

JUSTICE



Access to justice in Europe: an overview of challenges and opportunities



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



This report addresses matters related to the right to an effective remedy and to a fair trial (Article 47) falling under Chapter VI 'Justice' of the Charter of Fundamental Rights of the European Union.

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Foreword

The possibility of enforcing a right is central to making fundamental rights a reality. Access to justice is not just a right in itself but also an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress. In this sense, it transforms fundamental rights from theory into practice. Research and evidence-based advice on access to justice, therefore, also support making other rights effective. This report is an introductory overview on access to justice that adds to the four reports of the European Union Agency for Fundamental Rights on the 'fundamental rights architecture in the European Union', published in 2010. It does so by providing core findings on the challenges to and opportunities for the realisation of access to justice in Europe.

Building on the Agency's European Union minorities and discrimination survey (EU-MIDIS) – which concluded, among other things, that levels of awareness and confidence in complaints mechanisms were low amongst ethnic minorities and immigrant groups who were victims of discrimination – this report provides insight into the nature and functioning of judicial mechanisms in the European Union (EU). The particular focus of the report is on judicial mechanisms at national level in EU Member States. This is addressed through discussion of national practices and procedures applicable in the area of non-discrimination law. This focus was chosen since the Member States are under an obligation to provide effective remedies as part of their implementation of EU law in this area.

Apart from the national level, avenues available at the European and international levels are also described, namely through the Court of Justice of the EU, the European Court of Human Rights and the monitoring bodies of United Nations human rights treaties. The report explains how these mechanisms work and deals with their comparable advantages. Changes introduced by the Treaty of Lisbon, such as accession of the EU to the European Convention on Human Rights and alterations to rules on legal standing are highlighted. However, fundamental rights are most commonly an issue at the national level, and for this reason the report focuses on domestic judicial mechanisms and their challenges.

At national level, the report points out concerns and concrete obstacles to accessing justice but also highlights actual practices. Some of the key concerns include unnecessarily strict time limits on bringing claims. This is, for instance, the case in 22 of the 27 EU Member States. Other notable difficulties include restrictive rules on who can make a claim, excessive legal costs, and the complexity of legal procedures. This report is the first study by the European Union Agency for Fundamental Rights dealing primarily with access to justice. It will be followed by a report focussing on the role of equality bodies and similar entities in facilitating access to justice and the experiences of equality bodies, claimants and those actors providing support to claimants. These reports are complementary in nature, focussing respectively on the court system and on equality bodies in their function of assisting claimants or providing an alternative avenue of redress. This reflects a broad conception of access to justice. By highlighting where the principal challenges exist, as well as examples of good practice, this report can contribute to a better understanding of how improvements can be made in order to allow individuals to enforce their fundamental rights in practice.

Morten Kjaerum
Director



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List of abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment / Committee Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women / Committee on the Elimination of Discrimination Against Women
CEPEJ	European Commission for the Efficiency of Justice (of the Council of Europe)
CERD	Committee on Elimination of Racial Discrimination
CFR	Charter of Fundamental Rights of the European Union
CJ	Court of Justice, when needed to distinguish from the General Court – both these courts jointly constituting the Court of Justice of the European Union
CJEU	Court of Justice of the European Union (formerly the Court of Justice of the European Communities), herein referring both to the General Court and the Court of Justice of the European Union, unless specified
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EU-MIDIS	European Union Minorities and Discrimination Survey
FRA	European Union Agency for Fundamental Rights
FRALEX	FRA network of legal experts
GC	General Court (formerly Court of First Instance)
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
TEC	Treaty establishing the European Communities
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN HRC	United Nations Human Rights Committee



Executive summary

This report provides an EU-wide comparative analysis of the effectiveness of access to justice as a means of ensuring individuals' rights in the area of non-discrimination law. The area of non-discrimination law, as embodied in the Racial Equality Directive, Gender Equality Directive (recast), Gender Goods and Services Directive and Employment Equality Directive, provided a focus for the report, in terms of the cases sampled and rules and practices that were observed, as well as ensuring that the enquiry fell within the scope of EU law. Because the applicable rules and practices tended to relate not only to non-discrimination law but civil and/or administrative law more generally, however, the present findings in terms of challenges and good practices are likely to apply beyond this area of substantive law. It should also be recalled that the research was confined principally to civil law, and may also include administrative procedures, where applicable, but did not cover criminal law.

The research for the country reports, which constitute the background information for this report, was conducted through analysis of laws and rules of procedure as well as a selection of cases in each of the 27 EU Member States, in the light of the concept of access to justice. This concept is broken down through a typology of the components of this broader idea. As for the EU and international elements, it is based on available literature and analysis of case law.

The report shows that access to justice is a concept with many nuances which includes, first and foremost, effective access to an independent dispute resolution mechanism coupled with other related issues, such as the availability of legal aid and adequate redress. There are various avenues available at both national and European/international levels.

European and international level

The report analyses judicial and quasi-judicial mechanisms at European (EU and Council of Europe) and international (United Nations) levels. Each of these levels has both common and divergent characteristics in relation to rules on legal standing, the nature of proceedings, the remedies available, and applicable follow-up mechanisms. Save for the Court of Justice of the EU (by reason of the way that EU law is integrated into national systems), all the monitoring mechanisms

operate as 'subsidiary' means of obtaining redress. That is, before having recourse to these procedures, individuals are under an obligation to pursue remedies, so far as they are effective, at the national level. In this way, states are given the opportunity to remedy breaches of their obligations internally, before an international body may take jurisdiction.

The UN monitoring bodies responsible for overseeing the implementation of human rights treaties offer a relatively accessible quasi-judicial mechanism. Some of these bodies are mandated to deal with individual complaints, such as the Committee on Elimination of Racial Discrimination (CERD) under the Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the Human Rights Committee (UN HRC) under the International Covenant on Civil and Political Rights (ICCPR). The ICERD was the first of the UN human rights treaties that provided for a specific monitoring body – CERD – and served as the precursor to those under the other conventions, including the UN HRC. Special features of the ICERD include the ability to receive complaints not only from individuals but also groups of individuals. However, the UN HRC is the monitoring body that has built up the greatest volume of decisions on individual complaints. At the same time, it should be noted that states have not expressly recognised the views of the treaty bodies as legally binding. However, they do represent authoritative interpretations of the relevant treaties.

The European Court of Human Rights (ECtHR) has responsibility to decide on complaints submitted in respect of the European Convention on Human Rights (ECHR). In recent years, the ECtHR caseload, relative to its capacity to deliver judgments has become unsustainable, causing delays in the resolution of cases. Protocol No. 14 to the ECHR has introduced a range of measures designed to address this, including the 'pilot' procedure for dealing with repeat violations – similar cases due to systemic problems at national level. Considering these reforms, the significance of the role that the ECtHR will play appears to be shifting from providing individuals with a recourse of last resort towards a more constitutional role in delivering decisions on legal issues of broader importance and of relevance to a number of complaints. In the context of social rights, the ECtHR is complemented by the European Committee of Social Rights (ECSR), which monitors implementation of the European Social Charter (ESC).

There are two main avenues through which an individual can access the Court of Justice of the European Union (CJEU) in pursuing a remedy against the EU itself: direct (through the action for annulment) and indirect (through preliminary rulings). While the rules relating to legal standing under the action for annulment have been loosened by the Lisbon Treaty, access to the CJEU remains relatively narrow.

The Treaty of Lisbon has also introduced other significant changes. Firstly, the Charter of Fundamental Rights of the European Union has acquired legally binding status. Secondly the jurisdiction of the CJEU has been broadened to allow for review in areas of EU law that were formerly beyond its remit. Thirdly, it mandates the EU to accede to the ECHR, which will confer jurisdiction on the ECtHR in relation to breaches of the ECHR by the EU itself.

National level

Since the protection of fundamental rights should first and foremost be provided at the national level, judicial mechanisms in individual EU Member States constitute the focus of the report. The main issues covered include concrete limits in the context of accessing justice at national level, existing regimes of legal aid and different means of compensating victims of discriminatory treatment. Specific practices that can be found in different EU Member States in relation to these issues are likewise identified. In addition, these chapters refer, where relevant, to existing practices that often intend to facilitate access to justice.

From the research findings presented in the report, it can be concluded that excessively short time limits for bringing a claim in order to initiate judicial proceedings, restrictive conditions of legal standing (including absence or rigid application of public interest complaint rules which are usually limited to environmental cases) as well as undue delays in non-discrimination proceedings, represent major obstacles for individuals when accessing justice in the domestic courts of individual Member States. In the context of undue delays in particular, it should be noted that although domestic laws of most Member States contain provisions for the speedy resolution of urgent or sensitive cases, it remains unclear whether in practice such expedited procedures do actually reduce the length of the legal process.

In order to reduce reliance on court proceedings, which may be lengthy and costly, many EU Member States provide victims of discrimination with alternative non-judicial routes through which they can obtain redress. In addition some EU Member States allow victims to waive the right of access to a judicial

body and settle the dispute outside the court, subject to certain safeguards.

Legal aid is generally available for a party to proceedings in the area of non-discrimination law in all EU Member States through the application of 'means' or 'means plus merits' tests. Nevertheless, a greater allocation of resources appears to be needed. Particular concern has been raised regarding budget cuts due to the economic crises. These difficulties appear to be partially offset in some Member States through the existence of initiatives complementary to legal aid, such as free legal advice services or legal insurance.

According to the relevant research findings, financial compensation is the primary means of compensating victims of discrimination in all 27 EU Member States. In the majority of EU Member States, furthermore, such financial compensation is supplemented by other non-financial forms of reparation (such as reinstatement in the case of dismissal from employment that was discriminatory).

As for the level of financial compensation, there are considerable variations among EU Member States. The relevant research findings showed that the average amount of financial compensation awarded by domestic courts varies greatly, and that this does not appear to be owed entirely to factors such as variations in living costs. Only two Member States allow for the award of punitive damages.

Most EU Member States operate a 'loser pays' rule where the losing party is expected to cover the legal costs of the other side. At the same time in some Member States the judiciary has discretion not to apply this rule. It appears, however, that legal costs may be of such a level as to constitute a barrier to access to justice in some Member States.

The report identified numerous good practices that had the potential to facilitate access to justice for complainants. These include: simplified and less formalistic procedural rules making it easier to enforce rights; E-justice initiatives that aim to make relevant jurisprudence widely accessible at no cost; generous rules on legal standing (such as public interest actions); the availability of redress other than compensation; pro bono initiatives and legal advice centres.

In light of the fact that there is great divergence between the Member States in terms of the challenges that they face and practices they adopt, the results of the FRA research at national level do not always allow for direct comparison. In order to ensure as complete a picture as possible further information is available via the FRA website containing details on access to justice by Member State and core categories.



Opinions

The European Union Agency for Fundamental Rights has formulated the following opinions based on the findings and comparative analysis in this report.

Access to justice is a crucial right since all other fundamental rights depend upon it for their enforcement in the event of a breach. Analysing the situation in the EU Member States, there is a need for revisiting procedures with a view to ensuring that access to justice is made more effective across the European Union.

Legal standing

Narrow rules relating to legal standing prevent civil society organisations from taking a more direct role in litigation. EU non-discrimination law requires Member States to allow associations, such as non-governmental organisations (NGOs) or trade unions, to engage in judicial or administrative proceedings on behalf of or in support of claimants. Beyond this area of law such entities are allowed to initiate legal proceedings in only some Member States. Most Member States allow for public interest actions (*actio popularis*) in relation to environmental cases according to their obligations under the Aarhus Convention. This suggests that broader rules on legal standing are acceptable in principle, and Member States should consider widening their rules on standing in other areas of law.

Waiver of rights

In the law of seven Member States, it is possible to waive, at least partially, the right of access to a judicial body by, for instance, concluding a friendly settlement or through an arbitration or mediation clause in a contract, so long as there are no elements of coercion involved. In contrast, 13 Member States prohibit contractual terms purporting to limit or exclude an individual's right of access to a court. While offering alternative means of obtaining a remedy that are less costly or lengthy than judicial proceedings, it is desirable these should be applied in such a way as to avoid overriding an individual's right of access to justice. In addition, any remedies agreed upon through means such as arbitration, mediation, or conciliation should fully reflect the entitlement of the claimant to an effective proportionate and dissuasive remedy.

Legal aid

High costs associated with legal proceedings, such as court and lawyers' fees, may deter individuals from pursuing remedies through the courts. Although legal aid is available in all Member States, of itself this may not be sufficient to allow all victims of breaches of non-discrimination law to bring claims. Rules surrounding the determination of eligibility for legal aid should be formulated in such a way as to ensure that those without sufficient financial means have access to adequate assistance. Accordingly, Member States should consider re-examining the thresholds set for 'means' testing, or the formulations applied in 'means and merits' testing in such a way as to guarantee access to justice for all.

The introduction of alternative dispute settlement mechanisms, such as quasi-judicial procedures available before some of the equality bodies, may help to ensure access to justice by providing a faster and cheaper alternative to claimants. Those Member States that have not endowed equality bodies with these powers could consider doing so. In this regard it should be noted that equality bodies require adequate resources to carry out this function.

Consideration should be given to alternative or complementary measures available in some Member States, such as: agreed limits on legal fees, waiving court fees for claimants in financial difficulty, and legal insurance. Consideration should also be given to promoting practices such as the delivery of support through legal advice centres or pro bono work, while ensuring that these are complimentary to and not a substitute for an adequately resourced legal aid system. The introduction of simplified procedures where individuals are not required to be represented through a lawyer should also be considered, while ensuring that adequate safeguards are in place to guarantee their rights and their ability to participate effectively in proceedings.

Statutes of limitations

Time limitations for claims are needed for the sake of legal certainty, however, this must be balanced against the right of the claimant to obtain a remedy. Unnecessarily short time limits appear to constitute a major obstacle to accessing justice across the EU Member States.

Member States should ensure that time limits are extended to a reasonable length so as to comply with the standards laid down by the ECtHR in its case law.

Length of proceedings

If an individual is obliged to wait for an unreasonably long period of time for a remedy it risks rendering their rights ineffective. In the long-run it also has the consequence of deterring future claimants. Analysis of judgments delivered by the ECtHR, as well as sample cases collected for this report, suggest that systematic difficulties exist in some Member States preventing the delivery of judgments within a reasonable time. The case law of the CJEU requires that remedies in national courts for rights derived from EU law are effective. Member States should consider examining the organisation of their judicial systems and allocation of resources in order to ensure this.

International commitments

While all the Member States are party to a core of UN human rights treaties, not all of them have consented to the jurisdiction of the monitoring bodies to hear individual complaints. The generous rules on legal standing and accessibility of the procedures make these a valuable alternative to other fora, such as the ECtHR. In addition, some of these bodies oversee the implementation of rights that are not currently contained in the ECHR or the Charter of Fundamental Rights of the European Union, such as certain social rights. Furthermore only one Member State currently allows national NGOs to bring cases before the European Committee of Social Rights. In light of the benefit of allowing access to dispute settlement procedures at the European and international levels, those Member States that have not done so should consider consenting to the jurisdiction of these bodies.



1

Access to justice – Situating the concept in the EU



1.1. The FRA research on access to justice

This report is about ‘access to justice’ in the European Union – that is, how rights can be enforced in the EU. This is done by analysing mechanisms in Member States, as well as mechanisms offered by the EU, the Council of Europe, and the United Nations (UN). However, focus is placed on judicial mechanisms at the national level, and the challenges and good practices that pertain to them. A further delimitation is a focus on access to justice in the area of non-discrimination law as laid down by the Gender Equality Directives, Racial Equality Directive and Employment Equality Directive.¹ This examination is focused principally on civil law remedies and may also include administrative law remedies, but excludes the area of criminal law. This comparative report is the first study of the FRA to explicitly focus on access to justice.²

The report should be seen in the context of a series of FRA research projects. The FRA 2009 European Union Minorities and Discrimination Survey (EU-MIDIS) showed that awareness of redress mechanisms (for discrimination) is very low, in particular among

vulnerable groups, such as minorities and immigrants. This report on access to justice will be followed by a study focussing on the role of equality bodies and similar entities in facilitating access to justice and the experiences of equality bodies, claimants and those actors providing support to claimants. These studies are complementary in nature, focussing respectively on the court system and on equality bodies in their function of assisting claimants or providing an alternative avenue of redress. In May 2010, the FRA published a set of reports on how the architecture for the promotion and protection of human rights, in particular National Human Rights Institutions, Data Protection Authorities, and Equality Bodies, could be improved in the EU.³ Other related projects that address various components of access to justice include:

- the asylum-seeker perspective: access to effective remedies and the duty to inform applicants;
- access to remedies for irregular migrants;
- the impact of the Racial Equality Directive – Views of trade unions and employers in the European Union;
- the right to political participation of persons with mental health problems and persons with intellectual disabilities;
- joined-up governance: connecting fundamental rights (including improved access to complaint mechanisms at the local level and their links to national and international levels);

1 Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ. L 180, 19 July 2000, p. 22); Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (OJ. L 303, 02 December 2000, p. 16); Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ. L 373, 21 December 2004, p. 37); Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ. L 204, 26 July 2006, p. 23).

2 See also the recently published FRA report on *Access to effective remedies: The asylum-seeker perspective* (Vienna, 2010) available at: http://fra.europa.eu/fraWebsite/attachments/asylum-access-remedies-report-092010_en.pdf (all hyperlinks listed in the report have been accessed in November 2010).

3 Produced in a series as *Strengthening the fundamental rights architecture in the EU I-III: National Human Rights Institutions in the EU Member States; Data Protection in the European Union: the role of National Data Protection Authorities; EU-MIDIS Data in Focus Report 3: Rights awareness*. All available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.

- developing indicators for the protection, respect and promotion of the rights of the child in the European Union (child-friendly justice);
- Handbook on European on non-discrimination case-law.⁴

This first chapter elaborates on the concept of access to justice and situates it within the framework of European law and policy. Four chapters follow, dealing with: (2) accessing mechanisms at European and international level, (3-5) accessing justice at the national level, including legal and available remedies. Important cases from national courts as well as from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) are presented as illustrative examples.

1.2. Report background

This report draws mainly on 27 national studies produced by the FRA network of legal experts (FRALEX)⁵ on the basis of a typology designed to allow for a comparative overview on selected key elements of access to justice. For the national level, the analysis and information on which this report is based presents the situation as it stood at the end of 2008. Case assessment and statistics, as well as high-level administrative or political responses to access to justice issues, cover the period from 2000 to 2009. The EU and international elements represent the situation as it stood on 15 October 2010.

Since there is no standardised concept of ‘access to justice’, the research at national level was structured around a five-part typology setting out its constituent elements. This was developed using the right to a fair trial as well as the broader right to a remedy contained in Articles 6 and 13 ECHR; Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (ICCPR); and Article 47 of the Charter of Fundamental Rights of the European Union (CFR). On the basis of these provisions ‘access to justice’ was broken down into the following elements:

1. the right to effective access to a dispute resolution body;
2. the right to fair proceedings;

⁴ All FRA projects available at: http://fra.europa.eu/fraWebsite/research/projects/proj_accesstojustice_en.htm; and all FRA publications at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.

⁵ FRALEX was set up in 2007 and is composed of highly qualified legal experts in the field of fundamental rights in each of the Member States of the European Union. FRALEX delivers a variety of reports, analyses and studies at the national and comparative level, which are used as background material for FRA publications. A separate report on access to justice at the EU and international level was also commissioned. Based on these 27 national reports and the EU and international report, along with additional research, the FRA produced this comparative report.

3. the right to timely resolution of disputes;
4. the right to adequate redress;
5. the principles of efficiency and effectiveness.

These were in turn sub-divided into more detailed points, referred to as indicators. For three of these indicators, the FRALEX teams were asked to analyse a selection of 50-80 national cases.⁶ The cases had to be related to ‘civil’ rights as protected by Article 6(1) of the European Convention on Human Rights (ECHR) and Article 14 ICCPR.⁷

Non-discrimination was selected as a focus area to reduce the scope of enquiry to a feasible level, but also because previous FRA research showed the particular need for improving and facilitating access to justice in this area. However, the purpose of the study is to capture access to justice more broadly and this report is only a first step in this regard.

Elements of the 27 national studies, which provide additional country-specific information on access to justice in the context of the aforementioned typology, are available online via the FRA website.⁸ The reports, structured in accordance with the typology, analyse the judicial systems in the respective EU Member States. Details that were not possible to capture in or not relevant to this comparative report are provided in these national overviews, which offer insight into the mechanisms for accessing justice in cases of discrimination.⁹

1.3. The concept

The term ‘access to justice’ is not commonly used as legal terminology and is not expressly used in, for example, the ECHR.¹⁰ Instead, the ECHR contains provisions on fair trial and the right to a remedy (Articles 6 and 13 ECHR). Similarly, the Universal Declaration on Human Rights (UDHR) states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him

⁶ In some Member States this proved difficult given the impossibility of accessing case law from lower courts.

⁷ See further, UN Human Rights Committee (UN HRC) *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, paragraph 16; ECtHR, *Sporrong and Lonnroth v. Sweden*, No. 7151/75, 23 September 1982, paragraphs 79-83. Article 47 CFR does seemingly not have the same limitation but is applicable to all types of cases.

⁸ See <http://fra.europa.eu/>.

⁹ References to the UK primarily refer to the situation in England and Wales. However, most of the rules and practices discussed are also applicable in substance (if not in form) in Scotland and to a lesser extent, Northern Ireland.

¹⁰ The concept received explicit attention in the legal doctrine by Mauro Cappelletti in the 1970’s - 1980’s, see Cappelletti, M. (ed.) (1978) *Access to Justice*, Milan: Sijthoff and Noordhoff. More recently see Francioni, F. (ed.) (2007) *Access to Justice as a Human Right*, Oxford University: Oxford University Press (OUP).

by the constitution or by law.”¹¹ The ICCPR equally refers to an “effective remedy” (Article 2(3a)) for all the rights in the convention and further guarantees the right to “take proceedings before a court” (Article 9(4)), the right to a “fair and public hearing” (Article 14(1)), and the right to be tried without undue delay (Article 14(3c)).¹²

However, with the Treaty of Lisbon, a specific reference to access to justice was introduced: the Treaty on the Functioning of the European Union (TFEU), Article 67(4) stipulates that “the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”¹³ The CFR which, according to the reforms introduced by the Lisbon Treaty, has the same legally binding status as the Treaties, provides for the “right to an effective remedy and to a fair trial” (Article 47 CFR).¹⁴ The third paragraph of that Article specifically refers to access to justice in the context of legal aid, but the term access to justice also concludes the Article as a whole.¹⁵ In this way the Article summarises all the particular rights enshrined in the concept of ‘access to justice’:¹⁶

- right to an effective remedy before a tribunal;
- right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law;
- right to be advised, defended and represented; and
- right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

At the international level the UN HRC, since its establishment under the ICCPR, has led the way among the UN treaty bodies on interpreting concepts related to access to justice.¹⁷

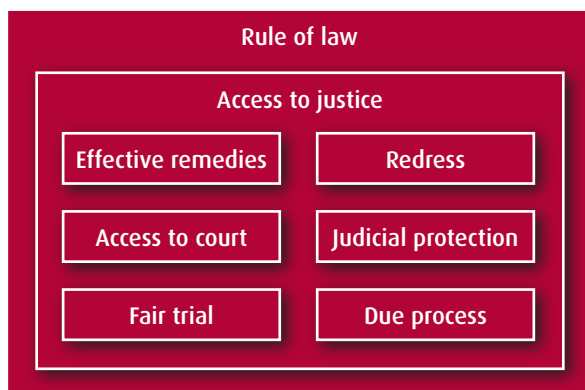
Also the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters¹⁸ is an example of an explicit use of ‘access to justice’. The Convention defines access to justice as “access to a review procedure before a court of law or another independent and impartial body established by law” (Article 9(1)). Moreover, with the 2006 Convention on the Rights of Persons with Disabilities, ‘access to justice’ was enshrined in a United Nations convention.¹⁹

According to current usage, then, access to justice is related to a number of terms that at times are used interchangeably or to cover particular elements, such as access to court, effective remedies or fair trial. Figure 1 offers a schematic overview of the most common terms.

¹¹ UN General Assembly, Universal declaration of human rights, Resolution 217 A(III), UN Document A/810 at 71 (1948), Article 8.
¹² The UN HRC has upheld the view that denial of access to justice is a sufficiently egregious breach of human rights that it may give rise to the right to have a criminal conviction reconsidered if the right to submit an appeal has been violated. UN HRC, *Earl Pratt and Ivan Morgan v. Jamaica*, Communications No. 210/1986 and No. 225/1987. Views adopted on 6 April 1989, UN Document A/44/40, Vol. II, 222. The International Court of Justice (ICJ) has taken a similar stance. In *Avena (case concerning Avena and other Mexican nationals (Mexico v. United States))* 31 March 2004, where a number of Mexican nationals had been sentenced to death in the United States without having benefited from the consular assistance required under Article 36 of the Vienna Convention of 1963.
¹³ Article 81(2)(e) refers to access to justice and Article 81(2)(f) to the “elimination of obstacles to the proper functioning of civil proceedings”.
¹⁴ The status of CFR is provided in Article 6(1) TEU. See the Explanations relating to the Charter of Fundamental Rights of the European Union, OJ C 303/17 of 14 December 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF>.
¹⁵ CFR, Chapter VI, Justice, Article 47, Right to an effective remedy and a fair trial: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”
¹⁶ Indeed, the terms “effective remedy” and “access to justice” appear to be used interchangeably: the Explanations relating to the Charter of Fundamental Rights (n. 14), p.30: where the relevant case law (ECtHR, *Airey v. Ireland*, No. 6289/73, 09 October 1979) of the ECtHR is referred to and the term effective remedy is used to explaining access to justice.

¹⁷ See for example UN HRC, General Comment No. 32 (n. 7), paragraphs 8-13.
¹⁸ Convention of the UN Economic Commission for Europe (UNECE) concerned with transparency and accountability that links human and environmental rights. The phrase access to justice is referred to in the title, the preamble and in Articles 1, 3, 9 and 10. It places positive obligations upon the States parties and importantly establishes relatively firm parameters, which must be satisfied in order to fulfil the States’ duties and grant adequate enjoyment of the right.
¹⁹ Article 13 places an obligation upon states to ensure equal access to justice to those persons with disabilities, further obliging the states to provide their agents with appropriate training to accomplish this. Useful analyses of a range of European and international standards on access to justice can be found in: McBride, J. (2009) *Access to Justice for Migrants and Asylum Seekers in Europe*, Strasbourg: Council of Europe Publishing.

Figure 1: Access to justice and related terminology



Source: FRA, 2010

1.4. Related research and instruments by the Council of Europe

The Council of Europe’s European Commission for the Efficiency of Justice (CEPEJ) has developed a series of studies on access to justice in the Member States of the Council of Europe.²⁰ CEPEJ collects judicial data from the 47 Member States, analyses shortcomings and new trends, and promotes a more homogenous data collection at national level. A comprehensive report, *European Judicial Systems (2008-2010)*, covers, for instance, public expenditures on courts and legal aid, types of legal aid in criminal cases, number of cases involving legal aid, conditions for granting aid, systems of court fees, length of procedures, availability of legal representation in court, and execution of court decisions.²¹ CEPEJ has also issued a report on the use of e-justice in Europe.²²

On 18 November 2010, the Consultative Council of European Judges (CCJE, an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, composed exclusively of judges, adopted the Magna Carta of Judges (Fundamental principles). This Magna Carta of judges highlights the fundamental principles relating to judges and judicial systems. It reiterates,

among other issues, the fundamental criteria of the rule of law, the independence of the judiciary, access to justice, and the principles of ethics and responsibility in a national and international context.²³

The Committee of Ministers of the Council of Europe adopted, on 24 February 2010, Recommendation CM/Rec(2010)3 on effective remedies for excessive length of proceedings. The Recommendation makes reference to the case law of the ECtHR as well as its pilot judgments in the area and calls on Member States to, among other things, ensure mechanisms that identify excessive length of proceedings; effective remedies for a trial within a reasonable time; compensation, including non-pecuniary damages; and to consider non-monetary redress where trials have run for an excessive length of time, such as reduction of sanctions.²⁴

This FRA report complements existing research in this area by offering a broad overview and analysis of the principal challenges and existing good practices at national level in light of the requirements of European and international human rights law. In this sense it is able to comment on particular practices which either limit or help to contribute to the realisation of Member States’ obligations. It will in this way also feed into the FRA research on access to justice with respect to complainant’s access to justice through equality bodies.

20 See in particular European Commission for the efficiency of justice (CEPEJ) *European Judicial Systems – Edition 2008 (2006 data): Efficiency and quality of justice*; as well as *Access to Justice in Europe*, CEPEJ Studies No. 9. The European Parliament, in its resolution of 19 May 2010 (2009/2241(INI)) on the accession of the Union to the ECHR, called on the Union to become member of the CEPEJ. More information available at: www.coe.int/t/dghl/cooperation/cepej/series/default_en.asp.

21 CEPEJ (2010) *European Judicial Systems (2008-2010)*, Strasbourg: Council of Europe, available at: www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp.

22 CEPEJ (2008) *Use of information and communication technologies (ICT) in European judicial systems*, Strasbourg: Council of Europe, available at: www.coe.int/t/dghl/cooperation/cepej/series/etudes7TIC_en.pdf.

23 For the text, see <https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE-MC%282010%293&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>. In a broader context, see also the CCJE’s Opinion No. 13 on the role of judges in the enforcement of judicial decisions, which is an essential element of the functioning of a state, based on the rule of law adopted on 09 December 2010, available at: [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE\(2010\)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CCJE(2010)2&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

24 See also the Recommendation of the Committee of Ministers of the Council of Europe to Member States on judges: independence, efficiency and responsibilities, adopted on 17 November 2010. It places emphasis on the independence of every individual judge and of the judiciary as a whole, precisely to guarantee the independence of individual judges. For the first time ever, judicial “efficiency” is defined in a clear and simple manner as “the delivery of quality decisions within a reasonable time following fair consideration of the issues”. Further measures proposed concerning the selection and training of judges, their responsibility, as well as judicial ethics, are further steps towards strengthening the role of individual judges and the judiciary in general. CEPEJ also hosts a centre for judicial time management, SATURN, that provides statistics on time management and supports selected courts in improving time management. See further www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp.

1.5. Access to justice in European law

In Europe, the right to access to justice – specifically to a court or a tribunal – was developed by the ECtHR in the context of Article 6 ECHR and has since been extensively dealt with in scholarly doctrine.²⁵ Article 6 ECHR applies only to “civil rights and criminal charges”. Although ECtHR jurisprudence has, over the years, continuously enlarged the scope of the notion of ‘civil rights’, so that nowadays also considerable parts of administrative law are now covered by the safeguards of this provision,²⁶ it is nonetheless a notable step forward that Article 47 CFR has abandoned this restriction, deliberately granting access to justice to all sorts of rights and freedoms guaranteed by the law of the Union.²⁷

According to long established case law of the CJEU, access to justice is one of the constitutive elements of a Union based on the rule of law.²⁸ This is guaranteed in the treaties through establishing a complete system of legal remedies and procedures designed to permit the CJEU to review the legality of measures adopted by the institutions.²⁹ The right to effective judicial protection has been accepted by the CJEU as a general principle of Union law, as

influenced by the case law of the ECtHR.³⁰ The CJEU has traditionally used the constitutional traditions common to the Member States and Articles 6 and 13 ECHR as a basis for the right to obtain an effective remedy before a competent court.

Advocate General Ruiz-Jarabo Colomer has stated in his Opinion in *Roda Golf & Beach Resort SL*: “Access to justice is a fundamental pillar of western legal culture [...]. Therefore the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised [...]. Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seized of those proceedings.”³¹ In other words, access to justice must be much more than a mere formal possibility, it must also be feasible in practical terms.

Within the EU legal order, the right to effective legal protection equally covers access to the EU courts (here, the Court of Justice and the General Court), as well as access to national courts and tribunals for the enforcement of rights derived from EU law.

1.5.1. Rights derived from EU law in national courts: equivalence and effectiveness

The idea that EU law may, in certain circumstances, give rise to individual rights that are capable of direct enforcement by domestic courts has been recognised since the classic case of *Van Gend en Loos*. In this case, the CJEU concluded that: “Community law [...] not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the

25 Starting with the *Golder* case (ECtHR, *Golder v. the United Kingdom*, No. 4451/70, 21 February 1975). See as well: Harris, D.J., O’Boyle, M., Bates, E.P. and Buckley, C. M. (2009) *Harris, O’Boyle and Warbrick, Law of the European Convention on Human Rights*, 2nd edition, Oxford: OUP, Chapter 6; van Dijk, P., van Hoof, G.J.H., van Rijn, A. and Zwaak, L. (eds.) (2006) *Theory and Practice of the European Convention on Human rights*, Antwerpen: Intersentia, Chapter 10; Frowein, A.J. and Peukert, W. (2009) *Europäische Menschenrechtskonvention, EMRK-Kommentar*, Kehl: N.P. Engel Verlag; and Grabenwarter, C. (2009) *Europäische Menschenrechtskonvention*, 4th edition, Basel: Helbing Lichtenhahn Verlag.

26 The ECtHR has been reluctant to offer a concrete definition of ‘civil’ rights, in practice its interpretation seems consistent with that of the UN HRC (see General Comment No. 32 (n. 7), paragraph 16). See *ibid*.

27 “In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations.” That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court of Justice of the European Communities (CJEU), *Les Verts v. European Parliament*, Case 294/83, 23 April 1986, ECR 1339. Explanations relating to the EU Charter of Fundamental Rights, OJ C 303/17 of 14 December 2007, p. 30, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:En:PDF>.

28 This can be seen in its reasoning for establishing the principles of direct effect (CJEU, *Van Gend en Loos*, Case 26/62, 05 February 1963) and supremacy (CJEU, *Costa v. ENEL* Case 6/64, 15 July 1964), as well as the concept of state liability (*Francovich and Bonifaci v. Italy*, Case C-6 and C-9/90, 19 November 1991) and the requirement that national remedies for breaches of rights derived from Community law comply with the principles of equivalence and effectiveness (CJEU, *Preston v. Wolverhampton Healthcare NHS Trust*, C-78/98, 16 May 2000).

29 Case 294/83, *Les Verts v. Parliament*, No. 25, paragraph 23.

30 The approach of the CJEU has generally been to follow the reasoning of the ECtHR with regard to the meaning of the right to a fair trial as a general principle of Union law. See for example CJEU, *Baustahlgewebe GmbH*, C-185/95, 17 December 1998. However, it has not been common for the CJEU to focus in detail upon particular aspects of this right; where it has done so, the context of application has often differed to that of the present report. For instance, the case law of the CJEU relating to the criteria of ‘reasonable time’ has tended to focus upon actions brought against the Union institutions, which may reduce their relevance for the present report. See for example CJEU, *Hoechst v. Commission*, T-410/03, 18 June 2008, paragraphs 227–228; CJEU, *Limburgse Vinyl Maatschappij (LVM) v. Commission and Others*, C-238/99 P, 15 October 2002, paragraph 169; CJEU, *Chronopost and La Poste v. Ufex and Others*, C-341/06 P, 1 July 2008, paragraph 45.

31 Opinion of Advocate General Ruiz-Jarabo Colomer, CJEU, *Roda Golf & Beach Resort SL*, C-14/08, paragraph 29, delivered on 5 March 2009. The CJ delivered its judgment in this case on 25 June 2009 (note that the judgment does not include any discussion on the issue of access to justice raised by the Advocate General).

Institutions of the Community.”³² In this context, the CJEU also placed great emphasis on the role that national courts play in the safeguarding of individuals’ Community law rights by ruling that the Treaty provision at issue “produces direct effects and creates individual rights which national courts must protect”.

In its seminal judgment in *Costa v. ENEL* the CJEU further held that the TEC, now the TFEU, has created “its own legal system which [...] became an integral part of the legal systems of the Member States and which their courts are bound to apply.”³³ It is also important to recognise the close connection between effective protection of the rights of the individuals, and the effective enforcement of Union law, given that the concern of individuals of their rights constitutes an additional form of enforcing EU law. In fact, in *Costa v. ENEL* the CJEU underlined that the “vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted” to the European Commission. In this sense EU citizens act like decentralised agents contributing to an efficient implementation of EU law at national level.

Indeed national courts are obliged to implement Union law and protect the rights of the individuals under Union law. They can do so according to their domestic legal procedures, remedies and sanctions, under the principle of national procedural autonomy.³⁴ In the words of the CJEU: “It must also be borne in mind that, according to settled case-law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each Member State, under the principle of the procedural autonomy of the Member States.”³⁵

In such a situation, the national legal order must, however, comply with two principles. The first is the *principle of equivalence*: the domestic procedural rules enforcing Union law cannot be less favourable than those applied to similar domestic law actions. The second is *the principle of effectiveness*: the application of national procedural rules cannot render the exercise of rights conferred by Union law virtually impossible or excessively difficult.³⁶

Judging national legal norms on remedies and procedural and jurisdictional issues in the light of these two principles is essentially a matter of contextual case-by-case determination by domestic courts. These principles are capable of affecting a range of national remedies and procedural and jurisdictional conditions, such as domestic time limits and other limitation periods, rules of evidence and the burden of proof, *locus standi* rules, the national conditions for reparation of loss and damage and a range of other remedies and sanctions.

One important dimension of the principle of national procedural autonomy has traditionally been that the domestic effect of Union law is “not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law”.³⁷ As a matter of Union law, therefore, domestic courts are not obliged to take advantage of legal remedies beyond those that already exist under domestic law. In practice, however, domestic courts may have great difficulties adapting existing rules and in effect, new procedures might have to be established.³⁸

1.5.2. Liability for breach of Union law

The CJEU has also developed the principle of state liability for breach of Union law. According to the CJEU, the full effectiveness of Union rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Union law for which a

32 CJEU, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, 5 February 1963, p. 3.

33 CJEU, *Flaminio Costa v. ENEL*, Case 6/64, 15 July 1964, p. 593.

34 As the Court of Justice has pointed out: “although the Treaty has made it possible under a number of circumstances for private persons to bring a direct action, where appropriate, before the Court of Justice, it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law”. See *Butterboots case*: CJEU, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel*, Case 158/80, 7 July 1981, paragraph 44. See also CJEU, *Unectef v. Heylens and Others*, Case 222/86, 15 October 1987, paragraph 14; and CJEU, *Vlassopoulou v. Ministerium für Justiz*, Case C-340/89, 7 May 1991.

35 CJEU, *Reemtsma Cigarettenfabriken GmbH v. Ministero delle Finanze*, C-35/05, 15 March 2007, paragraph 40. See also, inter alia, CJEU, *Preston and Others*, C-78/98, 16 May 2000, paragraph 31, and *i-21 Germany and Arcor*, Joined Cases C-392/04 and C-422/04, 19 September 2006, paragraph 57. See also CJEU, *Rewe-Zentralfinanz eG*, Case 33/76, 16 December 1976. This is also supported by the ECtHR, *Zubayrayev v. Russia*, No. 67796/01, 10 January 2008, paragraph 105; ECtHR, *Khatsiyeva v. Russia*, No. 5108/02, 17 January 2008, paragraph 161; ECtHR, *Stoica v. Romania*, No. 42722/02, 4 March 2008, paragraph 101.

36 CJEU, *Peterbroeck Van Campenhout SCS & Cie v. Belgian State*, C-312/93, 14 December 1995, paragraph 12; CJEU, *Comet v. Produktschap voor Siergewassen*, Case 45/76, 16 December 1976, paragraphs 12-6; CJEU, *Commission v. Spain*, C-96/91, 9 June 1992, paragraph 12. See also CJEU, *Preston and Others*, Case C-78/98, No. 26, paragraphs 31 and 57. In this case, the CJEU found that a requirement for a membership claim of an occupational pension scheme should be made within a time limit of six months running from the end of employment did not render the exercise of Community rights excessively difficult. At the same time it did find that a rule restricting the calculation of pensionable service to two years preceding the claim, where the individual had been making payments over a longer period, would render the individual’s rights ineffective (paragraphs 35-44).

37 CJEU, *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v. Hauptzollamt Kiel*, Case 158/80, 7 July 1981, paragraph 44.

38 CJEU, *R. v. Secretary of State for Transport, ex parte Factortame and Others (Factortame I)*, C-213/89, 19 June 1990.

Member State can be held responsible.³⁹ In the absence of any Union legislation on the issue, the state must make reparation in accordance with the rules of national law on liability. The principles of equivalence and effectiveness apply here as well.

The principle of effective judicial protection of an individual's rights under Union law may also require national courts to review all legislative measures and to grant interim relief where appropriate even when there are no relevant national provisions on which such relief may be based.⁴⁰

1.5.3. Union legislation

Within the Union legal order, there are a number of legislative instruments that are intended to give effect to the right to access to justice that therefore shape the content of national law.⁴¹ For instance, Article 31 of Directive 2004/38/EC on the right to move and reside freely⁴² (the Citizens' Directive or Free Movement Directive) contains certain procedural safeguards in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied to leave, enter or reside in another Member State. According to this provision, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State. Furthermore, the directive confirms the right of Union citizens and their family members who have been excluded from the territory of a Member State to submit a fresh application after a reasonable period, in line with the relevant case-law of the CJEU.

Another example of an EU legislative instrument providing for the right to access to justice is Article 7 of the Racial Equality Directive: "Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to

them."⁴³ According to the directive, persons who have been subject to discrimination based on racial and ethnic origin should have adequate means of legal protection. The directive also makes a specific reference to associations or legal entities that should be empowered to engage, either on behalf or in support of any victim in proceedings in order to provide a more effective level of protection before the national courts.⁴⁴ Finally, the Racial Equality Directive establishes certain rules concerning the burden of proof, according to which the latter must shift to the respondent when evidence of a *prima facie* case of discrimination is brought.⁴⁵ Similarly worded provisions appear in the Gender Equality Directives and the Employment Equality Directive.

Two specialised Union legal instruments deal with particular aspects of access to justice: the Legal Aid Directive⁴⁶ and the Mediation Directive.⁴⁷ The Legal Aid Directive promotes judicial cooperation in civil matters having cross-border implications within an area of freedom, security and justice. The main purpose of the directive is to guarantee an adequate level of legal aid in cross-border disputes by laying down certain minimum common standards. The directive applies only in cross-border disputes, to civil and commercial matters. It ensures that all persons involved in a civil or commercial dispute within the scope of the directive must be able to assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings. According to the directive, legal aid is appropriate when it allows the recipient effective access to justice. Legal aid covers pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance in bringing a case before a court and representation in court and assistance with or exemption from the cost of proceedings.

According to the Mediation Directive, the objective of securing better access to justice should encompass access to judicial as well as extrajudicial dispute resolution methods. Extrajudicial procedures for the settlement of disputes in civil and commercial matters can simplify and improve access to justice. Mediation can provide a cost-effective and quick extrajudicial

39 CJEU, *Frankovich and Bonifaci v. Italian Republic*, Joined Cases C-6/90 and C-9/90, 19 November 1991; CJEU, *Brasserie du Pêcheur and Factortame*, Joined cases C-46/93 and C-48/93, 5 March 1996.

40 CJEU, *R. v. Secretary of State for Transport, ex parte Factortame and Others (Factortame I)*, C-213/89, 19 June 1990.

41 See also European Commission (2010) *Promoting equality: activities on fighting discrimination in 2009*, Luxembourg: Publications Office of the European Union (Publications Office), p. 26ff.

42 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC), No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L158, 30 April 2004, p. 77.

43 Directive 2000/43, 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19 July 2000, p. 22.

44 See FRA (2011) *The Racial Equality Directive: application and challenges*, Luxembourg: Publications Office.

45 See FRA and ECtHR (2011) *Handbook on European non-discrimination law*, Luxembourg: Publications Office.

46 Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L26, 31 January 2003, p. 41.

47 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24 May 2008, p. 3.

resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. The directive applies to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. However, it does not apply to rights and obligations on which the parties are not free to decide under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law. The mediation provided for in the directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time limits for a mediation process.

1.6. Access to justice in EU policy

At a policy level, the European Council has in its three justice and home affairs programmes outlined priorities for five years at the time, most recently in the Stockholm Programme, adopted in 2009.

1.6.1. Tampere

The Tampere European Council (1999) stressed the need for better access to justice, in particular through mutual recognition of judicial decisions and increased convergence of procedural laws. The Council stressed the need to launch information campaigns, user guides, and easily accessible information systems. Legal aid, extra-judicial procedures, and minimum standards were given as further examples of areas where progress was desirable, not least in cross-border situations.

The Council also underscored that “minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.”⁴⁸ It should be noted that, while this initiative refers principally to the area of criminal law, it reflects concerns that are

48 Presidency Conclusions, section V, entitled “Better access to justice in Europe”, paragraphs 29 et seq., available at: http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

applicable to access to justice as a whole, including through civil and administrative procedures.

1.6.2. The Hague

The Hague European Council (2004) similarly concluded on guaranteeing a “European area of justice by ensuring an effective access to justice for all and the enforcement of judgments.”⁴⁹ The programme stressed that such access to justice “is more than an area where judgments obtained in one Member State are recognised and enforced in other Member States, but rather an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions”.

1.6.3. Stockholm

The Stockholm European Council (2009) underscored a “Europe of law and justice: The achievement of a European area of justice must be consolidated so as to move beyond the current fragmentation. Priority should be given to mechanisms that facilitate access to justice, so that people can enforce their rights throughout the Union. Cooperation between public professionals and their training should also be improved, and resources should be mobilised to eliminate barriers to the recognition of legal acts in other Member States.”⁵⁰ The programme also states that the “European judicial area must also allow citizens to assert their rights anywhere in the Union by significantly raising overall awareness of rights and by facilitating their access to justice.”⁵¹ In this context, the importance of e-justice is mentioned (see below).⁵²

The European Commission was tasked by the European Council to produce an Action Plan Implementing the Stockholm Programme.⁵³ The Action Plan contains a number of relevant measures, including a *Green paper on minimum standards for civil procedures and necessary follow up* (intended for publication in 2013); *Legislative proposal aimed at improving the consistency of existing Union legislation in the field of civil procedural law* (2014);

49 European Commission (2005) *Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice*, COM (2005) 0184 final, 10 May 2005, section 2.3.

50 Council of the European Union, *The Stockholm Programme – An open and secure Europe serving the citizen*, 2010/C 115/01, 4 May 2010, section 1.1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>.

51 *Ibid.*, section 3 and 3.4.

52 The Council adopted *The European Council's Multi-Annual European e-Justice Action Plan 2009-2013*, 2009/C 75/01, 31 March 2009, OJ C 75, section 1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:075:0001:0012:EN:PDF>.

53 European Commission (2010) *Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010, pp. 23–24, available at: http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf.



Report on the application of Directive 2003/8/EC on legal aid (2011); Communication/Green Paper on the promotion of Alternative Dispute Resolution in the EU (2010); and Communication on the implementation of the mediation directive (2013). The Action Plan also includes a European e-justice Portal.⁵⁴

The European e-justice Portal⁵⁵

The use of information and communication technologies enhances access, timeliness, transparency, and accountability, helping judiciaries to provide more efficient services. Such innovations can bring improvements in all these areas, and of particular relevance here, in the area of access to justice. The European e-justice Portal is aimed at improving the way judicial systems operate by facilitating legal practitioners' daily work and fostering cooperation among legal authorities.

On 16 July 2010, the EU launched the portal, a one-stop-shop for access to justice throughout the Union. With this new website, the EU aims at addressing the main questions related to legal issues and helping citizens – and people living in the Union, companies as well as legal practitioners, by contributing to the creation of a single area of justice. More information, tools, and functions will be added to the portal over time.

Future versions will also make existing EU justice tools more effective, for instance, allowing a citizen to pursue their cross-border small claims online (Regulation (EC) No 861/2007, 11 July 2007), providing citizens and businesses all over Europe with a speedy and affordable civil procedure which applies in civil and commercial matters where the value of a claim does not exceed €2,000. This typically written procedure applies to pecuniary as well non-pecuniary claims. The judicial decision obtained as a result of this procedure has to be recognised and enforced in another Member State automatically and without any possibility of opposing its recognition, unless the defendant was not served with the papers.

Another example is the possibility to apply for a European order for payment in order to recover uncontested debts online (Regulation (EC) No. 1896/2006, 12 December 2006). This allows creditors to recover their uncontested civil and commercial claims before the courts of the Member States according to a uniform procedure that operates on the basis of standard forms procedure. It does not require an individual to appear before the court and can be initiated and handled in a purely electronic way. The claimant only has to submit an application, after which the procedure

will be automatic. The judicial decision obtained as a result of this procedure circulates freely in other Member States; the creditor does not have to undertake intermediate steps to enforce the decision abroad.

Courts will also be able to deal with cross-border requests online and communicate with the claimants and defendants in a particular case as well as with courts in other Member States. Good progress is also expected to be made to tackle EU-wide interoperability issues for e-Signature, e-Identity and e-Payment. The European e-Justice internet portal is expected to become fully operational by 2013.⁵⁶

e-justice exclusively is not the solution

It is, however, important to note that the CJEU recently underlined that “electronic means” may not be offered exclusively, due to the danger that thus “the exercise of rights [...] might be rendered in practice impossible [...] for certain individuals”.

(CJEU, *Rosalba Alassini and Filomena Califano v. Wind SpA, Lucia Anna Giorgia Iacono v. Telecom Italia SpA, Multiservice Srl v. Telecom Italia SpA*, Joined Cases C-317/08 to C-320/08, 8 March 2010, paragraph 58)

⁵⁴ *Ibid.*, pp. 20 and 23.

⁵⁵ See <http://e-justice.europa.eu/>.

⁵⁶ See also section 4 of the Special EUROBAROMETER 351 concerning the European procedures in which the awareness and use of EU's three cross-border procedures and the sources of awareness for each procedure are covered, available at: http://ec.europa.eu/public_opinion/archives/ebs/ebs_351_en.pdf.

Other examples of e-justice at national level

In **Italy**, the project known as *Processo Civile Telematico* (on-line Civil Trial) has been introduced in civil courts. This system aims to increase the availability of on-line services, building a two-way data and document interchange and application interoperability between all external users (such as lawyers and expert witnesses), all the courts' internal users (such as clerks and judges) and all the public administrations involved in civil cases. The system is intended to enable lawyers, expert witnesses or other individuals concerned to create, digitally sign and transmit their own legal acts to the relevant court, receive notifications from the court at their certified e-mail addresses, get full access to the information and the electronic acts, regarding their own civil cases, with a wide range of search criteria, information retrieval functions and conceptual searches. Given the system's complexity, however, the *Processo Civile Telematico* has so far been used only by a few district courts in Northern Italy (e.g. Milano, Monza, and Brescia).

In the **Czech Republic**, the governmental project *ejustice* (as a part of the overall project *eGovernment*) is aimed at introducing electronic and internet tools related to the judiciary in order to reduce the time of judicial and administrative proceedings. It includes, for instance, online databases that enable parties to a dispute to

follow individual procedural steps taken in their case. Given the lack of financial means necessary for proper implementation of the project, the impact of the initiative seems to have been, thus far at least, low.⁵⁷

The availability of web services, including the possibility of consulting on-line legislation and case-law is another example of good practice. In this context, in particular is worth mentioning the **Austrian** "Rechtsinformationssystem" [Law Information System] which provides – on a cost-free basis – not only case-law of all branches (constitutional, administrative, civil and criminal) and levels (not only case-law of the supreme courts, but also of courts and tribunals of appeal and even of first instance) of the judiciary, but also a range of legal instruments both of federal and regional level. It is possible to access not only the current consolidated version, but also the initial version and all amendments, as well as the formal text of official publication; in addition, also official drafts and governmental proposals of federal legislation may be found.⁵⁸

There are also official legal databases, though seemingly of a somewhat narrower scope, in other Member States, such as **Bulgaria, Cyprus, Denmark, France, Greece, Latvia, Lithuania, Malta, Poland** and the **United Kingdom**.⁵⁹

1.7. Summary

Previous FRA studies have identified access to justice as a major concern and have addressed particular aspects of access to justice. This is the first FRA report devoted to the topic. The research at the national level in the Member States was constructed on the basis of a typology on access to justice, in an effort to make the findings as comparable as possible.

Access to justice is a concept with many nuances. Even though the term itself is not used in legislation in the Member States, other terms or concepts capture the

same idea. At the European and international levels, the term is not frequently used, but it does appear in the CFR (Article 47(3)). The area of access to justice has been developed by both the ECtHR and the CJEU, and legislation, as well as policy measures at EU level that give prominence to facilitating access to justice.

⁵⁷ See www.obcanskyzakonik.justice.cz/ejustice/.

⁵⁸ See www.ris.bka.gv.at/.

⁵⁹ See www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Information_technology/Links/. See also the EU N-Lex, with national law in 23 EU Member States, available at: http://eur-lex.europa.eu/n-lex/index_en.htm, as well as information on case law in various Member States, available at: https://e-justice.europa.eu/contentPresentation.do?lang=en&idTaxonomy=11&idCountry=eu&vmac=JYNoto04GvR-tuU3d_GXjWMF4u6q6BWIWh7snIEPojYnekllwVFJT1ZRanfMZ3ozh7U47TW eDq--g-xE7XlAvGAAEIsAAAON.

2

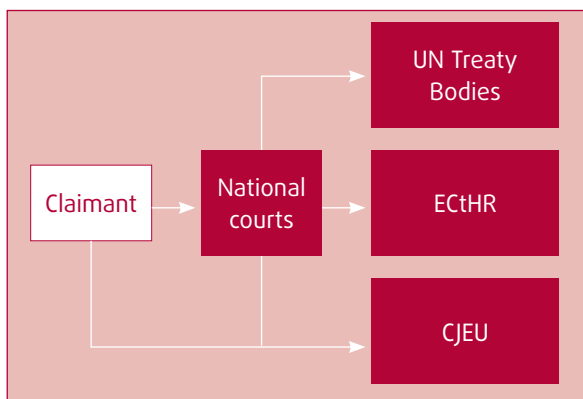
Available mechanisms at European and international level



One of the main purposes of this report is to present an overview of the mechanisms available for accessing justice in Europe.⁶⁰ While subsequent chapters will deal exclusively with courts at the national level, this chapter is devoted to judicial and quasi-judicial mechanisms at the European and international levels. Simply viewed, there are dispute settlement procedures open to individuals available at three levels beyond the national realm: the EU (before the CJEU), the Council of Europe (before the ECtHR and the ECSR), and the UN (before the treaty monitoring bodies). This first section will explain certain general features that distinguish the three systems from each other, as well as features that they hold in common.

Since the ESCR does not deal with individual (but only collective) complaints it is not included in this figure.

Figure 2: Overview of selected mechanisms



Source: FRA, 2010

2.1. Common features and distinctions

2.1.1. The relationship between the national and international mechanisms

The relationship between the CJEU and the national jurisdictions of the Member States is distinct from the relationship between the ECtHR, ECSR and UN treaty bodies and national jurisdictions. This is because EU law differs fundamentally from other types of international law, such as the ECHR or UN treaties in two ways. Firstly the EU Member States are obliged to give EU law ‘direct effect’ at the national level. That is, an individual must be able to rely directly on EU law before the national courts (the doctrine of ‘direct effect’).⁶¹ Secondly, the EU Member States must ensure that EU law always takes precedence over conflicting provisions of national law (the doctrine of ‘supremacy’).⁶² In this sense EU law is, in a way, automatically integrated into the national law of the EU Member States. The procedures available for an individual before the EU reflect this position. The ‘preliminary reference’ procedure is the principal channel through which an individual can ask for the correct interpretation, including the validity, of EU law. Hence, under this procedure a national court may refer questions of interpretation of EU law to the CJEU, in order to help it decide on the outcome of a case. The autonomous judgment of the national court will then be based on the respective interpretation of the CJEU and executed through procedures set out in national

⁶⁰ For a comparative overview of the ECtHR and the UN human rights dispute settlement procedures see Butler, I. (2007) *Unravelling sovereignty: human rights actors and the structure of international law*, Antwerpen: Intersentia, Chapter 4.

⁶¹ Certain criteria must first be satisfied. See: CJEU, *Van Gend en Loos*, Case 26/62, 5 February 1963, ECR 3; moreover the direct effect is (generally speaking) not horizontal in nature and therefore applies in the relationship between individuals and the state and not amongst individuals (see CJEU, *Paola Faccini Dori v. Recreb Srl*, Case 91/92, 14 July 1994, ECR I-3325).

⁶² CJEU, *Costa v. ENEL*, Case 6/64, 16 July 1964, ECR 1194.

law. In this sense EU law is both procedurally and substantively tightly interlinked with national law and the national courts.

In contrast, under the ECHR, ESC and UN treaties States parties commit to guarantee the rights they contain in their national legal framework. Although a state remains responsible in international law for failure to comply with these instruments, unlike EU law there is not an automatic corresponding obligation within national law to make them directly applicable or supreme to national law. Where the state commits a violation the individual complainant must engage in two separate processes. Firstly to attempt to resolve the complaint through the national courts, which are not obliged to apply the relevant treaty directly, or accord it priority over national law. Secondly, if they are unsuccessful at the national level, they may begin proceedings before the ECtHR, ECSR, or a UN treaty body.

2.1.2. The relationship between international mechanisms

Although independent of one another, the above described three systems interrelated. Firstly, all Member States of the EU are also parties to the ECHR, as well as a number of the 'core' UN human rights treaties with their own quasi-judicial mechanisms. As such an individual may be able to exercise a choice over which of the three systems to use.

There are obvious comparative advantages and disadvantages between the three mechanisms. To mention one aspect: the EU offers a clear and direct impact at the national level with its legislation and judgments. At the same time, the CJEU is not the main avenue to access justice that individuals would take in order to have their claim regarding a violation of their fundamental rights heard before court. In 2009, for the CJEU, the total number of filed cases was close to 1,000⁶³ with only a minority of these raising fundamental rights issues while the ECtHR struggled with almost 60,000 new applications concerning alleged violations of fundamental rights lodged in the same year.⁶⁴ The UN HRC, to take the most active of the five treaty bodies presently receiving individual complaints, has received less than 2,000 applications in total since it started to receive cases in 1977.⁶⁵ The quantity of cases is

63 These are made up of 561 for the Court of Justice and 568 for the General Court. See: CJEU, *Annual Report 2009*, pp. 81 and 165, available at: http://curia.europa.eu/jcms/jcms/J02_7000/.

64 ECtHR, *Annual Report 2009*, Strasbourg: Registry of the European Court of Human Rights, p. 139, available at: www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_Final.pdf.

65 To give another example of the caseload of the UN treaty bodies, the Committee on Elimination of Racial Discrimination has in all received 45 cases.

obviously not the only factor determinative of the impact of these bodies. However it may indicate the extent to which these mechanisms are known, the perception of claimants as to which body is most effective, how accessible such bodies are in terms of cost or admissibility criteria, and the resources available to these bodies (for instance the UN monitoring bodies only operate on a part-time basis).

The second way in which the three levels interrelate is that the judicial and quasi-judicial bodies themselves frequently draw on each others' case law when interpreting similarly worded provisions. This is particularly common in relation to the interpretation of human rights provisions. In this sense the CJEU developed human rights standards in EU law by drawing on human rights treaties to which the Member States are party, particularly the ECHR, but also UN treaties.⁶⁶

Finally, the Lisbon Treaty mandates the EU to accede to the ECHR, which will allow an individual in future to sue the EU directly before the ECtHR.⁶⁷

2.1.3. Procedural issues

Judicial versus quasi-judicial

The nature of the procedures before the CJEU, ECtHR on the one hand, and the ECSR and the UN treaty bodies on the other are slightly different in nature. The former are closer to traditional judicial dispute settlement mechanisms, while the latter are more accurately described as 'quasi' judicial. 'Judicial' dispute settlement at the international level refers to dispute settlement by a body of formally elected judges on the basis of evidence submitted by the parties, according to the applicable law, where a legally binding judgment is delivered. Quasi-judicial dispute settlement is understood to be dispute settlement by a body of independent experts who consider the evidence and arguments of the parties by reference to law and delivers findings which the parties have not expressly accepted as legally binding.⁶⁸

66 See for example *Opinion 2/94 Accession of the European Community to the European Convention for the Safeguard of Human Rights and Fundamental Freedoms* (1996) ECR I-1759; *Case C-540/03, European Parliament v. Council*, ECR I-5769, 27 June 2006. For an example of the ECtHR drawing on the UN treaties see: ECtHR, *Opuz v. Turkey*, No. 33401/02, 9 June 2009. See also Rosas, A. (2009) 'Fundamental Rights in the EU, with special emphasis on the Case-law of the European Court of Justice (Luxembourg)' in: Alfredsson, G. et al. (eds.) *International Human Rights Monitoring Mechanisms*, Leiden: Martinus Nijhoff.

67 Article 6(2) Treaty on European Union.

68 Steinberger, H. (1981) 'Judicial Settlement of International Disputes' in: Berhardt, R. (ed.) *Encyclopaedia of Public International Law*, Holland: Max Planck, p. 120; Steiner, H. (2000) 'Individual Claims in a World of Mass Violations: What Role for the Human Rights Committee?' in: Alston, P. and Crawford, J. (eds.) *The Future of UN Human Rights Treaty Monitoring*, Cambridge: Cambridge University Press, pp. 29-30.



Legal standing⁶⁹

Optional Protocol One to the ICCPR stipulates that only individual victims or their appointed representative may bring a complaint.⁷⁰ This means that while NGOs may represent victims with their express consent, there is therefore no public interest complaint (*actio popularis*). In relation to violations of the rights of persons belonging to minorities (Article 27) the UN HRC has found that a community leader may submit a complaint relating to the group as a whole without the separate written authorisation from all concerned.⁷¹ Although the right to self-determination contained in the ICCPR is also a 'group' right, the UN HRC has held that it is not justiciable under the Optional Protocol.⁷² Similarly, under the ECHR the applicant must be a victim of the alleged violation, or their appointed representative.⁷³

Admissibility criteria

Before the CJEU, the ECtHR, or the UN treaty bodies will take jurisdiction over the merits of a claim the claimant must satisfy a range of admissibility criteria. The nature of these criteria differs between the CJEU on the one hand and the ECtHR and UN treaty bodies on the other. This is primarily because of the interrelationship between national jurisdictions and these bodies, discussed above. Because the admissibility criteria for the ECtHR and UN treaty bodies are almost identical they will be discussed here, while those concerning the CJEU will be dealt with below.

Firstly, the ECtHR or UN treaty body must be satisfied that the claimant has exhausted all remedies at the national level. However, the remedies are understood as those that are reasonably available. In this sense both the UN treaty bodies and the ECtHR have taken a victim-friendly approach to this criterion by not requiring the claimants to exhaust those remedies which are ineffective or excessively prolonged.⁷⁴ The rule itself is based on the consideration that a state should have the opportunity to rectify violations

internally before a case is brought at the international level.⁷⁵ Secondly, the complaint in question must relate to a right protected by the relevant treaty⁷⁶ and concern a violation by a party to that treaty.⁷⁷

2.2. The UN treaty bodies

There is, as of yet, no global judicial forum to which individuals may submit human rights complaints: there is no global equivalent of the ECtHR. Instead, the United Nations offers mechanisms that contribute to making justice accessible world-wide through quasi-judicial treaty monitoring bodies that also are mandated to deal with individual complaints.⁷⁸

All the Member States of the EU are party to six of the 'core' human rights treaties elaborated under the aegis of the UN: the Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic Social and Cultural Rights 1966, (ICESCR), the Convention on the Elimination of Discrimination Against Women 1979, the Convention Against Torture 1984, and the Convention on the Rights of the Child 1989. All EU Member States are expected to become party to the UN Convention on the Rights of Persons with Disabilities (CRPD), 17 have already done so, as of January 2011.⁷⁹ The EU also formally ratified the Convention on 23 December 2010.⁸⁰

69 For a discussion on legal standing of an individual before the CJEU, see, in particular, section 2.4.1 on the action of annulment.

70 Optional Protocol to the ICCPR, Article 1 and UN HRC Rules of Procedure Rule 96(b), UN Doc. CCPR/C/3/Rev.8, 22 September 2005.

71 UN Human Rights Committee (UN HRC) *Chief Bernard Ominoyak and the Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984, 26 March 1990, available at: www.unhcr.org/refworld/docid/4721c5b42.html.

72 *Ibid.*

73 It should be noted, however, that in certain cases, in order to give effective protection to human rights, the ECtHR had to interpret the notion of victim widely to include potential or indirect victims as well. See, for instance: ECtHR, *Klass v. Germany*, No. 5029/71, 6 September 1978 or ECtHR, *Norris v. Ireland*, No. 10581/83, 26 October 1988. The key ECtHR case law on the concept of victim in general is available at: www.echr.coe.int/NR/rdonlyres/0F2B45AE-4F54-41AB-AA8B-1E12D285110C/COURT_n1976742_v4_Key_caselaw_issues_Article_34_The_concept_of_the_victim_trad_eng.pdf.

74 UN HRC, *Hugo Rodriguez v. Uruguay*, Communication No. 322/1988, 9 August 1994, paragraph 6.2; ECtHR, *Akdivar et al. v. Turkey*, No. 21893/93, 16 September 1996, paragraph 65.

75 In case the individual raises the same issue before both ECtHR and UN treaty body, the ECtHR will refuse to deal with it in accordance with Article 35 (2) (b) ECHR (see www.echr.coe.int/NR/rdonlyres/53FEB066-3AB2-4382-A3D6-06AFB88B24910/COURT_n1978459_v2_Key_caselaw_issues_Matter_already_examined_Article_35_2b_trad_eng2p.pdf). The ECtHR will not, furthermore, examine the application lodged outside a period of six months from the date on which the final decision was taken in accordance with the so-called six-month-rule (see www.echr.coe.int/NR/rdonlyres/41EFF42A-FBE7-4E41-987C-0A141AAE294A/COURT_n1356862_v3_Key_caselaw_issues_Sixmonth_rule_art_3513.pdf).

76 See for example, UN HRC, *Chadzjian v. The Netherlands*, Communication No. 1494/2006, 22 July 2008; ECtHR, *Skorobogatykh v. Russia*, No. 37966/02, 9 June 2006.

77 UN HRC, *H.v.d.P. v. The Netherlands*, Communication No. 217/1986, 8 April 1987; ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, No. 15318/89, 23 March 1995.

78 See generally www.ohchr.org. On treaty bodies see, for example, Kjaerum, M. (2009) 'State Reports' in: Alfredsson, G. et al. (eds.) *International Human Rights Monitoring Mechanisms*, Leiden/Boston: Martinus Nijhoff. Individuals may also submit individual complaints under the 'special procedures' operating under the UN Human Rights Council. However, these procedures are generally more akin to dispute settlement through diplomatic channels. On the 'special procedures' see www.ohchr.org/english/bodies/hr/special/index.htm. On the treaty bodies see www.ohchr.org/english/bodies/petitions/index.htm.

79 In addition, some Member States are also party to the International Convention for the Protection of All Persons from Enforced Disappearance 2006, though none are yet party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICRMW).

80 See Council Decision 2010/48 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27 January 2010, p. 35.

Table 1: EU Member States as parties to the UN Conventions

	ICERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ICRMW	ICPED	CRPD	Number of 'core' UN human rights conventions (9 in total) accepted by EU Member State
Austria	✓	✓	✓	✓	✓	✓	X	S	✓	7
Belgium	✓	✓	✓	✓	✓	✓	X	S	✓	7
Bulgaria	✓	✓	✓	✓	✓	✓	X	S	S	6
Cyprus	✓	✓	✓	✓	✓	✓	X	S	S	6
Czech Republic	✓	✓	✓	✓	✓	✓	X	X	✓	7
Denmark	✓	✓	✓	✓	✓	✓	X	S	✓	7
Estonia	✓	✓	✓	✓	✓	✓	X	X	S	6
Finland	✓	✓	✓	✓	✓	✓	X	S	S	6
France	✓	✓	✓	✓	✓	✓	X	✓	✓	8
Germany	✓	✓	✓	✓	✓	✓	X	✓	✓	8
Greece	✓	✓	✓	✓	✓	✓	X	S	S	6
Hungary	✓	✓	✓	✓	✓	✓	X	X	✓	7
Ireland	✓	✓	✓	✓	✓	✓	X	S	S	6
Italy	✓	✓	✓	✓	✓	✓	X	S	✓	7
Latvia	✓	✓	✓	✓	✓	✓	X	X	✓	7
Lithuania	✓	✓	✓	✓	✓	✓	X	S	✓	7
Luxembourg	✓	✓	✓	✓	✓	✓	X	S	S	6
Malta	✓	✓	✓	✓	✓	✓	X	S	S	6
Netherlands	✓	✓	✓	✓	✓	✓	X	S	S	6
Poland	✓	✓	✓	✓	✓	✓	X	X	S	6
Portugal	✓	✓	✓	✓	✓	✓	X	S	✓	7
Romania	✓	✓	✓	✓	✓	✓	X	S	✓	7
Slovakia	✓	✓	✓	✓	✓	✓	X	S	✓	7
Slovenia	✓	✓	✓	✓	✓	✓	X	S	✓	7
Spain	✓	✓	✓	✓	✓	✓	X	✓	✓	8
Sweden	✓	✓	✓	✓	✓	✓	X	S	✓	7
United Kingdom	✓	✓	✓	✓	✓	✓	X	X	✓	7
✓ = State party s = signed x = not signed										

Source: FRA, 2010



Table 2: Number of State parties among the EU-27 that have accepted individual complaints procedures under the respective Treaty bodies

Treaty Bodies	Number of EU Member States
Committee on Elimination of Racial Discrimination (CERD)	23
Human Rights Committee (UN HRC) (under the ICCPR)	26
Committee on the Elimination of Discrimination Against Women (CEDAW)	24
Committee Against Torture (CAT)	27
Committee on the Rights of Persons with Disabilities	14

Source: FRA, 2010

Five of the ‘core’ UN human rights treaties currently make provision for the relevant treaty monitoring body to receive and issue a decision on the merits of individual complaints (also referred to as ‘petitions’ or ‘communications’), upon consent of the state.⁸¹ All EU Member States, apart from the United Kingdom, have accepted the jurisdiction of the UN HRC to act upon individual complaints by ratifying the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).⁸² Of the remaining four treaty bodies mandated to receive individual complaints, the acceptance among the EU Member States ranges between 14 and 27, where the lowest number relates to the most recently adopted, the Optional Protocol to the CRPD (2008).⁸³

Tables 2 and 3 show the five treaty bodies mandated to process individual complaints and the EU Member States that have consented to the individual complaints procedure.⁸⁴

Since the UN HRC is the treaty body to have received the most complaints it will constitute the focus of discussion on the UN treaty bodies. It should also be noted that for the most part the treaty bodies adopt similar approaches in relation to individual complaints, and in this sense the UN HRC serves as an example of the way the treaty bodies operate.⁸⁵ However, given the focus of the report on non-discrimination law, discussion of the UN HRC is complemented by a brief overview of CERD.

2.2.1. Human Rights Committee

When handling individual complainants it operates as a quasi-judicial body.⁸⁶ In particular this means that the state party has not expressly accepted the ‘views’ delivered by the UN HRC on cases brought before it as legally binding (in contrast to the judgments delivered by the ECtHR). Nevertheless views of the UN HRC represent authoritative interpretations regarding the substance of legally binding treaty obligations. The reasoning of the UN HRC in this regard is that under Article 2 of the ICCPR ‘the state party has undertaken to ensure to all individuals within its territory and

81 When the Optional Protocol to the ICESCR 2008 enters into force, the Committee on Economic Social and Cultural Rights will also be able to deal with individual complaints. At present, only one EU Member State (Spain) is party and an additional eight have to date signed this instrument. Provision for this procedure is either made within the main body of the treaty (such as ICERD), or under a separate instrument (such as the Optional Protocol to the ICCPR).

82 See for example UN HRC, *Czerin et al v. the Czech Republic*, Communication No. 823/1998, 26 June 2003, on execution of judgment; UN HRC, *Äärelä v. Finland*, Communication No. 779/1997, 24 October 2001, on awarding of costs for non-discrimination hearings; UN HRC, *Moraël v. France*, Communication No. 207/1986, 28 July 1989, on length of proceedings (no violation), and UN HRC, *Pezoldova v. the Czech Republic*, Communication No. 757/1997, 5 October 2002, on access to an effective remedy. 13 of the EU Member States have made a reservation (to Article 5(2)) that seeks to regulate conflicting complaints between the ECtHR and the UN HRC – avoiding potentially conflicting decisions from the two instances.

83 Information on how to file a complaint, submit an application, is available at: www2.ohchr.org/english/bodies/question.htm and some of the treaty bodies offer model forms for what an application should contain and how it should be structured, see for example: www.un.org/womenwatch/daw/cedaw/protocol/modelform-E.PDF.

84 Estonia, Greece, Latvia, Lithuania, and the United Kingdom have not accepted individual complaints under ICERD; Estonia, Latvia, and Malta have not accepted individual complaints under CEDAW; and Denmark, Estonia, Greece, Ireland, Latvia, the Netherlands, and Poland have to date not even signed the Optional Protocol under the CRPD.

85 Butler, I. (2007) *Unravelling sovereignty: human rights actors and the structure of international law*, Antwerpen: Intersentia, pp. 123-131.

86 See also De Zayas, A. (2009) ‘The Human Rights Committee’s Optional Protocol Procedure’ in: Alfredsson, G. et al. (eds.) *International Human Rights Monitoring Mechanisms*, Leiden/Boston: Martinus Nijhoff.

Table 3: Accepted individual complaints procedures, by EU Member State

	ICERD	ICCPR	CEDAW	CAT	CRPD
Austria	✓	✓	✓	✓	✓
Belgium	✓	✓	✓	✓	✓
Bulgaria	✓	✓	✓	✓	s
Cyprus	✓	✓	✓	✓	s
Czech Republic	✓	✓	✓	✓	s
Denmark	✓	✓	✓	✓	x
Estonia	x	✓	x	✓	x
Finland	✓	✓	✓	✓	s
France	✓	✓	✓	✓	s
Germany	✓	✓	✓	✓	✓
Greece	x	✓	✓	✓	s
Hungary	✓	✓	✓	✓	✓
Ireland	✓	✓	✓	✓	x
Italy	✓	✓	✓	✓	✓
Latvia	x	✓	x	✓	✓
Lithuania	x	✓	✓	✓	✓
Luxembourg	✓	✓	✓	✓	s
Malta	✓	✓	x	✓	s
Netherlands	✓	✓	✓	✓	x
Poland	✓	✓	✓	✓	x
Portugal	✓	✓	✓	✓	✓
Romania	✓	✓	✓	✓	s
Slovakia	✓	✓	✓	✓	✓
Slovenia	✓	✓	✓	✓	✓
Spain	✓	✓	✓	✓	✓
Sweden	✓	✓	✓	✓	✓
United Kingdom	x	x	✓	✓	✓
✓ = State party / applicable s = signed x = not signed					

Source: FRA, 2010



subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established'. In this sense the state is to take due regard of the 'views' of the UN HRC, as the body appointed under the Optional Protocol to interpret the ICCPR, in taking action to remedy a breach which it has found.⁸⁷

Procedure before the UN Human Rights Committee and legal aid

Proceedings before the treaty bodies are generally written, and each party has the ability to respond to the others' arguments during the process. One apparent shortcoming of the complaints procedure before the UN treaty bodies is that there is no provision for legal aid for applicants. Of course, this may be offset where NGOs are able to provide assistance, which so far has occurred only on an ad hoc basis. At the same time it should be kept in mind that the cost of proceedings may be kept low since they are normally written and there is no requirement for the complainant to be assisted by legal counsel.⁸⁸ It is also open for the treaty body to direct the state to pay legal costs upon conclusion of the case.⁸⁹

Remedies

The UN treaty bodies may request states to take interim measures to prevent 'irreparable damage to the victim'.⁹⁰ This is particularly important in cases involving a threat to life, or torture. The object of an interim measure is to maintain the *status quo* pending a final decision on the merits. Where the treaty body finds in favour of the claimant it may simply declare the existence of a violation of the treaty without further recommendation for a specific remedy. However, it will usually invite the state to take some form of action, such as the opening of procedures at the national level (an investigation or prosecution),⁹¹ reform of legislation,⁹² release or reinstatement in post of a victim⁹³ and occasionally compensation⁹⁴ or the payment of legal costs.⁹⁵

⁸⁷ See for example UN HRC, *Sooklal v. Trinidad and Tobago*, Communication No. 928/2000, 8 November 2001, paragraph 7.

⁸⁸ De Zayas, A. (2001) 'Petitioning the United Nations' in: *American Society of International Law (ASIL)*, Proceedings of the 95th Annual meeting, Washington D.C., April 2001.

⁸⁹ See for example UN HRC, *Laptsevich v. Belarus*, Communication No. 780/1997, 20 March 2000.

⁹⁰ See for example UN HRC Rules of Procedure Rule 92, UN Document CCPR/C/3/Rev.8, 22 September 2005.

⁹¹ See for example UN HRC, *Blazek et al. v. Czech Republic*, Communication No. 857/1999, 12 July 2001.

⁹² *Ibid.*

⁹³ See for example UN HRC, *Mansaraj et al. v. Sierra Leone*, Communication No. 839/1998, 16 July 2001; UN HCR, *Chongwe v. Zambia*, Communication No. 821/1998, 20 October 2000.

⁹⁴ See for example UN HRC, *Laptsevich v. Belarus*, Communication No. 780/1997, 2 March 2000.

⁹⁵ *Ibid.*

Length of proceedings

The UN HRC like the other treaty bodies, is not a permanent body and usually meets three times each year for a period of three weeks, which necessarily limits the amount of time available for consideration of individual complaints, alongside its other tasks. It is unclear what the average length of time is for a final decision to be adopted once a claim has been registered. However, it is clear that a backlog of cases exists and is increasing. The number of new cases registered appears to be over 200 per year, while the number of cases concluded on an annual basis seems to vary between 50 and 100.⁹⁶

Enforcement of decisions

The UN treaty bodies have provision within their rules of procedure to follow-up on the execution of 'views' adopted on individual complaints.⁹⁷ However, the incentive for states created by this is limited to the pressure that the treaty body's designated rapporteur can exert, which includes the publication of the degree of compliance in the body's annual report. While the annual reports of the treaty bodies are presented to the General Assembly of the UN, compliance with individual decisions is not addressed by the General Assembly on a state by state basis.⁹⁸

2.2.2. Committee on the Elimination of Racial Discrimination

The ICERD was the first of the UN human rights treaties that provided for a specific monitoring body – CERD – and served as the precursor to those under the other conventions, including the UN HRC.⁹⁹ Special features of the ICERD include the fact that in addition to individual complaints, the CERD is expressly authorised to receive complaints from groups of individuals.

As noted in Table 2, 23 of the EU Member States have consented to the individual complaints procedure under ICERD. In order to consent to this procedure states need not become party to a separate instrument, but merely make a declaration to this

⁹⁶ UN HRC, Report of the UN HRC, 2008, UN Document A/63/40, Volume I, Chapter V.

⁹⁷ UN HRC Rules of Procedure, Rule 101, UN Document CCPR/C/3/Rev.8, 22 September 2005; CEDAW Rules of Procedure, Rule 73, UN Document A/56/38 (Supplement) and A/62/38 (Supplement) Chapter V; CAT Rules of Procedure, Rule 114 UN Document CAT/C/3/Rev.4, 9 August 2002; CERD Rules of Procedure, Rule 95; Report of the Committee on the Elimination of Racial Discrimination, UN Document A/60/18, Supplement No. 18, 19 August 2005, p. 170.

⁹⁸ See for example UN GA Resolution 64/152, International Covenants on Human Rights, 26 March 2010.

⁹⁹ Van Boven, T. (2009) 'The Petition System under ICERD: An Unfulfilled Promise' in: Alfredsson, G. et al. (eds.) *International Human Rights Monitoring Mechanisms*, Leiden/Boston: Martinus Nijhoff.

effect. Greece, Latvia, Lithuania, and the United Kingdom have not done so.

Further, Article 14(2) of the Convention allows for the designation of a national body to receive complaints relating to any of the rights guaranteed by the ICERD. Only five EU Member States have made use of this option: Austria, Belgium,¹⁰⁰ Luxembourg,¹⁰¹ Portugal,¹⁰² and Romania.¹⁰³ Austria has, however, only reserved the right to do so but not explicitly named any institution.¹⁰⁴

In all, some 40 cases have been processed by the CERD in its 25 years of operation, with a quarter ending in the adoption of ‘views’ – finding a violation.¹⁰⁵ Of the 27 EU Member States, individual communications from Denmark have been numerous, providing for almost half of the total number of cases. Only four of these have, however, ended in views being adopted. In relation to five other EU Member States, individual complaints have been submitted but the numbers range from between one to three complaints for each of these states.

2.3. The Council of Europe mechanisms

2.3.1. European Court of Human Rights

The ECtHR is the judicial mechanism for accessing justice at the Council of Europe level. Even though it covers mainly civil and political rights, it constitutes an important mechanism for obtaining access to justice in individual cases as well as more broadly by developing standards for the states party to the ECHR through its case law.¹⁰⁶

With the accession of the EU to the ECHR provided for by the Treaty of Lisbon, the ECtHR will have the jurisdiction in relation to an act, or a failure to act, by an EU institution or a Member State implementing EU law and falling within the remit of the ECHR.

As noted above, certain admissibility criteria, including the exhaustion of local remedies, must first be satisfied by an individual applicant. Unlike cases lodged with the UN HRC, applications must be lodged within six months following the last judicial decision in the case, which will usually be a judgment by the highest court in the country concerned. Time starts running from the day after the applicant became aware of the act or decision of which he or she complains – i.e. the date on which the individual can be considered to have exhausted domestic remedies.¹⁰⁷

Procedure before the ECtHR and legal aid

The ECtHR high caseload means that in practice cases are dealt with through a written procedure. However, it does occasionally hold public hearings in specific cases. There are no fees for proceedings before the ECtHR. In addition, in the first stages of the proceedings before the ECtHR, the applicants do not need to be represented by a lawyer. Nevertheless, a lawyer is needed once a state has been notified of an application. At this stage, the President of the Chamber may, either at the request of an applicant or of its own motion, grant legal aid to the applicant in connection with the presentation of the case before the ECtHR. Such legal aid may be granted to cover not only representatives’ fees but also travelling and subsistence expenses and other necessary expenses incurred by the applicant or appointed representative. Having said that, the amounts offered by the ECtHR are seen as a contribution to legal costs and it is open to the applicant to recoup the actual legal costs incurred under Article 41 ECHR if he/she wins the case.¹⁰⁸

Legal aid is not granted automatically: the President of the Chamber must be satisfied that it is necessary for the proper conduct of the case before the ECtHR and that the applicant has insufficient means to meet all or part of the costs entailed. The President of the Chamber may, if satisfied that these conditions are no longer fulfilled, revoke or vary a grant of legal aid at any time.¹⁰⁹

¹⁰⁰ Centre pour l’Égalité des Chances et la Lutte contre le Racisme (Centre for Equal Opportunity and the Struggle against Racism, now officially referred to as Centre for Equal Opportunity and Opposition to Racism, see www.diversiteit.be).

¹⁰¹ Commission spéciale permanente contre la discrimination.

¹⁰² High Commissioner for Immigration and Ethnic Minorities.

¹⁰³ Council for Combating Discrimination.

¹⁰⁴ Austrian Declaration of 20 February 2002.

¹⁰⁵ Status of communications dealt with by CERD under Article 14 procedure (22 July 2010), www2.ohchr.org/english/bodies/cerd/docs/CERDSURVEYArt14.xls.

¹⁰⁶ As for the protection against discrimination under the ECHR, Article 14 ECHR prohibits discrimination in the enjoyment of one or the other rights guaranteed by the ECHR. In addition, Protocol No. 12 to the ECHR provides for a general prohibition of discrimination by guaranteeing that no-one shall be discriminated against on any ground by any public authority. So far, however, Protocol No. 12, have been only ratified by five EU Member States.

¹⁰⁷ Where the complaint concerns a continuing situation, time runs from the end of the situation but as long as the situation continues, the six month rule cannot bite. See, for example: ECtHR, *Papamichalopoulos and Others v. Greece*, No. 14556/89, 24 June 1993 or ECtHR, *Ülke v. Turkey*, No. 39437/98, 1 June 2004.

¹⁰⁸ Harris, D.J., O’Boyle, M., Bates, E.P. and Buckley, C. M. (2009) *Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights*, Oxford: OUP, p. 841.

¹⁰⁹ Rules of Court, 1 June 2010, Chapter XI, Legal Aid, Rule 100-105.



Remedies

As the UN HRC, after the application has been lodged, the ECtHR may, at the request of an applicant under Rule 39 of its Rules of Court, indicate interim measures to the defending state. Interim measures are applied only in limited situations where there is an imminent risk of irreparable damage.¹¹⁰ In practice, most of the cases where an interim measure is requested concern expulsion or extradition from a state. In these cases, the Court can request the state concerned to suspend a deportation order against the applicant.

The ECtHR routinely awards legal costs to a successful applicant (including costs incurred at the national level),¹¹¹ and sometimes also awards the payment of compensation.¹¹² The ECtHR will not usually direct the state to take specific measures to remedy the violation, often considering that payment of legal costs and the declaration of a finding of violation to be sufficient of themselves.¹¹³ Rather it is left to the state itself, in conjunction with the enforcement role of the Council of Ministers (noted below) to determine whether any other specific course of action, such as reform of legislation, is appropriate.

Length of proceedings

At the end of 2009, the ECtHR had 120,000 pending applications.¹¹⁴ In view of this backlog, an applicant may have to wait a year before the ECtHR proceeds with its initial examination of an application. It is impossible to indicate the length of proceedings before the ECtHR in a precise manner. The ECtHR endeavours to deal with cases within three years but the examination of some cases takes longer and some can be processed more rapidly.

The length of the proceedings before the ECtHR obviously varies depending on the case, the formation to which it is assigned, the diligence of the parties in providing the ECtHR with information and many other factors, such as the holding of a hearing or referral to the Grand Chamber. Some applications may be classified as urgent and handled on a priority basis,

especially in cases where the applicant is alleged to be facing an imminent threat of physical harm.¹¹⁵

In any case, the explosive growth of litigation in the last ten years poses a threat to the effective functioning of the ECtHR. As a result, on 1 June 2010 Protocol No. 14 to the ECHR entered into force.¹¹⁶ Its aim is to guarantee the long-term efficiency of the ECtHR (that is reduce its workload and the length of proceedings), by optimising the filtering and processing of applications. In particular, it provides for new judicial formations to deal with repetitive (showing a systemic problem) and clearly inadmissible cases and for a new admissibility criterion (that of "significant disadvantage").¹¹⁷

Reform of the European Court of Human Rights

On 18 and 19 February 2010, Switzerland organised a ministerial conference in Interlaken in order to decisively spur the reform of the overburdened ECtHR. According to the declaration adopted by the representatives of the 47 Member States of the Council of Europe at the end of the Conference, it is necessary in particular to reach a balance between incoming cases and the rate at which cases can be settled and to reduce the volume of approximately 120,000 outstanding cases as well as to guarantee that new appeals are dealt with in reasonable time. Moreover, the national implementation of the ECtHR judgments should be improved and the Committee of Ministers should guarantee effective supervision of the implementation process. In order to achieve these objectives the political declaration contains an action plan with a list of short and medium-term measures as well as an agenda for their implementation.¹¹⁸

Pilot judgments

The ECtHR introduced the measure of issuing a 'pilot' judgment¹¹⁹ in order to redress one of the main problems of its high caseload: that of repetitive (clone) cases, i.e. large numbers of cases raising essentially

¹¹⁰ See ECtHR, *Mamatkulov and Askarov v. Turkey*, No. 46827/99 and No. 46951/99, 4 February 2005 or ECtHR, *Paladi v. Moldova*, No. 39806/05, 10 March 2009.

¹¹¹ See for example ECtHR, *Zimmermann and Steiner v. Switzerland (Merits and Just Satisfaction)*, No. 8737/79, 13 July 1983.

¹¹² ECtHR, *Kingsley v. the United Kingdom (GC)*, No. 35605/97, 28 May 2002.

¹¹³ ECtHR, *Le Compte, Van Leuven and De Meyere v. Belgium (Just Satisfaction)*, Nos. 6878/75 and 7238/75, 18 October 1982. Exceptionally, see: ECtHR, *Assanidze v. Georgia (GC)*, No. 71503/01, 08 April 2004.

¹¹⁴ ECHR (2010) *Annual Report 2009*, Strasbourg: Registry of the European Court of Human Rights, p. 139, available at: www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_Final.pdf.

¹¹⁵ Most of such cases concern expulsion or extradition from a state.

¹¹⁶ Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, CETS No. 194, available at: www.conventions.coe.int/Treaty/en/Reports/Html/194.htm.

¹¹⁷ See for example ECtHR, *Rinck v. France*, No. 18774/09, 17 November 2010.

¹¹⁸ See www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf.

¹¹⁹ The pilot judgment procedure was applied for the first time in the case of ECtHR, *Broniowski v. Poland*, No. 31443/96, 22 June 2004. For an elaboration, see Björgvinsson, D. T. (2009) 'The "pilot-judgment" procedure of the European Court of Human Rights' in: Alfredsson, G. et al. (eds.) *International Human Rights Monitoring Mechanisms*, Leiden: Martinus Nijhoff.

the same issue. The way in which the procedure operates is that when the ECtHR receives a significant number of applications deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, it will seek to achieve a solution that extends to cover all similar cases raising the same issue. The resulting judgment is designated as a ‘pilot’ judgment.

An important feature of the pilot judgment procedure is the possibility of adjourning or ‘freezing’ the examination of all other related cases for a certain period of time. This is an additional means of encouraging national authorities to take the necessary steps. Such adjournment, which will usually be for a set period of time, may be subject to the condition that the respondent state act promptly and effectively on the conclusions drawn in the pilot judgment.¹²⁰

The introduction of the pilot judgment procedure cannot resolve all the difficulties caused by the ECtHR excessive workload. But it has the potential to make significant inroads into the existing backlog and eliminate some of the root problems which lie behind repetitive applications as well as establishing a remedy for those adversely affected.¹²¹

Execution of judgments

Once the ECtHR judgment becomes final, it is transmitted to the Committee of Ministers (comprised of the Foreign Affairs Ministers of all the Council of Europe’s Member States or their permanent diplomatic representatives in Strasbourg). The latter then invites the respondent state to inform it of the steps taken to pay any costs or compensation awarded by the ECtHR. Often this will require the adoption of general measures, especially amendments to legislation.¹²² In order to persuade the state concerned to comply with the ECtHR judgments, the Committee of Ministers exercises its influence and diplomatic pressure not least by noting its failure to comply with the ECHR and taking appropriate action. Until the state in question has adopted satisfactory measures, the Committee of Ministers does not adopt a final resolution striking the judgment off its list of cases, and the state continues to be required to provide explanations or to take the necessary action.

120 In a pilot judgment in the case: ECtHR, *Maria Atanasiu and Others v. Romania*, Nos. 30767/05 and 33800/06, 12 October 2010, the ECtHR adjourned the cases concerning properties nationalised during the communist era in Romania pending general measures at national level.

121 For further information, see www.echr.coe.int/NR/rdonlyres/DF4E8456-77B3-4E67-8944-B908143A7E2C/0/Information_Note_on_the_PJP_for_Website.pdf.

122 See Articles 41 and 46 ECHR. See the Council of Europe Committee of Ministers’ Annual Report (2009) on supervision of the execution of ECtHR judgments available at: www.coe.int/t/DGHL/MONITORING/EXECUTION/Source/Publications/CM_annreport2009_en.pdf.

2.3.2. European Committee of Social Rights

The European Committee of Social Rights (ECSR), monitors implementation of the European Social Charter (ESC), and supplements the ECtHR by providing supervision of economic and social rights. Direct access to the ECSR is available through a collective complaints mechanism that is open to organisations meeting certain criteria.¹²³ By becoming party to the Additional Protocol to the ESC states authorise international and national organisations of employers and trade unions and international NGOs to submit complaints against them for failure to comply with the ESC.¹²⁴ States may also opt to authorise national NGOs to submit complaints. Due to the collective nature of the mechanism the breaches complained of tend to be of a systematic rather than an individual nature. Since the entry into force of the Additional Protocol in 1999 over 60 complaints have been registered.

To date 12 EU Member States, have become party to the Additional Protocol.¹²⁵ Table 4 lists these states as well as those that have signed but not yet ratified the Protocol (signalling an intention to become full parties at some later date).

Table 4: EU Member States parties and signatories to the Additional Protocol under the ESC

State parties (12)
Belgium, Bulgaria, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal, Slovenia, Sweden
Signatories (5)
Austria, Czech Republic, Hungary, Denmark, Slovakia

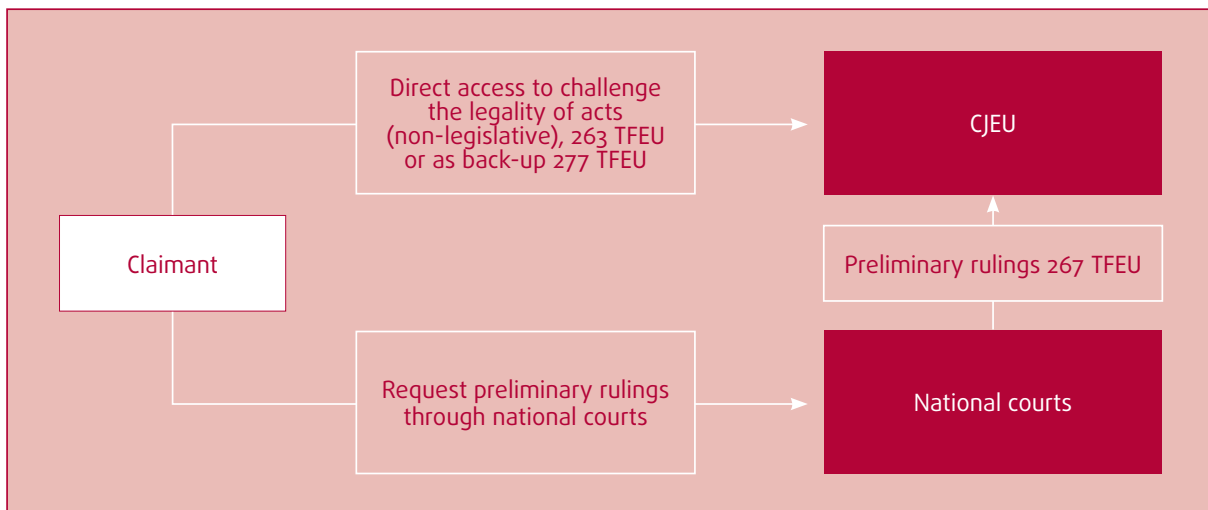
Source: FRA, 2010

123 For an overview of which EU Member States are State Parties to the European Social Charter and which countries have accepted the protocol allowing for collective complaints as well as for details on accepted rights under the European Social Charter, see FRA (2010) *Annual Report 2010*, Vienna: FRA, pp. 167-170, available at: http://fra.europa.eu/fraWebsite/attachments/AR_2010-conf-edition_en.pdf. For a list of organisations eligible to lodge complaints see: www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrganisationsIndex_en.asp.

124 Additional protocol to the European Social Charter Providing for a System of Collective Complaints, 1995, CETS No. 158. International NGOs may be granted this right by applying to the Governmental Committee (composed of representatives of the State Parties) for eligibility.

125 For ratifications and signatures as of 3 March 2010, see www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp; there is also a possibility under the Revised European Social Charter (1996) to be bound by the Collective Complaints Protocol through notification upon ratification of the Charter (Part IV, Article D of ESC (revised) (resorted to by Bulgaria and Slovenia).

Figure 3: The two main routes to access to the CJEU



Source: FRA, 2010

Only Finland has given further consent to allow national NGOs to make complaints.

The ECSR is mandated to adopt decisions on these collective complaints. As with the ECtHR, once a decision finding a violation has been adopted it falls to the Committee of Ministers of the Council of Europe to recommend a solution to the State Party in question. The Committee of Ministers adopts a resolution irrespective of the outcome in the case, which may contain Recommendations if there has been a violation.¹²⁶ The state must then explain in its next periodic report to the ECSR (due every four years) what it has done to implement the decision.¹²⁷

2.4. Court of Justice of the European Union

Compliance with EU law is guaranteed by the CJEU which may hear cases relating to the institutions of the EU as well as the Member States in areas falling in the scope of EU law. The CJEU is divided into two bodies: the General Court (GC), and the Court of Justice (CJ).¹²⁸ For the purposes of the current report two principal mechanisms exist through which individuals may challenge the validity of EU measures or measures by Member States relevant to the implementation of EU

law: the action for annulment (which is dealt with by the GC and can be appealed to the CJ) and the preliminary reference procedure (dealt with directly by the CJ). The EU also offers non-judicial mechanisms, such as the European Ombudsman, to which one can file complaints about maladministration within the EU institutions and bodies.¹²⁹ Focus here is, however, placed on judicial procedures available through the CJEU.

2.4.1. The action for annulment

The action for annulment under Article 263 Treaty on the Functioning of the European Union (TFEU), formerly Article 230 Treaty establishing the European Communities (TEC),¹³⁰ allows a legal or physical person to request the annulment of any legally binding measure taken by the EU institutions or agencies.¹³¹ Such measures are not restricted to those legally binding measures listed in Article 288 TFEU (regulations, directives and decisions).¹³²

The conditions for legal standing are, however, restrictive. An individual may lodge a complaint against an act that is specifically addressed to them, such as a decision against a commercial enterprise issued by the European Commission in the context of competition law. An application must be lodged within two months of publication of the measure being contested. If the act complained of is not addressed to the complainant, then he/she must show that they have 'individual' concern – that is that they are affected by the measure in question just as if they had

¹²⁶ See Article 9 of the Protocol. To date Recommendations have only been issued in one case, rather, the resolution contains a number of detailed measures that the respondent government will remedy.

¹²⁷ See Article 10 of the Protocol. Article 21 actually stipulates reporting every two years but by Committee of Ministers decision in 2006 the periodicity was changed to four years. See Brillat, R. (2009) 'The European Social Charter' in: Alfredsson, G. et al. (eds.) *International Human Rights Monitoring Mechanisms*, Leiden: Martinus Nijhoff, p. 508.

¹²⁸ This report is referring to CJEU as the general entity unless a distinction between the CJ and the GC is required.

¹²⁹ For an overview of the work, see <http://ombudsman.europa.eu>.

¹³⁰ There is a similar procedure allowing the institutions to be sued for failing to act where they were under a duty to do so. See Article 265 TFEU.

¹³¹ The Lisbon Treaty amended former Article 230 TEC to allow the CJEU to review not just the legality of acts of the institutions but also of 'bodies, offices or agencies of the Union'.

¹³² See, for example, Case 216/83 *Les Verts*, [1984] ECR 3325.

Table 5: Overview of provisions providing for access to justice before the CJEU

Treaty on the Functioning of the EU	Article 263 TFEU	Article 267 TFEU	Article 277 TFEU
Type	Action for annulment	Preliminary ruling procedure	'Indirect' (incidental) review
Purpose	To review the legality of acts of the EU institutions, bodies and agencies	To clarify an issue of EU law	To review the legality of acts of the EU institutions, bodies and agencies
CJEU	General Court (appealable to Court of Justice)	Court of Justice	Court of Justice
Type of access	Direct	Indirect through national courts	Indirect through national courts

Source: FRA, 2010

been the express addressee. The interpretation given to this provision has meant that in practice,¹³³ apart from a few exceptional cases, a complainant cannot contest the validity of a general legislative measure, such as a regulation or directive.¹³⁴ This is because by their nature such instruments are designed to create general rules rather than being targeted at specific individuals.

2.4.2. The preliminary reference procedure

Under the preliminary reference procedure a national court may request the CJEU to provide an interpretation of a provision of EU law that is needed to resolve a dispute pending consideration at the national level (Article 267 TFEU). The CJEU may at the same time undertake judicial review of the EU measure in question itself (under Article 277 TFEU). In this sense the preliminary reference procedure under Article 263 TFEU is capable of mitigating the restrictive rules on standing under the action for annulment (Table 5 below). As such the two mechanisms taken together have been referred to as a 'complete system of legal remedies and procedures designed to permit

the Court of Justice to review the legality of measures adopted by the institutions'.¹³⁵

In 2009 a total of 302 new references for a preliminary ruling were made from domestic courts of the EU Member States.¹³⁶ The number ranged from 59 (Germany) to zero (Ireland and Luxembourg). Member States from which more than 20 references were made include Germany, Belgium, France, Italy, the Netherlands, and the United Kingdom. In practice, however, issues of EU law are commonly decided by domestic courts without making a reference for a preliminary ruling by the CJEU under 267 TFEU.

2.4.3. The 'complete system of legal remedies'

However, the ability of the preliminary reference procedure to adequately complement the action for annulment in allowing individuals the opportunity to challenge the validity of measures adopted by the institutions needs to be seen in the light of the following considerations. Firstly, the decision to make the referral to the CJEU and the parameters of the enquiry rest not with the individual parties to the

¹³³ See Case 25/62 *Plaumann v. Commission*, [1963] ECR 95.

¹³⁴ The exceptional cases where standing has been allowed to contest a general legislative measure have generally related to a situation where there was only one possible individual who could be particularly negatively affected by that measure. See for example Case C-309/89 *Cordoniu v. Council*, [1994] ECR I-1853; Case C-359/89 *Extramet v. Council*, [1991] ECR I-2501.

¹³⁵ Case 294/83 *Les Verts*, [1986] ECR 1339, paragraph 23. Individuals may also access the Union courts under 268 TFEU (235 TEC) by bringing an action for damages caused by non-contractual liability of the Union according to paragraph 2 of 340 TFEU. However, the latter does not allow the ECJ to annul any offending legislation and the individual will only succeed where the breach of law is manifest. See for example Case 175/84 *Krohn v. Commission*, [1986] ECR 753.

¹³⁶ Statistics concerning the judicial activity of the Court of Justice at p. 82, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/ra09_stat_cour_final_en.pdf. As for urgent preliminary rulings, in 2009, there were three such requested.



case but with the national court itself.¹³⁷ Secondly, the function of conducting a review under Article 277 via the preliminary reference procedure relies on the existence of an actual legal dispute in the national courts. This may represent a challenge when the measure being complained of does not actually require implementation at the national level, for instance a regulation (which by definition is directly applicable) abolishing an agricultural subsidy.¹³⁸ The absence of a national implementing measure means that there would be no national measure that the parties could actually invoke in order to begin national court proceedings that could eventually trigger a request for a preliminary reference by the national court.

The latter issue has been partially addressed by the Treaty of Lisbon, amending former Article 230 TEC (now Article 263 TFEU) and now allows individuals standing 'against a regulatory act which is of direct concern to them and does not entail implementing measures'. This means that in a situation where no national implementing measure exists (and thus no national measure that could be contested before the national courts) an individual may nevertheless have standing before the CJEU. However, it does not address the former problem, namely that it is for the national court itself rather than the parties to initiate the request for a preliminary reference and to determine the parameters of the question put to the CJEU.

Two further changes introduced by the Treaty of Lisbon should be noted. Firstly, it confers legally binding status on the CFR, Article 47 of which recognises the right "to an effective remedy and to a fair trial" with specific reference to access to justice. Secondly, the EU is mandated to become party to the ECHR which, under Articles 6 and 13, require a range of guarantees to be implemented relating to access to justice. The extent to which the preliminary reference procedure and action for annulment guarantee access to justice may need to be reconsidered in light of these provisions.

¹³⁷ See Case 283/81 *CILFIT*, [1982] ECR 3415, paragraph 7: "Article 177 (later Article 234 and now Article 267 TFEU) does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177." For the relevant national case law on this question, see, for instance, judgment of the Federal Constitutional Court, 2 BvR 2661/06, 6 July 2010 (available at: www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-069.html), in which it was held that non-referral to the Court of Justice (CJ) did not constitute violation of right to effective legal remedy in cases of established jurisprudence. The Federal Labour Court had not been obliged to refer the case at hand to the CJ as long as its decision not to do so did not appear arbitrary but is based on good reasons.

¹³⁸ As was the situation in Case C-50/00 *P Unión de Pequeños Agricultores v. Council*, [2002] ECR I-6677.

2.4.4. The range of the CJEU's jurisdiction

The CJEU only has jurisdiction to consider issues relating to the interpretation or application of EU law. As such, if a measure in question falls purely within the competence of the Member States the CJEU will not be able to deliver a judgment on the merits. This can be illustrated by reference to the case of *SPUC v Grogan* where a pro-life organisation obtained an injunction against a group of university students in Ireland who were distributing literature that gave the contact details of abortion clinics in the United Kingdom. Before the CJEU it was argued that Ireland had breached EU law by interfering with the free movement of services (i.e. abortions being offered in another Member State) and that the injunction amounted to a breach of the right to freedom of expression. The CJEU found that it was able to address the question relating to free movement of services, since this right is secured under EU law. However, the law relating to freedom of expression was found to lie outside the jurisdiction of the CJEU since it was not regulated by EU law.¹³⁹ As such, a more appropriate forum would have been the ECtHR since freedom of expression is protected under the ECHR.

Prior to the Treaty of Lisbon the CJEU had jurisdiction only to hear matters relating to the implementation of Community Law and as such was not competent to decide on claims relating to some issues falling within the so-called second and third pillars.¹⁴⁰ Articles 263 and 267 now allow the CJEU to review the broader range of measures adopted by the EU, except the Common Foreign and Security Policy (CFSP). Review in the context of the CFSP is only permitted in relation to "restrictive measures against a natural or legal person" (Article 275(2) TFEU).

2.4.5. Expedited procedures

The expedited procedure enables the CJEU to give rulings quickly in very urgent cases by reducing the time limits and omitting certain procedural steps. On application by one of the parties, the President of the CJEU may decide, whether the particular urgency of the case requires its use. Such a procedure can also be used in the preliminary ruling proceedings before the CJEU. In that case, the application is made by the national court seeking the preliminary ruling. The procedure can be further accelerated and truncated in case of sensitive issues relating to the area of freedom, security and justice.¹⁴¹ Article 267(4)

¹³⁹ Case C-159/90 *SPUC v. Grogan*, [1991] ECR I-4685.

¹⁴⁰ For an overview of the changes of the CJEU proceedings, see CJEU, *Annual Report 2009*, available at: http://curia.europa.eu/jcms/jcms/j02_7000/.

¹⁴¹ Rules of Procedure of the Court of Justice, 13 April 2010, Chapter 35, Expedited Procedures, Article 62a; Rules of Procedure of the General Court, 13 April 2010, Chapter 3a, Expedited Procedures, Article 76a.

specifically provides for a preliminary reference to be given 'with the minimum of delay' where the national case relates to 'a person in custody'.

2.4.6. Legal aid

Regarding litigation before the CJEU, a party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. The application has to be accompanied by evidence of the applicant's need of assistance, and in particular by a document from the competent authority certifying this lack of means. The application need not be made through a lawyer. The application is referred to a formation of the CJEU which decides whether legal aid should be granted. This formation of the CJEU may at any time, either of its own motion or on application, withdraw the legal aid if the circumstances which led to the grant alter during the proceedings.¹⁴²

2.5. Summary

This chapter provides a brief overview of existing avenues to access justice available to individuals within the jurisdiction of the Member States of the EU. These are both judicial and quasi-judicial in nature. Key comparative advantages and disadvantages are highlighted. Up to five EU Member States have not yet accepted individual complaints to be submitted to UN treaty bodies, even though they have been in operation for many years. Similarly, EU Member States have been slow to accept future individual complaint mechanisms, under the ICESCR.

The ECtHR represents, in terms of caseload as well as influence, the main mechanism for accessing justice above the national level in Europe. The number of applications shows the need to improve structures at the national level in order to pre-empt repeat applications resulting from systematic problems. It also underscores the need to support reform measures introduced by the ECtHR to deal with the pressure, such as accepting pilot-judgments to deal with similar cases. The ECSR, supplementing the work of the ECtHR with monitoring of economic and social rights, provides for a collective complaints mechanism, through which international organisations of employers and trade unions and international NGOs can submit complaints. It is noteworthy that only Finland has accepted the possibility for national (in addition to international) NGOs to submit complaints. In this way the ESCR is an underused resource where civil society could contribute to improving the system by highlighting systematic shortcomings at the national level.

Overall the balance between the caseload and capacity to issue decisions is a significant problem for both the ECtHR and the UN treaty bodies. As such, this underscores the importance of adequate implementation of human rights guarantees at the national level in order to pre-empt an unsustainable caseload.

The CJEU is crucial in providing access to justice within the EU. However, the system of legal remedies may not always be seen as effective, given that it is relatively difficult to obtain standing before the CJEU in the first place. The Treaty of Lisbon has gone some way to mitigate this problem. With the EU's future accession to the ECHR, the interaction between the ECtHR and the CJEU is bound to intensify, providing further developments for a range of issues, including access to justice, as well as allowing individuals to bring complaints against the EU directly before the ECtHR.

¹⁴² Rules of Procedure of the Court of Justice, 13 April 2010, Chapter 6, Legal Aid, Article 76; Rules of Procedure of the General Court, 13 April 2010, Chapter 7, Legal Aid, Articles 94-97.



3

Accessing justice at national level



It is difficult to provide an overview of access to justice at the national level in all 27 EU Member States. Even though all of these recognise the general right of recourse to a judicial body in order to resolve legal disputes relating to breaches of a right, the way this is achieved differs widely. The judicial systems of the Member States, for instance, may broadly be distinguished by two key factors: the existence of a separate constitutional court or not, and a unified court system as opposed to one with separate judiciaries for different branches of law, such as administrative law.¹⁴³ A growing number of States have a separate constitutional court, dealing with, among other issues, complaints based on alleged violations of fundamental rights. Currently, a third of the Member States do not have such an institution.¹⁴⁴ Also, it is possible to make a distinction between states with a separate judiciary for (at least some matters of) administrative law (the French Model)¹⁴⁵ from those opting for one single judiciary (the English Model)¹⁴⁶. However, a large majority of Member States apply a separation.¹⁴⁷

¹⁴³ If going into details the picture might change somewhat: for example on the one hand the Austrian Constitutional Court (dating back to (at least) 1920 and thus being the most ancient in Europe) is still not competent to decide on appeals against rulings of the ordinary judiciary and of the Administrative Court, whereas, on the other hand, in Finland there is no constitutional court but the constitutionality can since 2000 explicitly be checked. See also CJEU (2009) *Les juridictions des États Membres de l'Union Européenne*, Luxembourg: CJEU, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-11/qd7707226frc.pdf>.

¹⁴⁴ Namely Cyprus, Denmark, Estonia, Finland, Greece, Ireland, the Netherlands, Sweden, and the United Kingdom.

¹⁴⁵ See Aguila, Y., Kreins, Y. and Warren, A. (2007) *La justice administrative en Europe. Observatoire des Mutations Institutionnelles et Juridiques (OMI) de l'Université de Limoges*, Paris: Presses universitaires de France, p. 16.

¹⁴⁶ *Ibid*, p. 16.

¹⁴⁷ To the pure English model belong, apart from the United Kingdom itself, only Hungary, Ireland, Rumania, and Slovakia. In Spain administrative justice is delivered by separate chambers integrated in courts of general competence, a model which is followed also Estonia (where separate administrative tribunals do only exist on the lowest stage), Latvia and Slovenia (where the supreme courts have general competence). In Italy the Administrative Court is now almost independent from the general cassation court.

Rather than providing all the nuances of the various legal and judicial systems, this report proceeds on the basis of the comparative findings based on the above-mentioned typology.¹⁴⁸ A selection of the most indicative areas is offered below, stressing the limits on access to justice.

This chapter analyses the identified limits to access to justice under the following headings: (i) time limits; (ii) legal standing; (iii) length of proceedings; (iv) legal costs; (v) procedural formalities and requirements; and (vi) complexity of legislation. It then proceeds briefly to examine alternatives to a judicial route, namely non-judicial procedures and the possibility of waiving the right to settling disputes before a court.

3.1. Limits

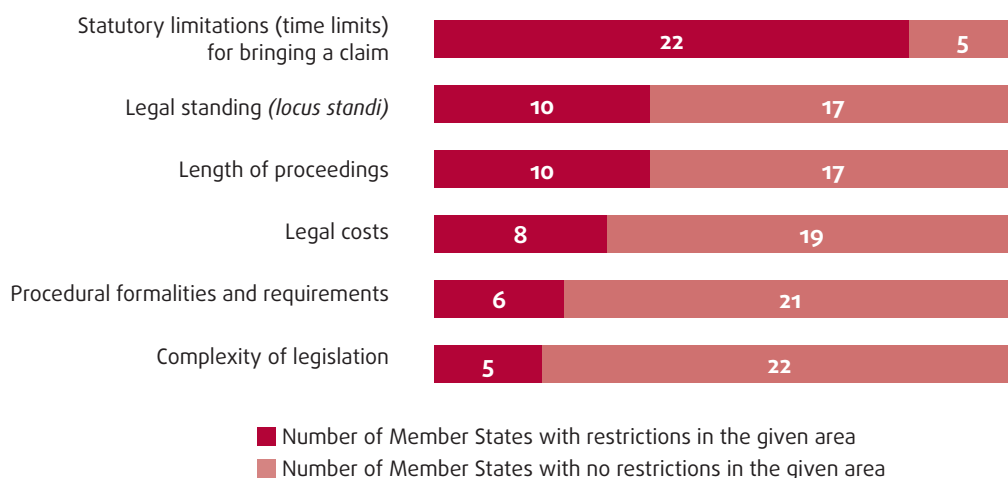
It is now well established that the “fundamental right to effective judicial protection constitute[s] a] general principle [...] of Community law.”¹⁴⁹ Accordingly, EU law recognises a general right of access to a judicial body for the resolution of disputes relating to rights deriving from EU law. The ECtHR has likewise interpreted the right to institute proceedings before courts in civil matters as constituting one aspect of the right to a fair trial enshrined in Article 6 ECHR.¹⁵⁰

¹⁴⁸ See section 1.2: Report background.

¹⁴⁹ CJEU, *Alliance for Natural Health and Others*, C-154/04 and C-155/04, 12 July 2005, paragraph 126; CJEU, *Unibet*, C-432/05, 13 March 2007, paragraph 37; CJEU, *Angelidaki et al.*, Case C-378/07, 23 April 2009; CJEU, *Sahlstedt et al. v. Commission*, C-362/06 P 23 April 2009; CJEU, *Angelidaki et al.*, C-378/07, 23 April 2009. ‘Community’ is maintained in quotes, otherwise Union is consistently used.

¹⁵⁰ ECtHR, *Golder v. the United Kingdom*, No. 4451/70, 21 February 1975 (n. 25).

Figure 4: Restrictions on access to justice in EU Member States



Source: FRA, 2010

It has nevertheless been acknowledged that this right is not absolute and may be subject to limitations.¹⁵¹ According to the ECtHR jurisprudence, restrictions on access to justice will be permissible to the extent that they are proportionate to achieving a legitimate aim and so long as they do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Thus, the proportionality of particular obstacles very much depends on the specific circumstances of the case.

The following sections analyse the identified restrictions and examine the alternative routes for resolving a dispute outside of a court.

Figure 4 provides the six main restrictions to accessing justice most commonly found in the EU Member States, as identified by the research.

3.1.1. Time limits

Research findings in as many as 22 EU Member States showed that the specific rules on limitations (prescriptive periods, specifying the time within which a claim has to be made) to be one of the major obstacles to accessing justice in discrimination cases (Figure 4). Such limitations are in theory designed to ensure legal certainty and finality.¹⁵² In order for such limitations to be acceptable from the point of view of effective access to justice, however,

their length should be set in such a way as not to render the right to proceed before a court impossible.¹⁵³

Among the EU Member States with legislation limiting the right to initiate proceedings before a court, a majority provide for two types of limitation periods applicable in this area of law – one that is applicable to civil law claims in general and one used in respect of specific areas of the law such as is the case with employment discrimination. Limitation periods for general civil law claims range on average between three and five years, with the exception of Poland, Belgium and the Netherlands, where this period can extend to 10, 20 and 30 years respectively. Unlike limitation periods in general civil law matters, the specific periods of prescription applicable in cases of employment discrimination are usually much shorter – in some cases as short as eight days.¹⁵⁴ Such short time limits, which are undoubtedly much more restrictive than those applied in the ordinary civil claims, are balanced to an extent by the less formalistic procedures that are used in employment cases in some Member States.¹⁵⁵

¹⁵¹ ECtHR, *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998.

¹⁵² ECtHR, *Stubbings v. the United Kingdom*, No. 22083/93 and 22095/93, paragraph 51. The ECJ has also stated that time-bars serve legal certainty. See CJEU, *Slagterier v. Germany*, C-445/06, 24 March 2009, paragraph 32; CJEU, *Aprile v. Amministrazione delle Finanze dello Stato*, C-228/96, 17 November 1998, paragraph 19; CJEU, *Marks & Spencer v. Commissioners of Customs & Excise*, C-62/00, 11 July 2002, paragraph 35.

¹⁵³ The Estonian Supreme Court held, for example, that even though the legislator has a wide discretion in deciding over the length of time limitations to complaints, these limitations could not be disproportionately short.

¹⁵⁴ For example in Slovenia.

¹⁵⁵ For example in the United Kingdom.

Time limits in annulment proceedings before the CJEU

Before the CJEU annulment proceedings under Article 263(6) TFEU (Article 230 (5) TEC) must be instituted “within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.” The fact that the time-limit starts when the plaintiff became aware of the measure allows for a balance to be struck between legal certainty and the right to pursue a claim before the courts.

3.1.2. Legal standing

Legal standing (standing to sue or *locus standi*) represents the gateway for access to justice. Rules relating to legal standing may be divided into three classes. Narrow rules for standing restrict the ability to pursue a particular claim to the individual who has suffered the harm in question or their direct representatives (for instance, where the individual is deceased). At the other extreme, wide rules of standing may allow any individual to bring a claim relating to harm suffered by a third party, which is sometimes referred to as an *actio popularis* or ‘public interest’ claim. Often rules of standing of this sort are restricted to particular areas of law that may relate to a general public interest, such as the environment. Between these two extremes one may find rules of standing that allow certain third parties that may have an interest in particular legal issues, to bring claims relating to breaches of laws within their area of expertise, such as NGOs, trade unions or equality bodies.

In the area of non-discrimination law, the Racial Equality Directive (Article 7), Employment Equality Directive (Article 9), Gender Equality Directive (recast) (Article 12), and Gender Equality Directive on Goods and Services (Article 8) oblige Member States to ensure, in accordance with national law, that associations, organisations or other legal entities may engage in judicial or administrative proceedings on behalf of or in support of victims, with the victim’s permission. Such associations may include NGOs, trade unions or equality bodies.¹⁵⁶

In Denmark, Finland, Sweden and the UK no special rules appear to regulate associations in discrimination procedures.¹⁵⁷ However, individual lawyers working

for associations such as NGOs or trade unions may represent a victim with their permission. In other Member States more specific rules exist. In many Member States NGOs are able to provide legal representation or initiate court proceedings either in the name of the victim or on their own behalf. NGOs are able to bring cases to court without the consent of the victim in certain circumstances (such as for ‘class actions’), for example in Bulgaria, Hungary, Italy and the Slovak Republic. In other Member States the consent of the victim is required, for example in Latvia, Lithuania, and Spain (though in the latter only in cases outside the sphere of employment). In other Member States it appears that the standing of NGOs is more limited, either to appearing before particular bodies or a right of third party intervention.¹⁵⁸

In more than half of the Member States victims are entitled to be represented by trade unions in at least some dispute settlement fora: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Estonia, Germany, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain and the UK. Trade unions in some Member States also provide financial assistance to cover the legal costs of those involved in disputes. They are also able to initiate legal proceedings upon satisfaction of certain criteria in the following Member States: Belgium, Bulgaria, Denmark, France, Italy, Malta, the Netherlands, Poland, Romania, Spain and Sweden. In Cyprus, Hungary and Italy trade unions are entitled to bring claims of a ‘collective’ nature (that is, where a large group of individuals are affected, or there is no identifiable victim).¹⁵⁹

In a small number of Member States equality bodies may ensure the representation of private individuals pursuing remedies in the courts, for example Hungary and the United Kingdom. In around one third of Member States equality bodies may themselves initiate court proceedings either in the victim’s and/or their own name (though sometimes the consent of the victim is required). In Belgium, Hungary and Ireland the equality bodies may bring claims addressing potentially widespread discrimination such as where there is no identifiable victim, in relation to patterns of discrimination, or as a public interest action (*actio popularis*).¹⁶⁰

¹⁵⁶ See FRA (2010) *The Racial Equality Directive: application and challenges*, Luxembourg: Publications Office.

¹⁵⁷ Chopin, I. and Gounari, E.N. (2009) *Developing anti-discrimination law in Europe. The 27 EU Member States compared*, report prepared for the European Network of Legal Experts in the non-discrimination field, Luxembourg: Publications Office, p. 63.

¹⁵⁸ See FRA (2010) *The Racial Equality Directive: application and challenges*, Luxembourg: Publications Office.

¹⁵⁹ *Idem*.

¹⁶⁰ *Idem*.

The role of NGOs before the Inter-American and African court systems

The ability of civil society organisations to support victims or take cases on their behalf can reduce the financial and personal burden of legal action on the individual claimant. In this sense the role that NGOs play before the Inter-American Commission and Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights should be noted. Under the rules of procedure of these systems NGOs may bring claims in their own names, and in relation to the African system, the vast majority of claims are brought by NGOs.¹⁶¹ This illustrates the important role of civil society organisations in facilitating access to justice, particularly where claimants face financial difficulties.

There are two practical limitations on the ability of civil society organisations to bring cases. Firstly, human and financial resources will dictate the number of cases that they may undertake. Secondly, the criteria imposed under national law that such organisations need to satisfy in order to be eligible to exercise this function limits the number of organisations available to victims. For instance, in Germany an association wishing to act as counsel for a victim must operate on a non-profit and non-temporary basis, have at least 75 members, or be comprised of at least seven associations acting together. In Italy associations must first register with public authorities, but this process can be a lengthy process. In France and Luxembourg such associations must have already been in existence for at least five years.

Beyond the area of non-discrimination law research findings show that in ten out of 27 Member States, the domestic rules on legal standing are considered overly restrictive (Figure 4). In this way legal standing is one of the major restrictions regarding the right of access to justice. Legislation on standing in these ten states does not enable individuals to bring a claim to a court unless they have full legal capacity (for instance, that they do not have intellectual disability) and at the same time are directly concerned in the matter. Although in limited instances, a claim for the protection of a presumed right or interest of another person or the public is allowed in these EU Member States, such claims have been mostly accepted in cases where this has been specifically prescribed by domestic law – such as parents that can file a claim

on behalf of their child. As a result, third parties having only a remote interest or fighting merely public interest have no access to a court.¹⁶² Apart from environmental cases, the majority of EU Member States have refused to accept a general right to file a public interest complaint (*actio popularis*), which would enable an individual or other entity to obtain redress in the name of the general public, without being the victim or directly authorised to represent the victim.¹⁶³ As a result of implementation of the Aarhus Convention, in environmental cases the requirement of having a sufficient interest in a case or being directly concerned may be waived when it comes to environmental protection matters, where a kind of *actio popularis* has become accepted in most of the EU Member States.¹⁶⁴

3.1.3. Length of proceedings

The overall length of proceedings undoubtedly has implications for access to justice. According to the ECtHR, access to the courts can be rendered largely theoretical and illusory where disputes are not resolved in a timely manner, since the principle motive of taking a dispute is to receive a remedy. Delays in legal proceedings have the effect of keeping an individual in a protracted state of doubt that may be considered similar to a denial of justice.¹⁶⁵

According to ECtHR statistics, a very large number of cases submitted to the ECtHR concern the right guaranteed by Article 6 ECHR to a hearing within

¹⁶² Note also that in some EU Member States, NGOs specialising in combating discrimination are considered privileged applicants and do not have to show an interest to stand before national courts.

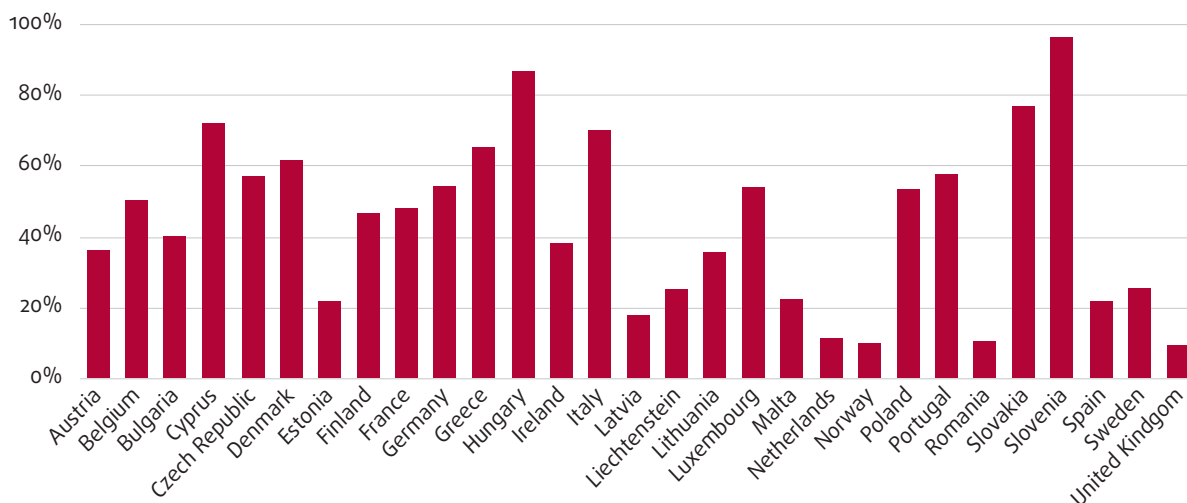
¹⁶³ Very specific restrictions regarding *locus standi* rules can additionally be identified in Cyprus. Cases involving claimants who are purported to belong to certain categories or are ascribed certain characteristics seem to be particularly vulnerable to having their access blocked; such a category are Turkish-Cypriots claiming their properties located in the Republic-controlled areas against the institution of the Custodian of Turkish Cypriot Properties, which is the Interior Minister.

¹⁶⁴ UN Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), adopted on 25 June 1998. For relevant CJEU case law see, for instance, a reference for preliminary rulings lodged in *Lesoochránárske Zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, C-240/09, 15 July 2010 or in *Marie-Noëlle Solvay and others v. Walloon Region*, C-182/10, lodged on 09 April 2010.

¹⁶⁵ Edel, F. (2007) *The Length of Civil and Criminal Proceedings in the Case-Law of the European Court of Human Rights*, Strasbourg: Council of Europe Publishing. Despite the fact that justice delayed is justice denied, however, very rapid proceedings do not always translate into good justice. Certain expedited procedures where speed takes priority over the rights of the defence may be detrimental to the quality of justice. The ECtHR has always held that the principle of good administration of justice goes well beyond the notion of reasonable time and may justify resort to lengthier but fairer proceedings. See Calvez, F. (2006) *Length of court proceedings in the Member States of the Council of Europe based on the Case Law of the European Court of Human Rights*, Report adopted by European Commission for the Efficiency of Justice (CEPEJ) at its 8th plenary meeting, Strasbourg: CEPEJ, available at: www.coe.int/t/dghl/cooperation/cepej/delais/Calvez_en.pdf.

¹⁶¹ Inter-American Commission on Human Rights, Rules of Procedure, OAS/Ser.L/V/1.4 rev. 13, 30 June 2010, Rule 23; African Charter of Human and Peoples' Rights, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, Article 55; See further: Butler, I. (2007) *Unravelling sovereignty: Human rights actors and the structure of international law*, Antwerp: Intersentia, p. 104.

Figure 5: Violations concerning length of proceedings as a percentage of all ECtHR’s judgments finding violations of the ECHR, by EU Member State plus Liechtenstein and Norway (%), during the period 1959–2009



Source: ECtHR, ‘50 Years of Activity: European Court of Human Rights. Some Facts and Figures’, 2010¹⁶⁶

a reasonable time. Indeed, undue delays in the proceedings account for more judgments of the ECtHR than any other issues covered by other ECHR Articles. In the period 1959–2009, the ECtHR handed down more than 12,000 judgments finding violations, of which more than one quarter concerned the excessive length of proceedings (across the, by now, 47 State Parties).¹⁶⁷ Figure 5 indicates the total number of ECtHR’s judgments finding violation of the right to a hearing within a reasonable time as a percentage of all ECtHR’s violation judgments against the respective present 27 EU Member States in the period 1959–2009.¹⁶⁸ According to Figure 5, more than 95% of all judgments against Slovenia concerned violation of Article 6 ECHR due to undue delays in proceedings, in Hungary it was more than 80% and in Slovakia more than 75%.

As shown previously in Figure 4, in ten of the 27 Member States, findings suggest that problems with delays in judicial proceedings were of a systemic nature.¹⁶⁹ Structural problems relating to excessive length of judicial proceedings have resulted in a high number of violations of Article 6 ECHR and they often represent the most significant obstacles individuals face from the point of view of access to justice in

their territories. In Cyprus, for instance, court users in civil cases will, due to the length of proceedings in the vast majority of cases, rather reach an out-of-court settlement. As a result, only very few civil cases are decided by the Cypriot courts. In this respect, it is also interesting to note that in some Member States, there are strong regional differences when it comes to the average length of civil proceedings. In the Czech Republic, for example, where a considerable length of proceedings is suggested to be de-motivating for victims of discrimination, the average duration of civil proceedings can take several years in one region, yet only a few months in another.¹⁷⁰

Across the EU-27, the procedures in non-discrimination cases, as for civil cases in general, are lengthy for various reasons. The most commonly identified in the research studies include excessive workload and insufficient number of judges; inefficient organisation of court work; excessive delays between the handing down of a judgment and its notification to the parties as well as delays between individual hearings; lack of communication between judges

¹⁶⁶ Available at: www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/o/FactsAndFiguresENAvril2010.pdf.

¹⁶⁷ See ECtHR (2010) *50 Years of Activity: European Court of Human Rights. Some Facts and Figures*, Strasbourg: ECtHR, available at: www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/o/FactsAndFiguresENAvril2010.pdf.

¹⁶⁸ Note that that data used concerns both civil and criminal proceedings.

¹⁶⁹ The findings are however only very indicative as a great majority of national research teams explicitly acknowledged the lack of empirical data due to non-existence of relevant databases and statistics.

¹⁷⁰ On 1 May 2009 the Polish President signed a law amending the Law of 17 June 2004 on complaints about a breach of the right to a trial within a reasonable time. The amendment provides that in the event of excessive length of detention, the court is required to award an appropriate sum of money (“odpowiednia suma pieniężna”) ranging from PLN 2,000 (approximately €500) to PLN 20,000 (approximately €5,000). The Finnish Parliament likewise adopted a bill for an Act in the Compensation for Excessively Long Trial Proceedings. The Act entered into force 1 January 2010. It awards damages for parties to the excessively long trials. The law is applicable to civil and criminal proceedings and petitions in ordinary courts but not to extended administrative proceedings or proceedings in special courts. The bill is being motivated by a series of ECtHR rulings against Finland for length of proceedings (violation of Article 6(1) of the ECHR).

and parties to the proceedings; and the rigidity of procedural rules, including rules of evidence.

In Latvia, the findings specifically underscored the impact of economic crises on the average length of proceedings. The delays in proceedings have been caused by the increase of number of cases due to socio economic reasons and insufficient capacity of the courts to process cases due to budget cuts.

Expedited types of procedures

In order to make proceedings in equal pay claims speedier, the **United Kingdom** introduced two specific procedures: the equal value dispute procedure and the questionnaire procedure. In the 'average straightforward case', the timetable envisages that claims not involving an independent expert should take no more than 25 weeks from presentation of the claim to full hearing. Cases involving an independent expert are expected to take 37 weeks. Another type of expedited discrimination procedure in the United Kingdom is the so-called questionnaire procedure. This type of procedure is aimed at helping claimants discover the reasons for the treatment of which they seek to complain and assist them in establishing whether they have been discriminated against. This type of procedure is designed to help a claimant decide whether to make a complaint and how to formulate and present a case most effectively.

In **Belgium**, the non-discrimination legislation provides for injunction procedures in urgent cases. The duration of these procedures, in which the president of a court can establish and order the cessation of a violation when aggrieved parties lodge an injunction action (*action en cessation*), alleging discrimination and order coercive fines in case the violation is not terminated, has often only been a matter of days.

In **Hungary**, non-discrimination legislation sets out that shall be reached in a fast track procedure, and at most within 45 days from submitting the application or from initiating the procedure, where (i) the client is a minor; (ii) the procedure was initiated by a Parliamentary Commissioner; or (iii) the procedure was initiated by the public prosecutor.

In **Austria**, the Civil Procedure Code provides for an expedited procedure for civil suits regarding pecuniary claims not exceeding €75,000. The court will order the respondent to pay within 14 days without conducting an oral hearing. The respondent can object to the order within four weeks. In case of objection, the court must call for a hearing. This long-established national system operates similarly to the European order for payment procedure created by Regulation (EC) No 1896/2006 of 12 December 2006.

3.1.4. Legal costs

As indicated in Figure 4, in eight EU Member States the findings suggest that the high amount of legal costs, which mainly includes attorney and court fees, often prevents access to justice.¹⁷¹ The analysis of relevant case law of these states has indeed shown that the fear of incurring costs can turn out to be a significant factor determining whether (or to what extent) a victim decides to pursue justice, especially given the prevalence of the loser-pays rule in the EU, which implies that the losing party will pay the winning party's costs.¹⁷² For this reason, some national courts are left with a certain leeway in deciding whether or not to order the payment of legal costs. Depending on the individual's financial situation as well as the merits of the dispute, they may decide to completely or partially relieve a party from legal costs. In addition, the person may receive other types of legal aid from the state, such as the appointment of a lawyer for representation in the judicial proceedings.

In the Netherlands, the so-called Liquidation Rate arrangement exists between the Dutch Bar Association and the judiciary based on fixed rates subject to, on the one hand, the interest involved in the case and, on the other hand, the number and nature of activities. This means that the costs cannot rise too high in case of a party employing an excessively expensive lawyer or an inexperienced lawyer who charges for too many hours. According to the Dutch national team, without the Liquidation Rate instrument, the case law of lower courts would probably diverge substantially. In this respect, this instrument of the judiciary may prevent (to a certain extent) inequalities and provide for legal certainty.

In Cyprus, if a client is not satisfied with the bill rendered by his or her lawyer, she or he may apply to the Courts Registrar to have the bill reduced. The Registrar will exercise his/her discretion on whether to reduce the bill or not by taking into consideration

¹⁷¹ In the United Kingdom, for instance, Lord Justice Jackson was appointed to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost in November 2008. In his findings, which were published in January 2010, he stated that "in some areas of civil litigation costs are disproportionate and impede access to justice"; more information available at: www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf. See also ECtHR, *Marina v. Latvia*, No. 46040/07, 26 October 2010, in which it was held that the requirement to pay fees to civil courts at the time of bringing a claim could not be regarded as a restriction on the right of access to court incompatible per se with Article 6 ECHR, provided that the very essence of the right of access to court was not impaired. In this respect, restrictions of a purely financial nature which had been completely unrelated to the prospects of success of the claim had to be subjected to a particularly rigorous scrutiny from the point of view of the interests of justice.

¹⁷² For further analysis of loser-pays rule, see section 5.3 on rules relating to the payment of legal costs.

all relevant circumstances and especially the complexity, difficulty or novelty of the case, the specialised knowledge and responsibility required as well as time consumed by the lawyer, the volume of documents drafted, the urgency and importance of the matter to the client and the value of the money or property at stake.

Effective remedy – legal costs

The applicant had instituted proceedings against the state for damages caused by unjustified pre-trial detention. The domestic courts awarded the damages but the court fees amounted to approximately 90% of the compensation. The ECtHR held that the imposition of a considerable financial burden due after the conclusion of the proceedings acted as a restriction on the right of access to court.

As a result of this judgment and other similar cases, a new low fixed fee was introduced as opposed to the previous formula based on a percentage of the damages.

(ECtHR, *Stankov v. Bulgaria*, No. 68490/01, 12 October 2007)

Effective remedy – legal costs

The applicant sued the municipality of Plock for failure to issue an administrative decision, which resulted in his economic loss. He applied for an exemption from court fees. The court refused to accept the applicant's argument that he was unable to pay the court fees, but reduced the amount to the average annual salary in the country. For the applicant the sum was still substantial and he did not pay the fees. The proceedings were for this reason discontinued and his case was not heard. The ECtHR found a violation of Article 6 ECHR and the ruling led to changes in the Court Fees Act to make the fee system more efficient and transparent.

(ECtHR, *Kreuz v. Poland*, No. 28249/95, 19 June 2001)

3.1.5. Procedural formalities

In six of the EU Member States the research suggests that some specific procedural formalities and requirements in their national legislation limit access to justice. These requirements relate to the form or content of introductory documents with which an individual initiates courts proceedings and/or to specific pre-trial procedural steps which each individual is obliged to undertake before approaching the court.

In Bulgaria, for instance, an application in civil cases has to be lodged in writing and contain the following information: specification of the court, the name and other details of the applicant, the full name and address of the respondent, the essence of the violation, subject of the dispute and signature of the person who lodges the application. In the application, furthermore, the applicant is obliged to specify the evidence which he or she wants to have collected and to present the written evidence that he or she possesses. If the application does not contain the required information or is not presented in a required form, it may get rejected without a court examining the merits of the case.

In the Netherlands, the relevant statutory law distinguishes between the petition procedure (*verzoekschriftprocedure*) and the summons procedure (*dagvaardingsprocedure*). In principle, claims relating to property rights are dealt with in the petition procedure while all the other claims are addressed in the summons procedure. As for petitions, they need to contain obligatory information, such as name and domicile of both claimant and defendant, claim and motivation thereof, designated court or tribunal, and, if a court session takes place, further details such as the date and time of that session, means of evidence. Petitions should be issued by a bailiff (*deurwaarder*) in a specific way as prescribed by law. Summonses are formalised to a lesser extent. Flaws in these documents may be sanctioned. In addition, in some cases, the Dutch law provides for obligatory preliminary procedures. This may include obligations for deliberation with the defendant. Such provisions aim to enhance friendly settlement of disputes. Estonian judges will likewise refuse a complaint if a person has not met the mandatory pre-trial procedure requirements.

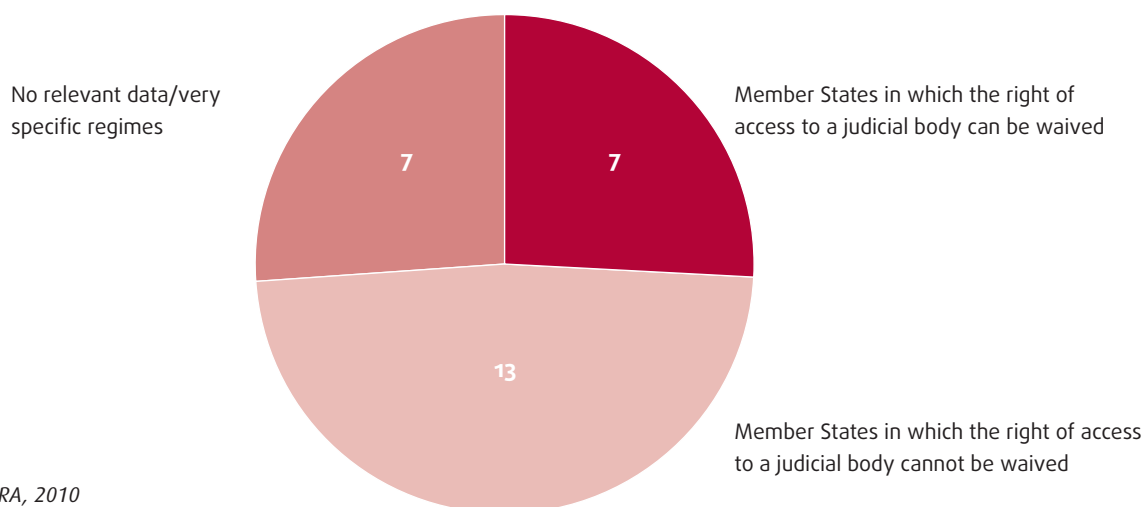
3.1.6. Complexity of legislation

In Austria, the complexity of a legal framework scattered in several laws seems to pose undue difficulties to those who wish to access non-discrimination procedures.

In Poland, there is equally no single law on non-discrimination comprising a general ban on discrimination on all grounds and provisions are scattered across many different pieces of legislation. When combined with the lack of legal awareness and existing gaps in legislation, they create a serious obstacle to access to justice.

In the Czech Republic, the position of the Antidiscrimination Act in relation to other laws that also includes provisions on discrimination appears to be unclear. Even though the Antidiscrimination

Figure 6: Possibility of waiving the right of access to a judicial body in EU Member States



Source: FRA, 2010

Act is supposed to constitute the overarching legislation (*lex generalis*), it amends only some of the laws containing special provisions on discrimination while other relevant laws remaining unchanged. Thus there continues to be lack of clarity on provisions of the various laws, which produces legal uncertainty, potentially hampering the access to courts in discrimination cases.

3.2. Alternatives

Having analysed rules and practices surrounding access to courts, the following two sections examine alternatives to judicial routes. Although the right to initiate proceedings before a civil court is considered instrumental to effective access to justice, there may be cases when an individual may want to avoid judicial proceedings which are often overly formal, expensive or too lengthy. Victims of discrimination may do so by waiving their right to bring a case before a civil court. Rather than seeking redress before the court, furthermore, victims of discrimination may decide to initiate proceedings before a non-judicial body. The Racial Equality Directive (Article 7), Employment Equality Directive (Article 9), Gender Equality Directive (recast) (Article 17) and Gender Goods and Services Directive (Article 8) allow Member States to provide for conciliation or mediation as a means for individuals to obtain redress for a breach of their rights. It should be recalled, however, that these instruments also require any remedy to be effective, proportionate and dissuasive.¹⁷³

¹⁷³ Racial Equality Directive, Article 15; Gender Equality Directive (recast), Article 25; Gender Goods and Services Directive, Article 14; Employment Equality Directive, Article 17.

3.2.1. Waiving access

According to ECtHR case law it would appear that it is possible in principle to waive, at least in part, the right of access to a judicial body through, for instance, an arbitration clause in a contract.¹⁷⁴ It also appears permissible in principle to waive the right of access to a court through agreement of a friendly settlement at the national level, so long as there are no elements of coercion.¹⁷⁵

On the basis of the analysis of the FRA (Figure 6), it would appear that it is possible to waive, although not completely, the right of access to a judicial body in seven EU Member States.¹⁷⁶ In these Member States it appears permissible in principle to waive the right of access to a court through, for instance, agreement of a friendly settlement or an arbitration or mediation clause in a contract. Even in these cases, however, caution is exercised by national courts in assessing the acceptability of waiver of rights and such waiver will be regarded as legally valid only so long as there are no elements of coercion involved.

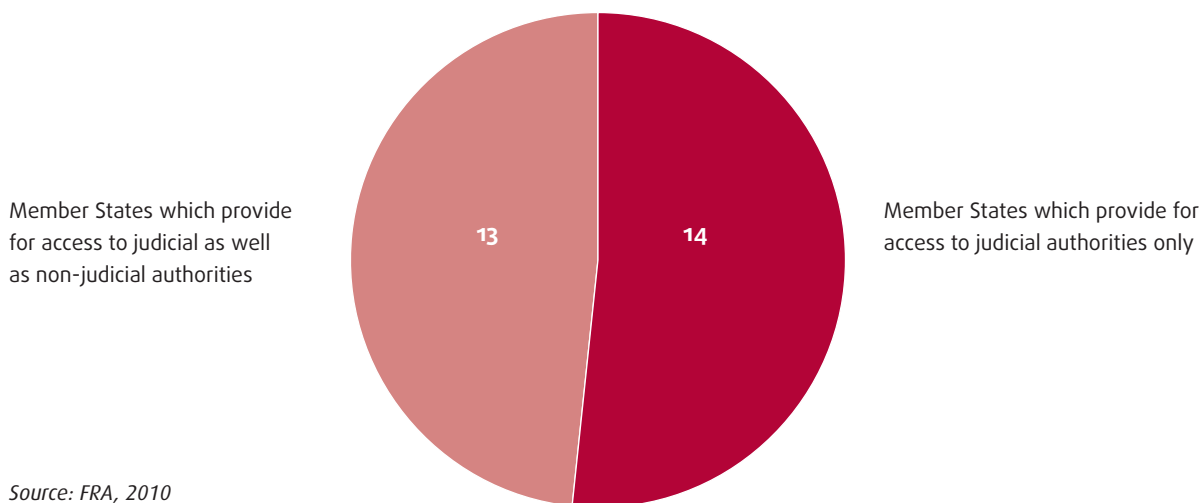
The national discrimination laws of 13 EU Member States, on the other hand, do not provide a victim of discrimination with a possibility to waive his/her right to access to a judicial body. The relevant legislative provisions rather state that a contractual

¹⁷⁴ ECtHR, *Stran Greek Refineries and Stratis Andreadis v. Greece*, No. 13427/78, 9 December 1994, paragraphs 44-45; ECtHR, *Regent Company v. Ukraine*, No. 773/03, 3 April 2008, paragraphs 51-61.

¹⁷⁵ ECtHR, *Popov v. Moldova*, No. 74153/01, 18 January 2005, paragraph 48.

¹⁷⁶ It should be noted that specific exceptions exist in various EU Member States (especially with respect to employment disputes) and, as a result, generalisation was required to determine in which category to place a Member State. Furthermore, in 7 EU Member States either particularly specific regimes exist or no sufficient data is available to be able to classify a given Member State.

Figure 7: Possibility of accessing non-judicial procedures in EU Member States



Source: FRA, 2010

term that purports to exclude or limit an individual’s right to access a court shall be unenforceable.

3.2.2. Access to non-judicial procedures

Both the CJEU and the ECtHR accept the validity of non-judicial dispute mechanisms so long as the decisions of such bodies may ultimately be supervised by a judicial body (which itself conforms to the requirements of Article 6 ECHR), and so long as the alternative mechanisms themselves conform to general requirements of fairness.¹⁷⁷ These criteria of fairness are not as rigorous as those applying to judicial proceedings under Article 6 ECHR. The case-law includes the following stipulations concerning non-judicial proceedings: the independence and lack of bias of the body or official in question, the ability of the applicant to present and contest evidence, and the ability of that body to take a legally binding decision.¹⁷⁸

As reflected in Figure 7, in 14 EU Member States, victims of discrimination have a possibility to access non-judicial procedures in order to obtain redress.¹⁷⁹ The advantages of these procedures are that they are usually free of charge, simpler and more accessible

to victims of discrimination than courts. Non-judicial procedures are usually seen as complementary to other legal remedies and are generally subject to judicial supervision.

Mediation

As noted above, the Racial Equality Directive, Gender Goods and Services Directive, Gender Equality Directive and Employment Equality Directive allow the Member States to provide a remedy for breach of non-discrimination law not only through the courts, but also through conciliation or mediation. Mediation has the advantage of avoiding the legal costs and delays associated with judicial proceedings as well as the conflict and polarisation that may arise during dispute settlement mechanisms in general. However, it is also essential that the settlements achieved reflect the outcomes available through regular dispute settlement channels and that the interests of the victim are adequately protected. In some Member States it is obligatory to attempt mediation before proceeding to the trial phase of a dispute. For example in France, Portugal and Spain mediation is mandatory part of court proceedings, while in Hungary and Slovakia they are mandatory but separate from court proceedings.¹⁸⁰ The involvement of equality bodies may range from directly offering mediation services, to simply referring cases to a third party mediator. Where equality bodies are directly involved in mediation, or where settlements reached must be approved by the equality body, this may serve to ensure that the victims’ interests are adequately protected, so as to ensure that they receive an

¹⁷⁷ ECtHR, *Peck v. the United Kingdom*, No. 44647/98, 28 January 2003, paragraph 109.

¹⁷⁸ See for example CJEU, *Evans*, C-63/01, 4 December 2003, paragraphs 48-58; ECtHR, *Silver v. the United Kingdom*, No. 5947/72, 25 March 1983, paragraph 116; ECtHR, *Campbell and Fell v. United Kingdom*, Nos. 7819/77 and 7878/77, 28 June 1984, paragraph 126.

¹⁷⁹ It should be noted that this figure covers only those equality or other non-judicial bodies which have power to investigate suspected acts of unlawful discrimination and, at the same time, are competent to resolve complaints between private individual, have power to deliver legally binding decisions and impose sanctions. In this respect see also FRA (2010) *National Human Rights Institutions in the EU Member States*, Luxembourg: Publications Office, The report addresses the issue of data protection authorities, equality bodies, and national human rights institutions, which constitute a cornerstone in the fundamental rights architecture in the EU.

¹⁸⁰ Chopin, I. and Gounari, E.N. (2009) *Developing anti-discrimination law in Europe. The 27 EU Member States compared*, report prepared for the European Network of Legal Experts in the non-discrimination field, Luxembourg: Publications Office, p. 58.

effective, and proportionate remedy which is also has a dissuasive effect on the perpetrator.¹⁸¹

Quasi-judicial mechanisms

In the context of non-discrimination law the principle alternative dispute settlement mechanisms operate through the equality bodies designated by the Member States under the Gender Equality and Racial Equality Directives. While Member States are not obliged to endow these bodies with a quasi-judicial role, some of them have chosen to do so.

The powers of these institutions are not identical in all countries. Decisions of the Bulgarian equality body (PADC), the Hungarian Equality Authority or the Romanian equality body (NCCD) are legally binding and where they make a finding of discrimination, they can order that discriminatory action be ceased as well as impose a fine. In all these countries, fines of the equality body are in practice the most likely sanctions in cases of discrimination.

In Romania, furthermore, the victim of discrimination can choose between lodging a complaint with the NCCD which can issue administrative sanctions: administrative warnings and fines, or/and filing a civil complaint before the court which can award moral and pecuniary damages, or re-establish the status quo ante or, nullify the situation established as a result of the discrimination, according to civil law. The courts can also decide that the public authorities will withdraw or suspend the official recognition of legal persons that caused significant damage as a result of discriminatory action or that repeatedly infringed the provisions of anti-discrimination legislation. The two avenues are not mutually exclusive and the plaintiff can choose to use them simultaneously or only one of them.

In Austria and the Netherlands, the decisions of the respective Equal Treatment Commissions are not legally binding and cannot include a fine or other sanction. In the Netherlands, although claimants may ask for a court order for compensation or other forms of sanctions after an opinion of the Dutch Equal Treatment Commission (CGB), most of them do not do so.¹⁸² In Austria, the situation is similar.

The decision of the respective Equal Treatment Commission is a legal expert opinion focusing on the question of whether discrimination occurred. The decision then can be used in a subsequent court case to obtain compensation, even though the court is not obliged to follow it. It appears that in practice it is not common for court cases to be brought subsequently to the issuing of a decision by the Equal Treatment Commission. A consequence of this phenomenon in both these Member States is that compensation awards concerning discrimination are relatively rare.

3.3. Summary

Section 3.1 provided a comparative analysis of the main limits that have the potential to undermine victims' right of access to a court. The limits were examined under the following headings: (i) time limits; (ii) legal standing; (iii) length of proceedings; (iv) legal costs; (v) procedural formalities and requirements; and (vi) complexity of legislation. As regards the issue of time limits (i.e. statutory limitations for bringing a claim) it is most commonly referred to in 22 EU Member States, and complexity of legislation is regarded as a restriction only in five EU Member States.

Section 3.2 examined possible alternatives to court proceedings that are available to victims of discrimination. From what has been stated above, it follows that victims of discrimination may decide to waive, first of all, their right of access to a judicial body through, for instance, an arbitration clause in a contract or an agreement of a friendly settlement, so long as there are no elements of coercion (in seven EU Member States). Secondly, in many EU Member States (13), it is likewise open to the victims to initiate proceedings before a non-judicial (equality) body. The powers of equality bodies to issue legally binding decisions impose fines or initiate court proceedings are not identical in all Member States. In general, non-judicial remedies may be considered to form part of the right of access to justice in so far as these contribute to the existence of an effective remedy. Nonetheless, their role is seen as complementary in that the right to a fair trial will not be deemed satisfied unless the non-judicial mechanism can be subject to review by a judicial body.

¹⁸¹ See FRA (2010) *The Racial Equality Directive: application and challenges*, Luxembourg: Publications Office.

¹⁸² The CGB applies an active follow-up policy. In relevant cases where discrimination has been established, the CGB communicates with the petitioner and the referring party (employer, service provider). The objective is to ascertain that the referring party applies the opinion by taking individual or structural measures to redress the discrimination. As described above in paragraph [24], the 'success rate' is high: in around 70 % of all (relevant) cases, the referring party applies measures. In cases relating to race the percentage is even higher: 86 %. See Commissie gelijke behandeling (2005) *Het verschil gemaakt: evaluatie AWGB en werkzaamheden CGB 1999-2004*, Utrecht: CGB, pp. 77-84.



4

Legal aid at national level



Article 47 CFR states that “legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.” Thus, denial of legal aid may constitute a violation of the fundamental right of accessing justice if the lack of legal aid may lead, for example, to an inequality of arms, which would create a substantial disadvantage for the individual.

In its case law, the ECtHR noted that the state must “display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6”.¹⁸³ In the case of *Mirosław Orzechowski v. Poland* the ECtHR found that the decision to refuse legal aid “infringed the very essence” of the applicants’ right to access the courts.

Legal Aid Directive

The Legal Aid Directive aims to improve cross-border access to justice within the EU.¹⁸⁴ The directive establishes the principle that persons who do not have sufficient resources to defend their rights in law are entitled to receive appropriate legal aid. It lays down the services that must be provided for the legal aid to be considered appropriate: access to pre-litigation advice, legal assistance and representation in court and exemption from, or assistance with, the cost of proceedings, including the costs connected with the cross-border nature of the case.

It based its reasoning on the fact that the applicant was destitute (thereby qualifying for a waiver of court fees) and that the national court had not justified its refusal.¹⁸⁵ A similarly exceptional case can be noted, where the applicants were defending a long, complicated case and the possibility of a substantial order of damages against them meant that legal aid should be available.¹⁸⁶ Thus it seems that while there is no right to legal aid in civil proceedings, there will be circumstances where the interests of access to justice require that it be granted.¹⁸⁷

Council of Europe agreement on legal aid

For the Council of Europe, the European Agreement on the Transmission of Applications for Legal Aid was adopted in 1977¹⁸⁸ under the aegis of the Council of Europe. All EU Member States, with the exception of Germany, are party to it. The Agreement introduces a procedure whereby, if an individual has his or her habitual residence in the territory of one of the Contracting Parties and wishes to apply for legal aid in the territory of another Contracting Party, he or she may submit an application in the state where he or she is habitually resident. That state will transmit the application to the other state unless such application appears to be manifestly not made in good faith.

¹⁸³ ECtHR, *Mirosław Orzechowski v. Poland*, No. 13526/07, 13 January 2009, paragraph 20.

¹⁸⁴ European Union, the Council Directive 2002/8/EC was adopted in order to establish minimum standards ensuring an adequate level of legal aid in cross-border cases on 27 January 2003 (see n. 45 above). For further information, see: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_ec_en.htm and also the e-Justice portal, available at: <https://e-justice.europa.eu/home.do?action>. Although not comprehensive from a comparative point of view, this websites are a valuable source of information on legal aid systems that exist in individual EU Member States.

¹⁸⁵ *Ibid.*, paragraphs 21-22.

¹⁸⁶ ECtHR, *Steel & Morris v. the United Kingdom*, No. 68416/01, 15 February 2005.

¹⁸⁷ However, the Strasbourg jurisprudence has accepted certain limitations to the distribution of legal aid as proportionate in pursuing the legitimate aim of ensuring that public funds are used appropriately. First, that it is reasonable to impose conditions on the availability of legal aid depending on the financial situation of the litigant. Secondly, it was acknowledged that the prospects of success of the litigation can be taken into account when the case is brought before a court. See, for instance, ECtHR, *Airey v. Ireland* (n. 16), or ECtHR, *Munro v. the United Kingdom*, No. 10594/83, 14 July 1987.

¹⁸⁸ For further information see www.conventions.coe.int/Treaty/EN/Treaties/Html/092.htm.

Legal aid – mental health problems

The applicant, who experienced mental health problems, was involved in civil proceedings. Even though the applicant repeatedly referred to low income and lack of legal expertise and requested legal assistance before two court instances, this was rejected since the law at this time did not provide free legal aid in civil proceedings. The applicant lost the case in national courts and lodged an application with the ECtHR.

Given the importance of the outcome of the case, as well as the complexity of the procedures, the principle of the equality of arms, and the mental health problems of the applicant, the ECtHR concluded that legal aid was required and consequently found a violation of Article 6(1).

(ECtHR, *Nenov v. Bulgaria*, No. 33738/02, 16 July 2009)

Legal aid – effective representation

The applicants in two cases claimed that the lawyers appointed under the legal aid scheme failed to take the necessary steps to represent their interests effectively. According to the Code of Civil Procedure legal representation was mandatory in case of a cassation appeal to the Supreme Court against a judgment of the appellate court. The appointed lawyers refused to lodge a cassation appeal arguing that there was no prospect of success. However, the applicants were informed about the refusal leaving insufficient time before the deadline for lodging the appeal, making an alternative impossible.

The mere refusal of a legal-aid lawyer to prepare a cassation appeal does not constitute a sufficient ground for a new lawyer to be automatically assigned to the case under the legal-aid scheme. However, refusal of a legal-aid lawyer to prepare and lodge a cassation appeal should meet certain quality requirements, including a written format and within a reasonable time.

The ECtHR found a violation of Article 6 ECHR. As a result of the judgment, Polish Bar Association and the National Bar of Legal Advisors introduced new ethical requirements for lawyers preparing cassation appeals.

(ECtHR, *Staroszczyk v. Poland*, No. 59519/00, *Siałkowska v. Poland*, No. 8932/05 and 59519/00, 22 March 2007)

All EU Member States have established some kind of legal aid systems in order to ensure effective access to justice for individuals regardless of income and wealth. The research for this report dealt with a series of issues relating to the nature and scope of legal aid available and the conditions for entitlement. The overview of the findings is provided in two separate sections below. In addition, research from some Member States showed various schemes that complement the state aid systems; this issue will be touched upon in section 4.3 below.

Legal aid initiatives at international level

At the international level, the Convention on International Access to Justice of 1980 also makes provisions for the transmission of applications for legal aid between the Contracting Parties in the form of a commonly agreed model.¹⁸⁹ This Convention requires that nationals and residents of the Contracting Parties be granted legal aid in other Contracting States under the same conditions as if they resided there. The Convention likewise establishes the entitlement of all such persons, when pursuing their proceedings in any other Contracting States, to free service of documents, letters of request and social enquiry reports, and to legal aid to secure the recognition and enforcement of the decision obtained.¹⁹⁰ The present scope of the Convention remains rather limited as it has so far been ratified only by 19 EU Member States¹⁹¹ and, as such, does not guarantee real 'universal' access to justice at the international level.¹⁹²

¹⁸⁹ For further information, see www.hcch.net/index_en.php?act=conventions.text&cid=91.

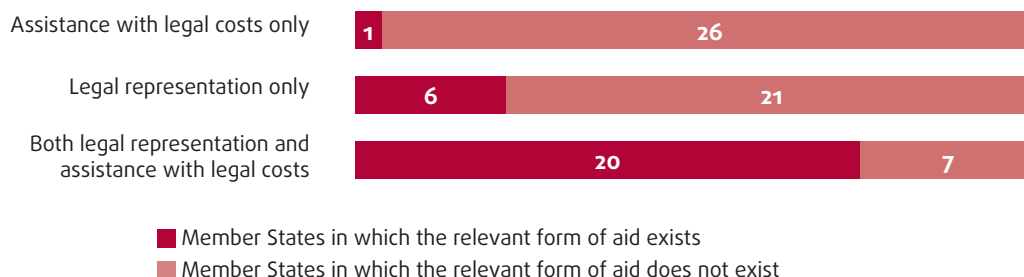
¹⁹⁰ For further details on these and other provisions, see www.hcch.net/upload/outline29e.pdf.

¹⁹¹ The following EU Member States ratified this Convention: Bulgaria, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden. For the official chart of signatures and ratifications, see: www.hcch.net/index_en.php?act=conventions.status&cid=91.

¹⁹² In 2008, the Permanent Bureau of the Hague Conference on Private International Law drew up a Questionnaire aimed at evaluating the practical operation of the Hague Convention of 25 October 1980 on International Access to Justice; a comparative synthesis and analysis of the responses received is available at: www.hcch.e-vision.nl/upload/wop/2008pd15e.pdf.



Figure 8: Availability of legal aid in EU Member States



Source: FRA, 2010

4.1. Nature and scope of legal aid

Essentially, there are two complementary forms of legal aid:¹⁹³ (i) exemption from or assistance with all or part of the court fees; and/or (ii) assistance of a lawyer who provides pre-litigation advice¹⁹⁴ and represents an individual in court either free or for a subsidised fee. Figure 8 summarises the studies’ findings with respect to the question whether there is legal aid available to individuals who lack sufficient funds in Member States and what forms such legal aid may take.¹⁹⁵

As shown in Figure 8, the majority of Member States (20) provide individuals with both forms of legal aid: legal representation and assistance with court costs (fees).¹⁹⁶ In six Member States, legal aid takes the form of free legal representation.¹⁹⁷

Regarding the extent to which legal aid can be made available, the legal aid systems of most Member States are based on state ‘contributions’ as opposed to ‘state pays all’ funding. In case of

the former, applicants are required to contribute towards costs and the amount of such contribution usually depends on the individual’s income. In some countries, such as Ireland, the law provides for an obligatory minimum which an individual always has to pay in order to be provided with legal advice.¹⁹⁸

Finally, in most Member States, the fact that legal aid has been provided does not remove the considerable risk of being obliged to pay the litigation costs of the opposing party in case of losing the case.¹⁹⁹

The legal aid systems of EU Member States work in a variety of ways. In Lithuania, legal aid is divided into ‘primary’ and ‘secondary’ legal aid. Primary legal aid refers to the provision of legal information, legal advice and drafting of the documents to be submitted to state and municipal authorities, with the exception of procedural documents. This legal aid also covers advice on the out-of-court settlement of a dispute, actions for the amicable settlement of a dispute and drafting of a settlement agreement. Secondary legal aid includes drafting of documents, defence and representation in court, including the process of execution, representation in the event of preliminary extrajudicial consideration of a dispute, where such a procedure has been laid down by laws or by a court decision. This legal aid shall also cover the litigation costs incurred in civil proceedings, the costs incurred in administrative proceedings and the costs related to the hearing of a civil action brought in a criminal case. The state guarantees and covers 100% of the costs of primary legal aid. The costs of secondary legal aid provided to the persons by taking account of a person’s property and income.²⁰⁰

193 The term legal aid is used to encompass both the concept of free legal representation as well as assistance with court costs (fees).

194 Note that not all Member States have the system enabling the legal assistance to be provided already at pre-trial stage (such as a pre-litigation advice).

195 The cases in which financial assistance was provided only in order to cover the costs of legal representation were classified under the heading “legal representation only”. The cases in which financial assistance was provided in order to cover the costs of legal representation as well as assist with court costs (fees), were classified under the heading “both legal representation and assistance with court costs (fees)”.

196 In Denmark, for instance, a practical problem seems to be that it is often easier to get free legal aid in the larger cities than in the smaller ones.

197 It should be noted that in the United Kingdom legal representation is available only in a limited number of cases in the County Courts (first-instance courts with civil jurisdiction), but not in small claims (up to €5,814 (that is £5,000 – exchange rate as of September 2010)). In addition, legal representation is not provided in the Employment Tribunals, which are independent judicial bodies which determine disputes between employers and employees over employment issues including unfair dismissal, redundancy payments and discrimination (but here labour unions are likely to assist).

198 In this respect, it is also interesting to note that according to the provisions in Austria if the person concerned acquires sufficient financial means during the first three years after being provided with the legal aid, he or she has to pay back the legal aid granted.

199 For more detail on how this can be mitigated through judicial discretionary powers, see section 5.3 on rules relating to the payment of legal costs.

200 The so-called “means test” as explained in section 4.2 Eligibility of legal aid.

As for the pre-trial aid, the example of Belgium can be taken, where in every judicial district (*arrondissement*) there is a special Commission for Legal Aid (*Commissie voor Juridische Bijstand – Commission d'Aide Juridique*). It is composed of representatives of the local bar and of the public centres for social welfare. Its main tasks are to provide practical information (e.g. admission requirements for legal aid) and judicial information or preliminary legal advice.

Specific national legal aid mechanisms

In order to ensure access of Roma to free legal aid in Hungary, the Ministry of Justice and Law Enforcement has been operating the Roma Anti-diskriminációs Ügyfélszolgálati Hálózat (IRM-RAÜH) [Roma Antidiscrimination Network Service] since 2001. The lawyers participating in the Network provide free legal aid (providing legal advice, drafting legal documents, initiating lawsuits and representation in court) specifically in cases where clients' rights were infringed because of their Roma origin. The Ministry ensures the financial resources of the operation of the Network (lawyers' fees) and the potential costs of initiating lawsuits. The Network is continuously expanding: the initial number of attorneys was 23 in 2001, 27 in 2003 and 30 in 2005. Currently clients may receive legal assistance in 44 offices, and there are more attorneys in those regions where Roma are overrepresented. Available information relating to the output of the Network's activities however indicate that only a fraction of the cases relate to discrimination.²⁰¹ Moreover, an as yet unpublished research paper commissioned by the Ministry of Justice and Law Enforcement argues that not only are the lawyer members of the Network in need of clear guidelines, methodology and training, but that the Network itself is in need of being connected to other branches of rights protection, notably the Equal Treatment Authority (i.e. the Hungarian equality body).²⁰²

In the Netherlands, anti-discrimination agencies (ADAs) were locally funded by municipalities for activities related to support of victims and awareness raising. They were first established in the 1980s and developed over the years into professional organisations trained in counselling victims of discrimination on all grounds. In addition to their local presence a dedicated hotline assists victims to lodge complaints, which are registered in a national database. Experience showed over the years that many cases were resolved locally through ADAs without recourse to legal proceedings. After the adoption of the Act on the municipal anti-discrimination facilities in 2009, all citizens in the Netherlands have access to a locally present professionally run anti-discrimination agency where they can receive support and assistance in cases relating to discrimination. Compared to the past system there is now nationwide coverage of these facilities. The type of paralegal aid offered to victims of discrimination means that people receive information about their position, receive advice about how to address their specific situation and receive assistance in cases where a judicial procedure is the best solution. The role of the ADAs is such that the Dutch Equal Treatment Commission and courts will receive cases that are relevant.²⁰³

201 Between 15 October 2001 and 31 July 2005 network lawyers provided assistance in 4908 cases, out of which 328 revealed discrimination (mainly in relation to housing, education, execution of sentences and personal civil rights claims), available at: www.irm.gov.hu/index.php?mi=2&katid=2&id=103&cikid=2839 (09.03.2009).

202 László Pap, A. (2008) A Roma anti-diskriminációs ügyfélszolgálati hálózat szerepe a jogvédelemben [The Role of the Roma Antidiscrimination Network Service in Rights Protection], unpublished research paper.

203 See www.binnenlandsbestuur.nl/nieuws/2009/01/sukkelende-aanpak-discriminatie.106816.lynkx.



4.2. Eligibility for legal aid

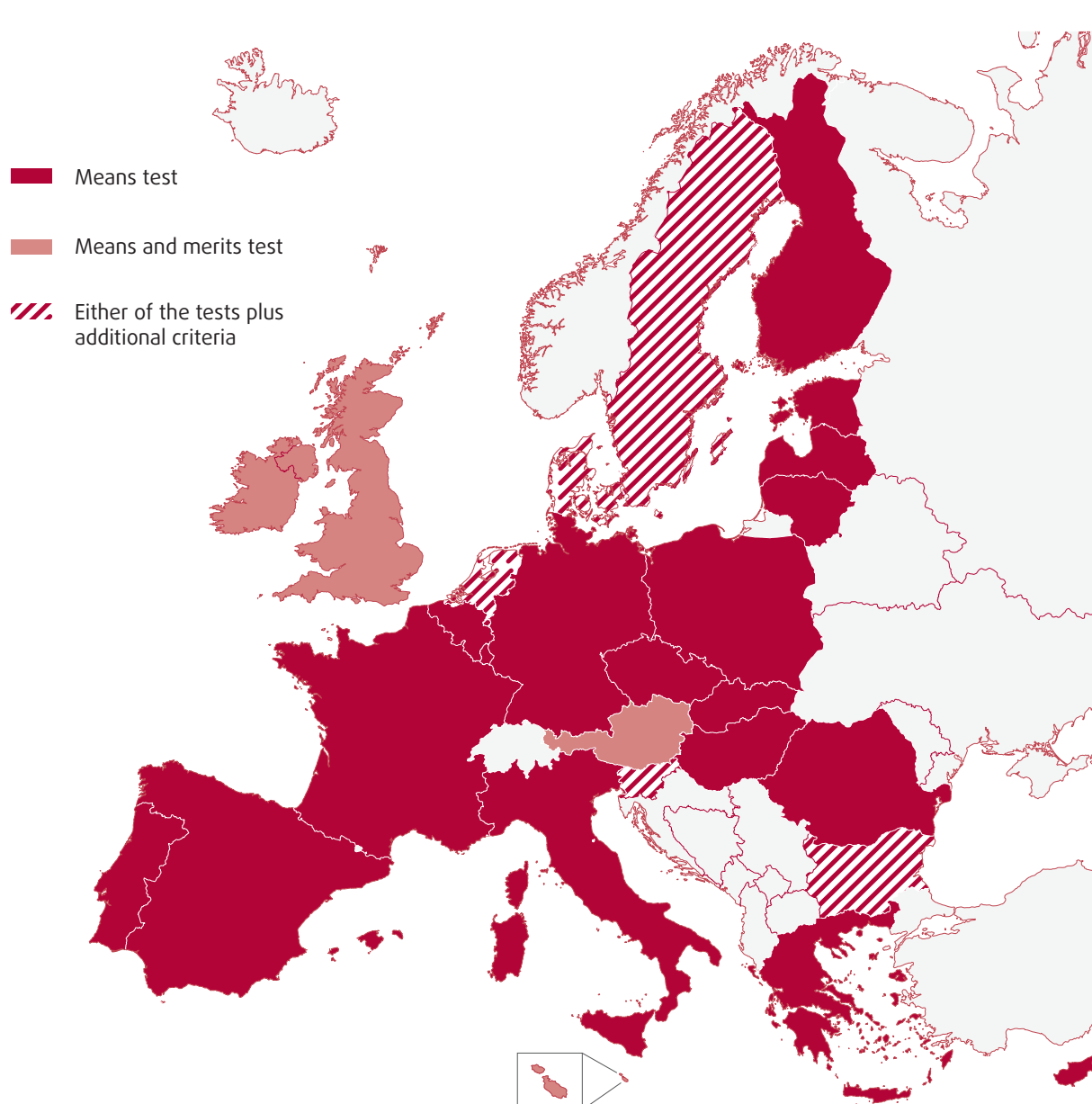
On the basis of the analysis of research findings from the 27 EU Member States, it can be concluded that there are two major approaches to the question of an individual's eligibility for legal aid across the Union. In order to decide whether or not to award legal aid, States typically apply one of the following tests:

- 'means test' (including property and family situation);
- 'means and merits test'.

While applying one of these tests, some national courts take into account additional criteria, such as the importance of the case, the amount of compensation at issue, or the availability of home insurance coverage.

As Figure 9 shows, some jurisdictions only apply income tests, excluding merits, namely the following 18 countries: Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Spain and Slovakia. A specific form of

Figure 9: Eligibility tests for legal aid in EU Member States



Source: FRA, 2010

income questionnaire was introduced as a first step to making the process of receiving a fees waiver and ex officio lawyer more objective in Poland, for example. Apart from looking at the person's income, the majority of these countries examine property status and family situation (such as the number of dependant family members) of the individual.

Conditions get tougher when a 'means test' is applied in conjunction with a 'merits test', which assesses the legal merits²⁰⁴ of the case and its likely outcome.²⁰⁵ Figure 9 indicates that the countries that take both income and merits issues into account when determining legal aid eligibility include Austria, Ireland, Malta,²⁰⁶ and the United Kingdom.

Finally, as shown in Figure 9, while using one of the two tests, some Member States look at additional criteria when deciding whether or not to award legal aid. In the Netherlands and Slovenia, for instance, the importance of the case and the amount in dispute play a role in assessing whether an individual is entitled to legal aid. In Bulgaria, the individual's eligibility is assessed not only in light of income level, but also, for example, healthcare coverage, employment status, and age. Another example is Denmark, where applying for free legal aid is secondary to legal expenses insurance. If an individual has such insurance and it covers the concrete case it is not possible to grant an exemption from court fees or appoint a lawyer to represent the individual in the proceedings. A similar mechanism exists in Sweden.

Notwithstanding the way in which individual Member States approach eligibility for legal aid, it seems that most countries target legal aid towards the poorer section of the population.

Equality of arms and legal aid

The applicants were associated with London Greenpeace. They produced and distributed a leaflet called 'What's wrong with McDonald's?'. McDonalds issued a writ against them for libel and the applicants contested the claim. The applicants were refused legal aid, which was not available for defamation proceedings. Damages were awarded against them, and, although these were reduced on appeal, they remained substantial when compared to their incomes and resources.

It was central to the concept of a fair trial that a litigant should not be denied the opportunity to present his or her case effectively and should enjoy equality of arms with the opposing side. It was found that the disparity between the levels of legal assistance enjoyed by the applicants and McDonalds had been so great that it must have given rise to unfairness. In these circumstances, the lack of availability of legal aid for indigent litigants was a violation of the right to effective access to a court and the ECtHR found a violation of Article 6(1) ECHR.

(ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005)

²⁰⁴ In order to assess legal merits of the case, one must examine whether the applicant has reasonable grounds for taking or defending proceedings before the courts.

²⁰⁵ The reasoning behind this approach is, of course, to keep a balance between a reasonable extent to which an individual can access the courts and courts' workload.

²⁰⁶ In addition, in Malta, the applicant seeking legal aid must take an oath confirming his/her means.



Access to justice – irregular immigrant

A Brazilian citizen living in Portugal asked the Public Body of Solidarity and Welfare (*Instituto Português de Solidariedade e Segurança Social*) for legal aid in a case involving a labour dispute. The Body refused the request due to the person being an irregular immigrant. The Lisbon Labour Law Court ruled that regardless of immigration status, as long as the person was registered for social welfare and paid taxes, legal aid should be provided. The Constitutional Court upheld the decision.

(Portuguese Constitutional Court, 17/04, 24 March 2007, available at: www.tribunalconstitucional.pt/tc/acordaos/20040208.html)

Access to legal aid for all, irrespective of nationality and immigration status

The Spanish Ombudsman lodged an appeal with the Constitutional Court invoking the unconstitutionality of Article 2 a) of Act 1/1996 on Legal Aid.

Article 2 a) read: “Personal scope of application: [...] The following persons are entitled to free of charge-legal assistance:

a) The Spanish citizens, the citizens of other EU member states and the aliens legally residing in

Spain without sufficient financial means in order to take legal actions.”

The Ombudsman argued that the notion “aliens legally residing” violates the right to effective judicial protection of the aliens since aliens possess the right to effective judicial protection which comprehends the right to free of charge – legal assistance.

The Constitutional Court held that every person regardless of nationality is holder of the right to effective judicial protection since this right emanates from the right to human dignity.

The Constitutional Court declared the notion of “aliens residing legally” to be unconstitutional. As a result, even aliens not legally residing in Spain are entitled to receive legal aid (or representation by an assigned counsel) in all proceedings of all jurisdictions where they are a party and not only within penal or contentious-administrative proceedings regarding their expulsion from the Spanish territory or relating to asylum.

(Spain, *Pleno del Tribunal Constitucional* [Plenary of the Constitutional Court], STC 95/2003, appeal number 1555/96, 22 May 2003, available at: www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=8064)

Legal aid, the Inter-American human rights system, and vulnerable groups

The Inter-American system for the protection of human rights has criticised cases of systematic exclusion of particularly vulnerable sectors of society from access to justice. In particular, it has stressed the obligation of the state to provide free legal services and to strengthen community mechanisms for this purpose, in order to enable these groups to access judicial bodies. It held also that those sectors may need more information about the resources available to them within the justice system and about their rights.

4.3. Complementary schemes

Over time, usually because of gaps in state-funded legal aid systems and limited public resources, complementing schemes have begun to emerge. These include legal expenses insurance, legal advice centres, pro bono work (free-of-charge services by, for example, law firms) and self-help services.

In Sweden and Denmark, legal claims are primarily financed by the private sector through the medium of legal expenses insurance. In fact, it seems that a kind of ‘subsidiarity’ principle exists between such insurance and legal aid. The rule is that where individuals have legal expenses insurance, they will not normally be entitled to free legal aid and will have to use their insurance.

In many Member States, a variety of NGOs and ‘legal aid clinics’ are found to be delivering legal aid solutions, supplementing the state system. These clinics often specialise in advising victims of discrimination. There are also various specialised centres/bodies established to address the absence of adequate legal services available to disadvantaged communities (e.g. the Traveller Community in

Ireland).²⁰⁷ In addition, national lawyers in many jurisdictions offer services on a *pro bono* basis.²⁰⁸

Finally, the United Kingdom offers an example of a self-help service system where the absence of legal aid for representation in small claims before national courts seems to be outweighed by less restrictive procedural rules.²⁰⁹ Pursuant to these rules, aggrieved individuals are not only entitled to represent themselves before the court but they are, in fact, implicitly encouraged to do so.²¹⁰

Legal aid centres and NGOs

In **Ireland**, the Irish Traveller Movement, which is a specialist law centre aiming to protect Travellers' human and legal rights by providing access to expert legal advice, to advance their human rights through the courts, to achieve positive change in the perception of the Traveller community, and to educate Traveller organisations to deal with the legal issues facing them.

Various non-discrimination NGOs or quasi NGOs offering legal and other advice to discrimination victims free of charge exist in other EU Member States, including **Austria, the Czech Republic, Spain, France, Lithuania, Latvia, Poland, Slovakia, Sweden** and the **United Kingdom**. In some of these countries (namely the Czech Republic, Romania, Poland and Slovakia), these organisations can, in addition, represent their clients (victims of discrimination) in court proceedings. In other Member States, such as the Netherlands, the state has mandated the establishment of independent and accessible local anti-discrimination bureaux across the country. Their task is to provide independent legal assistance and support on cases concerning discrimination and to register all discrimination complaints.

4.4. Summary

According to the research findings presented in this Chapter, some kind of legal aid system can be said to exist in all EU Member States in the context of proceedings for cases of discrimination.

Section 4.1, which dealt with a series of issues relating to the nature and scope of legal aid available, shows that the majority of Member States (20) provide individuals with both types of legal aid: legal representation and assistance with court fees.

In the light of research findings from the 27 EU Member States included in section 4.2, it can be concluded that there are two major approaches to the question of an individual's eligibility for legal aid across the EU: a 'means test' approach (including property and family situation) and a 'means and merits test' approach. Additional criteria such as the importance of the case, the amount at dispute, or the availability of insurance coverage, may also play a certain role in some EU Member States.

Finally, section 4.3 examined complementary schemes that exist in some EU Member States and successfully fill gaps in the national legal aid provisions. These include legal expenses insurance, legal advice centres, *pro bono* work, and self-help services.

²⁰⁷ See Irish Traveller Movement, available at: www.itmtrav.com.

²⁰⁸ In Bulgaria, for example, most of the reviewed discrimination cases were initiated and led by attorneys-at-law who work for human rights NGOs and provide in principle *pro bono* legal aid to the applicants. See also FRA (2009) *EU-MIDIS Data in Focus Report 1: The Roma*, Luxembourg: Publications Office, available at: http://fra.europa.eu/fraWebsite/eu-midis/index_en.htm.

²⁰⁹ Even less rigid procedural rules exist with respect to the proceedings before employment tribunals where no legal aid (assistance) is available either.

²¹⁰ Notwithstanding the informality in such proceedings, this can in fact raise an issue of equality. Indeed, according to the United Kingdom research findings the lack of free, detailed guidance on the procedure and the preparation required in such claims undermines claimants' ability to represent themselves.



5

Redress at national level



Effective access to justice presupposes the possibility for a victim not only to bring perpetrators to court but also to obtain adequate and prompt reparation for harm suffered. Providing effective recourse to anyone who alleges that his/her rights have been violated is essential as without such recourse, the substantive right at issue becomes empty. In the context of non-discrimination law Member States are required to provide effective, proportionate and dissuasive remedies.²¹¹

The UN HRC has stated that where a state fails to guarantee a right under the ICCPR, reparation “generally entails appropriate compensation”. Indeed, the UN HRC seems to indicate that there will be a presumption that compensation should be treated as the primary means of affording a remedy.²¹² However reparation may also take other forms such as “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant law and practices”.²¹³

The ECtHR has been less explicit in this respect since its approach to remedies has generally been to focus on those remedies that it may offer itself in cases before it, rather than assessing the adequacy of remedies offered at the national level. At a general level the ECtHR has stated that where a state breaches its obligations it must “put an end to such

breach [...] and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*).”²¹⁴ Thus, although provision for financial compensation should not necessarily be considered an inherent and permanent element of the right to a remedy according to the ECtHR, in many cases it may be difficult to imagine how restitution can be made without it.²¹⁵ In cases of serious violations the ECtHR seems to assume implicitly that the availability of compensation at national level is required as a minimum, and that this should be supplemented with other measures such as the conduct of an investigation or a criminal prosecution.²¹⁶

The CJEU has generally not stipulated that compensation must be available as part of an individual’s right to effective judicial protection. In this sense it can be noted that secondary EU legislation, such as Article 15 of the Racial Equality Directive, states that sanctions for breaches of the prohibition on discrimination ‘may include’ the payment of compensation. Nevertheless, the CJEU does seem to have established a strong presumption that compensation should be available for vindicated individuals in order to restore “a situation of equality” unless there was some other means available to do so, such as reappointing an individual in the case of

²¹¹ Racial Equality Directive, Article 15; Gender Equality Directive (recast), Article 25; Gender Goods and Services Directive, Article 14; Employment Equality Directive, Article 17.

²¹² See for example UN HRC, *Lnenicka v. Czech Republic*, Communication No. 1484/2006, 9 February 2009, paragraph 8; UN HRC, *Howell v. Jamaica*, Communication No. 798/1998, 20 January 1998, paragraph 8; UN HRC, *Zheludkov v. Ukraine*, Communication No. 726/1996, 20 October 2002, paragraph 10; UN HRC, *Boodoo v. Trinidad and Tobago*, Communication No. 721/1996, 13 June 1994, paragraph 8.

²¹³ UN HRC, General Comment 31 (above note 47), paragraph 16.

²¹⁴ ECtHR, *Mentes v. Turkey*, No. 23186/94, 25 July 1998, paragraph 24.

²¹⁵ In applying this approach the UN HRC has stated that in cases of deprivation of property restitution would require the return of this property, and if this were not possible then compensation should be offered. See UN HRC, *Persa v. Czech Republic*, Communication No. 1479/2006, 24 March 2009, paragraph 9; UN HRC, *De Fours v. Czech Republic*, Communication No. 747/1997, 21 November 1996, paragraph 9.2; UN HRC, *Brok v. Czech Republic*, Communication No. 774/1997, 23 December 1996, paragraph 9.

²¹⁶ ECtHR, *Zubayrayev v. Russia*, No. 67796/01, 10 January 2008, paragraph 105; ECtHR, *Khshiyv and Akayeva v. Russia*, No. 57942/00, 24 February 2005, paragraph 183.

unlawful dismissal.²¹⁷ At the same time the principle of ‘equivalence’ developed by the CJEU requires that remedies available at the national level for individuals to secure their rights under EU law should not be less favourable than those available for similar actions in national law.²¹⁸ Thus, where compensation is normally available under similar national procedures, it should also be available in the context of non-discrimination law. At the same time the CJEU also requires that remedies should be ‘effective’, and it has taken this to include a requirement that adequate compensation be available where this is necessary to repair the damage caused to individual as a result of breaches of their rights under EU law. In this sense the CJEU has found that ceilings on the amount of compensation payable may render such a remedy ineffective.²¹⁹

There are several issues that are examined in the subsequent sections in the context of the right to an effective remedy, namely (i) nature of redress; (ii) level of financial compensation; (iii) rules relating to the payment of legal costs; (iv) rules relating to evidence; and (v) execution of final judgments awarding victims financial compensation or other types of satisfaction.

5.1. Nature of redress

In cases concerning discrimination, redress generally includes financial compensation. Research findings from the national teams suggest that in all 27 EU Member States, an award of financial compensation is the principal means of compensating an individual where their rights are breached as a result of discrimination (Figure 10).

The comparative analysis suggests that such compensation is available for pecuniary as well as non-pecuniary damages in the majority of EU Member States. The former is related to the economic losses whereas the latter is awarded in respect of distress and inconvenience caused by breaches of rights. It appears that where compensation is available for both pecuniary and non-pecuniary damage, the emphasis in discrimination cases is on non-pecuniary damages.²²⁰

In 19 EU Member States, the financial compensation is supplemented by other non-financial forms of reparation (Figure 10).²²¹ The most commonly non-financial forms of reparation referred to by the EU Member States are:

- requests for reinstatement to a previous position;
- request for nullification of a discriminatory contractual clause;
- order for equal treatment or an order that specific action be taken to relieve the injured party.

In some cases, courts can even issue orders of a more general nature, going beyond the parties to the case. For instance, in Ireland, in *58 Named Complainants vs Goode Concrete Ltd*,²²² decided under the Employment Equality Acts in Ireland, the respondent was ordered to pay compensation to the claimants and, in addition, to put in place clear procedures for ensuring non-national employees are clear as to the terms and conditions of their employment and understand all safety documentation, to provide training to management on the provisions of the Employment Equality Acts and to maintain better records of disciplinary proceedings. This latter part of the order goes beyond the individuals in the case. The power for courts to order perpetrators

²¹⁷ CJEU, *Marshall v. Southampton and South West Hampshire Area Health Authority II*, C-271/91, 2 August 1993, paragraph 25. It appears to be accepted by both the CJEU and the ECtHR that the ability to request an interim, emergency or preventive measure should likewise be available to individuals where an alleged breach of their rights will otherwise result in irreversible damage: CJEU, *Factortame*, C-213/89, 19 June 1990, paragraph 20. CJEU, *Köbler v. Austria*, C-224/01, 30 September 2003, paragraph 61; ECtHR, *Salah Sheekh v. the Netherlands*, No 1948/04, 11 January 2007, paragraph 153. Compare the case of ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989, paragraph 123 where the ECHR held that the existence or not of the ability to grant interim relief would not have a bearing on the effectiveness of the remedy in question because the courts in the United Kingdom would not permit the extradition of an individual while their claim was still pending.

²¹⁸ Case C-78/98 *Preston*, [2000] ECR I-3201, paragraph 31.

²¹⁹ Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority II*, [1993] ECR I-4367, paragraphs 0-31; Case C-180/95 *Draemphael v. Urania*, [1997] ECR I-2195. These cases suggest that a priori ceilings on the amount of damages payable will not be permitted where these do not allow the level of compensation to reflect that actual damages suffered. However, ceilings may be permitted for those claims where it can be proved that the individual would receive the same treatment, even in the absence of discrimination.

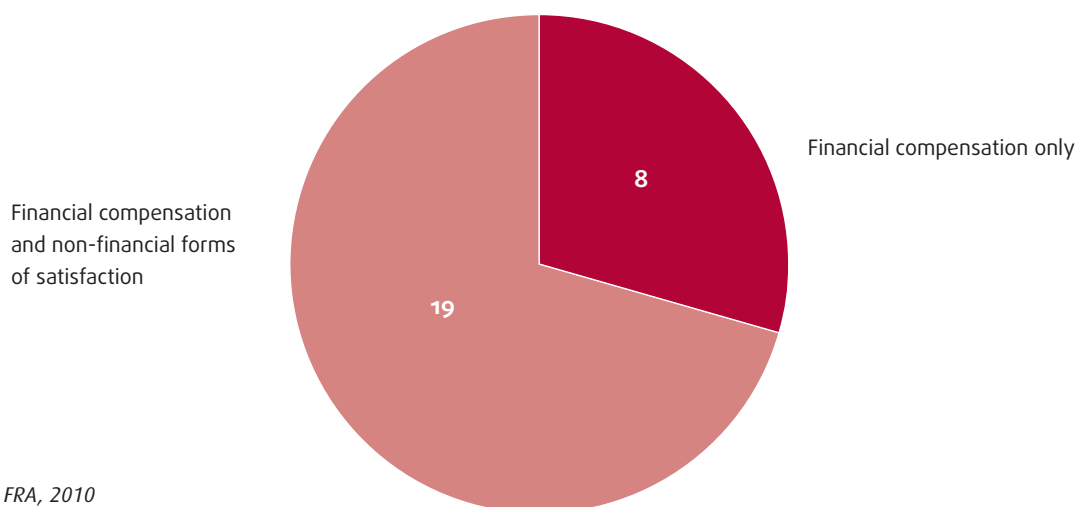
²²⁰ There are, however, countries, such as Malta, where compensation is only available for actual damages suffered and there is no evidence that moral damages are considered or compensated for. It should be likewise noted that although compensation for non-pecuniary damages exist in Poland, it is rarely awarded by courts in practice.

²²¹ Interestingly, in Italy, non-financial forms of satisfaction are more often used by the courts as a form of redress for the loss suffered by a victim of discrimination than the financial compensation.

²²² Equality Officer’s decision No. DEC-E2008-020, 30 April 2008, available at: www.equalitytribunal.ie/index.asp?locID=139&docID=1770.



Figure 10: Nature of redress in EU Member States



Source: FRA, 2010

to take action going beyond the individual case of the victim has now been expressly included in legislation. Under the new Equality Act 2010, Employment Tribunals can make recommendations that benefit the whole workforce, rather than just applying a remedy to the individual that brought the claim. For example it can order that an organisation introduces or revises its equal opportunities policy, or provides training for its managers.

In some Member States, administrative sanctions are possible in discrimination cases. One possible form of administrative sanction concerns public procurement: somebody who discriminates can be excluded from public procurement and, thus, from a possible source of business and revenue (for example, in France,²²³ Italy²²⁴ and Portugal²²⁵). Another form of administrative sanction concerns the cancellations of licenses and permits (for example, in Austria²²⁶ and Portugal²²⁷). Another example is the official recognition of legal personality: this can be withdrawn or suspended in some Member States in case of discrimination (for example, in Romania).²²⁸

²²³ Article 225-4 of the French Penal Code.

²²⁴ Article 44(11) of the Immigration Act, available at: www.migpolgroup.com/public/docs/169.2008_Countryreportonmeasurestocombatdiscrimination_Italy_EN.pdf.

²²⁵ Portuguese Decree-law 111/2000

²²⁶ Article 87(1) of the Austrian Business Regulation ["Gewerbeordnung"].

²²⁷ Portuguese Decree-law 111/2000.

²²⁸ Article 21.5, Romania/ Ordonanța Guvernului No. 137/2000 privind prevenirea și combaterea tuturor formelor de discriminare, republished in February 2007 [Government Ordinance No 137/200 regarding the prevention and combating of all forms of discrimination].

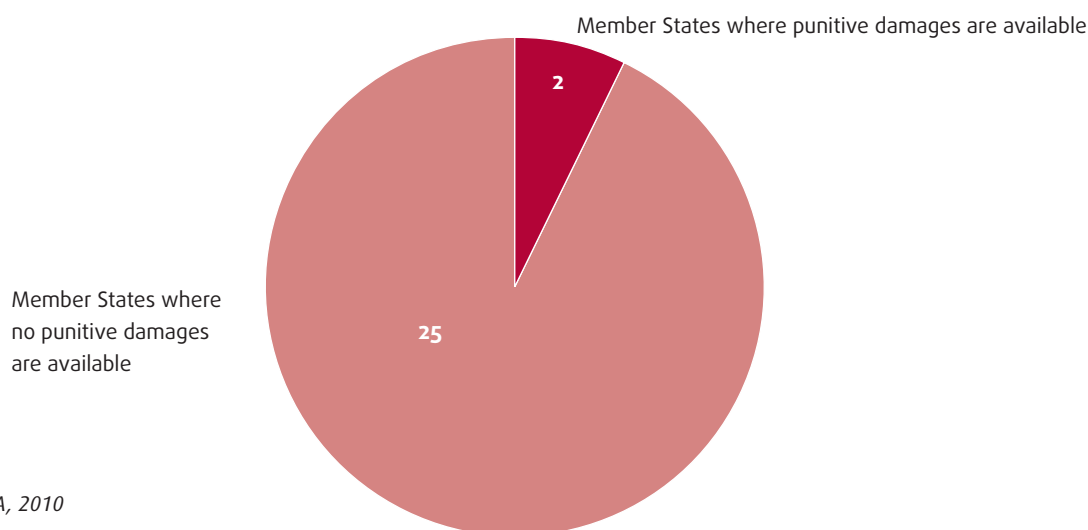
Different types of redress

In **Belgium**, the Anti-Discrimination and Anti-Racism Acts provide for two types of compensation. First of all, the victim can claim an amount fixed by law. This amount is in the order of €650 to €1,300. Secondly, he can claim compensation for the actual damage. In this case, however, the victim needs to prove the extent of the damage.

In **Poland**, it is quite common to claim – as a way of compensation – payment of a sum to be dedicated to a particular indicated social purpose, such as a donation to an NGO. This mechanism has many positive functions. First, it provides some NGOs with additional funds. Second, if judgment is given in high-profile case, it promotes activity of the NGOs to which the money is paid. Third, it may promote the value-oriented approach of the claimant, who may show that he/she is not interested in benefiting himself/herself but is suing for the sake of public interest or honour.

A specific arrangement for dealing with financial compensation in cases where the proceedings have been initiated by interest groups was created by the Act on the Collective Settlement of Mass Losses 2005 (*Wet collectieve afwikkeling massaschade*) in the **Netherlands**. This act allows for compensation for the individual members of a given group with the possibility to opt out of the collective settlement.

Figure 11: Availability of punitive damages in EU Member States



Source: FRA, 2010

There are, finally, two EU Member States, whose national orders allow for punitive damages – in effect, damages that go beyond compensation for actual loss or harm suffered – to be awarded (Figure 11).²²⁹ Punitive damages (‘exemplary’ damages in the United Kingdom) are damages intended to deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit. In the United Kingdom, courts and tribunals may award punitive damages if the compensation that would otherwise be awarded would be inadequate to punish the guilty party. The same is the case for Cyprus, although the national courts tend to award punitive damages only occasionally.

5.2. Level of financial compensation

The CJEU and ECtHR have set out certain principles relative to the calculation of compensation, in that it should be proportionate to the damage suffered.²³⁰ In this sense the CJEU has specified that for compensation to be considered “adequate” it “must enable the loss and damage actually sustained [...] to be made good in full according with the

applicable national rules”.²³¹ Furthermore, the CJEU underlined that compensation should not be limited *a priori* by a ceiling in national law and the payment of interest should be added to financial awards to reflect changes in the value of an award from the date of the breach to the date of payment.²³² By way of exception to this, certain financial awards will not incur interest where the award cannot be rightly seen as payment of compensation (such as a claim for arrears of benefits).²³³ Furthermore, a ceiling on the payment of compensation will be permissible if it can be shown that the damage suffered by the applicant is limited by objective factors (for instance, if the individual has been discriminated against in an application for employment, but it can be shown that they would not have been offered the post even if there had been no discrimination).²³⁴

The FRA research shows that the question of the amount of financial compensation commonly awarded by domestic courts depends heavily on the national context. Such amounts will to some extent be relative to the national standard of living and also for this reason it differs from state to state. Figure 12 indicates the highest recorded amounts awarded in discrimination cases in different EU Member States.²³⁵ Furthermore, the relevant national rules in Finland, Germany and Ireland provide for a specific ceiling on the payment of compensation.

²²⁹ Hungarian law does not provide for the award of punitive damages; yet, a so-called “fine to be used for public purposes” may be imposed by the court if the amount of the damages (pecuniary or non-pecuniary) that can be imposed is insufficient to mitigate the gravity of the actionable conduct. This fine is however rarely applied and is payable to the state and not the victim.

²³⁰ CJEU, *Von Colson and Kamman v. Land Nordrhein-Westfalen*, Case 14/83, 10 April 1984, paragraph 28; ECtHR, *Tolstoy Miloslavsky v. the United Kingdom*, No. 18139/91, 13 July 1995, paragraph 50; ECtHR, *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, No. 55120/00, 16 June 2005, paragraph 112; ECtHR, *Steel and Morris v. the United Kingdom*, No. 68416/01, 15 February 2005, paragraph 92; ECtHR, *Shilyayev v. Russia*, No. 9647/02, 6 October 2005, paragraphs 20-21.

²³¹ CJEU, *Marshall II*, C-271/91, 2 August 1993, paragraph 25.

²³² *Idem.*, paragraphs 30-31. This has also been the approach of the ECSR. See ECSR, ‘Conclusions 2006 (Albania)’, at: www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Albania2006_en.pdf.

²³³ CJEU, *R v. Secretary of State for Social Security, ex parte Eunice Sutton*, C-66/95, 22 April 1997.

²³⁴ CJEU, *Draemphael v. Urania*, C-180/95, 22 April 1997.

²³⁵ It should be noted that seven EU Member States did not provide relevant data on the amount of compensation awarded in non-discrimination cases.

Figure 12: Level of compensation: the highest recorded amounts in EU Member States (€)



Source: FRA, 2010

Average compensation in employment discrimination cases in the United Kingdom in 2007-2008, by ground (€)

Race	17,000
Sex	13,000
Disability	23,000
Religion or belief	4,000
Sexual orientation	9,000
Age	4,000
Average	12,000

(UK/Tribunals Service (2008) Employment Tribunal and EAT Statistics (GB) 1 April 2007 to 31 March 2008 (in €, exchange rate as of September 2010). See www.employmenttribunals.gov.uk)

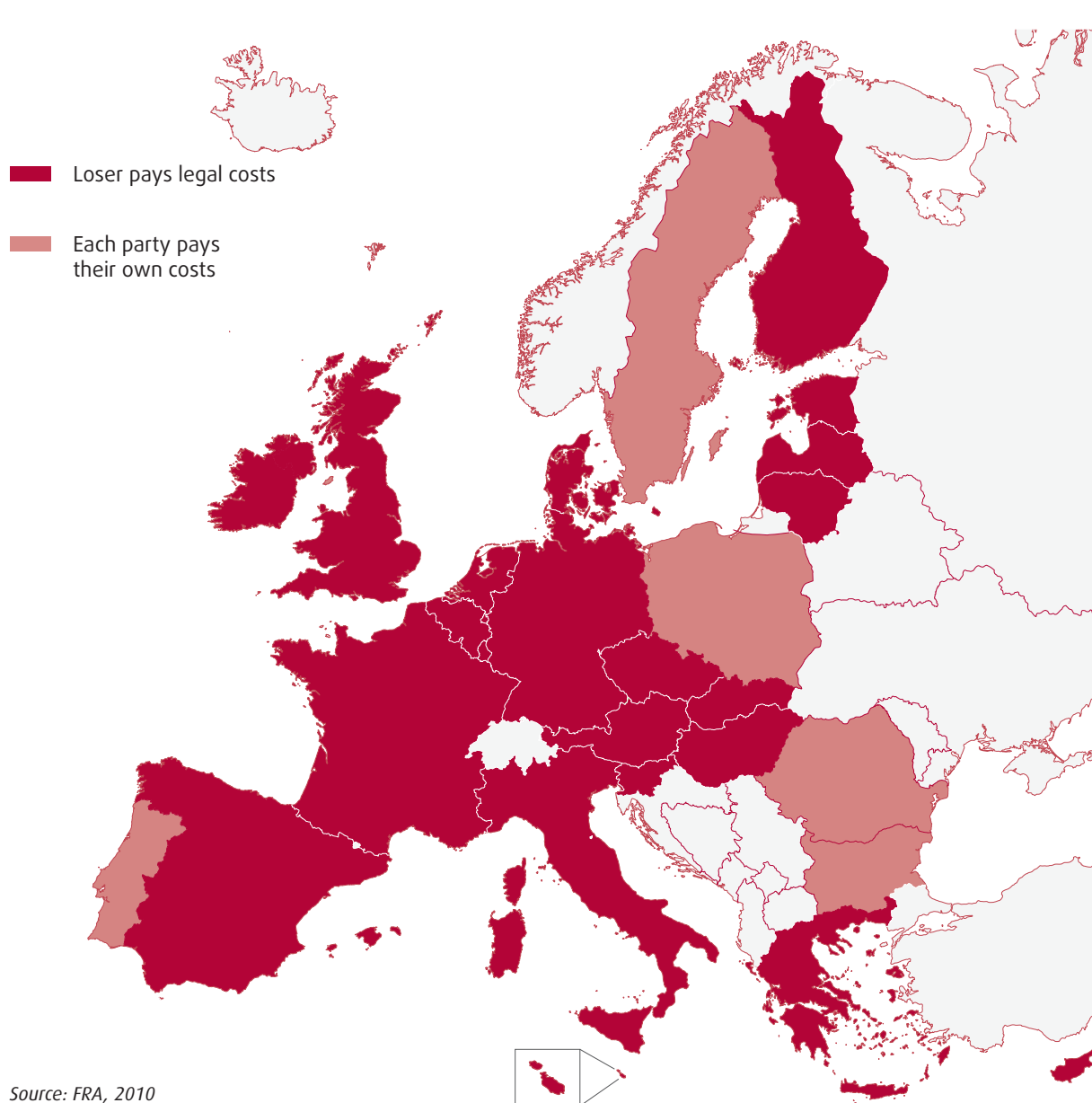
5.3. Payment of legal costs

National rules placing an excessive financial burden on individuals who wish to obtain redress for a violation of their rights under EU law, and may deter them from pursuing their rights, might be considered to interfere with the right to an effective remedy. The UN HRC has stated that “the imposition of fees on the parties to proceedings that would *de facto* prevent their access to justice might give rise to issues under Article 14, paragraph 1. In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.”²³⁶ Similarly, the ECtHR has noted that court fees that are payable in advance of instituting proceedings should not prove such a financial burden as to prevent or deter applicants from exercising their right to a remedy.²³⁷ However, the imposition of high fees or high legal costs will not always result in a finding of a violation of the right to a fair

²³⁶ UN Human Rights Committee, General Comment No. 32 (n. 7), paragraph 11; UN HRC, *Äirelä and Näkkäljärvi v. Finland*, Communication No. 779/1997, 4 November 1997, paragraph 7.2.

²³⁷ ECtHR, *Scordino v. Italy*, No. 36813/97, 29 March 2006, paragraph 201. In this context, see also ECtHR, *Perdigão v. Portugal*, No. 24768/06, 16 November 2010, in which it was held by the ECtHR Grand Chamber that forcing the applicant to pay court fees that were higher than the compensation awarded breached Article 1 of Protocol No. 1 to the ECHR.

Figure 13: Rules regarding payment of legal costs, by EU Member State



trial (Article 6 ECHR) as the overall assessment will depend on the specific circumstances of the case.²³⁸

Figure 13 shows that in the non-discrimination proceedings, national courts of 22 EU Member States

apply a 'loser pays' rule.²³⁹ This rule, which implies that the losing party will pay the winning party's costs, is believed to play an important function in filtering out unfounded cases. The rule that each party bears his or her court fees independently from

²³⁸ Thus in the case of ECtHR *Tolstoy Miloslavsky v. the United Kingdom*, No. 18139/91, 13 July 1995, for example, the requirement by the Court of Appeal for the appellant to pay a substantial security deposit in respect of the legal costs of the opposing party was not seen as unreasonable in light of the fact that the national courts did not consider the appeal to be meritorious. In this situation the opposing party risked incurring high legal costs and there was a risk that these could not then be paid by the appellant. It was thus considered that the rights of the two parties had been properly balanced.

²³⁹ Notwithstanding this general rule, in the United Kingdom, the situation in small claims (with a value of up to €5,814 (that is £5,000 – exchange rate as of September 2010) cases is modified and the costs that a losing party will pay have been deliberately restricted to limit the financial risk for the parties. There is no presumption that the losing party will pay the victor's costs in the employment tribunal either. In Germany, a general rule that a loser pays equally does not apply to the employment proceedings in which each party pays his or her own costs. Such approach aims to encourage vulnerable employees to initiate proceedings without the risk of paying their employer's costs.

the outcome of the litigation is applied in five EU Member States. However, since a rigid duty to apply such rules without consideration of the implications thereof would effectively limit access to redress in these jurisdictions, specific exemptions have been established in these States. Thus, in order not to discourage victims of discrimination with meritorious claims, national courts in most of the EU Member States are empowered to derogate from the default rules and grant an exemption from the relevant rule on the basis of the principle of equity and justice in the light of the individual's financial or personal situation. In Denmark, a party who has recklessly frustrated judicial hearings, caused unnecessary delays, asked for irrelevant production of evidence or other unnecessary procedural steps can be charged for the costs, even though he or she wins the case.

Payment of legal costs

Notwithstanding the general rule that the loser pays legal costs, in the **United Kingdom**, the situation in 'small claims' cases (with a value of up to €5,814²⁴⁰) is modified and the costs that a losing party will pay have been deliberately restricted to limit the financial risk for the parties. There is no presumption that the losing party will pay the victor's costs in the employment tribunal either.

In **Germany**, a general rule that a loser pays equally does not apply to the employment proceedings in which each party pays his or her own costs. Such an approach aims to encourage vulnerable employees to initiate proceedings without the risk of paying their employer's costs.

Procedures in special non-judicial complaints mechanisms are normally free, for example in Austria (Equal Treatment Commission), Denmark (Board of Equal Treatment), the Netherlands (Equal Treatment Commission (CGB)), in Bulgaria (PADC) and in Romania (NCCD). However, when court action is involved the cost of legal proceedings can be a barrier to effective redress. This is particularly the case in those Member States, where losing a court case leads to paying the other party's legal costs (see Figure 13).

5.4. Evidence

In order for victims of discrimination to obtain adequate redress for harm suffered from the courts, they have to bring sufficient evidence to prove discriminatory treatment. If the obstacles to bringing evidence are so great that an action before courts is doomed to failure, individual legal rights are not really enforceable in practice. To address the difficulty of proving discrimination, European non-discrimination law allows the burden of proof to be shared.²⁴¹ In addition, a claimant may need to rely on statistical data that proves general patterns of differential treatment. Some national jurisdictions, furthermore, accept evidence generated through 'situation testing'.

5.4.1. The burden of proof

In the context of non-discrimination law, proving discrimination is often difficult, since the perpetrator will not necessarily expressly indicate that they are treating the victim less favourably than others because they possess a particular protected characteristic, such as age or sex. Such a motive often only exists in the mind of the perpetrator. In order to address this difficulty the Racial Equality Directive (Article 8), Gender Goods and Services Directive (Article 9), Gender Equality Directive (recast) (Article 18) and Employment Equality Directive (Article 10) expressly allow the burden of proof to be 'shared' between the parties. Accordingly where the claimant is able to establish facts from which it may be presumed that there has been discrimination, it then falls to the respondent to prove that there has been no breach.²⁴² This provision articulates a principle already established in the case law of the CJEU concerning discrimination on the ground of sex.²⁴³ Nevertheless, it appears that this rule was not in operation in many Member States prior to the introduction of these directives. A small number of Member States appear not to have explicitly incorporated this principle into their rules of civil procedure, or have not applied it during court proceedings.²⁴⁴

²⁴¹ See Article 10 of Directive 2000/78, the Employment Framework Directive, OJ L 303, 2 December 2000, p. 16. See also ECtHR, *Gurgurov v. Moldova*, No. 7045/08, 16 June 2009, paragraph 56.

²⁴² Though Member States in which the court has an investigatory role are not obliged to apply the rule. For in-depth discussion of European standards on evidence in non-discrimination law see ECHR and FRA (2011) *Handbook on European non-discrimination law*, Luxembourg: Publications Office, Chapter 5.

²⁴³ See *Enderby v. Frenchay Health Authority and Secretary of State for Health*, [1993] ECR I - 5535, paragraph 14.

²⁴⁴ Chopin, I. and Gounari, E.N. (2009) *Developing anti-discrimination law in Europe. The 27 EU Member States compared*, report prepared for the European Network of Legal Experts in the non-discrimination field, Luxembourg: Publications Office, pp. 66-67.

²⁴⁰ That is £5,000 (exchange rate as of September 2010).

5.4.2. Statistics

In order to be able to substantiate a claim of discrimination the claimant must prove that they have received less favourable treatment than other individuals in a comparable situation. However, this information may sometimes be difficult to obtain.²⁴⁵ For instance in order to prove a claim of direct discrimination in the context of pay a claimant will need access to evidence that they are receiving less pay than colleagues in similar posts with similar levels of experience or qualifications. However, this information is not always readily available. In order to prove indirect discrimination it is necessary to show that a uniform (that is, apparently 'neutral') rule or practice has a disproportionately negative impact on a particular group of persons characterised by, for instance, their racial or ethnic origin. In certain situations this requires the production of statistical data. For instance, it may be shown that a service provider, who refuses to offer a service in a particular neighbourhood, is in fact committing indirect discrimination on production of evidence that this area is populated predominantly by members of an ethnic minority. Statistical data has been accepted as evidence capable of giving rise to a presumption of discrimination by the CJEU and the ECtHR and its use is well established in the United Kingdom and the Netherlands.²⁴⁶ However, this practice remains uncommon in many Member States, since data which might be of assistance is not actually collected – the reasons for which are discussed below.

More than a third of Member States appear to allow 'situation testing' to be used in order to prove the existence of discrimination, subject to certain criteria (Belgium, Bulgaria, the Czech Republic, Finland, France, Hungary, Latvia, the Netherlands, Sweden and the United Kingdom).²⁴⁷ 'Situation testing' has been conducted by some equality bodies and NGOs and involves using both members of the majority population and minority groups who may try to access a particular service, such as entry to a restaurant or bar. Similarly, it may involve sending out job applications from candidates with

identical qualifications and employment histories but with names identified both with the majority population and ethnic minorities. Where evidence is collected that members of the minority group are systematically treated less favourably without objective justification this has been accepted as proof of discriminatory treatment by the courts.

5.5. Execution of judgments

Failure to execute or enforce judgments – that is, the carrying out of a final judgment in order to ensure that obligations actually are imposed or fulfilled in practice – constitutes a further obstacle to access to justice. Non-execution or delayed execution of final judicial decisions which grant financial or other forms of compensation to an individual, may thus restrict rights protected in such decisions and hence undermine the right to adequate redress and effective judicial protection.²⁴⁸

The ECtHR and the UN HRC have made clear in their jurisprudence that failure to execute a final judgment²⁴⁹ in itself will amount to the breach of a right to an effective remedy. Clearly, the right to an effective remedy relies not only on removing barriers to access justice, but also on the execution of any findings and orders of the national authorities in order to put the ruling into practice.²⁵⁰

²⁴⁵ On statistical evidence see also: FRA (2010) *The Racial Equality Directive: application and challenges*, Luxembourg: Publications Office.

²⁴⁶ See, for example, CJEU, Joined Cases C-4/02 and C-5/02 *Hilde Schönheit v. Stadt Frankfurt am Main* and *Silvia Becker v. Land Hessen*, [2003] ECR I-12575; ECtHR, *D.H. and Others v. The Czech Republic* (GC) No. 57325/00, 13 November 2007. In the United Kingdom, the use of statistics is a well-established means of proof in racial and ethnic discrimination cases: see, for example, *West Midlands Passenger Transport Executive v. Singh* (1988) IRLR 186. In the Netherlands, the Commission for Equal Treatment uses statistical evidence in individual cases, often in order to establish indirect discrimination: the Netherlands/CGB, Case No. 2004-15, 1 March 2004.

²⁴⁷ Rorive, I. (2009) *Proving discrimination cases – the role of situation testing*, Sweden/Brussels: Centre for Equal Rights, Migration Policy Group, p. 56.

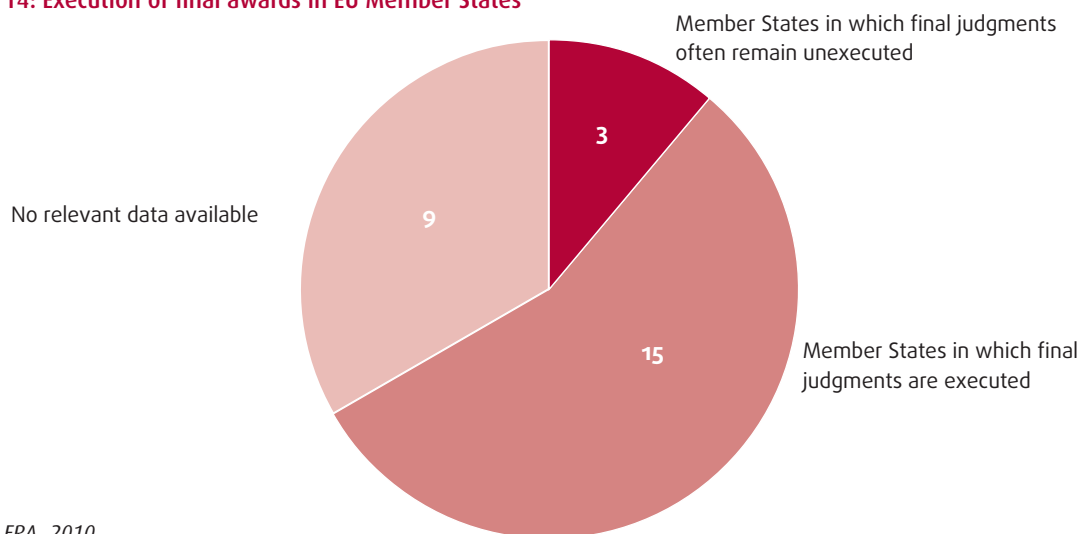
²⁴⁸ The lack of execution of a court decision is also of relevance in determining whether proceedings have been reasonable in length, see Section 3.1.3.

²⁴⁹ The judgment becomes final only after the appeals process is exhausted or waived. Where a possibility of appeal does exist (note that there is no a general right of appeal in civil cases: ECtHR, *Ekbatani v. Sweden*, No. 10563/83, 26 May 1988, paragraphs 23-33 or Protocol No. 7 to the ECHR (ETS 117) only guarantees a right of appeal in criminal trials), it is not necessary for each stage of the proceedings to conform to the requirements of Article 6 ECHR. Rather the assessment of whether Article 6 requirements have been complied with should be based on the totality of proceedings. Once the judgment becomes final, the principle of *res judicata* begins to apply. *Res judicata* is the principle of the finality of legal proceedings, which requires that a particular decision be regarded as final and irrevocable once all available proceedings or remedies have been exhausted or the time limits for these have been allowed to expire. While it is possible for higher courts to conduct a review of final proceedings this should be limited in purpose to correcting judicial errors or miscarriages of justice, but not to obtain a rehearing or a fresh determination of the case. Thus where courts are permitted to re-hear a particular dispute on its merits once a judgment is finalised this will conflict with the right to an effective remedy, since a vindicated party will not dispose of the certainty and security of a final decision. See, for instance, ECtHR, *Brumarescu v. Romania*, No. 28342/95, 28 October 1999, paragraph 61, or ECtHR, *Driza v. Albania*, No. 33771/02, 13 November 2007, paragraph 64.

²⁵⁰ ECtHR, *Iatridis v. Greece*, No. 31107/96, 25 March 1999, paragraph 66; ECtHR, *Karahalios v. Greece*, No. 62503/00, 11 December 2003, paragraph 23; ECtHR, *Scordino v. Italy*, No. 36813/97, 29 March 2006, paragraph 198. See as well UN HRC, *Czernin v. Czech Republic*, Communication No. 823/1998, 4 December 1996, paragraph 75.



Figure 14: Execution of final awards in EU Member States



Source: FRA, 2010

Enforcement of judgments

A government entity delayed payment of debts determined by a court to an employee for periods of up to twenty months. The ECtHR considered the delays disproportionate. The execution of a court decision or order of any jurisdiction must be considered as an integral part of the procedure under this provision.

A public authority cannot invoke the lack of resources for not paying a debt ordered by a court decision and failure to respect a final decision of a court within a reasonable time might violate the ECHR.

(ECtHR, *SĐcDleanu v. Romania*, No. 73970/01, 6 September 2005)

'Anticipatory' enforcement of judgements

In **Bulgaria**, the national law provides for so-called 'anticipatory' enforcement. The Bulgarian courts allow anticipatory enforcement of the judgment in case they award maintenance, remuneration and compensation for work. Bulgarian courts may furthermore allow anticipatory enforcement where they award amounts of money due or owed on the basis of an official document or where such amounts have been admitted by the respondent, where the delay of enforcement may result in material and irreparable damages to the plaintiff or the enforcement itself would become impossible or be considerably impeded.

According to the research findings in 15 EU Member States, there was no evidence to suggest that final judgments remain unexecuted whereas nine other did not have relevant data to properly evaluate the situation (Figure 14).

Problems with non-execution of final judgments were found in three EU Member States (Figure 14). Non-execution of final judgments appears to be a systemic problem in particular in Romania.²⁵¹ In the United Kingdom, the Ministry of Justice has produced statistics indicating that employment tribunal decisions on claims stemming from non-discrimination in employment and unequal pay regularly remain unexecuted. According to the relevant findings, amendments to national law have recently been made to simplify enforcement procedures even though it is difficult to predict the significance of their impact. Some problems in relation to non-execution of final judgments also exist in Greece.²⁵²

²⁵¹ See, for example, *SĐcDleanu v. Romania*, No. 73970/01, 6 September 2005.

²⁵² In this respect, it should also be noted that although there is no evidence to suggest that final judgments remain unexecuted in the area of non-discrimination in Hungary, the execution of decisions granting satisfaction other than financial compensation may be problematic, as the domestic law does not contain any relevant rules on how to execute decisions ordering specific performance.

5.6. Summary

The preceding sections of Chapter 5 analysed, in a comparative way, several aspects of the right to an effective remedy, namely nature of redress (section 5.1), level of financial compensation (section 5.2), rules relating to the payment of legal costs (section 5.3), and finally, execution of final judgments awarding victims financial compensation or other types of satisfaction (section 5.4).

According to the relevant research findings (section 5.1), in all 27 EU Member States, financial compensation is the primary means of compensating victims of discrimination. Such financial compensation is supplemented by other non-financial forms of reparation (e.g. requests for reinstatement to a previous position or an order that specific action be taken to relieve the injured party or a discriminatory contractual clause be nullified) in the majority of EU Member States (19). The award of punitive damages is only provided for in two EU Member States.

As for the amount of financial compensation commonly awarded by domestic courts, the relevant research findings (section 5.2) showed that this depends heavily on the national context, national

standard of living in particular. It can be concluded that in the majority of EU Member States that provided relevant statistical data, the average amount of financial compensation ranges from €2,000 to €5,000.

In the non-discrimination proceedings, national courts of 22 EU Member States apply a 'loser pays' rule (section 5.3). Yet, in order not to discourage victims of discrimination with well-founded claims, domestic judges in most of the EU Member States can derogate from this rule, granting an exemption on the basis of the principle of equity and justice.

The 'sharing' of the burden of proof between the parties in the context of non-discrimination law is of particular importance in this area of law given the difficulties involved in proving a case of discrimination. Experience in various Member States likewise shows that statistics and discrimination testing may be very useful tools in providing evidence of discriminatory practice (section 5.4).

But for two EU Member States, there are no major problems with execution of final judgments (section 5.5).



Conclusions

Access to justice is essential in ensuring that rights are made effective and implemented. This report provides an EU-wide comparative overview and analysis of challenges and good practices relating to access to justice. At the international level, it provided a comparative overview of mechanisms available in the EU through European and international mechanisms, and their relationship with national jurisdictions. At the national level, it discussed limitations on accessing dispute settlement procedures, such as time limits for lodging complaints, rules on legal standing and legal fees, as well as the ability to use non-judicial procedures in order to obtain redress. It went on to examine the availability of legal aid, existing alternatives, and the types of redress available at national level.

At the European level, the report examined the UN treaty monitoring bodies, the ECtHR, ECSR and CJEU. The UN offers mechanisms that contribute to making justice widely accessible through quasi-judicial monitoring bodies. However, State parties have not expressly undertaken to be legally bound by their decisions on individual complaints. Further, not all EU Member States have consented to the individual complaints procedure. The ECtHR may hear complaints relating to breaches of the ECHR, while the ECSR monitors implementation of the European Social Charter. The latter may only hear complaints of a collective nature lodged by certain bodies such as NGOs and trade unions. The ECtHR unsustainably high caseload has led to the introduction of a 'pilot' procedure designed to deal with repeat violations. The CJEU may hear

complaints relating to EU law. Individuals may access to CJEU directly (through the action for annulment) or indirectly (through the preliminary ruling procedure). While remaining relatively restricted, legal standing before the CJEU in the context of annulment proceedings has been broadened by reforms introduced by the Treaty of Lisbon.

At national level, the report focussed on analysing existing practices in light of a typology of access to justice in order to identify challenges and good practices. Procedural rules, case law and practices in the area of non-discrimination law, as represented by the Racial Equality Directive, Gender Equality Directives and Employment Equality Directive, formed the focus of the enquiry. Member States are obliged to implement these instruments and ensure that redress for breaches of the rights they guarantee are both effective and equivalent to that available at national level for similar procedures. It was found that while access to justice is available to a substantial degree, there is still room for improvement among the EU Member States.

This represents FRA's first study specifically on the issue of access to justice, and has served to identify areas where further research may be needed. While the report has focussed on access to courts as a means of obtaining redress, it should be read together with forthcoming FRA research on the role and experiences of non-judicial mechanisms, in particular equality bodies, as an alternative avenue to obtaining access to justice.

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The ability to enforce a right is central to transforming fundamental rights from theory into concrete reality. Access to justice is not only a right in itself but also an enabling and empowering right since it allows individuals to enforce their rights and obtain redress. This report, the first study of the European Union Agency for Fundamental Rights to focus on this issue, provides an overview of challenges to and opportunities for the realisation of access to justice. It provides a comparative analysis of procedures available at the European and international levels and their relationship with national judicial systems. Its main focus, however, is on national judicial systems, and the procedures and practices through which access to justice is delivered. It identifies concrete obstacles such as strict time limits for lodging complaints, restrictive rules on legal standing, excessive legal costs and the complexity of legal procedures.



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