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**Approaches to Equality and Non-discrimination Legislation**  
**inside and outside the EU**

**DISCUSSION PAPER - WORKSHOP 2**  
*Multiple Discrimination*

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*This discussion paper does not necessarily reflect the opinion or position of the  
European Commission, Directorate-General Justice.*

**Introduction**

The European Union has created a body of legislation aimed at combating discrimination on the grounds of gender, ethnic and racial origin, religion and belief, sexual orientation, disability and age. Multiple discrimination is not specifically and separately addressed as a ground in the directives. However, the recitals of directives 2000/43 and 2000/78 mention gender discrimination, using the notion of multiple discrimination in order to connect the aims of the non-gender directives to the gender directives and underlining that women are often the victims of multiple discrimination. There are opinions questioning the single-ground approach in the directives claiming that it may fail to address fully the multitude of discrimination.

Problems may arise when there are differences in the level of protection provided under different directives. This may happen, since Directive 2000/78/EC on Employment Equality prohibits discrimination based on age, religion and belief, sexual orientation and disability only in employment, occupation and vocational training. In contrast, Directive 2000/43/EC prohibiting discrimination on grounds of racial or ethnic origin and Directive 2004/113/EC prohibiting discrimination based on sex both cover a wider range of areas, including areas beyond employment. To address this problem and to complete the EU anti-discrimination legal framework, the Commission proposed in 2008 a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.<sup>1</sup> This proposal is still being negotiated in the Council.

In 2006, the European Commission commissioned a study on multiple discrimination.<sup>2</sup>

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<sup>1</sup>COM (2008) 426 final.

<sup>2</sup>European Commission (2007) *Tackling Multiple Discrimination. Practices, policies and laws*, Brussels September 2007, study conducted by the Danish Institute for Human Rights, Mandana Zarrehparvar and Caroline Osander.

However, this study did not cover all the Member States and the other states bound by the EU Non-Discrimination acquis and did not consider the gender dimension of multiple discrimination.

The European Commission therefore requested the European Network of Legal Experts in the field of Gender Equality (hereafter: Gender network) to provide a complementary report to cover not only 10, but 30 states, and to focus specifically on legal problems related to gender equality and multiple discrimination. Gender discrimination occurs not only as isolated form of discrimination, but also affects women who simultaneously are suffering from discrimination on grounds of their racial and ethnic origin, their age, their disability, their sexual orientation and their religion or belief. This discussion paper is based on the executive summary (written by Dagmar Schiek) of this complementary report produced in 2009<sup>3</sup>. Examples provided focus therefore specifically on gender equality and multiple discrimination, although multiple discrimination may appear in many combinations (for instance, race/age, race/religion, religion/sexual orientation).

## Terminology

In this discussion paper, we use the term of *multiple discrimination*, since it is used in EU policy documents, EU legislation and international instruments. In the Beijing platform for Action for Equality, Development and Peace, issued by the United Nations Fourth World Conference on Women, reference is also made to *multiple barriers*: the governments affirm their determination 'to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people.'<sup>4</sup> The term *multiple discrimination* is used here as overarching, neutral notion for all instances of discrimination on several of the discrimination grounds contained in Article 19 TFEU and in other instruments. Other terms often used and distinguished in literature are *intersectionality* and *additive or compound* discrimination. 'Additive' or 'compound' discrimination would signify instances of discrimination against women on more than one ground, where the role of the different grounds can still be distinguished. 'Intersectional' discrimination would refer to such discrimination against women where the influence of various grounds cannot be disentangled, e.g. discrimination through denying ethnic minority women or women with disabilities the right to bear children.<sup>5</sup>

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<sup>3</sup>Susanne Burri and Dagmar Schiek, *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?* Information on the Gender Network and some recent publications are available at: [http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm), accessed on 31 August 2011.

<sup>4</sup>United Nations, 1995.

<sup>5</sup>See for example T.M. Makkonen, *Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore*, Åbo Akademy University, 2002, pp. 10-11 and D. Schiek, 'From European Union non-discrimination law towards multidimensional equality law for Europe' in: D. Schiek & V. Chege (eds.) *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality law* pp. 3-28 London & New York 2009, pp. 12-13.

## Some case law of the Court of Justice of the EU

There is only little case law of the Court in which various forms of multiple discrimination are addressed. Case law does not generally address the issue, even after the two non-discrimination directives were adopted in 2000. However, several cases have in the past concerned the interaction of age and gender discrimination: Ms Defrenne<sup>6</sup> and Ms Marshall<sup>7</sup> were compulsorily retired at an earlier pension age than men would have been; Mrs Steinicke<sup>8</sup> and Mrs Kutz-Bauer<sup>9</sup> were denied a specific favourable form of part time work at an age at which men were still allowed access to this 'old age part time' (*Altersteilzeit*). These cases were decided when discrimination on grounds of age was not prohibited under EU law. Arguably the Court could not have been expected to consider both forms of discrimination.<sup>10</sup> In the more recent *Lindorfer* case,<sup>11</sup> however, the Court did have the opportunity to consider both age and sex discrimination: the transfer of pension rights for EU employees distinguished on grounds of age and also on grounds of sex by reference to actuarial tables. The Court re-opened the proceedings in order to re-assess the question of age discrimination after its *Mangold* decision, but, guided by AG Sharpston,<sup>12</sup> held that there was no age discrimination.

The decision in the *Coleman* case is another example of the neglect of gender discrimination intersected with disability discrimination.<sup>13</sup> The claimant had been harassed at her workplace because she took time off work in order to care for her disabled son. The reference from the Employment Tribunal London South only considered discrimination on grounds of her son's disability. Arguably, gender role expectations were also a factor in the case, though it was not relied upon before the national court.

In sum, the case law of the Court of Justice does not yet acknowledge instances of intersectional discrimination against women. Only in the *Lindorfer* case has a cautious attempt to this effect been made, by addressing the issue of age discrimination after having decided that the rule at stake amounted to sex discrimination. Arguably, the neglect of the second dimension of discrimination mirrored the litigation strategy of the parties before the national courts, who chose to rely on one ground only. However, this does not necessarily prevent a court from engaging with the problem of intersectionality, as a few cases at national level show.

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<sup>6</sup>ECJ 149/77 [1978] ECR 1365 (in the absence of secondary law prohibiting unequal treatment on grounds of gender this was not seen as a violation of Community law at the time).

<sup>7</sup>ECJ 152/84 [1986] ECR 723.

<sup>8</sup>ECJ C-77/02 [2003] ECR I-9027.

<sup>9</sup>ECJ C-187/00 [2003] ECR I-2741.

<sup>10</sup>Nielsen is expecting that this would change as soon as the Court decided cases under the new non-discrimination framework: R. Nielsen, 'Is European Union equality law capable of addressing multiple and intersectional discrimination yet? Precautions against neglecting intersectional cases' in: D. Schiek & V. Chege (eds.) *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality law* pp. 31-51 London and New York 2000, p. 42.

<sup>11</sup>ECJ C-227/04 P [2007] ECR I-6767.

<sup>12</sup>Opinion of 30 November 2006.

<sup>13</sup>ECJ C-303/06, [2008] ECR I-5603.

## Some cases at national level

The national reports of the experts of the Gender Network show that in general, information at national level on multiple discrimination is rather scarce. This is mainly due to the fact that multiple discrimination is a fairly new theme, which is not yet sufficiently reflected in legal research and practice. The national experts of the Gender Network were asked to provide examples of cases in which combinations of gender with other grounds were at stake. The case examples cluster around five combinations.

The largest number of cases is reported under the heading of *gender and racial or ethnic origin*. These are 21 case examples altogether, of which 7 relate to Roma women. The next large number of cases were 9 examples for combinations *gender and family status/reconciliation of paid and family work (including part time work)*, followed by 8 cases of *gender and age*. The experts also reported 3 cases in relation to *gender and religion* and 3 cases in relation to *gender and the position in employment*.

Sometimes multiple discrimination was not acknowledged. One of these cases is the much-discussed UK case *Bahl v Law Society*.<sup>14</sup> Here, the national court did not recognise the possibility that discrimination could be based on two grounds at the same time, such that the grounds could not be disentangled. Since the Equality Act of 2010 was adopted, some forms of multiple discrimination involving a combination of two discrimination (dual discrimination) grounds can now be addressed.<sup>15</sup>

An example of a national court addressing the issue of multiple discrimination is the Danish *Føtex* case.<sup>16</sup> The claimant, who was dismissed from her job at a department store because she started wearing a hijab, challenged the dismissal exclusively on the basis of religious discrimination. The Supreme Court, however, considered ethnic and gender discrimination in addition to religious discrimination. Although the case was not successful in the end, because the dress code on which the dismissal was based was considered as reasonable, this suggests that the recognition of multiple discrimination claims is a practical possibility.

Even the limited amount of cases reported under the head of multiple discrimination demonstrates that this is a field in which legal recognition of multiple disadvantage could be achieved. Such achievements would, depending on the national legal culture, possibly lead to acknowledging the existence of discrimination at all, or to awarding more advantageous claims. However, in many cases the existence of multiple discrimination was not acknowledged.

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<sup>14</sup>*Bahl v Law Society* [2003] I.R.L.R. 640 and [2004] I.R.L.R. 799.

<sup>15</sup>See Section 14(1) of the Equality Act 2010 and on this issue the European Gender Equality Law Review (EGELR): A. McColgan, *United Kingdom*, EGELR 2010-1, pp. 135-140, available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#h2-9](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9) (accessed on 9 September 2011 and C. Barnard, *The Equality Act 2011*, EGELR 2011-1, pp. 13-22 (not yet published).

<sup>16</sup>U 2005, 1265H.

### **Discussion questions**

- 1) *Did you come across examples in your legal practice of 'additive' or 'compound' discrimination and 'intersectionality'? If so, how were these cases addressed in court and/or by an equality body?*
- 2) *Does in your view the notion of multiple discrimination provide a useful tool and have added value in order to address in courts forms of discrimination involving more than one ground of discrimination only?*