

EQUINET SURVEY

Influencing the Interpretation of the Law through Litigation

The Powers and Practices of Equality Bodies

SURVEY

1. Organisational Information:

1.1 What is the name of your organisation?

Parliamentary Commissioner/Ombudsman for the Rights of National and Ethnic Minorities

1.2 Contact Details of person completing the survey

Dr. Katalin Szajbély, deputy-head of department, szajbely@obh.hu

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

-Age

-Disability

-Gender

-Transgender

-Sexual Orientation

-**Race/Ethnicity** (only for the 13 historical minority groups enumerated in Act LXXVII. of 1993. on the rights of national and ethnic minorities, so our competence does not cover migrants or refugees)

-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?

If a case is before court, the ombudsman has no competence.

- Are there any other requirements (eg 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

According to the Hungarian Constitution and Act LIX. Of 1993 on parliamentary commissioners, ombudsmen are not entitled to represent individuals, and are not entitled to participate in court proceedings either.

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 body¹
- Other, please specify

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 Own Name:

¹ A **Quasi-judicial body** is an individual or organization 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 organization.

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

YES/NO, with the exception of Constitutional Court proceedings, which can be initiated if a legislative regulation is deemed as unconstitutional

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 (constitutional review, effectuated by the Constitutional Court)

-Injunctions

-Actio popularis²

-Class actions/Representative actions³

- Other, for example discriminatory acts such as advertisements⁴

3.4 In 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:⁵

² Actio popularis-a principle under which a citizen could request the courts to protect a public interest.

³ 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.

⁴ This may for example be situations where there is no identifiable claimant such as the Feryn case before the ECJ, C-54/07 in which the Belgium Centre for Equality and Equal Opportunities brought a claim.

⁵ 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 European Court of Justice.

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
- **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 Aid⁶
- Other, specify

⁶ 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.

The ombudsman is free to make any recommendations he considers appropriate.

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?

We cannot tell the exact number of discrimination cases, as generally we have mixed cases involving the violation of various constitutional rights. (However, we have recently introduced a new statistical system, that may in future screen cases involving discrimination.)

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
- 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:

(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 the 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 curiae⁷ submissions to national courts and/or tribunals? Y/N

If so is this done by:

⁷ 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.

- Intervening as an **independent third party**
- Intervening on behalf of the complainant⁸
- Other way, please specify

The amicus curiae cannot contain implications concerning a specific case, only general guidelines concerning the interpretation of national and international non-discrimination legislation.

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

The ombudsman has no right to intervene into court proceedings, it is strictly forbidden by law. Amicus curiae is therefore an exceptional tool to help the courts in the interpretation of non-discrimination legislation and to indirectly influence them towards the right decision.

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

See above.

⁸ Strictly speaking, intervening on behalf of the complainant will, in general, not be seen as an amicus curiae intervention, as such intervention is in support of the complainant and not as a neutral third party.

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?

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. European Court of Justice:

6.1 Can your organisation take part in national court proceedings where a reference can be made to the European Court of Justice (ECJ) for a preliminary ruling?⁹

-Yes/**No**

-Don't 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 ECJ to be made?¹⁰

⁹ All parties to domestic proceedings (claimant, defendant and interveners) can appear in ECJ preliminary proceedings.

¹⁰ 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 ECJ.

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 ECJ?

- Yes, **No**

Please specify reasons

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

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 ECJ?

-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

-Don't 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 ECJ 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 Commission¹¹

- the European Parliament

-Your Member State's government

If it has, please provide details

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

¹¹ 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.

6.10 The Rules of the ECJ do not currently permit Equality Bodies to intervene in ECJ 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