

# **How EU law shapes opportunities for preliminary references on fundamental rights: discrimination and other examples.**

Workshop, EUI, 24 February 2017

E. Muir, C. Kilpatrick and B. de Witte<sup>1</sup>

---

## **Contents**

1. Introduction .....	2
2. Background .....	2
3. Method.....	3
4. Case studies .....	4
5. Programme .....	5
6. Organisation .....	6

---

<sup>1</sup> We are very grateful to Egelyn Braun (review of CJEU case law) and Marie Gérardy (review of Belgian procedural law in the three selected Belgian cases) for very valuable research assistance as well as to the VENI funding having made their support possible.

## 1. Introduction

This workshop will explore the impact of procedural provisions inserted in EU fundamental right legislation to facilitate access to court in support or on behalf of victims. We will investigate the interplay between:

- (i) ‘collective actors’ understood in the broad sense to cover civil society organisations and independent organisations such as equality bodies intended to represent individuals,
- (ii) the actual litigation of EU fundamental right law before domestic courts as it unfolds before the CJEU by way of preliminary references,
- (iii) and rules on access to domestic courts as influenced by EU legislation to activate the relevant EU legal framework.

These last set of rules indeed form a bridge between collective actors and actual litigation, their influence on legal opportunity structures for preliminary references are under-researched.

## 2. Background

EU legislation increasingly often provides for a set of procedural provisions intended to support actual enforcement of the relevant area of EU law. Central components of such procedural provisions are rules intended to facilitate access to court. These rules could be extremely useful to enhance law compliance where victims of breaches of EU law are particularly vulnerable, as is often the case with fundamental right breaches.

The most ancient and sophisticated set of procedural rules for the enforcement of EU fundamental rights can be found in EU equality legislation. Anti-discrimination law thus offers an ideal field to explore the ability of EU legislative intervention on fundamental right matters to trigger change at domestic level. Much literature has been devoted to substantive equal treatment rights created by EU law (ie. sex equality law and Art.19 TFEU grounds of discrimination) and increasing research is being devoted to the strategies developed by collective actors making use of the EU layer of rights. In contrast, the actual legal mechanisms through which domestic actors have been – or failed to be – empowered to go to court in order to enforce the said rights have been subject to less attention despite the innovative emphasis on collective actors.

More recently, distinct yet comparable procedural provisions have been inserted in other branches of EU law closely intertwined with fundamental right protection. A directive on the on the enforcement of posted workers’ rights contains for instance an article entitled ‘Defence of rights, facilitation of complaints, back-payments’<sup>2</sup>; another on the enforcement of the right

---

<sup>2</sup> Directive 2014/67 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 cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ L 159, 8.5.2014, p. 11, Article 11.

of mobile EU workers and their families also includes a provision on ‘Defense of rights’<sup>3</sup>; the latest regulation on data protection also has a whole chapter on ‘Remedies, liabilities and penalties’.<sup>4</sup> All these rules place emphasis on the role of collective actors in supporting litigation next to the alleged victim.

Lessons can be learnt from the past 10-15 years of transposing and using (or not) the procedural rules introduced in domestic legal orders by EU equality legislation as well as from examining more recent legislative developments. This is particularly important as rules on access to court are developing fast and could be further expanded in the context of EU migration and social legislation for instance where victims may also be particularly vulnerable or isolated. What is the practical impact of the procedural provisions inserted side by side with substantive rights in EU fundamental right legislation? Do they indeed have an impact on access to court and the litigation process? Does this influence the preliminary ruling procedure?

Research on access to court will also feed into a broader research agenda on the enforcement of EU law before domestic courts. Several general principles of EU law indeed influence access to court (see the major role played by the principles of primacy, direct effect, effectiveness and equivalence in shaping the conditions for access to court at domestic level). These general principles are well established and well studied; there are multiple and useful writings on the interplay between domestic and EU courts as well as legal orders. Now, again, what has been subject to less attention is the way EU legislation may itself influence the conditions for access to courts. Procedural provisions intended to facilitate the enforcement of a given policy are increasingly often inserted in specific EU instruments.<sup>5</sup>

### 3. Method

There would be several ways of tackling this research agenda (eg. checking if the EU provisions have been well transposed and how; looking into domestic rules and cases etc...). It is proposed for now to insist on rigorous, qualitative and contextual analysis. To that effect, the workshop will combine two types of approaches.

A first set of contributions will examine the procedural history of cases (a) having reached the CJEU by way of preliminary ruling, (b) in matters covered by the EU fundamental right legislation and (c) involving a collective actor (either bringing the case or supporting the claimant) as encouraged by most of the procedural provisions identified above. This will allow us to reflect on the actual mechanics of access to domestic court resulting in preliminary questions to the CJEU and the possible influence of EU law thereupon. Further guidance on this is available on request.

---

<sup>3</sup> Directive 2014/54 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, Article 3.

<sup>4</sup> Regulation 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), OJ L 119, 4.5.2016, p. 1, Articles 7 et seq.

<sup>5</sup> See M. Eliantonio & E. Muir, (2015). Special issue on the incidental proceduralisation of EU Law. *Review of European Administrative Law*, 8 (1).

A second set of contributions will reflect more broadly on the dynamics of specific branches of EU law as well as their anchorage in domestic procedural law to shed light on the broader context in which rules on access to court operate. Such broader context may for instance explain why collective actors in certain countries make little use of their newly acquired litigation powers.

Questions that form part of our common research agenda are:

- Have EU rules requiring national law to facilitate access to court had an impact on access to court at domestic level?
  - o If not, why?
  - o If yes, which aspects of EU law have introduced change?
  - o Is the influence of EU law explicit?
  - o Do domestic rules comply/go beyond EU requirements on procedural aspects?
  - o Has EU law had spillover effects on domestic rules on access to court?
- Do collective actors engaging in litigation share common characteristics?
  - o Are they specialised in terms of expertise?
  - o Are they labeled as specialised entities or fundamental right institutions or other?
  - o If not, how do they relate to specialised entities such as data protection authorities, equality bodies and/or fundamental right institutes?
  - o Do they develop litigation strategies?
- Does the involvement of collective actors influence the outcome of cases or their ultimate impact?
  - o In terms of content, quality and diversity of legal arguments raised?
  - o In terms of decision to make use of the preliminary ruling procedure?
  - o In terms of actual compliance with rulings?

#### 4. Case studies

As indicated above, EU anti-discrimination law provides a particularly fertile ground to start the analysis. It will thus be the focus of the first part of the workshop. A review of the CJEU case law involving collective actors as from 2000 (ie. when the relevant rules were first introduced in EU equality law and up until 1.3.2016) 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 (further information available on request).<sup>6</sup> A first set of speakers will thus be invited to further examine the procedural history of Danish, Belgian, Italian and Bulgarian/Romanian cases that have been singled out in this preliminary quantitative analysis. A second set of speakers will be asked to shed light on the resonance of the procedural requirements contained in EU equality legislation in other countries, such as France or Germany, from which hardly any preliminary rulings involving collective actors has emanated as well as from the more horizontal perspective of the Commission.

---

<sup>6</sup> I am leaving out for now countries where such litigation may take place but with no referrals to the CJEU.

The second part of the workshop will be devoted to exploring the real or potential impact of procedural rules on access to court in other and more recent branches of EU law with strong fundamental right dimensions. Contributors will be invited to reflect on the relevance of the existing or possible future rules on access to court and collective actors in their field as well as to illustrate their point with specific cases involving collective actors when possible. Speakers will be invited to discuss EU data protection law and the protection against nationality discrimination in the context of EU free movement of workers and posted workers where strong parallels can be drawn with anti-discrimination. We will also investigate an area where there is a lack of such provisions (eg. EU migration or social law) and an area where collective actors play a very specific role, EU environmental law.

## 5. Programme

09.15-09.30 Welcome and introduction

### **PANEL A – The mechanics of the collective enforcement of EU anti-discrimination law**

Chair, *Claire Kilpatrick* (EUI)

Discussant, C. Favilli (University of Florence)

09.30-09.50 Analysis of procedural history of selected Belgian cases before the CJEU, *E. Muir* (University of Maastricht & KU Leuven) & *S. Kolf* (College of Europe)

09.50-10.10 Analysis of procedural history of selected Bulgarian and Romanian cases before the CJEU, *L. Farkas* (EUI)

10.10-10.30 Discussion

10.30-10.50 Coffee

10.50-11.10 Analysis of procedural history of selected Danish cases before the CJEU, *J. Miller* (EUI) & *A. Atanasova* (KU Leuven)

11.10-11.30 Analysis of procedural history of selected Italian cases before the CJEU, *V. Passalacqua* (EUI)

11.30-11.50 Discussion

11.50-13.30 Lunch

### **PANEL B – Reception of EU ‘procedural’ anti-discrimination law in domestic legal systems**

Chair, *Elise Muir* (UM & KUL)

Discussant, K. Meuwissen (KULeuven & European Network of National Human Rights Institutions)

13.30-13.50 Litigating anti-discrimination cases in Germany: what role for collective actors?, *M. Möschel* (CEU)

13.50-14.10 Litigating anti-discrimination cases in France: what role for collective actors?, *S. Latraverse* (Défenseur des droits)

14.10-14.30 The provisions of the anti-discrimination Directives on access to justice for collective actors: which added value?, *A. Oliveira* (European Commission)

14.30-15.00 Discussion

15.00-15.20 Coffee

### **PANEL C – The spread of collective actors to other fundamental right areas**

Chair, *Bruno de Witte* (EUI)

Discussant, *M. Eliantonio* (University of Maastricht)

15.20-15.40 The role of collective actors in the enforcement of the rights of posted workers under EU, *M. Kullmann* (University of Maastricht)

15.40-16.00 The role of collective actors in the enforcement of the right to data protection under EU law, *O. Lynskey* (LSE)

16.00-16.20 The role of collective actors in the enforcement of the rights of third country nationals under EU law, *L. Tsourdi* (EUI)

16.20-16.50 Discussion

16.50-17.00 Conclusion & closing

## **6. Organisation**

This event is co-organised by the European University Institute (Department of Law) and the University of Maastricht (Maastricht Centre for European Law); it is supported by the Veni programme of the Dutch Research Council (NWO).

Contact: [elise.muir@maastrichtuniversity.nl](mailto:elise.muir@maastrichtuniversity.nl)