



**Summary workshop proceedings Legal Seminar
on the implementation of EU law on equal opportunities and anti-discrimination**

***How to address discrimination across all grounds and share experience between different
kinds of discrimination***

25 November 2008, Brussels, Belgium

Workshop 1 – Positive Action/positive duties

Panel members

Chair: Prof. Mark Bell, Network of legal experts on anti-discrimination

Panellists:

Ms. Lilla Farkas, Network of legal experts on anti-discrimination

Prof. Sandra Fredman, University of Oxford, United Kingdom

Prof. Christopher McCrudden, Network of legal experts on gender equality and Network of legal experts on anti-discrimination

Mr. Daniel Sabbagh, Centre d'études et de recherches Internationales, Paris, France

Rapporteur: Dr Anneli Albi, Network of legal experts on gender equality/ Senior Lecturer at the University of Kent, Canterbury

The panel was opened by Prof. Sandra Fredman who set the context by explaining the differences between the approaches of formal and substantive equality. She pointed out that the model of formal equality depends on the individual complaints and individual compensation, while the substantive equality model, by contrast, focuses on systematic, institutional change and co-operation, including positive duties and forward-looking structural remedies. Prof. Fredman also noted the participative gap and suggested that it can be filled by the following: giving of information; transparency; the need to be given opportunity to influence decisions; monitoring and better compliance; harnessing political and managerial support. However, she cautioned against the risk of the equality obligation becoming regarded an exercise of bureaucratic box-ticking.

Prof. McCrudden placed Prof. Fredman's theoretical points into the context of legal practice, using the UK one of the few examples where the duty of equality is placed upon authorities by legislation. In the UK, the duty to actively promote equality of opportunity goes back to 1970s and thus predates EU obligations. In the second part of his paper, Prof. McCrudden provided an overview of the main principles arising from the case-law. These could be summarised as follows:

- The judges regard it as an 'important' duty. Government departments have to give advance consideration to equality policies.
- Proactive responsibility: public bodies need to take it into account regardless of whether anyone else has raised the issue.
- Duty of 'due regard' rather than of achieving a particular result; this is essentially about proportionality analysis.
- Equality of opportunity is broader than non-discrimination; it includes a requirement not to discriminate, but also involves issues of substantive equality. In practice, this is likely to include disadvantage in the field of education, housing, healthcare and other social needs.



Ms Lilla Farkas presented the Directive 2000/43 on non-discrimination on the grounds of race and ethnic origin as a human rights instrument and compared its content to other human rights treaties. She also looked at the European Court of Human Rights case-law on substantive equality. Ms. Farkas noted the fact that segregation of Roma is widespread in new Member States from Central and Eastern Europe, and brought concrete examples from Hungary. Generally Ms. Farkas underlined the importance of positive action measures to help this particular minority group.

Mr. Sabbagh highlighted the fact that US courts have struck down policies which openly assign quotas for minority groups, while having upheld more covert policies, eg. those which promote diversity. The US also uses the concept of outreach. Such an approach by the courts suggests that in order to succeed, affirmative action in essence requires a degree of dissimulation or opacity (=lack of transparency). This originates from the deeply rooted view in the American public opinion that affirmative action may be in conflict with the meritocratic principle and the principle of “color-blindness”. In terms of lessons that can be drawn by the EU, Ms. Sabbagh advised to stay away from automatic positive discrimination.

Several insightful comments were made by the audience, of which a comment highlighting the underused potential of the NGOs in promoting substantive equality merits particular attention. It was noted that NGOs could have an important role in taking cases to court and to work with companies to promote change. This would reduce the victimisation risk of an individual complainant.

Workshop 2 - Indirect discrimination

Panel members

Chair: Prof. Sacha Prechal, Utrecht University, Network of legal experts on gender equality

Panellists:

Prof. Emmanuelle Bribosia, Network of legal experts on anti-discrimination

Dr. Susanne Burri, Network of legal experts on gender equality

Prof. Christa Tobler, Network of legal experts on anti-discrimination

Rapporteur: Per Norberg, Network of legal experts on anti-discrimination

During the workshop the following issues were discussed:

1. The concept of indirect discrimination

The concept of indirect discrimination is based on effect; its central element is the disparate impact a formally neutral provision, criterion or practice may have for members of a certain group. There is no need to show a will to discriminate or negligence on the part of the perpetrator. The actor behind a potentially discriminating practice can only defend itself by showing an objective justification. The concept entails a duty to accommodate the needs minority groups if this can be done at a reasonable cost. Thus, the concept of indirect discrimination has a potential to address the problem of structural discrimination. The concept is, however, problematic in several ways. The relation between direct and indirect discrimination is not always clear. Parental leave, maternal leave and language are examples of such situations.

Comparability of situations is an implicit requirement in the law. The ECJ have on several occasions decided that the absence of a comparable situation means that no discrimination has occurred.

2. Objective justification

Objective justification and the proportionality test is a concept based on a rule of reason. It entails weighing the pros and cons of a rule, criterion or practice both from the majority and from the minority perspective. In language proficiency requirements is a key issue but it is hard to assess the language skill needed for different jobs. The majority have a right to protect their language and promoting the use of the majority language among immigrants facilitates integration. The balancing of majority rights and minority rights is very sensitive especially in recently independent countries where the minority language may be that of a former occupation power.

Another important difference is that between the public sector and the private sector. Should there in some cases be more scope to require costs to be borne by the tax-financed public sector compared to the private sector? A democratic decision sometimes leads to a discriminatory rule, criterion or practise being used. Can the duty of minority to accept the majority's decisions in special circumstances be a valid argument for sometimes accepting a disparate impact on a certain group?

Conclusions:

Indirect discrimination is a useful legal concept with a high potential. This potential is, however, not fully realised. The many problems built into this concept make it unlikely that even an improved discrimination law by itself will combat structural discrimination effectively enough. The concept of indirect discrimination works best when it is combined with social engineering designed to address different causes of structural discrimination directly. Legislation on rebalancing family and working life and the duty of employers to assess their practices in relation to the demands of minority groups are good examples of such legislation.

Workshop 3 - Multiple discrimination and potential conflicts between grounds

Panel members

Chair: Prof. Dr. Beate Rudolf, Network of legal experts on gender equality

Prof. Dr. Rikki Holtmaat, Network of legal experts on anti-discrimination and Network of legal experts on gender equality

Panellists:

Ms. Csilla Kollonay Lehoczky, Network of legal experts on gender equality

Prof. Timo Makkonen, Network of legal experts on anti-discrimination

Prof. Dr. Dagmar Schiek, University of Leeds, United Kingdom

Ms. Mandana Zarrehparvar, Danish Institute for Human Rights, Denmark

Rapporteur: Prof. Peter Xuereb, Network of legal experts on gender equality

A key question raised was the definition of multiple discrimination for purposes of discussion, theorising, but also possible legal provision. As a relatively new phenomenon, multiple discrimination knows no final definition as yet. Prof Makkonen indeed explained that there can be at least three types of multiple discrimination. The other speakers made their own contributions to this issue, notable Ms Csilla Kollonay Lehoczky in one of several references to the Roma during the discussion. Some key questions raised, but not answered definitively, were: (1) How much of a terminological problem is there? Are we using the same concepts, and imagining the same things? Is multiple discrimination an "umbrella term"? Is it a new ground? Can it be defined, as something beyond the congruence or co-existence of one or more grounds, and does it need to be defined in such a way? Generally, it was felt that

it was too early to come to any conclusion about the benefit of ‘defining’ the term in law; we might (even should) use it, but we should leave its meaning open. (2) The concept of multiple discrimination has two dimensions, the individual and the group dimensions, but what is the relationship between the two? And does each dimension require a separate approach? Should some law be individual-based, while other law and instruments be group-based? (3) What is perceived to be the main ‘legal’ obstacle to combating multiple discrimination? Is it the concept of ‘ground’ of discrimination? Is it the way the Equality Bodies work? Is it the way the law is structured (single ground) and the way that lawyers and the courts feel they are obliged to categorise a case within a particular ground, to the exclusion of the nuance of the multiple case before them? Is the current law forcing the players to play it simple where life is more complex, and in the process ignoring the reality, a reality that is far deeper and needs to be recognised as such? But (4) (back to (1)) can the complexity be defined? Can the vulnerable groups be identified, and should they be ex ante? Certainly there is a need to ‘concretely contextualise’ the discussion, it was said, to avoid an ‘essentialist’ or ‘reductionist’ approach, with all players prepared and open to ‘seeing’ a complex situation for what it is, but at the same time, the general feeling was that the system needs to be open and flexible in order for this to happen.

Most participants felt that the current Directives, as well as current and near future proposals, including the proposed Article 13 Directive, should not be “re-opened” at this point. The general feeling was that the existing gaps (lack of coherence across grounds, for example re scope, going beyond the work-place) in single ground protection would be substantially filled by such current and medium-term Commission initiatives. While the concept of multiple discrimination had been mentioned in some directives, what explained the lack of mention in other Directives was the legal imperative that gender equality be mainstreamed. Yet it was considered very important that the concept of multiple discrimination be also mainstreamed both in European law and in national law; consciousness or awareness about it had to be built up.

It followed that possible future legislation should at least refer to multiple discrimination, if only in the Preambles. Multiple Discrimination is a reality, going beyond the mere conjuncture of double or triple etc. discrimination on separate grounds. Moreover, while one could think of other new grounds on which discrimination can occur in real life, there seemed to be no case for lengthening the Article 13 or any other list of grounds, while noting that in many cases lists in whatever kind of legal instrument (European law, international conventions) are not exhaustive and the grounds, even if main, merely illustrative.

The question was whether this means that multiple discrimination needs to be specifically included as a ‘ground’, as some put it. More widely the question was asked whether the reality of multiple discrimination forced a conceptual re-think such that the legislator ought to be thinking of an “integrated approach” or an “intersectional approach” to it, possibly with a dedicated Directive on Multiple Discrimination, as opposed to relying on the historical single ground approach to anti discrimination legislation, albeit while making some amendments to the latter in order to provide better for the m.d. phenomenon. Suggestions quickly canvassed included: (a) adopting an intersectional approach in lieu of the single ground approach, (b) adopting same but ‘without throwing out the single ground approach’, (c) adopting same “in addition” to the single ground approach, and (d) adopting same while ‘basing it on’ the single ground approach.

Some conclusions drawn were that this was not the time to re-open the single ground approach, neither to re-open the current legislative proposals, nor was the time ripe to



render multiple discrimination the object of specific legal treatment, via a dedicated Directive, for example. However, a mainstreaming exercise, both for multiple discrimination suffered by women, and for multiple discrimination in general, needed to be made effective at all levels. Serious consideration needs to be given to the role that human rights law can play. The tools of positive obligation, positive action could be mobilised after solid work on identifying the vulnerable groups needing protection. This seems to point to a studied and flexible approach forward, without excluding more frequent reference to the concept in European legislation from the earliest opportunity, thus inviting national legal development and judicial application. The structures of Equality Bodies may in any case be gravitating towards the Single Equality Body model in all Member States, but various internal arrangements might work better for multiple discrimination than others. However, there seemed to be a bias, at least from the perspective of effectiveness against multiple discrimination, for all Equality Body staff to be, and to practice as, generalists.

Workshop 4 - Reasonable accommodation

Panel members

Chair: Matthias Mahlman, Network of legal experts on anti-discrimination

Panelists:

Dr. Niraj Nathwani, European Union Agency for Fundamental Rights, Austria

Prof. Beatrice Vizkelety, Commission des droits de la personne et des droits de la jeunesse du Québec, Canada

Prof. Lisa Waddington, Network of legal experts on anti-discrimination

Rapporteur: Romanita Iordache, Network of legal experts on anti-discrimination

Prof. Waddington provided an analysis of reasonable accommodation in the European law, up to Art. 5 of the Equal Employment Directive defined as an attempt in addressing de facto inequality and accommodating differences. From this starting point, the participants engaged in an informative discussion on the relevant content of the new Article 13 Directive given the provision on an obligation to provide reasonable accommodation unless it amounts to disproportionate and that denial of reasonable accommodation is explicitly defined as discrimination.

Ms. Vizkelety provided a comprehensive review of the development of the concept of reasonable accommodation under the Canadian law while Dr. Nathwani shared data regarding the jurisprudence and the practices across Member States in the context of reasonable accommodation, particularly in the area of religious minorities thus opening out the floor for a discussion on reasonable accommodation as a part of the assimilation versus integration debate.

The participants discussed reasonable accommodation from substantive and procedural perspectives; analyzed the impact of extending the scope of reasonable accommodation outside disability and employment, particularly in the context of the Canadian experience marking a shift in Canadian law from an individual approach towards more inclusive policies; focused on the content of the proposed anticipatory duty which is deemed to reduce the need for individualized measures; looked at reasonable accommodation in the context of gender or of sexual orientation. The floor discussions also pondered over the limits of reasonable accommodation (costs; reasonable/ unreasonable burden, undue hardship; in the context of religious tenants triggering reasonable accommodation, need to observe other values, sometimes even fundamental rights).



Workshop 5 - Exceptions to the principle of discrimination: what justification(s)?

Panel members

Chair: Kádár András, Network of legal experts on anti-discrimination

Panellists:

Mr. Colm O'Cinneide, Network of legal experts on anti-discrimination

Prof. Aileen McColgan, Network of legal experts on gender equality

Prof. Isabelle Rorive, Network of legal experts on anti-discrimination

Rapporteur: Sylvaine Laulom

After the three panellists presented how the exceptions of the non-discrimination principle are envisaged in the three different grounds of age, gender and religion/belief, a discussion followed on the complex issue of determination of the exceptions that may be justified and on the existences of common principles on all the three grounds.

The participants discussed the genuine occupational requirements of article 4.2 of the Employment Equality Directive that requires a specific interpretation. The question is what is included in the term of religion; the fact that religion is not defined by the Directive does not mean that a definition by Community law could not be given, on which the application of exceptions depends.

Although differences might exist according to the type of discrimination, a common framework can certainly be defined in order to apprehend the justified exceptions. In fact, in every of the grounds mentioned, a difference of treatment might be justified according to art. 4.2 of the Employment Directive; this exception authorises, in each one of the three grounds, the employer to request certain characteristics from a person. The conclusion that the participants reached, was that this common exception could be applied under a different manner according to each ground of discrimination. This does not mean that a hierarchy exists within the different types of discrimination, but mostly that the exceptions of the principle of non-discrimination might sometimes request a different analysis on the fact that the context into which discrimination might occur differs and it is necessary to take this context into account.

Also, regarding age discrimination, it is often that this type of discrimination cannot be treated under the same way as the other types of discrimination. The first decisions of the Court of Justice (Mangold, Palacios della Villa) show especially that this type of discrimination should be seriously taken into account and mainly that the Court cannot adopt a specific reasoning that would be applied in every case. Regarding the discrimination on the ground of religion, one of its characteristic is the fact that it often appears within a context where the other grounds of discrimination can equally intertwined and a conflict might arise among other fundamental rights.

The participants agreed that, for the moment, if they knew the limited manner with which the Court of Justice interprets the justified exceptions for gender discrimination within the employment field, the uncertainties continue to exist into the European interpretation concerning the authorised exceptions of other types of discrimination. Under the same way, we do not know yet how the Court of Justice could interpret the justified exceptions on gender discrimination in the field of access to goods and services.

Finally, the participants discussed the margin of discretion of the Member States as they transpose the directives and, more particularly, as they transpose the exceptions that might be justified under the non-discrimination principle. As we analyse the national measures of transposition, we take into account, first of all, that two approaches have been adopted by the Member States. The Member States can, first of all, adopt a general approach consisting of reproduction of the general formula of the directives that allows for certain exceptions. But another approach can also be adopted; the Member States might prefer to define a list of activities in which the different treatment is possible. It is not certain that one or another approach is preferable; this can equally depend on the ground of discrimination itself.

Workshop 6 - Enforcement and role of equality bodies: best practises?

Panel members

Chair: Prof. Ann Numhauser-Henning, Network of legal experts on gender equality

Panellists:

Ms. Chila van der Bas, Dutch Equal Treatment Commission, The Netherlands

Ms. Pia Engström Lindgren, The Equal Opportunities Ombudsman, Sweden

Ms. Sophie Latraverse, Network of legal experts on anti-discrimination

Ms. Genoveva Tisheva, Network of legal experts on gender equality

Rapporteur: Orlagh O'Farrell, Network of legal experts on anti-discrimination

Ms Genoveva Tisheva explained how Article 13 of the Racial Equality Directive (RED) (2000/43/EC), Article 20 of the Recast Directive (2006/54/EC) and Article 12 of the Services Directive (2004/113/EC) provide for the designation of bodies respectively responsible for the promotion of equal treatment on the grounds of racial and ethnic origin and gender, in matters of employment and access to goods and services. The Bulgarian Equality body is the Commission for Protection against Discrimination, whose mandate is broader than the EU requirements in terms of grounds and scope of protection. The Commission is an independent specialised state authority for prevention of discrimination, protection against discrimination and ensuring equal opportunities. It exercises control over the implementation and observance of the PADA or other laws regulating equality of treatment. A more general recommendation is addressed to the EU – to assess the results and the impact on equality of the comprehensive equality bodies like the Bulgarian Commission, compared to the separate existence, more specifically, of specialized gender equality bodies.

Ms Chila van der Bas described how the Dutch Commission has a dual function, (a) semi-judicial, and (b) more pro-active activities, like surveys and reports. The semi-judicial function consists of issuing Opinions about the lawfulness of unlawfulness of conduct, practices or regulations. The Commission's recommendations are not legally binding, and it cannot impose penalties or other sanctions. However its Opinions are influential and are published annually. Its more pro-active activities include an advisory role, information and training activities, awareness-raising, carrying out independent surveys and issuing independent reports. It is entitled to conduct investigations where systemic discrimination is suspected. The Commission produces publications on performance and annual reports. It conducts an evaluation every five years.

Mr Magnus Jacobsen described the work of the Swedish Equal Opportunities Ombudsman, that is a governmental authority established in 1980 whose mission is to combat sex discrimination. It is headed by an Equal Opportunities Ombudsman appointed by the government. The Equal Opportunities Ombudsman is a governmental authority whose constitution guarantees its independence as a human rights institution in accordance with



the Paris Principles. It can take legal action and impose legally binding outcomes. From January 1st 2009 the four Swedish Ombudsmen (Sex/Gender (JämO/EOO), Ethnicity and religion (DO), Disability (HO), Sexual orientation (HomO)) will become one ombudsman, The Equality Ombudsman. Two new grounds of discrimination will be introduced from 1 January 2009, concerning gender identity, (intergender, transvestite etc) in all fields (employment, education and access to and supply of goods and services, and age (late implementation of directive), only in employment and education.

Ms Sophie Latraverse presented the work of the French specialized equality body, the HALDE, which was created by Law in 2005 and is headed by a Presidency, with a College of 11 members, and a Consultative Committee of 18 members. The College members are part-time, unsalaried, not nominated for their technical competence, appointed by Government. They take their decisions in private. The HALDE covers multiple grounds of discrimination, has investigating powers, powers of recommendation, and intervention before the courts. Its litigation strategy and objectives are: development of investigation practices, development of judicial practice, and development of jurisprudence.

In the discussion following the presentations, it was noted that 3 out of 4 of the Equality bodies presented already had a single multiground equality authority, with Sweden about to follow suit. The problem of how to maintain the independence of national equality bodies in face of a sometimes hostile government attitude was raised. This is currently a particular problem with Italy and Ireland. In Italy the National Equality Adviser was removed from post in October because of a disagreement with government policy. In Ireland the Equality Authority, very active in combating discrimination in both state and private sectors, was singled out for a damaging decentralization move which will harm its effectiveness, and a budget cut of 43% in 2009 compared to 4% for other state bodies. Its Chief Executive Officer Neil Crowley has resigned his post in protest. As independence is a legal requirement under the directives, attacks on the capacity of these equality bodies to carry out their functions independently should be a matter for infringement actions against Governments. It was mentioned that Equinet has carried out a study on the independence of equality bodies which will be published shortly, and that the Commission is to undertake a similar study in 2009. This may provide a focus for examining the conduct of Governments in this regard.