

REMEDIES OF UNION CITIZENS VIS-À-VIS DISCRIMINATION

ZSÓFIA ASZTALOS

University of Miskolc, Faculty of Law, Department of European Law and International Private Law, Hungary

REVIEWER: JUDIT FAZEKAS

Key words

Citizenship of the European Union – Article 17 EC – Prohibition of discrimination on the base of nationality – Court of Justice – Preliminary ruling – Article 234 EC – Action for annulment– Locus standi – Article 230 EC – Action against a Member State – Articles 226, 227 and 228 EC – Complaint to the European Ombudsman – Maladministration – Right to petition to the European Parliament – Lisbon Treaty

Resume

Prohibition of discrimination on the base of nationality is at the core of the dispositions governing Union citizenship: a citizen of the European Union who resides lawfully in the territory of an other Member State can rely on prohibition of discrimination in all situations that fall within the scope *ratione materiae* of Community law. I state in my paper that there are at least three remedies of Union citizens to combat against discrimination on the base of nationality. I give a comparative presentation of these instruments.

First of all, Union citizens can bring an action directly or indirectly before the Court of Justice against dispositions of Community and national law. I argue for that it is more useful for an individual to bring a proceeding before a national court, and to ask the national judge to suspend the proceeding and to refer questions to the Court of Justice on the interpretation or on the validity of Community law than to bring an action for annulment or an action for damages. Although the parties in the national proceeding cannot enforce the preliminary ruling, since, according to fourth paragraph of Article 234 EC, it is only a court or tribunal adjudicating at last instance is under the obligation to bring the matter before the Court of Justice, an individual has a minimum protection in a case if he or she cannot enforce preliminary ruling in the final national proceeding and thus the decision of the national court causes damage to individuals of the Member States by the serious and manifest breach of Community law.

A non-judicial tool for Union citizens is to submit a complaint to the European Ombudsman. Comparing to the action to the Court of Justice or to a national court or tribunal, it is an alternative way of solution of a debate and complements the Union and Member State courts and the parliamentary petitions committees. The power of the Ombudsman is wider than solely discrimination cases; it investigates cases of maladministration in the activities of the Community institutions and bodies.

Ombudsman proceedings are flexible, swift and no cost for the parties. They may in some instances be quasi-judicial by the review of legality both in substance and procedure, but generally they display typical features of mediation: win-win types of solution, consensual settlement, broader standard of review, non binding solutions, no enforcement or follow up procedure. There is no express *locus standi* restriction, so it means that it is not necessary for a citizen to show any specific interest in order to complain to the Ombudsman. The European Ombudsman is vested with broad powers of inquiry on one hand, but more limited powers to undo the maladministration on the other hand; he cannot quash an administrative decision. His proceeding usually does not remedy the maladministration occurred, but helps to promote better administrative behavior in the future.

The third possibility of Union citizens is to address a petition to the European Parliament. Its subject matter is wider than the remit of the Ombudsman, as well as a petition may concern any matter which comes within the Union's fields of activity. Another important difference is that most of the work of the Committee on Petitions of the European Parliament concerns the application of Community law by authorities of the Member States. While the work of the Ombudsman with citizens' complaints has no political implications in principle, it is generally assumed that the form of petition is more appropriate for political issues. Judicial review on the decisions of the Committee on Petitions is excluded. An alleged maladministration of the Committee could be, in principle, subject of the review of the European Ombudsman; however he refuses to conduct inquiries on petitions, because he does not consider himself as investigator of the European Parliament. Although, according to Article 194 EC, a matter addressed to the European Parliament must affect the petitioner directly, this condition does not restrict the circle of petitioners in practice, contrary to similar condition of bringing an action for annulment before the Court.

There is a strong interaction between the three instruments. On one hand, it appears on practical level: the Committee on Petitions transfers, with the consent of the petitioner, any petition containing an allegation of maladministration in the activities of the Community institutions and bodies to Ombudsman, to be dealt with it as a complaint, and vice versa. The

other level of interaction is more theoretical. The European Ombudsman, as well as the Court of Justice, became a novel source of law, especially, a source of soft law in the European Union. This 'administrative soft law' of the Ombudsman may be 'crystallized' into hard law via legislation or via judicial case law.

The Lisbon Treaty will reinforce the prohibition of discrimination on base of nationality of Union citizens in some instances. It takes into one unit, into Part Two of the EC Treaty, the provisions governing prohibition of discrimination and Union citizenship, under the title of 'Non-Discrimination and Citizenship of the Union'. It will expand the circle of contestable acts in the way of action for annulment before the Court of Justice also. In the field of reinforcement of protection of fundamental rights, a further innovation of the Lisbon Treaty is the decision on accession to European Convention for the Protection of Human Rights and Fundamental Freedoms.

Contact - email: *zsofi_a@freemail.hu*