

Enforcing EU Equality Law Through Collective Redress: Lagging Behind?

Dr Sara Benedi Lahuerta

University College Dublin (UCD), Sutherland School of Law

ERA Webinar: Current Reflections on EU Anti-Discrimination Law

25-26 May 2020



Funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission

Overview

- Preliminary clarifications: "Collective Redress" (CR)
- EU general approach to Collective Redress (CR)
 - ✓ The Collective Redress Recommendation
- EU approach to anti-discrimination law enforcement
- Normative reasons for encouraging CR in anti-discrimination law
- Final remarks

Preliminary clarifications: “Collective Redress”

Actio popularis

A natural or legal person is allowed to bring a claim on grounds of public interest, even with no identifiable victim

Representative actions

A natural or legal person is allowed to bring a claim on behalf of a group of complainants

Joint actions

Several claimants bring claims based on a similar set of facts (all of them are parties)

Class actions

A ‘representative plaintiff’ brings a claim on her own behalf and on behalf of a number of other persons (the class)

THE EU GENERAL APPROACH TO CR (I)

- Traditionally, enforcement based on:
 - ✓ “Individual vigilance” OR
 - ✓ “Institutional vigilance”
- BUT in practice, both have **shortcomings**:
 - ✓ Reluctance to take action (intimidated,...)
 - ✓ High cost v low compensation
 - ✓ Actions filed one at a time → structural problems unaddressed
 - ✓ Infringement actions: “horse-trading” & appearance of “norm-conform behaviour”

THE EU GENERAL APPROACH TO CR (II)



So... More recent approaches:

Consumer law: since the 1980s, attempts to empower NGOs to mobilize the law

The Collective Redress Recommendation: Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress:

- Recital 7:
 - ✓ Recognizes that “collective redress is of value” in consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection
 - ✓ Encourages MS to introduce representative actions in these fields...
 - ✓ ...And: *‘in any other areas* where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant’

THE EU APPROACH TO ANTI-DISCRIMINATION LAW ENFORCEMENT

- Strong focus on **“individual vigilance”** → individual adjudication
- Some efforts to develop **“non-adjudicatory collective enforcement”**:
 - ✓ EU funding, mainstreaming
 - ✓ EU Platform for Roma Inclusion and National Roma Integration Strategies
 - ↳ Limited to effectiveness to address systemic disadvantage
- No requirement to introduce CR in this field

WHY WOULD CR BE USEFUL IN THE FIELD OF ANTI-DISCRIMINATION LAW?

- Existing enforcement procedures are failing at addressing systemic discrimination
- Discrimination is often:
 - Based on collective prejudice (e.g. against the Roma)
 - Structural (e.g. gender pay inequalities, housing discrimination)
 - A collectively-experienced phenomenon (e.g. xenophobic speech, “speech acts”)

NORMATIVE REASONS FOR ENCOURAGING CR IN ANTI-DISCRIMINATION LAW

- I. **Ensuring a coherent and uniform application of EU law throughout the territory of the Union (I)**
 - **In theory**, where EU law creates rights for individuals/groups, the principle of effective judicial protection requires the existence of effective enforcement mechanisms
 - In practice, “there can ... be EU rights without judicial protection” (Beljin)
 - Example: *Firma Feryn*:
 - ✓ Minority **groups** have the right not to be discriminated against under the Race Directive
 - ✓ BUT no requirement that groups/legal entities representing them have access to adjudicatory procedures
- Member States are not required to enable CR for individuals whose anti-discrimination rights have only been wronged at group level

NORMATIVE REASONS FOR ENCOURAGING CR IN ANTI-DISCRIMINATION LAW

I. Ensuring a coherent and uniform application of EU law throughout the territory of the Union (II)

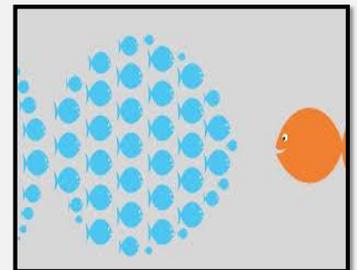
- Only some MS have developed CR mechanisms for anti-discrimination law
- Consequences:
 - ✓ Lack of uniformity and enforcement inequalities in the application of EU anti-discrimination law
 - ✓ Undermines the "substantive primacy" of EU law
 - Guaranteeing the effective enforcement and primacy of EU substantive rights may require some degree of EU "procedural primacy" (Delicostopoulos)
 - Progress in that direction in data protection, consumer protection & competition law

NORMATIVE REASONS FOR ENCOURAGING CR IN ANTI-DISCRIMINATION LAW

II. Overcoming the divide between economic and social rules (I)

Sectoral measures to encourage "actio popularis" or representative actions:

Instrument	Field & Type of action
Directive 2004/35/EC	Environmental law
Directive 2005/29/EC	Unfair commercial practices
Directive 2011/83/EU	Consumer protection
Directive 2014/104/EU	Antitrust damages (no CR <i>stricto sensu</i> but widens standing)
Regulation 2016/679/EU	Data protection



NORMATIVE REASONS FOR ENCOURAGING CR IN ANTI-DISCRIMINATION LAW

II. Overcoming the divide between economic and social rules (II)

- Most of the above mentioned areas: closely connected to the internal market
- EU anti-discrimination law is more a human rights instrument than a market integration document
- **BUT:**
 - ✓ Above mentioned areas also have underlying social objectives
 - ✓ Market objectives are often intertwined with social objectives, e.g. Directive 2014/54/EU (hybrid instrument)
 - ✓ Examples of cross-fertilization between internal market law & anti-discrimination law
 - ✓ Consumer protection, data protection and non-discrimination law:
 - Fundamental rights protected by the EU Charter
 - Complainants have low bargaining power and resources compared to respondents

FINAL REMARKS

- EU anti-discrimination law **lags behind** other areas as regards CR
- Some forms of CR are available for consumer & data protection but not for anti-discrimination law → **enforcement inconsistencies**
- **Normatively, not justified**
- **At national level:** examples of **cross-pollination** as regards CR mechanisms between consumer protection and anti-discrimination law
- Introducing CR in EU anti-discrimination law: not easy, but not impossible
- **European Pillar of Social Rights** → opportunity for:
 - Advancing towards better enforcement tools in anti-discrimination law
 - Better integrating market and social rights

