of Equal Treatment (*Ligebehandlingsnævnet*) (hereinafter, “the Board”) presides over cases involving complaints involving discrimination on the grounds of disability, gender, race, skin color, religion or belief, political opinion, sexual orientation, age and national, social or ethnic origin in the field of employment.²⁰ The Board consists of three judges and nine “ordinary members” who are appointed by the Ministry of Employment. Usually panels consist of one judge and two ordinary members. Statistics compiled by the Board show a steady increase in anti-discrimination claims brought before it.²¹ Prior to the establishment of the Board, anti-discrimination complaints were divided between

¹⁶ See Jackie Lane & Natalie Videbaek Munkholm, *Danish and British Protection from Disability Discrimination at Work—Past, Present and Future*, 31 INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS 91, 101 (2015).

¹⁷ See *id.* at 102. The resulting Act on the Prohibition of Discrimination in the Labour Market, etc. prohibits discrimination on the grounds of “race, colour, religion or belief, political opinion, sexual orientation, age, disability or national, social or ethnic origin.”

¹⁸ See Tore Vincents Olsen, DISCRIMINATION AND ANTI-DISCRIMINATION IN DENMARK (2008) at 16.

¹⁹ See Jens Peter Christensen, “The Supreme Court in Today's Society,” in Jens Peter Christensen et al. (eds.) *The Supreme Court of Denmark* (2015) at 11-13.

²⁰ See Consolidated Act No. 905 of 3 September 2012 with later amendments.

²¹ See Board of Equal Treatment, *Annual Report 2015*, available at [availhttps://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/arsberetning-ligebehandlingsnaevnet-2015](https://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/arsberetning-ligebehandlingsnaevnet-2015); see also the Board's official website: <https://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet> (showing that the total

a Gender Equality Board (*Ligestillingsnævnet*), which dealt with gender discrimination claims and the Committee for Ethnic Equal Treatment (*Klagekomiteen for Etnisk Ligebehandling*), which dealt with claims of discrimination on the grounds of ethnic origin. Age and disability discrimination complaints were processed through the regular court system.²²

The Board considers complaints on the basis of written observations only; no oral evidence is taken. The Board's decisions are legally binding, and parties have the right to appeal the Board's decision to the national courts. If a defendant does not comply with the Board's decision, the Board may bring an action against the defendant in court, taking over the procedural and financial burden from the plaintiff.²³

Legal Standing of Collective Actors in Denmark

Officially, Denmark has two national equality bodies: The Board of Equal Treatment and the Danish Human Rights Institute (DIHR). Both are members of *Equinet*, a European network of equality bodies, defined by Equinet as: "independent organisations assisting victims of discrimination, monitoring and reporting on discrimination issues, and promoting equality."²⁴ As discussed in the section above, the Board of Equal Treatment mainly performs a quasi-judicial function, processing complaints based on the grounds enumerated in the EU's anti-discrimination directives.

DIHR, among other tasks, is authorized to provide the public with information about Denmark's anti-discrimination laws and give advice about how to file a complaint. It may participate in pending court cases as *amicus curiae*, and since 2015, has the right to bring complaints before the Board on its own initiative in "cases that are a matter of principle or of general public interest".²⁵ Until recently, DIHR acted mainly as a source of information and expertise for individuals who were interested in learning more about their rights and how to exercise them.²⁶ Increasingly, DIHR participates directly in litigation on behalf of individuals who claim to be victims of discrimination. For example, DIHR has contributed *amicus curiae* in cases before the Danish Supreme Court pertaining to discrimination on the grounds of disability with respect to family reunification and access to citizenship,²⁷ and has submitted an *amicus* brief in a case currently pending before the Court of Appeal for the Eastern Circuit regarding the rights of individuals under guardianship to vote.²⁸

Trade unions and NGOs have the right to represent individuals in legal proceedings under slightly different circumstances. As a general rule, only certified attorneys may represent individuals in court

number of cases received by the Board has doubled from 194 in 2009 to 426 in 2012, followed by a slight drop in the following years after 2012).

²² See Board of Equal Treatment, "Om Ligebehandlingsnævnet" <https://ast.dk/naevn/ligebehandlingsnaevnet/om-ligebehandlingsnaevnet>

²³ The jurisdiction of Danish labor courts and labor arbitration bodies is limited to cases involving collective agreements and alleged violations of collective agreements. As such, they do not have jurisdiction to hear anti-discrimination employment claims. See Act no. 106 of 26 February 2008 with later amendments on the Labour Court and Labour Arbitration [*Lov om Arbejdsretten og faglige voldgiftsretter*]. The one exception to this rule is when equal treatment is covered as part of a collective agreement See Section 1(6) of the Act on Discrimination in the Labour Market, etc. For further information see Pia Justesen, *Country Report Non-discrimination Denmark*. 2016 at 76-77. In Decision 199/2011, the Board rejected a complaint from a postal service employee because it dealt with a violation of a collective agreement.

²⁴ See Website of Equinet: <http://www.equineteurope.org/-Equality-bodies->

²⁵ Act No. 1570 of December 2015, cited in Pia Justesen, *Country Report Non-discrimination Denmark*. 2016 at 10.

²⁶ See *id.* at 79.

²⁷ See Decision of the Danish Supreme Court No. 16/2016 <http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Pages/Afslagpaaagtefaellesammenfoeringvarikkediskrimination.aspx> and No. 120/2016

<http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Pages/Afslagpaainfoedsretvarikkediskrimination.aspx>

²⁸ Email correspondence with Maria Ventegodt Liisberg, Danish Institute for Human Rights, Department Director, Equality Department (11 May 2017).

cases. This requirement is slightly relaxed for trade unions and other membership organizations in cases involving pay and employment matters, which pursuant to Section 260 of the Administration of Justice Act, allows for in-house jurists to represent individuals, even if they are not certified attorneys. A trade union is also permitted to file suits in its own name on behalf of its member, but formally speaking, the member—and not the trade union—remains the only party to the case. NGOs do not enjoy the same status as trade unions in this respect. NGOs can assist in preparing a case, but the plaintiff must be represented by a certified attorney.²⁹

Denmark does not have a strong tradition of *actio popularis*. Associations, organizations, or trade unions acting in the public interest must represent a specific, identifiable plaintiff. In Decision No. 88/2011, the Board of Equal Treatment rejected an NGO complaint that alleged discrimination on the basis of race and ethnic origin based on a newspaper report that the owner of a campground would refuse access to people of Roma origin. The Board concluded that it could not hear the complaint because the NGO did not refer to any specific individual whose rights had been violated.³⁰ However, as noted above, DIHR is authorized to bring cases before the Board that are in the general public interest, and has done so on at least two occasions. In one case, DIHR challenged a daycare center's policy of allowing only female staff members to assist children with using the bathroom and changing diapers and clothes.³¹ In another case, DIHR challenged a Danish high school's policy of segregating students by ethnic group, which resulted in a settlement favorable to DIHR's position.³²

In short, we find evidence to support the view that the procedural requirements set forth in Directives 2000/43 and 2000/78 transformed Danish anti-discrimination law. In the interviews we conducted for this paper, stakeholders consistently stressed that the directives, which were transposed into national law in 2004, were instrumental in pushing Denmark to implement judicially enforceable anti-discrimination rights and remedies that did not exist before. The change was particularly pronounced in the fields of age and disability discrimination. We also observe a steady increase in the institutional capacity of Denmark to address anti-discrimination claims. The Board of Equal Treatment, created in 2009, is a significant upgrade from the Gender Equality Board and the Committee for Ethnic Equal Treatment. Statistics compiled by the Board show that its docket has been steadily growing.³³ DIHR's powers to ensure that the directives are properly implemented have also been gradually strengthened over time. It has served as a national equality body with regard to race and ethnicity since 2003, with regard to gender since 2011, and has the power to independently file complaints before the Board of Equal Treatment since 2015.³⁴

However, we see little evidence to suggest that the directives' provisions regarding the role of collective actors have influenced Danish preliminary references in the field of EU anti-discrimination law. The principal collective actors that appear before the CJEU are not the Danish equality bodies or NGOs, but trade unions. To date, Danish courts have referred 8 cases to the CJEU requesting guidance on the correct interpretation of Directive 2000/78; trade unions participated in all of them.³⁵ To the best of our

²⁹ See Pia Justesen, *Country Report Non-discrimination Denmark*. 2016 at 79.

³⁰ See *id.* at 80.

³¹ See Press Release, available at <https://ast.dk/naevn/ligebehandlingsnaevnet/nyheder-fra-ligebehandlingsnaevnet/lbn/nyheder-2017/mandlige-ansatte-i-en-bornehave-matte-ikke-hjaelpe-born-ved-toiletbesog-ble-og-tojskiftning>

³² For additional details, see <https://menneskeret.dk/nyheder/forlig-sag-fordeling-elever-paa-grund-etnicitet>. Email correspondence with Maria Ventegodt Liisberg, Danish Institute for Human Rights, Department Director, Equality Department (11 May 2017).

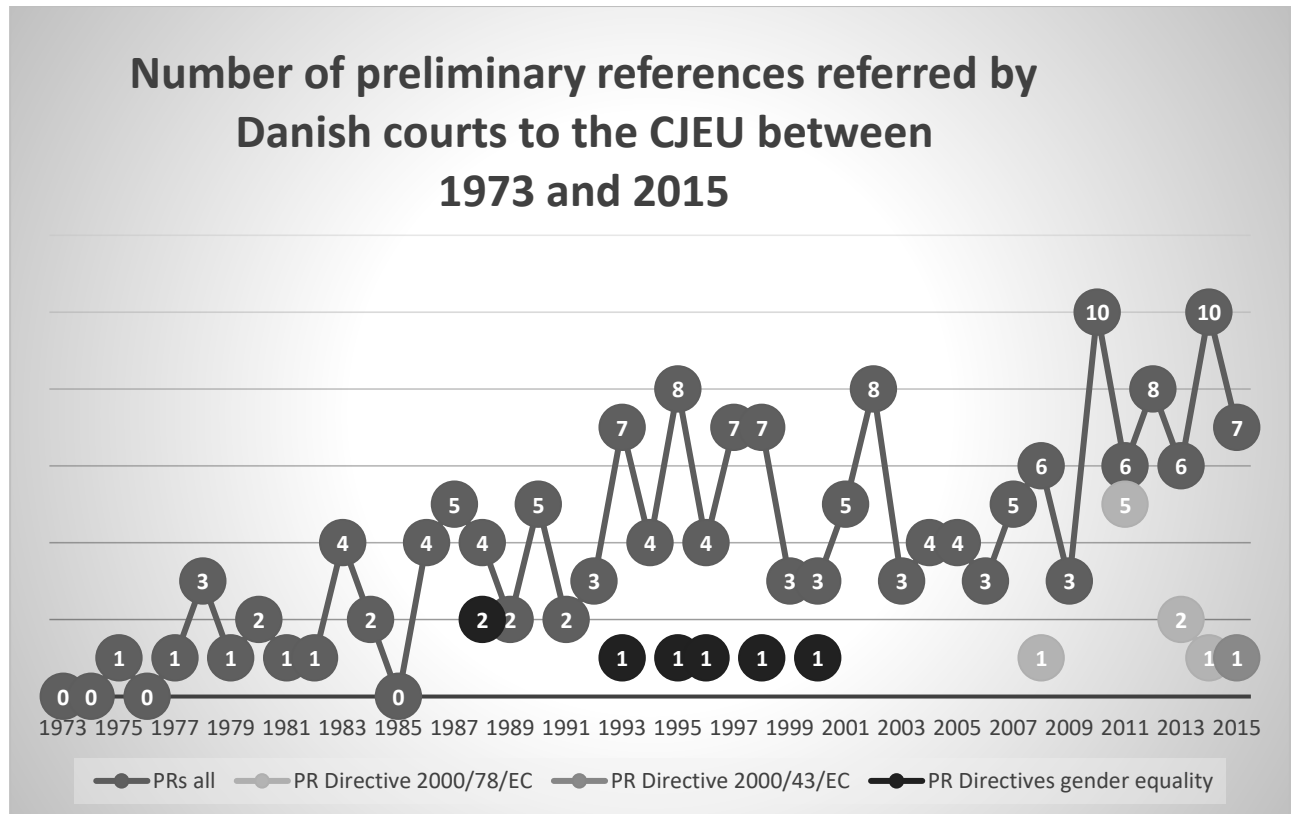
³³ See Board of Equal Treatment Website, "Tal og statistik fra Ligebehandlingsnævnet", available at <https://ast.dk/naevn/ligebehandlingsnaevnet/tal-og-statistik-fra-ligebehandlingsnaevnet>.

³⁴ See Website of Equinet, "Denmark: Danish Institute for Human Rights" available at <http://www.equineteurope.org/Danish-Institute-for-Human-Rights>.

³⁵ Results based on CURIA database search: Subject matter: "Directive 2000/78"; Source of a question referred for a preliminary ruling: "Denmark".

knowledge, DIHR and Danish NGOs participated in none of them. And this is not a new development. Trade unions were also involved in all 7 Danish preliminary references³⁶ brought under EU gender equality directives³⁷ between 1988 and 2000. Chart 1 provides a visual representation of Danish preliminary references over time with special attention paid to references involving EU anti-discrimination directives.

Chart 1



³⁸Note

³⁶ See Case C-226/98, Case C-109/00, Case C-66/96, Case C-400/95, Case C-179/88, Case 109/88, Case C-400/93. We note, however, that other collective actors may have encouraged the trade unions to take advantage of the preliminary reference procedure. Specifically, the Equal Status Council, founded in 1975 and dissolved in 2000, has been cited as influencing litigation activity at the EU level between 1988 and 2000. See Claire Kilpatrick, *Gender Equality: A Fundamental Dialogue*, in Silvana Sciarra (ed.) *LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE ECJ* 80 (2001); see also Dorte Sindbjerg Martinsen, *The Europeanization of Gender Equality – Who Controls the Scope of Non-Discrimination?* 14 *JOURNAL OF EUROPEAN PUBLIC POLICY* 544 (2007).

³⁷ Data has been collected for preliminary references on gender equality coming from Denmark on the following Directives - Directive 2010/41/EU repealing (Directive 86/613/EEC), Directive 2010/18/EU repealing (Directive 96/34/EC), Directive 2006/54/EC repealing (Directive 2002/73/EC, Directive 98/52/EC am., Directive 97/80/EC, Directive 96/97/EC, Directive 86/378/EEC, Directive 76/207/EEC, Directive 75/117/EEC), Directive 2004/113/EC, Directive 92/85/EEC, Directive 79/7/EEC. Directives requiring the establishment of national equality bodies were not introduced until Directive 2002/73/EC, Directive 2004/113/EC, Directive 2006/54/EC and Directive 2010/41/EU.

³⁸ The chart is based on data obtained through CURIA with the following search criteria: period 01/01/1973 – 09/05/2017 – period or date = "Date of the lodging of the application initiating proceedings" under the reference for a preliminary ruling and preliminary reference – urgent procedure, Court = "Court of Justice", source: Denmark. Reports on the cases after 2015 are not yet available in CURIA, therefore, the cases included in the chart are those submitted until 2015. The total number of preliminary references referred by Danish courts in the period between 1973 – 2015 is 172, out of which 7 are under directives related to gender equality, 9 under Directive 2000/78 and 1 under Directive 2000/43. Joined cases are

The following section provides an analysis of the authors' findings regarding two cases involving Directive 2000/78 brought by Danish trade unions which were referred to the CJEU under the preliminary reference procedure. The case studies are based on official court documents and interviews with individuals who were directly involved in the litigation. Both cases involved plaintiffs who alleged that they had been discriminated against on the grounds of disability. Although we learned that the Danish trade unions reached the preliminary reference stage under somewhat different circumstances, in both instances the involvement of the trade unions were crucial. They appear to be the only collective actors in Denmark with the legal expertise, financial resources, and motivation to take legal battles all the way to Luxemburg.

Selected Danish Preliminary Reference Cases on EU Anti-Discrimination Law

HK Danmark (Ring and Skouboe Werge), joined cases C-335/11 and C-337/11 [2013]

HK Danmark involved two plaintiffs whose employment had been terminated after absences from work for medical reasons. Jette Ring was terminated from her position as a customer service center operator for the firm Dansk Almennyttigt Boligselskab (DAB). Lone Skouboe Werge had been employed as an administrative assistant by the firm Pro Display A/S. Both plaintiffs were represented by the trade union Handels- og Kontorfunktionærernes Forbund Danmark (HK Danmark). According to its website, HK Danmark is a trade union with approximately 250,000 members³⁹, who “work within the retail sector and as administrative staff within both the public and the private sectors.” Unique among Danish trade unions, HK Danmark is a repeat player before the CJEU, which is perhaps best known for its representation of the plaintiff in *Danfoss*, a landmark European court case in the field of equal pay for men and women.⁴⁰

The preliminary reference in joined cases C-335/11 and C-337/11 was the culmination of several years of outreach spearheaded by a group of legal practitioners who regularly represented Danish employees. After Directive 2000/78 was transposed into Danish law, employees' representatives held regular meeting and workshops with trade union members to raise awareness about the new workers' rights and how to exercise them.⁴¹ At roughly the same time, Danish courts began to issue decisions that interpreted the disability-related provisions of Directive 2000/78 quite narrowly. Particularly disconcerting for disability rights advocates, two early cases from the Court of Appeal for the Western Circuit determined that plaintiffs with, respectively, multiple sclerosis and post-traumatic stress syndrome, were not disabled. The court reached this result because the plaintiffs had only requested reduced working time as an accommodation for their disabilities, and, in the court's opinion, reduced working time was not an accommodation required by Danish law.⁴² Later decisions of the Court of Appeal for the Eastern Circuit and the Danish Board of Equal Treatment took a more forgiving approach to the question of who

represented as separate cases. For example, joined case 335/11 and 337/11 is counted as 2 cases. The year corresponds to the year when the application of the respective case is lodged before the CJEU.

³⁹ See Website of HK Danmark, “About HK Danmark” at <https://www.hk.dk/omhk/about-hk>.

⁴⁰ Other cases brought by HK Danmark via preliminary reference include: Case C-476/1, *HK Danmark (Glennie Kristensen) v. Experian A/S* [2013] (raising issues related to age discrimination under Directive 2000/78); Case C-109/00, *Tele Danmark A/S v HK Danmark* [2001] (involving interpretation of gender equality provisions); Case C-400/95, *Handels- og Kontorfunktionærernes Forbund i Danmark (Larsson) v. Dansk Handel & Service (Føtex Supermarked A/S)* [1997] (requesting guidance on absence due to pregnancy and confinement); Case C-179/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening* [1990] (involving absence due to illness attributable to pregnancy or confinement).

⁴¹ Information obtained in interview with Danish legal practitioner familiar with the case.

⁴² See Danish Western High Court Judgment of 11 October 2007, published in UFR2008.30V; see also Danish Western High Court Judgment of 11 October 2007, No. B-2777-06 (unpublished).

qualified as disabled under the Act, but it remained the view among many employees' representatives that a preliminary reference could provide Danish courts with greater clarity about the scope and appropriate application of the Directive. They also believed that the CJEU would probably take a more expansive view of the Directive than Danish courts had.⁴³

The reference poses several questions, but from the perspective of the employees' representatives, the key goals were to clarify the definition of disability and—with a nod to the aforementioned Danish Western High Court judgments of 2007—establish whether a reduction in working hours could be considered a reasonable accommodation. Counsel for the plaintiffs were extremely pleased with the CJEU's response.⁴⁴

The CJEU acknowledged that since its ruling in *Chacón Navas*, the European Union had approved the UN Convention on the Rights of Persons with Disabilities (CRPD) and that the CRPD formed an integral part of the EU legal order. Therefore, Directive 2000/78 “must, as far as possible, be interpreted in a manner consistent with that convention.” With respect to the specific questions raised in the preliminary reference, the CJEU held that so long as the individual met the definition of disability, it was irrelevant whether the impairment was curable or incurable. It further held that a reduction in working time could be a reasonable accommodation, but that it was up to the Danish court to determine whether the accommodation constituted a disproportionate burden on the employer.⁴⁵

FOA on behalf of Karsten Kaltoft vs Billund Kommune, Case C-354/13 [2013]

Mr. Kaltoft was dismissed by the Municipality of Billund, Denmark where he was employed as a childminder for 15 years.⁴⁶ He was considered obese during his whole career and was encouraged by his employer to reduce his weight. Mr. Kaltoft was represented by Fag og Arbejde (FOA), which brought the case to a local court in Denmark - Retten i Kolding (District Court, Kolding), claiming his dismissal was a result of discrimination on the basis of obesity.⁴⁷ FOA is the third largest union in Denmark, with a membership consisting of 186,000 assistants and workers in the healthcare and social fields, nursery schools and kindergartens, employed by municipalities, with 39 local branches across the country⁴⁸. Although FOA handles many cases at national level, this is the only case in which they have acted as a legal party before the CJEU.

Local stakeholders familiar with the *Kaltoft* case reported in interviews that bringing a case to court was not the first and most preferred step that unions in Denmark take. The complaint of a worker would first reach a local office of a union, and if no compromise with the employer is negotiated, the case moves up to the central office of the union. As a last resort, the union can take the case to court, covering the financial burden for the litigation process, and providing legal support by an in-house lawyer or a specialized external attorney.

The *Kaltoft* case was led by an external attorney who was hired to represent the claimant in cooperation with the FOA legal team. Even though the plaintiff's side was pushing for a preliminary request to the CJEU, they thought it highly unlikely that the local court would agree to send a reference, as it was widely believed that this is “reserved” mainly for the high courts in Denmark.⁴⁹

⁴³ Information obtained in interview with Danish legal practitioner familiar with the case.

⁴⁴ Information obtained in interview with Danish legal practitioner familiar with the case.

⁴⁵ See Joined Cases C-335/11 and C-337/11 *HK Danmark (Ring and Skouboe Werge)*, [2013] at ¶¶ 30-32, 41 & 59.

⁴⁶ See Case C-354/13 *FOA on behalf of Karsten Kaltoft v Billund Kommune* [2013] at ¶17.

⁴⁷ See *id.* at ¶¶ 18 & 29.

⁴⁸ See Website of FOA, “About FOA” at <https://www.foa.dk/Forbund/Om-FOA>.

⁴⁹ A search in CURIA for all cases referred by Danish courts under the preliminary ruling procedure reveals that the most active ones are the Danish Supreme Court and the two Danish High Courts, respectively Højesteret and Østre Landsret,

A preliminary reference was sent to the CJEU by the Retten i Kolding in June 2013. The local judge submitted four questions to the CJEU concerning obesity—either as a potential “self-standing ground of discrimination” within the general framework of equality, set by the Treaties (Art. 6 TEU) and the Charter of Fundamental Rights of the EU—or as a part of the vague concept of disability, covered by Council Directive 2000/78.⁵⁰ The two lawyers had a say in formulating the questions referred to the CJEU, which were then referred to the CJEU by the local court.⁵¹

Inspired by a similar case in the USA involving a bus driver, whose seat was adjusted to his physical condition of obesity as a part of a reasonable accommodation measure, the FOA considered that obesity could be defined as a disabling condition in Europe too. The CJEU rejected obesity as a “self-standing ground of discrimination” but, in response to the fourth referred question, responded positively, setting out the necessary conditions under which obesity could be recognized as a disability.⁵² In the end, the judgment of the national court focused on the fact that Mr. Kaltoft’s obesity was not a reason for his dismissal.⁵³ The FOA team has not given up the fight for Mr. Kaltoft’s rights. They are about to appeal the case (information obtained in October 2016) to the Supreme court in Denmark, which serves as the second and last instance for this case.

Kaltoft has not provoked any similar cases related to obesity, but other cases in the disability domain have followed up after its publication. On the one hand, the case has opened the minds not only of employees but also of the local union branches to think “more broadly what disability” could be, including psychological conditions such as ADHD and depression. On the other hand, there appears to be a growing camp that is concerned that the parameters of the concept of disability could be stretched too far.

Based on interviews conducted in October 2016, the perception of Danish stakeholders working in the equality field at national level was that the CJEU was more likely to issue positive decisions in the equality field compared to national courts. The CJEU is clearly perceived by some trade unions as a potentially powerful partner with the ability to influence the outcome of national disability claims.

Conclusion

At the outset of this paper, we asked why Danish courts have been uncharacteristically enthusiastic about making preliminary references involving Directive 2000/78. Building on the work of Eliantonio and Muir, we hypothesized that the EU anti-discrimination directives’ relatively detailed procedural requirements regarding access to justice and the participation of collective actor may have caused, or contributed to, this anomalous result. We found ample evidence to suggest that the directives’ procedural provisions had a profound effect on Danish anti-discrimination law at the domestic level, strengthening the national equality bodies’ powers. As a result, the number of cases brought before the Board of Equal Treatment has steadily increased and DIHR has become a more active participant in national litigation.

That said, the involvement of collective actors involved in preliminary references has not changed. Just as the trade unions led the charge for preliminary references in the field of gender equality in the late 1990s, Danish trade unions remain the key actors pushing for preliminary references to the CJEU in the anti-discrimination field today. Danish trade unions inform employers about their duties and employees about their rights under EU law, and when they deem it necessary, they back their members in court—

Vestre Landsret, followed by the Maritime and Commercial Court So- og Handelsretten, which send approximately 85% of the total number of preliminary requests referred to the CJEU.

⁵⁰ See Case C-354/13 *FOA on behalf of Karsten Kaltoft v Billund Kommune* [2013] at ¶ 30.

⁵¹ The process of drafting the questions was confirmed in an interview with national stakeholders familiar with the case.

⁵² Case C-354/13 *FOA on behalf of Karsten Kaltoft v Billund Kommune* [2013] at ¶ 65.

⁵³ See Press Release, available at <http://www.domstol.dk/kolding/nyheder/Pressemeddelelser/Pages/Domafsaagden31marts2016.aspx>

with legal expertise and financial support—to ensure that EU law is appropriately applied. Although we were unable to establish why Denmark has been so active in referring cases involving Directive 2000/78, based on the analysis above, we feel confident that the answer lies in a closer examination of the motivations of Denmark’s trade union, rather than the directives’ procedural rules regarding access to justice and collective actor participation.

The litigation of anti-discrimination cases in France by collective actors: a selective mobilization hindered by tradition

*Sophie Latraverse**

In France, since the year 2000, institutional and legal reforms fostered by EU directives have allowed the emergence of significant evolutions regarding the impact and enforceability of discrimination law. However, French political and legal traditions have been reluctant to adopt this approach because it conflicts with the traditional theory of equality and the defiance of the legal environment towards legal doctrines that question the systematic application of the law in order to respond to particular interests. French civil society, including NGOs and trade unions, shares this defiance and resists acting in support of the rights of particular communities. In this context, the French equality bodies, i.e. the High Authority against Discrimination and for Equality (HALDE), created in 2005, and the Defender of Rights, which was integrated into the HALDE in 2011, have been determining actors in support of the enforcement and promotion of the anti-discrimination legal framework. As regards NGOs, traditional human rights NGOs are not significantly engaged and prefer criminal law and the European Convention on Human Rights (ECHR) to the EU anti-discrimination legal framework. Significant cases relating to Article 19 of the Treaty on the Functioning of the European Union (TFEU) grounds, including referrals to the Court of Justice of the European Union (CJEU), were either supported by the French equality body, private parties or new activist NGOs acting in specialized areas such as religious and LGBTI rights. As regards the implication of trade unions, the analysis of legal developments show that while they have contributed to the development of anti-discrimination law in the context of the fight for the rights of union representatives, they have only supported a few isolated cases with respect to other grounds.

EU law has been at the core of the enforceability of anti-discrimination law in France. Transposition of the EU Directives has led to the creation of a comprehensive legal framework and the adoption of the institutional reforms necessary to insure its effectiveness.

The French equality body, the High Authority against Discrimination and for Equality (HALDE), which was created in 2005 and integrated into the Defender of Rights in 2011¹, was conceived to bring about effective enforcement. Both institutions have been determining actors in support of the enforcement and promotion of the anti-discrimination legal framework since 2005.

However, the European anti-discrimination legal framework is perceived by French political and legal actors as the superfluous importation into the French legal system of an Anglo-Saxon political and legal approach, which conflicts with the inner logic of French civil law, the theory of equality and paramount legal principles such as the universal application of the rule and the refusal to recognize minorities, which anchor the French conception of public good.

In addition, the French conception of democracy considers it illegitimate to pursue social change through legal action. Therefore, anti-discrimination law is perceived as a foreign mutation, introducing mechanisms which disrupt the institutional play and construct a covert activism that intervenes to counteract political action and social mobilization.

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¹ Law 2004-1486 of 30 December 2004 creating the High Authority against discrimination and for Equality (Haute autorité de lutte contre les discriminations et pour l'égalité/ HALDE) which had been replaced by the Organic Law n° 2011-333 of 29 March 2011 creating the Defender of Rights (Défenseur des droits).

The anti-discrimination agenda is received with defiance by social actors as well.

Traditional anti-racist and human rights NGOs prefer to invest in the symbolic denunciation of racism through criminal procedure. Trade unions are not really open to focusing their action towards the interests of what they perceive to be minority groups.

The implementation of EU anti-discrimination law in France embodies the paradox of the attitude of French society towards European-driven social change. While anti-discrimination law has been transposed into national law and has prospered significantly, it crystalized such defiance that it remains an instrument that escapes mainstream means of action. It is a domain of specialists; its impact and influence on legal reasoning remains fragile.

After presenting an overview of the rhetoric used by French institutions and social actors to limit the impact of the anti-discrimination legal framework, we will present the actions of the equality body, NGOs and trade unions.

The Core of French Resistance

French society's political tradition is based on democratic expression through political mobilization aimed at supporting change through and by the state. Religious freedom, equality between men and women and the fight against racism are paramount collective values and as such must be recognized and enforced by the state through penal sanctions and public policy.

They are deemed to have been the subject of exemplary action on the part of the French Republic, which has led to a high level of collective awareness and mobilization on these issues. It attributes paramount worth to the fact that, as opposed to the Anglo-Saxon approach, the Republican tradition promotes universal values for all, without creating opposing social groups and promoting particular interests. Individual rights are always balanced by the principle of equality and one's connection to the people.

According to this philosophy, racism, islamophobia and homophobia must be dealt with by insuring equal treatment for all, whereas the anti-discrimination agenda supports the specific claims of victimized sub-groups. This approach is deemed to be bad for social cohesion and would not favor effective equality in the long run.

The concept of discrimination has long been dismissed as irrelevant by the social sciences and the political discourse, under the influence of the analytical framework of inequalities inherited from Marxism, combined with the Jacobinism of the French Universalist approach that sees individuals as holding identical rights. Inequalities are held to be a matter of systemic class struggle. According to French social democrats, the legitimate strategy to fight discrimination is to educate and reduce economic disparities, a solution which will *in fine* settle all integration problems.²

Ever since 2000, the European pressure on legal action as the mean chosen to impose a specific approach to the analysis and agenda on the fight against discrimination is perceived by most political forces as a domain where France must fight against European politics. This position has had tremendous implications for collective actors.

This resistance is particularly visible in the hostile reactions of jurists and judges, political actors and trade unions. They consider discrimination law as an instrument that allows individuals, or very small groups, to use the courts to by-pass French democratic institutions in order to implement a foreign

² P.ICARD, Y.LAIDIE et al, Le principe de non-discrimination : l'analyse des discours, *The principle of non-discrimination: Analysis of the legal discourse* CREDESPO, June 2016: <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/R.F.214.04.03.21-1.pdf>;

political agenda for social change monitored by European politics to foster the construction of a liberal society of singular components and parallel communities.³

In addition, some protected grounds, such as religion and opinions - if they impose requirements beyond the protection of religious and political freedoms - are criticized by most French actors as illegitimate. They appear as the political imposition of foreign considerations giving rights to sub-groups without consideration for the public interest.

The resistance of jurists: limiting the impact of Anglo-Saxon legal reasoning on the integrity of French law

Before 2000, the few cases that were brought before the courts failed by reason of difficulties relating to the burden of proof of claimants and the reluctance to resort to the collective analysis of the situation of persons sharing a similar situation related to a prohibited ground of discrimination, in the context of an individual case.

French law has historically been structured around its own theory of equality, formal and universalist, which still constitutes the foundation of French public law, proposing a line of reasoning along the ideas of “equal application of the law” and equality before the state and public service. All acceptable exceptions are subject to the necessity of pursuing a “paramount public interest”.

Regarding private law, it is governed by the tradition of freedom of contract in civil law and therefore holds that restrictions on this principle must be required by law, public order or a paramount public interest.

French political and legal traditions are systematically cautious of doctrines that question the systematic application of the law in order to respond to particular interests.

Many scholars have discussed the influence of anti-discrimination law on the equilibrium of French legal reasoning. Today, impact studies show that judges, while officially accommodating the principle of non-discrimination, often limit their reasoning to an application of the legal theory of equality and clearly confirm open resistance to its wider application because of its consequences for civil procedure and legal reasoning.⁴

While the jurisprudence of the higher courts in matters related to employment law has supported the implementation of the legal framework of the EU directives, important difficulties remain before lower courts and administrative and civil jurisdictions.

The judge has particular problems with the idea of abandoning the general application of the rule, and passing on to an approach that finds individual solutions to particular situations.⁵ Inequality is no longer a fact, it becomes an action, individual or collective, that can be sanctioned against a designated

³ For example, the political journalist A.-G. Slama : « Quand on considère l'usage qui est fait en ce moment de la notion de lutte contre la discrimination, il est difficile de ne pas en conclure que ce combat s'exerce surtout contre la démocratie. Cette notion repose sur le principe universaliste d'égalité de tous devant la loi, qui est nécessaire au consensus républicain. Elle devient mortelle quand elle est mise au service d'un particularisme, dans le but de la subvertir» : *“When one considers the use that is being made of the concept of discrimination, it is difficult to conclude that this fight is not one targeting democracy itself. It becomes lethal when it serves particular interests with the purpose of bypassing its basic principles”*. Our translation, « Discrimination et subversion », Le Figaro, 13 novembre 2006.

⁴ P.ICARD, Y.LAIDIE et al , Op . Cit..

⁵ M. MERCAT-BRUNS, J. PERELMAN, et al. Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination: perspectives pluridisciplinaires et comparées, *Courts and public authorities implementing non-discrimination law : comparative and pluridisciplinary perspectives*, École de droit de Sciences Po, June 2016: http://www.gip-recherche-justice.fr/wp-content/uploads/2016/11/gip_rapportfinal_les-juridictions-et-les-instances-publiques-la-non-discrimination-final.pdf.

respondent, held responsible for the impact of collective choices over time and, possibly, bring about sanction in the absence of intentional fault.

It highlights the fundamental rhetorical difference between legal systems regarding procedural rules and evaluation of the merits of the case: it goes to the purview of the trial process, the scope of liability, the very concept of equitable behavior and the function of legal action. But before all else, it goes to the heart of the definition of equality and the reluctance of the French to the idea of treating persons differently in different situations.

One of the solutions of French lawyers and judges is to frame legal discussion outside the legal framework of anti-discrimination law; another is to generalize to all citizens the scope of a protection in favor of equal treatment afforded by the principle of non-discrimination. In the Ponsolle case, the Court of Cassation created a general principle of equal pay applicable to all workers, i.e. between men, between women, and between men and women.⁶

The resistance of political actors: limiting the introduction of foreign concepts contrary to the French legal and political tradition

The French Republic has systematically refused to ratify international conventions for the recognition and protection of rights of minorities.

The concept of minority is considered to be contrary to the French conception of the public good. It allows sub-groups to claim specific rights, thereby altering social cohesion and the very concepts of equality and public interest.

In this context, the concept of indirect discrimination translates the legal empowerment of minorities and supports the construction through European law of the conditions for the covert recognition of minority rights benefiting from the adaptation of the general rule to specific circumstances.

Many members of Parliament hold a very negative view of anti-discrimination law. For example, in 2008, the Senate adopted a resolution denouncing European law as importing a Community-based approach to equality that was contrary to the principles of the French Constitution.⁷

As another example of an effort to adapt the principle of non-discrimination to the French tradition by generalizing the requirements of equal treatment, in Article L1110-3 of the Code of Public Health, Parliament created a general principle of non-discrimination in access to health services without reference to a list of protected grounds.

The resistance of trade unions: limiting support to legal action

In France, political action and social activism are perceived as the only democratic mechanisms of communication between the people and the institutions.

The separation of powers is a necessity, and normative power cannot be delegated to judges, who can only interpret and apply the law but can in no way jurisprudentially impose on citizens independent norms or act as social regulators. Such legal activism, activated by private interests, is foreign to French traditional mechanisms of power struggle.

This reluctance is emblematically illustrated by the refusal of trade unions to get significantly involved in anti-discrimination litigation, except on the ground of anti-union discrimination. The justification is

⁶ Cass. Soc., 29 October 1996, n° 92-43680: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007038205>

⁷ Senate resolution on the proposal for a new anti-discrimination Directive in access to goods and services, adopted on 30 October 2008: http://www.senat.fr/rap/108-072/108-072_mono.html

that they have a mandate to represent the collective interests of the workers and that anti-discrimination cases pursue interests of sub-groups of the working unit.

In addition, the trade unions consider that their function is to support “the struggle” and the “negotiation process”. Thus, their function is not to engage in judicial activism.

For example, they have not supported claims by old North African workers questioning their discriminatory status and their ensuing careers against Renault and the National Railway (SNCF). Moreover, in the context of the discussions relating to the adoption of a class action in anti-discrimination cases, the trade unions’ lobby went so far as to argue, with success, in favor of the preeminence of traditional social dialogue methods over legal action⁸, i.e. negotiations under the exclusive direction of legally appointed trade unions⁹, while preserving their exclusive right to initiate class actions in relation to discrimination in the workplace. As a result, their strategic choices to initiate an action will afford no challenges. NGOs are prevented from representing claimants in class actions relating to discrimination in employment and cases of alleged discrimination before accessing employment, such as those questioning hiring practices.¹⁰

The Actors of the Implementation of Anti-discrimination Law

The pro-European context of the early 2000’s and the pressure of the European Commission have brought about institutional and legal reforms that have allowed the emergence of significant evolutions in France regarding the impact and enforceability of anti-discrimination law.

It is first the French equality body that has undertaken a strategy to develop the jurisprudence in order to allow effective application of the anti-discrimination legal framework and foster effective action before the labor law jurisdictions.

However, while some specialized NGOs have integrated anti-discrimination law in their activities, their contribution remains focused on specific grounds and most anti-racist NGOs have pursued their former approach.

Trade union action has contributed to the development of anti-discrimination law, but only through the indirect impact of jurisprudence developed in the context of discrimination against union representatives.

The contribution of the equality body

Overview

Article 71-1 of the Constitution of 1958 and Organic Law n° 2011-333 of 29 March 2011 created the Defender of Rights, an independent administrative authority that is, amongst other functions, the national equality body that succeeded HALDE. HALDE had been created in 2005 as part of the transposition of Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Council Directive 2002/73 of 23

⁸ Pécault-Rivolier, L., Rapport au ministre du travail sur les discriminations au travail/ *Report to the Minister of Labor on discrimination in employment*, 6 December 2013, <http://www.justice.gouv.fr/publication/rap-l-pecaut-rivolier-2013.pdf>

⁹ In France representative trade union are not elected but designated by decree of the Minister of employment. The decree issued on 1 June 2013, constitutes the first revision of the list since the last decree of 31 March 1966: <http://social.blog.lemonde.fr/2013/06/01/la-liste-des-syndicats-representatifs-au-journal-officiel/>

¹⁰ Articles 87 and 88 of the Law n° 2016-1547 of 18 November 2016 of Modernization of the Justice of the XX1st Century: <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo>

September 2002 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.

The competence of the Defender of Rights covers all discrimination prohibited by law and international conventions ratified by France. The scope of its mission encompasses all requirements of the Directives (Article 13 of Directive 2000/43, Article 1 par 7 of Directive 2002/43 and Article 20 of Directive 2006/54 recast) , i.e. providing independent assistance to victims of discrimination in pursuing their complaints (Article 27), conducting independent surveys concerning discriminations, publishing independent reports (Article 34) and making recommendations to the government (Article 32), employers and civil society actors relating to its findings on discrimination (Article 25).

Assistance of victims, investigative powers and dispute resolution

Its competence relating to the assistance to be provided to victims takes the form of an independent investigation of individual and collective complaints. The investigation is initiated of its own accord or following a written request from the claimant, a trade union or an NGO.

It is carried out at arms-length but is not quasi-judicial. It takes the form of an administrative investigation.

Its competence to investigate complaints and render decisions extends to all issues relating to claims against the government and public services, as well as the ‘best interest of the child’, as defined in article 3 of the UN Convention on the Rights of the Child, and ethics in the activities of public and private security forces. Therefore it covers most human rights issues as well as all questions relating to children’s rights and relations between the police, security forces and citizens, except questions related to defence rights in criminal law.

The Defender of Rights has investigative powers that allow him to request any information, on any support, from any person, public or private (Article 18). He can also take testimony from any person and proceed to verification *in situ* (Article 22).

The investigation can give rise to a non-binding decision concluded on the merits of the complaint. If it finds the complaint well-founded, he can address recommendations to all interested parties, who have a certain amount of time to comply. These recommendations can include a request to pay damages or to issue a disciplinary sanction (Article 29). The Defender of Rights can also make general recommendations to the parties, government, public bodies or groups of interest and propose legislative and regulatory reforms and amendments to existing legislation (Article 32).

The Defender of Rights can deal with any case by pursuing an ‘equitable settlement’, which in French law consists of proposing a solution correcting the unfairness resulting from a strict application of the law despite the absence of effective means of legal action, and he may recommend mediation to the parties (Article 25).

In case of non-compliance, the Defender has the power to issue ‘injunctions’, failing which he will draw public attention to his recommendations and the failure of the Respondent to comply (Article 25). In addition, he may alert the relevant authorities if disciplinary sanctions against the respondent are required (Article 29).

However, the Defender’s decisions do not otherwise bind the parties or the courts, and claimants are not required to address their complaints to the Defender of Rights. Claimants can initiate actions directly before courts in all cases.

Relationship to courts

The law sets out at Article 33 of the Organic Law an original role for the Defender of Rights, who may intervene as an advisor to criminal, civil and administrative courts at all levels: the law creates on the one hand the possibility for criminal, civil and administrative courts to seek his observations in cases under adjudication, and on the other hand, it allows the Defender of Rights to file his investigation in the court record and submit observations arguing the facts and the law on his own initiative.

The Court of Cassation and the Conseil d'Etat have given some further indications as to the status of the Defender of Rights before the courts: the Defender of Rights is not a party to the case¹¹ but acts as *amicus curiae*; he is not a court or a tribunal since his decisions are not binding, and he cannot be sued in court because he cannot be held to be detrimental to the defeated party¹² until the Defender of Rights decides to give some publicity to his decision.

The Court of Justice of the European Union has not yet had the opportunity to render a decision on the standing of HALDE and the Defender of Rights. Considering the nature of the procedure before the Defender of Rights and his status before the courts, as defined by Article 33 its Organic Law, according to the test adopted by the Court of Justice of the European Union in the *Belov* case¹³, the Defender of Rights does not seem to be a jurisdiction that can address referrals to the Court within the meaning of Article 267 TFEU: he meets the Court's definition of a body pursuing administrative investigations and taking administrative decisions that cannot directly address referrals to the Court of Justice.

As regards his standing before the Court, the Defender of Rights has been involved in a referral to the CJEU by the Conseil d'Etat, in which he requests the authorization to present conclusions on the basis that he is party to the procedure in the sense of the article 23 RPCJEU.¹⁴

Institutional strategy

Since 2005, both equality bodies have pursued a strategy focused on contributing to the adjudication of cases before the courts by collecting necessary evidence to be filed in the court record, contributing to the development of legal arguments in strategic cases and allowing the creation of the critical volume of jurisprudence necessary to create the conditions for the effective enforcement of anti-discrimination law.

At the time of its creation, civil procedure did not allow claimants to have access to certain evidence in possession of the defendant in order to establish facts in support of his or her case. In this context, claimants failed to establish discrimination before French courts on the basis of the fundamental civil principle that claimants had to sustain the burden of proof.

HALDE and the Defender of Rights have pursued a strategy of investigation to intervene as *amicus curiae* in the proceedings and file evidence in all cases where claimants had brought their case to court and the equality body found that there had been discrimination.

In addition, HALDE has specifically argued cases relating to the right to access evidence in order to construct a line of jurisprudence that develops the right to access evidence as a substantive right, directly related to ensuring that the proper conditions exist to enforce anti-discrimination laws.

The Court of Cassation went so far as to hold that in derogation to the usual rules of procedure, the trial judge has a duty to unilaterally ask defendants to provide evidence that allow the court to evaluate the

¹¹ Cass. Soc., 16 November 2010, pourvoi n° 09-42956.

¹² CE, 13/07/2007 n° 294195; CE 23/07/2010 n°299384.

¹³ CJEU, 31 January 2013, C-394/11, *Belov vs CHEZ ElektroBulgarian AD*.

¹⁴ Conseil d'Etat n°399922 of 19 July 2017 in *CNIL, Defender of Rights and others vs Google Inc*, relating to the right to privacy and the right to withdrawal of personal data in application of the Decision of the Court in *Google Spain*.

veracity of the allegations of unequal treatment of the claimant¹⁵, and that refusal to communicate such evidence could justify a shift in the burden of proof against the defendant.¹⁶

This was the first step of a more comprehensive strategy to present legal arguments on the application of anti-discrimination law, facilitate enforceability, and multiply cases. Before the courts, the equality body has built a rhetoric based on the specificity of the issues that can only be addressed in an anti-discrimination law framework, outlining the specific contribution of prohibited grounds of discrimination which relate to characteristics of the person that can be considered to impose considerations of public order and public interest in contract law and public law.

Since 2005, the action of the equality body has given rise to a substantial corpus of cases on issues related to access to evidence and the implementation of the shift in the burden of proof, which have reached the Court of Cassation and Conseil d'État, thereby providing the authority necessary to be recognized by the French legal system as a whole.

This evolution has had a significant impact on the enforcement of anti-discrimination laws on the grounds of age, disability, sex and pregnancy in labor law, before the Social Chamber of the Court of Cassation, and in matters related to employment in the public service before the Conseil d'État. Regarding the ground of sexual orientation, it is mainly raised in relation to cases alleging harassment in the workplace.

Even if some philosophical hesitations remain about the use of the concepts of race and ethnic origin¹⁷, their enforceability has been recognized by the Court of Cassation in cases built by the equality body. The Court has gone so far as to recognize the admissibility of statistical evidence and social studies to support the presumption of discrimination.¹⁸

In addition, the HALDE and the Defender of Rights have developed and spent substantial energy in influencing and supporting evolutions in the academic curriculum of universities and developing training programs for professionals, trade unions and NGOs, encouraging them to go beyond their reflexes and propensities to apply traditional French law to solve the same legal issues.

The substantive contribution of discrimination law to the French legal corpus was recognized in a professional seminar co-organized by the Court of Cassation, the Conseil d'État, the National Bar and the Defender of Rights to honor the 10th anniversary of the creation of the French Equality Body. This Seminar was introduced by the Presidents of both French supreme courts. At the morning session the heads of each competent chamber of the High jurisdictions, as well as Justice Jean-Claude Bonichot from the European Court of Justice, and Justice Françoise Tulkens, former vice-president of the European Court of Human Rights, presented each court's contribution to ten years of judicial development. In the afternoon, lawyers who had argued landmark cases presented their judicial strategy and their analysis of legal developments of the last 10 years.¹⁹

The limited impact of the European legal framework on the action of NGOs

All NGOs, including trade unions (see section II.3), that have been in existence for a period of more than 5 years can intervene before the court on their own.²⁰ In addition, Article 2 of the Law n° 2001-1066 of 16 November 2001 transposing Council Directive 2000/43 (Supra) and Council Directive

¹⁵ Cass. Soc. 28 March 2008, n° 97-45258, Fluchère.

¹⁶ IBM c. Buscail, CA Montpellier, 25/03/2003 N° 0200504.

¹⁷ Constitutional Council, 15 November 2007 n° 2007-557 DC.

¹⁸ Cass. soc., 15 December 2011, n° 10-15873 ; Cass. 1st Civ., 9 November 2016, n° 15-24.207 to 15-25.877, see infra.

²⁰ Article 31 NCCP and Article R779-9 of the Code of Administrative Justice.

2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, expressly provide for the competence of NGOs and trade unions to represent and/or act on behalf of plaintiffs in anti-discrimination cases.²¹

Since the transposition of EU anti-discrimination law, most NGOs have kept to their former means of intervention, except for a few noteworthy organizations.

Anti-racist NGOs (SOS Racisme, le MRAP, la Ligue des droits de l'homme, LICRA, MRAP) are active and intervene in anti-discrimination cases based on ethnic origin in private and public access to goods and services. In pursuing their anti-racist agenda, they favor initiating penal cases relating to intentional and overt racial discrimination. To our knowledge, they have not been involved in cases relating to access to goods and services before civil and administrative courts that apply Directive 2000/43.

However, with the support of the Open Society, they have combined efforts to initiate civil actions against the State to challenge racial profiling by the French police. In this context, with the influence of the lawyers in charge of the case, non-intentional discrimination and the shift in the burden of proof provided by Directive 2000/43 have been the pillars of a judicial strategy before the civil court in 12 emblematic cases that were decided by the Court of Cassation on 9 November 2016.²²

NGOs that are active in defending the rights of migrants (GISTI), of Travelers (ANGVC, UFAT, France Liberté Voyage) and the rights of Roma (FNASAT - Romeurope) have intervened in a variety of cases related to access to public service that are based on mainstream public law. When they raise issues related to discrimination, the subject matters generally relate to principles of equal application of rights protected by the European Convention of Human rights, with which administrative courts are very familiar.

Very few NGOs intervene in employment cases, except specialists such as AVFT (Association européenne contre les violences faites aux femmes au travail) in matters of sexual harassment.

Some NGOs that intervene in relation to homophobia and sexual orientation, such as AutreCercle, ADHEOS or Homoboulot, are very active in promoting best practices but only intervene before the courts in isolated cases (see *infra* Hay Case).

NGOs that intervene in the field of disability have a very active dialogue with the State and public services. They pursue projects for the integration of disabled persons in housing, education, employment and leisure, but intervene very little before the courts. They have however contributed to the dissemination of the concept of reasonable accommodation provided by Article 5 of Directive 2000/78, and its impact on employment practices has been very significant.

The support of NGOs in legal cases related to discriminatory practices on the grounds of sex is non-existent. Historically, Frenchwomen's rights activists have been particularly engaged in issues related to violence against women and reproductive rights, but issues related to employment are deemed to be the competence of trade unions. This explains why there have been very few successful cases relating to discrimination on the ground of sex before the creation of HALDE. However, since 2005 effective adjudication has rapidly given rise to accelerated enforcement of situations of discrimination in employment on the grounds of sex.

As regards cases referred to the CJEU by French jurisdictions, although EU law has made a fundamental contribution to the enforceability of anti-discrimination law in France, there have been only two references to the CJEU, and both have been referred by the Social Chamber of the Court of Cassation with the support of specialized NGOs.

²¹ This is pursuant to article 7 Paragraph 2 of Directive 2000/43, 9 paragraph 2 of Directive 2000/78 and 17 paragraph 2 of Directive 2006/54.

²² Cass. 1st Civ., 9 November 2016, n° 15-24.207 to 15-25.877.

The first case, *Hay*, related to allegations of discrimination on the ground of sexual orientation with respect to access to legal holidays related to family events in violation of Directive 2000/78. It was brought by a claimant who was himself a SUD union representative, and president of an NGO supporting gay rights called ADHEOS. He first filed a claim with HALDE, which gave rise to the presentation of observations in support of an argument of indirect discrimination regarding conditions of employment pursuant to Article 1132-1 of the Labor Code and Article 3.1 C) of Directive 2000/78 before the Courts and then was challenged up to the Court of Cassation. The Social Chamber made a referral to the CJEU.²³

The second referral from the Court of Cassation relates to the *Bouagnaoui* case. It raises the issue of whether employers may limit the right to wear the Islamic veil in private employment and the admissibility of justifications based on requests of clients pursuant to Article 1132-1 of the Labor Code and Article 3.1 C) of Directive 2000/78. The case was brought with the support of the NGO ADDH-CCIF (Association de défense des droits de l'homme – Collectif contre l'islamophobie en France) which defends the religious rights of Muslims.²⁴ The ADDH intervenes in many cases to challenge difficulties of access to public service, to goods and service and to employment, in relation with the wearing of religious signs, and particularly the Islamic veil.

A mobilization of trade unions focusing on discrimination against union representatives

As noted above, all NGOs and trade unions that have existed for more than 5 years can intervene before the courts on their own.²⁵

The paradox is that even if trade unions are not significant actors supporting implementation of European anti-discrimination law, they chose to structure the fight for the rights of union representatives around the approach of European anti-discrimination law. Hence, their action has had a determining impact on the implementation of discrimination law. It triggered jurisprudential recognition of the shift in the burden of proof and provided the volume of cases necessary to challenge existing rules of procedure and establish a solid jurisprudence to overcome difficulties involving access to evidence.

The approach to evidence of discrimination developed by the trade unions and recognized by the Court of Cassation consists of identifying a point of abrupt change in the progression of the employee's career based on the first manifestation of the employer of the discriminatory ground: initially this approach was based on the impact of engaging in union activities; after 2000, it was further used to establish the impact of pregnancy, of the knowledge of sexual orientation, and the manifestation of a disability.

This panel is usually completed by the comparative analysis of the situations of persons identified to the prohibited ground and the situation of others. This method, identified in France as the Clerc method, has been recognized by the Court of Cassation and Conseil d'État as a relevant and conclusive way to establish a presumption of discrimination, allowing a shift in the burden of proof. After this first step, the employer must establish that the situation of this particular employee is objectively justified and unrelated to a discriminatory factor.²⁶

Today, trade unions intervene mostly in cases related to discrimination based on union activities or on issues related to the status of employees, such as age limitations in employment or access to retirement rights.

In conclusion, French jurisprudence shows the emergence of a substantial corpus of cases relating to the implementation of European anti-discrimination law, but most of them are the result of cases appealed to higher courts in labor matters, pursued by individual private parties, a handful of specialized lawyers

²³ CJEU, 12 December 2013, C-267/12, *Hay vs. Crédit Agricole*.

²⁴ *Bouagnaoui & ADDH vs Micopole SA*, C-188/15, 14/03/2017.

²⁵ *Supra* section II.2

²⁶ Cass. soc. 28 mars 2000, *Fluchère* no 97-45258 et 45259 ; CE 20/11/2013, n°362879, *Perreux*.

and with the support of the equality body acting indirectly in the context of its mandate pursuant to Article 7 paragraph 1 of Directive 2000/43 and Article 9 paragraph 1 of Directive 2000/78.²⁷ Few cases to date have involved collective actors as parties to lawsuits. It is remarkable that equality bodies, NGOs and trade unions have not litigated EU equality law much in France.

This is not to say however that such collective actors do not play an important role in advancing EU equality law in the French context. To start with, as shown above, the equality body has developed a sophisticated strategy to facilitate the domestication of EU equality law and relevant concepts in a particularly hostile landscape.

Secondly, strategic litigation carried out in very specific areas and supported by new organizations that are mobilized to target grounds of discrimination outside of the mainstream of traditional activism in French civil society have led to (rare) examples of referrals to the CJEU. These cases have not been the result of mainstream litigation: they are the result of very active and well-organized communities that have been empowered by EU anti-discrimination policies, such as the LGBTI community in the *Hay* case, and the main organization defending religious rights of Muslims in the *Bouagnaoui* case. It is interesting to note that both have been the product of referrals by the Social Chamber of the Court of Cassation relating to the interpretation of the scope of the protection of Directive 2000/78.

Thirdly, collective actors may have a role to play in seeking a change of approach to the notion of indirect discrimination defined at Article 1 of the Law of 27 May 2008 completing transposition of EU Law in relation to anti-discrimination. The concept of indirect discrimination is new to French legal culture and is seldom argued, although it is a key concept of EU equality law. There have been few decisions on the subject, some of which involved collective actors.

The first decision of the Court of Cassation, in 2007, resulted from an argument raised by the judges themselves in a matter brought to the Court's attention by an individual plaintiff on an issue of annual regulation of working hours where the rule implemented had an adverse impact on the salary of employees who were on sick leave during periods of increased time of service.²⁸

The second action was brought by a group of 38 female employees claiming retirement rights with the support of their trade union. They succeeded in arguing that collective agreement employment classifications attributing retirement points to a specific function mainly occupied by women were discriminatory on the ground of sex for the purpose of calculating retirement benefits, when compared to points attributed to a similar employment occupied by men.²⁹

A third action questioned the comparable age of retirement of the employees of the Opéra de Paris, stage technicians, a profession exclusively occupied by men, leaving at age 55, and dressers/make-up artists, who were all women, leaving at age 65. The Court expressly invoked Directive 2006/54 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 (recast) to reach the conclusion that the policy amounted to indirect discrimination on the ground of sex³⁰.

Two additional cases have been concluded regarding indirect discrimination on the grounds of origin pursuant to Article 1132-1 of the Labour Code and Article 1 of the Law of 27 May 2008 that defines indirect discrimination.

The first one related to the situation of abuse of a home servant. It was brought by a lawyer specialized in discrimination law, acting on a *pro bono* basis, in a matter referred by an NGO supporting rights of illegal migrants (as the NGO had no means to support the litigation, financially or otherwise). The

²⁷ Note that very few cases have been brought before civil and administrative courts in relation to access to goods and services.

²⁸ Cass. soc. Sportfabrics, n° 05-43962, 09/01/2007.

²⁹ Cass. soc., AGIRC, n°10-21489, 06/06/2012.

³⁰ Cass. Soc. Opéra National de Paris, n°12-14752 and 12-14964, 30 September 2013.

plaintiff argued that violent treatment of illegal migrants in the workplace did not require a comparator to reach the conclusion that it was indirect discrimination in employment on the ground of origin, and was successful before the Court of Cassation.³¹

The second case was brought with the support of the equality body and concluded that the prohibition of statistics on the grounds of origin did not forbid establishing a presumption of discrimination by all available means. Therefore, the equality body and the plaintiff could present evidence by counting employees of foreign origin that had been hired in the last six years on the basis of their last name, in order to establish a presumption of discrimination on the grounds of national origin.³²

³¹ Cass. soc., Dos Santos, n° 10-20765, 03/11/2011.

³² Cass. Soc., Airbus, n°10-15873, 15 December 2011.

Litigating anti-discrimination cases in Germany: what role for collective actors?

Mathias Möschel*

This paper argues that the role of collective actors in Germany in litigating anti-discrimination cases and in influencing the interpretation of EU law in this domain via the mechanism of preliminary references to the CJEU has been very limited and at best indirect. This is due to resistance from (mainstream) legal academia and a rather restrictive legal framework that was reluctantly set up in Germany in 2006 to implement the EU anti-discrimination directives.

Introduction

This contribution will look at the role played by collective actors in Germany in litigating anti-discrimination cases in Germany and at how they have – or have not - used EU law and/or influenced the interpretation of EU law by triggering preliminary reference rulings.

As stated in the workshop outline, “hardly any preliminary rulings involving collective actors have emanated” from Germany on the issue of anti-discrimination law. This might seem surprising for a number of reasons. First, the sheer number of inhabitants of the country and therefore the number of cases (potentially) litigated in courts might warrant higher referral numbers than say from Malta. Second, German courts are consistently among the most active users of the preliminary reference procedure to the Court of Justice of the European Union (hereinafter CJEU)¹. Third, even within the domain of anti-discrimination law, a number of the most famous *individual* non-discrimination cases and numerous age discrimination cases before the CJEU have originated from Germany², thus contributing to the development of EU law in this domain. However, collective actors have been practically absent from this picture.

I hereby posit that the limited involvement by collective actors is mainly caused by the hostility towards anti-discrimination law demonstrated at the time that four EU anti-discrimination directives, namely Directive 2000/43/EC (hereinafter Race Equality Directive), Directive 2000/78/EC (hereinafter Equal Treatment Employment Directive), Directive 2002/73/EC and Directive 2004/113/EC were transposed into German law via the *Allgemeines Gleichbehandlungsgesetz* (the General Equal Treatment Act,

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¹ From 1952 until 2015, Germany made a total of 2216 preliminary references, a little less than double that of Italy, which comes in second place with 1326. See Court of Justice of the European Union, “Annual Report 2015. Judicial Activity”, Luxembourg, 2016, p. 96, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf (last visited on 3 May 2017).

² See for some of the CJEU cases originated from German requests for preliminary rulings: *Werner Mangold v. Rüdiger Helm* (GC), Case C-144/04, [2005] ECR I-9981 (age); *Ursula Voss v. Land Berlin*, Case C-300/06, [2007] ECR I-10573 (sex); *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06, [2008] ECR I-1757 (sexual orientation); *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH)*, Case C-427/06, [2008] ECR I-7245 (age); *Jürgen Römer v. Freie und Hansestadt Hamburg*, Case C-147/08, [2011] ECR I-3591 (sexual orientation); *Gisela Rosenblatt v. Oellerking Gebäudereinigungs GmbH* (GC), Case C-45/09, [2010] ECR I-9391 (age); *Gerhard Fuchs and Peter Köhler v. Land Hessen*, Cases C-159/10 and C-160/10, [2011] ECR I-6919 (age); *Sabine Hennigs v. Eisenbahn-Bundesamt and Land Berlin v. Alexander Mai*, Joined Cases C- C-297/10 and C-298/10, [2011] ECR I-7965 (age); *Reinhard Prigge and Others v. Deutsche Lufthansa AG* (GC), Case C-447/09, [2011] ECR I-8003 (age); *Johann Odar v. Baxter Deutschland GmbH*, Case C-152/11, 6 December 2012 (disability); and *Johannes Kratzer v. R+V Allgemeine Versicherung AG*, Case C-423/15, 28 July 2016 (sex and age).

hereinafter AGG)³. This hostility has translated into a domestic legal framework on anti-discrimination legislation, which left reduced avenues for collective actors to make use of the preliminary ruling mechanism.

As a consequence, this paper is subdivided into three parts. Part I will look at the mostly hostile reactions by the German legal and political community to the introduction of the AGG. Part II will then look at the legal framework which resulted from this hostility and in particular the heavy limitations on the use of the AGG by collective actors. Part III will then analyze what nevertheless such actors have attempted to do and try to identify how they could instead make better use of what is available to them.

Part I – German hostility to anti-discrimination legislation

It is a well-known fact that Germany was politically quite reluctant to implement the non-discrimination directives and in particular the Race Equality Directive and the Equal Treatment Employment Directive. Indeed, the European Commission had to threaten Germany with infringement procedures due to its delay in implementing these instruments and once Germany finally did in 2006 with the AGG, the launch of other such procedures had to be threatened due to incorrect implementation⁴.

Partly the political resistance was driven by German economic actors who feared or predicted a flood of litigation by rejected job applicants and/or abuse of the possibilities to litigate (so-called “AGG-Hopping”)⁵, i.e. fake job applications followed by litigation to make money out of rejections⁶ with increased costs for German companies to deal with such claims.

This political-economic reluctance was backed up by more technical legal opinions from German academics. The main legal arguments and/or fears were that anti-discrimination legislation restricts the (constitutional) principle of private autonomy and contractual freedom⁷. Other arguments were that such legislation might lead to high damage awards, when “[i]n Germany there is as yet no culture of anti-discrimination, such as it is commonly known especially in the Anglo-Saxon nations”⁸.

What is surprising is the almost virulent tone of the legal critiques expressed against anti-discrimination legislation by some scholars and practitioners in a domain (law) which is otherwise more known for its (dry) technical language. Indeed, one author talked about the introduction of a “Republic of virtues by the new Jacobins”⁹. Another one insinuated that Germany was becoming totalitarian again¹⁰. A third author published a critique in one of Germany’s best-known generalist law reviews stating that the Anglo-American approach adopted in the AGG presumably derived from the philosophy of the 1968

³ *Allgemeines Gleichbehandlungsgesetz*, 14 August 2006, published in *BGBI*, I, p. 1897. An English translation of the AGG is available at: http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/EN/publikationen/agg_in_englischer_Sprache.pdf?__blob=publicationFile (last visited on 3 May 2017).

⁴ See the various letters by the European Commission threatening to start infringement procedures: nos. 2007/2253, 2007/2362 and 2006/2519.

⁵ Martin Diller, “AGG-Hopping durch Schwerbehinderte”, *Neue Zeitschrift für Arbeitsrecht* (2007), p. 1321 and Martin Diller, “AGG-Hopping – und was man dagegen tun kann”, *Betriebs-Berater* (2006), p. 1968.

⁶ One of these AGG-Hopping cases from Germany has been decided recently by the CJEU: *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG*, Case C-423/15, 28 July 2016.

⁷ On this debate see: Klaus Adomeit, “Diskriminierung – Inflation eines Begriffs”, *Neue Juristische Wochenschrift* (2002), p. 1622; Susanne Baer, “‘Ende der Privatautonomie’ oder grundrechtlich fundierte Rechtssetzung?” *Zeitschrift für Rechtspolitik* (2002), p. 290; and Eduard Picker, “Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie”, *Juristenzeitung* (2002), p. 880.

⁸ Dieter Straub, “Drohen amerikanische Verhältnisse?“, *Arbeit und Arbeitsrecht* (2005), vol. 2, p. 65.

⁹ Franz-Jürgen Säcker, “‘Vernunft statt Freiheit’ – Die Tugendrepublik der neuen Jakobiner”, *Zeitschrift für Rechtspolitik* (2002), p. 286.

¹⁰ Johannes Braun, “Übrigens – Deutschland wird wieder totalitär”, *Juristische Schulung* (2002), p. 424.

generation and imposed political correctness¹¹. In yet another law review article, a legal practitioner even went so far as to call the German equality body which EU member states had an obligation to identify on the basis of the anti-discrimination directives, an “unconstitutional monster”¹².

As a consequence of such resistances coming from various domains, the AGG was framed restrictively rather than expansively, raising doubts by some authors as to whether this was a correct implementation of the EU anti-discrimination directives¹³. The material scope of the AGG has been limited in various ways. One such example concerns the statutory limitations on the prohibition of discrimination in certain mainly contractual relations, whereby such discrimination is excluded “where the parties or their relatives are closely related or a relationship of trust exists”¹⁴. Moreover, a specific exemption exists with regard to tenancy, in as much as discrimination in housing rentals only applies to those who rent out more than 50 units¹⁵. In other words, in Germany the prohibition on discrimination mainly applies to standard contracts that are bound to apply in a large number of cases but not in closely negotiated contractual relations.

This restrictive approach is also particularly visible in the domain which is the object of this study, namely the level of intervention of collective actors in anti-discrimination lawsuits as can be seen in the next section. However, as appears from the 2014 European Commission report on the Race Equality Directive and the Equal Treatment Employment Directive, Germany does not seem to be in breach of EU law¹⁶.

Part 2 – The legal framework for collective actors

Under the AGG

In fact, whereas an earlier bill of the AGG had still foreseen the possibility for anti-discrimination organizations to bring anti-discrimination claims in the name of a victim of discrimination if they had been authorized to do so by a power of attorney (*Bevollmächtigtenbefugnis*), such a possibility was cancelled in the final bill. This created a legislative inconsistency. Indeed, the general statute establishing the procedures before labour law courts allowed such a representation of victims by organizations in trials, which meant that potentially in general labour law claims plaintiffs could be represented by organizations, whereas in claims brought under the AGG they could not. Rather than levelling up the standards, the German legislator decided to level them down by reforming general labour law as well, thus preventing representation by organizations both under the AGG and under the general labour law procedures¹⁷.

¹¹ Klaus Adomeit, “Political correctness - jetzt Rechtspflicht!”, *Neue Juristische Wochenschrift* (2006), p. 2169.

¹² Wolfgang Phillip, “Ein verfassungswidriges Monstrum. Die Antidiskriminierungsstelle des Bundes”, *Neue Zeitschrift für Verwaltungsrecht* (2006), p. 1235.

¹³ See on these critical voices on various aspects of the conformity with EU law of the AGG e.g.: Ralph Göbel Zimmermann & Liisa Marquardt, “Diskriminierungen aus Gründen der „Rasse“ und wegen der ethnischen Herkunft im Spiegel der Rechtsprechung zum AGG”, *Zeitschrift für Arbeitsrecht* (2012), p. 369 and Sabine Berghahn, Micha Klapp & Alexander Tischbirek (eds.) for the Antidiskriminierungsstelle des Bundes, “Evaluation des Allgemeinen Gleichbehandlungsgesetzes”, Nomos, 2016, pp. 73, 115, 116, 187.

¹⁴ Article 19, para. 5 AGG.

¹⁵ *Id.*

¹⁶ Report from the European Commission to the European Parliament and the Council, Brussels, 17 January 2014, COM(2014) 2 final, available at: http://ec.europa.eu/justice/discrimination/files/com_2014_2_en.pdf (last visited on 20 May 2017).

¹⁷ See more in detail on this: Wolfgang Däubler & Martin Bertzbach (eds.), *Allgemeines Gleichbehandlungsgesetz*, Nomos, 2nd ed., 2008, p. 728.

The main provision of the AGG dealing with collective actors is § 23, entitled “Support from Anti-discrimination organizations”. It offers the possibility for anti-discrimination organizations “to be entrusted with the legal affairs of disadvantaged persons”¹⁸. However, there are certain limitations as to how far such “support”, especially in court hearings, can go. On the one hand, there are certain organizational requirements that need to be respected. Anti-discrimination organizations “must operate on a non-profit and non-temporary basis”, their articles of association must contain as an objective the “particular interest of persons or groups of persons discriminated against” and they need to have at least “75 members or be composed of at least seven organizations”¹⁹. On the other hand, the limitations concern the modalities with which they can intervene in anti-discrimination lawsuits.

First of all, the strongest level of intervention, namely the possibility for anti-discrimination organizations to bring claims to protect collective interests independently and in their own name, for example in the case when no victim of discrimination brings a claim, is excluded²⁰. This exclusion not only extends to anti-discrimination organizations but also to the German equality body, which has been created to implement the EU anti-discrimination directives. This explains why preliminary reference procedures, such as those initiated from Belgium²¹ are not possible in Germany. It also explains why one of those decisions, namely the *Feryn* judgment by the CJEU²² could be presented and critiqued in German scientific and journalistic writings as an (inacceptable) case of victimless discrimination²³ or hypothetical discrimination²⁴.

Second, a lower level of intervention, namely the representation of someone’s interests in their name when authorized by a power of attorney, has been reduced to a minimum as mentioned above, and is basically limited to court proceedings where no formal legal representation by an attorney is required. This mainly means that they can intervene in this way in first instance proceedings but no further²⁵.

Hence, the main way in which such anti-discrimination organizations can support victims of discrimination in court proceedings is by providing legal advice to them, by making third-party interventions and/or by referring them to specialized lawyers in the field who could take up their cases.

There are then specific provisions for certain collective actors or institutions to bring claims for violations of the AGG. One is foreseen in Article 17, para. 2 of the AGG. In the case of gross violations of the AGG in a company, works councils (*Betriebsräte*) or trade unions of that company may bring a case to court. However, this does not include claims for individual damage awards.

The other is the German equality body, the *Antidiskriminierungsstelle des Bundes* (hereinafter ADB) which deals with discrimination on the grounds of race, ethnicity, sex, religion, disability, age and/or

¹⁸ § 23, para. 3.

¹⁹ § 23, para. 1.

²⁰ It should be noted here that the German legal system in general is not necessarily favourable at the procedural level to let collective interests or individual interests with a collective dimension (such as environmental law or anti-discrimination claims) be defended by actors who might not be considered to be directly harmed. See Sabine Schlacke, *Überindividueller Rechtsschutz*, Mohr Siebeck, 2008.

²¹ See on this point the contribution on Belgium by Elise Muir and Sarah Kolf in this working paper.

²² CJEU, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, Case C-54/07 [2008], ECR I-5187.

²³ See e.g.: “Diskriminierung braucht kein Opfer“, *Frankfurter Allgemeine Zeitung*, 11 July 2008, p. 13.

²⁴ See Frank Bayreuther, “Drittbezogene und hypothetische Diskriminierungen“, *Neue Zeitschrift für Arbeitsrecht* (2008), p. 986.

²⁵ See on this point: Franz-Jürgen Säcker & Gregor Thüsing (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 1, 2. Halbband: AGG, Beck, 5th ed., 2007, pp. 406-407.

sexual orientation. It was created in 2006 with the AGG and started operating in 2007²⁶. Article 27 of the AGG identifies the ADB's tasks *inter alia* as allowing it to provide generic assistance and advice to victims of discrimination, to mediate between parties under certain conditions in order to obtain out-of-court settlements, and to write or commission scientific studies. Its mandate has not been changed/strengthened since its inception. In other words, the ADB's competences largely mirror the narrow possibilities given to anti-discrimination organizations and does not include the possibility to make third party interventions in courts or to assist with preliminary reference procedures to the CJEU.

This restrictive approach has generally been deemed to be in compliance with EU law requirements²⁷ but has been critiqued in a 2016 Evaluation Report of the AGG as not going far enough, as causing unnecessary obstacles in practice²⁸ and, with regard to the ADB (whose independence from the competent Ministry could be also be improved²⁹), as ranging among the weaker anti-discrimination bodies from an EU Member States comparison with some potential for increased competences especially as far as the intervention in concrete anti-discrimination is concerned³⁰.

Outside the AGG

However, the AGG is not the only domain in which collective procedures or claims can be brought with regard to anti-discrimination law. According to § 23, para. 4 of the AGG, "the special rights of action and powers of representation of associations for the benefit of disabled persons shall remain unaffected"³¹, meaning that at least for this ground of discrimination, organizations can represent certain social rights of disabled individuals in courts³² if such individuals give their consent to such representation. A separate representation of rights deriving from the AGG is not established nor is a completely independent representation of a disabled individual.

Besides this, there are other statutory possibilities for collective actors to bring anti-discrimination claims. The Act for Injunctive Relief (*Unterlassungsklagegesetz*) allows consumer protection associations under certain conditions to obtain injunctive relief for violations of law without claiming the infringement of personal rights. However, this is limited to violations of consumer protection laws.

Another specific possibility for collective actors to bring anti-discrimination claims is established by Article 15 of the Disability Equal Treatment Act (*Behindertengleichstellungsgesetz*). According to this statute, disability associations may sue for violations of the obligation to provide reasonable accommodation. However, such obligations are only imposed on public actors.

One should also mention that under the Bavarian state constitution³³, everyone can bring what has been called popular actions (*Popularklagen*) against violations of the Bavarian Constitution, meaning that this

²⁶ For an overview and assessment in English, see: Matthias Mahlmann, „Country report Non-discrimination. Germany“, 2016, pp. 93-96 accessible at: <http://www.equalitylaw.eu/downloads/3706-2016-de-country-report-nd> (last visited on 3 May 2017).

²⁷ Wolfgang Däubler & Martin Bertzbach (eds.), *Allgemeines Gleichbehandlungsgesetz* Baden Baden: Nomos, (2nd ed., 2008), p. 729 and Franz-Jürgen Säcker & Gregor Thüsing (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Band 1, 2. Halbband: AGG, Beck, 5th ed., 2007, p. 403.

²⁸ Sabine Berghahn, Micha Klapp & Alexander Tischbirek (eds.) for the Antidiskriminierungsstelle des Bundes, "Evaluation des Allgemeinen Gleichbehandlungsgesetzes", Nomos, 2016, pp. 159-161.

²⁹ *Ibid.*, pp. 176-180.

³⁰ *Ibid.*, pp. 192-196.

³¹ Article 23, para. 4.

³² According to Article 63 of the German Social Code (*Sozialgesetzbuch - SGB*), organisations can bring claims concerning rights resulting from Title IX of the SGB which contains a whole set of special obligations towards people with disabilities.

³³ Article 55.

also permits collective actions (Verbandsklagen). The limits here are both geographical (Bavaria) and personal in the sense that only state action can be challenged.

Last but not least, anti-discrimination organizations and/or associations have the possibility to bring human rights' challenges under certain international human rights conventions, such as the United Nations' Convention on the Elimination of All Forms of Discrimination (ICERD), the United Nations' Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the United Nations' Convention on the Rights of Persons with Disabilities (UNCPRD) and/or the European Social Charter (ESC) of the Council of Europe. Under the optional protocols of these conventions, it is possible to bring individual claims for violations of these conventions once all domestic remedies have been exhausted. It is clear that the human rights bodies that adjudicate such claims do not interpret EU anti-discrimination law and therefore do not contribute *strictu sensu* to the development of EU law. However, there is potential overlap with certain aspects of EU non-discrimination law and anti-discrimination organizations might opt for this avenue, rather than going to the EU level where, at least under German law, their possibilities to intervene directly are very limited.

In conclusion under this part, today, there is still some debate whether especially the rules for collective actors implementing the EU anti-discrimination directives under the AGG are actually consistent with EU law. One thing is certain: Germany implemented a minimalist version of what is allowed and reports consistently ask for a strengthened position of such collective actors.

Part 3 – The reality and the future

The question at this point becomes, how have collective actors navigated these limited waters in practice? Have they tried to use the little wiggle room made available for them? Have they tried to expand such spaces? And how has EU law featured in this process? Have they actively suggested EU preliminary references to German courts? This part looks at the practice by analyzing case law and also by conversations/emails with some actors in the field.

As far as the use of Article 23 is concerned, the restrictive legal framework described above has also had an impact on the limited role that collective actors have played in using or directly influencing the interpretation of EU law via preliminary reference procedures. One might also add that the German courts possibly in many cases provided satisfying answers in using EU law at the internal level or did not believe that a preliminary reference was necessary, thus “preventing” more anti-discrimination cases from reaching the CJEU.

Scratching a little bit under the surface, some nuances nevertheless emerge. For this, a number of German NGOs/institutions/umbrella organizations working in the domain of anti-discrimination were contacted to obtain something of a real-life picture³⁴.

On the one hand, there is one actor, the *Büro zur Umsetzung von Gleichbehandlung e.V.* (hereinafter the BUG), which has strategic anti-discrimination litigation as its goal and which has been involved in a

³⁴ Emails were sent to the following NGOs/institutions/umbrella organizations: “Öffentlichkeit gegen Gewalt e.V.; Antidiskriminierungsbüro (ADB) Köln” (answer received on 11 January 2017 – on file with the author); “Gender/Queer e.V.” (answer received on 11 January 2017 – on file with the author); “Büro zur Umsetzung von Gleichbehandlung e.V. (BUG)” (answer received on 12 January 2017 – on file with the author); “Antidiskriminierungsstelle des Bundes (ADB)”, (answer received on 13 January 2017 – on file with the author); “Antidiskriminierungsberatung Brandenburg der Opferperspektive e.V.” (answer received on 10 February 2017 – on file with the author); Antidiskriminierungsnetzwerk Berlin des Türkischen Bundes in Berlin-Brandenburg (no answer received); “Bildungswerkstatt Migration & Gesellschaft e.V.” (no answer received); “TransInterQueere.V.” (no answer received); “Deutsches Studentenwerk” (no answer received); “Antidiskriminierungsbüro (ADB) Sachsen (no answer received); “Anti-Rassismus Informations-Centrum, ARIC-NRW e.V.” (no answer received); “Antidiskriminierungsverband Deutschland” (no answer received);

number of anti-discrimination cases before German courts³⁵. It is interesting to note that one of the cases currently pending before the CJEU on the interpretation of Article 4 of the Equal Treatment Employment Directive dealing with certain exemptions by religious employers³⁶ is being litigated by a directly involved person, Vera Egenberger. She is the founder and manager of the BUG and therefore knows the importance of litigation and EU law. Even though it cannot strictly speaking be considered a case directly initiated by a collective actor, it nevertheless constitutes an interesting link between collective actors and the interpretation of EU law in this domain.

On the other hand, the various anti-discrimination associations, with the more limited powers granted to them, provide counselling to victims of discrimination by referring them to specialized lawyers who then sometimes raise preliminary reference rulings. For example, a number of the German CJEU rulings on anti-discrimination stem from one lawyer in Hamburg, Klaus Bertelsmann, who has litigated quite a few (employment) anti-discrimination cases before the CJEU, some of which were referred by the BUG³⁷. So, we can see that there is - at least - an indirect influence that collective actors can have on EU law interpretation in the domain by counselling victims of discrimination and referring them to experts/lawyers who litigate their cases³⁸.

In conclusion, with regard to Article 23 AGG, the influence of collective actors in the sense indicated by this contribution has been relatively limited and at best indirect, compared to what happens in other geographic realities.

With regard to the possibility of using Article 17 AGG by works councils or trade unions, an expert from the ADB indicated that it was unknown to them whether works councils had ever pursued this path³⁹. This is also confirmed in a recent evaluation report commissioned by the ADB which indicates that a certain ignorance of the rules, coupled with a tendency for these organizations to solve disputes outside of courts might explain their inactivity from this perspective⁴⁰.

As to the use of consumer protection claims for anti-discrimination purposes in cases falling into the domain of contracts for goods and/or services, this has not been dealt with before German courts yet.

³⁵ <http://www.bug-ev.org/> (last visited on 3 May 2017). Some of the most important cases litigated under the AGG can be found here: <http://www.bug-ev.org/themen/recht/agg-urteile.html>

³⁶ See: *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, Case C-414/16, OJ C 419, 14 November 2016, p. 27–28.

³⁷ As indicated in an email by Klaus Bertelsmann dated 1 February 2017 (on file with the author), these were: *Hofmann v. Barmer Ersatzkasse*, Case C-184/43, 12 July 1984; *Bilka Kaufhaus v. Karin Weber von Hartz*, Case C-170/84, ECR 1607; *Maria Kowalska v. Freie und Hansestadt Hamburg*, Case C- 33/89, 27 June 1990; *Nimz v. Freie und Hansestadt Hamburg*, Case C-184/89, ECR I-297; *Edith Freers and Hannelore Speckmann v. Deutsche Bundespost*, Case C-278/93, ECR [1996] I-1165; *Draehmphael v. Urania Immobilien Service oHG*, Case C-180/95, ECR [1997] I-2195; *Hellen Gerster v. Freistaat Bayern*, Case C-1/95, ECR [1997] I-5253; *Silke-Karin Mahlburg v. Land Mecklenburg-Vorpommern*, Case C-207/98, ECR [2000] I-00549; *Bärbel Kachelmann v. Bankhaus Hermann Lampe KG*, Case C-322/98 (GC), ECR [2000] I-07505; *Helga Kutz-Bauer v. Freie und Hansestadt Hamburg*, Case C-187/00, ECR [2003] I-02741; *Susanne Bulicke v. Deutsche Büro Service GmbH*, Case C-246/09, ECR [2010] I-7003; *Rosenbladt v. Oellerking Gebäudereinigungsges.mBh*, Case C-45/09, 12 October 2010; *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, Case C-414/16.

³⁸ It should be noted that Mr. Bertelsmann's experience dates back to the times when in particular gender equality/equal pay cases were being litigated and/or referred to the CJEU. Moreover, activist judges undoubtedly played a certain role as well in this domain. On both points see: Claire Kilpatrick, "Gender Equality: A Fundamental Dialogue", in Silvana Sciarra (ed.), *Labour Law in the Courts. National Judges and the European Court of Justice*, Hart Publishing, 2001, in particular pp. 51-55. However, especially with regard to activist judges, from the perspective of an association it seems easier to refer one's client to a specialized activist lawyer in the domain who can litigate the case anywhere in Germany or before the CJEU than planning a litigation strategy by "feeding" cases into the court of a judge who likes to raise preliminary rulings to the CJEU.

³⁹ See email from Petra Wutz, dated 13 January 2017 (on file with the author).

⁴⁰ Antidiskriminierungsstelle des Bundes, "Evaluation des Allgemeinen Gleichbehandlungsgesetzes", 2016, pp. 142-143.

However, seemingly the possibility for associations to bring claims has mainly been used in competition law⁴¹.

With regard to the possibility for disability associations to independently litigate, one of the first cases taking advantage of such a possibility was lost by such an association. The decision by the German Supreme Administrative Court (*Bundesverwaltungsgericht*) involved essentially a reasonable accommodation claim for access without barriers to train platforms for individuals in wheelchairs against the German railway company⁴². The problem was that the cost of this case was established at 30.000 euros to which the extra-legal costs sustained by the defendant were added⁴³. This early decision and the high reimbursement requested had a chilling effect on disability associations that might have entertained challenging other structural issues relating to disability discrimination in Germany in spite of the favourable rules established in legislation. As a consequence, associations that effectively have the power to bring disability related claims against the state were shocked into a silence by this early decision.

As far as the Bavarian *Popularklage* is concerned, one has to mention a recent case dealing with upper age limits for certain local representatives under Bavarian law, invoked *inter alia* the equality principle but also the prohibition of age discrimination enshrined in the AGG. Both the Bavarian Constitutional Court⁴⁴ and thereafter the Federal Constitutional Court⁴⁵ rejected the claims. The case demonstrates that it is possible that EU (non-discrimination) law comes into play in such cases.

Last but not least, as to the possibility for anti-discrimination organizations to bring human rights challenges, one could mention two cases brought against Germany by two different associations/organizations both concerning publications containing racially discriminatory language. The first was brought by the Zentralrat Deutscher Sinti und Roma⁴⁶ and the second by the TBB/Turkish Union in Berlin Brandenburg⁴⁷. Although both are not cases concerning the application or the interpretation of EU anti-discrimination law, they nevertheless show that (anti-discrimination) organizations/associations do seize international instances protecting against discrimination when and as soon as the procedural hurdles are lower.

In terms of forward-looking comments, the sense that one gets is that even within the limited legislative framework, collective actors could make better use of the potential avenues mentioned above. This does not only concern specific anti-discrimination associations but also consumer protection associations, disability associations and also trade unions or work councils. Moreover, it could be that within the limits of discrimination cases arising in Bavaria by Bavarian authorities, collective organizations might have another means of intervening in a more independent way and of raising preliminary references.

In conclusion, the problem in Germany stems from an initial hostility to anti-discrimination law in general, which translated into a restrictive legal framework and, with the exception of one specific association which has a strategic litigation approach, anti-discrimination associations have not really used the EU litigation avenue. It therefore comes as little surprise that EU law has played a limited role in the first place and that in turn collective organizations have only played an indirect role in shaping EU law in this domain.

⁴¹ *Id.*

⁴² BVerwG, 9 C 1.05, 5 April 2006.

⁴³ *Id.*, paras. 45 and Beschluss.

⁴⁴ Bayerischer VerfGH, 5-VII-12, 19 December 2012.

⁴⁵ BVerfG, 2 BvR 441/13, 26 August 2013.

⁴⁶ CERD Committee, *Central Council of German Sinti and Roma et al. v. Germany*, Communication no. 38/2006, CERD/C/72/D/38/2006, 3 March 2008.

⁴⁷ CERD Committee, *TBB/Turkish Union in Berlin Brandenburg v. Germany*, Communication no. 48/2010, CERD/C/82/D/48/2010, 4 April 2013.

Advancing EU equality law in Italy: Between unsystematic implementation and decentralized enforcement

Virginia Passalacqua*

The EU Equality Directives represented a key turning point in the field of anti-discrimination law in Italy. However, the Italian law-maker failed to implement the Directives systematically, and this generated confusion about their interpretation and application. This also affected the participation of collective actors. With the aim of understanding whether EU equality law has facilitated collective actors' access to courts, the paper examines the role that they have played in the anti-discrimination cases brought before the Court of Justice of the EU. In Italy, collective actors participated in a limited number of preliminary references, mostly in the field of discrimination on the grounds of nationality. The work of collective actors, both inside and outside the courtroom, has been crucial in creating a decentralized form of enforcement of EU equality law. Through litigation and campaigns, collective actors contributed to the full implementation of EU anti-discrimination law, filling the gaps left by the Italian law-maker. The paper concludes that, on the one hand, EU law introduced important tools to enhance protections against discrimination in Italy; but, on the other, the unsystematic transposition of EU law created some obstacles to the protection of migrants from discrimination and to collective actors' access to courts.

Introduction

This paper develops two main questions relating to Italian anti-discrimination law and practice. The first is how EU equality law affected the Italian legal framework. The second looks at whether the introduction of EU anti-discrimination law has facilitated collective actors' access to courts, with a focus on the Court of Justice of the EU (hereinafter, CJEU).¹ To answer the first question, I analyse the Italian legal framework before and after the adoption of the Equality Directives. The second question, instead, requires a more contextual analysis. First, I look at how the implementation of EU anti-discrimination law changed the rules about collective actors' *locus standi*. Then, I identify the proceedings before the CJEU where collective actors have participated. As part of the research conducted for this paper, I interviewed the participants in the proceedings and consulted Italian press articles, NGOs' documents and other non-legal sources that provide insights into the context of the litigation. Finally, the paper assesses whether EU law had a positive impact on Italian judicial remedies against discrimination.

Preliminary Remarks on Italian Anti-Discrimination Law

Italian anti-discrimination law evolved in three stages. The first stage created its constitutional foundation; the second was brought about by labour law reforms; the third was triggered by the introduction of the EU Equality Directives. These three stages are summarized in the first sub-section below, while the other sub-section focuses on the provisions relating to the creation of the Italian Equality Body and on collective actors' participation in anti-discrimination proceedings.

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¹ This paper was first presented at the workshop 'How EU law shapes opportunities for preliminary references on fundamental rights: discrimination and other examples', held at the EUI on 24 February 2017 and organized by Professors Elise Muir, Claire Kilpatrick and Bruno de Witte. I would like to express them my gratitude for the opportunity to participate in this interesting project and for their valuable feedback on my work.

The Three Stages of Italian Anti-Discrimination Law

The first stage of the evolution of Italian anti-discrimination law dates back to the drafting of the Constitution in 1947. Article 3 enshrines the cornerstone of Italian anti-discrimination law: the principle of equality. Its first part states that all are equal before the law (principle of formal equality); and the second part commits the Italian law-maker to removing the economic and social obstacles that constrain the realization of equality among citizens (principle of substantive equality). An ideal of social equality lies behind the second part of the article, which requires the law-maker to do his utmost to grant equal opportunities to all and, therefore, constitutes the basis for positive actions against discrimination. In the Italian Constitution we also find the first explicit reference to a ground of prohibited discrimination: sex. Article 37 states that women are entitled to enjoy the same pay and rights as men in the workplace. But the second part of the article requires special protection and adequate working conditions for women to ensure the fulfilment of their ‘essential role in the family’. The Constitution, in sum, states that women are equal but different from men. This mirrors the common perception about gender roles in post-fascist Italy.² At that time, men and women were considered psycho-physically different, and accordingly charged with different responsibilities both in the work sphere and in the family sphere.³

The second stage saw the constitutional principles enacted by the Italian law-maker. The first major anti-discrimination legal tools were adopted in the field of labour law. However, this did not happen overnight; only in the seventies, prompted by a period of workers' strikes and demonstrations, did Italy undertake a process of labour reforms. This period of political struggles culminated in the introduction of the Workers' Statute, which, besides generally strengthening workers' rights, in article 15 provided special protection against discrimination on the grounds of political belief and trade union affiliation.⁴ A few years later, in 1977, a law on equality of treatment between men and women in the workplace was adopted, extending the protection of article 15 to discrimination on the grounds of sex.⁵ The introduction of this second law was to a great extent due to Community law: indeed, two directives on the prohibition of sex discrimination in employment had been adopted shortly before.⁶

EU law vastly marked the third stage in the evolution of Italian equality law. Under the impulse of the EU Equality Directives of 2000, Italian equality law was revolutionised, leading experts to call this ‘the golden age’ of anti-discrimination law in Italy.⁷ In 2003, the Italian government adopted two decrees, one implementing the Race Equality Directive⁸ and the other the Framework Directive.⁹ However, Favilli rightly noted how such transpositions were made in an almost literal way, with no attempt at coordination with the pre-existing Italian legal instruments of anti-discrimination.¹⁰ This unsystematic

² Barbera explains that, even if the constitutional norm might seem contradictory, it correctly mirrored social perceptions at the time and maintained social cohesion. Marzia Barbera, “Parità Di Trattamento Tra Uomini E Donne in Materia Di Lavoro,” *Enciclopedia Giuridica Treccani VII* (2010).

³ Maria Vittoria Ballestrero, “Il Lavoro Delle Donne Secondo Barassi,” *Lavoro E Diritto*, no. 1/2002 (2002).

⁴ Art. 15 of Law 300/1970, *Statuto dei Lavoratori*.

⁵ Law 903 of 1977, ‘*Parità di trattamento tra uomini e donne in materia di lavoro*’. For the sake of precision, however, it should be noted that the first norm adopted in the field of discrimination on the grounds of sex was Law 7 of 1963, which prohibits the dismissal of a female worker because of marriage.

⁶ Directive 75/117/EEC and Directive 76/207/EEC; Flavia Cannata, *L'eguaglianza nella previdenza di genere* (Milano, Italy: Franco Angeli, 2014), 61.

⁷ Fausta Guarriello, “Il nuovo diritto antidiscriminatorio,” *Giornale di Diritto del Lavoro e Delle Relazioni Industriali*, 2003, 341.

⁸ Legislative Decree 215/2003 implementing the Directive 2000/43/EC prohibiting discrimination on the grounds of race and ethnic origins.

⁹ Legislative Decree 216/2003 implementing the Directive 2000/78/EC prohibiting discrimination on the grounds of sexual orientation, disability, age, religion and belief in the workplace.

¹⁰ Chiara Favilli, “Italy, Country Report Non-Discrimination, State of Affairs 01 January 2016,” *European Equality Law Network*, October 4, 2016, 7.

transposition, as I shall show, generated problems of interpretation. New legislation was also adopted in 2006,¹¹ whereby the prohibition on disability discrimination was extended beyond the field of employment, and in 2010,¹² which transposed the ‘Gender Recast’ Directive 2006/54, bringing together the main instruments for equality between men and women.

At present, all the main Italian anti-discrimination provisions are the result of the transposition of European directives. This is also true for the equality clauses provided by the directives in the field of migration and EU citizenship. These clauses establish that, in some situations, migrants and citizens should be treated equally.¹³ The only partial, but important, exception is the Italian Immigration Law adopted in 1998.

The Immigration Law, which preceded the Equality Directives, already contained a prohibition on direct and indirect discrimination on the grounds of nationality, race, religion and ethnic origin (article 43 and 44).¹⁴ Discrimination on these grounds can be challenged by victims via a special judicial remedy: the ‘civil action against discrimination’, which is widely used in practice.¹⁵ This action can be also brought directly by trade unions in case of ‘collective discrimination’ in the workplace, which is discrimination against a group of people that are not directly or immediately identifiable.¹⁶ However, only the trade unions that are ‘the most representative at the national level’ have legal standing, and only against acts of the employer in the workplace. As next section will show, collective actors’ access to courts was substantially increased in 2003 by the law transposing the Equality Directives.

Notwithstanding the evident overlap between the scope of the Immigration law and the Race Equality Directive, articles 43 and 44 were not repealed by the Italian legislature.¹⁷ And luckily so, for they also prohibit discrimination on the grounds of nationality, which is explicitly excluded from the scope of the Race Equality Directive.¹⁸ The directive, in fact, despite applying also to third-country nationals, does not protect them from differential treatments based on their nationality.¹⁹ Even if, at first sight, the difference between the grounds of nationality and race/ethnic origin might seem a formal one, it has practical repercussions for Italian equality litigation, as this paper will show.

Judicial Remedies Against Discrimination and the Role of Collective Actors

Regarding judicial remedies against discrimination, in 2011 the Italian law-maker reformed the anti-discrimination proceedings by including a special fast-track procedure.²⁰ Even if this was an important step towards the systematization of the field, access to courts is still regulated by each specific anti-

¹¹ Law 67/2006, “*Misure per la tutela giudiziaria delle persone con disabilità vittime di discriminazioni*”.

¹² Legislative Decree 5/2010: “*Attuazione della direttiva 2006/54/CE relativa al principio delle pari opportunità e della parità di trattamento fra uomini e donne in materia di occupazione e impiego*”.

¹³ The strongest equality norm regards Union citizens who, under article 18 of the TFEU and article 24 of the Citizenship Directive 2004/38, are entitled to equal treatment with national citizens. Equal treatment clauses are also provided by the Long-Term Resident Directive and the Single Permit Directive, with a more limited scope of application. The last norm adopted in the field is Directive 2014/54 ‘on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers’, of 16 April 2014. Although the deadline for transposition has already passed, it has not been transposed into the Italian legal framework.

¹⁴ Legislative Decree n. 286 of 25 July 1998, “*Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero*”.

¹⁵ *Azione civile contro la discriminazione*: introduced by article 44 of the Immigration Law 286/1998.

¹⁶ Article 44(10) of the Immigration Law 286/1998.

¹⁷ Article 2(2) of the Legislative Decree 215/2003 makes them explicitly safe.

¹⁸ Preamble 13 and article 3(2) of the Race Equality Directive.

¹⁹ Discrimination on the grounds of nationality is instead prohibited with regard to Union Citizens, see article 18 TFEU.

²⁰ Article 28, Legislative Decree 150/2011.

discrimination instrument. This also means that each anti-discrimination law has its own *locus standi* rules for participation by collective actors.²¹ This fragmentation creates uncertainty, leading experts to call for a systematization of the field.

Under the EU Equality Directives, Member States shall ensure that collective actors may participate in anti-discrimination proceedings on behalf of, or in support of, victims. This is one of the strategies that the EU law maker uses to secure an effective implementation of its policies, a phenomenon that scholars called ‘proceduralization’ of EU equality law.²² However, when transposing the directives, the Italian law-maker decided to go beyond what EU law requires and introduced a remedy against collective discrimination. This remedy enables qualified collective actors to challenge in court a discriminatory act by themselves when a victim is not immediately and directly identifiable.²³ This might happen, for example, in the case of a public statement against LGBT people: the victim is not a single individual but an indeterminate group of people discriminated against for their sexual orientation.

Under the law transposing the Race Equality Directive, in order for collective actors to have *locus standi*, they need to be registered on an official list managed by the Italian government’s Department for Equal Opportunities.²⁴ Subject to the same registration, they are entitled to bring actions against collective discrimination.²⁵ Moreover, since these provisions on collective actors’ standing are regulated by the Italian transposition of the Race Equality Directive, formally they only apply to cases of discrimination on the grounds of race or ethnic origin; discrimination on the grounds of nationality is excluded.²⁶ This means that, for instance, if a registered association wants to challenge collective discrimination enacted by a school against non-Italian children, the association cannot use the transposition of the Race Equality Directive (because it does not cover nationality) or the Immigration Law, because it applies only to collective discrimination in the workplace. This gap in protection had serious consequences: in cases of collective discrimination based on nationality (like the case of *Nabil* discussed later) collective actors’ *locus standi* has been contested. Still, in most cases, Italian judges have adopted a functional interpretation of the law, stating that collective discrimination may be challenged by collective actors on the grounds of nationality.

Another step towards the ‘proceduralization’ of EU equality law involved the creation of ‘Bodies for the promotion of equal treatment’, provided by the Race Equality Directive.²⁷ In Italy, this body is UNAR.²⁸ UNAR started operating in 2004, with a focus on discrimination based on race and ethnic origin. Over time, even though its mandate has never been officially expanded, UNAR has extended the

²¹ For discrimination in the workplace, see article 5, Legislative Decree 216/2003. For discriminations on the grounds of race and ethnic origins, see article 5 Legislative Decree 215/2003. For discriminations on the grounds of sex, see article 37, 198/2006. For discrimination on the grounds of disability, see article 4 of the Law 67/2006.

²² Elise Muir, “Procedural Rules in the Service of the ‘Transformative Function’ of EU Equality Law: Bringing the Prohibition of Nationality Discrimination Along,” *Review of European Administrative Law* 8, no. 1 (June 25, 2015): 153–76.

²³ Article 5(2) Legislative Decree 216/2003 transposing the Framework Directive; article 37 and 55 of the Legislative Decree 198/2006 on equality between men and women; article 4(3) of Law 67/2006 on disability rights. Each Italian anti-discrimination law establishes which collective actors are entitled to bring action against collective discrimination and whether they must fulfil some requirement. For instance, the transposition of the Framework Directive states that trade unions and associations representing the affected interest can challenge collective discrimination.

²⁴ The list is managed by the Department for Equal Opportunities of the Presidency of Council of Ministers, as provided by article 5 of Legislative Decree 215/2003.

²⁵ Article 5(3) of Legislative Decree 215/2003.

²⁶ Italian Immigration Law also provides for a remedy against ‘collective discrimination’ on the grounds of nationality, but this applies only to discrimination in the workplace and can only be pursued by the trade unions that are ‘the most representative at the national level’. See art. 44(10) of the Immigration Law.

²⁷ Article 13 of the Race Equality Directive.

²⁸ UNAR stands for *Ufficio Nazionale Antidiscriminazioni Razziali*, and was instituted by the Legislative Decree 215/2003, article 7.

grounds of discrimination it deals with to include sex, disability, nationality, and sexual orientation. By law, the body can intervene in court, but in fact it mainly performs monitoring activities and manages a contact centre for victims of discrimination.²⁹ The Council of Europe criticized UNAR because it does not ‘comply with the principle of independence and its powers are incomplete’.³⁰ The criticism seems to be well-founded, since the body is under the Department of Equal Opportunities of the Italian government and its director is appointed by the Italian Prime Minister. This exposes UNAR to political pressures, as denounced by European and international organizations and confirmed by the political scandals that have dogged the organization over recent years.³¹

According to official reports, in Italy, when it comes to judicial remedies against discrimination, most litigation has focused on discrimination on the grounds of nationality or race/ethnic origin.³² This is probably due to a combination of cultural and social factors. Part of the explanation lies in the fact that there are many associations working in support of immigrants’ and ethnic minorities’ rights, while this is not the case for other fields. This also means that, in Italy, most discrimination cases where collective actors are involved concern migration and race/ethnic origin. Accordingly, the cases selected for the analysis below are all in this field.

Anti-discrimination Litigation in Italy: Analysis of the Most Relevant Cases in the Light of Collective Actors’ Participation

This second section considers the role that collective actors play in anti-discrimination proceedings; special attention is given to the cases brought before the CJEU. I singled out the preliminary rulings where it was possible to detect collective actors’ participation. Four cases feature the presence of collective actors, but only two of them deal precisely with anti-discrimination issues: *Kamberaj* and *Martinez Silva*.³³ I decided to also include in my analysis a third case, *Nabil*, even though it did not lead to a preliminary reference; the case of *Nabil* is relevant because it shows how EU equality law proved problematic for collective actors, since it does not provide them with *locus standi* to challenge collective discrimination on the grounds of nationality.

All three cases (*Kamberaj*, *Martinez Silva* and *Nabil*) happen to be in the field of anti-discrimination on the grounds of race/ethnic origins and nationality. This reflects the general trend of anti-discrimination litigation in Italy, since these types of discrimination are the most frequently alleged.³⁴ Still, each of the cases offers a different perspective on EU equality law. Indeed, the first concerns a case of discrimination against a long-term resident migrant; the second, discrimination against a third-country worker; and the third, collective discrimination. Analysed together, these three cases offer a multifaceted view on the impact that EU law has had on Italian anti-discrimination law.

Equal Treatment and Housing Benefit: *Kamberaj v. IPES*

The first case analysed is *Kamberaj*. Four collective actors supported the applicant’s complaint against a norm that was allegedly discriminatory towards third-country nationals. The *Kamberaj* case gave rise

²⁹ UNAR, *Relazione Annuale 2014*, available at: <http://www.unar.it/unar/portal/?p=1178> (last access on 4 August 2017)

³⁰ Council of Europe, *ECRI Report on Italy 2015*, CRI(2016)19, published on 18 March 2016, at page 15.

³¹ European Equality Law Network, *News Report*, 05 October 2015; *ibidem*, *News Report*, 8 March 2017; both available at <http://www.equalitylaw.eu/country/italy> (last access on 4 August 2017).

³² Favilli, ‘Italy, Country Report Non-Discrimination, State of Affairs 01 January 2016’; UNAR, *Relazione Annuale 2014*.

³³ The two that I excluded are joined Cases C-22/13, C- 61/13 to C-63/13 and C-418/13, *Mascolo v. MIUR*, EU:C:2014:2401; and Case C-89/13, *D’Aniello and others v. Poste Italiane SpA*, ECLI:EU:C:2014:299. Both deal with the legitimacy of stipulating a fixed-term work contract.

³⁴ See footnote 30.

to a preliminary reference that was decided by the CJEU in April 2012. First, I will briefly outline the proceedings; then, I will explain the collective actors' strategy and I will assess its impact.

Kamberaj: the proceedings

In the case of Kamberaj, the CJEU, upon request from the Labour Law Tribunal of Bolzano, interpreted two directives.³⁵ One was the Race Equality Directive; the other was the Long-Term Resident Directive, which provides for equal treatment between long-term resident migrants and Member State nationals.³⁶

The proceedings were initiated by Mr Servet Kamberaj, an Albanian national residing in Italy since 1994. Four local associations intervened: Associazione Porte Aperte/Offene Türen, Human Rights International, Associazione Volontarius, and Fondazione Alexander Langer. Mr Kamberaj brought a 'civil action against discrimination' (article 44 of the Italian Immigration Law) to challenge the decision whereby IPES (the social housing institute) rejected his application for a housing benefit. IPES rejected Mr Kamberaj's application because the budget for third-country nationals' housing benefits for 2009 was exhausted. In Bolzano, the funds for housing benefits are allocated according to a 'linguistic' criterion:³⁷ every year the province decides on the amount of money to allocate to each of the three linguistic groups (Italian, German and Ladin speaking)³⁸ and to the third-country national migrants' group. However, in 2008, the province adopted a different method to calculate the funds for third-country nationals.³⁹ This resulted in a disadvantage for the latter group, which saw a rise in the number of rejections of applications for benefits. This comparatively more disadvantaged treatment was challenged for violating EU equality law. The Bolzano judge, acting upon the request of Mr Kamberaj's lawyer and the four associations, decided to stay the proceedings and refer the case to the CJEU.

In its decision, the Court of Justice first clarified that the Race Equality Directive did not apply in this case. In fact, Mr Kamberaj was treated differently because of his status as a third-country national, while the Directive applies only to discrimination based on race or ethnic origin.⁴⁰ The Court stated that the Directive 'does not cover difference of treatment based on nationality' and it applies without prejudice 'to any treatment which arises from the legal status of third-country nationals'.⁴¹ However, the Court also noted that Mr Kamberaj enjoyed a right to equal treatment stemming from his status as a long-term resident; in fact, article 11 of the Long-Term Resident Directive granted him the right to be treated equally vis-a-vis Italian nationals with regard to social assistance. For this reason, the Court declared the province's policy incompatible with EU law.

The role of the four associations

Reports, local press articles and interviews with members of the intervening associations (Associazione Porte Aperte/Offene Türen, Human Rights International, Associazione Volontarius, Fondazione Alexander Langer) enabled me to understand their litigation strategy and their role in the Kamberaj case.

³⁵ Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2012].

³⁶ See art. 11(1) of Directive 2003/109.

³⁷ Article 5(7) of the Law of the Province n. 13/1998. The Province of Bolzano is characterized by the institutionalization and protection of the three linguistic groups that are historically present in the region. See Pallaoro and Coletti, 'Nuove' minoranze in Alto Adige/Südtirol: impatto sugli strumenti a tutela delle 'vecchie' minoranze, in Medda-Windischer and Carlà (edited by) *Politiche Migratorie e Autonomie Territoriali. Nuove Minoranze, Identità e Cittadinanza in Alto Adige e Catalogna / Migrationspolitik und Territoriale Autonomie. Neue Minderheiten, Identität und Staatsbürgerschaft in Südtirol und Katalonien*.

³⁸ All Italian and Union citizens, to facilitate the allocation of benefits, must select a linguistic group to which they belong.

³⁹ Deliberation 1885 of 20 July 2009 by the Autonomous Province of Bolzano.

⁴⁰ *Kamberaj* ruling, para. 48 and 49.

⁴¹ *Ibidem*, at 49.

To begin with, it is not coincidental that precisely these four associations intervened in the Kamberaj proceedings. Since 2008 they had been partners in a EU-funded project promoting non-discrimination in the Province of Bolzano.⁴² The project consisted partly in providing legal advice to victims of discrimination (but not representing them) and partly in raising awareness about non-discrimination.

The quasi-institutional role played by the four associations made them a reference point for other collective actors in the area. In fact, when the problem of housing benefits for third-country nationals emerged, meetings with other organizations working in the field were organised. The network collectively decided to challenge the province's deliberation in court and to seek a preliminary reference to the Court of Justice. Two pilot cases were identified through contacts with trade unions; the lawyers of these unions eventually conducted the litigation.⁴³ This gave the four associations the convenient option of intervening in the cases without bearing the costs of the litigation.

As mentioned, two pilot cases were initiated with the aim of challenging the discriminatory distribution of housing benefits: Kamberaj was not the first case brought before the Bolzano Tribunal. The first was N.N.,⁴⁴ an action brought a month before Kamberaj by the same trade union's lawyers (Simonato and Pintor) and where the same four associations intervened, but which was decided by a different judge of the Tribunal. Remarkably, although N.N. was similar in many respects to Kamberaj (the facts of the cases were also the same), it led to a different result. In the case of N.N., the judge did not find any inconsistency between Italian and EU law, and accordingly did not refer a question to the Court of Justice. The judge recognised that Mr N.N. was a victim of discrimination, but she merely ordered that he receive individual compensation without challenging the overall legitimacy of the province's policy. This is a remarkable example of how, everything being the same (same case, same argument, same lawyers), the judge is the ultimate master of the preliminary reference proceedings.

Arguably, the associations' role was particularly crucial in the aftermath of the proceedings. In fact, the ruling of the CJEU found that the province's allocation of benefits was discriminatory to the extent that it concerned long-term resident migrants, like Mr Kamberaj. However, treating third-country nationals differently because of their nationality is not prohibited under EU law. Thus, the Bolzano province could have resolved the issue simply by granting equal treatment to long-term residents,⁴⁵ but maintaining the less favourable treatment for all other migrants. In this context, the advocacy campaign conducted by the four associations was crucial: they spread information about the CJEU's ruling among their network of associations and via the local press.⁴⁶ The associations successfully conveyed the message that the allocation of the housing benefit unlawfully discriminated against migrants, ignoring the fact that this was true only for long-term residents. Their campaign left the province no choice but to change the law and to introduce a more equal way to allocate benefits.

⁴² The project's name was '*Azioni di Tutela dalle Discriminazioni*', European Social Fund 2/220/2008.

⁴³ Report of the European Social Fund Project number 2/220/2008, '*Azioni di Tutela dalle Discriminazioni. Rapporto di attività*', page 36.

⁴⁴ Order of the Tribunal of Bolzano, *N.N.* case, issued on 16 November 2010, RG 665/2010, available at <http://www.humanrightsinternational.org/it/attualita-ricerche/news/italia-tribunale-di-bolzano-ordinanze-no-6652010-e-no-6662010.html>.

⁴⁵ This is how the Province accommodates the situation of Union citizen migrants, who are treated like members of the linguistic minorities.

⁴⁶ The Court of Justice decision was published in the main local press (see '*Sussidio casa, stroncatura dell'UE*', published in '*Alto Adige*' on 14 December 2011), on the Human Rights International's website (<http://www.humanrightsinternational.org/it/attualita-ricerche/news/lussemburgo-italiaalto-adige-successo-davanti-la-corte-di-justizia-europea-contro-le-discriminazio.html>, last access on 4 August 2017).

Equal Access to Family Benefit: The Cases of Martinez Silva and Nabil

Martinez Silva, at first glance, does not seem to be a public interest litigation case: neither a third-party intervention nor a collective actor was involved. However, one of the lawyers representing Mrs Martinez Silva, Alberto Guariso, was a member of the ASGI's board (Association for Juridical Studies on Immigration), the most important Italian network of legal experts in the field of migration law.⁴⁷ For many years, ASGI has been a leading actor in conducting strategic litigation and advocacy campaigns.⁴⁸ A few years ago, the association established an anti-discrimination centre, whose director is, in fact, Alberto Guariso. This lawyer is also the link with the second case analysed in this section, Nabil, where he represented both the victim and the two collective actors: ASGI and the non-profit organization Avvocati Per Niente (APN), which was founded by Guariso. In the next two sub-sections, I will first give an overview of the two proceedings. I will then analyse the role of collective actors in the specific area where the two cases originated: equal access to family benefits.

Martinez Silva: the proceedings

Martinez Silva is an interesting example of (less visible) collective actors' participation. The case has been referred by the Genova Court of Appeal and has been recently decided by the CJEU.⁴⁹ This reference gave the Court of Justice the opportunity to interpret the Single Permit Directive for the first time.⁵⁰ The questions asked by the Italian court touch upon the equality clause of the Directive: shall third-country workers enjoy equal treatment with Italian nationals with regard to certain benefits?⁵¹ As in Kamberaj, the applicant's basis for claiming equal treatment derives from an EU directive on migration; this time the Race Equality Directive was not even called into question.

Mrs Martinez Silva initiated a civil action against discrimination (article 44 of the Italian Immigration Law) in order to challenge the rejection of her application for benefits. This is a special type of family benefit directed to households below a certain income and with at least three minor children (hereinafter, the child benefit).⁵² The rejection was based solely on the fact that Mrs Martinez Silva is a third-country national with a single permit status.⁵³ Indeed, when introduced in 1998, the child benefit was limited to Italian nationals residing in Italy. However, as the Genova Court of Appeal pointed out, the law has already been amended a number of times to include among the beneficiaries certain categories of non-nationals: first, Union citizens; then, refugees; and, lastly, long-term resident migrants.⁵⁴ In light of the foregoing, and recalling the equality treatment clause in the Single Permit Directive, the Court of Appeal asked the Court of Justice whether the Italian legislation excluding single-permit migrants from the recipients of the child benefit is compatible with EU Law. In its judgment, the CJEU first examined

⁴⁷ ASGI official website: <http://www.asgi.it/>

⁴⁸ About the role of ASGI in other cases of legal mobilization, Virginia Passalacqua, "El Dridi Upside down : A Case of Legal Mobilization for Undocumented Migrants' Rights in Italy," *Tijdschrift Voor Bestuurswetenschappen En Publiekrecht*, 2016, 215–25.

⁴⁹ Case C-449/16, *Kerly Del Rosario Martinez Silva v Istituto nazionale della previdenza sociale (INPS), Comune di Genova*, 21 June 2017, OJ C 410/08. See also the Order for Reference by the Genova Court of Appeal of 1 August 2016, case n. 437/2015 RG, available at <http://www.asgi.it/wp-content/uploads/2016/08/s-comune-genova-cda-genova-rg-437-del-2015-ord-rinvio-cge-01-08-2016.pdf>.

⁵⁰ Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343).

⁵¹ Article 12(e).

⁵² The benefit is known as 'allowance for households with at least three minor children' (*Assegno per i nuclei familiari con almeno tre figli minori*) and was introduced by article 65 of the Law 448/1998.

⁵³ Order for Reference, at 2.

⁵⁴ Order for Reference, at 13.

whether the child benefit can be considered as a social security benefit, and answered affirmatively.⁵⁵ Then, it stated that a single-permit migrant may not be excluded from receiving a benefit such as the child benefit by national legislation, because of the Directive's equality treatment clause.⁵⁶ This judgment represents an important endorsement of the arguments brought forward by Mrs Martinez Silva's lawyers.

Nabil: the proceedings

The Nabil case did not give rise to a preliminary reference to the Court of Justice; nevertheless, it offers important insights into collective actors' participation and into the problems they might face. Indeed, the lack of an organic and coherent transposition of the Race Equality Directive created problems for collective actors' access to court.

In Nabil, the claimants challenged the legality of a public statement issued by the Italian social security agency (INPS) whereby it declared that long-term residents are not eligible to receive the child benefit for the first half of 2013.⁵⁷ The statement is clearly at odds with the equality clause of the Long-Term Resident Directive, which states that long-term residents should be treated equally vis-a-vis Italian citizens.⁵⁸ Hence, the INPS's statement was challenged in court as amounting to both individual and collective discrimination. The individual discrimination was judicially contested by Mr Mohammed Nabil, a long-term resident with three children. Two associations, ASGI and APN, also challenged the INPS's statement for enacting collective discrimination, as defined by the Italian transposition of the Race Equality Directive.⁵⁹ Under that law, discrimination is collective when, due to its general scope, its victims are not directly and immediately identifiable; in this case, collective actors have the right to bring legal action by themselves.

The case of Nabil was recently decided by the Italian Supreme Court.⁶⁰ The substance of the case was no longer in doubt: the first-instance court declared the statement discriminatory on the grounds of nationality. However, INPS contested the claimants' locus standi before the Appeal and Supreme Courts. With regard to Mr Nabil, the courts upheld INPS' view: since the statement was not an individual rejection of Mr Nabil's application for the child benefit, he could not complain about concrete discriminatory treatment.

Regarding ASGI and APN, INPS challenged their locus standi, arguing that the prohibition of collective discrimination does not apply in cases of nationality discrimination, like Nabil. Indeed, the Italian law-maker prohibited collective discrimination in the same law that transposed the Race Equality Directive, which addresses only discrimination on the grounds of race/ethnic origin. Accordingly, collective discrimination on the ground of nationality is not covered, since nationality is excluded from the scope of the Directive. INPS claimed that its interpretation was in line with the Italian framework, since nationality discrimination is considered less serious than discrimination on the grounds of race/ethnic origin.⁶¹ Like in Kamberaj, the fact that Italian law regulates separately discrimination on the grounds of nationality and racial/ethnic discrimination gives rise to problems of interpretation. And Nabil is not

⁵⁵ Art. 3(1)(j) of Regulation 883/2004 defines and distinguishes between social security and social assistance benefits.

⁵⁶ See *Martinez-Silva* Judgment at 31.

⁵⁷ See Circolare n. 4 of 15 January 2013, where INPS states that, since the Long-Term Resident Directive was transposed in the Italian legal order on August 2013 (by the Legge Europea 97/2013) before that date the equal treatment clause does not apply.

⁵⁸ See the equality clause of the Long-Term Resident Directive 2003/109, at art. 11(1).

⁵⁹ Article 5(3) Legislative Decree 215/2003, transposing the Race Equality Directive.

⁶⁰ Corte Suprema di Cassazione, Sezione Lavoro, *INPS v. Nabil and ASGI and APN*, n. 11166/17 (May 8, 2017).

⁶¹ *Ibid.*, para. 3.2.

an isolated case: recently the number of cases where collective actors' locus standi was similarly challenged increased.⁶²

On 8 May 2017, the Italian Supreme Court issued its judgment in *Nabil*. The Court upheld the interpretation of the lower courts: it stated that collective actors do have locus standi in cases of collective discrimination on the grounds of nationality. The Supreme Court explained its decision by stating that nationality and race/ethnic discrimination are equally prohibited by Italian law, and therefore they should be equally regulated. The Court interpreted broadly the law transposing the Race Equality Directive, so that the remedy against collective discrimination includes also discrimination based on nationality. According to the Court, a different interpretation would not be in line with Italian law because it would leave acts that are clearly discriminatory, like the INPS's statement, unpunished.⁶³ The judgment in *Nabil* represents an important step for collective actors, which now see their right of access to the courts secured, especially in the field of migrants' equality.

Equal access to family benefit and the role of collective actors

Family benefits have been at the centre of many battles for migrants' equality in the last decade: the cases analysed here are just two of many. These proceedings fostered the implementation of the equality clauses provided by the Long-Term Resident and the Single Permit Directives. As the Court of Appeal in *Martinez Silva* recalled, the Italian law-maker intervened three times to extend the group of persons eligible for the child benefit. What the Court did not say is that, prior to the Italian law-maker's acknowledgement that the law needed to be amended, several cases had (mostly successfully) challenged the discriminatory character of the child benefit law, before both national and European courts.⁶⁴

ASGI, with its anti-discrimination centre, is involved in this battle on three fronts. First, it raises awareness about anti-discrimination law by conducting monitoring activity and advocacy campaigns. Secondly, it supports litigation against discrimination in courts by either bringing cases by its own members or by offering training and advice to other lawyers. Finally, ASGI works with institutions, establishing a dialogue with local governments, social security agencies and proposing legislative amendments.

Although the work of ASGI and similar associations is remarkable, such a decentralised judicial enforcement of the Directives' equality clauses has many drawbacks compared to centralized enforcement by the law-maker. It takes a long time, is costly and depends on the availability and expertise of lawyers or associations working in the anti-discrimination field. Indeed, even big associations like ASGI have a limited reach. Most of its activity is concentrated in Lombardy and the North of Italy; the association is almost absent in some regions of the South. More importantly, even if ASGI lawyers successfully challenge a norm/act in court because it is discriminatory, the judgement is valid only in relation to the case at issue, and does not influence the validity of the discriminatory norm in other cases. In this respect, obtaining a positive ruling by the Court of Justice can be of invaluable help: preliminary rulings are binding erga omnes, and the discriminatory norm would be deprived of its effects.

⁶² Interview with Alberto Guariso, 6 February 2017.

⁶³ Corte Suprema di Cassazione, Sezione Lavoro, *INPS v. Nabil and ASGI and APN*, n. 11166/17 at 5.

⁶⁴ The case of a Tunisian migrant worker's eligibility for the child benefit was brought before the ECtHR: *Dhahbi v. Italy*, European Court of Human Rights, n. 17120/09, 8 April 2014; see also the infringement procedure brought by the EU Commission against Italy regarding long-term resident migrants, Infringement Proceedings 2013_4009. There are many Italian cases challenging the exclusion of migrants from family benefits, for example: *El Housni against INPS*, Tribunale di Genova, Order n. 2656 of the 24 September 2012; Case 351/2010 RGL, *Azem v. INPS*, Tribunale di Gorizia, 1 October 2010.

Conclusion

The implementation of EU equality law in Italy has proceeded along two parallel tracks. At the institutional level, the Italian law-maker transposed the EU anti-discrimination directives in an unsystematic way, at the expense of coherence and legal certainty. It also created an Italian Equality Body, UNAR, but it mainly performs monitoring tasks and is not active in courts. Instead, at the local level, collective actors are working for the effective implementation of anti-discrimination norms through litigation, especially in the field of race/ethnic origin and nationality discrimination. Focusing on such decentralized enforcement of EU equality law, this paper has sought to understand whether the ‘proceduralization’ of EU equality law helped collective actors’ access to courts. However, the answer is not clear-cut, for some ambiguities emerged within the EU equality law and procedures.

In the case of Kamberaj, four associations intervened via an Italian legal procedure. These associations used EU equality law to support their claims, but not EU procedural norms. The same holds true for the second case, Martinez Silva. The collective actor did not use any of the EU law procedures to participate in the case; the lawyer and member of a collective actor (ASGI) was privately hired to represent Mrs Martinez Silva in the case. Finally, the Nabil case illustrates how, under certain conditions, the discrepancy in the scope of EU law and Italian Immigration law might even hinder access to courts for collective actors. Since some norms for collective actors’ participation have been introduced in Italian law in relation to the Race Equality Directive, their validity in proceedings regarding nationality discrimination has been challenged, making collective actors’ locus standi contested. Eventually, the Nabil case concluded with a positive ruling for collective actors. However, an intervention by the Italian law-maker is desirable, since it could remedy the fragmentation in the anti-discrimination field and provide for a single set of procedures valid for all grounds of discrimination.

This paper showed that, EU norms, such as the equality clauses of the migration directives, provide useful new tools to advance equality in Italy. These norms were often used fruitfully by collective actors, as the cases about litigation for migrants’ equal treatment demonstrated. On the other hand, the unsystematic implementation of some EU law provisions created obstacles for collective actors’ participation. Namely, the exclusion of nationality discrimination from the scope of the Race Equality Directive was problematic. EU law does not fully protect third-country nationals from illegitimate discrimination on the grounds of nationality, and this generates ‘equality gaps’, as noted by Muir.⁶⁵ To offset these inequalities, collective actors are actively engaged in litigation, advocacy and campaigns at the local and national level to concretely advance equal treatment for third-country nationals. Hopefully, judgments like the one delivered in Nabil by the Italian Supreme Court will open new doors to facilitate their work.

⁶⁵ Elise Muir, “Enhancing the Protection of Third-Country Nationals Against Discrimination: Putting EU Anti-Discrimination Law to the Test,” *Maastricht Journal of European & Comparative Law*, no. 1–2 (2011): 136–56.

The role of collective actors in the enforcement of the right to data protection under EU law

Orla Lynskey*

Introduction

The EU data protection framework is comprised of a blend of primary law provisions (Article 16 TFEU, and Articles 7 and 8 EU Charter of Fundamental Rights), secondary legislation, and soft law initiatives. The primary law framework is bold and progressive: in addition to the established right to private life (Article 7 EU Charter), it also includes an independent right to data protection (Article 8 EU Charter), setting it apart from other international legal instruments. EU secondary legislation, enacted in 1995 long before these primary law provisions existed, is similarly ambitious in its scope and its endeavour to implement a fundamental rights oriented approach to data protection law. Yet, despite its broad scope and laudable aspirations, the 1995 Data Protection Directive (DPD)¹ was under-enforced at national level in EU Member States and received scant attention at supranational level by EU institutions until the entry into force of the Lisbon Treaty in 2009.²

Since the EU Charter acquired binding force pursuant to the Lisbon Treaty, there has been an explosion of data protection jurisprudence before the CJEU. The author estimates that between December 2009 and December 2016, the CJEU delivered forty judgments and had six cases pending before it where data protection was a consideration of more than marginal relevance.³ Twenty-seven of these cases are preliminary references, with the remainder involving either actions for annulment against decisions of EU institutions or bodies (eg. refusals to provide access to documents on privacy/data protection grounds⁴), or infringement proceedings against a Member State (eg. for failure to guarantee the independence of the national supervisory authority⁵). As the interpretation and application of data protection law gathers steam, the secondary law framework for data protection in the EU will experience

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¹ European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/23.

² See, for instance, the empirical findings of David Erdos in the context of ‘new media’ where he found that although DPAs in the EU tend to adopt an expansive interpretation of the law, implementation of the law has been weak and unharmonised. David Erdos, *European Data Protection Regulation and Online New Media: Mind the Enforcement Gap* (2016)43(4) *Journal of Law and Society* 534–564.

³ These are preliminary figures that are personally compiled based on a search in the Curia database using the ‘subject matter’ filter to search for ‘data protection’ cases. I noted that one data protection judgment (that I am aware of) was missing from these results and added this manually, and I then conducted a cursory qualitative analysis of the judgments to gauge their origins; nature; and, relevance: <https://docs.google.com/spreadsheets/d/1ps9eXCKpuuORsnoGK9FOvmrBieNxPDPeh8RLE-B-dVI/edit?usp=sharing>.

⁴ Case T-194/04 *The Bavarian Lager Co Ltd v Commission* [2007] ECR II-04523.

⁵ Case C-518/07 *Commission v Germany* [2010] ECR I-1885.

its first relatively modest overhaul from a substantive perspective⁶: a new General Data Protection Regulation (GDPR) shall enter into force across EU Member States on 25 May 2018.⁷

Despite this recent jurisprudential boom and pending the introduction of the GDPR, soft law instruments, such as Opinions of the European Data Protection Supervisor (EDPS) and the ‘Article 29 Data Protection Working Party’ (A29WP) continue to provide most guidance on the substantive provisions of EU data protection law. The A29WP is an advisory body comprised of a representative of each of the national data protection regulators that, amongst other things, delivers opinions on relevant and topical matters of data protection interpretation. Yet, on paper at least⁸, the most important actors in the current governance system for data protection in the EU are ‘supervisory authorities’, or data protection authorities (DPAs). Pursuant to Article 28(1) DPD, each Member State must designate one, or several, public authorities to monitor the application of the data protection rules within its territory. In carrying out their role, the DPAs are said to act as ‘ombudsman, auditor, consultant, educator, policy advisor, negotiator and law enforcer’.⁹ Irrespective of the national law applicable to a data processing operation, each DPA is competent to exercise its powers on the territory of its own State and may be asked to do so by other Member States.¹⁰ DPAs also cooperate when necessary for the performance of their duties.¹¹ Given their statutory role in data protection enforcement, these DPAs are included in the definition of ‘collective actors’ for the purposes of this paper.

Before proceeding, it should be noted that although the EU data protection regime is generally considered to be a ‘comprehensive system’, as unlike for instance the US framework, it adopts a cross-sectoral approach to data protection regulation, the general data protection legislative framework does not apply to former second and third pillar measures (Common Foreign and Security Policy, and Police and Judicial Cooperation in Criminal Matters respectively). The DPD stipulates explicitly that it shall not apply to the processing of personal data ‘in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union’.¹² Similarly, the GDPR states that it does not apply to the processing of personal data by Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the TEU (concerning policies on border checks, asylum and immigration).¹³ Moreover, the EU data protection reform package due to enter into force next year includes a ‘Law Enforcement Directive’ (LED) alongside the GDPR.¹⁴

⁶ As Peter Hustinx, former European Data Protection Supervisor, has noted the GDPR is more about ‘continuity than change.’ Yet, while the substantive data protection framework remains largely unchanged post-GDPR, it is suggested below that it will revolutionise data protection governance through, inter alia, the creation of a new EU Agency with the power to adopt decisions that bind national data protection authorities.

⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

⁸ As mentioned above, the DPAs have not yet played a considerable role in elevating data protection issues to supranational level by seeking preliminary references.

⁹ C Bennett and C Raab, *The governance of privacy: Policy instruments in global perspective* (MIT Press, 2006).

¹⁰ Article 28(6) DPD.

¹¹ Article 28(6) DPD. This occurred, for instance, when DPAs collaborated to investigate Google’s new data use policy across its entire suite of offerings in 2012. See, ICO, ‘Google to change privacy policy after ICO investigation’, 30 January 2015. Available at: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/01/google-to-change-privacy-policy-after-ico-investigation/>.

¹² Article 3(2) Directive 95/46 EC.

¹³ Article 2(2)(b) GDPR.

¹⁴ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

While the EU Charter applies to EU institutions, bodies, offices and agencies as well as EU Member States when they are ‘implementing EU law’¹⁵, including in the fields covered by the former second and third pillar, the precise application of the right to data protection in these fields remains unknown. To date, when interpreting the right to data protection the CJEU has suggested that secondary data protection legislation – in particular, the Data Protection Directive – gives expression to this right. However, this then begs the question of what the content of the right to data protection is in the former second and third pillars where the DPD will not apply. On this basis, it is possible to assume that as of next May, the GDPR will inform the content of the right to data protection in the former first pillar while the LED will inform the content of this right in the law enforcement context. Given the fundamental rights status of data protection, this conclusion appears unsatisfactory and merits further probing. Yet, the differentiated application of the right to data protection in this context is recognised by the A29WP. On the one hand, the A29WP insists that a human rights compliant approach must be taken to law enforcement activities, for instance initiatives to prevent money laundering and terrorist financing. However, on the other hand, it implicitly acknowledges the limits of the right to data protection in this context when it cautions against the ‘blanket application of exceptions to data protection legislation, ignoring the conditions for such exceptions, and offering in return no real content and substance to privacy and data protection’.¹⁶

Given the fragmented application of the legislative framework in this field, and the lack of guidance from the CJEU on the application of the right to data protection beyond the former first pillar, this working paper shall focus on the role of collective actors in the enforcement of the right to data protection under the 1995 Directive and the GDPR only. This paper shall therefore examine the role of collective actors pursuant to each of these legislative initiatives in turn.

The role of collective actors pursuant to the Data Protection Directive

When examining the role of collective actors in the enforcement of the right to data protection under the DPD, it is necessary to distinguish between the role of the national DPAs and the role of other collective actors, including civil society organisations.

The role of national DPAs

The independence of DPAs

A defining feature of supervisory authorities (or DPAs) is their independence: Article 28(1) DPD states that DPAs ‘shall act with complete independence in exercising the functions entrusted to them’ while recital 62 DPD specifies that the establishment of supervisory authorities ‘exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data’. Following the entry into force of the Treaty of Lisbon, this independence has been imbued with fundamental rights status and, as the CJEU is noted, is derived from primary law.¹⁷ The constitutionalisation of the independence of DPAs in Article 8(3) EU Charter and Article 16(2) TFEU sets these data protection regulators apart from other economic regulators – such as energy or rail regulators.

¹⁵ Article 51(2) EU Charter.

¹⁶ Article 29 Data Protection Working Party, Opinion 14/2011 on data protection issues related to the prevention of money laundering and terrorist financing, 13 June 2011, 3.

¹⁷ *Maximilian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650, para 40.

One potential consequence of this independence, and perhaps of the differing normative conceptions of the right to data protection across EU Member States, is that the manner in which the mandate of data protection authorities has been interpreted, and the extent to which data protection law has been enforced, ostensibly differs significantly across EU Member States.

The mandate of DPAs

Supervisory authorities, or DPAs, are entrusted with the task of overseeing data protection compliance within their respective jurisdictions. According to Article 28 DPD, DPAs should have advisory powers; investigative powers; and, effective powers of intervention. These powers also include the power to engage in legal proceedings where data protection law has been violated or to ‘bring these violations to the attention of judicial authorities’.¹⁸

The DPD is silent on the issue of what priorities the DPA should pursue when exercising these powers and, in particular, whether they ought to prioritise the protection of the right to data protection of individuals through their activities. It may be argued that all aspects of data protection enforcement promote the right to data protection and therefore such explicit guidance is not required (for example, it could be claimed that ensuring a high level of data protection renders economic data flows possible). However, as discussed further below, one area where such prioritisation may be relevant is in the context of complaint-handling. Article 28(4) DPD states that DPAs ‘*shall* hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data’ (emphasis added).¹⁹ Furthermore, recital 63 suggests that DPAs ‘*must* have the necessary means to perform their duties, including powers of investigation and intervention, *particularly in cases of complaints from individuals*’ (emphasis added). Thus the Directive appears to envisage that the handling of individual complaints is a facet of the powers of DPAs. However, in some Member States, DPAs have eschewed such systematic complaints handling of individual complaints in order to dedicate scarce regulatory resources to more systemic issues. For instance, in Ireland s.10(1)(a) of the Data Protection Act 1998 appears to give the Data Protection Commissioner discretion as to whether individual complaints are investigated. It states that:

The Commissioner may investigate, or cause to be investigated, whether any of the provisions of this Act have been, are being or are likely to be contravened by a data controller or a data processor in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention.

Anecdotal evidence would suggest that Member States have thus interpreted their obligations in different ways. For instance, in Ireland there is no obligation to investigate complaints, in Estonia a ‘public interest’ threshold guides intervention while in Poland the DPA is obliged to proceed with every case in a formal manner. The CJEU was asked to pronounce on whether such a *de minimis* approach to the enforcement of data protection law on the part of DPAs was compatible with EU fundamental rights in a reference from a Dutch court.²⁰ Unfortunately however, this reference was withdrawn leading to the current state of uncertainty regarding the responsibility of the DPAs. This is a far cry from similar provisions under the Equality Directives. For instance, Article 13(2) of the Race Equality Directive requires Member States to ensure that Equality Bodies provide ‘independent assistance to victims of discrimination in pursuing their complaints about discrimination’. The role of the DPAs is not stated in such terms, indicating that no such obligation of assistance exists to facilitate access to justice and legal redress.

¹⁸ Article 28(3) DPD; recital 63.

¹⁹ It further specifies that the individual concerned shall be informed of the outcome of the claim.

²⁰ C-192/15, *T. D. Rease and P. Wullems v College bescherming persoonsgegevens* EU:C:2015:861.

The enforcement 'track record' of DPAs

In the absence of comprehensive empirical research, it is not possible to draw any conclusions regarding the extent to which DPAs have been instrumental in advancing the right to data protection. Erdos' empirical work in the context of 'new media' concludes that despite the expansive interpretation of key data protection provisions by DPAs, the enforcement of these provisions has been 'limited' and 'sporadic'.²¹ This would seem to confirm the prevailing impression that data protection has not been adequately enforced to date. A survey of the jurisprudence of the CJEU regarding data protection matters adds to this impression. It indicates that the role of DPAs in litigating contentious issues, and seeking further clarification on the interpretation of the DPD, has been very limited.

Of the twenty-seven or so preliminary references before the CJEU between the entry into force of the Lisbon Treaty and December 2016, only six involved domestic DPAs. This could perhaps be explained by the participation of DPAs in the work of the A29WP, which issues advisory opinions on the interpretation of key data protection provisions. It might be inferred that as difficult concepts can be the subject of advisory opinions by the A29WP, DPAs do not feel the need to litigate in order to clarify them. Yet, the CJEU has on occasion ignored these Opinions of the A29WP, and interpreted the DPD in a manner inconsistent with them.²² Moreover, the capacity of the A29WP to issue Opinions is finite, and it therefore needs to set its own strategic priorities for the interpretation of the data protection rules.²³ The more likely explanation for this lack of involvement of DPAs in preliminary references is that data protection enforcement at national level has been lacking, with the notable exception of enforcement actions for 'easy wins' such as cold-calling violations and data security breaches. As a result, the CJEU has not yet had the opportunity to consider the DPD's most knotty provisions, for example the prohibition on automated decision-making in Article 15 DPD. It would also appear that of the twenty-seven preliminary references received by the CJEU in this field, most have come from the same countries (Germany – six; Ireland – four; Netherlands – three; Austria – three; and, Spain – three). Some of these countries (most evidently, Germany) have a long-standing legal tradition of data protection while others (Ireland) have no such tradition but have several major technology companies established in the country. It is noteworthy that – until recently – no references have been received from large Member States, including France, the UK and Poland.²⁴

Furthermore, it would appear that as a result of the DPD's failure to provide guidance on the strategic role of DPAs, there has been significant regulatory competition, or arbitrage, between independent DPAs. For instance, although Facebook is established in Ireland, and the Irish DPA has claimed jurisdiction over Facebook's personal data processing activities in relation to EU residents, various other DPAs have sought to claim jurisdiction over Facebook (including the Belgian Privacy Commissioner; and various German DPAs).²⁵

The role of other collective actors

Article 28 DPD, cited above, provides that DPAs shall hear claims lodged by any person, or 'by an association representing that person'. Thus, it allows for representative organisations to intervene on

²¹ Note 2 above.

²² See, for instance, C-141/12 and 372/12, *YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v M and S* EU:C:2014:2081, which contradicts the A29WP Opinion on Personal Data (A29WP, 'Opinion 4/2007 on the Concept of Personal Data', adopted on 20 June 2007 (WP136)).

²³ For these purposes, the A29WP adopts an 'Action Plan' which sets out its priorities and identifies its objectives and deliverables for the coming year. The 2017 Action plan is available here: <https://www.huntonprivacyblog.com/wp-content/uploads/sites/18/2017/01/Pressrelease-Adoptionof2017GDPRActionPlan.pdf>.

²⁴ Two preliminary references have been sent to the CJEU from the French Conseil d'État in 2017: 136/17, *G.C. and Ors* and 507/17, *Google* (lodged in March and August 2017 respectively).

²⁵ *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, [2016] OJ C260/18 (pending).

behalf of individual ‘data subjects’. This is only before the DPA however. It is important to recall that the administrative remedies available to a data subject before a national DPA are without prejudice to any judicial remedy that might be available to the individual data subject.²⁶ The DPD also provides for ‘judicial remedies, liability and sanctions’ in Chapter III. In particular, Articles 22-25 provide that Member States shall provide for a right to a judicial remedy; a right to compensation for damage suffered as a result of unlawful processing or breach of the Directive; and, for effective sanctions in case of infringement of the Directive. Whether or not collective actors can intervene before domestic courts depends on the procedural rules in place at Member State level.

Therefore, thus far, *Digital Rights Ireland*²⁷ is the only action taken on the part of a collective actor to have been referred to the CJEU.²⁸ Although contested before the Irish courts, Digital Rights Ireland – a civil society organisation dedicated to ‘defending civil, human and legal rights in a digital age’²⁹ – was ultimately allowed to take a proceeding in *actio popularis* (on behalf of the privacy and data protection rights of all individuals, rather than its own corporate rights) before the Courts. In granting the Plaintiff standing, the Court took into account several factors: that the Plaintiff was a sincere and serious litigant; that the case raises important constitutional questions; that the impugned provisions affect almost all of the population; that such proceedings would be an effective way to bring legal action; the public good to be protected; and, the Plaintiff’s right of access to the Court and the Court’s duty to uphold the Constitution.³⁰ Furthermore, the Court allowed the Plaintiff company to litigate the contested telecommunications data retention with regard to the infringement of the Plaintiff’s rights as a legal person as well as those of natural persons despite the potentially different findings in relation to these two categories of litigants. The Court justified this on the grounds that it would be in the interests of justice and Court time for the Plaintiff to do so.³¹ Following eight years of litigation, the Plaintiff’s legal action culminated in the CJEU’s judgment. Digital Rights Ireland has highlighted a number of factors that made this victory possible, including: educating and sharing knowledge with the public to garner support; maintaining journalists as key allies; working with a number of specialists, including academics and practitioners; and, preparing groundwork and formulating arguments clearly for litigation.³²

Another ‘class action’ (or more accurately, an action based on assignment) is however pending at national level – an action taken by the group ‘Europe-v-Facebook’ (led by Max Schrems) before the Austrian Supreme Court.³³ This litigation has been suspended while a number of preliminary questions are referred to the CJEU regarding the admissibility of this class action.³⁴ The plaintiff in this action recognises that the applicable data protection law to this action is Irish data protection law, and that data protection law is not amenable to choice of law considerations.³⁵ However, it is argued that the applicable civil law is that of the US State of California, unless this can be overridden by *ius cogens*,

²⁶ Article 22 DPD.

²⁷ *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, Joined Cases C-293/12 and C-594/12, EU:C: 2014: 238.

²⁸ While the EDPS has intervened in a number of infringement proceedings and actions for annulment heard before the CJEU, it does not have leave to intervene in preliminary reference procedures. Order of the President of 12 September 2007, Case C-73/07 *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi OY, Satamedia*, [2007] I-07075.

²⁹ See further: <https://www.digitalrights.ie/>. Accessed on 29 August 2017.

³⁰ *Digital Rights Ireland Ltd –v- Minister for Communication & Ors*[2010] IEHC 221, para 91.

³¹ *Ibid*, Para 92.

³² See further: <https://www.eff.org/node/81899>.

³³ See further: http://www.europe-v-facebook.org/sk/PA_OGH_en.pdf.

³⁴ C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, lodged on 19 September 2016 by the Oberster Gerichtshof (Austria).

³⁵ See, ‘Copy of the Lawsuit filed – English translation of German original’, filed on 31 July 2014. Available at: http://www.europe-v-facebook.org/sk/sk_en.pdf, paras 169 - 171.

mandatory requirements or public policy under Austrian law.³⁶ Therefore, the plaintiff claims jurisdiction to hear this dispute, not on the basis of data protection law, but on the basis of Article 16(1) of Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters.³⁷ Pursuant to this Regulation (Article 17(1)) the plaintiff claims this clause is invalid. The referring court has referred a number of questions to the CJEU regarding the admissibility of this claim pursuant to Regulation 44/2001. In particular, the referring court asks, first, whether a ‘consumer’ loses that status if his professional activities are linked to the claim.³⁸ Facebook had argued that Schrems was a ‘professional litigant’ while Schrems claimed this amounted to a claimant losing his rights if he fought for them publicly. The second question referred to the Court was whether a consumer in a Member State can simultaneously invoke his own claims arising from an issue in his own jurisdiction and the claims of other consumers relating to the same issue if these other consumers are domiciled (i) in the same Member State; (ii) in another Member State; and (iii) in a non-Member State. The answers to these preliminary reference questions will have implications beyond the data protection context, and may facilitate group actions in other areas of EU law.

A non-profit organisation – EPIC: the Electronic Privacy Information Centre – was also given leave to intervene as *amicus curiae* before the Irish High Court in the so-called *Schrems II* litigation. The US Government, as well as two industry trade associations (BSA Business Software Alliance and, Digital Europe) were also granted leave to intervene in this manner, although several other applicants were refused such leave to intervene as *amicus curiae* on the grounds that they could not offer further assistance to the court beyond that already being offered.³⁹ It is noteworthy, in particular, that the Irish High Court declined the application of the Irish Human Rights and Equality Commission to intervene in this case on the grounds that it was ‘not satisfied that it [could] offer any assistance to the court that cannot be offered by the Data Protection Commissioner’.⁴⁰ The Court had acknowledged that the proceedings came within the scope of the Irish Human Rights and Equality Commission’s functions. However, it noted that the remit of the Equality Commission ‘goes way beyond data protection and information technology issues and involves the protection and promotion of human rights and equality generally’ while the ‘Data Protection Commissioner is the entity in the State that has a particular remit with regard to issues of data protection’.⁴¹ It follows implicitly that the High Court therefore assumes that the Data Protection Commissioner will advocate a human rights focused interpretation of the data protection rules in the same way that the Irish Human Rights and Equality Commission would have.

Whether or not the actual or potential intervention of a DPA in legal proceedings pursuant to Articles 22-24 DPD precludes the involvement of other public service organisations, such as the Irish Human Rights and Equality Commission in this instance, will be determined by the CJEU. In *Fashion ID GmbH*⁴² the Court is asked to consider whether these provisions preclude national legislation which grants public-service associations the power to take action against an alleged data protection infringer in order to safeguard the interests of consumers. The answer provided to this question will be of real

³⁶ *Ibid*, paras 174 – 179.

³⁷ OJ [2001] L12/1.

³⁸ The Court was asked whether the plaintiff would cease to be a consumer if he ‘publishes books in connection with the enforcement of his claims’, delivers occasional lectures for remuneration, ‘operates websites, collects donations for the enforcement of his claims and has assigned to him the claims of numerous consumers on the assurance that he will remit to them any proceeds awarded, after the deduction of legal costs?’.

³⁹ *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems* [2016 No. 4809], delivered on 19 July 2016. Available at: <https://arstechnica.co.uk/wp-content/uploads/sites/3/2016/07/Judgment-of-the-High-Court-of-Ireland-in-the-case-data-protection-Commissioner-v-Facebook-relating-to-motions-to-allow-amicus-curia.pdf> .

⁴⁰ *Ibid*, para 14.

⁴¹ *Ibid*.

⁴² C-40/17, *Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV* [2017] C112/22.

significance to the role that collective actors – beyond national DPAs – such as consumer protection authorities can play in ensuring effective compliance with the right to data protection.

The role of collective actors pursuant to the General Data Protection Regulation (GDPR)

The GDPR seems likely to enhance the role of collective actors in the enforcement of the right to data protection. The role of DPAs will be augmented as they will be able to speak with one voice – that of the new European Data Protection Board (EDPB) – on transnational data protection matters. A residual query remains whether they will adopt a ‘selective to be effective’ approach to their tasks in order to prioritise systemic complaints and problems over complaints lodged by individuals. Furthermore, the GDPR introduces new provisions providing for representative actions on the individual’s behalf by not for profit organisations thereby further enhancing the prospect of the more effective enforcement of the right to data protection.

DPAs speaking with a single voice on transnational matters

The choice of a regulation rather than a directive to replace the DPD was deliberate and was designed to introduce more substantive harmonisation of EU data protection law. However, it is the provisions of the GDPR concerning data protection enforcement that shall truly revolutionise, or ‘Europeanise’, this body of law.⁴³ In particular, the A29WP shall be replaced by a new EU agency – an EDPB with the power to issue binding decisions – and a new ‘consistency mechanism’ shall be introduced to ensure that data protection matters pertaining to several Member States shall be interpreted and applied in a consistent matter.⁴⁴ This should therefore eliminate the regulatory arbitrage mentioned above. While, at first glance, this procedural harmonisation might be most closely associated with the GDPR’s internal market rationale, its role in ensuring a fundamental rights objective – the effectiveness of the right to data protection – is equally as significant. At present, disputes regarding how the right to data protection applies in the context of transnational data processing activities are arbitrarily resolved. If the data controller has an establishment in the EU where decisions regarding data processing are made, then it will be this country’s DPA that resolves complaints concerning the data controller. Therefore, for instance, the Irish Data Protection Commissioner adjudicates complaints regarding Facebook’s data processing activities. At present, there is no formal mechanism (other than the drastic Article 259 TFEU mechanism) through which other national DPAs can contest the decisions of another DPA. Moreover, even when national DPAs cooperate, as several did in the context of the 2012 investigation to Google’s privacy policy, there is no obligation on data controllers to recognise their collective findings. Therefore, in the Google investigation culminated in six DPAs issuing separate data protection recommendations to Google to ensure compliance with national data protection rules.⁴⁵ By harmonising data protection enforcement mechanisms the GPDR will therefore simultaneously promote the Regulation’s market integration objective while also ensuring a uniform and more effective level of protection for the right to data protection across the EU.

⁴³ See further, O Lynskey, ‘The Europeanisation of data protection law’, Cambridge Yearbook of European Legal Studies, published online 21 December 2016. Available at: <https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/div-classtitlethe-europeanisation-of-data-protection-lawdiv/579DCFDE8EE5D8A3C83FED4C9ACB8CCF>.

⁴⁴ Articles 63-67, GDPR.

⁴⁵ For instance: Information Commissioner’s Office, ‘Google to change privacy policy after ICO investigation’, 30 January 2015. Available at: <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2015/01/google-to-change-privacy-policy-after-ico-investigation/>.

The prioritisation of DPA resources to ensure more effective rights protection?

Articles 57 and 58 GDPR continues to allocate numerous tasks and powers to DPAs (22 mandatory tasks as well as 27 powers) while failing to set out any strategic plan for their exercise. The Centre for Information Policy and Leadership (CIPL) therefore advocates that in the absence of infinite resources, DPAs should adopt a ‘smart’ or responsive approach to regulation and should prioritise their tasks and powers in order to be more effective. If such an approach were accepted, enforcement and the imposition of sanctions would be treated as a last option and DPAs would favour a more cooperative (or responsive) relationship with those who they regulate. Moreover, in order to ensure a harmonised approach to data protection law across the EU, CIPL suggests that DPAs should agree upon a common approach to such prioritisation.

This begs the question of whether ‘maximum compliance’ with the data protection rules equates to the more effective protection of the right to data protection. On the one hand, it might be argued that such an approach might free up resources for DPAs to engage in more strategic data protection litigation in order to safeguard the right to data protection. Data protection would therefore be promoted as a collective right or public good rather than an individual right. Such an approach is also arguably supported by the independence of DPAs, which should allow them to prioritise their resources as they deem appropriate. One potential objection to any such prioritisation is that it may deprive individual complainants, whose complaints might not be viewed as a priority by a DPA, of an administrative remedy. Article 57 GDPR states that each DPA shall ‘handle complaints lodged...and investigate to the extent appropriate’, indicating that DPAs should have some leeway as to how to handle complaints. However, Article 77 GDPR provides that ‘every data subject shall have the right to lodge a complaint with a supervisory authority’. It is suggested that whether or not the rapid rejection of such complaints for lack of ‘strategic importance’ would breach the right to an effective remedy would require a context specific assessment. This might require consideration of, amongst other things, whether alternative administrative remedies are available (such as the ability to complain to an Ombudsperson); whether judicial review of the DPA decision to not pursue the complaint is feasible; and, whether private litigation is possible. In *Puškár*, the CJEU has been asked to consider whether the requirement to exhaust domestic administrative remedies prior to legal proceedings is compatible with the right to an effective remedy in Article 47 EU Charter.⁴⁶ Advocate General Kokott has opined that while this right is affected by such a requirement this may be justifiable as long as the rules governing the remedy do not disproportionately impair the effectiveness of judicial protection.⁴⁷ In her reasoning, the Advocate General recognises that a gain in efficiency is a valid objective to pursue under EU law.⁴⁸ Should the Court also recognise this objective in its judgment, it may pave the way for a ‘smart’ approach to data protection enforcement by DPAs.

The enhanced role for ‘not-for-profit’ bodies, organisations and associations

A further notable development in the GDPR, designed to strengthen the hand of individual data subjects vis-à-vis data controllers, is the introduction of specific rights to redress in Articles 77-79: to lodge a complaint with a DPA; to an effective remedy against a DPA; and to an effective remedy against a data controller or processor. Of most significance however is Article 80 GDPR, entitled ‘representation of data subjects’, which merits replication in full here. This provision provides as follows:

1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory

⁴⁶ C-73/16 *Puškár* [2016] OJ OJ C 165/6.

⁴⁷ C-73/16 *Puškár*, Opinion of AG Kokott delivered on 30 March 2017, EU:C:2017:253, para 69.

⁴⁸ *Ibid*, para 59.

objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.

This is a major novelty in the GDPR. Pursuant to the GDPR, collective actors will be able to exercise the data subjects' rights to complain to a DPA and to an effective judicial remedy, provided that the data subject mandates them to do so. This provision may be compared to those in the anti-discrimination directives. For instance, Article 7(2) of the Race Equality Directive provides that 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.

A close comparison of this provision with Article 80(1) GDPR reveals a broad similarity: 'interested' associations and organisations can, with the individual's approval, engage in judicial and administrative procedures on the individual's behalf. However, it also reveals a number of distinctions. The GDPR stipulates that the representative actor must be 'not-for-profit'; have statutory objectives in the public interest and be 'active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data' while the Race Equality Directive simply specifies that the organisation has a 'legitimate interest in ensuring that the provisions of the Directive are complied with'. The GDPR may be therefore narrower in this regard: for instance, the Irish Human Rights and Equality Commission might not be viewed as 'active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data' while it would certainly have a legitimate interest in ensuring that the provisions of EU data protection legislation are complied with. Furthermore, the GDPR provides that the representative actor can intervene 'on behalf of' the data subject while the Race Equality Directive provides that this representation may be either on 'behalf or in support of the complainant'. Again, the GDPR is ostensibly more narrow in this regard although one would hope that it would not be construed as such.

The GDPR does however go a step beyond the EU anti-discrimination directives. Article 80(2) GDPR allows Member States the possibility to introduce measures enabling representative actors to lodge a complaint before a DPA or to have an effective remedy against a DPA or data controller, independently of the data subject's mandate. The anti-discrimination directives require the victim's approval before such remedies can be exercised. These new provisions in the GDPR may therefore go some way to remedying the asymmetry of power and information between individual data subjects and those who process and control their personal information. Indeed, commentators have noted that whether or not these provisions are implemented will be a 'litmus test as to how seriously all Member States...want to protect the privacy of its citizens'.⁴⁹ Member States with a historically weak record of protecting the rights of data subjects, and affording greater weight to the consequences for industry of such compliance, are less likely to implement legislation to facilitate representative class actions without a mandate, or

⁴⁹ Amberhalk Training, 'Article 76 & Recital 112 of the GDPR should keep data controllers "honest"', 8 March 2016. Available at: https://m.theregister.co.uk/2016/03/08/heres_one_obscure_little_eu_data_protection_rule_that_would_be_good/

actions for compensation with a mandate. The disparity between the levels of protection offered by Member States thus seems likely to continue even post-GDPR.

Conclusions

The role of collective actors in the enforcement of the right to data protection has, to date, under the DPD been quite limited. National DPAs have seemingly interpreted their mandates in different ways and few references to the CJEU have involved DPAs directly. Moreover, actions on the part of other collective actors – such as civil society organisations – are only now recently starting to bear fruit.

The entry into force of the GDPR should however enhance the role of collective actors in the enforcement of the right to data protection. The actions of DPAs will be given increased transnational weight when acting through the EU's newest agency, the European Data Protection Board, while explicit provision is made for representative actions on behalf of individuals.

Enforcing refugee rights under EU procedural law: the role of collective actors and UNHCR

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*Harmonisation in asylum carries the potential for the Court of Justice of the European Union (CJEU) to shape EU asylum, and by extension international refugee law, as well as to enforce refugees' rights. Strict procedural rules circumscribe the CJEU's potential to become an 'asylum Court'. Nevertheless, provisions in the EU asylum *acquis* influence the conditions for asylum seekers and refugees to gain access to national courts. Proceduralisation has been an explicit goal of the EU asylum policy since its inception. It has materialised in three legislative waves. The first resulted in the creation of a basic set of procedural guarantees, alongside a plethora of exceptional procedures. The second resulted in modest improvements in terms of harmonisation, and adherence to fundamental rights, but saw exceptional procedural arrangements either retained or introduced. The third, forthcoming wave, aims at further harmonisation that would, however, be heavily focused on the underlying goal of externalising protection to third countries. Procedural harmonisation sought to enhance the role of collective actors and the Office of the United Nations High Commissioner for Refugees (UNHCR). While a 'defence clause' is absent, the legislation envisages information - provision to applicants, legal aid, and feeding into the establishment of country of origin information as their primary involvement. Additional functions are reserved for UNHCR, falling, however, short of establishing a genuine supervisory role. In practice, collective actors engage in strategic litigation on behalf of refugees, and both they, and UNHCR, have formally intervened in cases that reached the CJEU. They also engage in 'hidden' forms of support: legal advice to lawyers, liaison, and training.*

Introduction

Lacking both an international judicial instance, and a global level monitoring mechanism with a possibility to deliver opinions in individual cases, international refugee law is particularly challenging to enforce. The creation of a Common European Asylum System (CEAS) carried within it the potential for the Court of Justice of the European Union (CJEU) to shape EU asylum, and by extension international refugee law, as well as to enforce refugees' rights. Strict procedural rules on direct access somewhat circumscribe the CJEU's potential to become an 'asylum Court'. Nevertheless, provisions in the EU asylum *acquis* influence the conditions for asylum seekers and refugees to gain access to national courts. One of the main advances of CEAS in relation to the international refugee law regime is that it seeks to harmonise in a detailed manner rules around asylum procedures at national level, including provisions on the right to an effective remedy, and related guarantees. In addition, refugee-assisting organisations, at national and EU level, as well as the Office of the UN High Commissioner for Refugees (UNHCR), are increasingly engaging in strategic litigation in the field of asylum.

Set against this backdrop, the paper examines the role of collective actors, understood in the broad sense to cover civil society organisations and independent organisations, as well as that of the Office of the UN High Commissioner for Refugees (UNHCR), in judicially enforcing the rights of asylum seekers and refugees. It ascertains the type of proceduralisation taking place in EU asylum law, critically assessing the three waves of EU asylum procedural legislation: their content, quality and implications. The research then scrutinises selected provisions of the EU asylum instruments in force, highlighting

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what functions they foresee for collective actors, and for UNHCR, within CEAS. It analyses if, and how, these functions relate to their capacity to judicially enforce asylum seekers and refugees' rights. The study, finally, draws examples from CJEU case-law on asylum involving collective actors and UNHCR, shedding light on the hidden processes behind asylum litigation and their often-ignored influence.

Proceduralisation in the EU Asylum Policy: Three Legislative Waves

One of the distinct features of the EU's harmonisation project on asylum was that it also included harmonisation of national procedural rules. This is an ambitious aspect of the EU asylum policy, given that the 1951 Refugee Convention does not include relevant norms,¹ and no harmonisation of national administrative procedures more broadly exists to date.² The complexity of the matter, combined with the wish of Member States to see their own national administrative traditions reflected in the relevant EU legislation, led in practice to a cumbersome adoption procedure, and the establishment of highly differentiated standards.

Nevertheless, proceduralisation in the EU asylum policy was not 'incidental',³ but rather an explicit goal of the EU asylum policy under the EU Treaties since its inception. Namely, the initial legal basis for the EU asylum policy included, as part of the substantive measures to be adopted: '*minimum standards* on procedures in Member States for granting or withdrawing refugee status'.⁴ Minimum harmonisation must not be taken as a term necessarily pointing to a low level of harmonisation. As the CJEU has stated in a different area where minimum harmonisation was foreseen, namely the working time Directive:

that provision does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but means that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.⁵

As a result of this first harmonisation round, Member States adopted the 2005 version of the Asylum Procedures Directive.⁶ Where minimum harmonisation was envisaged under the Treaty of Amsterdam, the instruments allowed Member States to adopt more favourable standards.⁷ For clarity, the expression 'more favourable' refers to standards being more favourable for protection seekers. If they were more favourable for the Member States, i.e. by providing them with the possibility to be more restrictive where no discretion was foreseen in the directives, the standards in question would go against the *effêt utile* of the instruments, which was to harmonise standards in this policy area.

¹ 1951 Convention Relating to the Status of Refugees, 25 July 1951, entered into force 22 April 1954, 189 UNTS 150, as amended by the 1967 Protocol Relating to the Status of Refugees, 31 January 1967, entered into force 4 October 1967, 606 UNTS 267 (hereafter: 1951 Refugee Convention).

² Neither does a single body of procedural rules for executive rule-making in the EU exist. See, however, relevant material developed in the framework of the Research Network on EU Administrative Law (ReNEUAL) at: <http://www.reneual.eu>, and scholarly debate on the importance of establishing a corpus of procedural rules for the EU in: D. Curtin, H. Hofmann, J. Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' (2013) 19 *European Law Journal* 1.

³ Mariolina Eliantonio and Elise Muir conceptualise 'incidental proceduralisation' as the: 'insertion of procedural rules in secondary EU law measures adopted on the basis of provisions enabling the EU to develop a substantive policy'. See M. Eliantonio and E. Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law' (2015) 8 *Review of European Administrative Law* 177, 178.

⁴ See TEC Amsterdam, Article 63(1)(d) (emphasis added).

⁵ Case C-84/94, *UK and Ireland v Council (working time directive)* [1996] ECLI:EU:C:1996:431, para 56.

⁶ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 (hereafter: 2005 Procedures Directive).

⁷ See, for example, 2005 Procedures Directive, Article 5.

The ambition expressed in the Lisbon Treaty is higher, calling for the development of: ‘common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status’.⁸ The Union is therefore now free to harmonise asylum law fully. On this basis, the co-legislators adopted in 2013 the recast Asylum Procedures Directive.⁹ What level of harmonisation does the recast instrument foresee? The 2009 Commission proposal for a recast asylum procedures directive¹⁰ made reference to ‘minimum standards’. However, it was issued before the entry into force of the Lisbon Treaty in December 2009. The amended recast proposal that was issued in 2011 referred to ‘common’ procedures reflecting the amended legal basis.¹¹ What is the legal gravity of this reformulation? The instrument retains a ‘more favourable standards’ clause phrased in identical terms to the one employed in the first-generation instrument.¹² This observation is supported by the analysis undertaken in a subsequent section on the legal quality of the recast instrument.¹³ Hence it is clear that, although the level of harmonisation is enhanced compared to the first-generation instruments, there is no exhaustive harmonisation yet. In other areas of EU integration, the Court has checked the actual content of instruments in order to ascertain whether they do in fact fully harmonise a field.¹⁴

Aspiring to harmonise EU asylum legislation further, the European Commission announced in April 2016 its intention for: ‘a comprehensive harmonisation of procedures across the EU by transforming the current Asylum Procedures Directive into a new Regulation establishing a single common asylum procedure in the EU - replacing the current disparate arrangements in the Member States’.¹⁵ It released its proposal in July 2016; promoting the instrument as seeking to establish ‘a common procedure’ that was currently under negotiation.¹⁶ The goal of establishing a CEAS is broad enough to encompass further harmonisation as envisaged by the Commission. While a fully federalised system, where processing of individual claims lays in the competence of the Union, would require a Treaty change, this is not the case for ‘a common procedure’, as long as this refers in practice to further harmonisation of procedural rules concerning decision-making performed by national administrations and courts of individual Member States. The following subsections critically assess these three waves of EU asylum procedural legislation: their content, quality and implications.

First wave, or when the exception became the norm

The 2005 Procedures Directive, as the entire first generation of asylum instruments, was adopted by the Council acting unanimously.¹⁷ As one author characteristically notes, while asylum was no longer subject to an ‘intergovernmental’ system in the *legal* sense, decision-making was still intergovernmental in the *political* sense, in that national executives (in practice interior and justice ministers and their

⁸ See TFEU, Article 78(2)(c) (emphasis added).

⁹ See Directive 2013/32/EU on Common Procedures for Granting and Withdrawing International Protection (Recast), OJ L 180/60 (hereafter: 2013 Asylum Procedures Directive).

¹⁰ See European Commission, ‘Proposal for a directive on minimum standards on procedures in Member States for granting and withdrawing international protection’, COM(2009) 554 final (hereafter: 2009 APD proposal).

¹¹ See European Commission, ‘Amended proposal for a directive on common procedures for granting and withdrawing international protection status (Recast)’, COM(2011) 319 final (hereafter: 2011 APD proposal).

¹² See Recast APD, Article 5.

¹³ See below, subsection ‘Second wave: tangible progress or lipstick on a pig?’.

¹⁴ See for example the Case C-323/93, *Société Civile Agricole du Centre d'Insémination de la Crespelle et Coopérative d'Élevage et d'Insémination Artificielle du Département de la Mayenne* [1994] ECLI:EU:C:1994:368.

¹⁵ European Commission, ‘Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe’ (Communication), COM(2016) 197, part I2, subsection c.

¹⁶ European Commission, Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final (hereafter: 2016 APR proposal).

¹⁷ See TEC Amsterdam, Article 67.

officials,) retained extensive control over decision-making.¹⁸ Given the nature of the instrument, which was to have wide implications in national administrative and judicial practice, this decision-making technique held back the harmonising effect of legislation. It led to the inclusion of provisions in the instrument that contained ambiguous or contradictory wording, left a wide margin of discretion to Member States, and made numerous references to national law, derogations and exceptions.¹⁹

The instrument did set out a number of basic principles and guarantees for the examination of asylum applications at first instance and at appeal, including: access to the procedure, right to remain pending the outcome of an application, right to a personal interview, various provisions on right to information, communication with UNHCR etc.²⁰ However, alongside the ‘normal’ procedure, it established a series of ‘exceptional’ procedures, applicable in a variety of cases, which allowed for divergences from the basic principles and guarantees. Hemme Battjes classified the disparate provisions regulating exceptional procedures in the 2005 Directive under four categories: ‘preliminary examination procedure’; ‘normal border procedures’; ‘special border procedures’; and the ‘safe third neighbouring country procedure’.²¹ The leeway for Member States to diverge from the basic set of guarantees was such that the criticism of Cathryn Costello that through this instrument ‘exceptional procedures become the norm’ is fully justified.²² The European Commission thus admitted in 2010 that: ‘some of the Directive’s optional provisions and derogation clauses have contributed to the proliferation of divergent arrangements across the EU, and that procedural guarantees vary considerably between Member States’.²³

Second wave: tangible progress, or lipstick on a pig?

The Lisbon Treaty reaffirmed the passage to co-decision, already a legal reality since 2005. It stated explicitly that the majority of asylum instruments²⁴ are to be adopted under the ordinary legislative procedure, i.e. co-decision.²⁵ Hence, the European Parliament rose as co-legislator on an equal footing with the Council in the area of asylum. This entailed the emergence of new institutional dynamics, and the predominance of ‘trilogues’ in the legislative process.²⁶ Coupled with the introduction of qualified majority voting, this new framework seemed more conducive to achieving higher levels of procedural harmonisation on asylum decision-making, and better safeguarding asylum seekers’ access to justice.

Nevertheless, the negotiation process of the recast instrument proved cumbersome. The initial 2009 Asylum Procedures Directive (APD) proposal sought to simplify procedural arrangements, reducing

¹⁸ See S Peers, ‘Transforming decision making on EC immigration and asylum law’ (2005) 30 E. L. Rev. 285, 286.

¹⁹ For the effect of the use of such techniques in the entire body of immigration and asylum legal instruments see P De Bruycker, ‘Le Niveau d’harmonisation Législative de la Politique Européenne d’immigration et d’asile’, in F Julien-Laferrriere, H Labayle, O Edström (eds) *La politique européenne d’immigration et d’asile: bilan critique cinq ans après le traité d’Amsterdam* (Bruylant 2005) 45.

²⁰ See 2005 Procedures Directive, Chapter II and Chapter V.

²¹ See for analysis, H Battjes, *European Asylum Law and International Law* (Brill/Nijhoff 2006) 301-304.

²² C Costello, ‘The European asylum procedures directive in legal context’, UNCHR New Issues in Refugee Research Series, Research Paper No. 134, 2006, 34 <<http://www.unhcr.org/4552f1cc2.html>>, 8.

²³ See European Commission, ‘Report on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States’, COM(2010) 465, 15.

²⁴ An exceptional procedure is foreseen only for the introduction of temporary measures ‘in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries’; see TFEU, Article 78(3).

²⁵ TFEU, Articles 78(1)-(2), 289(1) and 294.

²⁶ Trialogues are tripartite meetings between the European Parliament, the Council and the Commission during which a common position is sought between the amendments of the Parliament and the position of the Council on the Commission proposal. While not formally foreseen by the Treaties, trialogues have become a commonly used tool of pre-negotiation in practice.

exceptions to the basic set of principles and guarantees; and provided for additional guarantees, such as free legal assistance at first instance procedures, and special guarantees for vulnerable asylum applicants.²⁷ It also sought to strengthen access to an effective remedy, namely through providing for a suspensive effect for appeals, subject to limited exceptions.²⁸ This proposal was met with resistance at the Council level. Such was the legal impasse, that the Commission had to release an amended recast proposal in 2011. The additional amendments aimed at responding to Member States' concerns by rendering the proposal more 'cost-effective' and 'flexible enough to accommodate the particularities of national legal systems'.²⁹ In practice, this led to the watering down of some of the additional guarantees, by, for example, further conditioning access to free legal aid, or reintroducing exceptions to the basic guarantees, and restricting the automatic suspensive effect of appeals. The text was further reformed during two years of negotiations, and by the adoption of the recast instrument in 2013, the level of legal clarity had been considerably diluted, and a great part of the Commission's efforts to effectively harmonise procedural arrangements had been abandoned.

Overall, the result of the procedural reform could be analysed as follows: modest improvements in terms of the level of harmonisation, as well as in terms of adherence to fundamental rights. This somewhat disappointing outcome led an academic commentator to describe the amendments as 'lipstick on a pig'.³⁰ Characteristic examples of additional safeguards were: the establishment of several protective guarantees for 'applicants with special procedural guarantees',³¹ including unaccompanied minors, or LGBTI applicants; and the explicit strengthening of the role of collective actors and UNHCR in information provision and assistance.³² Moreover, the quality of effective remedy that Member States needed to make available was improved, by establishing that judicial authorities should be able to examine both points of law and facts.³³ Parallel to these developments, robust procedural provisions were introduced to other instruments of the EU asylum *acquis*. New provisions in EU's responsibility allocation Regulation enable applicants to challenge their transfer to a different Member State.³⁴ In addition, new provisions in EU's reception conditions directive enable applicants to challenge their detention,³⁵ or challenge decisions related with the granting, reduction, or withdrawal of reception conditions.³⁶

Nonetheless, exceptional procedural arrangements were either retained or introduced, such as the possibility for Member States to prolong the length of border procedures for an undefined period,³⁷ or the multitude of situations in which Member States could apply exceptional asylum procedures.³⁸ In addition, several of the newly-introduced additional procedural guarantees were heavily conditioned.

²⁷ See 2009 APD proposal, Explanatory Memorandum.

²⁸ *Ibid.*

²⁹ 2011 APD proposal, Explanatory Memorandum.

³⁰ See S Peers, 'The second phase of the Common European Asylum System: A brave new world – or lipstick on a pig?', (*Statewatch*, 08 April 2013) <<http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>>.

³¹ See 2013 Asylum Procedures Directive, Article 2(d) and Recital 29.

³² See further analysis below in section 'Access to justice for asylum seekers and refugees: what role for collective actors and UNHCR?'.
³³ 2013 Asylum Procedures Directive, Article 46. See also analysis in M Reneman, *EU Asylum Procedures and the Right to an Effective Remedy* (Hart Publishing 2014).

³⁴ See Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180/31 (hereafter: 2013 Dublin Regulation), Article 27.

³⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L180/96 (hereafter: 2013 Reception Conditions Directive), Article 9.

³⁶ 2013 Reception Conditions Directive, Article 26.

³⁷ See Recast APD, Article 43(3).

³⁸ See Recast APD, Article 31(8).

For example, Member States retain the possibility to deny the suspensive effect of appeals in various vaguely defined cases, thus affecting the applicants' right to remain during the examination of their appeal, and, subsequently, their access to reception conditions during appeal.³⁹ They also have the possibility to apply several conditions to accessing free legal aid and representation at the appeals stage.⁴⁰ Finally, Cathryn Costello and Emily Hancox have argued that the focus on vulnerability is in itself unhelpful, since it allows for the proliferation of deviations from the basic procedural guarantees aimed at the 'abusers', as long as further procedural guarantees are devised to release the 'vulnerable' from the rigours of those procedures, compounding the overall level of complexity.⁴¹

The forthcoming, third wave: further harmonisation, higher quality?

The third wave of asylum procedural harmonisation is still under negotiation. Nevertheless, some trends can be clearly discerned through the 2016 Commission proposal. First, the Commission is seeking to achieve a higher level of harmonisation, and greater uniformity in the outcome of asylum procedures, employing this time additional means. Secondly, the focus on combatting what are considered abusive applications is retained, and, in fact, strengthened by the underlying goal of externalising protection obligations to third countries instead of processing the merits of asylum applications, and subsequently providing protection, in the EU territory. These goals are intertwined, with greater harmonisation serving primarily the goal of externalising protection obligations and seeking to combat perceived abuse, rather than a focus on quality of decision-making. I substantiate these points below.

To achieve the first goals, i.e. a higher level of harmonisation, and uniformity in decision-making, the Commission has altered the type of proposed instrument, from a directive to a regulation. This type of instrument, which is directly applicable, and normally provides for less discretion in its application, has the potential to serve this purpose. However, while streamlining the current disparate procedural arrangements is a stated goal, exceptional procedures are not suppressed; in fact, their use is proliferated and enhanced. The proposed regulation establishes the obligation for Member States to accelerate the examination on the merits in a variety of broadly defined cases,⁴² including: making 'clearly inconsistent and contradictory, clearly false or obviously improbable representations',⁴³ or misleading the authorities by presenting false information.⁴⁴ Apart from acceleration, an optional border procedure,⁴⁵ and an obligatory specific procedure for subsequent applications, are retained.⁴⁶ These procedures contain less safeguards, such as limited time available to prepare for the examination of the claim, or the additional practical difficulty of gaining access to information and expert representation at border and transit zones. An intricate set of exceptions is foreseen for unaccompanied minors, who are in principle exempted from their application, but could still be subject to those special procedures, when, for example, they come from a safe country of origin.⁴⁷ The image that emerges is one of complex procedural arrangements that will, as the previous versions of this instrument, lead to divergent national practice.

³⁹ See Recast APD, Articles 9(1) and 46 (6), read together with Article 3(1), 2013 Reception Conditions Directive and analysis in M Peek and E Tsourdi, 'Asylum Reception Conditions Directive 2013/33/EU' in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law* (Beck/Hart/Nomos 2016) Article 3, MN 42-43.

⁴⁰ See Recast APD, Article 21.

⁴¹ C Costello and E Hancox, 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee', in V Chetail, P De Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: the New European Refugee Law* (Brill/Nijhoff 2016) 377.

⁴² 2016 APR proposal, Article 40.

⁴³ 2016 APR proposal, Article 40(1)(b).

⁴⁴ 2016 APR proposal, Article 40(1)(c).

⁴⁵ 2016 APR proposal, Article 41.

⁴⁶ 2016 APR proposal, Article 42.

⁴⁷ 2016 APR proposal, Article 41(5) and Article 42(5).

This situation is compounded by the underlying aim to externalise protection obligations. The proposed regulation would see the introduction of an obligatory admissibility phase.⁴⁸ This would entail an examination, prior to assessing the individual's protection needs, of elements such as whether a third country can be considered a first country of asylum⁴⁹ or a safe third country⁵⁰ for the applicant.⁵¹ Should this be the case, then the application is to be rejected as inadmissible and the applicant should be transferred to the third country in question. However, since this finding hinges on the cooperation of the third country, this decision would be revoked when it does not admit, or readmit, the applicant to its territory.⁵² Apart from the collaboration of third states, the operationalisation of the externalisation imperative is to be supported by harmonising practices. Notably, the proposed regulation foresees, for example, the designation of safe third countries at Union level,⁵³ and, an increasingly important role for the European Asylum Support Office (EASO)⁵⁴ in providing common analysis of country of origin information.⁵⁵ While these practices will enhance a uniform approach, their impact on the quality of decision-making is less than certain, and depends on whether the designation of third countries as safe, and the inadmissibility finding on an individual level, will be based on a rigorous assessment of information, coming from a multitude of sources, including civil society. These eventual developments certainly foreshadow a new set of procedural challenges that applicants will have to face, and the importance of expert legal assistance, representation, and defence. Bearing this in mind, the next sections critically assess the role foreseen in the asylum *acquis* for collective actors, and UNHCR, as well as reflecting on actual practice.

Access to justice for asylum seekers and refugees: what role for collective actors and UNHCR?

Enhancing collective actors',⁵⁶ and UNHCR, involvement in the CEAS has been part of the efforts to better safeguard asylum seeker and refugee rights, and to facilitate their access to justice. Some of these functions, such as information provision to applicants, and feeding into the establishment of country of origin information, relate to both UNHCR and collective actors. Nevertheless, additional, distinct roles are foreseen for UNHCR, due to the special position it holds in the international refugee regime.

UNHCR was created as a subsidiary organ of the UN General Assembly, initially as a temporary organisation with a 3-year mandate.⁵⁷ The 1951 Refugee Convention established a supervisory role for UNHCR in the international refugee regime:

[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the

⁴⁸ 2016 APR proposal, Article 36.

⁴⁹ 2016 APR proposal, Article 36(a) and Article 44.

⁵⁰ 2016 APR proposal, Article 36(b) and Article 45.

⁵¹ The applicant still retains the possibility to challenge the safety of the third country in their particular circumstances; see, for example, Article 44(3) and Article 45(4).

⁵² 2016 APR proposal, Article 44(6) and Article 45(7).

⁵³ 2016 APR proposal, Article 46.

⁵⁴ See for its current mandate: Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11 (hereafter: EASO Regulation).

⁵⁵ See for example: 2016 APR proposal, Recitals 30, 49, 50, 52, 54, and Article 33(2)(a),(c), (3).

⁵⁶ This study follows the understanding of 'collective actors' adopted in the framework of this collection to cover to cover civil society organisations, and independent organisations, such as equality bodies, intended to represent individuals.

⁵⁷ See General Assembly Resolution 428 (V) of 14 December 1950, Statute of the Office of the United Nations High Commissioner for Refugees.

exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.⁵⁸

The drafters of its statute did not want it to be as operationally active, or to replace government services as its predecessor, the International Refugee Organisation (IRO) had done.⁵⁹ Its initial budget was 300,000 US dollars, and it could only seek voluntary contributions from governments with the approval of the General Assembly.⁶⁰ A lot of water has run under the bridge since then. The High Commissioner expanded its activities incrementally, with the authorisation of the General Assembly, by offering its services to help address the challenges posed by new and different groups of refugees and displaced persons in the developing world.⁶¹ States also came to gradually see assistance to refugees as a central part of their policy towards newly independent states.⁶²

Later in the 1990s the refugee agency assumed lead responsibility for the humanitarian operation in the former Yugoslavia as that country collapsed into civil war, rising in prominence to take on the role as the world's foremost humanitarian organisation.⁶³ Hence, instead of the initial reluctance on the part of States to recognise an operational role for the agency, it now employs 9,700 people in 126 countries.⁶⁴ Its budget is made up almost entirely of voluntary contributions, with 86 per cent coming from governments and the European Union; six per cent from other inter-governmental organisations and pooled funding mechanisms, and a further six per cent from the private sector, including foundations, corporations and the public.⁶⁵ Funding for UNHCR is voluntary, a fact that 'encourages a certain pragmatism in relations with states'.⁶⁶ Combined with its increased operational role, these realities call for a delicate balance to be struck between the supervisory function bestowed upon it by the 1951 Refugee Convention, and its capacity to effectively assist, and provide services to, refugees.

Collective actors in asylum essentially are non-governmental, not for profit organisations, operating at national, or European, levels. The asylum instruments do not call for the establishment of specialised bodies at national level, independent from the national administration and judiciary, specifically tasked with supervising, and enforcing the application of the asylum *acquis*. Neither do they explicitly call on Member States to facilitate the defence of asylum seekers and refugees' rights through relevant collective actors.⁶⁷ The 2016 APR does not introduce such obligations either. This of course does not

⁵⁸ 1951 Refugee Convention, Article 35.

⁵⁹ See C Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) 13-14 referring in fn 65 of her work to the UK representative, Mr. Corley who mentioned that the High Commissioner 'would not constitute an operational agency; furthermore, he would concern himself with refugee problems of a broader and more universal nature than those faced by the IRO', UN GAOR, 4th Sess., 265th plen. mtg. at para. 14 (4 November 1949).

⁶⁰ D Callagher, 'The Evolution of the International Refugee System' (1989) 23 *The International Migration Review* 579, 581.

⁶¹ See A Betts, G Loescher, and J Milner, *UNHCR: The Politics and Practice of Refugee Protection* (Routledge, 2nd edn 2012) 24-27.

⁶² *Ibid.*, 27-33.

⁶³ See A Hammerstad, *The Rise and Decline of a Global Security Actor: UNHCR, Refugee Protection and Security* (Oxford University Press 2014) 193 and analysis 193-211.

⁶⁴ See UNHCR, *Figures at a Glance* <<http://www.unhcr.org/figures-at-a-glance.html>>; see also M Kagan, "'We live in a country of UNHCR": The UN surrogate state and refugee policy in the Middle East', *UNCHR New Issues in Refugee Research Series*, Research Paper No. 201, 2011 <<http://www.unhcr.org/4d5a8cde9.pdf>>.

⁶⁵ UNHCR, 'Figures at a Glance', *op. cit.*

⁶⁶ See M Barutciski, 'The limits to the UNHCR's supervisory role' in J C Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Oxford University Press 2013) 59, 69.

⁶⁷ Cf., for example, Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative co operation through the Internal Market Information System, OJ L 159/11, Article 11(3), or Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures

prohibit relevant collective actors from taking up such action, where national procedural legislation allows them to do so. In addition, since asylum legislation is part of national administrative law, some functions of monitoring and follow-up of individual complaints can be taken up by national Ombudsmen.⁶⁸

The next sections outline the functions foreseen for collective actors and UNHCR in the procedural *acquis* in greater detail, before critically assessing insights into the role that both collective actors, and UNHCR, are playing in strategic litigation efforts before the CJEU.

The role of collective actors and UNHCR according to the procedural *acquis*

Having access to objective, and accurate, legal information, is crucial for asylum seekers and refugees to be able to enforce their rights. A series of provisions in the recast APD, and the 2013 Reception Conditions Directive, establish an obligation for Member States to provide information to applicants, ‘[t]aking into account their particular circumstances’, to ‘[e]nable [them] to better understand the procedure [...]’.⁶⁹ It is indicated that Member States ‘[s]hould have the possibility to use the most appropriate means to provide such information, such as through non-governmental organisations [...]’.⁷⁰ Accordingly, both collective actors and UNHCR should be able to have access to asylum seekers.⁷¹ These provisions resonate with the reasoning of the European Court of Human Rights (ECtHR) in the case of *MSS v Belgium & Greece*, which held that asylum seekers on the whole are ‘a particularly underprivileged and vulnerable population group in need of special protection’.⁷² Although the ‘vulnerable-group’ approach entails risks,⁷³ it has the advantage of explicitly recognising the specific situation in which asylum seekers find themselves. Due to their traumatic experience of flight, the fact that they are unfamiliar with the language and legislative frameworks of the country of asylum, and their lack of economic means - where the latter is applicable - they need additional safeguards to be able to

facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, and relevant contributions in this collective publication for analysis, OJ L 128/8, Article 3(2).

⁶⁸ See, for example, the recent report of the Greek Ombudsman on operationalising the hotspot approach to migration management in Greece, including, analysis on: access to the asylum procedure; legality of detention; and transparency of the procedural aspects of returns to Turkey: Συνήγορος του Πολίτη, *Η πρόκληση των μεταναστευτικών ροών και της Προστασίας των Προσφύγων*, 2017 <https://www.synigoros.gr/resources/docs/greek_ombudsman_migrants_refugees_2017-el.pdf>.

⁶⁹ See Recast APD, Recital 22. See also 2013 Reception Conditions Directive, Article 5(1) stating that that in the framework of reception: ‘[M]ember States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care’.

⁷⁰ See Recast APD, Recital 22. This is reinforced in Recast APD, Article 21(1).

⁷¹ See Recast APD, Article 12(1)(c) providing that applicants ‘[s]hall not be denied the opportunity to communicate with UNHCR or with any other organisation providing legal advice or other counselling’; Recast APD, Recital 25 establishing that Member States ‘[s]hould normally provide an applicant at least with: [...] the opportunity to communicate with a representative of the UNHCR and with organisations providing advice or counselling to applicants for international protection [...]’; and recast APD, Article 29(1)(a) making it obligatory for Member States to allow UNHCR to: ‘have access to applicants, including those in detention, at the border and in the transit zones’. Finally, Recital 21 of the 2013 Reception Conditions Directive indicates that: ‘[i]n order to ensure compliance with the procedural guarantees consisting in the opportunity to contact organisations or groups of persons that provide legal assistance, information should be provided on such organisations and groups of persons’.

⁷² *MSS v Belgium and Greece*, Appl no 30696/09 (ECtHR 21 January 2011), para. 251.

⁷³ For a critical assessment of the vulnerable-group concept in the ECtHR’s legal reasoning see L Peroni, A Timmer, ‘Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law’ (2013) 11 (4) ICON 1056. Peroni and Timmer identify that the Court’s reasoning risks reinforcing the vulnerability of certain groups by essentialising, stigmatising, victimising, and paternalising them.

have effective access to justice. These needs are enhanced for detained asylum seekers,⁷⁴ those present at border or transit zones,⁷⁵ and those assigned in reception centres.⁷⁶ Hence, the asylum instruments contain additional specifications to ensure access for collective actors and UNHCR in these locations.

The asylum *acquis* also contemplates the possibility for collective actors to provide free legal assistance to, and representation of, individual applicants in appeals procedures.⁷⁷ Establishing free legal assistance and representation schemes during first instance procedures remains a possibility, but not an obligation for Member States. Nevertheless, applicants have a right to legal assistance and representation at all stages of the procedure at their own cost,⁷⁸ and Member States have a possibility - but not an obligation - to allow non-governmental organisations to provide these services.⁷⁹ Finally, collective actors could be appointed as representatives of unaccompanied minors, provided that they perform their duties in accordance with the principle of the best interests of the child, and that they have the necessary expertise.⁸⁰

Another important function foreseen for both UNHCR, and collective actors, is their participation in the establishment of country of origin information (COI). COI are intrinsically linked with the credibility assessment of the merits of individual claims,⁸¹ as well as with the establishment of the finding that a third country is safe, a function that gains increasing importance with the externalisation impetus.⁸² Therefore, among the procedural standards established is the use of:

precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited [...].⁸³

A final set of functions relate specifically to UNHCR, and somewhat reflect its supervisory role under the 1951 Refugee Convention. First, Member States are obliged to allow UNHCR to: ‘have access to information on individual applications for international protection, on the course of the procedure and on the decisions taken, provided that the applicant agrees thereto’.⁸⁴ This function allows UNHCR to perform its so-called quality initiatives at national and EU levels. The agency has conducted, for example, sampling of national cases in the European context at first instance and at appeal. This exercise

⁷⁴ See 2013 Reception Conditions Directive, Article 10(4) stipulating that Member States should ensure that ‘[f]amily members, legal advisers or counsellors and persons representing relevant non-governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy’. See also recast APD, Article 29(1)(a).

⁷⁵ See Recast APD, Article 8(2) providing that: ‘Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders’. See also recast APD, Article 29(1)(a).

⁷⁶ See relevant guarantees in 2013 Reception Conditions Directive, Article 18(2)(b)-(c).

⁷⁷ See Recast APD, Article 20, Article 21(1).

⁷⁸ See Recast APD, Article 22(1).

⁷⁹ See Recast APD, Article 22(2).

⁸⁰ See Recast APD, Article 25(1)(a) and Article 2(n). See also 2013 Reception Conditions Directive, Articles 2(n), 24 and 25(3), as well as 2013 Dublin Regulation, Articles 2(k) and 6(4).

⁸¹ See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337/9 (hereafter: 2011 Recast Qualification Directive), Article 4(3), which makes the use of COI mandatory in asylum decision-making.

⁸² See analysis above in section: ‘Proceduralisation in the EU Asylum Policy: Three Legislative Waves’.

⁸³ See Recast APD, Article 10(3)(b). Further relevant obligations are established, or elaborated in, Recast APD, Recitals 39 and 48, as well as Articles 37(3) and 45(2).

⁸⁴ See Recast APD, Article 29(1)(b).

has allowed it to identify and highlight weaknesses in national decision-making systems, as well as develop on that basis practical tools to assist national practitioners.⁸⁵

A second function specifically concerning the UN agency is the obligation for Member States to allow it to: ‘present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure’.⁸⁶ This function would allow the agency to intervene - if it so chooses - in an individual case in a formal manner. This provision has far-reaching effects as national procedural arrangements need to be altered, if necessary, to allow for UNHCR to intervene, at both the administrative, and the judicial, stages of the assessment of the claim. The obligation is absolute, and it is not tempered by the mention of any ‘criteria laid down in national law’. Interestingly, collective actors could indirectly benefit from both functions, since the recast APD foresees that these provisions apply also ‘to an organisation which is working in the territory of the Member State concerned on behalf of UNHCR pursuant to an agreement with that Member State’.⁸⁷

Strategic litigation before the CJEU: shedding light on hidden forms of support

Harmonisation in the policy area of asylum carries within it the potential for the Court of Justice of the European Union (CJEU) to shape EU asylum, and by extension international refugee law, as well as to enforce refugees’ rights.⁸⁸ Strict procedural rules on direct access somewhat circumscribe the CJEU’s potential to become an ‘asylum Court’.⁸⁹ Therefore, most commonly, the CJEU’s effects are indirect, namely through the interpretation of the asylum *acquis* in the framework of preliminary rulings.⁹⁰ Strategic litigation⁹¹ of EU asylum law is centred around litigation before national courts, that could end up before the CJEU if a question is referred to it. Nevertheless, strategic litigation is in practice much broader than the actual litigation of cases. It consists of a continuum of activities, including pre-litigation assessment: weighing up the particular facts/circumstances and considering different strategies to bring about policy change; as well as post-litigation actions to ensure proper implementation of the decision in practice, or improving the strategy in case of a negative outcome.⁹² Regarding the former aspect, practitioners caution that identifying cases as strategic and non-strategic is not a precise science.⁹³

⁸⁵ For an example at national level see information and material of the UK ‘Quality Integration Project’: <<http://www.unhcr.org/quality-initiative-and-integration.html>>. For the outcomes of a similar initiative at EU-wide level see: UNHCR, *Building In Quality-A Manual on Building a High Quality Asylum System: Further Developing Asylum Quality (FDQ) in the European Union* (UNHCR 2011).

⁸⁶ See Recast APD, Article 29(1)(c).

⁸⁷ See Recast APD, Article 29(2).

⁸⁸ For a scholarly appraisal of the Court’s role see: S Botruche-Zarevac, ‘The Court of Justice of the EU and the Common European Asylum System: Entering the Third Phase of Harmonisation?’ (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 53 and R Bank, ‘The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law’ (2015) 27 *IJRL* 213.

⁸⁹ See TFEU, Article 263.

⁹⁰ See TFEU, Article 267.

⁹¹ There is no universally agreed definition of what constitutes ‘strategic litigation’. The term refers to the impact of the outcome of a case. Coomber has advanced that: ‘[s]trategic ‘litigation (or ‘impact’ or ‘test’ litigation) is a form of public interest litigation where a case is pursued on behalf of an applicant or group of applicants, with a view to achieving a law reform goal beyond the individual case’. See A Coomber, ‘Strategically Litigating Equality: Reflections on a Changing Jurisprudence’ (2012) 15 *European Anti-Discrimination Law Review* 11, 11.

⁹² A M Bucataru, ‘Is strategic litigation a way of ensuring that the rights of unaccompanied minors are fully considered in law, policy and practice?’ (*European Database on Asylum Law Blog*, 15 February 2017) <http://www.asylumlawdatabase.eu/en/journal/strategic-litigation-way-ensuring-rights-unaccompanied-minors-are-fully-considered-law>.

⁹³ Weiss argues that strategic cases ‘seem explainable and predictable only in retrospect’, see A Weiss, ‘What is Strategic Litigation’ (*European Roma Rights Centre Blog*, 1 June 2015) <<http://www.errc.org/blog/what-is-strategic-litigation/62>>.

Among the factors to consider are: the particular facts of the case, the timing, constraints on the lawyers involved, constraints on the organisation (funding issues, other role played by the organisation at national or European level) etc.

Despite the absence of a ‘defence clause’ in procedural legislation on asylum, collective actors are involved in strategic litigation on behalf of asylum applicants. The only such case in the area of asylum to have reached the CJEU is the case of *Cimade and Gisti*.⁹⁴ It concerned the French practice to deprive asylum seekers, subject to transfer to another Member State under EU’s responsibility allocation rules, from reception conditions. The judgment resulted from a reference for a preliminary ruling from the French *Conseil d’État*. The Court held that there is ‘[...] only one category of asylum seekers’⁹⁵ and that ‘[...] an application for asylum is made before the process of determining the Member State responsible begins’.⁹⁶ Following this pronouncement, the legislator amended the Reception Conditions Directive to clarify its scope, and to fully align it with the CJEU case law.⁹⁷ This case represents the tip of the iceberg, since further direct litigation on behalf of applicants that could have broader policy impact is taking place at national level.⁹⁸

Apart from litigating on behalf of applicants, both collective actors and UNHCR, intervene in support of their position, meaning through formal third party interventions before national courts (*amicus curiae*).⁹⁹ Where UNHCR, or collective actors, have intervened formally as third parties at the national level, then they can be granted permission to intervene before the CJEU. A characteristic example was the *N.S. and M.E.* case,¹⁰⁰ concerning returns to Greece in application of EU’s responsibility allocation Regulation. The CJEU’s judgment signalled the end of ‘blind’ mutual trust between Member States in asylum, and had a far-reaching effect, with Member States suspending transfers to Greece. UNHCR, and several collective actors, namely: Amnesty International, the AIRE Centre (Advice on Individual Rights in Europe), the Equality and Human Rights Commission (EHRC) were given leave to intervene. Finally, even when it does not formally intervene in a case, UNHCR could choose to issue public statements on the interpretation of EU asylum law on the issues under examination before the CJEU. It has done so, for example, in cases relating to exclusion from refugee status,¹⁰¹ and the status of

while Walsh elaborates that ‘[w]hile it is possible to an extent to attempt to identify cases as strategic and non-strategic, the spectrum of variables involved is broad and by no means stationary – i.e. there is no set formula, just factors to consider and some are more predictable than others’, see J Walsh, ‘Strategic Litigation at a European Level’ (*European Database on Asylum Law Blog*, 14 February 2017) <<http://www.asylumlawdatabase.eu/en/journal/strategic-litigation-european-level>>.

⁹⁴ Case C-179/11, *Cimade, Groupe d’information et de soutien des immigrés (GISTI) v Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration* [2012], ECLI:EU:C:2012:594. Both Cimade and Gisti are migrant assisting associations active at national level in France that, among other activities, provide legal aid and representation. See for more information respectively: <<http://www.lacimade.org>>; <<http://www.gisti.org/spip.php?page=sommaire>>.

⁹⁵ *Ibid.*, para. 40.

⁹⁶ *Ibid.*, para.41.

⁹⁷ See 2013 Reception Conditions Directive, Recital 8, and analysis in E Tsourdi, ‘Reception Conditions for Asylum Seekers in the EU: Towards the Prevalence of Human Dignity’ (2015) 29(1) JIANL 9.

⁹⁸ A recent example is jurisprudence from the Netherlands concerning the implementation of the emergency relocation schemes; see RB Den Haag, 24-03-2017, ECLI:NL:RBDHA:2017:2809 (Stichting We Gaan Ze Halen) [online].

⁹⁹ A detailed list of such formal Court interventions in asylum-related cases of both the UNHCR and collective actors are available at <<http://www.refworld.org/type,AMICUS,,,,,0.html>>.

¹⁰⁰ Joined Cases C-411/10 and C-493/10, *N. S. and M. E.* [2011] ECLI:EU:C:2011:865.

¹⁰¹ UNHCR, *UNHCR Statement on Article 1F of the 1951 Convention*, 2009 <<http://www.unhcr.org/4a5edac09.pdf>>.

Palestinian asylum seekers.¹⁰² In its respective judgments, the CJEU aligned itself partly, but not fully, with the UNHCR positions as advanced in its public statements.¹⁰³

Still, the bulk of collective actors' involvement in what concerns cases that finally reach the CJEU is through more 'hidden' forms of support, such as: drafting arguments, providing legal advice and research support to the lawyers who represent asylum seekers and refugees, as well as enabling networking between relevant actors. A specialist non-profit organisation that engages in an array of actions around strategic litigation: litigating cases directly (before the ECtHR), intervening as third party before proceedings, and supporting lawyers who litigate cases before national and European courts, is the AIRE Centre.¹⁰⁴ Another organisation with intense activity on strategic litigation in asylum is the European Council on Refugees and Exiles' (ECRE), the largest European umbrella network of refugee-assisting civil society organisations. Apart from third party interventions, ECRE links relevant national practitioners through training and networking activities of the ELENA Network,¹⁰⁵ assists practitioners through providing informal support on building legal argumentation, and seeks to identify cases at national level that could serve as the basis for a preliminary reference to the CJEU.¹⁰⁶

UNHCR, apart from its formal interventions, engages in the above more 'hidden' support activities, for example, through training for practitioners, or networking, such as the 'Annual Roundtable on Strategic Litigation', which it has organised for the past four years in the framework of its annual consultations with civil society. There are some factors pertaining specifically to UNHCR before deciding upon a formal or more informal type of intervention. Formal types of intervention bear the risk of it undermining its own supervisory authority when the CJEU rejects its arguments, the resulting decision then being binding within the EU.¹⁰⁷ Furthermore, given the UN agency's increased operational role, a decision to formally intervene needs to be weighed against the necessity to collaborate with Member States holistically, including for the continuing provision of services to asylum seekers and refugees.

Conclusions

Proceduralisation in asylum has materialised in three legislative waves. The first resulted in the creation of a basic set of procedural guarantees, alongside a plethora of exceptional procedures. The second resulted in modest improvements in terms of harmonisation, and adherence to fundamental rights, but saw exceptional procedural arrangements either retained or introduced. The third, forthcoming wave, aims at further harmonisation that would, however, be heavily focused on the underlying goal of externalising protection to third countries. On the ground, the quality of asylum decision-making varies greatly, among others, in terms of divergences in recognition rates, access to free legal assistance, and duration of the examination of individual claims.

Procedural harmonisation sought to enhance the role of collective actors and UNHCR to better safeguard asylum seekers' and refugees' access to justice. While a 'defence clause' is absent, the legislation envisages information-provision to applicants, legal aid, and feeding into the establishment of country of origin information as their primary involvement. Additional functions are reserved for UNHCR, such as the obligation for Member States to allow it to formally intervene - if it so chooses - in individual

¹⁰² UNHCR, *UNHCR Revised Statement on Article 1D of the 1951 Convention*, 2009 <<http://www.refworld.org/pdfid/4add79a82.pdf>>.

¹⁰³ See respectively the judgments in CJEU, Joined Cases C-57/09 and C-101/09, *B and D* [2010], ECLI:EU:C:2010:661 (exclusion from refugee status), and CJEU, C-31/09, *Bolbol* [2010], ECLI:EU:C:2010:351, as well as CJEU, C-364/11, *El Kott* [2012], ECLI:EU:C:2012:826 (Palestinian asylum seekers).

¹⁰⁴ See <<http://www.airecentre.org/pages/human-rights-litigation.html>>.

¹⁰⁵ The European Legal Network on Asylum (ELENA) coordinated by ECRE extends across 35 European states and involves some 500 lawyers and legal counsellors.

¹⁰⁶ See <<https://www.ecre.org/our-work/strategic-litigation/>>.

¹⁰⁷ G Gilbert, 'UNHCR and Courts: Amicus Curiae...sed curia amica est?' (2016) 28 *IJRL* 623, 632.

cases. These functions however, fall short of establishing a genuine supervisory role for the UN agency. In practice, collective actors engage in strategic litigation on behalf of refugees, and both they, and UNHCR, have formally intervened in cases that have reached the CJEU. They also engage in ‘hidden’ forms of support: legal advice to lawyers, liaison, and training.

With a new procedural landscape emerging, including joint processing conducted by national authorities together with EU agency-coordinated missions,¹⁰⁸ and the externalisation impetus, the need to access accurate legal information; representation; and defence, becomes more pressing than ever for the effective enforcement of refugee rights in the EU.

¹⁰⁸ E. Tsourdi, ‘Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office’ (2016) 1 *European Papers*, 997.

Anti-discrimination law as a laboratory for EU governance of fundamental rights at the domestic level: collective actors as bridging devices

*Elise Muir**

The oldest set of procedural rules for the enforcement of EU fundamental rights can be found in EU equality legislation. It may be recalled that the anti-discrimination Directives from 2000 that introduced most of these rules (e.g. on the creation of equality bodies or access to court for private collective actors) could be interpreted as ‘the counterweight of closing borders to immigration from third countries’ as well as a response to the rise to power in Austria of a philo-nazi and anti-semitic party.¹ The Directives were intended to provide genuine protection against xenophobia and extremism, and were deemed to be ‘the best car in town’ as Oliveira puts it; they provided more detailed and effective protection than earlier equality law instruments.²

The governance of EU equality law thus benefits from the dynamics and strengths of an advanced form of supranational integration while promoting a selected fundamental right domestically. Almost two decades after the adoption of the first legislative instruments and policy initiatives designed to engage in this sectoral form of fundamental right policy, EU equality law can be examined as a laboratory for the governance of fundamental rights in an integrated legal order. What is the role of EU law in promoting a fundamental right at domestic level? How does the system operate in practice? It would be beyond the scope of this contribution to deal exhaustively with these ambitious questions,³ but it is possible to sketch out some preliminary directions for further research.

Despite criticisms of the fact that EU anti-discrimination law as designed in the post-Amsterdam era remains overly centered on individual litigation,⁴ collective actors, defined in a broad sense and understood to cover both private (e.g. civil society organizations) and public actors (independent organizations such as equality bodies), have been given an important role. These collective actors created, structured or supported by EU law are intended to act as bridges between the EU and domestic legal orders as well as between a conventional, vertical approach to human rights focused on enforcement and a more reflexive process concerned with mutual learning. They thus constitute a useful starting point for enquiry.

In this collection of papers, the effects of procedural provisions inserted in EU anti-discrimination legislation to facilitate access to court for collective actors acting in support or on behalf of victims were explored. An investigation was carried out to examine the interplay between: (i) ‘collective actors’ as just defined, (ii) the actual litigation of EU equality law before domestic courts as it unfolds before

* This paper is part of a broader publication project: E. Muir *EU Equality Law as the ‘First’ Fundamental Rights Policy of the EU* (OUP: Oxford Studies in European law, forthcoming).

¹ Álvaro Oliveira, ‘What difference does EU law make? The added value of EU Equality Directives on access to justice for collective actors’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 1) A historical note.

² Álvaro Oliveira, ‘What difference does EU law make? The added value of EU Equality Directives on access to justice for collective actors’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 1) A historical note.

³ See also the recent contribution by Mark Dawson who usefully reflects on the added value of EU intervention on matters of fundamental rights’ protection: Mark Dawson, *The Governance of EU Fundamental Rights* (CUP 2017).

⁴ Mark Bell, *Anti-Discrimination Law and the European Union* (OUP 2002) 49.

the Court of Justice of the European Union ('the Court') by way of preliminary references, and (iii) rules on access to domestic courts as influenced by EU legislation. This last set of rules may indeed shape legal opportunity structures for preliminary references. It was therefore used as a test-case to look at the interplay between domestic and EU spheres in matters of enforcement of the fundamental right to equal treatment.⁵ In essence, we sought to answer two – distinct yet related – central research questions: do EU law provisions on collective actors' access to court indeed facilitate access to courts in practice? And, second, do collective actors make specific use of EU law arguments and the preliminary ruling procedure?

The study proceeded owing to a rigorous, qualitative and contextual analysis of the procedural history of cases (i) having reached the Court by way of preliminary ruling, (ii) in matters covered by EU anti-discrimination legislation, and (iii) involving a collective actor (either bringing the case on its own initiative or supporting the claimant as encouraged by the relevant procedural provisions identified above). It emerges from an overview of the Court's case law based on these three criteria⁶ that a number of countries stand out either because of the great number of referrals (such as Belgium, Denmark and Bulgaria) or because of the low number of referrals (France and Germany). Experts in the legal regime applicable in these countries, as well as in the Italian regime which illustrates the 'hidden' role that collective actors may play in creating the circumstances for litigation without being formally involved, were thus invited to reflect on the research questions identified above. The intention was to seek to identify patterns in the domestication – or lack thereof – of EU procedural law on collective actors for the enforcement of the fundamental right to equal treatment. This could then serve to map out a broader research agenda on what may be the strengths and weaknesses of the new forms of governance created at the European level to promote and enhance the effectiveness of the principle of equal treatment in the domestic sphere.

Before outlining some of the findings, one ought to make a series of disclaimers. This research exercise is not methodologically perfect or exhaustive. Instead, it is modestly exploratory. The importance of many factors other than the standing of collective actors - such as the scope of key legal concepts, fees or burden of proof - in accessing courts as well as that of avenues other than litigation to combat discrimination is fully acknowledged.⁷ Furthermore, a significant dimension of the role of collective actors in litigation is actually invisible⁸ in the context of a study primarily focused on reliance on the preliminary ruling procedure: for instance, when collective actors only intervene through funding this will not be visible in the Court proceedings. Also, collective actors may be involved in domestic proceedings not leading to a reference to the Court.⁹ Finally, it shall be stressed that for the purpose of

⁵ See also: Claire Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in Silvana Sciarra (ed), *Labour Law in the Courts: National Judges and the ECJ* (Hart Publishing 2001) 80 and Chris Docksey, 'The Principle of Equality between Women and Men as a Fundamental Right under Community Law' (1991) 20 ILJ pages 258 and 280.

⁶ The selection of country studies is based on a review of the Court's case law involving collective actors as from 2000 (i.e. when the relevant rules were first introduced in EU equality law and up until 1.3.2016) performed with the most valuable support of Egeyn Braun and Marie Gérardy. Further information is on file with the author.

⁷ See also the in-depth analysis and related conclusions by Catherine Barnard and Amy Ludlow, 'Enforcement of Employment Rights by EU-8: Migrant Workers in Employment Tribunals' (2016) 45 ILJ 1, page 27.

⁸ Elaborating on this point in relation to the role of collective actors in EU asylum law: Evangelia Tsourdi, 'Enforcing Refugee Rights under EU Procedural Law: the Role of Collective Actors and UNCHR' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section on 'Strategic litigation before the CJEU: shedding light into hidden forms of support'.

⁹ This may be because national courts know how to apply EU law and/or do not believe that a preliminary reference is needed. E.g. Mathias Möschel, 'Litigating Anti-Discrimination cases in Germany: What role for collective actors?' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section III. See also the discussion of the *Martinez Silva* case in Virginia Passalacqua, 'Advancing EU Equality Law in Italy: Between unsystematic implementation and decentralized

this exercise there is no attempt at assessing whether a preliminary ruling by the Court has had a positive or a negative outcome. Instead, the very use of the preliminary ruling procedure is deemed to be of interest as it shows reliance on the multi-layered institutional set up provided by EU law.

Although the starting point for the study was narrow in contrast with the broad range of governance tools existing in the governance of EU equality law, the chosen angle has allowed for particularly interesting qualitative case studies. The contributions took the predefined angle as a starting point but then engaged in a deep reflection on the dynamics underlying processes of change at the domestic level as well as resistances to such change. What clearly comes out of this study, despite its initial grounding in a conventional approach to fundamental rights through its focus on litigation, is the importance of EU anti-discrimination law in shaping infrastructure that stimulates societal debate on equality in domestic spheres. Collective actors and equality bodies in particular, as empowered by EU law and adjusted to the specificities of each national context, act as vectors conveying new legal concepts domestically and in turn seeking to influence the definition of such concepts at the European level.

The practices developed in the six countries under examination have characteristics which we will briefly develop below. To start with, the domestic approach to the enforcement of the fundamental right to equal treatment as it results from EU anti-discrimination law is profoundly dependent on the reception of the relevant legal concepts at domestic level (1). As a consequence, enforcement mechanisms provided by EU law will hardly be used in a legal culture which is hostile to the core dynamics of the new field of law. This is a particularly important lesson for EU intervention on matters of fundamental rights protection as domestic resistances to ‘imported’ rights may actually be very strong as the study confirms. For that very reason, collective actors shaped by EU law – if and when they are able to emancipate themselves from the internal dynamics of a given country – constitute crucial infrastructures for change at the domestic level (2). The study illustrates the wide range of strategies that such collective actors develop to counter internal resistances to change.

The effectiveness of the transformative project initiated by EU anti-discrimination law is enhanced by the several complementing governance tools supported through EU intervention (3). Several elements of the case studies indeed confirm the added value of the hybrid approach developing at EU level¹⁰ if well targeted. Building on this holistic approach, EU anti-discrimination law and the relevant governance framework has spillover effects beyond the actual scope of the anti-discrimination Directives (4). Such effects are mediated through policy as well as legal avenues that are worth keeping in mind for further research in the field. Furthermore, several examples under analysis illustrate that legal mobilization at the domestic level have resulted in attempts to steer EU law developments (5). Several case studies indeed reveal a particularly strategic use of the preliminary ruling procedure.

The construction of a framework for the governance of equality law at EU level has therefore resulted in the creation and consolidation of infrastructure at domestic level through a broad range of regulatory mechanisms. Although these mechanisms are adapted to the specificities of anti-discrimination, such a holistic approach is not unique to EU equality law. There is ample literature on new governance of EU policies.¹¹ Increasing attention is also being devoted to burgeoning initiatives and rules enshrined in EU legislation that are intended to support the enforcement of specific EU policies at domestic level.¹²

enforcement’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17).

¹⁰ Gráinne de Búrca, ‘EU Race Discrimination Law: a Hybrid Model?’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006)98-99; Gráinne de Búrca, ‘Stumbling into Experimentalism: The EU Anti-Discrimination Regime’ in Charles F. Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union* (OUP 2010) 215-235; Gráinne de Búrca, ‘Human Rights Experimentalism’ (2017) NYU Public Law & Legal Theory Research Paper Series Working Paper No.17/06.

¹¹ E.g. Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006).

¹² E.g. Mariolina Eliantonio and Elise Muir, ‘Concluding thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law’ (2015) 8REALaw 175.

Within this diversity though, the ‘transformative’ mandate of selected areas of EU law shapes the modes of governance chosen at European level. Policies intended to have a direct impact on interpersonal relationships and intended to modify societal habits indeed warrant a particularly wide range of tools. While this is certainly the case of EU equality law and policy, these features are not exclusively for that policy area. EU data protection law, for instance, is also in many ways intended to regulate horizontal relationships. In this context, it shall not come as a surprise that much attention is paid to engaging NGOs or other legal entities with a qualified interest in triggering change in these fields where interests to be protected are fairly abstract or the victims disenfranchised and dispersed.¹³ The latest regulation on data protection actually features a whole chapter on ‘Remedies, liabilities and penalties’¹⁴ with important innovations for collective actors, as critically examined by Lyskey in this collection of papers.

Lessons can thus be learnt from the last 10-15 years of transposing and using (or not using) the procedural rules inserted into domestic legal orders by EU equality legislation as well as from examining more recent legislative developments and practices in other fields. This is particularly important as rules on access to court are developing quickly. Distinct yet comparable procedural provisions that emphasise the role of collective actors in supporting alleged victims in litigation have been inserted in other branches of EU law closely intertwined with fundamental rights protection. For example, a Directive on the enforcement of posted workers’ rights contains an article entitled ‘Defence of rights, facilitation of complaints, back-payments’.¹⁵ Another on the enforcement of the right of mobile EU workers and their families also includes a provision on ‘Defense of rights’.¹⁶ One developing area of EU law that is particularly sensitive is EU asylum law. Here victims of breaches of the law are often particularly vulnerable or isolated and the role of collective actors is important, as illustrated by Tsourdi. Let us then examine the various lessons emerging from the national case studies on EU equality law before reflecting on their relevance for other fields of law such as data protection and migration (6).

Interdependency between the reception of EU legal concepts and their enforcement at domestic level

Oliveira suggests making a rough distinction between three groups of countries in which the measures requested for the implementation of the provisions of the anti-discrimination Directives on access to court for private collective actors has had a varying impact on existing legislation.¹⁷ In a first group of countries, the Directives are deemed to have had a ‘considerable impact’ on national law because the rules on the standing of associations other than trade unions (who often already had legal standing in the employment context), such as human rights associations, did not exist prior to the implementation of the Directives (such as Belgium, Bulgaria, Romania, Czech Republic, Greece, Italy, Poland, and Portugal). In a second group, the Directives are deemed to have had ‘some impact on national law’ but they did not introduce radical change since national law already provided some rights for associations and did not strengthen these rights considerably (for example France, Germany, Hungary, and Spain).

¹³ M. Eliantonio and E. Muir, ‘Concluding thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law’ (2015) 8REALaw 175, 187.

¹⁴ Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, Articles 7 et seq.

¹⁵ Directive (EU) 2014/67 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’)[2014] OJ L159/11, Article 11.

¹⁶ Directive (EU) 2014/54 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers [2014] OJ L128/8, Article 3.

¹⁷ Álvaro Oliveira, ‘What difference does EU law make? The added value of EU Equality Directives on access to justice for collective in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 2) The impact on national legislation – the added value.

In a third but limited group, Oliveira argues that the Directives did not make much of a difference since the legislation on the matter was well developed before implementation of the Directives (in the Netherlands and the UK).

On the basis of this classification, Oliveira observes that the impact of the procedural provisions of the Directives on access to justice for private collective actors has in general been stronger in southern Member States and in new Member States as from 2004.¹⁸ He points out that the influence of EU law has often been greater in countries that did not provide for the right for private collective actors to be involved in litigation before implementation of the Directives and which introduced new provisions that actually go beyond the requirements of the Directive. This is largely corroborated by Farkas.¹⁹ She stresses that many Member States from Central and Eastern Europe implemented the anti-discrimination Directives beyond EU law requirements, for instance looking at the powers of equality bodies and the rules on standing of collective actors. This was subsequently followed by intense legal mobilization as her case study on Bulgaria illustrates. In her view, this ‘enthusiasm’ was driven by the joint exercise of having to incorporate the EU *acquis* during accession and adjusting to the Council of Europe framework and international human rights standards.

Besides this overview of measures implementing selected aspects of the procedural provisions of the anti-discrimination Directives, the study coordinated with Kilpatrick and de Witte engaged in an evaluation of the actual use by domestic actors of the procedures thereby made available to them. Most interesting are the findings in the case studies on France and Germany. These countries have been classified by Oliveira as being countries where EU procedural rules have had ‘some impact on national law’ in terms of the *measures adopted to implement* the EU requirements; the actual *use* of the relevant provisions at domestic level has been very limited. The French, the German as well as – although to a lesser extent – the Danish country studies, illustrate that the substance of fundamental rights protection as defined at the EU level may trigger strong and supported resistance at the domestic level resulting in obstacles to the effectiveness of the policy in the Member State.

According to Latraverse, the European anti-discrimination legal framework is perceived by French political and legal actors ‘*as the superfluous importation in the French legal system of an Anglo-Saxon political and legal approach which conflicts with the inner logic of French civil law, the theory of Equality and paramount legal principles such as the universal application of the rule and the refusal to recognize minorities, that anchor the French conception of public good.*’²⁰ Similar observations emerge from the Danish case study. Atanasova and Miller point at the deeply rooted vision of EU law as a ‘*regrettable foreign import[s], inconsistent with the country’s consensus-based policy making style and culture of equality*’.²¹ They further report that, according to a widely spread perception, Denmark would not have passed new anti-discrimination legislation had it not come under pressure to meet its obligations under EU law. In Germany, the well-known reluctance to implement the anti-discrimination Directives from 2000 resulted from a combination of factors. German economic actors predicted ‘*a flood*

¹⁸ Álvaro Oliveira, ‘What difference does EU law make? The added value of EU Equality Directives on access to justice for collective actors’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 2, d) conclusions of the analysis above.

¹⁹ Lilla Farkas, ‘NGO and Equality Body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 1.

²⁰ Sophie Latraverse, ‘The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction.

²¹ Angelina Atanasova and Jeffrey Miller, ‘Collective Actors and EU Anti-Discrimination law in Denmark’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I. Transposition.

of litigation by rejected job applicants and/or abuse of the possibilities to litigate'.²² An important body of academic writing expressed fears that anti-discrimination legislation would unduly restrict the (constitutional) principle of private autonomy and contractual freedom.²³ Furthermore, there was a concern that such legislation would lead to high damages awards as in the Anglo-Saxon nations.²⁴

The depth of these resistances ought not be underestimated. In the French context, although the implementation of the EU Directives has not actually been minimalist, a variety of actors are reported by the Director of the Secretariat General of the French Equality Body, Latraverse, to hinder the effectiveness of anti-discrimination law on principled grounds. According to her, '[e]ver since 2000, the European pressure on legal action as the mean[s] chosen to impose a specific approach to the analysis and agenda on the fight against discrimination is perceived by most political forces as a domain where France must fight European politics'.²⁵ Many jurists, judges, political actors and trade unions consider discrimination law to be an instrument that allows one to use the courts to circumvent French democratic institutions.²⁶ In practice, lawyers and judges avoid anti-discrimination law and prefer to frame their discussion outside of its scope. And even when these actors do make use of equality law, they actually limit their reasoning to an application of the traditional French legal theory of 'Equality'.²⁷ Trade unions, important actors in the fight against discrimination in the work place, largely refuse to be involved in anti-discrimination litigation.²⁸ The same unions have also lobbied to preserve their exclusive right to initiate class actions in relation to the work place. As a consequence, these anti-discrimination law sceptics have almost fully prevented any other interested organisations from representing claimants in class actions relating to discrimination in employment.²⁹ As for NGOs, they do not litigate much on the basis of anti-discrimination law. For instance, anti-racist NGOs are present mostly before criminal courts while NGOs that are active in defending the rights of migrants as well as

²² Mathias Möschel, 'Litigating Anti-Discrimination cases in Germany: What role for collective actors?' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I.

²³ Mathias Möschel, 'Litigating Anti-Discrimination cases in Germany: What role for collective actors?' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I.

²⁴ Mathias Möschel, 'Litigating Anti-Discrimination cases in Germany: What role for collective actors?' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I.

²⁵ Sophie Latraverse, 'The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction to Section I.

²⁶ Sophie Latraverse, 'The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction to Section I.

²⁷ Sophie Latraverse, 'The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I (1).

²⁸ Sophie Latraverse, 'The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I (3).

²⁹ Sophie Latraverse, 'The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I (3).

those of Roma are used to relying on the equal treatment principle enshrined in the ECHR rather than on the basis of anti-discrimination law.³⁰

Similarly, on the German side, measures implementing the EU Directives were framed so narrowly, as a result of the reluctances introduced above, that they triggered doubts as to whether this was a correct implementation of the EU anti-discrimination Directives.³¹ Such a restrictive legal framework, also affecting the rules on standing for collective actors, has limited the role that collective actors have played in using or directly influencing the interpretation of EU law via preliminary reference procedures according to Möschel.³²

In contrast, in Denmark, the investigation carried out by Atanasova and Miller allows for the assertion that the procedural requirements in Directives 2000/43 and 2000/78 transformed Danish anti-discrimination law, leading to a greater number of cases and a greater involvement of the Danish Institute for Human Rights (DIHR). Reticence there has thus to some extent been overcome but there is little evidence that the role of collective actors in that respect has changed after the implementation of the anti-discrimination Directives.³³ Trade Unions have long been and still remain the key players in litigation, in contrast with NGOs or the equality bodies. Such unions have actually developed an ‘uncharacteristic’ enthusiasm about litigating and pushing for preliminary references involving Directive 2000/78.³⁴

Infrastructure for change: the central role of collective actors at the domestic level

Precisely because EU anti-discrimination law may be perceived as a foreign tool at the domestic level, it is interesting to recall where relevant legal provisions have their roots. There is very little doubt that engaged jurists from civil society have had a significant impact on introducing change in fundamental rights governance at the EU as well as the domestic level in some Member States, pushing for very new mechanisms – therefore not strongly anchored in domestic systems – in both contexts.

Oliveira recalls that the origins of the rules on standing for private collective actors are to be found in a proposal from 1993 by a network of NGOs and independent experts (the ‘Starting Line Group’) subsequently supported by the European Parliament.³⁵ The proposal to establish equality bodies able to assist victims of discrimination could also be traced back to that document. This is thus part of the important role of civil society movements from the 1990s in lobbying in the run up to the Amsterdam Treaty and then adoption of key anti-discrimination Directives. At the domestic level, Farkas notes that,

³⁰ Sophie Latraverse, ‘The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section II (2)).

³¹ Mathias Möschel, ‘Litigating Anti-Discrimination cases in Germany: What role for collective actors?’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I).

³² Mathias Möschel, ‘Litigating Anti-Discrimination cases in Germany: What role for collective actors?’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section III).

³³ Angelina Atanasova and Jeffrey Miller, ‘Collective Actors and EU Anti-Discrimination law in Denmark’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section III & Conclusions).

³⁴ Angelina Atanasova and Jeffrey Miller, ‘Collective Actors and EU Anti-Discrimination law in Denmark’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Conclusions).

³⁵ Álvaro Oliveira, ‘What difference does EU law make? The added value of EU Equality Directives on access to justice for collective actors’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 1) b) the origins of the rule on access to justice by collective actors.

although Central and Eastern European Member States were not involved in the adoption of the EU Directives, many were among the first to transpose them prior to accession, and domestic law actually went beyond EU law requirements.³⁶ In that regard, members of NGOs engaged with the Council of Europe and EU integration processes played a central role.

While these examples illustrate the role of civil society actors in ‘pushing from outside’³⁷ to shape EU law and its implementation at domestic level, the study coordinated with Kilpatrick and de Witte shows that the creation of infrastructure at the domestic level under the umbrella of EU law is also unquestionably capable of promoting the emergence of a human rights culture from *within* - that is both within EU law and at the domestic level. The importation of new concepts, through sophisticated structures at domestic level, is indeed capable of generating a process of progressive change even where the domestic terrain is particularly hostile. EU equality bodies at the domestic level have played a particularly important role in that regard in certain Member States.

Equality bodies created by virtue of EU law are playing a central role in enforcing the Racial Equality Directive. Such bodies are quite strongly present in relevant procedures before the Court.³⁸ In the Bulgarian context, Farkas noted that the implementation of the Directive has been an essential precondition for legal mobilization as the problems of racial discrimination related to access to electricity at issue in *Belov* and *CHEZ* had existed since 1998, but did not become the subject of legal challenges until the Directive came into force.³⁹ Even beyond the scope of the Racial Equality Directive, in certain equality cases reaching the Court litigation was made possible almost exclusively owing to mechanisms significantly shaped by EU law. In cases emerging from Belgium, such as *Feryn*, *Rosselle* or *Achbita*, the involvement of equality bodies was a pre-condition to litigation either because no clear victim had been identified or because actual victims would have not had sufficient financial means to carry out the proceedings.⁴⁰

Besides these remarkable though limited examples of public interest litigation, equality bodies also perform crucial background work and act as catalysts for legal change within domestic legal systems. Latraverse stresses that the French equality body has targeted its strategy specifically towards developing a new legal culture.⁴¹ To that effect, the equality body educates judges via *amicus curiae* and supports the importation of new concepts specific to anti-discrimination law, such as the partial shift of

³⁶ Lilla Farkas, ‘NGO and Equality Body Enforcement of EU Anti-Discrimination law: Bulgarian Roma and the Electricity Sector’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 1.

³⁷ Expression borrowed from Gráinne de Búrca, ‘Stumbling into Experimentalism: The EU Anti-Discrimination Regime’ in Charles F. Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union* (OUP 2010) 222.

³⁸ Lilla Farkas, ‘NGO and Equality Body Enforcement of EU Anti-Discrimination law: Bulgarian Roma and the Electricity Sector’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction.

³⁹ Lilla Farkas, ‘NGO and Equality Body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Conclusion.

⁴⁰ Elise Muir and Sarah Kolf, ‘Belgian Equality Bodies reaching out to the ECJ: EU procedural law as a catalyst’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section on ‘Equality bodies at the forefront of equality litigation reaching the CJEU’.

⁴¹ Sophie Latraverse, ‘The Litigation of Anti-Discrimination Cases in France by Collective Actors: A Selective Mobilization Hindered by Tradition’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I (3).

the burden of proof (as well as the necessary evidence and concept of ‘the right to have access to evidence’⁴²) and the concept of indirect discrimination.

Complementary tools of EU Fundamental Rights governance? ‘Hybridization’⁴³ in action

As this French example illustrates, a fundamental rights policy ought to be based on a multiplicity of factors. To start with, the case studies provided multiple examples of the complementarities between several categories of collective actors encouraged by EU law to engage in litigation. Together with Kolf⁴⁴, we reported that Belgian NGOs do not litigate much in the field of anti-discrimination although their standing to do so has been enlarged through the implementation of the relevant EU Directives. However, these NGOs actually refer cases to the more resourced equality bodies who themselves engage in litigation. Similarly, Latraverse explains that the *Hay* case, which led to a preliminary ruling, was initially brought by a claimant who was himself a union representative and president of an NGO supporting gay rights, and that the HALDE had presented observations in the course of judicial proceedings at domestic level.⁴⁵ And again, the Bulgarian preliminary ruling request in *CHEZ* is reported to have started with an individual complainant but formed part of a test case strategy anchored in collective actions and involving equality body and civil courts.⁴⁶

The co-existence of public (that is, equality bodies) and private (NGOs in this context) collective actors therefore allows for diversity in the type of entities and powers available to counter discriminatory practices.⁴⁷ In that sense, EU intervention may support different types of collective actors so as to have an impact on the diversity of factors at play in the construction of litigation. Conversely, certain litigation factors, such as the existence of high profile jurists supporting specific forms of litigation, are largely outside the realm of regulatory intervention. Möschel for instance notes that German anti-discrimination NGOs tend to refer cases to specialized lawyers such as Klaus Bertelsmann who himself litigates and is behind a number of preliminary references from German courts on anti-discrimination matters.⁴⁸

The second important feature of infrastructure created under EU law to introduce change at the domestic level is the complex interplay between various forms of governance adjusted to each national context. The tool box for the governance of anti-discrimination thus reaches far beyond the limited realm of litigation. The diversity and complementariness of governance mechanisms used to engineer legal and policy change is well illustrated by the French country study. As well as supporting individual litigation,

⁴² Sophie Latraverse, ‘The Litigation of Anti-Discrimination Cases in France by Collective Actors: A Selective Mobilization Hindered by Tradition’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section I (3)).

⁴³ The expression is borrowed from Gráinne de Búrca, ‘EU Race Discrimination Law: a Hybrid Model?’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) Chapter 4.

⁴⁴ Elise Muir and Sarah Kolf, ‘Belgian Equality Bodies reaching out to the ECJ: EU procedural law as a catalyst’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section on ‘Belgian equality bodies as strategic users of the preliminary ruling procedure’.

⁴⁵ Sophie Latraverse, ‘The Litigation of Anti-Discrimination Cases in France by Collective Actors: A Selective Mobilization Hindered by Tradition’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section II (2)).

⁴⁶ Lilla Farkas, ‘NGO and Equality Body Enforcement of EU Anti-Discrimination Law: Bulgarian Roma and the Electricity Sector’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction & Section 2.

⁴⁷ Bob Hepple, ‘Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation’ (2011) 40 *ILJ*315, 322.

⁴⁸ Mathias Möschel, ‘Litigating Anti-Discrimination Cases in Germany: What Role for Collective Actors?’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section III.

the equality body influences the academic curriculum of universities and deploys training programmes for key stakeholders.⁴⁹ Atanasova and Miller also report that Danish employees' representatives have been very active in raising awareness about the new workers' rights and how to exercise them in the aftermath of the implementation of Directive 2000/78.⁵⁰

Although the interplay between this broad range of mechanisms largely takes place at domestic level, EU law is capable of influencing - if not shaping - some of the features of this governance framework. The study coordinated with Kilpatrick and de Witte provides examples of how the EU governance tool box operates in practice. Bulgarian and Italian case studies illustrate the importance of EU funding to support the anchoring of a given legal culture.⁵¹ Virginia Passalacqua in particular stresses that the four Italian associations that intervened in the *Kamberaj* proceedings that led to a preliminary ruling had been partners in an EU-funded project promoting non-discrimination. The project involved providing legal advice to victims of discrimination as well as raising awareness about non-discrimination. The author of the Italian case study adds that these four associations played a 'quasi-institutional role': they organized meetings with other organizations to address specific problems related to housing benefits for third-country nationals and collectively decided to challenge the approach of the province through pilot cases.

Such complementarities between various governance tools are particularly useful where there are power asymmetries between stakeholders, for instance where the national equality body is very weak, as is the case in Italy or where NGOs lack resources or expertise. One interesting point however is whether these various governance tools may also compete or hinder each other. In Denmark for instance, one could question whether the omnipresence of unions in the handling of discrimination complaints does not create a risk of having a lack of monitoring of discrimination practices outside the field of employment. Along similar lines, it may be considered whether the *quasi-judicial* function of certain equality bodies may have a detrimental effect on their other more policy and ex-ante focused functions.⁵² In the context of EU asylum law, Tsourdi also expresses the concern that public entities, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), which combine monitoring with operational functions, may be inclined to choose soft governance tools when exercising the first function in order not to undermine their collaboration with Member States for the purpose of assisting and providing services to refugees.⁵³

⁴⁹ Sophie Latraverse, 'The Litigation of Anti-Discrimination cases in France by collective actors: A selective mobilization hindered by tradition' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section II (1)).

⁵⁰ Angelina Atanasova and Jeffrey Miller, 'Collective actors and EU anti-discrimination law in Denmark' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section IV).

⁵¹ Lilla Farkas, 'NGO and Equality Body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Conclusion; Virginia Passalacqua, 'Advancing EU Equality Law in Italy: Between unsystematic implementation and decentralized enforcement' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 2 (b) on 'The role of the four associations'.

⁵² Along similar lines see Lilla Farkas, 'NGO and Equality Body Enforcement of EU anti-discrimination law: Bulgarian Roma and the Electricity Sector' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17 Section 1. Further exploring this theme in the UK context see: Bob Hepple, 'Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation' (2011) 40 ILJ 315.

⁵³ Evangelia Tsourdi, 'Enforcing Refugee Rights under EU Procedural Law: the Role of Collective Actors and UNCHR' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section on 'Strategic litigation before the CJEU: shedding light into hidden forms of support'.

Spillover effects of EU fundamental rights governance beyond the scope of the anti-discrimination Directives

The influence of EU anti-discrimination policy comes not only from the combination of several governance tools within the framework designed at EU level but also from the use of some of these instruments outside of the framework. Several mechanisms can serve as bridging devices. Some of them are fairly diffuse and inherent to law and policy making. EU law trends may indeed be relied upon to legitimate developments beyond EU law requirements. For instance, the Belgian Constitutional Court relied on EU procedural rules on access to justice to uphold Belgian rules on standing for collective actors, some of which pre-dated or went beyond the EU law requirements.⁵⁴ The anti-discrimination Directives were used to point out the specific nature of litigation in this field and thus to support an enhanced standing for collective actors.⁵⁵ EU law developments may also be used for the purpose of ‘strategic campaigning’. Key stakeholders can enhance the impact of a given development at EU level through mobilisation at domestic level. By way of example, an information campaign and reliance on the media, in the aftermath of the *Kamberaj* ruling of the Court, allowed NGOs to pressure an Italian province to pass a reform which went well beyond what the Court’s ruling required.⁵⁶

Other bridging mechanisms have a more precise and classic legal nature - they are enshrined in general principles of law. One of them is the principle of equal treatment: national authorities may extend the use of legal tools adopted in the course of the implementation of EU law obligations (possibly going beyond such requirements) to non-EU law areas of a comparable nature.⁵⁷ In the recent ruling by the Italian Supreme Court in *Nabil*, the generous rules on standing for collective actors in claims based on race or ethnic origin adopted for implementation of the Racial Equality Directive were deemed to apply to claims of nationality discrimination as well, despite the silence of the relevant domestic provisions. As reported by Passalacqua,⁵⁸ the Supreme Court asserted that nationality and race/ethnic discrimination are equally prohibited by the Italian law, and therefore they should be equally regulated.⁵⁹ Conversely, the principle of equal treatment may be used to back up downwards spillover effects. For instance, in Germany, the minimalist implementation of the procedural provisions of the anti-discrimination Directives has resulted in a reform of the general statute establishing the procedures before labour law courts that lowered protection.⁶⁰ The possibility for organizations to bring claims in the name of a victim before labour courts is no longer possible as this option had been rejected in the context of the drafting of the General Equal Treatment Act.

Another principle that can be used to as a bridging device to expand the effects of EU law beyond their initial scope is the right to an effective remedy and/or a fair trial. This principle exists in domestic legal

⁵⁴ Elise Muir and Sarah Kolf, ‘Belgian Equality Bodies reaching out to the ECJ: EU procedural law as a catalyst’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, in Section on ‘EU law on access to courts for collective actors: a catalyst in the Belgian context’.

⁵⁵ Constitutional Court, case n°157/2004, 6th October 2004, Point B.86.

⁵⁶ Virginia Passalacqua, ‘Advancing EU Equality Law in Italy: Between unsystematic implementation and decentralized enforcement’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 2 (b) on ‘The role of the four associations’.

⁵⁷ For a similar reasoning in the context of EU internal market law: Dominik Hanf, ‘“Reverse Discrimination” in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?’ (2001) 18 MJ29.

⁵⁸ Virginia Passalacqua, ‘Advancing EU Equality Law in Italy: Between Unsystematic Implementation and Decentralized Enforcement’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17.

⁵⁹ Corte Suprema di Cassazione, Sezione Lavoro, *INPS v. Nabil and ASGI and APN*, n. 11166/17 (8 May 2017), para 5.1.

⁶⁰ Mathias Möschel in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17 Section II (1).

orders and interacts with Article 47 CFEU as well as Articles 6 and 13 ECHR.⁶¹ As legislative provisions of EU law encourage procedural change at domestic level, this may progressively feed into a reflexive process lifting upwards the common understanding of the fundamental right to effective judicial protection. Examples of domestic courts consolidating their standards of protection of the right to a fair trial by reference to an evolving legal framework influenced by EU law already exist. The Italian Supreme Court's *Nabil* ruling also referred to that fundamental right in order to broaden the scope of generous rules on standing for collective actors to grounds of discrimination not initially covered by national rules implementing the anti-discrimination Directives.⁶²

Such an upgrading of the fundamental right to an effective remedy and/or a fair trial inspired from legislative developments could also in turn have consequences on the content of the right at the European Union level. Reflections have already been shaped along those lines on the basis of procedural developments in fields other than EU equality law. It has been argued that certain provisions of Directives addressing remedies in a broad range of situations covered by EU public procurement law could 'end up acting as a blueprint of what is required from the Member States under the principle of effective judicial protection in areas which are not covered by the Directives'.⁶³ One may question whether the reasoning of the Court on the burden of proof in matters of pay in gender equality cases, further extended to the Article 19 TFEU grounds through legislative intervention, could be deemed to apply to isolated equal treatment clauses found in EU employment and migration law. In the early case law indeed, the Court had shifted the burden of proof out of concern that applicants may be '*deprived of any effective means of enforcing the principle of equal pay*'.⁶⁴ A reading of isolated equal treatment clauses in the light of the fundamental right to effective judicial protection⁶⁵ could thus result in spillover effects of procedural progress in mainstream anti-discrimination law. The Court here would be engaging in a subtle exercise of stretching certain mechanisms by reference to the fundamental right to effective judicial protection and respecting the specificities of the legislation adopted on various legal bases at EU level.⁶⁶

Interplay between the domestic sphere and EU law concepts

Besides these spillover effects at national level, the study showed that the dynamics created by the anti-discrimination Directives through the support they lend to collective actors domestically can feed back into the development of core EU legal concepts. EU law, which can be invoked before domestic courts and takes primacy over domestic law, provides a tool to circumvent domestic resistance towards change. In this context, the preliminary ruling procedure is sometimes used as a strategic tool to push for a progressive vision of a given right to be imposed on domestic authorities by EU law.

⁶¹ On the interplay between these various provisions at European level and their impact at domestic level see for instance: *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:811.

⁶² Corte Suprema di Cassazione, Sezione Lavoro, *INPS v. Nabil and ASGI and APN*, n. 11166/17 (8 May 2017), para 5.1. I am grateful to Virginia Passalacqua for most useful translation and exchanges on this point.

⁶³ Roberto Caranta, 'Remedies in EU Public Contract Law: The Proceduralisation of EU Public Procurement Legislation' (2015) 8REALaw 75, Section 1.5.

⁶⁴ *DanfossA/S and Sauer-DanfossApS v Skatteministeriet*[1989] ECLI:EU:C:1989:383, para 13 and *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECLI:EU:C:1993:859, para 14. This was also combined with a concern to ensure the effectiveness of EU law: *DanfossA/S and Sauer-DanfossApS v Skatteministeriet*[1989] ECLI:EU:C:1989:383, para 14.

⁶⁵ Note that the requirement of effective judicial control in the form of a general principle of EU law has been first formulated in a case on sex equality indeed: *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206. See further Sophie Koukoulis-Spiliotopoulos, 'The Amended Equal Treatment Directive (2002/73): An Expression of Constitutional Principles / Fundamental Rights' (2005) 4 MJ pages 327 and 362.

⁶⁶ See the discussion in Chapter III on the parallel reading of the legal regime applicable to EU anti-discrimination directives and that applicable to insulated equal treatment clauses.

The study coordinated with Kilpatrick and de Witte provides multiple illustrations in practice of this logic of circumvention of resistance to change. Danish trade unions have been reaching out to the Court to enhance the extent of the prohibition of disability discrimination. Atanasova and Miller explain that the Court's *HK Danmark (Ring and Skouboe Werge)* ruling largely came about as a result of a particularly narrow reading of the notion of disability by Danish courts.⁶⁷ Danish employee representatives made a conscious choice to push for a reference to the Court in the hope of a more generous interpretation of the notion. More generally, Danish stakeholders working in the equality field at the national level perceive the Court as more likely to issue positive decisions in the equality field compared to national courts.⁶⁸ It is perhaps worth noting here that the logic of circumvention may not always (immediately) work, either because rulings of the Court do not match expectations or because the domestic court resists adopting the suggested new approach.⁶⁹ It will be added here that although in certain settings, such as in *CHEZ*, lower courts make use of the preliminary ruling procedure to circumvent higher domestic courts, this is not always the case. Some of these preliminary rulings, such as that in *Achbita*, have actually emerged from the highest domestic courts themselves.

Apart from the general potential that EU law offers for strategic litigation, it is important to stress that governance infrastructures created or enhanced under the influence of EU law have been catalysts to make greater use of this circumvention logic. For instance, the Belgian equality bodies, significantly shaped by EU law, have purportedly decided to use the preliminary ruling procedure in an attempt to circumvent domestic resistance to change. The dynamics behind the *Feryn* and *Achbita* cases clearly illustrate this point.⁷⁰ The referral by the equality body in *Belov*, initiated in Bulgaria where no such body existed before the implementation of the EU Race Equality Directive, illustrates attempts to override decisions of the Bulgarian Supreme Administrative Court.⁷¹ Similar choices to use EU law arguments as well as the preliminary ruling procedure in order to address domestic problems are found in the background of the case identified by Italian associations funded by EU programmes in *Kameraj*.⁷²

In addition to opting for EU law and pushing for use of the preliminary ruling procedure, domestic collective actors also shape the way EU substantive equality may develop as a consequence of a Court ruling. Belgian equality bodies for instance have been making wise and strategic use of EU law arguments as well as the preliminary ruling procedure itself.⁷³ There is no procedure for parties or

⁶⁷ Angelina Atanasova and Jeffrey Miller, 'Collective Actors and EU Anti-Discrimination law in Denmark' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section IV.

⁶⁸ Angelina Atanasova and Jeffrey Miller, 'Collective Actors and EU Anti-Discrimination law in Denmark' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section IV.

⁶⁹ Angelina Atanasova and Jeffrey Miller, 'Collective Actors and EU Anti-Discrimination law in Denmark' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section IV.

⁷⁰ Elise Muir and Sarah Kolf, 'Belgian Equality Bodies reaching out to the ECJ: EU procedural law as a catalyst' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, in Section on 'EU law on access to courts for collective actors: a catalyst in the Belgian context'.

⁷¹ Lilla Farkas, 'NGO and Equality Body enforcement of EU anti-discrimination law: Bulgarian Roma and the electricity sector' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction & Section 3.

⁷² Virginia Passalacqua, 'Advancing EU Equality Law in Italy: Between unsystematic implementation and decentralized enforcement' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section 2 (b) on 'The role of the four associations'.

⁷³ Elise Muir and Sarah Kolf, 'Belgian Equality Bodies reaching out to the ECJ: EU procedural law as a catalyst' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data*

collective actors to have a direct influence on the wording of preliminary questions in Belgium. Yet, in collaboration with Kolf, we traced back the history of the preliminary rulings in *Feryn*, *Rosselle* and *Achbita* and could see evidence of the decisive impact of Belgian equality bodies on the use of EU law arguments in these cases going as far as before the Court. In all three cases the equality bodies had a very strong influence on the very drafting of the preliminary questions brought before the Court. In that sense, infrastructure empowered by EU anti-discrimination law to promote equal treatment at the domestic level has ended up also promoting the right at the EU level.

Conclusions and relevance for other fundamental right policies

EU law provisions on collective actors therefore did unquestionably facilitate or broaden access to courts in certain countries, such as Belgium and Bulgaria; and when collective actors seek access to court, they do make specific use of EU law arguments and the preliminary ruling procedure. Yet, the overall picture is highly complex and nuanced. Domestic resistance to legal concepts imported from a supranational level under the label of fundamental rights are real and have far-reaching implications for the efficiency of such EU policies.

In fact, the genuine added value of EU intervention in fundamental rights matters may lie in planting the seeds for fruitful reflexive processes at the domestic level through the creation of infrastructure, such as equality bodies, with a wide range of powers. The various contributions to the study coordinated with Kilpatrick and de Witte provide a vivid reminder that emphasis should not only be placed on the strength of the powers of actors but also on their diversity and softly textured nature, so as to allow for appropriation by the domestic sphere. Importantly, for such processes to be successful, infrastructure for EU fundamental rights governance at the domestic level ought to be able to operate despite potential hostility: they thus ought to be independent.⁷⁴

As EU intervention increasingly includes procedural rules on access to justice in sectoral legislation and diversifies governance tools in matters touching upon fundamental rights, it may be that EU decision-makers in the years to come will be more inclined to transpose and adjust some of the existing mechanisms to other fields of law. Cross-sectoral analysis of procedural rules, governance tools and their actual operation at the domestic level may act as a catalyst for cross-fertilization.⁷⁵ Horizontal soft-law initiatives such as the 2013 Commission Recommendation on Collective Redress certainly seems to be a step in that direction.⁷⁶ In the study coordinated with Kilpatrick and de Witte our focus has been on two remarkably dynamic, and equally fundamental-rights-sensitive, areas of EU law: data protection and asylum law.

Until recently, in none of these two fields were Member States under an obligation to make it possible for private collective actors such as NGOs to play a formal role in litigation. In the context of asylum law, EU legislation (still) only refers to a possibility for the Member States to enable such entities to provide legal assistance and representation. In contrast, the 2016 reform of EU data protection law has recently introduced change: provisions partly mirroring the rules in EU anti-discrimination Directives

Protection and Asylum (EUI Working Paper LAW 2017/17, Section on ‘Belgian equality bodies as strategic users of the preliminary ruling procedure’.

⁷⁴ See also Bob Hepple, ‘Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation’ (2011) 40 *ILJ* pages 315 and 332-333.

⁷⁵ For a similar approach with significant potential spillover effects in the context of administrative law see the work of the Research Network on EU Administrative Law, available at <<http://www.reneual.eu>> accessed 28 April 2014 and the Special Issue of this Journal devoted to it (2014) 2 *REALaw*.

⁷⁶ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.7.2013, p. 60–65). See also the Special Issue of Legal Issues of European Integration for a cross-sectoral analysis as well as the detailed enquiry into domestic rules in light of the Recommendation in Viktória Harsagi and C.H. van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia 2014).

have been inserted in the relevant legislative framework.⁷⁷ It will be interesting to observe in the years to come whether and how private collective actors actively engage in the governance of EU data protection law at domestic level and whether these developments spillover in particularly dynamic fields such as EU asylum law.⁷⁸

Lynskey's study of EU data protection law further observes the centrality 'on paper at least' of public collective actors or 'domestic fundamental rights watchdogs'. Here, the expression refers to data protection authorities or 'DPAs' in the current governance system for data protection in the EU.⁷⁹ In her view, though, such centrality on paper has not resulted in a major role for DPAs in litigating contentious issues of EU data protection law reaching as far as the Court. As for EU asylum legislation, it does not require the designation or creation of specialised entities such as equality bodies or DPAs at domestic level but, as we shall see below, the Office of the United Nations High Commissioner for Refugees (UNHCR) performs at least some of their functions.

Interesting features of both data protection and asylum law are the existence of specialised and strong supra-national governance structures. For instance, after the 2016 reform, a new EU body – the European Data Protection Board - will replace the current Article 29 Data Protection Working Party in order to ensure the consistent application of the relevant legislative framework across the Member States.⁸⁰ Another example is the European Data Protection Supervisor – in charge of monitoring the processing of personal data by EU institutions and bodies. It has power to intervene in infringement proceedings as well as actions for annulment before the Court (although not in preliminary reference procedures).⁸¹

In the context of EU asylum law, a special role is allocated to the UNHCR, created as a subsidiary organ of the UN General Assembly in 1950, and now given an important role by the 1951 Convention relating to the Status of Refugees. Among other functions, under EU law,⁸² the UNHCR must be given access to asylum seekers and these persons must also be able to communicate with the UNHCR in order to make legal advice available; access to individual applications for international protection and their follow up allows for the analysis of samples of domestic procedures making it possible to identify weaknesses; and, the UN agency must be allowed by the Member States to formally intervene in individual cases either before administrative authorities or the judiciary to present its views.

The importance given by EU legislation to both sets of supra-national entities in data protection and asylum law distinguishes them from what exists in the field of EU anti-discrimination. There, the most advanced structures beyond the domestic sphere are EQUINET and the European Gender Institute but

⁷⁷ Orla Lynskey, 'The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU Law' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17)

⁷⁸ Evangelia Tsoardi, 'Enforcing Refugee Rights under EU Procedural Law: the Role of Collective Actors and UNCHR' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Section on 'Proceduralisation in the EU Asylum Policy'.

⁷⁹ Orla Lynskey, 'The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU Law' in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17, Introduction.

⁸⁰ Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 Article 68.

⁸¹ Orla Lynskey, 'The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17 Section I.

⁸² Evangelia Tsoardi, 'Enforcing Refugee Rights under EU Procedural Law: the Role of Collective Actors and in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17 Section on 'The role of collective actors and UNHCR according to the procedural acquis'.

these entities are much less powerful than those just mentioned. The strong anchorage of data protection law in internal market law may go a long way in explaining the degree of sophistication of these EU level organs in contrast with other fundamental rights policies such as equality law. While the importance given to the UNHCR illustrates how closely EU and international asylum law are intermingled.

Quite naturally, both Lynskey and Tsourdi stress that collective actors have been involved in litigation even in the absence of specific rules to that effect in EU legislation. It is worth noting that in *Digital Rights Ireland*,⁸³ which pre-dates the rules on standing for private collective actors in EU data protection law, the Irish court adopted a remarkably creative approach to the standing of such organizations. The Court referred *inter alia* to effective judicial protection under both national law and EU law – also important in the Italian *Nabil* case mentioned above - in order to allow this *actio popularis* on behalf of the privacy and data protection rights of all individuals.⁸⁴ This confirms that the fundamental right to effective judicial protection may play a pivotal role in future jurisprudential developments; its interaction with provisions of EU legislation designed to enhance the effectiveness of EU fundamental rights policies shall provide for fruitful analysis in the years to come. Lynskey also observes that, curiously, no preliminary references have been received from larger Member States such the UK and Poland. It would be interesting to examine whether some of the entrenched resistances to imported legal concepts that characterize the French and German approach to anti-discrimination law could also explain the silence of these countries from EU level litigation in data protection law.

⁸³ *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238.

⁸⁴ Orla Lynskey, ‘The Role of Collective Actors in the Enforcement of the Right to Data Protection under EU Law’ in Elise Muir et al., (eds), *How EU Law Shapes Opportunities for Preliminary References on Fundamental Rights: Discrimination, Data Protection and Asylum* (EUI Working Paper LAW 2017/17 Section I. See High Court of Ireland, *Digital Rights Ireland Ltd v Minister for Communication & Ors* [2010] IEHC 221, pp. 43-46, 86 and 91.

