

Influencing the law through legal proceedings

The powers and practices of equality bodies

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Preface

This report on the ability of equality bodies to influence the interpretation of national and EU anti-discrimination law has been initiated by and prepared in cooperation with Equinet's Working Group on Dynamic Interpretation.

The Working Group on Dynamic Interpretation focuses on the interpretation of the legal concepts laid down in the EU anti-discrimination directives as well as on how Member States have implemented these directives into national legislation with the aim of securing harmonised and maximum levels of equality in the EU. The Working Group consists of legal experts working for national equality bodies in order to ensure a practical approach regarding how EU and national laws are applied in practice.

A key aspect in the Working Group's effort is comparing and analysing the application of anti-discrimination law in actual cases in different Member States with the purpose of: i) identifying patterns in regard to national implementation and application of the anti-discrimination directives; ii) identifying potential gaps in protection or areas requiring legal clarification in the anti-discrimination directives; iii) identifying potential and existing legislative gaps in national legal systems in regard to the implementation of the anti-discrimination directives; and iv) identifying issues where litigation in the Court of Justice of the European Union (hereinafter CJEU) may be appropriate to clarify the scope and meaning of the provisions of the anti-discrimination directives. In the period from 2006-2010, the Working Group published four reports on case studies on dynamic interpretation of European anti-discrimination law in practice.

The purpose of this report is to provide a source of evidence for the members of Equinet and external stakeholders in regard to how equality bodies are involved in interpreting the EU anti-discrimination directives in practice and to examine what changes in legislation, policies or practices may be appropriate either at national level or in the CJEU procedures in order to strengthen the ability of equality bodies to have an impact on the development of the law. The report is based on a Survey carried out among the members of Equinet by the Working Group on Dynamic Interpretation in February-April 2010.

It shall be noted that the observations and conclusions in this report do not necessarily represent the position or opinion of the equality bodies that have been involved in the survey.

Copenhagen/London, September 2010

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Chapter 1

Introduction, method and scope

The main objective of equality bodies is to promote equal treatment in Member States. One of equality bodies' most important tasks in this regard is to monitor and facilitate a uniform and effective implementation of EU anti-discrimination law in Member States. In this regard, it is pivotal for the work of equality bodies that they are able to participate in legal proceedings so that they can influence the interpretation of the EU anti-discrimination directives.

This report has two objectives. Firstly to provide a source of evidence for the members of Equinet and external stakeholders on how the equality bodies are involved in interpreting EU anti-discrimination directives in practice. Secondly, to examine what changes in legislation, policies or practices may be appropriate either at national level or in the CJEU procedures in order to strengthen the ability of equality bodies to influence the development of the law.

The report is based on a survey carried out amongst 25 members of Equinet¹ from February 2010 to April 2010 (see annexe 1). A list of the participating equality bodies has been provided in Annex 2.

This data has been supplemented with additional information on the powers and practices of equality bodies found in other reports and in legal scholarship. Both of these sources were then analysed to ascertain the different types of powers and practices of equality bodies in regard to influencing the law, the frequency of use of these powers, any barriers that equality bodies face in regard to using these powers and examples of good practice.

The EU requirement to establish equality bodies only covers discrimination on grounds of sex, race and ethnic origin.² Nonetheless, several Member States have established equality bodies that cover additional grounds, such as the grounds listed in the Employment Equality Directive (i.e., religion or belief, disability, age and sexual orientation). Since this report concerns equality bodies' ability to influence the interpretation of anti-discrimination law and is not focused substantively on any particular area of discrimination law, the observations and recommendations in the report generally apply to all grounds covered by equality bodies in practice. The same applies in regard to the scope covered by the EU anti-discrimination directives, i.e., the observations of the report apply to both areas of employment and areas outside of employment. However, where it is argued that equality bodies should be allowed to participate in national legal proceedings concerning the interpretation of the EU anti-discrimination directives on account of their mandate as specialised bodies as required under EU law, reference is only made to the areas within which it is a EU law requirement to establish equality bodies, i.e., in regard to sex, race and ethnic origin.

The structure of the report is as follows: Chapter 2 examines international recommendations and minimum requirements for the powers of equality bodies in regard to participating in legal proceedings, and thereby having an impact on the development of anti-discrimination law. In Chapter 3-7, some of the different approaches equality bodies may employ in order to have

¹ Currently, 33 equality bodies are full members of Equinet and three equality bodies participate as observers. A list of these equality bodies can be found at Equinet's website: www.equineteurope.org.

² Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment irrespective of racial or ethnic origin (hereinafter Race Equality Directive) article 13; 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 (hereinafter Gender Goods and Services Directive) Article 12; and Directive 2006/54/EC of 5 July 2006 on the implementation of the principles of equal opportunity and equal treatment of men and women in matters of employment and education (hereinafter Recast Gender Employment Directive) Article 20. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter Employment Equality Directive), which prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation, holds no requirement in regard to establishing an equality body. However, the European Commission has proposed a directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation with the effect that it will also be a requirement to establish an equality body or bodies for the promotion of equal treatment on these grounds, cf. COM(2008) 426 final. It is to be noted that this proposed directive has not to date been passed as agreement has not been reached in the Council of the European Union.

an impact on the development of anti-discrimination law are analysed, as well as equality bodies' use of these approaches in practice. Chapter 3 focuses on the ability of equality bodies to represent individuals through litigation. Chapter 4 examines the powers of equality bodies to bring proceedings in their own name. Chapter 5 concerns equality bodies' use of interventions in national court proceedings. Chapter 6 deals with the powers of equality bodies to decide individual complaints, and Chapter 7 looks into how equality bodies may influence preliminary rulings by the CJEU in cases concerning EU anti-discrimination law. Finally, Chapter 8 summarises the observations made, as well as presenting conclusions and lessons to be learnt as to how equality bodies may enhance their influence on the interpretation of national and EU anti-discrimination law.

Chapter 2

The powers of equality bodies

The EU anti-discrimination directives provide that Member States shall ensure that the powers of equality bodies include “providing independent assistance to victims of discrimination in pursuing their complaints about discrimination”; “conducting independent surveys concerning discrimination”; and “publishing independent reports and recommendations”.³ In relation to the Recast Gender Directive there is also an additional requirement that enables equality bodies to exchange information at the appropriate level with corresponding European bodies.⁴

The wording of these minimum powers that Member States must equip their equality bodies with is very general. As such, the wording does not provide much guidance in regard to whether, and if so to what degree, equality bodies should be given powers that enable them to participate in legal proceedings for the purpose of influencing the interpretation of EU anti-discrimination law.⁵

However, several international monitoring organs have provided recommendations on how specialised bodies for combating discrimination may be set up. Since it is not possible to determine on the basis of the wording of the EU anti-discrimination directives what powers the equality bodies shall be equipped with, international recommendations are used below as a baseline for what powers equality bodies may be equipped with in order to enable them to have an impact on the development of the law. An examination is also made as to whether any minimum requirements for the equality bodies to participate in legal proceedings may be inferred from EU law. The main focus is on the first aspect of equality bodies’ powers as laid down in the EU anti-discrimination directives. This concerns the provision of assistance to victims of discrimination, which is the key way in which equality bodies are involved in influencing the interpretation of the law at domestic and EU levels.

2.1 International recommendations

The UN Paris Principles are often applied as a standard for equality bodies, even though the Paris Principles lay down a standard for national human rights institutions. It follows from the Paris Principles that a “national institution may be authorised to hear and consider complaints and petitions concerning individual situations”.⁶ When reviewing complaints, emphasis should be put on seeking amicable settlement through conciliation or through binding decisions, informing complainants about their rights and the remedies available, and promoting access to their rights.⁷

In the UN Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination, it is recommended that the functions of a national specialised body combating racial discrimination shall include receiving complaints from alleged victims, conducting inquiries on behalf of complainants, acting as a mediator,

³ See footnote 2.

⁴ Article 20(2)(d) of the Recast Gender Employment Directive.

⁵ Cf. Moon, G., Enforcement Bodies, *Non-Discrimination Law* (2007) (D. Schieck, L. Waddington and M. Bell, Eds.) Hart Publishing p. 890; O’Cinneide, C., The Racial Equality Directive as Basis for Strategic Enforcement, *Strategic Enforcement and the EC Equal Treatment Directives. Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies. Report of the sixth expert’s meeting, hosted by the Irish Equality Authority, 4-5 March 2004* (J. Cormack, Ed.) Migration Policy Group 48-53 p. 49; Barry, E., Strategic enforcement – from concept to practice, *Strategic Enforcement and the EC Equal Treatment Directives. Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies. Report of the sixth expert’s meeting, hosted by the Irish Equality Authority, 4-5 March 2004* (J. Cormack, Ed.) Migration Policy Group p. 11.

⁶ General Assembly resolution A/RES/48/134 of 20 December 1993, Additional principles concerning the status of commissions with quasi-judicial status.

⁷ *idem*

bringing legal actions on behalf of complainants, and supporting complainants who have instituted court proceedings.⁸

The Council of Europe's European Commission against Racism and Intolerance (ECRI) has formulated the General Policy Recommendation no.2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level in 1997. It recommends that such specialised bodies should, subject to national circumstances, be given as many of the following competences as possible: "to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts"; "to have recourse to the courts or other judicial authorities as appropriate if and when necessary"; and "to hear and consider complaints and petitions concerning specific cases and to seek settlements either through amicable conciliation or, within the limits prescribed by law, through binding and enforceable decisions."⁹

In a subsequent recommendation, ECRI's General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination from 2002, ECRI recommends the establishment of national specialised bodies that shall be given competence to provide "assistance to victims".¹⁰ According to the Explanatory Memorandum to the recommendation, providing "assistance to victims" covers "provision of general advice to victims and legal assistance, including representation in proceedings before the courts."¹¹

Thus, international recommendations advise that equality bodies are given various powers in order to enable them to provide assistance to victims of discrimination, including the power to review complaints and issue decisions about whether discrimination has taken place and the power to represent or support victims of discrimination in legal proceedings.

2.2 Can a right for equality bodies to participate in legal proceedings be inferred directly from EU law?

As stated above, the wording of the EU requirement to establish equality bodies with competence to, *inter alia*, provide assistance to victims of discrimination is so general that it essentially leaves it to the discretion of Member States to decide how the equality bodies shall function in practice.

The preparatory works to the directives confirm that it indeed was the intention to leave Member States with a wide measurement of discretion in regard to how to set up their equality bodies. It follows from the preparatory works of the Race Equality Directive that the EU requirement to establish equality bodies with competence to provide assistance to victims of discrimination is based on the UN Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination. At the time of the drafting of the proposal, ECRI had also adopted its General Policy Recommendation no. 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level. As described above, these documents list numerous ways of providing assistance to victims of discrimination when pursuing their complaints, from providing information to mediating and litigating cases.¹² By not specifying what kind of assistance equality bodies shall be given competence to provide, it must be assumed that it was intended to leave this decision to the discretion of Member States in accordance with national legal traditions and policy choices.¹³

As the preparatory works to the anti-discrimination directives expound, this has also manifested itself in the directives by the fact that there is no reference to equality bodies in the provisions on remedies and enforcement, according to which Member States are required to

⁸ Article 20(g)-(k).

⁹ Appendix to ECRI's general policy recommendation no. 2, Principle 3(d)-(g).

¹⁰ Principle 24.

¹¹ Para. 51 concerning Principle 24.

¹² COM (2001) 291 final, para. 3.1.

¹³ See COM (2001) 291 final, para. 3.1.

ensure that “associations, organisations or other legal entities” may engage in support of complainants in judicial or administrative proceedings.¹⁴ Accordingly, Member States are free to choose whether equality bodies shall be able to represent or support victims of discrimination in legal proceedings, but they are not required to be able to do so. It also follows from the preparatory work that it was not the intention to make it a requirement that equality bodies must be able to investigate complaints and issue findings on whether discrimination has taken place.¹⁵

A purposive interpretation of the EU requirement to establish equality bodies with certain minimum powers leads to the same open-ended result: the main purpose of equality bodies is to combat discrimination and promote equal treatment, *inter alia*, by providing assistance to victims of discrimination. As seen in the international recommendations described above, this can be done in numerous ways; such as providing information and giving guidance regarding the law; reviewing complaints; mediating cases; and/or representing or supporting victims of discrimination in court. Thus, it seems that no specific right for equality bodies to participate in national legal proceedings can be inferred directly from the EU law requirement to establish equality bodies.

However, if the EU requirement that equality bodies are able to provide assistance to victims of discrimination when pursuing their complaints is to be effective in practice, it is fair to assume that the national model - in one way or the other - must provide for some legal assistance to victims of discrimination. Accordingly, if an equality body were to be set up without any ability to participate directly or indirectly in legal proceedings concerning discrimination, and no other national body or bodies were set up to provide such assistance on its behalf, it may well be that the EU Commission would initiate proceedings, arguing that such an equality body model is against the spirit of the EU requirement to set up specialised bodies for the promotion of equal treatment.¹⁶ However, until the scope of this requirement has been dealt with by the CJEU, the outcome of such a case is uncertain.

2.3 The indirect effect of the EU law requirement to establish equality bodies

As concluded above, a right for equality bodies to participate in legal proceedings as a means to influence the law does not follow directly from the EU legal requirement to establish equality bodies and to equip these with certain minimum powers. However, the EU law

¹⁴ See Council of the European Union, Interinstitutional File: 99/0253 (CNS), 7756/00, footnote 49. See also the European Parliament's Recommendation for second reading on the Council common position for adopting a European Parliament and Council directive on amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regard to access to employment, vocational training and promotion, and working conditions (COM (2000)334 – C5-0369/2000 – 2000/0142(COD)), A5-0358/2001, Amendment 13, cf. with Council of the European Union, Interinstitutional File: 2000/0142 (COD), 14492/01, Section 3.2.1.4. For further information on the preparatory works to the EU law requirement to establish equality bodies and the scope of this requirement, see Jacobsen, B., *Assistance to Victims of Discrimination by Equality Bodies of the EU Member States. A Scandinavian Perspective* (2010) DJØF Publishing pp. 81-86.

¹⁵ See the EU Commission's remark hereon in Council of the European Union, Interinstitutional File: 99/0253 (CNS), 6942/00, footnote 46. The European Parliament suggested that equality bodies should have the ability to “inquir(e) into research and give an opinion about complaints”, cf. The European Parliament's Report of 16 May 2000 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, A5-0136/2000, Amendment 53. This suggestion was rejected by the Council.

¹⁶ Notably, in November 2009, the European Commission stated in a reasoned opinion to the Danish government that the Danish equality body model in regard to gender does not meet the EU requirement laid down in the Gender Employment Directive to establish an equality body with competence to, *inter alia*, provide assistance to victims of discrimination on the grounds of sex (see press release from the European Commission of 20th November 2009). The reason for this may be that, although the current Danish model provides for that complainants can receive guidance by the secretariat of the Danish Board of Equal Treatment, have their complaints investigated and heard by the Board for free and have their decisions enforced in court by the Board, the Board is neither set up to advocate for victims of discrimination nor to safeguard their rights. In other words, it may be that the Commission is of the opinion that it is not sufficient to set up a quasi-judicial body with competence to hear and investigate complaints. Member States must designate a body with mandate to advocate for victims of discrimination and/or to safeguard their rights as, for example, an ombud institution. As a result of the Commission's reasoned opinion, the Danish government has announced that the Danish Institute for Human Rights will be given the mandate of specialised gender equality body by 2011. For further information hereon, see Jacobsen, B., *Assistance to Victims of Discrimination by Equality Bodies of the EU Member States. A Scandinavian Perspective* (2010) DJØF Publishing pp. 45-47 and 88.

requirement to establish equality bodies may have an indirect effect under national law, which permits equality bodies to participate in national legal proceedings.

For example, in some legal systems there is a tradition for allowing bodies to intervene in cases where the body has a special interest and/or expertise in regard to the issue raised in the case and where it is thought to be able to provide a relevant perspective to the case that would otherwise not be available to the court.¹⁷ Where there is such a tradition, it can be argued that a body that has been designated to carry out the role of national equality body as required under EU law should be considered to have the required interest, under national law, to intervene in cases concerning the observance of EU anti-discrimination law.¹⁸ A case before the Irish Supreme Court, *Doherty & anor. v. South Dublin County Council & ors*¹⁹, in which the Irish Equality Authority was allowed to intervene for the purpose of making submissions as to how the law should be developed in a case about racial discrimination, provides an instructive example of this reasoning.

A similar argument for being allowed to take legal action in their own name may be applied by equality bodies. For example, the former British Equal Opportunities Commission was found to have standing in a case, which concerned whether British law was in breach of EU anti-discrimination law, on account of the Commission's statutory duties to work towards the elimination of discrimination and to promote equal treatment between men and women.²⁰

Thus, the special role that equality bodies are given by EU law may mean that national rules and practices of civil procedure in Member States are interpreted so that equality bodies can participate in national legal proceedings.

¹⁷ See e.g., *A matter of public interest. Reforming the law and practice on interventions in public interest cases* (1996) (The Public Law Project) pp. 21-22; Arshi, M. and O'Conneide, C., Third-Party Interventions: the Public Interest Reaffirmed, *Public Law* (2004) 69-77.

¹⁸ Cp. Barry, E., Interventions and Amicus Curiae Applications, *Strategic Enforcement: Powers and Competences of Equality Bodies* (2006) (S. Obura and F. Palmer, Eds.) Migration Policy Group p. 41. See also O'Neill, P., Positive Duties and Strategic Enforcement, *Strategic Enforcement and the EC Equal Treatment Directives. Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies. Report of the sixth expert's meeting, hosted by the Irish Equality Authority, 4-5 March 2004* (J. Cormack, Ed.) Migration Policy Group p. 24.

¹⁹ *Doherty & anor. v. South Dublin County Council & ors* [2006] IESC 57.

²⁰ See e.g., *Equal Opportunities Commission v. Secretary of State for Trade & Industry* [2007] EWHC 483 (Admin) (12 March 2007).

Chapter 3

Representing individuals through litigation

A key way for an equality body to have an impact on the development of anti-discrimination law, both at national and EU level, is by representing individuals in national legal proceedings. Firstly, this allows the equality body, in cooperation with the complainant, to word the claim and to present its interpretation of the law directly before the national courts. Secondly, the equality body may argue before the national courts that the legal issue at hand shall be presented to the CJEU for a preliminary ruling. An illustrative example hereof is the support provided by the British Equality and Human Rights Commission in the *Coleman* case²¹.

According to the Survey, 17 out of the 25 equality bodies that participated in the Survey have the power to represent individuals in discrimination claims.²² The equality bodies that do not have the power to represent individuals through litigation generally replied that changes in national law are required for them to be able to do so.

Out of the 17 equality bodies with power to represent individuals, 15 responded that they can represent individuals in court.²³ 10 of these can also represent individuals before tribunals.²⁴ One equality body²⁵ can represent individuals before a quasi-judicial body with competence to make legally binding decisions and one equality body²⁶ can represent individuals before a commission, which can issue non-binding statements about whether discrimination has taken place.

In 2009, a total of 411 individuals were assisted with acquiring redress through litigation by 10 equality bodies.²⁷ This means that almost half of the equality bodies with power to represent individuals did not do so in 2009. The statistics for 2008 are similar in this regard.²⁸

The main barrier in regard to making use of the power to represent individuals through litigation, as reported by nine of the equality bodies, is a lack of state funding or staff resources.²⁹ According to four equality bodies, the deterrent effect of the possibility of costs

²¹ C-303/06 *Coleman v. Attridge Law*.

²² The Austrian Ombud for Equal Treatment; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the British Equality and Human Rights Commission, the Bulgarian Commission for Protection against Discrimination; the Danish Institute for Human Rights; the Hungarian Equal Treatment Board; the Estonian Gender Equality Commissioner; the Finish Ombudsman for Minorities; the Finish Ombudsman for Equality; the Maltese National Commission for the Promotion of Equality; the Swedish Equality Ombudsman; the Irish Equality Authority; the Equality Commission for Northern Ireland; the Romanian National Council for Combating Discrimination; and the Slovak National Centre for Human Rights.

²³ The Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the British Equality and Human Rights Commission, the Bulgarian Commission for Protection against Discrimination; the Danish Equal Treatment Board; the Estonian Gender Equality Commissioner; the Finish Ombudsman for Minorities; the Finish Ombudsman for Equality; the Hungarian Equal Treatment Authority; the Maltese National Commission for the Promotion of Equality; the Swedish Equality Ombudsman; the Irish Equality Authority; the Equality Commission for Northern Ireland; the Romanian National Council for Combating Discrimination; and the Slovak National Centre for Human Rights.

²⁴ The Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the British Equality and Human Rights Commission; the Finish Office of the Ombudsman for Minorities; the Finish Ombudsman for Equality; the Maltese National Commission for the Promotion of Equality; the Swedish Equality Ombudsman; the Irish Equality Authority; the Equality Commission for Northern Ireland; and the Romanian National Council for Combating Discrimination. The Finish Ombudsman for Minorities can only represent individuals before a tribunal.

²⁵ The Danish Institute for Human Rights.

²⁶ The Austrian Ombud for Equal Treatment.

²⁷ The Austrian Ombud for Equal Treatment (65); the Belgian Centre for Equal Opportunities and Opposition to Racism (18) the Belgian Institute for the Equality of Men and Women (10); the British Equality and Human Rights Commission (50); the Danish Board of Equal Treatment (15); the Finish Ombudsman for Minorities (1); the Irish Equality Authority (14); the Equality Commission for Northern Ireland (107); the Slovak National Centre for Human Rights (3) and the Swedish Equality Ombudsman (128, covering both individuals represented in settlements and in court).

²⁸ According to the Survey, in 2008, a total of 288 cases were carried out by seven equality bodies.

²⁹ The Austrian Ombud for Equal Treatment; the Belgian Institute for the Equality of Men and Women; the Bulgarian Commission for Protection against Discrimination; the Estonian Gender Equality Commissioner; the Finish

being awarded against the equality body also constitutes a barrier.³⁰ The fact that supporting individuals through litigation can be a costly and time-consuming process is dealt with by some equality bodies by preserving this approach for cases that may have strategic importance (i.e., where the case may test or clarify the law or create precedent).³¹

Three of the equality bodies reported that national procedural rules constitute a barrier. This may either be because the equality body's mandate to take cases to court is restricted to specific situations,³² or because it is unclear whether the equality body meets the requirements under national rules of civil procedure in regard to representing complainants in court.³³

The Danish Institute for Human Rights provides an illustrative example of an alternative approach to dealing with financial restraints and uncertainty concerning its ability to represent complainants under national rules of civil procedure. In practice, instead of assisting victims of discrimination with having their claim tried in court by attempting to be allowed to represent them in court, the Institute has chosen to provide assistance to victims of discrimination in applying for free legal aid at the Danish Civil Affairs Agency.³⁴ The Institute does so in, *inter alia*, situations where the case may assist in clarifying the law. Where free legal aid is provided by the state, the Institute recommends a lawyer with expertise in anti-discrimination law. Notably, in order to obtain free legal aid, the Institute has to argue in a written application to the Civil Affairs Agency why the case should be tried in court, including why the complainant should be considered as having a reasonable claim or why the case may be considered as useful in clarifying the law. This submission is also made available to the lawyer representing the complainant. Accordingly, in applying for free legal aid on behalf of the complainant, the Institute may indirectly have an impact on how the case will be argued in court.

As seen in Chapter 2, Section 2.1, international recommendations encourage that equality bodies should be given powers to settle cases amicably, for example through mediation. In practice, some equality bodies have the power to do this.³⁵ The Survey also posed the question of whether equality bodies' assistance to victims of discrimination by seeking amicable settlements out of court is a barrier in regard to having an impact on the development of the law. This may be the case because seeking amicable settlements through non-legal proceedings, when successful, prevents principle cases from being tried in court.

Ombudsman for Minorities; the Hungarian Equal Treatment Authority; the Maltese National Commission for the Promotion of Equality; the Irish Equality Authority; and the Slovak National Centre for Human Rights.

³⁰ The Austrian Ombud for Equal Treatment; the Belgian Institute for the Equality of Men and Women; the Finnish Ombudsman for Minorities; and the Maltese National Commission for the Promotion of Equality.

³¹ This approach is, for instance, applied by the British Equality and Human Rights Commission; the Irish Equality Authority; and the Equality Commission for Northern Ireland. The criteria for these equality bodies' legal representation can be found on their respective websites. The Swedish Equality Ombudsman reported that it is in the process of developing a strategic policy for litigation. For further information on the use of strategic litigation, see e.g. *Strategic Enforcement and the EC Equal Treatment Directives. Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies. Report of the sixth expert's meeting, hosted by the Irish Equality Authority, 4-5 March 2004* (2004) (J. Cormack, Ed.) Migration Policy Group.

³² The Austrian Ombud for Equal Treatment can only represent individuals through litigation where i) the Ombud has submitted a case to the Equal Treatment Commission and where the Ombud does not agree with the decision of the Commission, and ii) where the Equal Treatment Commission has concluded that the respondent practices discrimination and ordered this to stop, but where the order was not followed.

³³ Reported by the Danish Institute for Human Rights and the Estonian Gender Equality Commissioner.

³⁴ According to section 328(1) of the Danish Administration of Justice Act, a person may be provided free legal aid in court where there is considered to be a "reasonable cause" for litigating the case. When deciding whether this is the case, emphasis is put on, *inter alia*, the importance of the case for the complainant; the likelihood that the complainant will win the case; the size of the claim; the size of the expected costs and the possibility of having the claim tried by an administrative body. Further, the complainant must not be able to pay the costs her/himself without "suffering considerable privation". This means that the complainant's annual income must not exceed 275,000 kroner (approximately 36,249 euro) in 2009-2010, cf. the Danish Administration of Justice Act section 325(2), cf. Executive Order on Free Legal Aid. In addition, free legal aid may be provided, irrespective of the complainant's income, where the case may assist in clarifying the law, cf. section 329.

³⁵ See Salinger, U., *Mediation as a Tool for Specialised Equality Bodies?* (2007). This expert paper can be found on Equinet's website.

All of the 17 equality bodies that have the power to represent individuals reported that they do not have to attempt mediation first.³⁶ Thus, it seems that settling cases amicably out of court is generally not a barrier to representing complainants in cases of strategic importance. However, the results of the Survey may also be indicative of the fact that several equality bodies do not have the power to settle cases amicably, for example through mediation.³⁷

³⁶ In regard to the Swedish Equality Ombudsman, it follows from the Swedish Act on Discrimination that the Ombudsman shall ensure the law is complied with, but also that the Ombudsman shall initially attempt to ensure voluntary compliance of the law. However, this does not mean that the Ombudsman is obligated to initiate non-legal settlement proceedings, such as mediation. If the Ombudsman is of the opinion that discrimination has taken place, a claim will be made to the respondent. If the respondent offers to settle the case out of court on terms acceptable for the Ombudsman, the Ombudsman will agree to settle the case. As pointed out by the Ombudsman, this situation does not differ from in court settlements with respondents. In both situations, a court decision is not needed since the respondent has agreed to settle the case.

³⁷ In the Survey, it was asked whether mediation must be attempted before representing individuals in discrimination claims, but not whether equality bodies are capable of seeking amicable settlements or intend to do so in practice.

Chapter 4

Bringing proceedings in their own name

Taking legal actions in their own name is an effective means for equality bodies to have an impact on the development on anti-discrimination law. It is especially useful in situations where there are no identifiable victims of discrimination, for example, where a national provision appears to be in violation of EU anti-discrimination law or where a job posting is discriminatory, but no one has filed a complaint about it.

An illustrative example of this is the *Feryn* case³⁸, which was initiated by the Belgian Centre for Equal Opportunities and Opposition to Racism, in which the CJEU gave the preliminary ruling that when an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, this constitutes direct discrimination under the Race Equality Directive, regardless of whether there is an identifiable victim.

The ability of equality bodies to take legal action in their own name may also be useful in situations where it has come to the attention of the equality body that there are identifiable victims of discrimination, but where the victims are reluctant to file a personal complaint.³⁹ This may, for example, be the case where a victim of discrimination is still under the authority of the discriminator and, therefore, is afraid of reprisals, such as in employee-employer relationships or where a victim of discrimination is a student at an educational institution that discriminates.

17 of the 25 organisations participating in the Survey reported that they have power to bring proceedings in their own name.⁴⁰ Six equality bodies⁴¹ stated that they cannot do so and two⁴² responded that they are not sure.

In 2009, a total of 40 cases were brought by six equality bodies in their own name.⁴³ Notably, as a result of the wording employed in the Survey in regard to the questions covering this category of legal proceedings, this number may also include cases in which the equality body has represented individuals in court, i.e., cases that are also included in the statistics in Chapter 3.⁴⁴ In any event, the result of the Survey means that 11 of the 17 equality bodies with power to take legal actions in their own name did not do so in 2009. In regard to 2008, a total of 81 cases was reported by five equality bodies.⁴⁵

³⁸ C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*.

³⁹ Moon, G., Enforcement Bodies, *Non-Discrimination Law* (2007) (D. Schieck, L. Waddington and M. Bell, Eds.) Hart Publishing p. 899; Bodrogi, B., Legal Standing – The Practical Experience of a Hungarian Organisation, *European Anti-Discrimination Law Review* (2007) 23-29 p28.

⁴⁰ The Austrian Ombud for Equal Treatment; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the British Equality and Human Rights Commission; the Bulgarian Commission for Protection against Discrimination; the Czech Office of the Public Defender of Rights; the Croatian Ombudsman's Office; the Finish Ombudsman for Minorities; the Hungarian Equal Treatment Authority; the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities; the Maltese National Commission for the Promotion of Equality; the Swedish Equality Ombudsman; the French High Commission against Discrimination and for Equality; the Irish Equality Authority; the Equality Commission for Northern Ireland; the Dutch Equal Treatment Commission; the Romanian National Council for Combating Discrimination; and the Slovak National Centre for Human Rights.

⁴¹ The Danish Equal Treatment Board; the Finish Ombudsman for Equality; the German Federal Anti-Discrimination Agency; the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities; the Norwegian Equality and Anti-Discrimination Ombud; and the Equality Commission for Northern Ireland.

⁴² The Danish Institute for Human Rights and the Estonian Gender Equality Commissioner.

⁴³ The Belgian Centre for Equal Opportunities and Opposition to Racism (1); the Belgian Institute for the Equality of Men and Women (2); the Finish Ombudsman for Minorities (3); the Irish Equality Authority (1); the Romanian National Council to for Combating Discrimination (14); and the Swedish Equality Ombudsman (19).

⁴⁴ As a result of the composition of the Survey, this number may also include cases in which the equality body has represented individuals in court, i.e., cases that are also included in the statistics in Chapter 3. This is, the case, for example, in regard to the 19 cases reported by the Swedish Equality Ombudsman.

⁴⁵ The Belgian Centre for Equal Opportunities and Opposition to Racism (38); the Belgian Institute for the Equality of Men and Women (2); the Finish Ombudsman for Minorities (3); the French High Commission against Discrimination and for Equality (1); the Romanian National Council for Combating Discrimination (9); and the Swedish Equality Ombudsman (29). The reason that twice as many cases were reported in 2008 is that the Belgian Centre for Equal

The Survey did not pose the question of whether there are any barriers for equality bodies in regard to bringing proceedings in their own name. However, some possible reasons as to why more than half of the equality bodies with power to bring legal proceedings in their own name do not make use of this power in practice may be inferred from some of the other answers provided in the Survey.

One possible reason may be the fact that, as reported by some of equality bodies, the power to bring legal proceedings in their own name is limited to specific situations, such as only being able to take legal action where the victim (where there is an identifiable victim) gives her or his consent;⁴⁶ where national legislation is considered to be unconstitutional;⁴⁷ if a settlement is rejected or not met by the respondent;⁴⁸ or in relation to discriminatory advertisements, instructions or pressure to discriminate or persistent discrimination.⁴⁹

Another possible reason may be lack of financial resources or staff resources. As stated in Chapter 3, several equality bodies reported that lack of resources is a barrier in regard to representing individuals in court. As seen in Chapter 5, Section 5.1, some equality bodies also reported that lack of funding is a barrier to their ability to intervene in legal proceedings in practice. As such, it would seem that lack of resources may also be a barrier for equality bodies in regard to bringing proceedings in their own name.

The British Equality and Human Rights Commission indicated that it has the power to bring judicial review proceedings in its own name where there is a law or policy that breaches equality legislation. However where there is no identifiable victim that makes a complaint it can be difficult to become aware of the particular law or policy in order to instigate proceedings.

A notable potential barrier for equality bodies with mandate to review complaints is reported by the Dutch Equal Treatment Commission. The Commission is mandated to hear complaints about discrimination and to issue non-legally binding decisions. In addition, the Commission has been given the power to bring proceedings in its own name before the national courts as a means of having a discriminatory practice declared illegal, where individuals or groups are not considered capable of bringing legal actions themselves, or as a means to clarify the law. However, according to the Commission, it has never made use of this power because it considers this type of action to be in conflict with its role as an impartial decision-making body.

It is also notable that two of the equality bodies reported that they are uncertain about whether they can bring proceedings in their own name.⁵⁰ The reason given is that the equality bodies have not been given an express mandate to take legal action in their own name and that it is unclear whether national rules of civil procedure allow for them to do so.

Furthermore, as described in Chapter 2, Section 2.3, being an appointed specialised body for the promotion of equal treatment may, in some legal systems, enhance the likelihood of being allowed to take legal action in the equality body's own name. Accordingly, where equality bodies have not been given express powers to take legal action in their own name, it may be worth exploring whether national rules of civil procedure allow for these equality bodies to do so as specialised bodies for the promotion of equal treatment.

Opportunities and Opposition to Racism reported 38 cases in 2008, but none in 2009, as statistics for 2009 year are not available yet.

⁴⁶ The Austrian Ombud for Equal Treatment; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the Czech Office of the Public Defender of Rights; the Dutch Equal Treatment Commission; the Maltese National Commission for the Promotion of Equality; and the Swedish Equality Ombudsman.

⁴⁷ Reported by the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities.

⁴⁸ Reported by the French High Commission against Discrimination and for Equality.

⁴⁹ Reported by the Equality Commission for Northern Ireland.

⁵⁰ The Danish Institute for Human Rights and the Estonian Gender Equality Commissioner.

Finally, a reason why some equality bodies do not make use of their power to bring proceedings in their own name may simply be that it is found best to deal with the specific issue out of court. For example, in 2008 and 2009, whenever the Equality Commission for Northern Ireland and the British Equality and Human Rights Commission became aware of potentially discriminative conduct in areas where it has power to take legal action in its own name, it gave advice to the employer or service provider and the situation was resolved without the need for the commissions to issue formal proceedings.

Chapter 5

Interventions

Where individuals take a case to court by themselves or, for example, with the help of a labour union, equality bodies may have an impact on the development of the law by intervening in the court proceedings. In fact, it is recommended by both legal academics and practitioners that equality bodies should have the ability to intervene in court cases that raise issues of discrimination.⁵¹

The terminology used in different legal systems for the type of interventions that the equality bodies may make use of to have an impact on the development of anti-discrimination law is manifold; moreover, some of the terms used have divergent and/or overlapping meanings. Some examples are “interventions in support of a party”⁵², “third party interventions”⁵³, and “*amicus curiae* interventions”⁵⁴. In this report, in order to avoid conceptual confusion, the term “interventions” is used as an umbrella term for all types of interventions that equality bodies may employ to have an impact on a specific case for the development of the law. However, where a specific term is applied in case law or legislation, that term is reiterated as such.

5.1 The use of interventions in practice

13 of the 25 equality bodies that participated in the Survey stated that they can intervene in national proceedings before a court and/or a tribunal,⁵⁵ whereas the rest of the equality bodies reported that they do not have power to do so.⁵⁶

Considering the number of equality bodies that have power to intervene in legal proceedings, it is remarkable that only three equality bodies reported to have made use of this power in practice in 2008 and 2009.⁵⁷ The British Equality and Human Rights Commission, which reported 32 interventions, seems to be the only equality body that applies this approach to a greater extent. One of the reasons for this may be that there is generally a strong tradition for utilising interventions in legal systems employing common law.

⁵¹ Moon, G., *Enforcement Bodies, Non-Discrimination Law (2007)* (D. Schieck, L. Waddington and M. Bell, Eds.) Hart Publishing p. 904; Barry, E., *Interventions and Amicus Curiae Applications, Strategic Enforcement: Powers and Competences of Equality Bodies (2006)* (S. Obura and F. Palmer, Eds.) Migration Policy Group p. 41; O’Cinneide, C., *The Racial Equality Directive as Basis for Strategic Enforcement, Strategic Enforcement and the EC Equal Treatment Directives. Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies. Report of the sixth expert’s meeting, hosted by the Irish Equality Authority, 4-5 March 2004* (J. Cormack, Ed.) p. 53.

⁵² See e.g., the Danish Administration of Justice Act section 252.

⁵³ Arshi, M. and O’Cinneide, C., *Third-Party Interventions: the Public Interest Reaffirmed, Public Law (2004)* 69-77, see especially p. 10 (footnote 10), where “third party interventions” are distinguished from other types of interventions under British law.

⁵⁴ Krislov, S., *The Amicus Curiae Brief: From Friendship to Advocacy*, in *The Yale Law Journal (1963)* Vol. 72, No. 4 pp 694-721

⁵⁵ The British Equality and Human Rights Commission, the Bulgarian Commission for the Protection against Discrimination; the Czech Office of the Public Defender of Rights; the Croatian Office of the Ombudsman; the Danish Institute for Human Rights; the Hungarian Equal Treatment Authority; the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities; the Maltese National Commission for the Promotion of Equality; the Norwegian Equality and Anti-Discrimination Ombud; the French High Commission against Discrimination and for Equality; the Irish Equality Authority; the Equality Commission for Northern Ireland; and the Slovak National Centre for Human Rights.

⁵⁶ The Austrian Ombud for Equal Treatment; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the Bulgarian Commission for Protection against Discrimination; the Danish Board of Equal Treatment; the Estonian Gender Equality Commissioner; the Finish Ombudsman for Minorities; the Finish Ombudsman for Equality; the Luxembourgish Centre for Equal Treatment; the Swedish Equality Ombudsman; the Dutch Equal Treatment Commission; and the Romanian National Council for Combating Discrimination.

⁵⁷ The British Equality and Human Rights Commission (32); the Norwegian Equality and Anti-Discrimination Ombud (2); the Equality Commission for Northern Ireland (1). The Irish Equality Authority replied that it has intervened in two cases over the last ten years.

The main barriers to making use of the power to intervene in practice, as reported by the equality bodies, are lack of funding or other resources;⁵⁸ the possibility of costs being awarded against the equality body;⁵⁹ and courts being reluctant to permit interventions.⁶⁰

The British Equality and Human Rights Commission pointed out an interesting limitation in regard to interventions. According to the Commission, sometimes courts only accept written submissions from the intervening party. This inability of the Commission to make oral submissions in some cases prevents it from providing submissions on issues that may arise during the proceedings. Another potential barrier mentioned is that if the court believes that the Commission as an intervener will not add to the arguments of the claimant or other interveners, it may refuse permission to intervene.

5.2 Intervening without express powers to do so

12 out of the 25 equality bodies participating in the Survey stated that they do not have the power to intervene in national legal proceedings. It must be assumed that the reason for this is that they have not been given express power to do so as part of their mandate and because they do not consider themselves capable of doing so under national rules of civil procedure.

Furthermore, as stated in Chapter 2, Section 2.3, in some legal systems there is a tradition for allowing bodies to intervene in cases where the body has a special expertise and/or interest in regard to the issues raised in the case. Where this is the case, equality bodies may seek to intervene in discrimination cases as specialised bodies designated to combat discrimination and promote equal treatment. As mentioned, the Irish Equality Authority did so successfully in the *Doherty* case.⁶¹

Several of the equality bodies with no power to intervene responded that there is no tradition for allowing non-parties to intervene for the purpose of assisting the court in relation to the issues in the proceedings. According to these equality bodies, in order for them to be able to do so, a change in national rules of civil procedure is required.

In this regard, the Hungarian Minorities Ombudsman provides an inspirational counterexample. In Hungary, there is no tradition for allowing submissions by non-parties on how the law shall be interpreted,⁶² and the Ombudsman does not have any express statutory authorisation to intervene in court cases. Nonetheless, it follows from the Ombudsman's Annual Report 2005 that the Ombudsman filed a brief on its understanding of Hungarian anti-discrimination law in a court case from 2005, before the Debrecen Appeals Court, concerning segregation of Roma children in local schools. Careful attention was paid by the Ombudsman not to comment on the specific case or to what the outcome of the case should be, so that the brief would appear as a traditional *amicus curiae* brief. The rationale for filing the brief was

⁵⁸ The Bulgarian Commission for the Protection against Discrimination; the Maltese National Commission for the Promotion of Equality; the Irish Equality Authority; and the Slovak National Centre for Human Rights. Some additional equality bodies also reported that lack of funding is an issue in this regard, even though these equality bodies reported that they do not have power to intervene. It must be assumed that this means that if these equality bodies were to be given power to intervene, lack of funding would also be an issue for them.

⁵⁹ The Bulgarian Commission for the Protection against Discrimination; the Czech Office for the Public Defender of Rights; the Maltese National Commission for the Promotion of Equality; the Equality Commission for Northern Ireland; and the Slovak National Centre for Human Rights.

⁶⁰ The Bulgarian Commission for the Protection against Discrimination; the Croatian Office of the Ombudsman's; and the Irish Equality Authority.

⁶¹ *Doherty & anor. v. South Dublin County Council & ors* [2006] IESC 57. The former British equality bodies: the Commission for Racial Equality; the Equal Opportunities Commission and the Disability Rights Commission, did not have express powers to intervene. However, they managed to do so successfully in court cases concerning discrimination. A poignant example is the three commissions' joint intervention in the case of *Igen Ltd. & Others v Wong, Chamberlin & Another v Emokpae, and Brunel University v Webster* [2006] IESC 57, where the commissions had an impact on the development of the EU rules on the burden of proof and their use in British law. It is to be noted that although the commissions did not have the express power to intervene, pursuant to the rules of the civil and criminal courts, the commissions could apply to the courts to intervene and often permission was granted.

⁶² Cp. Bodrogi, B, Legal Standing – The Practical Experience of a Hungarian Organisation, *European Anti-Discrimination Law Review* (2007) 23-29 p. 26.

that the Ombudsman saw it as a natural task for a designated equality body as required under EU law to assist the courts in the interpretation of national anti-discrimination law. The brief was admitted by the court, and the legal submission presented in the brief was relied upon by the complainant and could be discerned from parts of the court's decision as having had an effect.⁶³ As such, the Ombudsman's successful submission in the court proceedings as to how the law should be developed illustrates that intervening in cases in order to offer the court its assistance on the interpretation of anti-discrimination law may be seen as a natural part of an equality body's powers, even in countries where there is no tradition for allowing such interventions.

5.3 The ability of equality bodies to intervene as objective experts

A notable obstacle arising from the mandate of equality bodies as specialised bodies for the promotion of equal treatment in regard to intervening in legal proceedings was reported by the Belgian Centre for Equal Opportunities and Opposition to Racism. The Centre does not have the power to intervene in cases concerning anti-discrimination law. Nonetheless, in a case before the District Court of Gent filed in 2009, the Centre was formally requested by the Court to give its expert opinion in regard to the application of relevant anti-discrimination legislation in order to assist the Court in deciding the case. The Court held that there had been discrimination, but this decision was appealed by the respondent, who argued that the Centre should not have been allowed to intervene as the Centre lacks the necessary impartiality and neutrality to assist the court as an expert.⁶⁴

The Dutch Equal Treatment Commission reported a similar concern. Like the Belgian Centre, the Commission does not have express powers to intervene in cases of discrimination. According to the Commission, even if such power could be procured from its other powers, it is uncertain whether it would make use of this power because of the impartiality requirements that follows from its decision making. In other words, it seems that the Commission does not find intervening in cases compatible with its mandate to issue decisions about whether discrimination has taken place.

The potential barrier caused by some equality bodies' mandate in regard to intervening is highly relevant especially since, as will be shown in Chapter 6, the majority of the equality bodies in the Survey do have some power to hear complaints regarding discrimination.

The fact that equality bodies have a professional interest in safeguarding victims against discrimination and promoting equal treatment does not mean that they cannot provide the court with objective and qualified expert knowledge that may assist the court in reaching a reasoned decision. In this regard, equality bodies do not differ from other bodies granted leave to intervene as third parties in order to provide the court with expert knowledge within a certain field such as national human rights institutions, consumer councils, environmental organisations and the like. It is exactly because of their objectives to promote certain interests that they have accumulated unique expertise with which they can assist the court.⁶⁵ The decisive factor is how the body presents the information. Where the information submitted is relevant and well-substantiated it ought to, and is more likely to, be admitted as expert knowledge. The Hungarian Minorities Ombudsman's successful submission as an expert body, described above, is a good example of this.

Another matter is that where an equality body itself has dealt with a complaint and made a statement concerning whether discrimination has taken place and where the case subsequently proceeds to court, the equality body's prior involvement in the case may make it more difficult for it to appear as an objective expert in the court proceedings; not because it has already stated its opinion about the interpretation of the law, but because it has also

⁶³ The Hungarian Minorities Ombudsman's Annual Report 2005 pp.119-121.

⁶⁴ At the time of writing, (September 2010), a decision regarding the intervention of the Belgian Centre for Equal Opportunities and Opposition to Racism had not yet been issued.

⁶⁵ Cp. Arshi, M. and O' Cinneide, C, Third-Party Interventions: the Public Interest Reaffirmed, *Public Law* (2004) 69-77 pp. 72-73.

applied the law to the specific case. However, in practice, this will generally not limit the ability of such equality bodies to have an impact on the development of the law, as their decision or statement is usually available for the court (generally because it is admitted by the complainant). Nonetheless, the situation may arise where an equality body may still wish to provide the court with information in regard to the case. For example, this may occur if the case raises new issues in court or where the equality body wishes to make additional comments to the court as its decision has been reversed by an intermediate administrative or judicial decision. Further, the equality body may want to intervene in the court proceedings in order to try to facilitate obtaining a preliminary ruling from the CJEU. In such situations, where the equality body has itself decided the case, and where the same incident is tried in court, the equality body's prior involvement in the case may in some legal systems have a limiting effect on its ability to intervene in the court proceedings.

This barrier may be overcome in practice in Member States by equipping the equality body with power to enforce its own decision in court. For example, when the Danish Equal Treatment Board⁶⁶ makes a decision that discrimination has taken place, and when the respondent does not comply with its findings, the Board has powers to file a suit in the ordinary courts on behalf of the complainant as a means of enforcing its own decision. Accordingly, the Board is given the opportunity to present its understanding of the law in court.

Finally, if an equality body intervenes in legal proceedings concerning anti-discrimination law, attention must be paid to the fact that submissions will generally be in favour of the complainant. As a result, it follows from the right to fair proceedings under Article 6(1) of the European Convention on Human Rights that the respondent shall be allowed to reply to the submission of an equality body.⁶⁷

⁶⁶ It is noted that as of January 2011, the Danish Board of Equal Treatment can no longer be considered an equality body in the sense that it has not been mandated to promote equal treatment as a specialised equality body as required under EU law. This has been made clear under Danish law by appointing the Danish Institute for Human Rights as specialised equality body in regard to sex as of January 2011. Prior to this, it was unclear whether the Board of Equal Treatment was meant to lift part of the EU law requirement to establish one or more equality bodies for the promotion of equal treatment irrespective of sex by assisting victims of sex discrimination. For further information hereon, see Jacobsen, B., *Assistance to Victims of Discrimination by Equality Bodies of the EU Member States. A Scandinavian Perspective* (2010) DJØF Publishing pp. 294-296

⁶⁷ See *Vermeulen v. Belgium* (Application no. 19075/91) Judgment of 20 February 1996 paras. 28 and 30-33. For further information on this issue, see Jacobsen, B., *Assistance to Victims of Discrimination by Equality Bodies of the EU Member States. A Scandinavian Perspective* (2010) DJØF Publishing pp. 45-47.

Chapter 6

Producing decisions or recommendations

The majority of the equality bodies surveyed have some power to hear individual complaints about discrimination and to produce legally binding decisions or non-legally binding statements or recommendations. When doing so, the equality bodies themselves apply national anti-discrimination law to specific situations and state whether discrimination has taken place. As such, producing decisions or making recommendations may be an effective means for equality bodies to have an impact on the development of national law. This is especially the case where the equality body issues legally binding decisions. Further, as described in Chapter 7, if an equality body makes legally binding decisions in individual cases regarding discrimination, there is a possibility that they may be entitled to refer questions to the CJEU for a preliminary ruling.

The Survey showed that the majority of the equality bodies questioned have some powers to review individual complaints: three equality bodies⁶⁸ reported that they can make legally binding decisions, and 13 equality bodies⁶⁹ stated that they can make non-legally binding recommendations. One equality body reported that it can make both legally binding decisions and non-legally binding recommendations.⁷⁰ Seven equality bodies reported that they can neither issue decisions nor recommendations.⁷¹

It is clear from the number of decisions and recommendations reported for 2008 and 2009 that equality bodies generally produce far more decisions and recommendations than they represent or support individuals in legal proceedings before a court or tribunal or than they take legal action in their own name. Several equality bodies issued legally binding decisions or made non-legally binding recommendations in over 100 cases in 2008 and in 2009, and some equality bodies produced considerably more.⁷²

Some decisions or recommendations made by equality bodies can be appealed to a tribunal and/or can be tried subsequently in court.⁷³ Further, in regard to the equality bodies that can make non-legally binding recommendations, it must be assumed that the dispute, which these recommendations are based on, can generally be tried before a tribunal or ordinary court. What is not clear from the Survey is how often the decisions or recommendations of equality bodies are appealed or tried in court and what the outcome of these cases are. In other words, the Survey does not reveal the extent to which decisions and recommendations made

⁶⁸ The Bulgarian Commission for Protection against Discrimination; the Danish Board of Equal Treatment; and the Hungarian Equal Treatment Authority.

⁶⁹ The Belgian Centre for Equal Opportunities and Opposition to Racism; the Croatian Office of the Ombudsman; the Czech Office of the Public Defender of Rights; the Estonian Gender Equality Commissioner; the Finish Ombudsman for Minorities; the Finish Ombudsman for Equality; the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities; The Luxembourgish Centre for Equal Treatment; the Maltese National Commission for the Promotion of Equality; the Norwegian Equality and Anti-Discrimination Ombud; the French High Commission against Discrimination and for Equality; the Dutch Equal Treatment Commission; and Slovak National Centre for Human Rights.

⁷⁰ The Romanian National Council for Combating Discrimination.

⁷¹ The Austrian Ombud for Equal Treatment; the Belgian Institute for the Equality of Men and Women; the British Human Rights and Equality Commission; the Danish Institute for Human Rights; the German Federal Anti-Discrimination Agency; the Irish Equality Authority; the Equality Commission for Northern Ireland; and the Swedish Equality Ombudsman.

⁷² For example, the Belgian Centre for Equal Opportunities and Opposition to Racism produced recommendations in 334 cases in 2008 (its statistics for 2009 are not available yet); the Bulgarian Commission for the Protection against Discrimination made 182 legally binding decisions in 2008 and 245 in 2009; the Croatian Office of the Ombudsman reported 172 recommendations in 2009; the Finish Ombudsman for Equality made 230 recommendations in 2008 and 220 recommendations in 2009; the Hungarian Equal Treatment Authority made 256 legally binding decisions in 2008 and 268 legally binding decisions in 2009; the Norwegian Equality and Anti-Discrimination Ombud made 172 recommendations in 2008 and 313 in 2009; the French High Commission against Discrimination and for Equality made 305 non-legally binding deliberations in 2008 and 406 deliberations in 2009; and the Dutch Equal Treatment Commission made 155 non-legally binding decisions in 2008 and 129 in 2009.

⁷³ E.g., the non-legally binding recommendations of the Norwegian Equality and Anti-Discrimination Ombud, which can be appealed to the Norwegian Equality and Anti-Discrimination Tribunal. The decisions of the Tribunal can be tried in court.

by equality bodies are overturned. However, given how often equality bodies make use of their power to decide or make recommendations in individual cases in practice, it must be assumed that the power of equality bodies plays a significant factor in regard to the ability of the equality bodies to influence the law.

Chapter 7

Preliminary rulings by the Court of Justice of the European Union

A pivotal mechanism in regard to ensuring uniform interpretation and application of the EU anti-discrimination directives across all Member States is the ability, and sometimes obligation, of the national courts and tribunals to refer questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling on the interpretation of EU law.

Equality bodies may play an important role in regard to the preliminary ruling procedure. This is firstly by facilitating important cases being brought before the national courts and tribunals so that questions can be referred to the CJEU for a preliminary ruling where necessary. Secondly, equality bodies can participate directly or indirectly in the CJEU's preliminary ruling procedure as a means to assist the CJEU with the clarification of the provisions of the anti-discrimination directives and establishing important precedents relating to strengthening protection against discrimination.

In this chapter, the CJEU's preliminary reference procedure is described, as well as how equality bodies may take part in this procedure as a means of having an impact of development of EU anti-discrimination directives.

7.1 The preliminary reference procedure

According to TFEU Article 267 (ex Article 234 TEC), any national court or tribunal of a Member State may refer questions pertaining to the interpretation of EU law to the CJEU for a preliminary ruling, provided the national court or tribunal considers this necessary in order to give judgment.⁷⁴ Where the court's or tribunal's decision is not subject to appeal, it is obligated to refer such questions to the CJEU for a preliminary ruling.⁷⁵

The issue of what constitutes a "court or tribunal" is a matter of EU law. Accordingly, the status of the relevant body under national law is not decisive.⁷⁶ In determining whether or not a body is a "court or tribunal of a Member State", the CJEU takes a number of issues into account: namely, whether the tribunal or court is established by law; whether it is permanent; whether its jurisdiction is compulsory; whether its procedure is *inter partes*; whether it applies rules of law; and whether it is independent.⁷⁷

These criteria are not exhaustive and they are not all given the same importance. For example, in a case regarding the ability of the German Federal Supervisory Board to refer a question to the CJEU for a preliminary ruling, it was argued that, *inter alia*, the Board should not be allowed to do so, since it employed an investigatory procedure. The CJEU stated that the *inter partes* criterion was not absolute and that, in any event, the parties to the Board's procedure had to be heard before any decision was made. Accordingly, the fact that the Board's procedure was not strictly adversarial did not prevent it from being regarded as a "court or tribunal" within the meaning of the EU preliminary procedure.⁷⁸ The fact that the criteria that the procedure must be *inter partes* is not absolute is relevant in regard to the

⁷⁴ TFEU Article 267(2)

⁷⁵ Cf. TFEU Article 267(3), which states that "[w]here any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

⁷⁶ See e.g. C-61/65 *G. Vaassen-Göbbels (a widow) v. Management of the Beambtenfonds voor het Mijnbedrijf*, referenced to in Schermes, H. G. and D. F. Aelbroeck: *Judicial Protection in the European Union* (2001) Kluwer Law International p. 254.

⁷⁷ See e.g. C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*. For further information on the criteria, see Tridimas, T: Knocking on heaven's door: fragmentation, efficiency and defiance, (2003) *CMLRev.* Vol. 40 9-50 pp. 27-34.

⁷⁸ Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH* paras. 30-31.

ability of the quasi-judicial equality bodies to meet the definition of “court or tribunal, since some of these equality bodies are responsible for the investigation of the case.”⁷⁹

It is up to the national court or tribunal to assess whether a preliminary ruling is required. A national court may choose not to refer a question to the CJEU for a preliminary ruling where the EU law in question has already been interpreted by the CJEU (the so-called “acte éclairé” doctrine)⁸⁰ or where the correct application of the EU law in question is so obvious as to leave no scope for reasonable doubt (the so-called “acte claire” doctrine)⁸¹.

In practice, it is often those who are party to the national proceedings that request that a question is referred to the CJEU for a preliminary ruling. However, questions concerning the interpretation of EU law may also be referred to the CJEU on the initiative of the national court or tribunal.⁸² Further, the national court or tribunal is not dependent on national rules allowing for it to do so.⁸³

When a preliminary request is made to the CJEU, the parties to the national proceedings are entitled to make written observations and to appear at the oral hearing.⁸⁴ Whether or not a person is a party to the national proceedings is a matter for the law of the national court.⁸⁵ The CJEU has accepted submissions from bodies that have been given leave to intervene by the national courts, including national equality bodies, and non-governmental organisations submitting observations in the interest of the public.⁸⁶

In addition, interventions in the proceedings before the CJEU may be made by the European Commission, by Member States (even when the national proceedings do not originate from the Member State making the intervention) and, where appropriate, the institution, body, office or agency which adopted the act, the validity or interpretation of which is in dispute.⁸⁷

When the CJEU receives statements from parties and interveners, it makes a preliminary ruling on the interpretation or validity of the EU law in order to enable the national court or tribunal to decide the case. The CJEU does not decide on the facts raised in the national proceedings; this is the task of the national court or tribunal. The preliminary rulings of the CJEU are binding on the national court or tribunal for which the decision is given, and are, in practice, precedent-setting for other national courts and tribunals across Member States in similar cases.⁸⁸

7.2 The ability of equality bodies to have an impact on the preliminary ruling procedure

7.2.1 Participating in CJEU procedure as a party to national proceedings

The most direct way for equality bodies to participate in the preliminary ruling procedure of the CJEU is by being a party to national proceedings before a court or tribunal. As described in Chapter 3 and 4, the majority of the equality bodies surveyed have the power to do so, either

⁷⁹ This is, for example, the case in regard to the Danish Equal Treatment Board.

⁸⁰ See e.g. Case C-337/95 *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV* para. 29.

⁸¹ See C-283/81 *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* para. 16.

⁸² See e.g. C-166-73 *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratssstelle für Getreide und Futtermittel*, rereferenced to in Schermes, H. G. and D. F. Aelbroeck: *Judicial Protection in the European Union* (2001) Kluwer Law International p. 275.

⁸³ See e.g. C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, referenced to in Craig, P. and G. de Burca, *EU law. Text, Cases, and Materials* (2008) Oxford University Press p. 466.

⁸⁴ Article 23(2) of the Statute of the Court of Justice.

⁸⁵ Case 9/74 *Casagrande v. Landeshauptstadt München*.

⁸⁶ See e.g. C-17/05 *Cadman v. Health & Safety Executive*, where the former British Equal Opportunities Commission was an intervener, and C-192/99 *R v. Secretary of State for the Home Department ex parte Manjit Kaur*, where the non-governmental British human rights organisation Justice was an intervener.

⁸⁷ Article 23 (2) of the Statute of the Court of Justice. ⁸⁷ Where a preliminary ruling concerns a subject matter that is covered by an agreement entered into between a non-member state and the Council, the non-member state may submit observations to the CJEU where agreement provides for this, cf. Article 23 (4) of the Statute of the Court of Justice.

⁸⁸ See Schermes and Aelbroeck: *Judicial Protection in the European Union* (2001) Kluwer Law International p. 305.

by representing individuals in legal proceedings before courts and/or tribunals or by taking legal action in their own name. Further, as described in Chapter 5, approximately half of the equality bodies participating in the Survey have the power to intervene in national court proceedings. As described in Section 7.1, this may also be sufficient to meet the requirement of being a party to the national proceedings.

The Survey asked whether any of the equality bodies questioned had ever taken part in national proceedings where a reference had been made to the CJEU: four equality bodies answered in the affirmative.⁸⁹ The cases mentioned by these equality bodies include the *Johnston* case⁹⁰, the *Coleman* case⁹¹ and the *Feryn* case⁹², which all had a decisive impact on the development of EU anti-discrimination law.

Considering that equality bodies have assisted victims of discrimination through legal proceedings and taken legal action in their own name in more than 400 cases in 2009 and 300 cases in 2008, the number of cases where a reference was made to the CJEU for a preliminary ruling, is remarkably low.

As stated in Section 6.1, it is for the national court or tribunal to decide whether it is necessary to refer a question to the CJEU in order for it to make a judgment. In order to uncover whether this constitutes a barrier for equality bodies in regard to having questions referred to the CJEU for a preliminary ruling, the Survey asked whether any equality bodies had ever taken part in national proceedings where the national court had refused to refer an issue to the CJEU. All except two of the equality bodies answered “no” to this. The Belgian Centre for Equal Opportunities, in a recent decision from 2010, was denied by a labour court to have a question referred to the CJEU. The British Equality and Human Rights Commission has also participated in a number of proceedings where the court or tribunal refused a request for a reference. For example, in 2008 a request for a reference relating to the application of the burden on proof provisions in victimisation cases was refused.⁹³

Thus, reluctance by the national courts to refer preliminary rulings to the CJEU may be one factor why so few equality bodies have taken part in national proceedings where a reference was made to the CJEU. However another reason which seems more likely in most countries is simply that the equality bodies, in practice, rarely take part in legal proceedings where it is relevant to request that a preliminary question is referred to the CJEU.

7.2.2 Referring questions to the CJEU as a “court or tribunal”

As described in Chapter 5, some of equality bodies have been given power to hear individual complaints and issue legally binding decisions about whether discrimination has taken place. This makes it relevant to examine whether these equality bodies, themselves, may refer questions to the CJEU as a “court or tribunal”.

⁸⁹ The Belgian Centre for Equal Opportunities and Opposition to Racism initiated and took part in C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*. The British Equality and Human Rights Commission referred to two cases: C-303/06 *Coleman v. Attridge Law* and C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* (aka the *Heyday* case). The Equality Commission for Northern Ireland reported that its predecessor, the Equal Opportunities Commission for Northern Ireland, supported complainants in bringing two cases before the CJEU: C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* and C-342/93 *Gillespie v. Northern Health and Social Services Board*. The Swedish Equality Ombudsman referred to C-236/98 *Jämställdhetsombudsmannen v. Örebro läns landsting*, which was initiated by one of its predecessors, the Equal Opportunities Ombudsman.

⁹⁰ In C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, the CJEU established that it was in violation of EU law to deprive the complainant of the possibility of asserting her right to not be discriminated against under the principle of equal treatment by judicial process.

⁹¹ In C-303/06 *Coleman v. Attridge Law*, the ECJ established that the prohibition against discrimination also protects against discrimination by association.

⁹² In C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn NV*, the ECJ established discriminatory acts without identifiable witnesses may still constitute discrimination under the principles against discrimination.

⁹³ *Oyarce v. Cheshire County Council* [2008] WLR (D) 138.

To the knowledge of this author, the equality bodies with the power to hear complaints and make legally binding decisions are all established by law; they are permanent; they shall apply national anti-discrimination law; and they are, at least to some degree, adversarial.⁹⁴ Further, it follows from the EU law requirement to establish equality bodies that they must be “independent” when carrying out their functions. Assuming that the equality bodies with the power to hear complaints can also be considered to be independent in their decision making, and given the range of bodies that the CJEU has considered to meet the definition of “court or tribunal”, as described in Section 6.1, it may well be that these equality bodies qualify as bodies that can refer preliminary rulings to the CJEU while handling individual complaints.

In addition, as stated in Section 7.1, it follows from the Statute of the CJEU that a body may be allowed to submit statements to the CJEU where the issue referred to the CJEU concerns a decision made by that body.⁹⁵ Accordingly, if a legally binding decision issued by an equality body is tried by an ordinary court, and if this court refers a question to the CJEU for a preliminary ruling, it may well be that the equality body is allowed to intervene in the CJEU’s preliminary reference procedure.

Nonetheless, according to the Survey, none of the equality bodies with the power to make legally binding decisions have attempted to refer a question to the CJEU for a preliminary ruling. One of the equality bodies⁹⁶ stated that it cannot do so; one⁹⁷ stated that it is uncertain whether it may do so; and one of the equality bodies⁹⁸ stated that it assumes it might be able to do so.

As the equality bodies with power to make legally binding decisions became operational fairly recently and are still getting accustomed to their mandate, these responses are understandable. Nonetheless, it seems that uncertainty regarding the ability of these equality bodies to refer questions to the CJEU for preliminary rulings and the reported rejections may constitute a barrier for making use of this mechanism where possible.

Notably, in June 2010, (after this Survey was carried out) the Advisory Board of the Hungarian Equal Treatment Authority issued an opinion according to which the Equal Treatment Authority, as a “court or tribunal”, has the right to refer questions to the CJEU for a preliminary ruling.⁹⁹

7.2.3 Making submissions to the European Commission or the national governments

As stated in Section 7.1, it follows from the preliminary reference procedure that the European Commission and Member States are entitled to submit statements to the CJEU on EU legal issues in dispute. In cases regarding the anti-discrimination directives, equality bodies can take advantage of this by submitting their observations on the interpretation of the directives to either the European Commission or to their government with the request that they communicate these viewpoints to the CJEU.

In the Survey, two equality bodies reported that they have made use of this approach: the French High Commission against Discrimination and for Equality forwarded a submission to the French government in relation to a CJEU preliminary ruling; however, the French government did not find it appropriate to intervene. The Swedish Equality Ombudsman reported that one of its predecessors, the Equal Opportunities Ombudsman, apparently made a similar request to the Swedish government.¹⁰⁰

⁹⁴ The Danish Board of Equal Treatment is responsible for the investigation of the case when handling individual complaints. As such, it could be argued that its proceedings are not *inter partes*. However, when conducting investigations and before it makes a decision, both parties have a right to be heard and to comment on each others’ statements.

⁹⁵ Article 23 (2) of the Statute of the Court of Justice.

⁹⁶ The Romanian National Council for Combating Discrimination.

⁹⁷ The Bulgarian Commission for Protection against Discrimination.

⁹⁸ The Danish Equal Treatment Board.

⁹⁹ Opinion No. 288/4/2010, issued 21 June 2010. It is noted that if the legally binding decision of the Hungarian Equal Treatment Authority is challenged before the courts, the Equal Treatment Authority becomes a party in the court procedure. As such, the Equal Treatment Authority will also be eligible to submit statements to the CJEU.

¹⁰⁰ The outcome of the Equal Opportunities Ombudsman’s request could not be recalled.

Two other equality bodies, the Belgian Centre for Equal Opportunities and Opposition to Racism and the Romanian National Council for Combating Discrimination, reported that they have been requested by their governments to provide points of view as experts in regard to specific preliminary rulings. Other equality bodies could draw inspiration from this example by suggesting to their governments that they are heard as experts by the government in cases brought before the CJEU.

Apparently, none of the equality bodies participating in the Survey have tried to have an impact on a preliminary ruling by submitting their observations to the EU Commission.¹⁰¹

7.2.4 Cooperating with an equality body that is part of a CJEU proceeding

Where an equality body is a party to the national proceedings and, therefore, capable of submitting its observations to the CJEU as part of the preliminary ruling procedure, other equality bodies may have an indirect impact on the preliminary ruling procedure by providing information on the implementation of the anti-discrimination directives in their Member States to the equality body that is a party to the CJEU procedure.

In the Survey, when asked whether the equality bodies would be interested in providing information about the implementation of the EU anti-discrimination directives in their Member States to an equality body taking part in a CJEU preliminary reference procedure, 19¹⁰² of the 25 equality bodies answered in the affirmative and none of the remaining equality bodies¹⁰³ expressed any opposition to employing such an approach.

As pointed out by the British Equality and Human Rights Commission in its response, receiving input from other equality bodies in connection to a CJEU preliminary reference procedure may be particularly useful if the equality body participating in the preliminary reference procedure before the CJEU argues that a different interpretation of the EU anti-discrimination directives is valid, and if the information provided by other equality bodies show that this interpretation of the directives is already employed in some of the other Member States or supported by other equality bodies.

For example, the British Equality and Human Rights Commission is currently intervening in two proceedings before the national courts where references may be made to the CJEU.¹⁰⁴ The cases relate to whether or not volunteers are protected from discrimination in relation to employment and occupation under the Employment Equality Directive. Equinet's Working Group on Dynamic Interpretation has been involved in providing the Commission with evidence on the situation in the different Member States, and that evidence will be used in submissions to the national courts and in references to the CJEU (if possible).

The Hungarian Equal Treatment Authority also pointed out in its response that Equinet provides a forum where it is possible for equality bodies to exchange information on the implementation of the anti-discrimination directives in their respective Member States.

¹⁰¹ An alternative means of ensuring that EU anti-discrimination directives are implemented effectively in Member States (which was reported by the Finnish Ombudsman for Equality) is to notify the European Commission about any lacking or incorrect transposition of the directives into national law. If the Commission agrees that a Member State has not implemented EU law correctly, it may initiate proceedings against a Member State, including, if necessary by bringing the matter before the CJEU, cf. TFEU Article 258 (ex Article 226 TEC).

¹⁰² The Austrian Ombud for Equal Treatment; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; The British Equality and Human Rights Commission; the Bulgarian Commission for the Protection against Discrimination; the Croatian Office of the Ombudsman; the Danish Board of Equal Treatment; the Danish Institute for Human Rights; the Dutch Equal Treatment Commission; the Estonian Gender Equality Commissioner; the Finnish Ombudsman for Minorities; the Finnish Ombudsman for Equality; the French High Commission against Discrimination and for Equality; the Hungarian Equal Treatment Authority; the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities; the Luxembourgish Centre for Equal Treatment; the Maltese National Commission for the Promotion of Equality; the Equality Commission for Northern Ireland; the Slovak National Centre for Human Right; and the Swedish Equality Ombudsman.

¹⁰³ Five equality bodies did not provide an answer to this question and one equality body answered "do not know".

¹⁰⁴ *Masih v. Awaz FM and X v. Mid Sussex CAB*.

Two equality bodies, the Danish Institute for Human Rights and the Estonian Gender Equality Commissioner, commented that it would indeed be relevant to provide information on the national implementation of the EU anti-discrimination directives to any equality body that takes part in a CJEU preliminary reference procedure. However, it has to be kept in mind that to do so would mean to add yet another function to their work load, and that they already have to prioritise their work due to a scarcity of resources.

7.2.5 Authorising equality bodies to intervene under the Statute of the CJEU

As described above, the preliminary reference procedure only allows for equality bodies to make submissions to the CJEU if they are a party to the national proceedings or if they themselves can refer an issue to the CJEU for a preliminary ruling as a court or tribunal.

A possible approach to ensuring that equality bodies can submit observations to the CJEU in cases concerning the interpretation of the EU anti-discrimination directives (irrespective of whether they are parties to the national proceedings regarding the issue in dispute) is to enable equality bodies, under the Statute of the CJEU, to intervene in such cases in a similar manner to that of the European Commission and Member States.¹⁰⁵ A comparison can be made with the European Court of Human Rights where an organisation can apply to intervene in the proceedings provided that it is 'in the interests of the proper administration of justice' to determine the issues before the court.¹⁰⁶

It was asked in the Survey whether equality bodies, in general, should be allowed to intervene in preliminary rulings before the CJEU where the disputed issue concerns the interpretation of the EU anti-discrimination directives. 18 of the 25 equality bodies agreed to this proposition.¹⁰⁷

The main reasons provided by the equality bodies in regard to why they should generally be allowed to intervene in the CJEU's preliminary reference procedure in cases concerning EU anti-discrimination law are that equality bodies have a statutory remit under the EU anti-discrimination directives to promote equal treatment in Member States. They also explained that they have unique expertise on the application of the provisions of the directives in Member States, which the EU legal system can benefit from. As pointed out by the Romanian National Council for Combating Discrimination, if equality bodies were to be authorised to intervene before the CJEU in cases about anti-discrimination law under the Statute of the CJEU, this would mean that the Council would not have to be dependent on whether its own government includes the Council by requesting an input from the Council. The Belgian Centre for Equal Opportunities and Opposition to Racism pointed out that although it would be relevant for the equality bodies to, in general, be able to intervene in cases before the CJEU concerning anti-discrimination law, it has to be kept in mind that to do so requires the necessary staff resources.¹⁰⁸

Of the remaining equality bodies participating in the Survey, four equality bodies¹⁰⁹ did not provide an answer to this question; one equality body stated "do not know"¹¹⁰; one equality body responded that this had not been discussed internally yet¹¹¹, and one equality body¹¹² stated that if equality bodies are to be given this power, it would seem that national expert

¹⁰⁵ See Article 23 (2) of the Statute of the CJEU.

¹⁰⁶ Rule 44(3) of the Rules of Court (1 June 2010).

¹⁰⁷ The Austrian Ombud for Equal Treatment; the Belgian Centre for Equal Opportunities and Opposition to Racism; the Belgian Institute for the Equality of Men and Women; the British Equality and Human Rights Commission; the Bulgarian Commission for the Protection against Discrimination; the Danish Board of Equal Treatment; the Dutch Equal Treatment Commission; the Estonian Gender Equality Commissioner; the Finnish Ombudsman for Minorities; the Finnish Ombudsman for Equality; the French High Commission against Discrimination and for Equality; the Hungarian Equal Treatment Authority; the Hungarian Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities; the Luxembourgish Centre for Equal Treatment; the Maltese National Commission for the Promotion of Equality; the Equality Commission for Northern Ireland; the Romanian National Council for Combating Discrimination; the Slovak National Centre for Human Rights; and the Swedish Equality Ombudsman.

¹⁰⁸ The Belgian Centre for Equal Opportunities and Opposition to Racism.

¹⁰⁹ The Croatian Office of the Ombudsman; the German Federal Anti-Discrimination Agency; the Norwegian Equality and Anti-Discrimination Ombud; and the Irish Equality Authority.

¹¹⁰ The Danish Board of Equal Treatment.

¹¹¹ The Czech Office of the Public Defender of Rights.

¹¹² The Danish Institute for Human Rights.

bodies within other areas of EU law should generally be given access to intervene in the CJEU's preliminary proceedings. Since a change like this may be difficult to push through, it would seem more expedient that equality bodies make use of the ability to submit their observations to the EU Commission, as described in Section 7.2.3.

Chapter 8

Concluding observations

It is a fundamental task of equality bodies to ensure that EU anti-discrimination law is implemented uniformly and effectively in Member States. In order to fulfill this task, it is pivotal for the work of equality bodies that they are able to influence the interpretation of EU anti-discrimination law.

The Survey shows that the majority of equality bodies have been given various powers that enable them to influence the interpretation of EU anti-discrimination law. However, the Survey also shows that there is great variation in regard to how often these powers are made use of in practice and that the potential of these powers in regard to having an impact on the development of the law is not always utilised fully. On the other hand, the Survey also gives examples of good practices and potential means of enhancing the ability of equality bodies to influence the interpretation of the law.

The Survey reveals that the majority of the equality bodies questioned have been given some power to participate in legal proceedings, either by representing individuals through litigation; by taking legal action in their own name and/or by intervening in legal proceedings concerning anti-discrimination law. Where used effectively, these powers may be highly effective in influencing the interpretation of EU anti-discrimination law - both on a national level and on an EU level.

However, the Survey also shows that many equality bodies do not make use of these powers in practice: close to half of the equality bodies with power to represent individuals in legal proceedings did not make use of this power in 2008 and 2009; more than half of the equality bodies did not make use of their power to take legal action in their own name in 2008 and 2009; and only three out of the 13 equality bodies with power to intervene in legal proceedings reported that they made use of this power in practice in 2008 and 2009.

The main barrier to not making use of these powers to represent individuals in legal proceedings and to intervene in such proceedings is lack of financial and staff resources. It is fair to assume that lack of such resources also constitutes a barrier in regard to equality bodies' use of the power to take legal action in their own name.

Lessons learnt:

Equality bodies should be given adequate resources to make use of their powers to participate in legal proceedings.

Equality bodies should make use of strategic litigation, i.e., they should focus on cases that may test or clarify the law and create precedent, in order to ensure that available resources are used most effectively.

In addition, some equality bodies reported that they cannot participate in legal proceedings because they have not been given an express legal mandate to do so. Further, some equality bodies also stated that it is uncertain whether national rules of civil procedure allow for them to participate in national legal proceedings. Moreover, it has been questioned whether equality bodies should be allowed to intervene as objective experts in legal proceedings concerning anti-discrimination law, when their main objective is to promote equal treatment, *inter alia*, by providing assistance to victims of discrimination.

Experiences from other Member States show that equality bodies have been allowed to participate in legal proceedings under national rules of civil procedure, for example by taking legal action in their own name or by intervening in court cases as a third party, without express powers to do so. In one Member State, an equality body was even allowed to intervene as a third party in order to submit its observations on the interpretation of the EU

anti-discrimination directives, although there is no tradition for allowing this type of intervention in that Member State. The reason these equality bodies have been successful in participating in legal proceedings is because they, as equality bodies, have a special mandate to combat discrimination and to promote equal treatment as required under EU law.

Lessons learnt:

Equality bodies without express powers to participate in legal proceedings should seek to clarify whether they are capable of doing so under national rules of civil procedure. When doing so, it is suggested that equality bodies rely on the argument that they, as designated specialised bodies for the promotion of equal treatment, should be allowed to initiate and/or intervene in legal proceedings concerning the use of EU anti-discrimination law.

The Survey shows that the majority of equality bodies have been given power to hear individual complaints and to make legally binding decisions or non-legally binding recommendations about whether discrimination has taken place. This power does not solely enable equality bodies to influence the interpretation of EU anti-discrimination law on a national level. Where equality bodies have power to make legally binding decisions, it may well mean that the equality bodies themselves, as a “court” or “tribunal”, can refer questions to the CJEU for preliminary rulings. Nonetheless, it follows from the Survey that none of the equality bodies with power to make legally binding decisions have made use of this power in practice and that some of them are in doubt about whether this is possible.

Lessons learnt:

Equality bodies with power to hear complaints from individuals and make legally binding decisions about whether discrimination has taken place should seek to establish whether they can refer questions to the CJEU for preliminary rulings, and, if so, make use of this mechanism in practice where expedient.

Despite the various powers equality bodies have regarding participation in national legal proceedings, the amount of cases reported that equality bodies have taken part in where a reference was made to the CJEU for a preliminary ruling, is remarkably low. However, the few cases that equality bodies have participated in before the CJEU have had a decisive impact on the interpretation of EU anti-discrimination law. This makes it relevant to examine how equality bodies can provide input to the CJEU's preliminary ruling procedure in alternative ways.

Lessons learnt:

Equality bodies should be proactive and strategic in the national legal proceedings they participate in and consider whether it is appropriate for a reference to be made to the CJEU, and if so request a reference is made.

In addition, it follows from the Statute of the CJEU that equality bodies can only take part in the preliminary reference procedure when the equality body in question is a party to the national proceedings in which a preliminary question has been referred to the CJEU or where the equality body, as a “court or tribunal” is able to refer questions to the CJEU for a preliminary ruling.

However, as examined in the Survey, equality bodies may also seek to influence the CJEU's preliminary rulings by submitting their observations on the interpretation of anti-discrimination law to the European Commission or to their national governments, with the request that the Commission or the national governments communicate these observations to the CJEU.

Lessons learnt:

Equality bodies may wish to consider engaging with the European Commission regarding submissions to the European Commission for its interventions in CJEU's preliminary rulings in cases about EU anti-discrimination law.

Equality bodies may wish to consider making a request to their government that they are provided the opportunity to make submissions to the government when that government is party to a preliminary ruling concerning the interpretation of the anti-discrimination directives.

Where an equality body takes part in a CJEU preliminary ruling procedure (for example because it is part of the national proceedings in dispute), other equality bodies may assist the concerned national equality body by submitting information on how the directives are employed in practice in their Member State. This also enhances the ability of equality bodies that are not directly involved in the CJEU preliminary ruling procedure to influence the interpretation of EU anti-discrimination directives. According to the Survey, the majority of the equality bodies questioned are interested in making use of this approach. As pointed out in the Survey, Equinet is an appropriate forum for this exchange of information.

Lessons learnt:

Equinet should develop a practice of gathering advice and evidence from equality bodies on the use of the directives in their Member States when a member organisation is taking part in a CJEU preliminary ruling on the interpretation of EU anti-discrimination directives.

Finally, despite these various alternative means of influencing the CJEU's preliminary rulings, it may often be that equality bodies are prevented from providing any input to the CJEU in cases concerning the interpretation of EU anti-discrimination directives; for example where an equality body is not party to the national proceedings, and where its government/the European Commission has not found it relevant or appropriate to include information submitted by the equality body to the CJEU.

As pointed out by the equality bodies in the Survey, equality bodies have a statutory remit under the EU anti-discrimination directives to promote equal treatment in Member States. It is also clear from the Survey that they have unique expertise on the application of the provisions of the directives in the Member States, which the EU legal system can benefit from. The majority of the equality bodies surveyed are of the opinion that they generally should be allowed to make submissions to the CJEU in preliminary ruling procedures concerning the interpretation of the EU anti-discrimination directives, even when they are not a party to the national proceedings in which the interpretation of EU law is in dispute.

Lessons learnt:

The European institutions should consider whether equality bodies should be permitted under the Statute of the CJEU to make submissions to the CJEU in all cases concerning the interpretation of the anti-discrimination directives.

Annex 1

Survey

1. Background

The Dynamic Interpretation Working Group

1.1 Equinet's working group on Dynamic Interpretation focuses on how to interpret the legal concepts and issues laid down by EU anti-discrimination Directives as well as how national legislation has implemented those Directives in order to secure harmonised and maximised levels of equality in the EU. The working group consists of legal experts working for national equality bodies in order to ensure a practical approach concerning how EU and national laws are applied in practice.

1.2 A key aspect of the work involves the consideration of real cases and comparing the application of the law in different Member States to those facts. The outcomes are analysed and presented in a report. This approach permits the comparison of different national solutions to the cases; which achieves a number of objectives:

- Identifying patterns in the way in which Directives have been implemented and applied in national laws;
- Identifying potential gaps in protection or areas requiring legal clarification in the Directives;
- Identifying potential and existing legislative gaps in national legal systems in the manner in which the Directives have been implemented, and;
- Identifying issues where litigation in the European Court of Justice (ECJ) may be appropriate to clarify the scope and meaning in the provisions in the Directives.

1.3 Recently the work of the Group has expanded into examining how equality bodies can in practice be involved in influencing the interpretation of EU and national equality law in national courts and by references to the European Court of Justice for preliminary rulings. This work is being taken forward in 2010 by conducting this survey and by developing a strategic litigation plan which can be used by equality bodies.

2. Purpose of the survey

2.1 The purpose of this survey is to research how equality bodies can influence the interpretation of EU and national equality law by means of litigation and related procedures both at domestic level and in the European Court of Justice. The data collected will be analysed to ascertain the different types of powers of equality bodies; the frequency of use of those powers; any barriers that equality bodies face in using those powers; and what conclusions can be made in relation to those powers.

2.2 The analysis will form the basis of a report that will be distributed to all Equinet members and the European Commission. This report will be an important source of evidence for Equinet members and external stakeholders on how equality bodies are currently involved in interpreting the law and what changes in legislation, policies or practices may be appropriate either at national level or in the European Court of Justice procedures.

3. Powers of equality bodies and relevant research

3.1 The minimum requirement on Member States is to have one or more bodies for the promotion of equality.¹¹³ These are required to provide independent assistance to victims of discrimination in pursuing their complaints about discrimination; conduct independent surveys concerning discrimination; and publish independent reports and recommendations. In relation

¹¹³ The Race Directive 2000/43/EC, the Gender (Recast) Directive 2006/54/EC and the Gender (Goods, Facilities and Services) Directive 2004/113/EC. There is however no requirement for Equality Bodies in relation to the Employment Directive 2000/78/EC.

to the Recast Gender Directive there is also an additional requirement to exchange information at the appropriate level with corresponding European bodies.¹¹⁴

3.2 This survey focuses on the first aspect of equality bodies powers in relation to providing independent assistance to victims of discrimination in pursuing their complaints of discrimination as this is the key way in which equality bodies are involved in influencing the interpretation of the law at domestic and EU levels.

3.5 There have been several studies over the last four years that have considered in some way these issues. For example:

- the “European Anti-Discrimination Law Review” analysed a number of powers of equality bodies;¹¹⁵
- the “Catalysts for Change” Report¹¹⁶ examined the competencies and mandates of equality bodies but only with respect to the Race Directive;
- the Equinet survey and report by the Strategic Enforcement Working Group on powers and competences of equality bodies which considered a range of strategic enforcement powers extending from litigation powers to investigations and positive duties to promote equality.¹¹⁷

3.6 This research is important for a number of reasons:

- it will be the first survey and report that focuses on equality bodies’ powers and practical involvement in the interpretation of equality law which will benefit equality bodies directly;
- it will only concentrate on the powers of equality bodies to influence the interpretation of equality law through litigation and not other powers, in order to be more focused;
- it will consider what barriers are currently faced by equality bodies in this role;
- it will update previous research, which is approximately four years old, to take into consideration new developments such as changes in the powers of equality bodies and the development of ECJ litigation by some equality bodies;
- it will analyse for the first time the ability of equality bodies to be involved in preliminary rulings before the ECJ which will also inform future strategic litigation in the ECJ by equality bodies with possible involvement of Equinet.

4. Proceedings before the European Court of Justice

4.1 The preliminary ruling system is a fundamental mechanism of the EU law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States. The procedure is therefore an important mechanism to interpret the meaning and scope of provisions in the Equality Directives.

4.2 Under the preliminary ruling procedure the Court's role is to give an interpretation of Community law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court to decide issues of fact raised in the main proceedings.

4.3 Any national court or tribunal may refer a question or questions to the Court on the interpretation of the rule of Community law if it considers it necessary to do so in order to

¹¹⁴ Article 20(2)(d) of the Recast Directive.

¹¹⁵ November 2006 edition

¹¹⁶ Catalysts for Change? - Equality bodies according to Directive 2000/43/EC, March 2006

¹¹⁷ Equinet, Report 2006.

resolve a dispute brought before it. It is not necessary for the parties in the case to raise the question, the national court may do so of its own motion.

4.4 The parties to the national proceedings are entitled to make both written observations and to appear at the oral hearing.¹¹⁸ Whether or not a person is a party is a matter for the law of the national court.¹¹⁹ Written and/ or oral submissions have been accepted from parties who have been given leave to intervene by the national court, including national equality bodies¹²⁰, and non-governmental organisations submitting observations in the public interest.¹²¹

4.5 Interventions in the proceedings of the European Court of Justice may be made by the European Commission and by Member States even where the national proceedings do not originate from the Member State making the intervention. However there are no grounds for allowing the intervention of a party (such as a national equality body) that is not a party to the national proceedings. It is therefore important for equality bodies to become parties to the national proceedings (by representing the individual, bringing proceedings in their own name, or by intervening in the proceedings) where this is possible under national law.

¹¹⁸ Article 20 of the Statute of the Court of Justice and Article 104(4) of the Rules of Procedure.

¹¹⁹ Case 9/74 Casagrande v Landeshauptstadt Munchen

¹²⁰ Case C-17/05, Cadman v Health & Safety Executive, where the British Equal Opportunities Commission was an intervener.

¹²¹ Case 192/99 R v Secretary of State for the Home Department ex parte Manjit Kaur where the non-government British human rights organisation Justice was an intervener.

SURVEY

1. Organisational Information:

1.1 What is the name of your organisation?

1.2 Contact details of the person completing the survey
Name, position, email, phone number

1.3 On what grounds of equality does your organisation provide legal assistance?

- Age
- Disability
- Gender
- Transgender
- Sexual Orientation
- Race/Ethnicity
- Religion or Belief
- Other, please specify

2. Equality bodies representing individuals through litigation:

2.1 Can your organisation represent individuals in discrimination claims?

- YES/NO
- Must mediation be attempted first? YES/NO
- Must a decision to represent an individual meet internal strategic criteria? If so what are the criteria?

- Are there any other requirements (e.g., must there first be a finding of discrimination by the equality body)?

If your organisation is unable to represent individuals please state the reasons why

2.2 If your organisation can represent individuals, at what type of court or other body can this representation take place?

- Tribunal
- Courts
- Quasi-judicial body¹²²
- Other, please specify

¹²² A Quasi-judicial body is an individual or organisation which has powers resembling those of a court of law or judge and is able to remedy a situation or impose legal penalties on a person or organisation.

2.3 How many individuals has your organisation supported through litigation from:

- (i) 01/01/08 to 31/12/08?
- (ii) 01/01/09 to 31/12/09?

2.4 Are there any barriers that your organisation faces in representing individuals?

- Possibility of costs being awarded against the equality body
- Lack of State funding or staff resources
- Procedural rules regarding the representation of claimants
- Other, please specify

3. Bringing proceedings in their own name:

3.1 Does your organisation have the power to bring discrimination proceedings in its own name?

- YES/NO

3.2 If your organisation does have power to bring these proceedings, is the consent of the victim (if they are identifiable) required?

- YES/NO

3.3 In what circumstances can it bring discrimination proceedings?

- Judicial review of unlawful legislation or policies
- Injunctions
- Actio popularis¹²³
- Class actions/Representative actions¹²⁴
- Other, for example discriminatory acts such as advertisements¹²⁵

3.4 How many cases has your organisation brought discrimination proceedings in its own name from:

- (i) 01/01/08 to 31/12/08?
- (ii) 01/01/09 to 31/12/09?

4. Producing decisions or recommendations:¹²⁶

4.1 Is your organisation able to make legally binding or non-legally binding decisions on discrimination cases?

- YES/NO

If YES are they:

- Legally Binding or

¹²³ *Actio popularis* - a principle under which a citizen could request the courts to protect a public interest.

¹²⁴ Actions brought on behalf of a group of claimants that have similar claims of discrimination, for example equal pay claims relating to the same employer.

¹²⁵ This may for example be situations where there is no identifiable claimant such as the Feryn case before the CJEU, C-54/07 in which the Belgium Centre for Equality and Equal Opportunities brought a claim.

¹²⁶ The ability of equality bodies to produce decisions or recommendations is of relevance in this context in that such decisions may end up in national courts and thereby have an impact on the interpretation of equality law. Further, some equality bodies may enforce their own decisions in national courts, which may offer them an opportunity to participate in proceedings before the CJEU.

- Non-Legally Binding

4.2 If they are binding, what remedies or penalties can they impose?

- Fines
- Damages
- Mandatory action that must be taken
- Public publication of decision
- Injunctions to prevent further discrimination
- Other, please specify

4.3 If they are non-legally binding, what decisions or recommendations can be made?

- Finding of discrimination
- Public publication of decision
- Changes in the organisation's policies
- Training for staff on equality and diversity
- The provision of Legal Aid¹²⁷
- Other, specify

4.4 In how many cases has your organisation decided discrimination claims from:

- (i) 01/01/08 to 31/12/08?
- (ii) 01/01/09 to 31/12/09?

4.5 Can your organisation's decision be appealed to an intermediate tribunal or similar body?

- YES/NO

If YES, what is the name of the intermediate tribunal or similar body?

If YES, does the tribunal:

- Issue binding decisions
- Issue non-binding decisions
- Provide damages
- Issue recommendations
- Take its own decisions to court

If YES, can your organisation participate in the proceedings before the Tribunal and, if so, in what capacity?

If YES, in how many cases has your organisation done this from:

¹²⁷ A benefit in the form of financial assistance linked to the income of an individual, for persons to meet the cost of advice and representation in legal proceedings.

- (i) 01/01/08 to 31/12/08?
- (ii) 01/01/09 to 31/12/09?

4.6 Can your Equality Body's decision be appealed directly to a court?
- YES/NO

If YES does the court:
- Issue binding decisions
- Provide damages
- Other, please specify

If YES, can your organisation participate in proceedings before the court and, if so, in what capacity?

If YES, in how many cases has your organisation done this from 1/1/08 to 31/12/08 and from 01/01/09 to 31/12/09?

5. Amicus curiae (interventions):

5.1 Does your organisation have the power to provide *amicus curiae*¹²⁸ submissions to national courts and/or tribunals?
- YES/NO

If YES is this done by:
- Intervening as an independent third party
- Intervening on behalf of the complainant¹²⁹
- Other way, please specify

5.2 If your organisation has the power to provide *amicus curiae*
- Is there an express power in national legislation or court rules
- An informal procedure
- Other, please specify

5.3 If your organisation has the power to provide *amicus curiae*, please list the criteria for being permitted to intervene?

5.4 If your organisation has the power to provide *amicus curiae*, in how many cases did it do so before national courts and/or tribunals from 1/1/08 to 31/12/08 and from 01/01/09 to 31/12/09?

¹²⁸ Literally means a 'friend of the court'. A person with strong interest in or views of the subject matter of an action, but not a party to the action.

¹²⁹ Strictly speaking, intervening on behalf of the complainant will, in general, not be seen as an *amicus curiae* intervention, as such interventions are in support of the complainant and not as a neutral third party.

5.5 If your organisation does not have the power of intervention, please say what you would require to do so?

- Change in your organisation's powers
- Change in national legislation or court procedures
- Other, please specify

5.6 Are there any other barriers to intervening in proceedings:

- The possibility of costs being awarded against your equality body
- Lack of funding or other resources
- Courts being reluctant to permit interventions
- Other, please specify

6. Court of Justice of the European Union:

6.1 Can your organisation take part in national court proceedings where a reference can be made to the Court of Justice of the European Union (CJEU) for a preliminary ruling?¹³⁰

- YES/NO
- Do not know

If YES, please describe how (with reference to the answers provided above):

- (i) by being able to represent complainants in national court proceedings;
- (ii) by being able to bring proceedings in your own name as an equality body;
- (iii) by commencing litigation following decisions by your equality body;
- (iv) by intervening in national proceedings.

6.2 If it cannot, please state what it would require under national law?

- changes in national legislation on your organisation's powers
- changes in court rules
- Other, please specify

6.3 Please set out the steps in the procedure in your national courts for a reference to the CJEU to be made?¹³¹

¹³⁰ All parties to domestic proceedings (claimant, defendant and interveners) can appear in CJEU preliminary proceedings.

¹³¹ For example, a suggestion is made by one or more of the parties for a reference; submissions are made to the Judge as to why a reference should or should not be made; a decision is made by the Judge; and the parties and Judge agree on the questions to be asked of the CJEU

6.4 If your organisation is able to take part in national court proceedings is it able to be involved in formulating the questions to be put to the CJEU?

- YES/NO

Please specify reasons

6.5 Has your organisation ever taken part in national proceedings where a reference was made to the CJEU?

- YES/NO

If YES please provide details of the cases

6.6 Have you ever taken part in national proceedings where the national court has refused to refer an issue to the CJEU?

- YES/NO

Please provide details and reasons for refusal

6.7 If your organisation can make decisions on discrimination claims, does this entitle your organisation to refer a question or questions to the court on the interpretation of the rule of Community law if it considers it necessary to do so in order to resolve a dispute brought before it.

- YES/NO
- Do not know

If YES/NO, please describe why this is the case

6.8 The European Commission, the European Parliament and Member States can intervene in CJEU preliminary ruling procedures. Has your organisation ever sent a submission or other information to the following in relation to any ECJ preliminary ruling in order to have an impact on the interpretation of Equality Law this way?

- The European Commission¹³²
- The European Parliament
- Your Member State's government

If it has, please provide details

¹³² Article 20(2)(d) of the Recast Gender Directive, for example, provides that Equality Bodies must have the power to exchange information with relevant EU institutions which could include the European Commission.

6.9 Please provide details of any outcome of CJEU litigation you have been involved in when the proceedings returned to your national courts.

6.10 The Rules of the CJEU do not currently permit equality bodies to intervene in CJEU preliminary ruling procedures if they are not a party to the national proceedings, even where it is regarding the Equality Directives.

Does your organisation agree or disagree with the proposition that Equality Bodies, in general (i.e., without being a party to the national proceedings) should be able to provide submissions in preliminary rulings by intervention before the ECJ where the issue related to one or more of the Equality Directives?

- YES/ NO

Please explain.

6.11 Regardless of whether your organisation has the power to appear in national proceedings and before the ECJ, would you be interested in being involved in ECJ proceedings where another Equinet Equality Body is a party, for example by providing information on the implementation of the Directive in your Member State to the Equality Body?

- YES/NO

Please explain

Annex 2

Equality bodies participating in the Survey

Ombud for Equal Treatment, **Austria**

Centre for Equal Opportunities and Opposition to Racism, **Belgium**

Institute for the Equality for Women and Men, **Belgium**

Commission for Protection against Discrimination, **Bulgaria**

Office of the Ombudsman, **Croatia**

Office of the Public Defender of Rights, **Czech Republic**

Board of Equal Treatment, **Denmark**

Danish Institute for Human Rights, **Denmark**

Gender Equality Commissioner, **Estonia**

Ombudsman for Equality, **Finland**

Ombudsman for Minorities, **Finland**

High Commission against Discrimination and for Equality, **France**

Federal Anti-Discrimination Agency, **Germany**

Equal Treatment Authority, **Hungary**

Office of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, **Hungary**

Equality Authority, **Ireland**

Centre for Equal Treatment, **Luxembourg**

National Commission for the Promotion of Equality, **Malta**

Dutch Equal Treatment Commission, **Netherlands**

Equality and Anti-Discrimination Ombud, **Norway**

National Council for Combating Discrimination, **Romania**

National Centre for Human Rights, **Slovakia**

Equality Ombudsman, **Sweden**

Equality and Human Rights Commission, **United Kingdom - Great Britain**

Equality Commission for Northern Ireland, **United Kingdom - Northern Ireland**

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