

ENAR Fact Sheet 44



European Network Against Racism

Réseau européen contre le racisme

Europäisches Netz gegen Rassismus

The legal implications of multiple discrimination

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This fact sheet aims to set out what is meant by multiple discrimination; what the UN and the European Union have to say about it; how different European Member States have introduced it into their legislation; how Europe could introduce pan-European provisions and how the concept of multiple discrimination has influenced policy responses in civil society. This factsheet, as a follow-up to ENAR's first factsheet on multiple discrimination (Factsheet 33), aims to explain multiple discrimination with a view to enhancing the capacity of ENAR members to develop mechanisms to address, in their work, the intersection between racism and other forms of discrimination.

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Introduction

Equal treatment is a founding principal of the European Union. It is based on the importance of individual personal dignity and so involves recognising the needs of the whole person, permitting distinctions to be made only on a justified and rational basis, and preventing any treatment that is inconsistent with that approach. When people are denied equality because of a failure to consider all the relevant facets of their individuality, they are usually said to suffer multiple or intersectional discrimination. This happens all too frequently¹ as demonstrated by the ENAR shadow reports on racism in European and other reports published the Fundamental Rights Agency (FRA).

It is easy to see the relevance of intersectional or multiple discrimination: none of us would consider ourselves to be adequately described by reference to a single facet of our being; we know that we are not mono-chrome. Rather we are diverse, complex and multi layered, and do not see ourselves as being solely, for instance, a woman, or black, or gay. We can readily see that in order to treat people truly equally, it is necessary to recognise all relevant aspects of an individual's identity.

However, sometimes, established equality law does not adequately address the multiplicity of aspects that go to make up a person's identity. It tends to treat people in accordance with a single label such as their gender or ethnicity. While this failing is now widely recognised by those working in the equality field, little has been done to address this inadequacy in the law and the problems that this produces.

It is important to be profoundly alive to the divisions, inequalities and prejudice that lead to tensions and conflict in society. Discrimination, that prevents people's talents being fully used, restricts the potential of many people. This is not only hurtful and demeaning for individuals but also to the disadvantage of us all; it means that people's skills and experiences are not fully utilised in society or in the economy. So making equality law adequate to the task of addressing whole identities is very important.

ENAR is therefore committed to securing an effective right to equal treatment that takes into account the whole person and that recognises that sometimes a person will suffer discrimination because of a combination of factors or because of the way that different factors intersect. Some member states do this quite well, others do not. Overall European Union law does not address this matter sufficiently.

This factsheet provides an update on such acts of intersectional or multiple discrimination. It will mostly use the phrase 'multiple discrimination', as this is the term that is most widely used across Europe by academics and jurists when seeking to address the full reality of the experience of discrimination shaped by the multiplicity of facets that make up a person or a group.

¹ See ENAR Shadow Report 2009-2010, p21 and EU-MIDI, European Union Minorities and Discrimination Survey, *Data in Focus Report – Multiple Discrimination*, FRA, 2010.

The complexity of identity

It is important to see how multi-faceted identities can be. Some characteristics are innate, while some are acquired. Each person has an age, a gender, a sexual orientation and an ethnicity. Some have or acquire a religion or belief, or a disability. Discrimination and unequal treatment can be experienced on the basis of any combination of these different characteristics. For example, an individual belonging to an ethnic minority may be a woman, a woman may be a lesbian, and a lesbian may be an individual with a disability. One person could identify themselves as having, or being perceived as having, any combination or all of these characteristics simultaneously and may experience discrimination as a result. Often where a combination of these grounds describes the reality of a person's identity, the person will be found to be among the most vulnerable, marginalised and disadvantaged within the community.² That is why in recognising the complexity of identity, the concept of multiple discrimination seeks to address the reality of discrimination, disadvantage and exclusion in a much better way.³

Developing awareness of multiple discrimination

The awareness of multiple discrimination by academics and jurists is relatively new and this is one reason why an appropriate response has not yet been fully developed in all member states and EU law. The particular condition of disadvantage that African American women suffered was first identified and discussed by Kimberlé Crenshaw in 1990 as discrimination that occurred when these two aspects of identity intersected in society. She pointed out the fallacy that a single ground approach to discrimination law gives rise to, since it ensures that comparisons are only made with the privileged members of the class in question:

...in race discrimination cases, discrimination tends to be viewed in terms of sex or class-privileged Blacks; in sex discrimination cases, the focus is on race- or class-privileged women.

This focus on the most privileged group members marginalises those who are multiply burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon...Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.⁴

² EU-MIDI, European Union Minorities and Discrimination Survey, *Data in Focus Report – Multiple Discrimination*, FRA, 2010, p16.

³ Fredman, Sandra, *Double trouble: multiple discrimination and EU law*, 2005, European Antidiscrimination Law Review, no5, p13-18; Makkonen, Timo, *Multiple Compound and intersectional discrimination: Bringing the experiences of the most marginalised to the fore*, 2002, Institute for Human Rights, Abo Akademi University; Moon, Gay, *Multiple Discrimination – problems compounded or solutions found?* JUSTICE Journal, p86-102.

⁴ Crenshaw, Kimberlé, *Demarginalising the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989, University of Chicago Legal Forum, p 150.

She also pointed out that the prevailing single ground analysis of discrimination influenced the way that politics were presented and argued that if struggles against prejudice became posed as arising only from singular issues, remedies would also tend to be crafted in the same way.

The European Union Agency for Fundamental Rights (FRA) has recently surveyed the impact of multiple discrimination on ethnic minorities and immigrant groups and concluded that they 'are generally more vulnerable to multiple discrimination than the majority population in the EU'.⁵ The FRA study also noted a clear link between economic vulnerability and experiences with multiple discrimination.⁶

This Fact Sheet takes forward these ideas and looks at them in the current context.

Different kinds of multiple discrimination

Before this phenomenon can be adequately addressed it is necessary to have an adequate description of the different problems of multiple discrimination that can occur.

Multiple discrimination is said to occur when someone experiences discrimination on more than one ground, for instance, by being treated less favourably not only on grounds of race but also because of gender or disability. It is now accepted that there are broadly three ways in which multiple discrimination may manifest itself.

Firstly, *sequential discrimination* can occur when someone experiences discrimination on different grounds but on separate occasions. For example, a black woman may be passed over for promotion because, firstly, her employers want a man to take the lead, and then, on another occasion, she may be excluded because of her skin colour. Here the current EU laws are likely to be adequate, since it is a single aspect of her multiple identity that is relevant to each occasion.

Secondly, *additive discrimination* can occur where requirements are cumulative, for instance, a series of desired attributes are stated in a job description, so that the lack of one merely decreases the chance of success in getting the job, but the lack of a further characteristic will additionally decrease the chance of success. The case of *Perera v Civil Service Commission (no 2)* provides an example of this kind of approach.⁷ In this case, the employer set out a series of requirements for a potential post-holder. Mr Perera was turned down for the job due to a variety of desired attributes he was assessed by the interviewing committee as being unable to fulfil, namely: experience in the UK, the command of English, nationality and age. Here, the lack of one attribute did not prevent him getting the job but it did make it less likely. Unable to show that he had two such attributes further decreased his chance of selection. So ultimately he was unsuccessful on a variety of different grounds.

In cases of 'additive discrimination' the steps in the overall treatment can be analysed separately and can consequently usually be adequately addressed.

⁵ EU-MIDI, European Union Minorities and Discrimination Survey, *Data in Focus Report – Multiple Discrimination*, FRA, 2010, p4.

⁶ *Ibid*, p16.

⁷ [1983] IRLR 166.

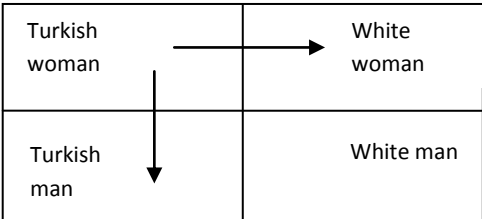
The third type is often called *intersectional discrimination* and represents the heart of the multiple discrimination problem. This occurs when the discrimination involves more than one ground and the grounds interact with each other in such a way that they are completely inseparable and cannot be disentangled. For example:

A Turkish woman machinist who is refused a job complains of direct discrimination, but the employer replies that it has employed both non-Turkish women and Turkish men.

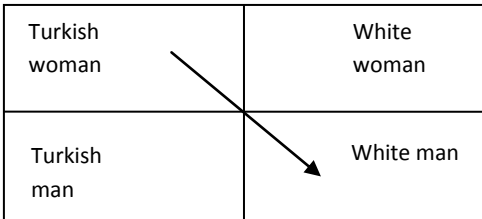
The employer’s argument only shows that they do not always exclude Turks or women. If the woman can show that it is the fact of the combination of being both Turkish and a woman that was critical this may not be enough. The treatment may be simply about Turkish women.

To show the full extent of the discrimination that she has suffered she must be able to compare her situation to that of a non-Turkish man in a way that identifies the full extent of the discrimination that she experiences as being caused by the combined effect of both her race and her gender.

This diagram expresses this graphically:



All too often at present the law will only permit a horizontal or a vertical comparison (as above), not a comparison on the diagonal (as below).



Thus, in order to have an adequate remedy for the discriminatory treatment that she has experienced, the grounds must be considered together.

Although this problem of intersectional discrimination is widespread, there have been few cases where it has been raised directly. This may well be because lawyers tend to argue cases on the strongest ground available to them and ignore other aspects, so they will craft the case to meet the limitations of the law.

What does the UN say about multiple discrimination?

The UN has addressed multiple discrimination in a number of important texts. In both article 26 of the International Covenant on Civil and Political Rights 1966 (ICCPR) and article 2(2) of the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR) the United Nations used an open ended definition of discrimination that recognises that equality can be denied for a multiplicity of reasons. For instance article 26 ICCPR says that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The phrase 'or other status' at the end of this definition, allows for the possibility of extending discrimination protection into new grounds. This flexible wording has the potential to encompass multiple discrimination; a combination of any of the named grounds could be treated as discrimination on '[an]other status'. Consequently the adoption of this type of definition of discrimination has sometimes been suggested as the most apposite way to address multiple discrimination.⁸

The UN Convention on the Rights of a Child 1989 (CRC) also gives some recognition of multiple discrimination in article 2 where it requires protection for children regardless of their parent or guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In article 23 it explicitly recognises the particular problems of disabled children but does not refer to further examples of multiple discrimination. The recent UN Convention on the Rights of Persons with Disabilities 2006 also recognises the diversity of people with disabilities and has specific articles dealing with multiple discrimination as it affects disabled women and girls (article 6) and children with disabilities (article 7) nevertheless it still does not have a specific provision to deal with multiple discrimination.

The first explicit recognition in the reports of the UN that multiple discrimination was a phenomenon that needed to be addressed was in the conclusions of the United Nations' Fourth World Conference on Women in Beijing. The Conference adopted a Platform for Action for Equality, Development and Peace in which the participating Governments affirmed 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.*⁹

The UN General Assembly Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2000, similarly acknowledged the significance of multiple discrimination. In the concluding Declaration No. 2 it was said:

⁸ Hannett, Sarah, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, Oxford Journal of Legal Studies, vol 23, no1, p65-86.

⁹ UN 1995, Beijing Declaration, para 32, at <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm>

We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.

So it can be seen that an awareness of the complexity of discrimination in society including multiple discrimination has entered into the dialogue of the UN's Treaty bodies.

It is also relevant that the UN committee responsible for the Convention on the Elimination of all forms of Racial Discrimination (CERD) has considered multiple discrimination in its analysis of Member State's reports on their compliance with Treaty obligations. It is the Treaty Body that has most frequently referred to multidimensional discrimination in its reports.¹⁰

European perspectives

The European Commission recognises that multiple discrimination is a problem and has commissioned a major report on it – *Tackling Multiple Discrimination: Practices, policies and laws*.¹¹ It has also funded research such as the GendeRace project to gather further evidence of the impact of multiple discrimination across gender and race.¹² The authors of *Tackling Multiple Discrimination: Practices, policies and laws* visited ten Member States to speak to their national equality bodies, the Ministries responsible for equalities as well as non-discrimination, European, national and local NGOs and European and national social partner organisations. They concluded that:

*It is evident that Multiple Discrimination exists. However a lack of documentation and statistical data makes the phenomenon of Multiple Discrimination less visible and lowers incentives to recognise the phenomenon and to find effective mechanisms to combat it.*¹³

The authors made wide ranging recommendations about the need for further research, for specific legal protection, for awareness raising, training and education, data collection, the promotion of good practice and the promotion of multiple ground NGOs.

The European Parliament has also highlighted the problem of multiple discrimination and called on EU member states 'to review the implementation of all policies related to the phenomenon of multiple discrimination'.¹⁴

¹⁰ Vadenhole,W, *Non Discrimination and Equality in the view of the UN Human Rights Treaty Bodies*, 2005, Intersentia, Antwerp.

¹¹ *Tackling Multiple Discrimination: Practices, policies and laws*, European Commission, 2007.

¹² See http://genderace.ulb.ac.be/index.php?option=com_content&task=view&id=85&Itemid=171

¹³ *Tackling Multiple Discrimination: Practices, policies and laws*, European Commission, 2007, p 48.

¹⁴ European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An Area of freedom, security and justice serving the citizen – Stockholm Programme, in OJC 285 E as of 21 October 2010, para 31.

What do the European discrimination directives say?

The directives that cover discrimination in gender, race, disability, religion or belief, sexual orientation and age do not explicitly require, but nor do they prevent, Member States in making legislation to include provisions to prevent multiple discrimination.¹⁵ However, these directives have different scopes. Moreover only the gender and race directives reach beyond the employment field so a legal prohibition of multiple discrimination under the directives can only be envisaged where there are common provisions. This undoubtedly creates some problems.

In some cases the directives do expressly recognise that different grounds may intersect. For instance, Recital 14 of the Race Directive, says:

In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

The Employment Equality Directive has a similar provision in recital 3.

Additionally, each Directive provides that:

Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

Arguably, this last provision could enable Member States to remove unnecessary procedural hurdles to remedies to multiple discrimination in fulfilling the objective of the directives of 'putting into effect in the Member States the principle of equal treatment'. Indeed some Member States have included provisions to prohibit multiple discrimination when they have introduced legislation to implement the equality directives.

How is multiple discrimination addressed in Member States?

Some aspects of multiple discrimination are addressed in a number of EU Member States. For instance, the German General Equal Treatment Act implicitly recognizes multiple discrimination by providing that in multiple discrimination cases any justification must apply to each of the grounds in question:

Discrimination based on several of the grounds [...] is only capable of being justified [...] if the justification applies to all the grounds liable for the difference of treatment.¹⁶

¹⁵ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment for men and women in matters of employment and occupation (recast) and Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

¹⁶ § 4 General Equal Treatment Act.

In Austria there are provisions for multiple discrimination to be taken into account in assessing the amount of compensation payable in discrimination cases.¹⁷ Polish legislation expressly provides that both direct and indirect discrimination may be based on more than one ground.¹⁸ Both Bulgarian¹⁹ and Romanian²⁰ legislation contain definitions of multiple discrimination. Spanish²¹ and Bulgarian²² legislation place a positive duty on public authorities to address the problem of multiple discrimination, for example, in devising policies and conducting surveys.

Even in member states where multiple discrimination is not expressly addressed some national experts consider that their national law could be interpreted to encompass multiple discrimination.²³

On the other hand, experts from Ireland, the UK, Slovakia and the Czech Republic have doubted whether such an interpretation is possible within their systems.²⁴

This lack of uniformity is a problem in itself which ENAR considers should be urgently addressed.

The position of Roma women

The position of Roma women provides an example of frequent multiple discrimination that crosses boundaries in Europe and exemplifies the need for a universal European approach.

While Roma as an ethnic group experience discrimination it is clear that it has a particularly adverse impact on Roma women. Roma women tend to reach a lower standard of education, spend more time in inadequate housing sometimes without electricity or running water, and experience greater risks to their health and difficulty accessing adequate healthcare.²⁵

It is now well recognised that multiple discrimination is a real and pressing issue for Roma women: the EC study *'Tackling Multiple Discrimination: Practices, Policies and Laws'* identified Roma women as particularly likely to experience multiple discrimination.²⁶ One example cited was of a Roma woman who was given more difficult and degrading work than was given to either Roma men or non-Roma women. She was threatened with having her social benefits cut off if she did not continue with

¹⁷ § 9(4) Federal Disability Equality Act, § 7j Act on the Employment of People with Disabilities, § 12 section 13 Equal Treatment Act (private sector) and §19a Federal Equal Treatment Act (Federal Public Sector).

¹⁸ Article 18(3a) (3) Labour Code for direct discrimination and Article 18(3a) (4) Labour Code for indirect discrimination, amended 2003 and 2008.

¹⁹ Article 11 of the Bulgarian Protection Against Discrimination Act defines multiple discrimination as 'discrimination on the grounds of more than one of the characteristics under Article 4(1)'.

²⁰ Article 4 of the revised Romanian Act on Equal Opportunities defines multiple discrimination as 'any discriminating action based on two or more discrimination criteria'.

²¹ Article 14(6) Act 3/2007.

²² Article 11 Act on Protection against Discrimination 2004.

²³ See Burri,S and Schiek,D, *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?* European Network of Legal Experts in the Field of Gender Equality, European Commission, 2009:29,47,77,114,132 where experts from Cyprus, Denmark, France, Iceland, Malta, the Netherlands, Norway, Portugal, Slovakia, Spain and Sweden consider that their legislation can accommodate multiple discrimination claims.

²⁴ See Burri and Schiek, *ibid* <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>

²⁵ See *Ethnic minority and Roma women in Europe: A case for gender equality?* Synthesis report

by Marcella Corsi, Chiara Crepaldi, Manuela Samek Lodovici, Paolo Boccagni,Cristina Vasilescu, Nov 2008, EU, and Koldinská,K, *EU Non-Discrimination Law and policies in reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe in European Union Non-Discrimination Law and Intersectionality*, ed Schiek, D & Lawson,A, 2011, Ashgate.

²⁶ *Tackling Multiple Discrimination: Practices, Policies and Laws*, European Commission, 2007.

this work. After 30 days work she fainted whilst working but nevertheless felt that she had to return to work as she needed her social benefits in order to feed her children.²⁷

Numerous other examples of their unacceptable experiences of multiple discrimination have been documented, amongst the worst are:

- the forcible sterilization of Roma women in Hungary, Slovakia and the Czech Republic (this has not been applied to Romani men);²⁸
- the segregation of Roma women needing pre and post natal treatment;²⁹ and
- the trafficking of Roma women.³⁰

A Europe-wide approach?

Various different Europe-wide solutions have been raised.

A solution that may seem the most obvious would be to adopt an open ended definition of the prohibited grounds. This would mean that any of the named grounds – as well as any additional grounds that were identified – could be put together to form a new composite ground. This approach would bring the definition of discrimination into line with that used in the Charter of Fundamental Rights of the European Union in article 21. However, it gives rise to two important problems.

Firstly, to have such a potentially unlimited range of grounds would make it very difficult for any employer or service provider to anticipate all possible grounds and so to put in place the necessary prevention measures. It would create uncertainty and it would be a major step beyond the current directive grounds which are clearly specified and widely understood across Europe.

Secondly, it would open up all cases of direct discrimination to the defense that the action in question can be justified by a legitimate aim which is appropriate and necessary. This is an approach that many jurists consider is undesirable and gives the judiciary greater powers to find justifications for discrimination.³¹ This might be particularly undesirable in countries where there is already a reluctance to acknowledge the impact of discrimination in the lives of those directly affected by discrimination.

Undoubtedly, the ideal solution would be for the EU to adopt a new all-encompassing equality directive to cover all the existing grounds of gender, race, disability, religion or belief, sexual orientation and age to the same extent. Then a specific provision to prohibit multiple discrimination or discrimination on a combination of more than one of the prohibited grounds could be included.

²⁷ Ibid, p41.

²⁸ See, for example, *Ambulance not on the way*, ERRC, 2006, also, CERD seventieth session (2007): Concluding observations, Czech Republic, CERD/C/CZE/CO/7 and CEDAW thirty ninth session (2007): Concluding observations, Hungary, CEDAW/C/HUN/CO/6.

²⁹ Ibid.

³⁰ *Ethnic minority and Roma women in Europe: A case for gender equality?* Synthesis report by Corsi,M, Crepaldi,C, Samek Lodovici,M, Boccagni,P, Vasilescu,C, Nov 2008, EU, pages 119 & 124.

³¹ See, for example, discussion in *Industrial Law Journal*, Bowers,J & Moran,E *Justification in direct sex discrimination law: Breaking the taboo*, 2002, *Industrial Law Journal*, 31(4),307-20 and Gill,T & Monaghan,K *Justification in direct sex discrimination law: taboo upheld*, 2003, *Industrial Law Journal*, 32(2),115-22.

In the shorter term to deal with the variations in scope of the different equality directives the European Commission in 2008 proposed a new directive in relation to goods and services discrimination on the grounds of disability, religion or belief, sexual orientation and age. It is still being considered at Member State level, having been passed by the European Parliament, but at the time of writing it was not progressing at any significant speed. Any equality directive requires unanimity amongst the Member States if it is to be passed. However, some Member States are opposed in principle to such a directive so its future progress is not guaranteed.

At the time when this proposed directive was being actively considered it was suggested that a specific provision in the new directive explicitly recognising the phenomenon of multiple discrimination would be helpful both in raising awareness of the problem and in enabling the courts in Member States to interpret their national laws to include multiple discrimination claims.³²

It was suggested that it could perhaps take the form of a statement that unlawful discrimination included discrimination based on more than one of the specified grounds or an intersection of these grounds. However, this proposal has been criticised as it is said that a clause which would cover only four of the six grounds and which only applied in context of non-employment would create problems for positive interpretations of the existing legal provisions. Thus it has been said that the absence of any explicit mention of multiple discrimination in the pre-existing directives would thereafter be interpreted as excluding any such interpretation of those prior texts. Critics of this approach have said that this

*would have devastating effects on the development of any adequate response to intersectional disadvantage by way of teleological interpretation.*³³

On the other hand it could be argued that any clause of this sort is merely a clarification of the pre-existing position which was less fully understood at the time that the earlier directives had been enacted.

Another concern has been raised about the use of comparators. European discrimination law as set out by the directives is essentially comparative. It requires that in order to establish discrimination it must be shown that a person is or has been treated 'less favourably than another is, has been or would be treated in a comparable situation' or in the case of indirect discrimination when a person has been put at a 'particular disadvantage compared with other persons'. It has been said that this requirement makes it particularly difficult to identify appropriate comparators to reveal multiple discrimination and consequently Courts should be able to make findings of multiple discrimination on the basis of a finding of 'stereo-typing' as a causal link between the disadvantages experienced and the multiple grounds.³⁴ However, since the comparator requirement has been broadly interpreted and can be met by the use of a hypothetical comparator, or indeed a series of comparisons, it may be that this difficulty has been over-stated.

³² See, for example, Bell, M, *Advancing EU Anti-Discrimination Law: the European Commission's 2008 proposal for a new directive*, Equal Rights Review, 2008, vol 3, p7-18 at <http://www.equalrightstrust.org/ertdocumentbank/mark%20bell.pdf>

³³ Schiek, D & Mulder, J, *Intersectionality in EU Law: A Critical Re-appraisal*, in European Non-Discrimination Law and Intersectionality, edited by Schiek, D & Lawson, A, Ashgate, 2011, p270.

³⁴ Ibid, p271.

The European Court of Justice (ECJ) has often been influential in the incremental development of new legal interpretations of the law. However, they have made no finding about multiple discrimination although some cases have touched on areas where multiple discrimination could be said to have occurred. For example, in the case of *Coleman v Attridge Law*³⁵ the ECJ had to consider the position of a woman who was dismissed because of the caring responsibilities that she had for her disabled son. The ECJ considered that there had been disability discrimination because she had been discriminated against on grounds of disability. However, the majority of people who undertake the primary caring responsibilities for disabled people tend to be women, the ECJ did not at any time consider whether this was also discrimination on grounds of gender.

Policy responses to multiple discrimination

Increasing recognition of the problems of multiple discrimination has led to a proliferation of policy responses both at national and European levels. As policy requires no major changes in the law, it has been easier to incorporate an awareness of, and response to multiple discrimination in policy making, mainstreaming and positive action programmes.

At the European level, the European Commission has commissioned studies³⁶ and research projects.³⁷ It has asked its panels of national equality experts to report on the treatment of multiple discrimination in their Member States and provided funding for networks of NGOs across Europe.³⁸ The FRA has also commissioned reports and studies on multiple discrimination.³⁹ Nevertheless, there is still a need for pan-European multi-ground equality NGOs which could take this issue forward in a systematic way.

At national level there are many examples of good practice as well as multi-ground NGOs. National governments have initiated policies, strategies and action plans. In concert with NGOs, awareness raising projects and training and education projects have been initiated.⁴⁰ However, there is still a very limited amount of statistical data collected in this area although there are a number of studies that have been and are being carried out.

³⁵ ECJ Case C – 303/06.

³⁶ *Tackling Multiple Discrimination: Practices, policies and laws*, European Commission, 2007.

³⁷ See http://genderace.ulb.ac.be/index.php?option=com_content&task=view&id=85&Itemid=171

³⁸ European Commission, 2008, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Non-Discrimination and Equal Opportunities: A Renewed Commitment*. COM(2008) 420 final, p9 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0420:FIN:EN:PDF>

³⁹ See EU-MIDI, European Union Minorities and Discrimination Survey, *Data in Focus Report – Multiple Discrimination*, FRA, 2010. The FRA is also currently undertaking a study into multiple discrimination in healthcare in Europe.

⁴⁰ Some of these are illustrated in *Tackling Multiple Discrimination: Practices, policies and laws*, European Commission, 2007 as well as in European Commission, Non-discrimination Expert Group, *Multiple Discrimination: Report on the work carried out by Governmental Expert Group on Non-Discrimination 2008/2009*.

Conclusions

Multiple discrimination has been widely recognized for some time by those working in the equality field as a problem that must be addressed. Yet creating appropriate legal and policy responses to disadvantage based on a variety of grounds has proved difficult. Historically, different approaches to different grounds have developed in an ad hoc way in response to a variety of single focus campaigns without the consistency and coherence that would ideally underpin an effective equality law.

A deeper understanding of the complexity of the many ways in which discrimination operates in practice in society has led to a greater awareness of the operation of multiple discrimination. There have been a number of policy responses across Europe, however, perhaps unsurprisingly, legal solutions are slower to materialise.

Looking ahead the best solution would be an entirely new equality directive combining all the current directives and levelling up the provisions on access to goods and services to those pertaining to race. A new directive on goods and services discrimination on the grounds of disability, religion or belief, sexual orientation and age would also be an improvement. Alongside this a progressive interpretation of the law by the ECJ could unlock some of the problems and help us to make more progress.

Materials

Academic and legal resources

Bell, M, *Advancing EU Anti-Discrimination Law: the European Commission's 2008 proposal for a new directive*, Equal Rights Review, 2008, vol 3, p7-18 at <http://www.equalrightstrust.org/ertdocumentbank/mark%20bell.pdf>

Burri and Schiek, *Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?* European Network of Legal Experts in the Field of Gender Equality, European Commission, 2009. <http://ec.europa.eu/social/main.jsp?catId=641&langId=en&moreDocuments=yes>

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ENAR is a network of some 700 NGOs working to combat racism in all EU member states. ENAR is determined to fight racism, racial discrimination, xenophobia and related intolerance, to promote equality of treatment between EU citizens and third country nationals, and to link local/regional/national and European initiatives.

PROGRESS is managed by the Directorate-General for Employment, social affairs and equal opportunities of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields. The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.

PROGRESS mission is to strengthen the EU contribution in support of Member States' commitment. PROGRESS will be instrumental in:

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