EQUINET Legal Seminar
REPORT

EUROPEAN CONCEPTS OF EQUALITY
ROLE OF THE EUROPEAN COURT OF JUSTICE

On 30 June 2009, EQUINET – the European Network of Equality Bodies – has organised a legal seminar on EU equality legislation and the role of the European Court of Justice (ECJ) with regards to equal treatment. The event was held in Brussels and was tailored for legal experts and legal practitioners with expertise in anti-discrimination law. Around 80 participants - legal experts from European institutions, NGOs, trade unions, legal research organisation and from a wide range of national equality bodies took part in the seminar. It was the first such initiative organised by EQUINET - European Network of Equality Bodies, which however is expected to be continued in following years.

The main objectives of the seminar were:

- To present the scope of EU anti-discrimination legislation;
- To discuss possible and potential interpretations of the existing laws;
- To present recent developments in the EJC's judiciary with regard to equal treatment;
- To debate how national equality bodies can make use of their litigation competences.

The legal seminar was divided into different sessions. The first panel, opened and chaired by ***Ingrid Nikolay-Leitner (Equal Treatment Ombud, Austria)*** discussed the current scope of the EU legislation on equal treatment and on the possibilities of litigation by national equality bodies.

Professor Evelyn Ellis (Birmingham Law School and University of West Australia) briefly described the history and developments of EU anti-discrimination legislation, referring to the different EC Directives which had been implemented from 2000 on. She then moved to analyse the current proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation which was backed by the European Parliament on 2 April 2009 and which is waiting for the Council approval. "One of the major problems in the EU anti-discrimination legislation is that it has created a sort of hierarchy within the different grounds of discrimination with different levels of protections", she emphasized. "Discrimination on the ground of race/ethnic origin is the best protected, followed by gender. Age discrimination, on the contrary, has unfortunately been left far behind, together with disability".

Professor Ellis also examined the omissions in the legislation, including those in the new Directive: "First of all there is no mention of education concerning sex discrimination – she said – which is a shame as education is the basis for economic competitiveness. The other aspect neglected by the EU anti-discrimination legislation is the multiple or intersectional discrimination: "it is important to protect people who experience discrimination on concurrent grounds and meet extra-hurdle". Finally she wondered if we need identical protection for identical fields or areas of discrimination. "We surely need common definitions of direct and indirect discrimination as well as of harassment – she stated – but I believe that a single approach might lead to a lowest common denominator rather than to better results. That is why I don't like a false consistency and I am in favour of keeping some distinctions. For instance, you cannot be as rigid as with regard to disability with other grounds of discrimination, when we speak about reasonable accommodation.

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And for instance, we still don't know what is meant by reasonable? The same goes for age". She underlined, that "one size fits all" approach risks dumping down the level of protection against discrimination.

To sum up, Professor Ellis made the point that Directives leave a lot of areas to be defined and it is up to the ECJ to interpret the law and to provide robust definitions (e.g. what is meant by religion or belief or what sexual orientation means). The path that needs to be pursued, according to her, is the equality mainstreaming, the promotion of best practises and good policies and further progress in the legislation. She finally suggested that another means to be used, together with litigation, might be the regulatory and self-analytical approach: she gave the Northern-Irish example where the law binds the government and the employers to periodically assess, via surveys, whether employees may be discriminated.

PhD Bjorn Dilou Jacobsen (The Danish Institute for Human Rights) continued to explain how equality bodies may have, in the future, the possibility of issuing legally-binding decisions and speculated on how they can participate and raise questions which can be of importance for the ECJ. "Whether equality bodies are entitled to issue legally-binding decisions is, according to me, a bit vague in the EU legislation. The new proposal of directive seems to leave it to the discretional choice of each member state", he said. "However there is for sure no direct right that can be inferred from the current laws".

Jacobsen therefore analysed the different ways in which equality bodies could contribute to the interpretation of law. "The most common approach is to represent individuals in courts – he stated – and both the UK Equality and Human Rights Commission (EHRC) and the Swedish Equality Ombudsman are competent to do so. But the Danish Institute for Human Rights, for instance, cannot represent any individual unless it has a direct legal interest in the case. Another approach is the class action. This, however, is most commonly taken by trade unions rather than by equality bodies, even if the Austrian National Council of Disabled Persons and some Scandinavian equality bodies did carry on such actions. The most difficult situation, however, is where there is no complainant and, in such cases, what an equality body can do depends only on the national civil law. He highlighted the example of the Belgian Centre for Equal Opportunities and Opposition to Racism which is competent to bring legal proceedings in its own name. For all these approaches – Jacobsen concluded – there are pros and cons: the pros are a better control of the case, possible coverage of the larger group and the possibility to influence on law interpretations. The cons, on the other hand, are related to the loss of credibility if the case is lost and to the financial resources needed".

Another factor which must be taken into consideration is the difference between those countries adopting a common law approach and those implementing a civil law approach. Besides, according to Jacobsen, there are some advantages and some disadvantages for equality bodies to try and be as neutral as possible and formulating recommendations before a court: "If you appear as being neutral – he explained – you might be considered more reliable by judges. Furthermore such behaviour results in being less expensive than bringing directly a case before a court. The disadvantages, on the other hand, are connected to the difficulty in both assisting victims of discrimination and in doing so in a neutral way".

Peter Reading (UK Equality and Human Rights Commission) concentrated on the example of his equality body and on how EHRC acts before the ECJ: "The ECJ will be, in the near future, a very important forum where all major problems we are now experiencing will play out, i.e. unequal

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treatment on the ground of age, sexual orientation discrimination, equal pay for women and men, ethnic minorities discrimination and so forth. Due to the limited resources of equality bodies, we should always have a strategy in litigation and make a selection of the cases we want to litigate. The strategy should lead to achieve a broad social change rather than merely individual justice. This can be done by analysing the area and the number of people involved, whether or not multiple discrimination occurred etc. The power of intervention of the EHRC – explained Peter Reading – can be exercised to represent individuals but also to proceed in our own name as equality body".

Mr. Reading then illustrated two cases they were dealing with: "The first one concerns a woman who has a son with a disability"– he said. "She was accused to exploit his son as an apology for being lazy at work. We have managed to set a precedent whereby the ECJ has, for the first time ever and in an explicit way, recognized discrimination by association with regard to disability (known as the *Coleman case*). The case was then referred by the ECJ to the British Employment Tribunal and now, as a consequence, the national legislation must be modified so that it covers also this type of discrimination. As a second consequence, this decision might have some influence on other countries such as Italy and Greece whose legislation doesn't encompass such type of discrimination. The second case – Peter Reading said – is about age discrimination and mandatory retirement. We are now presenting our submissions to the national tribunal and we want to state that mandatory retirement is not necessary under any circumstances, given the longer life expectancy, the economic crisis, the loss of value of pensions and so on. On top of that, in 2011 the British legislation on retirement age will be modified and it is there that we can and want to exercise our influence".
In conclusion, Peter Reading challenged the opinion according to which positive discrimination is positive only so far that it allows equal opportunities and not equality of outcomes. "We don't think this interpretation is necessarily correct – he said – because positive action, for instance quotas, is not only lawful but also fair when it allows the achievement of equality".

In the second seminar session chaired and facilitated by ***Sophie Latraverse (HALDE, France)***, the discussion was centred on the EU anti-discrimination legislation and on its impact on the different grounds.

Ingrid Aendenboom (Centre for Equal Opportunities and Opposition to Racism, Belgium) presented the *Feryn Case*: "a famous Flemish entrepreneur whose company installs sectional doors for garages openly refused to hire people originating from Morocco", Ms. Aendenboom told. "We, as equality body, tried a negotiation with him but we could not reach an agreement and we hence decided to go for litigation before a court to stop the discrimination. The work tribunal stated that Feryn's behaviour was discriminatory but only in hypothetical way, since there was no direct complainant victim of such discrimination. We appealed the decision and the Labour Court asked questions to the ECJ. The success of the *Feryn case* was that it established fairly a high level of protection against discrimination and since the ruling of the ECJ, it is clear now that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial background constitutes direct discrimination in respect to recruitment and breaches the Council Directive 2000/43/EC.

Paul Michell (Employment Law Specialist, UK) further elaborated on the *Coleman v. Attridge Law*, the case concerning discrimination by association. "Given the ECJ judgement – Mr. Michell said – it's the ground of the discrimination and not the person who has been discriminated against to count. The court has thus stated that perceived disability is as important and as covered by the EU legislation as actual disability", he underlined.

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Thereafter, ***Dr. Helmut Graupner (Lawyer, Austria)*** presented a series of cases dealing with sexual orientation and gender identity. He particularly concentrated on the *Tadao Maruko case*: "Hans Hettinger was a costume designer", Dr. Graupner explained. "He subscribed to a pension scheme – he told – and had paid this pension scheme for 45 years. Mr. Hettinger had been in a partnership for 13 years with Mr. Tadao Maruko and they registered their partnership in 2001. Mr. Hettinger died in 2005 and Mr. Maruko was not granted the pension as a survivor, since such pensions are granted only to married partners". The case was referred to the ECJ which stated that EU legislation does not influence national laws on marital status. However, the ECJ added that, if in a Member State both married couples and registered partnerships are granted the same rights, those couples should be treated equally. The ECJ nevertheless concluded that the final decision had to be made by a national tribunal. So the case was referred back to the German court, where it is currently being dealt. Dr. Graupner underlined that, if marriage is not available for same sex couples, the benefits which are normally applicable to married couples must be applied to registered partnerships as well. Otherwise, there is a threat of indirect discrimination as long as marriage is forbidden for same-sex couples. The criterion of marriage always is just „apparently neutral", and puts homosexual couples „at a particular disadvantage".

Pia Engström Lindgren (Deputy Equality Ombudsman, Sweden) chaired the last session of the seminar, which was opened with a presentation of ***Professor Marie Mercat Bruns (Sciences-Po Paris, France)*** focusing on the ECJ rulings with regard to age discrimination. "On the one hand – professor Mercat Bruns said – there are straight-forward criteria to define age, criteria which are well visible and documented by several cases. However a series of ambivalences and distinctions remains, whereby ECJ can provide justifications for age differentiations. The Court – she added – seems more interested in identifying the consequences of age discrimination rather than a clear concept of age itself. The ECJ, while it sets standards, has nonetheless adopted an approach which leaves lots of discretional-decision power to the member states. The key issue is how to implement policies for the elder people which do not damage the young and vice-versa, i.e. avoiding to put the two categories in competition with each other. In matters such as pensions schemes, the ECJ looks at the aim of a policy, at its appropriateness and at whether it deems this policy necessary or not. Considering all these factors, the ECJ then rules whether the age differentiation is justified or not. There are – Professor Mercat Bruns concluded – lots of unanswered questions related to age discrimination, but the most important article to be interpreted is Article 6 of the 2000/78/EC Directive". She also underlined, that still there is a great need to have an official interpretation from ECJ in relation to what are the relations between age and performance.

Professor Lisa Waddington (Chair in European Disability Law, Maastricht University, Netherlands) concentrated on the *Chacón Navas* Judgement: a woman had been dismissed by her employer after a prolonged period of absence from work due to her illness. She claimed she had been discriminated on the ground of disability and the ECJ had to decide whether illness could be included in the definition of disability given by the Directive or if it could be added as a further discrimination ground. The ECJ stated that disability was "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life". Furthermore, the ECJ maintained that for any limitation to be considered as a disability, it must last for a long period of time. Hence, the Court ruled that disability was different to sickness and that the latter was not to be covered by the Directive. Illness could not even be added to the grounds of discrimination covered by the Directive, even if the judgement leaves the way open for those people suffering from long-term diseases. Professor Waddington raised number of critical arguments with regard to the *Chacón Navas case*: sole focus on medical model of disability, disability defined as a limitation resulting from an impairment and lack of recognition of the social model of disability. Professor Lisa Waddington also presented

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different models of definitions and national approaches toward disability and gave her view on potential risks of respective solutions.

The Equinet legal seminar was closed with a final round of discussion with the panel of experts and among the participants, and final remarks from ***Ms Chila van der Bas (Chair of Equinet Board, Equal Treatment Commission, Netherlands)***.

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