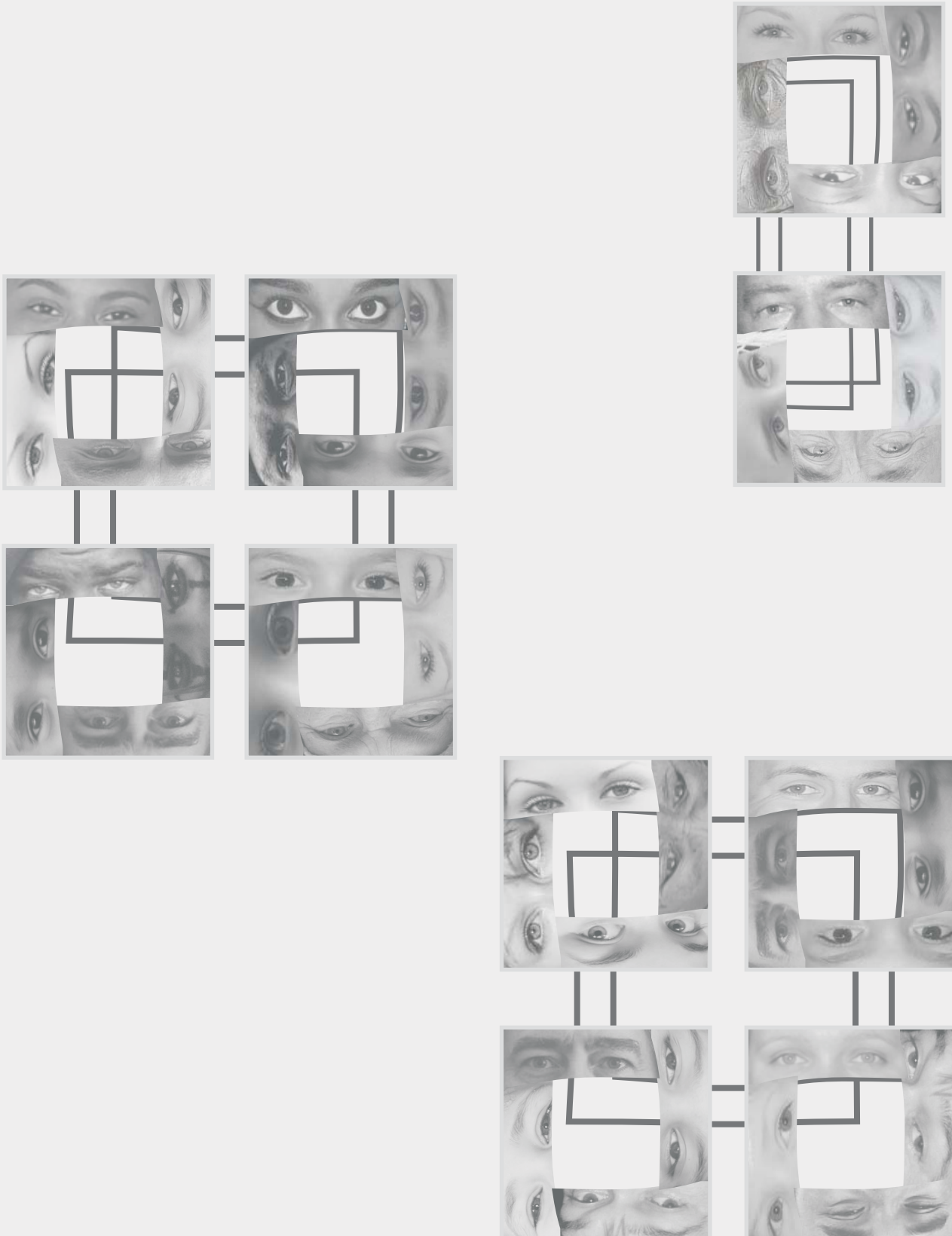


Multiple Discrimination in EU Law

Opportunities for legal responses to intersectional gender discrimination?



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EUROPEAN NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUALITY

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Part I

Executive Summary*

Dagmar Schiek

1. Introduction

Starting with legislative proposals in 1999,¹ the European Union has created a body of legislation aimed at combating discrimination on the grounds of ethnic and racial origin, religion and belief, sexual orientation, disability and age.² This body of law can be considered as an additional layer of European Union non-discrimination law, complementing the existing body of gender equality law³ as well as rules outlawing discrimination on grounds of nationality.⁴ The new non-discrimination directives referred to both bodies of legislation and case law. They clarified that they did not exclude discrimination based on nationality of Third Country Nationals, and their recitals mentioned gender discrimination, using the notion of multiple discrimination in order to connect the aims of the non-gender directives to the gender directives. There were, of course, other connections to the gender directives, not least in the fact that the new legislation was modelled upon these directives, and also codified concepts as they had developed in ECJ case law (Schiek 2009: 3-5).

Complementing these legislative changes, the EU Commission established a policy to combat discrimination on grounds other than gender in addition to the existing gender equality policy. Both policy fields had (and still have) their own NGO structures, and also expert bodies financed by the Commission were (and still are) maintained as separate entities.⁵

From 2000, policy pressure rose to align EU gender equality law and the new fields of EU non-discrimination law. The main inconsistency was the difference in scope of protection between Directive 2000/43/EC and the then gender equality directives. The former, unlike the latter, applies in the field of education, social

* The executive summary profited from the national reports and numerous individual comments made throughout and during the meeting of the network on 8th of May 2009, and in particular from annotations provided throughout by Aileen McColgan and comments by Hélène Masse. It was prepared by Dagmar Schiek, who is responsible for any remaining mistakes.

¹ Proposal for a Council directive establishing a general framework for equal treatment in employment and occupation (COM(1999) 565 final), and proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (COM(1999) 566 final). These proposals were accompanied by an action plan which inter alia provided funding for new NGOs at EU level (Proposal for a Council Decision establishing a Community action programme to combat discrimination (2001-2006) COM(1999) 567 final, see also the Communication accompanying all three proposals COM(1999) 564).

² Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 (Race Directive) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. (Framework Directive).

³ See on the development of this body of law Burri & Prechal (2008).

⁴ Article 12 EC and the provisions on free movement of workers (Article 39 EC), freedom of establishment (Article 43 EC) and freedom to provide services (Article 49 EC) all contain a prohibition to discriminate on grounds of nationality.

⁵ See for more information on the separated Commission web pages for gender equality (<http://ec.europa.eu/social/main.jsp?catId=418&langId=en>) and non-discrimination related to the other grounds (<http://ec.europa.eu/social/main.jsp?catId=423&langId=en>).

advantages, and provision of and access to goods and services, including housing. In 2004, Directive 2004/113/EC was adopted, which expands protection against gender discrimination to one of these fields, access to and the provision of goods and services. Directive 2004/113/EC had, however, a more limited scope of application even in this field.⁶ The ‘recasting’ of some gender directives into Directive 2006/54/EC⁷ was the provisional closure of the project ‘aligning gender equality law and the new non-discrimination law’.⁸

The question how to integrate factual overlap between these different policy fields was the remaining policy issue. 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. The reference in the recitals of Directives 2000/43/EC and 2000/78/EC to multiple discrimination provided a starting point for formulating new policy aims. In 2006, the European Commission commissioned a study on multiple discrimination. (European Commission 2007)

This study was meant as an explorative beginning. Based on a review of existing literature as well as on interviews and focus groups with ‘stake holders’⁹ in 10 Member States, a ‘legal expert review’ (European Commission 2007: 20-1) on these 10 Member States and 3 non-Member States (the US, Canada, and Australia), the report recommended more research, awareness raising and new legislation to define the concept (European Commission 2007: 53-4). However, it 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 to provide a complementary report to cover not only 10, but 30 states, and to focus on legal problems related to gender equality and multiple discrimination. The mandate of this report is to highlight legal perspectives on discrimination against women based on grounds additional to their sex (multiple discrimination against women), and to make recommendations for further research or policy measures.

This executive summary will first outline the background for discussing multiple discrimination in the EU (2). It will briefly explain the notion of multiple discrimination that was used in the questionnaire for the national reports. This will be followed by an overview of the intersectionality debate and its use for legal strategies to further gender equality and to combat gender discrimination. Next, responses to the

⁶ Directive 2000/43/EC defined its scope of application in relation to access to and the provision of goods and services in Article 2 as follows: ‘(...) this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (...) access to and supply of goods and services which are available to the public, including housing’. Directive 2004/113/EC by contrast contains a number of restrictions, defining its scope of application as follows (Article 2): ‘1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context. 2. This Directive does not prejudice the individual’s freedom to choose a contractual partner as long as an individual’s choice of contractual partner is not based on that person’s sex.’

⁷ Council Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.

⁸ See on the transposition of this directive Burri & Prechal (2009).

⁹ Page 13, the ‘stakeholders’ include governmental departments, national equality bodies as well as NGOs and social partner, the last two from European and national levels.

phenomenon of multiple discrimination against women in EU law will be analysed, starting with ECJ case law from before and after the enactment of Directive 2000/43/EC, and progressing towards analysis of legislation, including planned legislation. Against this background, the contributions of national experts, which form part II of the report, will be evaluated and analysed (3). Finally, recommendations for further research, legislation and policies will be outlined (4).

2. Background

2.1. The notion of multiple discrimination

As the following paragraphs will clarify, terminology resembles a mine field when discussing discrimination against women on grounds beyond their sex and gender. The multiplication of grounds, as it happened in EU equality law and international law, always seems to be fraught with the danger of establishing a hierarchy between grounds. In the case of the EU, this hierarchy has been said to work to the detriment of gender equality (Verloo 2006: 215), and in general to have induced a less structural approach to addressing inequalities (Squires 2008:54). Accordingly, some authors seem to imply a connection between building this hierarchy and acknowledging intersectional realities (Squires 2008: 57). Amidst these divergent interests relating to discrimination on grounds of gender and other grounds, it seems important to choose terminology that does not imply any specific position from the outset.

Terms that have been used include additive discrimination, compound discrimination and intersectional discrimination. Reference is also made to intersectional inequalities, intersectional disadvantage and disadvantages compound, to name only a few.¹⁰ Each of these indicates a particular stance. ‘Intersectionality’ has been the notion through which scholars aimed at introducing new orientations into non-discrimination law and equality politics (Crenshaw 1989). Within intersectionality theory, diverse notions are used. It is common to distinguish between ‘additive’ (or ‘compound’) and ‘intersectional’ discrimination (Schiek 2009: 12-13, Makkonen 2002: 10-11). ‘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. Those using the term ‘intersectional disadvantage’ often indicate a wish to move beyond intersectionality (Hunter & Simone de 2009).

Within this minefield, the search for a neutral terminology should best start with documents that have been widely, or even globally, agreed. The Beijing platform for Action for Equality, Development and Peace, issued by the United Nations Fourth World Conference on Women, comes to mind. 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.’ (United Nations 1995)

¹⁰ For a more comprehensive list, with references, see Makkonen (2002) at p. 10.

This document refers to multiplying of barriers. Similarly, the term ‘multiple discrimination’ is used in EU policy documents and even EU legislation.¹¹ There is no indication that the term ‘multiple’ is meant to refer to any specific form of connection between the different strands of disadvantage. Rather, we can safely assume that international and European organisations use the term ‘multiple discrimination’ as the overarching notion. Surely the notion can be criticised, for example for the mathematical notion that may be conjured by multiplying (Conaghan 2009: 24) or for the tendency of assuming a separateness of strands of discrimination, which in reality intersect (Yuval-Davis 2007: 565). However, the wide usage of multiple discrimination in international and supranational instruments seems to imply that it is the most obvious ‘neutral’ term.

This report, therefore, uses the term ‘multiple discrimination’ as overarching, neutral notion for all instances of discrimination on several of the discrimination grounds contained in Article 13 EC and in other instruments. The term ‘multiple discrimination of women’ is used to refer to any discrimination against a woman which does not only involve gender.

2.2. The intersectionality debate and its relevance for (EU) legal discourse

Not only in the US and Australia, (European Commission 2007: 19) but in socio-legal theory generally, discrimination against women on more than one ground has been widely debated under the notion of ‘intersectionality’.

The term was first used in this context by legal researcher Kimberlé Crenshaw in a 1989 article focusing on the experiences of black women. She used the picture of an intersection of streets.

‘Discrimination, like traffic through an intersection, may flow into one direction and it may flow into another. If an accident happens at an intersection, it can be caused by cars travelling from any number of directions, and, sometimes, from all of them. Similarly, if a black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.’ (Crenshaw 1989, 145)

This picture should, of course, imply that damage done by intersectional discrimination is likely to be more severe, just as an accident caused by cars from all directions leads to more damage. The term intersectionality also refers to specific situation of black women (or others situated at the disadvantageous end of two or more characteristics), which can neither be compared to that of black men, nor to that of white women. Crenshaw criticised both feminist and anti-racist politics, the one for neglecting black women’s colour, the other for neglecting their gender. Her concern has been understood as avoiding identity politics (Verloo 2006: 212).

Even before Crenshaw coined the term intersectionality, similar phenomena had been debated in Europe under different headings (Vieta 2009: 95-7). The common notion was that gender, race and class (Yuval Davies 2006: 201) were the central vectors around which inequalities evolved.

Although the intersectionality debate had its origin in legal discourse, it rapidly developed into a notion used more generally within women’s studies, an interdisciplinary field integrating sociology, cultural studies, political and economic science together with the odd legal scholar. The notion may have been first used in

¹¹ See further below under 2.3. b) and 2.3. c).

order to develop better law and politics. It soon took on other missions. For example, it was used to criticise the capacity of law to mirror any social reality adequately. In the wake of 'post-modern' social theory, the notion of intersectionality was increasingly used to theorise identities, rather than to move away from identity politics. Sociological quests into law as a practice that was generally ill-suited to establish change became a dominant feature of some intersectionality research. 'Modern' intersectionality theory was criticised because it mainly reflected on law as a medium of performing identities, instead of exploring the potential of equality law to contribute to overcoming disadvantage (Conaghan 2009: 39).

20 years after its official recognition, the concept of intersectionality does not remain uncontested. The emergence of a socio-legal edited collection entitled *'Intersectionality and Beyond'* symbolises this change. The concept has been criticised as being too complex as to offer any guidance in practical matters (Squires 2008: 55) or as being too rooted in the Anglo-Saxon discourse to be of use in Continental contexts (Rey Martinez 2008: IV). From feminist perspectives, especially in the EU context, the critique has focused on the lack of concern for structural inequality (Verloo 2006: 214-216) and on the danger of submerging the aim of achieving gender equality in other aims (Squires 2008: 55). This latter danger is said to be inherent in the specific way in which the European Union has embarked upon the agenda of multiplying grounds on which discrimination is prohibited (Holzleithner 2005). The specific strategy of the EU involves pursuing a nominal agenda of equality of grounds with a hidden practice of establishing hierarchies (Verloo 2006). This does not seem to be linked to acknowledging multiple, including intersectional discrimination. On the contrary, acknowledging multiplicity and intersectionality has the potential to strengthen the issue of gender equality, given the fact that most people disadvantaged by intersectional discrimination are female (Schiek 2005).

It has been questioned whether a notion as contested as intersectionality can be of use for legal discourse or even practice. Some authors propose to acknowledge the minor role any legal discourse can have in achieving societal change (Conaghan 2009). Others stress that advocacy remains an important element in bringing neglected issues into the public mind, and that advocacy is capable of developing strategies in relation to intersectional discrimination (Goldberg 2009). There is evidence that cases of multiple discrimination can be adequately dealt with by courts (Gerards 2007: 172-180, see also below 3.2. c)). There is also evidence that the position of intersectional discrimination involving gender is presently underdeveloped in EU juridical discourse (Nielsen 2009). Accordingly, much remains to do for socio-legal research at an academic level in this field.

The lack of research is partly addressed by Commission funded projects. The largest of these is the GENDERRACE project, funded via the 7th Framework programme with just under 1 million EUR. Under the long title 'The use of racial anti-discrimination laws: gender and citizenship in a multicultural context', legal and sociological researchers from 5 universities and one research centre investigate 2 hypotheses: 1) that women and men will use race equality law differently, and 2) that intersectional experience of discrimination based on race and gender is not recognised properly in legal frameworks based on a single ground approach. The project will cover 6 Member States (Bulgaria, France, Germany, Spain, Sweden and the UK). The researchers aim to examine almost 1000 case law and complaint files and to conduct around 200 interviews of foreign nationals and members of ethnic minorities (women and men) and 70 interviews of stakeholders (in this case excluding national institutions). The project started in February 2008 and will finish in July 2010. Further

projects funded by the EC Commission include the study ‘Economic Aspects of the Condition of Roma Women’ (project number IP/C/FEMM/2005-09) financed by EC DG of Internal Policies and implemented by an international team co-ordinated by Berliner Institut für Vergleichende Sozialforschung (BIVS).

These projects only cover a fraction of the EU Member States, which makes further research desirable (see below under 4).

2.3. Reflections of these developments in EU law

Against this background, we can now briefly map the development of the discussion at EU level, of course focused on a gender perspective.

a) General problems of EU equality law and multiple discrimination

Some problems perceived in the field of multiple discrimination may not be due to the problems with this specific field, but rather stem from general problems encountered by EU equality law. Only two aspects shall be highlighted here.

First, EU equality law generally has to be assessed against the background of governance through law in a multilevel polity. Especially when European legal integration relies on secondary law – as is the case with the younger equality provisions – the problems of implementing legislation are multiplied by the divergences between national legal orders. In any field of law, EU legislation is likely to involve some degree of transplanting legal concepts.¹² However, the field of equality law has been highlighted as a ‘remarkable example of direct transplantation’, (Hepple (2004: 3),¹³ mainly based on UK law, but also on Dutch models. (Schiek et al. 2007: 14-5). Especially in a field where law aims at moulding society, transplanting models from any particular background may be problematic. In addition, there may be specific drawbacks with rooting EU equality law mainly in a common law culture. While the ability to take a pin-point approach to law reform in this legal culture can be very positive, it also has the detriment of resulting at times in less than systemically structured fields. The contradictions inherent in EU equality law are likely to result in its rejection by legal cultures that praise themselves for their systemic approaches. Accordingly, EU legislation in the field, as well as the supervision of implementation processes, will be most successful if it does not insist on pin-point transplantation of specific national models. Directives should instead allow a flexible approach on the mode of achieving a substantively equal system of redress against discrimination in 27 Member States and 3 EEA states (Schiek et al. 2007: 25).

Second, EU equality law has traditionally been informed by different intrinsic paradigms, stemming from the logic of the EU integration process. The development from a market unifier towards a human rights approach and an autonomous field of law has been described so often that a repetition is not necessary here.¹⁴ The

¹² See generally on the limits of transplanting legal concepts from one system to another Cotterell, Roger, ‘Is it so bad to be different? Comparative Law and the Appreciation of Diversity’ in: Nelken & Özücü (eds.) *Comparative Law. A Handbook* pp. 133-154 Oxford and Portland 2007, M. Graziadei ‘Comparative Law and the Study of Transplants and Receptions’ in: Reimann & Zimmermann (eds.) *The Oxford Handbook of Comparative Law* pp. 441-476 Oxford 2008, recommending a critical approach to the (limited) possibilities of transplants at pp. 474-476.

¹³ Referring to Directive 2000/43/EC, and, in the remainder of the article criticising that this Directive transplants models to combat racism from the UK to the EU which have been recognised as partly dysfunctional in their home country.

¹⁴ For a recent summary with numerous references see Meenan (2007: 12-17), see also Nielsen (2009: 38-39).

incremental development of EU non-discrimination law on the basis of all these values has resulted in a field of law consisting of different conceptual layers. The values informing these layers include enhancing transnational competition between individuals, supporting individual mobility and engendering European employment markets, protecting against social exclusion, furthering group identities and numerous others. Contradictory values will sometimes lead to clashes of norms within the field. The problem of establishing hierarchies at the expense of gender equality and in favour of racial and other equalities could, for example, be traced to conflicts between a more socio-economic and a more human rights based approach to equality law (Nousiainen 2009). Another example: economically motivated justifications for unequal treatment on grounds of age (Article 6 Directive 2000/78/EC) may contradict the protection of individual autonomy which has been central in the field of gender equality. In cases where age discrimination and (indirect) gender discrimination intersect, this may lead to either lowering or enhancing the threshold for justifying different treatment. In order to decide between such divergent results, a common value base for the field would be needed. This has not been fully established yet.

Accordingly, one would expect the problems of legally addressing multiple discrimination to be aggravated by these issues that are specific to EU law.

b) ECJ case law

It has been rightly noted that multiple discrimination could always have surfaced in EU non-discrimination law, even when only discrimination on the grounds of gender and nationality had been prohibited (Nielsen 2009: 37). In addition, each of these grounds could be at stake in factual situations where discrimination on other grounds is also relevant. Thus, one would expect a few cases where the court has already addressed the problems of multiple discrimination. Contrary to these expectations, ECJ case law does not generally address the issue, even after the non-discrimination package was adopted in 2000. The following are examples of cases in which multiple discrimination against women was not acknowledged as such.

In the field of **nationality discrimination**, the ECJ has decided some cases concerning **migrant women**. Thus, the question would arise whether the intersections of gender and nationality discrimination were addressed. Cases such as *Allué*,¹⁵ *Spotti*,¹⁶ *Schöning-Kougebetoulou*¹⁷ and *Scholz*,¹⁸ while mainly decided under free movement of workers, also concerned women. The facts only partly allow the conclusion that these women had followed their husbands to their country of origin. The discrimination experienced by these women did not seem to have a gender dimension. Although their social situation is surely more typical for women than for men, these were not necessarily cases of intersectional discrimination.

The gender dimension is more evident in cases where women engaged in **prostitution** have relied on **free movement rights**, as in *Adoui and Cornuaille*¹⁹ and *Jany et al.*²⁰ In these cases the European Court of Justice could, at least in theory, have considered whether restriction of free movement of a predominantly female group of workers would be in conflict with the principle of gender equality as a general principle of Community law. The ECJ has stressed in a number of free

¹⁵ ECJ C-259 et al/91 [1993] ECR I-4309, ECJ 33/88 [1989] ECR 1591.

¹⁶ ECJ C-272/92 [1993] ECR I-5202.

¹⁷ ECJ C-15/96 [1998] ECR I-47.

¹⁸ ECJ C-419/92 [1994] ECR I-505.

¹⁹ ECJ 115/81 and 116/81 [1982] ECR 1665.

²⁰ ECJ C-268/99 [2001] ECR I-8615.

movement cases, that Member States are bound by general principles of Community law when relying on exceptions such as the public policy derogation in Article 39(3) and 46 EC.²¹ The Court has also acknowledged long ago that gender equality belongs to the general principles of Community law that has to be protected by the European Court of Justice.²² There was, however, no consideration of this fundamental right in relation to the Member States' policy of refusing access to women working as prostitutes, although the Court did acknowledge that there was unequal treatment on grounds of nationality.

Several cases have in the past concerned the **interaction of age and gender discrimination**: Ms Defrenne²³ and Ms Marshall²⁴ were compulsorily retired at an earlier pension age than men would have been; Mrs Steinicke²⁵ and Mrs Kutz-Bauer²⁶ 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 Community law. Arguably the Court could not have been expected to consider both forms of discrimination.²⁷ In the recent *Lindorfer* case,²⁸ however, the ECJ did have the opportunity to consider both age and sex discrimination: the transfer of pension rights for Community 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 Sharpstone,²⁹ 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**. 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 European 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. 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. This does not necessarily prevent a court from engaging with the problem of intersectionality, however.³⁰ At least in the cases involving women working as prostitutes, one would have expected a reference to this principle, given the prominence of the human right to sex equality. The reluctance of the EU's highest court to engage with intersectional gender

²¹ See ECJ 36/75 *Rutili* [1975] ECR I-1219, ECJ C-482/01 *Orfanopoulos* [2004] ECR I-5257.

²² The human rights character of gender equality rights was first acknowledged in *Defrenne III* (ECJ 149/77 *Defrenne III* [1978] ECR 1365, para. 27) and more recently reconfirmed in ECJ 227/04 P *Lindorfer* [2007] ECR I-6767 (para. 51).

²³ 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).

²⁴ ECJ 152/84 [1986] ECR 723.

²⁵ ECJ C-77/02 [2003] ECR I-9027.

²⁶ ECJ C-187/00 [2003] ECR I-2741.

²⁷ Nielsen (2009: 42), expecting that this would change as soon as the Court decided cases under the new non-discrimination framework.

²⁸ ECJ C-227/04 P [2007] ECR I-6767.

²⁹ Opinion of 30 November 2006.

³⁰ The *Føtex* case before the Danish Supreme Court may serve as a counter-example here, see below text accompanying footnote 39.

discrimination indicates the need of more reflection on the problem from an EU law perspective.

c) Community legislation, Council and Commission documents

Community law does not (yet) use the term multiple discrimination in legally binding provisions. The concept has, however, figured highly in the European Community's non-discrimination policy as established by the European Commission. The issue was first mentioned in recital 4 of the 2000 Council Decision establishing a Community action programme to combat discrimination, which states that equality of women and men requires action on multiple discrimination, and in recital 5, which states that all forms of discrimination are equally intolerable, the latter providing support for the claim that new practices and policies to combat discrimination should to include multiple discrimination.³¹ Recently, the European Commission has announced to use 'new governance mechanisms to address the issue of multiple discrimination', inter alia 'through (...) providing funding for smaller networks of NGOs representing intersectional groups'.³²

The concept has also found its way into the recitals of Directives 2000/43/EC and 2000/78/EC, both of which mention that Community law has a long tradition in prohibiting sex discrimination and that women are often the victims of multiple discrimination.³³ Interestingly, the recitals of the gender equality directives, even those adopted after Directives 2000/43/EC and 2000/78/EC,³⁴ do not mention multiple discrimination. There are, however, some Commission policy documents from the field of gender equality that mention the term (Nielsen 2009:35-7).

Community legislation contains a further indirect reference to the reality of intersections between gender discrimination and other forms of discrimination. The 2000 directives, invoking gender mainstreaming, oblige the Commission to include a reference to their impact on 'women and men' in their reports on the implementation of those directive (Article 17 Directive 2000/43/EC and Article 19 Directive 2000/78/EC). The report on the implementation of the Race Directive, however, contains only very little information under the heading 'Gender mainstreaming and multiple discrimination', which is explained by the dearth of information received from Member States.³⁵ The equivalent report on the implementation of the Framework Directive³⁶ contains neither a heading 'Gender mainstreaming and multiple discrimination' nor any explanation why the report omits to fulfil the relevant obligation under Article 19 Directive 2000/78/EC.

d) Planned legislation

Presently, a proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion and belief, disability, age or sexual

³¹ 2000/750/EC: Council Decision of 27 November 2000 OJ L 303, 2.12.2000, pp. 0023-0028.

³² 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, p. 9.

³³ Cf. recital 14 of Directive 2000/43/EC and recital 8 of Directive 2000/78/EC, the same formula is used in recital 13 of the draft directive equal treatment on all grounds except sex and race outside the employment context (COM(2008) 643).

³⁴ Directive 2004/113/EC and Directive 2006/54/EC.

³⁵ Communication from the Commission to the Council and the European Parliament, 'The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' COM(2006) 643 final, pp. 1 and 7.

³⁶ COM(2008) 225 final/2 of 18 July 2008.

orientation other than in the field of employment and occupation is being debated between the Community institutions. The original Commission proposal³⁷ only repeated the recital mentioning multiple discrimination found in from Directives 2000/43 and 2000/78. On Thursday 2nd April 2009 the European Parliament adopted a number of amendments,³⁸ relating, inter alia, to multiple discrimination. The amendments to the recitals shall not be repeated here. On the text of the directive, the EP proposes the following (amendments to Commission proposal in bold):

‘Article 1

1. This Directive lays down a framework for combating discrimination, **including multiple discrimination**, on the grounds of religion or belief, disability, age, or sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment other than in the field of employment and occupation.

2. **Multiple discrimination occurs when discrimination is based:**

(a) **on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or**

(b) **on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of**

(i) **sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive),**

(ii) **racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or**

iii) **nationality (in so far as the matter complained of is within the scope of Article 12 of the EC Treaty).**

3. **In this Directive, multiple discrimination and multiple grounds shall be construed accordingly.’**

‘Article 16

2. The Commission’s report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organizations, as well as the EU Fundamental Rights Agency. **The report shall include a review of the current practices in Member States in relation to Article 2(7), with regard to the use of age or disability as a factor in the calculation of premiums and benefits.** In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. **The report shall also contain information about multiple discrimination, covering not only discrimination on grounds of religion or belief, sexual orientation, age and disability, but also discrimination on grounds of sex, race and ethnic origin.** In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.’

While the inclusion in Community law of an obligation on Member States to ensure that cases of multiple discrimination can be addressed may be a positive development, some questions arise. First, it seems questionable whether gender discrimination that

³⁷ COM(2008) 426.

³⁸ P_6 TA (2009)0211.

intersects with racial discrimination should be omitted from the concept. Second, the proposal only addresses discrimination outside employment. The negative repercussions of such a restriction should be considered carefully. If the non-employment directives deal in terms with multiple discrimination, a systematic interpretation of all the non-discrimination directives would easily lead to the conclusion that, without this positive legislation, multiple discrimination is not covered. This would possibly also have negative repercussions in those Member States where – by contrast with the UK – courts have already acknowledged cases of multiple discrimination in employment law and/or of the intersections between gender discrimination and racial/ethnic discrimination (see further below 3.2. c)).

2.4. Preliminary assessment from a gender perspective

The forgoing demonstrates that multiple discrimination against women is not easy to address in any legal system. Despite these difficulties, addressing such discrimination seems necessary to do justice to all women suffering discrimination. On the one hand, without acknowledging the phenomenon women may lack the necessary protection when they are discriminated against on intersecting grounds. On the other hand, acknowledging gendered dimensions of discrimination on grounds other than gender will be a precondition for women to make full use of non-discrimination law on non-gender grounds.

The evaluation of the reports of national experts gives further indications as to whether multiple discrimination occurs, and whether and if so, how national courts and equality bodies respond to it.

3. Main findings of national reports

3.1. Preliminary remarks

The national replies to the questionnaire on multiple discrimination differ widely in breadth of coverage and degree of analysis. In general, information 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.

For example, the **Cypriot** expert mentions that any discussion on multiple discrimination is as yet academic. The German expert reports that ‘apparently, lawyers do not see an added value in using the concept of multiple discrimination’, referring to employment law cases where dismissal is based on a women wearing a headscarf.

The reports also, however, suggest a number of assumptions that may have influenced the breadth of reporting. Some experts seem to be concerned that acknowledging multiple discrimination may result in diminished attention being devoted to gender discrimination. This is based on the experience that the ‘new grounds’ of prohibited discrimination are more accepted or more successfully used in litigation and legislation.

The **Belgian** expert expresses the view that a single equality act, which would facilitate tackling multiple discrimination in his view, would at the same time endanger the ‘transversal gender dimension’. This is why he recommends retaining a specific act addressing gender equality. Similarly, the **Finnish** expert considers that merging former gender equality bodies with other equality bodies

could reduce the resources available to them, in particular the resources dedicated to gender. The **Hungarian** expert mentions a tendency of the national equality bodies (ETA) to disregard discrimination based on a ‘classical ground’ (i.e. gender), if discrimination occurred by reference to gender and another ground. The **Slovakian** expert notes that courts are ‘more inclined to decide on racial discrimination than on gender discrimination’, which is why applicants rely on race alone in intersectional discrimination cases. The **Luxembourg** expert fears that acknowledging multiple discrimination would reinforce hierarchies at the expense of gender equality.

Other experts, however, consider that acknowledging multiple discrimination is a precondition to adequately address all forms of gender discrimination.

The **Bulgarian** expert regrets that multiple discrimination is not yet an element in national gender equality legislation. The **Greek** expert hopes that acknowledging the concept allows sanctioning more severe forms of gender discrimination adequately. The **Polish** expert underlines that the concept of multiple discrimination would create greater awareness of problems such as violence against ethnic minority women. The **Portuguese** stresses that without acknowledging multiple discrimination some forms of gender discrimination may be ignored. The **Romanian** expert considers the concept as a precondition to acknowledge more complex ways to discriminate.

Some experts also point to the fact that the information systems regarding case loads in the field of discrimination do not allow to access information other than by analysing each and every decision of a specific body or court, which the time allocated to this specific report would not allow them to do.

The **Polish** expert claims explicitly that she couldn’t find sufficient information within the allocated time. The **French, Irish, Dutch** and **Romanian** experts also relate to the limited information given by existing statistics.

Due to the partial scarcity of factual information contained in national reports, the summary of these can only provide a few highlights. In particular, only a fraction of experts responded to the request to describe one case in which multiple discrimination was addressed or should have been addressed. This is due to the novelty of the concept and the notoriously slow reaction of the legal system to any novel concept. Even those experts who did report on cases could partly only find press reports to rely on. All this reaffirms the view that it would be worthwhile to invest considerable resources into socio-legal research on European (as opposed to US American and Canadian) experiences with multiple discrimination. Results of such research would then provide a more reliable basis for policy recommendations than this and foregoing reports to the European Commission can offer (see also above 2.2. towards the end).

3.2. How (if at all) are cases addressed by courts and equality bodies where a woman is discriminated on grounds of her sex or gender and at least one additional ground?

In order to give a practical element to the report, experts were asked to identify at least one case where a court of the equality body in their Member State should have addressed multiple discrimination, and also to comment on whether multiple

discrimination adds any value from a gender perspective. Due to the novelty of any approach to gender discrimination which takes into account the diverse other factors characterising women, only 23 out of 30 experts were able to provide any examples at all and only 10 experts were able to describe at least one case in more detail. This results in 43 ‘case examples’, of which 29 were decided by courts and 8 by equality bodies. The remaining 6 are examples from political debates or cases that were not brought to court. In addition, 2 experts state that there have been a number of cases on the same theme without identifying specific examples of those cases.

a) Groups of case examples – combinations of gender with other grounds

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**.

For future research, it may be worthwhile considering whether certain combinations have specific regional importance. For example, the cases relating to Roma women were mostly from MOE-states (**Czech Republic, Hungary, Lithuania, Poland, Slovenia and Slovakia**), with the exception of **Sweden**. There was also a certain dominance of newly acceded Member States in cases of combined gender and age discrimination.

b) Summary of case examples

Cases in which both **gender and ethnic or racial origin** were relevant only partly focus on the work place. The employment-related cases include cases of sexual and racist harassment (**Austria, the Netherlands**), of refusal to employ or promote or even the dismissal of a woman perceived as minority ethnic (**France, Germany, Slovakia, Sweden, UK**), or detrimental working conditions for groups of immigrant women employed as cleaners or domestic workers (**Greece, Spain**).

Moving beyond employment, several experts report cases in which women perceived as belonging to a minority were denied adequate protection against domestic or institutional violence (**Poland, Hungary, and Spain**). Cases of involuntary sterilisation of Roma women also are closely related to the problem of violence against women (**Czech Republic, Hungary**). Two cases concerned women in their role as mothers: in **Greece**, a state programme for funded access to child care institutions was found to be discriminatory because it excluded third country national women, while in **Finland**, women from the Sami minority were discriminated against as their children were not offered a place in child care institutions with their mother tongue, which in turn forced the mothers to remain at home. In two other cases, women were stereotyped in particular ways due to their ethnicity. Two Asian women were denied a room in an Oslo hotel because they were assumed to be prostitutes, and a Roma woman in traditional dress with a wide skirt was denied access to a store under crime prevention measures (**Norway**). The remaining cases turned on the question whether sufficient women-only sessions in municipal swimming pools were provided to accommodate the needs of ethnic minority women who would not use the facilities while mixed (**Finland**), and whether the award of joint custody to a Roma woman and her ex-partner for a common child was discriminatory (**Slovenia**).

Age and gender discrimination was most frequently found in relation to different statutory pension ages for women and men, which led to early compulsory retirement of women (**Ireland, Italy and Poland**) or, in one case, to special protection against dismissal provided to women close to the pension age (**Hungary**). A case of triple discrimination concerned a disabled woman who could only claim support for a special mobility wheelchair up to age 60, whereas the age limit for men was 65 (**Bulgaria**). Another case concerned the combined effects of part-time occupation (indirect gender discrimination) and age limits on access to an employer's pension scheme (**Ireland**). Age limits for certain occupations were also compounded by gender (**Norway, Latvia**) and two examples concerned collective redundancies that affected older women disproportionately. Another two cases concerned the consequences of commonly held stereotypes about young attractive women: in one case, a group of such women were harassed by their middle aged female supervisor (**Poland**), while in another case a middle aged man was denied employment in a rest house because he did not belong into that category (**Latvia**).

In the group of cases **where gender and family status or family role** were combined it was not always apparent that there was any other ground of discrimination in addition to gender. Discrimination against women working part time was repeatedly reported under this head (**Spain, Italy**), and could equally have been treated as indirect gender discrimination. Similarly, a **Bulgarian** case in which state legislation excluded the payment of both a student grant and benefits for single parents might be seen as involving gender discrimination alone, given that women are generally the recipients of the latter. Consequently, the national court considered a violation of CEDAW, but no other discrimination. The same argument could be made in relation to the denial of access to pension facilities to those not considered 'breadwinners' (**Spain**) and in relation to state legislation which disproportionately affects unmarried cohabiting mothers claiming family benefit in their own name (**Belgium**). In both cases disadvantage resulted from being with a partner who earned more, which is a situation more typical for women than for men. Cases involving the selection for dismissal of single mothers (**Hungary**) and refusal to employ the mother of a young child (**Sweden**), however, combine family status and gender.

Questions of **gender and religious discrimination** related to the hijab, and whether women-only sessions in public swimming pools which are intended to facilitate access by minority ethnic and other women whose religious views prohibit mixed-sex bathing were justified, or constituted unjustifiable discrimination against men. Interestingly, national courts categorised cases where women were dismissed or denied employment for wearing a headscarf differently, sometimes as discrimination at the intersection of gender and ethnicity (**Sweden**), sometimes as discrimination at the intersection of religion and gender (**Denmark, France and Germany**).

In three cases **women were disadvantaged** in employment as a result of their **specific position in the employment market**. A **Belgian** piece of legislation that provided for shorter notice periods for dismissing 'blue collar workers' in comparison with other employees in the public sector happened to disproportionately affect women. A **Latvian** woman was dismissed in order to give her position to a man who was working on very low wages. Similarly, a **Hungarian** woman was denied part time employment during parental leave partly due to her being employed in an executive role. Possibly, these cases could be dealt with as indirect or even direct gender discrimination, without using multiple discrimination as a concept.

c) Cases where multiple discrimination against women was acknowledged

It is worthy of note that experts identified a few cases in which courts or equality bodies acknowledged the phenomenon of multiple discrimination. Only a few of these shall be highlighted here.

In the **Danish** *Føtex* case³⁹ 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. Similarly, a case cited by the **French** expert is encouraging. The Paris Court of Appeal⁴⁰ considered a challenge made by a black woman who claimed ethnic and sex discrimination in connection with her career progression and the denial of access to her of vocational training. As seems to be typical for a French court, the Court did not question the group of comparators named by the applicant, which included white men and a white woman. It focused instead on the objective justification of the difference in treatment. In a similar vein, the case cited by the **Dutch** expert seems to indicate that the Dutch Equal Treatment Commission would not hesitate to consider intersectional sexual and ethnic harassment.⁴¹ In the actual case, the Commission uses slashes to indicate the unity of the claim. Of course there is question – also posed by the Dutch expert – as to the practical consequences this in a successful case. In the present case, the harassment was held not to be proven. Similarly, **Norwegian** examples in which the Equality Tribunal acknowledged the stereotyping of Asian women as potential prostitutes as discrimination on both ethnicity and gender is encouraging.⁴² However, as in the Dutch case, the Tribunal has no competence to award damages, the amount of which might have been the only tangible advantage of acknowledging such a case of intersectional discrimination.

d) Cases where multiple discrimination against women was not acknowledged

The cases reported above are encouraging examples, counterbalancing the negative experiences applicants had in other instances. These cases, which are more frequent, fall into two categories.

First, some cases fail because courts refuse to entertain intersectional claims. Among these cases is the much-discussed **UK** case *Bahl v Law Society*.⁴³ 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. In stark difference to the French court cited above, the court required the applicant to prove both forms of discrimination independently. Given the fact that a person in an executive position, such as the claimant, has a limited choice of comparators, this radically reduced the possibility of a successful claim. Possibly, a more positive result could have been achieved had the court allowed a fictional comparator of the opposite sex and a different ethnicity. However, this is not possible in cases of indirect

³⁹ U 2005, 1265H.

⁴⁰ Judgment of the Paris Court of Appeal, 29 January 2002, no° 2001/32582.

⁴¹ ETC Opinion 2007-40.

⁴² The Equality Tribunal, Case no. 1/2008, available at <http://www.diskrimineringsnemnda.no/sites/d/diskrimineringsnemnda.no/files/62958820.doc>, accessed 15 April 2009. On case law of the Norwegian Equality Tribunal regarding the hijab see Skjeie (2009:303-5).

⁴³ *Bahl v Law Society* [2003] I.R.L.R. 640 and [2004] I.R.L.R. 799.

discrimination, as the case cited by the **Irish** expert demonstrates.⁴⁴ In this case, the applicant might have been successful had she been allowed either to rely on mixed statistics, outlining the combined relationship of age and gender to exclusion from the pension fund, or to rely on the non-statistical approach to indirect discrimination which is provided for by the EU Directives on non-discrimination.

Secondly, cases of multiple discrimination sometimes succeeded only under one heading instead of two. Cases cited by the **German** and the **Finnish** expert are examples of these. The German court cases involving the denial of employment on grounds of wearing a *hijab*⁴⁵ have not dealt with as involving religious freedom alone, rather than as also concerning ethnic and gender discrimination. Clearly, considering these cases as discrimination cases instead would have the added advantage of providing the applicants with a cumulative claim to moral damages (§ 15 AGG) under German law. In a recent claim based on ethnic and gender discrimination⁴⁶ the Court only acknowledged direct gender discrimination, and did not consider the indirect discrimination claim based on combined statistics, rejecting the possibility of statistical proof. Acknowledging these claims would have led to cumulative damages. In the Finnish example, denying minority language education for children was only considered as discrimination on grounds of ethnicity from the child's perspective, not under the as ethnic and gender discrimination from the mother's perspective. Again, acknowledging the intersectional claim may have led to improved remedies for the claimant.

Thirdly, cases of multiple discrimination may not be dealt with as discrimination cases at all. In this way, applicants may lose out on remedies unique to discrimination cases, and they may also lose out on support by Equality bodies or specialised organisations. The example brought forward by the **Czech** expert⁴⁷ is one of these. The Czech courts have, after much hesitation, acknowledged that Roma women can be entitled to damages under tort law after sterilisation without consent. The results of these cases have not always been positive, e.g. due to time bars in tort law. Disregarding the difficult legislative position in the Czech Republic for a moment⁴⁸ as well as the reluctance of Czech courts to tackle racial discrimination, one could think about advantages of damages under non-discrimination law. Of course, this would presuppose that discrimination in provision of health services was prohibited not only on grounds of racial and ethnic origin, but also on grounds of gender. If this is the case, a Community law based claim to damages might exist. This would include the advantage that such damages should be deterrent under Community standards.

e) Conclusion

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. Also, some of the cases where it was

⁴⁴ DEC- P2009 – 001 and available at www.equalitytribunal.ie, accessed 30 March 2009.

⁴⁵ Most prominently Constitutional Court 24 September 2003 (2 BvR 1436/02) BVerfGE 108, 282.

⁴⁶ Wiesbaden Labour Court 5 Ca 46/08 of 18 December 2008, accessible under 'juris' (for account holders).

⁴⁷ Case No. 1 Co 43/2006 (*Olomouc* 12 January 2007).

⁴⁸ The Czech Anti-Discrimination Act is still not effective.

acknowledged seem to be better addressed other than as multiple discrimination claims.

3.3. Multiple discrimination in national legislation

*a) Is the phenomenon mentioned or even defined in national legislation?*⁴⁹

The reports show that national legislation differs widely as to whether multiple discrimination (or equivalents thereof) is explicitly defined or even mentioned. The **Austrian, German, Italian, Polish** and **Romanian** legislation mention the possibility that discrimination based on more than one of the prohibited grounds occurs. **Austrian** legislation envisages that multiple discrimination shall be taken into account when calculating compensation;⁵⁰ as do **Italian** and **Romanian** regulatory instruments (statutory instruments).⁵¹ **German** legislation clarifies that, in cases of multiple discrimination, the justification requirements for each single ground must be fulfilled, and thus presupposes that discrimination on several grounds may occur.⁵² Similarly, **Polish** legislation expressly provides that direct and indirect discrimination may both be based on more than one ground.⁵³

Bulgarian and **Romanian** legislation define multiple discrimination, albeit in a very basic way.

Article 11 of the Bulgarian Protection Against Discrimination Act (PADA) defines multiple discrimination as ‘discrimination on the grounds of more than one of the characteristics under Article 4 (1)’. Article 4 of the revised Romanian Act on Equal Opportunities defines as multiple discrimination ‘any discriminating action based on two or more discrimination criteria’.

Under **Spanish**⁵⁴ and **Bulgarian**⁵⁵ legislation, public authorities are under a positive duty to address the problem of multiple discrimination, for example in devising policies and conducting surveys.

b) Is a definition necessary to achieve adequate protection under national law?

The absence of explicit legislative acknowledgement does not lead all national experts to believe that multiple discrimination is not covered by their national legislation. The **Cypriot, Danish, French, Icelandic, Irish, Maltese, Dutch, Norwegian, Portuguese, Slovakian, Spanish** and **Swedish** experts state explicitly that the national legislation in their country allows claimants to bring claims of multiple discrimination, or even that the national legislation ‘silently implies’ the existence of such forms of discrimination.

⁴⁹ These findings contradict those summarised on page 20 of the study *Tackling Multiple Discrimination* (‘Thus, Austrian, German and Romanian law contain the only specific provisions in the EU Member States’ legislation on how to handle multiple discrimination’).

⁵⁰ § 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).

⁵¹ Italy: Article 1 of decree no. 215/2003, Romania: Governmental Ordinance 77 of 2003.

⁵² § 4 General Equal Treatment Act.

⁵³ Article 18^(3a) (3) Labour Code for direct discrimination and Article 18^(3a) (4) Labour Code for indirect discrimination.

⁵⁴ Article 14.6 Act 3/2007.

⁵⁵ Article 11 of the Act on Protection Against Discrimination.

The **French** report, based upon analysis of an impressive number of cases, concludes that ‘for the judges the alleged ground of discrimination is not so important if a difference is found between a worker and the others’. This approach seems to result from doctrine in the field of equal pay, where courts are reluctant to consider personal characteristics of workers. Thus, in practice, it is sufficient to bring any comparator who is paid more for work of equal value, upon which it will be on the employer to prove that the difference is objectively justified. Accordingly, French courts have no conceptual problem in treating multiple discrimination as a specific type of discrimination rather than as an addition of different forms of discrimination.

The **Belgian, Finnish, Greek and Hungarian** experts assume implicitly that multiple discrimination could be tackled under their national legislative system, in criticising courts for neglecting it in some cases.

3.4. Are there barriers in law that prevent adequate protection against multiple discrimination?

a) Lack of awareness

National experts see a number of specific barriers against acknowledging cases of multiple discrimination in courts and other legal institutions. Most of them stress that the most prominent barrier is generally recent acknowledgement of the problem, which has not filtered through to legal practice yet. As has been mentioned already,⁵⁶ the lack of awareness for multiple discrimination is also mirrored in a scarcity of statistical information on the subject. This problem is likely to prove a barrier to practical applications of discrimination law in relation to the problem.

However, some experts also identified barriers in legislation or concepts developed in case law.

b) Comparator approach

The barrier that is most difficult to overcome is a ‘comparator approach’ to discrimination. In the **UK**, the *Bahl* case⁵⁷ was obviously another proof of the weakness of this concept. The Court of Appeal, dealing with discrimination against an Asian woman, required her to bring separate evidence of discrimination on grounds of gender and ethnicity, i.e. she would have to name a man as comparator in the one field and a non-Asian in the other field. Several reports stress that the comparator approach was only imported into their system by Community legislation, which was modelled upon the UK system.

For example, the **Latvian** report stresses that it was the ‘copy-pasting’ of directive 2000/43 and 2000/78 which established the need to find a comparator.

The **Finnish** report stresses that this problem is particularly virulent in such fields of law that were changed in response to recent Community legislation.

c) Compartmentalisation

Other difficulties seem to emerge from different legal frameworks for different grounds.

⁵⁶ Above 3.1 towards the end.

⁵⁷ *Bahl v Law Society* [2003] I.R.L.R. 640 and [2004] I.R.L.R. 799.

A number of experts consider the different scope of application for prohibitions of discrimination on different grounds as problematic.

The **Estonian** expert stresses the different scope of application of different pieces of legislation for different grounds, and considers whether protection against multiple discrimination could be derived from the horizontal effect of the Estonian constitution, as this has a wider scope of application than equality legislation for some grounds. The **Italian** expert makes the same point in relation to Community law. The **Belgian** expert mentions the different range of admissible justifications for different treatment, in particularly comparing exceptions admissible for 'Community law grounds' and other grounds. The **Cypriot** expert foresees problems arising from different standards of proof for different grounds. The **Maltese** expert relates to the compartmentalisation of legislation at large, and stresses in particular the existence of different equality bodies.

Other experts mention practical problems, such as the absence of statistics, difficulties of proof or divergent competences of equality bodies. All these problems occur in relation to compartmentalisation.

For example, the **Cypriot** expert mentions that pursuing multiple discrimination claims is inhibited by different standards of proof in relation to different grounds. The **Estonian** expert explains that, while the problem has not yet surfaced in practice, different formulations of legislation in relation to gender equality and other grounds would imply different standards of proof as well and render pursuing multiple discrimination claims unpractical. Also, the **Irish** expert mentions that the burden of proof tends to be more difficult to discharge with in multiple discrimination cases.

3.5. Practical consequences of acknowledging multiple discrimination ('added value')

Not all national experts commented on the issue whether acknowledging multiple discrimination would have any consequences in practice.

In those reports which did mention any added value of the concept, the consequence most frequently mentioned refers to sums of compensation for pain and suffering.

This approach is taken by the **Austrian**, the **Greek**, the **German**, the **Polish** expert. The Italian expert's proposals for Community legislation seem to imply a similar position. The **Irish** expert recommends that, in cases of multiple discrimination, compensation should be higher than in single ground cases, regretting that this is not possible under Irish law due to strict ceilings on redress. The **Czech** expert takes an interesting position on this, proposing that multiple discrimination with a gender aspect should be tackled more strictly than other combinations. The **Greek** expert also stressed criminal and civil sanctions, which should be more severe in her view in cases of multiple discrimination.

Reducing problems of proving discrimination is cited as another practical consequence of acknowledging multiple discrimination.

The **UK** expert considers that acknowledging multiple discrimination would facilitate proof of discrimination in cases where proof is difficult under a single-ground approach. The **Portuguese** expert, on the other hand, mentions that acknowledging multiple discrimination may also compound difficulties of proof and proposes to complement any change in Community law with a specific rule concerning the reversal of the burden of proof.

The **Irish**, the **Maltese** and the **UK** expert stress as an added value of acknowledging multiple discrimination the opportunity to perceive of people in a multi-dimensional way rather than reducing them to one-dimensional entities.

The **German** expert stresses that the main added value of concepts such as multiple and intersectional discrimination would not be experienced in individual cases, but rather in acknowledging differences between women in general. She sees this as useful in developing policy strategies such as gender mainstreaming and diversity management, and for developing pro-active approaches in general. Similarly, the **Cypriot** expert stresses above all the necessity to factor multiple discrimination into gender mainstreaming and assessment tools.⁵⁸

The **Hungarian** expert, on the contrary, does not see any added value of multiple discrimination for gender cases, and thinks that the concept is only of use in relation to the new equalities.

Beyond the positions of individual experts, we can summarise that acknowledging multiple discrimination has added value mainly in two instances. The order of report here does not indicate an order of relevance.

First, there are cases where the discrimination is such that it is only experienced by persons who are ‘at the intersection’ of two grounds. For example, only women (not men) with disabilities or from specific ethnic groups are subjected to involuntary abortions. Or, to give another example, gender stereotypes about attractiveness and age intersect, which results in specific detriments for older women on the labour market. Some legal orders have difficulties acknowledging this kind of intersectional discrimination at all because the concept of multiple discrimination is alien to them (**Ireland, UK**). In many legal orders it is difficult to establish a case of intersectional discrimination, which is why a number of experts raise the problem of proof.

Second discrimination on more than one ground has a stronger effect of exclusion than discrimination on only one ground. For example, a woman who is bullied away from her workplace on grounds of race and ethnicity will also suffer intersectional discrimination in finding a new occupation. Accordingly, as many experts also stressed, multiple discrimination can be considered as causing more harm and should attract higher damages or more severe other consequences.

It is not, in the view of this report, helpful to identify specific ‘groups’, which are particularly vulnerable to multiple discrimination. Such conclusion cannot be drawn from the fact that the national experts reported three main groups of cases in which multiple discrimination occurred. These clusters may well be a consequence that multiple discrimination against women in other instances is not (yet) acknowledged. In particular, it is not advisable to only protect against intersectional discrimination on two grounds at a time, or only against a limited field of intersectional discrimination.

⁵⁸ These views coincide with Fredman (2009).

3.6. *On the necessity of Community legislation*

a) Community legislation in general

The vast majority of experts favour Community legislation, with the exception of only 7 experts.

Some experts believe that only a legislative obligation by the Community will incentivise their home member states to tackle the problem of multiple discrimination explicitly. This approach seems to mirror the disappointment of individual experts that their country is so reluctant to implement EU discrimination law at large.

For example, the **Czech** expert explains ‘The EC level is very important for Czech legislation. As can be seen from the terrible battle for the Antidiscrimination Act, the only force that can convince the Czech political representation (...) is that the Czech Republic has undertaken obligations through its membership in the EU and that it is necessary to observe these obligations if we do not wish to be fined under ECJ rulings.’ Other experts of this group include those from **Bulgaria, Latvia, Lithuania, Romania** and **Slovenia**. The **Austrian** expert also suggests that a community concept of multiple discrimination would raise consciousness and awareness, although she has not criticised her national equality bodies for ignoring the concept earlier.

The call for more Community legislation is rarely supported by arguments beyond the motivating effect of Community legislation in general, and the motive of raising awareness is repeated in no less than 12 out of 30 national reports.

Some experts support their suggestion for specific Community legislation with more specific arguments. The **UK** expert favours a general obligation under Community law for Member States to make cases of multiple discrimination actionable. This is based on the difficulties that UK courts have experienced in dealing with intersectional discrimination as a result of the comparator test. Similarly, the Irish expert suggests that Community law should outlaw ceilings for damages in discrimination cases, at least when several forms of discrimination are combined. Again, this is rooted in specific national experiences, as the ceilings in damages in Irish law make claims for multiple discrimination undesirable.

The **Swedish** expert recommends the Swedish national system, which has an open list of grounds, as a model for Community law on the basis that this ‘silently integrated approach allows a flexible reaction to cases of multiple discrimination’. The **Icelandic** expert considers that a fundamental conceptual re-orientation of Community legislation combating legislation may better serve the objective of equality than introducing a Community law definition of ‘multiple discrimination’.

A number of experts point to the fact that the different scope of application of the non-discrimination principle in relation to different grounds restricts the practical effect of the concept, because claimants are forced to focus on the ground with the widest scope of application (experts from **Belgium, Cyprus, Estonia, Finland, Italy, and Latvia**). Consequently, claims for aligning the scope of application are made, frequently with reference to Community legislation. The **Greek** expert, on the contrary, hopes that acknowledging intersectional discrimination will serve to enhance the scope of application of sex equality law.

She writes: ‘Through multiple discrimination, gender discrimination can be addressed in all areas covered by the Directives that prohibit discrimination on

other grounds than gender, even beyond the areas in which gender/sex is explicitly prohibited ground of discrimination.’

A few experts are reluctant to request more Community legislation. The **German**, **Polish**, **Norwegian** and **Spanish** expert consider that more research into practical difficulties and adequate methods to redress these would be necessary to create an adequate approach in Community law. The **Greek** expert warns in particular against a Directive only dedicated to multiple discrimination, thus contradicting the Italian expert, who demands just that. The **French** expert seems undecided whether she considers reinforcement of the legal approach to multiple discrimination necessary at all.

In conclusion, the accumulated positions of the experts would suggest that the Community legislator should, as a priority, remove obstacles to adequate legal responses to multiple discrimination. These obstacles consist mainly of the comparator approach (contained in the Community law definition of direct discrimination and, arguably, also indirect discrimination), and the differences in scopes of application of Community instruments.

Beyond this, a large majority of experts would wish that Community legislation is used to motivate national legislators to enact corresponding national legislation, or to change it to facilitate adequate legal responses to multiple discrimination. The **UK** and **Irish** experts make a convincing case that, within the specific legal tradition of their countries, multiple discrimination cases are either not acknowledged or not sanctioned adequately. The UK expert recommends the explicit inclusion of multiple discrimination in the concept of non-discrimination in Community law. The Irish expert requests clarification that discrimination on two or more compound grounds can be investigated and proven together. For these legal traditions, a positive obligation on Member States to make sure that the problem is tackled is seen as necessary.⁵⁹

While most experts stress the ‘awareness function’ of legislation, this expert would like to stress that the requirements for Community legislation are of a different kind. Under Article 5 EC, Community measures in fields such as discrimination law require that the suggested aim will not be achieved at national level, and can be better achieved at Community level (principle of subsidiarity). In this regard, the advice of some experts is that problems in addressing multiple discrimination are not best addressed by legislation, and this relates in particular to awareness-raising.

b) On the need of a definition of multiple discrimination in Community law

19 out of 30 experts express the view that a definition in Community law is necessary. These include a number of experts (**Austrian**, **Cypriot** and **French**) who have explained that within their national systems, protection against multiple discrimination would be feasible even in the absence of a definition. However, these experts still consider a Community definition a useful supportive means for pursuing cases of multiple discrimination. This seems to contradict their national reports to a certain extent.

The most frequently given reason in support of a Community law definition is that it would enhance clarity and raise awareness of the problem. The **UK** expert states that a definition of the concept in Community law would help to overcome

⁵⁹ See also McColgan (2007: 92-3).

governmental inertia. A similar approach is taken by the **Slovak** and the **Czech** expert.

9 out of 30 experts are more reluctant in relation to the Community definition. The **Danish**, **German**, **Luxembourg** and **Dutch** expert explicitly reject this proposal, partly because they find it premature. The **Spanish** expert stresses the need to raise awareness, but expresses doubt whether a legal definition is the best way to achieve this. The **Greek** expert recommends a very basic definition, in order not to prevent development in case law. The **Swedish** expert rejects a definition both for Community and national law as this would inhibit flexibility for case law developments.

c) Towards cautious steps in Community legislation

All this would point towards a cautious approach in legislation, which refrains from exhaustive lists or a fixed definition of multiple discrimination.

There is even the danger that a definition would clash with national traditions. If a national court has acknowledged multiple discrimination in the past in the absence of a legal definition, it might feel compelled to take a narrower approach once a narrow definition in Community law is available.⁶⁰

A piece of legislation that clarifies that multiple discrimination is covered by the EU law definitions of discrimination would be helpful, though. Given the problems created by divergent legal rules for discrimination on different grounds, it would not seem advisable to integrate such a provision in only one directive, just because it happens to be the one being dealt with at present by the legislative institutions. It would be preferable to have parallel provisions for all grounds of discrimination in this respect. This would also mitigate against the introduction of a definition of multiple discrimination only into the planned directive on equal treatment irrespective of disability, age, sexual orientation and religion and belief.

4. Recommendations

- There is definitely a need for more research combining social sciences and legal approaches. Such research should build on existing research, and accordingly link in with the ‘GENDERRACE’ project as far as possible. Research should include analysis of legal material, and possibly focus groups including legal practitioners or other methods through which barriers to and the practical effects of acknowledging cases of multiple discrimination can be assessed. If conducted in a thoroughly comparative way, such research could also help to explain problems of proving intersectional cases in different jurisdictions, which could again be a useful support for national legislators wishing to achieve a wider use of legal protection through adequate changes in procedural law. The research should also consider effects of EU equality law on the acknowledgment to multiple discrimination, and not shy away from naming negative effects.

⁶⁰ As an example for an overly narrow approach of defining multiple discrimination the UK Government publication ‘Equality Bill: Assessing the impact of a multiple discrimination provision’ (April 2009) can be cited. Based on extensive considerations on multiple discrimination, including statistics on success in cases regarding multiple discrimination, this document proposes to only outlaw multiple discrimination on maximal 2 grounds, and only if it occurs as direct discrimination. The typical common law definition of multiple discrimination specifies that a claimant must name a comparator who does not share either of the grounds. It also excludes the possibility to pursue cases of multiple discrimination considerably, e.g. in cases in which one of the forms of discrimination should be dealt with by a specific tribunal.

- The results of such research should be disseminated widely in order to enhance knowledge of the field. A series of seminars under the guidance of gender equality experts might be a useful instrument to achieve this (alongside the usual media of printed and on-line publications).
- Changing the Community legal framework seems most urgent in relation to those elements that have proven to be barriers for judges and equality bodies in addressing cases of multiple discrimination. These barriers include comparator-based definitions of discrimination. The definition should be expanded by clarifying that naming a comparator is only one way of proving sex discrimination.⁶¹ While not all hierarchies are avoidable, a reflection on hierarchies between grounds of discrimination from the perspective of multiple discrimination is necessary. Also, equality bodies with responsibilities for individual strands of discrimination are detrimental to the aim of addressing multiple discrimination in seriousness. Because Community law presently only requires equality bodies for two grounds, it can be cited as justification for maintaining single equality bodies.
- In order to avoid confusion as to whether multiple discrimination is covered by EU law, a clarifying clause in the legal texts (not only in the recitals) of the non-discrimination directives is desirable.⁶² Such a clause must not be different for different grounds. Accordingly, it would be contra-productive to include such a rule in only one legal instrument covering a limited number of grounds, or with a limited scope of application. Also, establishing a new instrument only covering multiple discrimination would be contra-productive, as this would put into question the possibility to pursue multiple discrimination claims under the existing directives.
- A specific definition of multiple discrimination seems problematic, as well as an exhaustive enumeration of consequences. It would prevent a flexible development of the concept. Thus, at this point in time, a specific definition of multiple discrimination should not be included into Community law, this is premature.
- In order to take full advantage of the acknowledgement of multiple discrimination, it would be useful to introduce policy oriented measures as presently provided, for example, in Spanish and Romanian legislation. In particular, the concept of gender mainstreaming should be developed in order to respond to multiple discrimination.

⁶¹ For example, in Directive 2006/54/EC, Article 2 1. a) could read: “‘direct discrimination’: where one person is treated less favourably on grounds of sex, for example if treated less favourably than another is, has been or would be treated in a comparable situation.’”

⁶² Such a clause could, for example, state ‘Discrimination can also occur if unfavourable treatment is based on more than one characteristic, or on a specific combination of characteristics.’

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Part II

Reports from the Experts of the Member States and EEA Countries

AUSTRIA – *Anna Sporrer*

1. Concept of multiple discrimination in legislation

Multiple discrimination is explicitly prohibited, but the term is not defined by law. The legal provisions just refer to the phenomenon of multiple discrimination, as Paragraph 12 Section 13 of the Equal Treatment Act (private sector), as amended by OJ I 98/2008, as well as Paragraph 19a Federal Equal Treatment Act (federal public sector) as amended by OJ I 97/2008, rule that multiple discrimination shall be taken into account when calculating the amount of compensation. The explanation refers to the example of a black women who might not be employed on the grounds of her sex as well as on the grounds of her racial origin. This explanation also illustrates that discrimination on different grounds deriving from one single fact shall not constitute cumulative claims for compensation.

2. Case law

Until now, no cases before the courts dealing with multiple discrimination have been published, but there is one case dealt with by the Equal Treatment Commission (private sector), which concerns sexual harassment combined with ethnic harassment, whereas a further allegation of discrimination on grounds of ethnic origin was denied.¹ The different grounds were addressed separately, because each ground is based on a separate legal provision: sexual harassment is based on Paragraph 6(1)1 Equal Treatment Act, whereas harassment because of the applicant's ethnic origin is based on Paragraph 21(1)1 Equal Treatment Act. The combined effect of multiple discrimination was explicitly acknowledged, as the Commission stated, that sexism and racism are often combined, which occurs in cases of discrimination against women with a dark complexion. In this particular case the employer not only sexually harassed the employee by his words and behaviour, but also called her something like 'my little dirty one', which she felt referred to her dark skin.

As the Equal Treatment Commission does not have the competence to impose sanctions, the fact that multiple discrimination was ascertained has not been reflected in higher sanctions, awards or damages.

3. Any cases where gender-related discrimination is overlooked?

Within the Austrian legal system, all discrimination grounds except disability are dealt with by the Equal Treatment Commission, which is divided into three senates, each of them dealing with different grounds and/or different areas of discrimination. Within this division of competences, 'Senate I', which deals with gender-related discrimination in all areas, is also competent for all cases concerning multiple discrimination involving gender. In practice, the chairperson of 'Senate I' screens all incoming applications to see whether multiple discrimination is concerned and

¹ GBK I/101/07-M (online: <http://www.frauen.bka.gv.at/DocView.axd?CobId=34243>, accessed 20 April 2009).

distributes the incoming files amongst the other senates. Therefore – as far as the Equal Treatment Commission is concerned – it is not very likely for cases of multiple discrimination to be overlooked.

4. Proof and procedural problems

As far as the Equal Treatment Commission is concerned, in multiple discrimination cases no particular problems of proof or procedure have appeared so far. (As mentioned above, no court cases concerning multiple discrimination have been published until now).

5. Description of a specific case

As mentioned above under 3, there is only one case dealing with multiple discrimination published by the Equal Treatment Commission (private sector), which concerns sexual harassment combined with discrimination on grounds of ethnic origin.

The case concerned a female employee of Russian origin, who complained about sexual and ethnic harassment after being dismissed on the last day of her fixed-term employment relationship. Her claim that this dismissal amounted to ethnic discrimination failed. The Equal Treatment Commission considered all three claims independently, as required by the separate statutory provisions.

The remarkable feature of this opinion seems to be the reasoning given by the Commission, that sexism and racism are often combined, which occurs in cases of discrimination of women with a dark complexion. Unfortunately, the Commission did not deliver a more detailed or in-depth reasoning.

6. Effects of legislation and case law in practice

For information and surveys: see below, under 10.

7. Role of equality bodies

The equality bodies in Austria in general play an important role where it concerns building up expertise and raising awareness in all fields and areas of discrimination – in particular when new provisions are to be applied.

As mentioned above, ‘Senate I’, which deals with gender-related discrimination in all areas, is also competent for all cases concerning multiple discrimination involving gender. In practice, the chairperson of ‘Senate I’ screens all incoming applications, to see whether multiple discrimination is concerned, and distributes the incoming files amongst the senates. Therefore the Equal Treatment Commission – as well as the Equal Treatment Ombud – plays and will play an important role in building up expertise and in raising awareness also for cases of multiple discrimination.

Furthermore, the equality bodies play an important role for possible victims of violation, as in particular the Equality Ombud provides for easy and free of charge access to information, counselling, as well as to enforcement of equality rights through her competence to file an application to the Equal Treatment Commission.

8. Reinforcement of legal approach at EU level necessary?

Reinforcement of the legal approach aimed at combating multiple discrimination at EU level would certainly lead to reinforcement at national level and therefore would help improve the enforcement of equality rights. Reinforcement of the legal approach could entail:

- a clear definition of the phenomenon of multiple discrimination;
- the possible impact of ascertained multiple discrimination on the question of sanctions, damages and awards; and
- a clear concept or guideline on how institutions like courts, equality bodies etc, should deal with cases in order to detect the phenomenon as such and/or carefully handle such cases in practice.

This would not only strengthen the legal position of individuals/victims of discrimination by offering better means of enforcement of their rights, but would also be a new incentive from the EU level, leading to political and/or public debate and raising awareness of the phenomenon of multiple discrimination as such.

9. Community-law definition of multiple discrimination necessary?

Yes, it would certainly help to raise awareness with regard to the phenomenon of multiple discrimination as well as strengthen the legal concept of multiple discrimination in Austrian national law, in particular by making it more visible and therefore easier to identify.

10. Available literature or research?

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Switzerland:

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<http://www.ekr.admin.ch/themen/00067/00070/index.html?lang=de>
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<http://www.mehrfachdiskriminierung.ch>

11. Further research

Research always seems useful, in particular on regional aspects of discrimination, concerning different groups of persons, in order to identify the specific features of multiple discrimination and/or the different forms of discrimination, the specific needs of certain individuals and/or groups of individuals, and the distribution of results would promote a good basis for courts, equality bodies and other institutions and stakeholders in order to detect, monitor and properly handle cases of multiple discrimination.

BELGIUM – *Jean Jacqmain*

Preliminary note

The federal nature of Belgian institutions is irrelevant to the subject of the present report, as multiple discrimination is not covered by the various federate anti-discrimination laws any more than it is by federal legislation.

1. Concept of multiple discrimination in legislation

The concept of multiple discrimination is not used, and consequently not defined, by any statute in Belgium. This means that every element of a multiple discrimination situation must be challenged separately in the light of one or several statutes; however, this may be done through the same proceedings.

2. Case law

There are no known cases if one restricts the notion of multiple discrimination to the framework of Article 13 EC. However, the expert can think of several situations in which a better fitting phrase was ‘multi-layered discrimination’, i.e. gender discrimination was hidden under an obvious difference of treatment which was not envisaged by Directives 2000/43/EC or 2000/78/EC, but could be challenged on the grounds of other instruments such as Articles 10 and 11 of the Constitution (the general principle of equality under the law) or Directive 97/81/EC (on the prohibition of discrimination against part-time workers).

In those cases (or rather ‘situations’, as for several of them a positive result was achieved without litigation), eliminating one type of discrimination meant getting rid of the other as well, so that whether or not to raise the gender discrimination claim was largely a question of strategy or a function of circumstances (e.g. was there a woman willing to complain about gender discrimination?).

3. Any cases where gender-related discrimination is overlooked?

The expert can add three examples to the previous answer:

– Until 1 January 2000, part-time contractual employees in the public services were not entitled to seniority increments in their pay scales. Indirect discrimination against women was obvious and could have been challenged on the grounds of Article 119 EEC/141EC (see the ECJ’s decision in *Nimz* C-184/89 [1991-I-297]), but the public services trade unions could not find any prospective claimants, given the risk of victimisation. The issue was solved when Belgium had to transpose Directive 97/81/EC, as authorities and unions agreed that the principle of non-discrimination against part-time workers must be applied to pay as well as to other working conditions.²

– The Employment Contracts Act of 3 July 1978 maintains a rigid distinction between white-collar (intellectual) and blue-collar (manual) employees. In case of dismissal of a blue-collar by the employer, the statutory notice period under Article 59 of the Act was very short (28 days, or 56 after twenty years’ seniority), which the Council of Europe’s Social Rights Committee found insufficient under the European Social Charter. In 2000, the National Labour Council adopted Collective Agreement No. 75, which lengthened the notice period (now from a minimum of 35 days to a maximum of 112 according to seniority). However, Collective Agreements are not applicable in the public sector and the only means to extend the reform to blue-collar employees in

² See the Network’s *Equality Quarterly News*, No. 1/2000 and 2/2000.

the public services would have been to integrate the provisions of C.A. No. 75 into Article 59 of the Employment Contracts Act, a suggestion which the social partners of the private sector firmly rejected, arguing that the matter must remain regulated by way of negotiations.

The deadlock was broken when the Equal Opportunities Council produced its Opinion No. 47, which showed that the obvious discrimination (under Article 10 of the Constitution) between contractual blue-collar employees in the private and public sectors concealed further indirect discrimination (under Directive 76/207/EEC) against women, who represented the vast majority of that category of personnel in the public services.

In this situation, gender equality was an effective lever for social progress and on 23 April 2003, Article 59 of the Employment Contract Act was amended to achieve the desired effect.³

– Also in the public services, the ‘home or residence allowance’ is a modest supplement to lower pay scales (the ‘residence’ benefit is half of the ‘home’ benefit). Up to 1999, the conditions of entitlement were different for members of married couples, who only had to meet the pay ceilings set by the regulations, and of unmarried couples, who must have dependent children for whom they were entitled to family benefits.

It was not until 1996 that a woman complained about the gender discrimination which was hidden under the obvious difference of treatment of married and unmarried couples. Under the consolidated Act on Family Benefits for Paid Workers, of 19 December 1939, when both parents may be entitled to family benefits for the same children, the priority is automatically given to the father; thus, for an unmarried couple, the woman was never entitled to the ‘home allowance’, even if she met the pay ceiling.

When the case was brought to the Labour Court of Appeal in Liège, the court found without any hesitation that there was discrimination under the domestic legislation on gender equality (at the time, the Act of 4 August 1978).⁴

4. Proof and procedural problems

There is nothing to report given the absolute lack of case law. However, it should be remembered that the three federal Acts of 10 May 2007 (the ‘Gender Act’, the ‘Race Act’ and the ‘Discrimination in General Act’) were drawn up along lines that are as uniform as possible, so that their provisions on procedure and the burden of proof are identical. This should limit the risks of contradictory findings in cases of multiple discrimination.

Still, another clash risk results from the scope of the Discrimination in General Act, which includes a long list of criteria beyond those of age, handicap, beliefs and sexual orientation. If one imagines a case of alleged double discrimination in employment, grounded on gender and, for instance, poor health (as distinct from handicap), a ‘direct distinction’ based on the first criterion may not be justified (in compliance with EC law) while objective justifications are admissible for the second one. The fear remains that a court might overlook such a subtlety and accept justifications on both counts, making the claimant’s burden of counter-proof heavier than intended by the EC directives.

³ See the Network’s *Bulletin Legal Issues in Equality*, No. 1/2002 and 2/2003.

⁴ Judgment of 17 October 2000, *Chroniques de droit social* 2001 p. 308 with a comment by J. Jacqmain.

5. Description of a specific case

Again, nothing to report.

6. Effects of legislation and case law in practice

No information available.

7. Role of equality bodies

It must first be recalled that the Centre for Equal Opportunities and the Struggle Against Racism was instituted in 1993; the Act of 25 February 2003 extended its jurisdiction to all types of discrimination (under EC directives and under federal legislation) except gender. On the other hand, the Institute for Equality of Women and Men was not created before 2002, and experienced various administrative problems before taking off.

Moreover, the Centre has always preferred warning and mediation as its methods of intervention, and is extremely reticent about providing details of its actions. Thus, one can only guess that, as long as the Centre was the sole antidiscrimination agency, it concentrated on the non-gender aspects of any multiple discrimination situations of which it was informed, confident that the maltreatment could be generally redressed.

Since the Institute became operational, the two agencies have developed certain forms of collaboration. Obviously, misdirected complaints must be forwarded to the right agency, and instances of overlapping jurisdictions, such as sexual orientation (Centre) and transsexualism (Institute), must be solved adequately; both agencies also have competence to conduct or commission research, and can do so jointly on issues of common interest such as ‘gender and immigration’.

8. Reinforcement of legal approach at EU level necessary?

According to the Statement of Purposes of the bill of a Discrimination in General Act,⁵ the initial intention was to transpose all EC directives on discrimination by way of a single Act, one advantage of which would have been an easier treatment of multiple discrimination situations. However, a three-act pattern was chosen instead, mainly in order to avoid a dilution of the transversal gender dimension and also for fear of blunting the instrument with regard to the nuances of EC law and the ECJ’s case law.

Unless practice demonstrates that the legislators’ order of priorities was wrong, the expert sees no reasons to regret their choice.

9. Community-law definition of multiple discrimination necessary?

Maybe at a more elementary level, the expert will only express the wish for a clarification of the hierarchy of types of discrimination, which arose from the ECJ’s surprising decisions in *C-144/04 Mangold* [2005-I-9981] and *C-427/06 Bartsch* [2008, unreported], as the first one seemed to state that the prohibition of discrimination grounded on age was more fundamental than when any other criterion (including gender) was used, and the second one appeared to have abandoned that view.

⁵ *Documents parlementaires/Parlementaire Stukken*, Chambre/Kamer, 2006-07, No. 2721/001, pp. 11-13.

10. Available literature or research?

Nothing to report. Indeed, in the master comment on the Acts of 10 May 2007,⁶ the issue of multiple discrimination is discussed in the contribution⁷ of Prof. J.H. Gerards, from the University of Leiden, who mainly relies on Dutch, British and US sources. This can hardly be regarded as an original piece of Belgian literature on the subject.

11. Further research

At a national level, only practice can indicate what kind of research would be useful. The same applies at EU level, with the advantage that experiences from other Member States may provide better material.

References

- Three Acts of 10 May 2007, <http://www.juridat.be> (in French and Dutch).
- Statement of Purposes of the bill of a Discrimination in General Act, www.lachambre.be or www.dekamer.be

BULGARIA – *Genoveva Tisheva*

1. Concept of multiple discrimination in legislation

Multiple discrimination is defined in the supplementary provisions of the Protection against Discrimination Act (PADA): ‘(...) 11. “Multiple discrimination” shall mean discrimination on the grounds of more than one of the characteristics under Article 4(1).’ It is also mentioned in Article 11 of PADA:

‘Article 11 ... (2) State authorities, public bodies and local governments shall undertake priority measures due to the provisions of Article 7(1), subparagraphs 12 and 13 (currently pp. 13 and 14), to provide equal opportunities for individuals who are victims of multiple discrimination.’

Subsequently, the protection from multiple discrimination is defined within the scope of two types of situation:

- educational and training measures ensuring balanced inclusion of women and men, as far as such measures are necessary; and
- specific measures for the benefit of disadvantaged individuals or groups of people on the grounds under Article 4(1) targeted at providing equal opportunities, as far as such measures are necessary.

There is no explicit prohibition in the general provisions of the law. Article 11 can be assessed as very unclear and difficult to implement. In addition, the limitation of the measures against multiple discrimination in the situations mentioned does not guarantee protection in cases where sex discrimination is involved.

2. Case law

Two cases can be mentioned so far as having been decided under more than one ground of discrimination, gender discrimination included. Although they do not represent sufficiently typical multiple discrimination cases, they are mentioned as

⁶ C. Bayart, S. Sottiaux and S. Van Drooghenbroek (ed.), *De nieuwe federale antidiscriminatie wetten – Les nouvelles lois fédérales luttant contre la discrimination*, Bruges, die Keure, 2008.

⁷ ‘Gronden van discriminatie – De Wenselijkheid van open en gesloten opsommingen’, pp. 156-161.

such in the Compilation of case law of the court under the Law on Protection against Discrimination (publication of the Commission for Protection against Discrimination – 2008).

Since these court decisions were rendered relatively early after the adoption of the PADA (in the period 2003-2005), the different grounds were not addressed separately and the gender aspects were not identified clearly enough.

The first decision of the Supreme Administrative Court is on a case of gender and age discrimination (administrative file 4402/2005). A disabled woman complained of multiple discrimination based on age and gender by a regulatory act which granted a special type of wheelchairs for disabled people to men up to 65 but to women only up to 60 years old. As a result of the discrimination identified, the respective provision was repealed/abolished by the court.

The second decision of the Supreme Administrative Court, under administrative file 5063/2003, is based on gender and personal status. A female university student complained that she was discriminated against as a woman and mother due to the ban for accumulation of a university student grant and payment of family benefits for pregnancy, giving birth and childcare under the Law on Family Assistance for Children. The court found that the grant and the benefits were due on different grounds and that, subsequently, the claimant was discriminated against, and repealed the respective provision of the governmental decree regulating student grants.

This case is very interesting, as it introduces for the first time in such a procedure the arguments for discrimination based on sex under CEDAW. In fact, the court accepts the claimant's argument regarding discrimination of women in the field of education, contrary to CEDAW which requires equality of women and men in the allocation of grants and other assistance for students.

There are no indications that the identification of multiple discrimination played a role, apart from the abolishment of the provisions challenged, in the allocation of compensation to the victims.

3. Any cases where gender-related discrimination is overlooked?

Despite the fact that the Commission for Protection against Discrimination has a special subdivision, a five-member panel specialized in multiple discrimination cases, so far it has not been very efficient in identifying multiple discrimination cases based, among other grounds, on gender.

As an illustration of this trend, it is worth noting that in the period 2006-2007 the Commission had to deal with cases related to the prohibition to wear headscarves by Muslim students in schools in South Bulgaria. The decision of the Commission, which raised strong debate in society, was that the prohibition of headscarves in schools where there is a requirement for wearing special uniforms does not constitute discrimination. The Ministry of Education and Science was instructed to adopt special regulations for wearing 'religious symbols' in schools.

Although the prohibition affected only female students, the Commission missed the opportunity to also consider the gender aspects of this problem.

4. Proof and procedural problems

No specific problems exist in this respect. It is simply a new issue that needs time to develop.

5. Description of a specific case

The second case of multiple discrimination described under 2 above is quite interesting due to its reference to CEDAW. It was presented in more detail above. It is indicative of the court's ability to identify multiple discrimination despite the fact that the case is from 2003 and that no consistent case law existed at that time.

6. Effects of legislation and case law in practice

More general surveys on discrimination based on the six main grounds (these are the notorious grounds of the Year for Equal Opportunities for All (YEOA): sex, disability, age, race and ethnicity, sexual orientation, religion or belief) were conducted in Bulgaria in 2007 during the YEOA. The survey conducted by 'Scala', the Agency for the Commission for Protection against Discrimination, covers multiple discrimination but does not deal with gender discrimination together with other grounds.

7. Role of equality bodies

The Commission for Protection against Discrimination has the competence to ensure protection from multiple discrimination but, as mentioned above, this has not been sufficiently used. According to Article 50 p. 2 of the PADA, the Commission has the competence to initiate cases, also for the cases of multiple discrimination.

In addition to this, the Commission has the competence to conduct independent surveys and to issue publications and recommendations on all aspects of discrimination (Article 47 PADA).

8. Reinforcement of legal approach at EU level necessary?

Yes, there is a need for reinforcement of the legal approach at EU and national level. At national level, the provisions in Chapter One 'General provisions' of the PADA on the need to tackle multiple discrimination should be more concrete, instead of the vague mention of 'measures' or 'all necessary measures'. The concept being very new for Bulgarian legislation, the respective national and local bodies will have difficulties in implementing such measures.

Furthermore, the protection against multiple discrimination should be tackled more specifically in a future law on gender equality in Bulgaria.

Possible changes in EU legislation in the direction of reinforcement and more concrete measures for protection against multiple discrimination would justify the need for the mentioned changes at national level.

9. Community-law definition of multiple discrimination necessary?

Yes, a Community-law definition will have a positive influence on the protection against gender-related multiple discrimination.

10. Available literature or research?

No such literature is available.

11. Further research

Yes, research on multiple discrimination is necessary. Some legal questions to be addressed are the following:

– Does gender-related multiple discrimination exist as a concept in current legislation and what types of such discrimination occur most frequently?

- What concrete measures against such discrimination exist at national level in terms of legislation and policy? and
- What is the legal practice and case law of equality bodies and of courts?

CYPRUS – Evangelia Lia Efstratiou-Georgiades

1. Concept of multiple discrimination in legislation

The legal system of Cyprus guarantees the necessary legal protection to persons claiming to be victims of any kind of discrimination and provides for effective remedies/recourses (administrative and judicial). The fundamental rights and liberties of citizens and the remedies provided for their effective implementation are defined in the Constitution of Cyprus, which incorporates and in some instances expands upon the rights and liberties safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

All these rights are guaranteed to all persons without making any distinction or differentiation between citizens and non-citizens of the Republic, or between citizens of the Republic who belong to the Greek and Turkish Communities and without any distinction or differentiation on grounds of community or religion or nationality, or on other grounds.

Article 28.1⁸ of the Constitution gives all persons the right of equality before the law, the administration and justice, and of equal protection and treatment thereby.

Article 28.2⁹ gives all persons the right to enjoy the said rights and liberties without any direct or indirect discrimination on the grounds of the person's 'community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class or on any ground whatsoever, unless there is express provision to the contrary in the Constitution'.

Article 6¹⁰ of the Constitution provides that no law or decision of the House of Representatives and no act or decision of any organ, authority or person in the Republic exercising executive power or administrative functions, shall discriminate against any person.

Article 35¹¹ of the Constitution imposes on the legislative, the executive and the judiciary a duty to secure, within the limits of their respective competence, the efficient application of the provisions of the Constitution setting out the fundamental rights and liberties.

⁸ Article 28(1) 1. 'All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby.'

⁹ Article 28(1) 2. 'Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, political or other convictions, national or social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution'.

¹⁰ Article 6 'Subject to the express provisions of this Constitution no law or decision of the House of Representatives or of any of the Communal Chambers, and no act or decision of any organ, authority or person in the Republic exercising executive power or administrative functions, shall discriminate against any of the two Communities or any person as a person or by virtue of being a member of a Community'.

¹¹ Article 35 'The legislative executive and judicial authorities of the Republic shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of this Part'.

Section 2 of Article 179¹² prohibits that the legislative, administrative and executive authorities of the Republic enact any laws or issue acts or decisions which are in any way repugnant to or inconsistent with any of the provisions of the Constitution, including the human rights provisions thereof.

Cyprus has ratified or signed most international conventions and/or protocols in the field of human rights, including civil, political, economic, social and cultural rights and rights in the field of protection and respect of minorities and combating discrimination.

Following the ratification of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, by Ratification Law No. 12/67, Cyprus amended the said Ratification Law in 1992 (by Law No. 11/92) so as to create a number of criminal offences relating to discrimination (Article 2A of the Law).¹³ This law was also amended in 1995 and 1999 by Laws Nos 6(III)/95 and 28(III)/99.

Cyprus has enacted four laws that entered into force on the date of its accession to the EU (1 May 2004): the law amending the existing disability law,¹⁴ the law transposing (roughly) the Employment Directive,¹⁵ the law transposing (roughly) the Race Directive¹⁶ and the law appointing the Ombudsman as the specialized body (hereinafter ‘the equality body’) empowered to investigate complaints of discrimination under all three of the aforesaid laws and beyond.¹⁷

¹² Article 179(2) ‘No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution’.

¹³ ‘Article 2A - Offences

- (1) Any person who in public either orally or through the press or by means of any document or picture or by any other means, incites acts which are likely to cause discrimination, hatred or violence against any person or group of persons on account of their racial or ethnic origin or their religion is guilty of an offence and is liable to imprisonment not exceeding two years or to a fine not exceeding one thousand pounds or to both sentences.
- (2) Any person who establishes or participates in any organization which promotes organized propaganda or activities of any form aiming at racial discrimination is guilty of an offence and is liable to the punishments provided for in subsection (1).
- (3) Any person who in public either orally or through the press or by means of any documents or pictures or by any other means, expresses ideas insulting any person or group of persons by reason of their racial or ethnic origin or their religion is guilty of an offence and is liable to imprisonment not exceeding one year or to a fine not exceeding five hundred pounds or to both.
- (4) Any person who supplies goods or services by profession and refuses such supply to another by reason of his racial or ethnic origin or his religion, or who makes such supply subject to a condition relating to the racial or ethnic origin or to the religion of a person is guilty of an offence and is liable to imprisonment not exceeding one year or to a fine not exceeding five hundred pounds or to both such punishments.’

This section was applied in criminal case No. 31330/99 dated 12 December 2001 and the accused was actually convicted under subsection (4), where a term of imprisonment was imposed.

¹⁴ Law on Persons with Disabilities No. 57(I)/2004 (31.03.2004). This law was subsequently amended in 2007 to introduce more favourable provisions for persons with disability and in order to rectify the wrong transposition of the reversal of the burden of proof No. 72(I)/2007, 102(I)/2007.

¹⁵ Equal Treatment in Employment and Occupation of 2004 No. 58(I)/2004 (31 March 2004). This law was subsequently amended in 2006 in order to rectify the wrong transposition of the reversal of the burden of proof.

¹⁶ The Equal Treatment (Racial or Ethnic Origin) Law No 59(I)/2004 (31 March 2004). This law was subsequently amended in 2006 in order to rectify the wrong transposition of the reversal of the burden of proof.

¹⁷ The combating of Racial and Some Other Forms of Discrimination (Commissioner) Law 42(I)/2004 19 March 2004 of the reversal of the burden of proof.

The national anti-discrimination legislation is in line with the two EU Council Directives 2000/43/EC and 2000/78/EC, but it has not been based on the matter of multiple discrimination, which has very recently started to be a subject of debate in Cyprus. For this reason, current legislation does not define or deal with multiple discrimination.

On the basis of the above, I believe that the existing legal framework in Cyprus is very wide and can provide protection for multiple discrimination as well.

2. Case law

There are no such cases before the courts and no complaints have been submitted to the Ombudsman (as 'equality body') for multiple discrimination. Only complaints related to single discrimination have been submitted and examined by the Ombudsman.

3. Any cases where gender-related discrimination is overlooked?

There are no such court cases. We do not have court decisions on civil actions for gender discrimination, not even related to single discrimination. We have decisions on gender discrimination, of the Supreme Court (as administrative court), before 2004, on the basis of Article 28 of the Constitution (*Xinari v Republic of Cyprus* 1962 3 CLR P.98).

The Ombudsman has published decisions on gender discrimination and other discrimination grounds after complaints related to single discrimination but they all refer to single discrimination. There are also decisions in criminal cases of sexual harassment.

4. Proof and procedural problems

In cases of single discrimination there is no particular problem regarding proof. In my opinion, for possible cases of multiple discrimination there may be a problem of proof, depending on the law under which the case is argued and what each law provides on the subject of the burden of proof.

5. Description of a specific case

As mentioned above, there are no decisions involving gender discrimination and one or more others grounds of discrimination. In Cyprus, the academic debate on multiple discrimination has recently started, mainly by the Ombudsman.

6. Effects of legislation and case law in practice

There are no surveys and no case law. The Ministry of Justice and Public Order has stated that there are no plans for the adoption of law or regulations to deal with multiple discrimination.

7. Role of equality bodies

The Law of the Commissioner for Administration (Amendment) Law 2004¹⁰ and the Combating of Racism and other Discrimination (Commissioner) Law 2004. These laws deal with the subject of non-discrimination within the meaning of the two Directives (2004/43/EC and 2000/78/EE). The Law of the Commissioner for Administration (No. 42(I)/2004 (appointing the Ombudsman as Equality Body) is much wider in scope, as it covers areas beyond the five grounds prescribed by the above two Directives, covering all rights and freedoms covered by the constitution,

Protocol 12, the European Convention of Human Rights and Fundamental Freedoms as well as any rights contained in any treaty ratified by the Republic of Cyprus.

The decisions and recommendations of the Ombudsman to the appropriate authorities have, in many cases, helped to eliminate discrimination against the persons submitting complaints and/or to begin the process for amending relevant laws and regulations. As mentioned above, all complaints submitted up to now related to single discrimination. The Ombudsman informed me that her office has begun to examine and discuss the matter of multiple discrimination and that one of their Officers has recently attended a training seminar on tackling multiple discrimination.

8. Reinforcement of legal approach at EU level necessary?

The debate on multiple discrimination is underway in the EU. In Cyprus, multiple discrimination is a new concept and until now there has not been any dialogue between the social partners or NGOs.

Reinforcement of the legal approach aimed at combating multiple discrimination at EU and national level is necessary. New legislation should cover all grounds of discrimination and in all areas (not just within the employment and occupation fields) such as social protection, including social security and healthcare; social benefits; education; and access to and supply of goods and services which are available to the public, including housing.

Multiple discrimination must be factored into all equality mainstreaming and impact assessment tools in EU policies, strategies, action plans and financial support must be provided for activities aimed at combating such discrimination.

The effects we expect from such reinforcement would be the elimination of such discrimination.

9. Community-law definition of multiple discrimination necessary?

Yes, a community-law definition of the term is necessary. EU anti-discrimination and equal treatment legislation does recognize that different protected grounds can intersect, but there is no explicit prohibition of multiple discrimination.

10. Available literature or research?

There is no literature or research in Cyprus on this matter. It is necessary to collect and analyze data and carry out studies in order to submit recommendations for any necessary legislative action.

11. Further research

Yes, further research on multiple discrimination at EU level and/or national level is recommended. Multiple discrimination is a new concept and it must be analyzed and understood in all EU Member States, with the involvement of the social partners, NGOs and equality bodies. Studies should address the following:

- The role of the media;
- The role of trade unions and employers' organizations;
- The role of NGOs' influence and capacity in the political process and legislation;
- The role of education;
- The role and influence of civil society in promoting equal treatment;
- National equality bodies;
- Groups vulnerable to multiple discrimination (especially female and migrant workers);
- The aspect of race as an aggravating element; and

– Legal questions to be addressed should include the burden of proof, assessment of damage and the definition (if possible) of multiple discrimination. Effective protection requires legislation that covers all spheres of life (not only employment).

CZECH REPUBLIC – *Kristina Koldinská*

1. Concept of multiple discrimination in legislation

Multiple discrimination is not defined in Czech law at all. It is a concept still completely unknown in Czech legislation, including Czech legal practice. Nothing more can be said on this question.

2. Case law

There have been no cases involving multiple discrimination, neither before a court nor before an equality body. Actually, a real equality body still does not exist in the Czech Republic. According to the still unapproved Antidiscrimination Act, this body should be the Czech ombudsman. However, this institution does not seem to be prepared to develop any new legal or theoretical approaches. This can be concluded from some real cases of multiple discrimination against Roma women. There have been some cases of involuntary sterilization of Roma women, which were handled by the Czech ombudsman. These cases, however, were seen as an unacceptable breach of these women's fundamental rights to family life and to proper medical treatment based on informed consent. The possible aspect of multiple discrimination – the intersection of gender and race – was not mentioned at all in any of the position documents of the ombudsman.

3. Any cases where gender-related discrimination is overlooked?

The cases of involuntary sterilization of Roma women mentioned above could serve as a good example of overlooking gender-related discrimination, or rather, as overlooking the aspect of discrimination as such in general. The few cases that emerged and that have been decided by Czech courts regarding this issue were only addressed from the point of view of the breaching of rules of medical treatment and the breaching of a woman's right to give informed consent before being sterilized. No informed consent, however, was given. In none of the decisions available, discrimination or multiple discrimination is mentioned.

4. Proof and procedural problems

There are no procedural problems, since cases of multiple discrimination are not addressed as such in the Czech Republic.

5. Description of a specific case

Involuntary sterilisations are carried out only on Roma women and only on women, although sterilization of men would have the same effect. Both discrimination on the grounds of race or ethnic origin and discrimination on the grounds of sex may thus be identified. Moreover, in these specific cases, the discrimination occurs twice. First of all, at the time of sterilisation, the women are discriminated against by the majority of society, represented by medical staff. Secondly, Roma women are consequently discriminated against in their own environment. Roma society is very traditional and patriarchal, and a woman who is no longer able to have children automatically assumes a very low position within her own community.

The profile of cases in the Czech Republic involves race-based targeting of Roma women for invasive and in most cases irreversible surgical procedures aimed at ending their ability to have children (and in most cases succeeding in that). The women concerned were often excluded from any form of dignified involvement in the decision to be sterilized. The very frequent profile of such cases is as follows: a Roma woman, frequently from a poor, marginalized family, is recommended to give birth by caesarean section. A form of caesarean section operation is performed (from among several available types of such procedure) which, if applied a second time, will cause a third pregnancy to be potentially life-threatening. There are other forms of caesarean section which would not cause any risk to the mother, but the doctors choose not to use them. During the second birth, also performed by this particular form of caesarean section, the woman concerned is sterilized. Despite ample opportunity during the pregnancy, the woman concerned is never informed that sterilization may even be a possibility during her second birth. And she is often given the consent form to sign only very shortly before the surgery.

6. Effects of legislation and case law in practice

There is no such information available.

7. Role of equality bodies

In the Czech Republic, the equality body does not play any role in tackling multiple discrimination. Currently, the equality body does not exist in practice and in the near future it is not expected that the ombudsman will handle such cases. On the other hand, he could help very much in starting the discussion on multiple discrimination, as, for example, the issue of involuntary discrimination of Roma women is an important one and could be a good start for such a theoretical legal discussion.

8. Reinforcement of legal approach at EU level necessary?

It would be useful to strengthen the legal approach aimed at combating multiple discrimination at the EU level. If a legal definition appears in EU law and if there is an obligation to introduce this concept into national law by prohibiting such discrimination, this would be very useful, especially from the Czech point of view. In my opinion, it is the only possible way of introducing multiple discrimination into the Czech legal system and of starting to think about it in practice and to penalize it when it occurs. The EU level is very important for Czech legislation. As can be seen from the terrible battle concerning the Antidiscrimination Act, the only force that can convince the Czech political representation in Parliament is that the Czech Republic has undertaken obligations through its membership in the EU and that it is necessary to observe these obligations, if we do not wish to be fined under ECJ rulings (as has already happened for non-implementation of the Occupational Pensions Directive).

9. Community-law definition of multiple discrimination necessary?

A community-law definition could be very useful, from the Czech point of view, for the sake of effectively facing multiple discrimination against Roma women; it could therefore be very important to have a legal definition of multiple discrimination. This could help at the national level to stress the problem and find a solution. A definition made at the EU level would be useful to define multiple discrimination at the national level.

10. Available literature or research?

There is no such literature known, at least as regards the legal aspect of multiple discrimination. There are only a few sociological studies, not primarily focused on multiple discrimination:

- A. Krchová and H. Víznerová *Diskriminace azylantů a azylantek v ČR z genderové perspektivy* (Discrimination of asylum seekers from the gender perspective), Evropská kontaktní skupina v ČR, Prague 2008.
- J. Hasmanová Marhánková 'Genderové 'Nerovnosti ve stáří: marginalizace a zvýhodnění žen ve stáří' (Ageing as a Gendered Experience: Marginalization and the Agency of Ageing Women), *Gender a sociologie* No. 2/2008.

11. Further research

From the Czech point of view, further research on multiple discrimination is certainly highly recommended at the national level. It would be interesting and useful to see whether there would be room within the Czech legal system to introduce multiple discrimination as a term and to penalize it when it occurs, possibly by multiplying the fine when multiple discrimination happens. As regards the European level, it remains to be seen in which way it would be possible to introduce the concept of multiple discrimination into EC law, so that this concept could appear sooner or later at the national level as well. More legal rather than political research should be conducted in this regard. Another very important question that could be discussed in further research would be to focus on the grounds of discrimination and their combination where multiple discrimination happens. Bearing in mind that gender has always played a special role in discrimination disputes, it would be of importance to see whether multiple discrimination with a gender aspect should be seen as a special type of multiple discrimination and therefore tackled in a special, and possibly stricter, way, or not.

DENMARK – Ruth Nielsen

1. Concept of multiple discrimination in legislation

There is no definition of multiple discrimination in Danish legislation. At present (February 2009), an amendment to Section 56 of the Administration of Justice Act which involves multiple discrimination is in the process of being adopted, see below.

At present, there are no female judges in Denmark wearing *hijab* during hearings but the possibility that some Muslim female judges might want to do so in the future led to public debate in the autumn of 2008. On 19 December 2008, the Government proposed an amendment to the Administration of Justice Act, prohibiting judges from exhibiting any religious or political symbols or views in the courtroom during hearings.¹⁸ In the new version, Section 56 of the Danish Administration of Justice Act will read: 'A judge must not appear in hearings in a manner that is likely to be perceived as a statement concerning any religious or political affiliation or a statement on his or her position on religious or political issues in general.'

In the preparatory works, the Ministry of Justice, on behalf of the Danish Government, explains that the proposed ban will include cases where the judge during the hearing visibly wears a Christian cross like a Dagmar Cross or a crucifix, where

¹⁸ Available in Danish at the Parliament's website; <http://www.folketinget.dk/Samling/20081/lovforslag/L98/index.htm>, accessed 14 May 2009.

the judge wears Muslim headgear like the *hijab*, or where the judge wears Jewish calotte (*kippa*). Also, the judge must not express any support or criticism of any specific political parties, visibly wear a party badge or anything similar, or express in any way his personal political position on other important community issues, regardless of whether they are international, national or local issues.

In the preparatory works, the Ministry of justice states that the proposal is in accordance with the Danish Constitution, with Article 9 and 10 ECHR and with the Employment Framework Directive.¹⁹

The amendment to the Administration of Justice Act is likely to be adopted in April 2009 and enter into force 1 July 2009. The legal interpretations underlying the amendment are in accordance with Danish case law on employers' rights to prohibit political or religious symbols in headscarf-cases, see below, but that case law is not discussed in the preparatory works to the amendment.

2. Case law

In 2007, the Gender Equality Complaints Body (which existed from 2000 to the end of 2008) ruled in a case²⁰ where a woman wearing *hijab* complained that her job application was rejected because she wore *hijab*. The employer denied this. He claimed that the reason why she was not offered a job was that the employer had imposed a recruitment stop. The Complaints Body found that the complainant had not sufficiently proved that her wearing a headscarf was the reason why she did not get the job.

In the first Muslim headscarf case to reach the Danish Court of Appeals,²¹ a school girl brought a religious discrimination claim when a department store, Magasin, refused to allow her to be a trainee in school-practice for a week, because she came to the workplace wearing a headscarf. The department store justified its actions by reference to its guidelines for employees' dress. The guidelines were vague. They required the staff to be decently dressed. The Court of Appeals held that the department store had violated the Discrimination Act's prohibition against discrimination on the basis of religion and required the store to pay compensation.

The next headscarf case²² concerned the refusal of a chocolate factory, Toms, to hire a Muslim woman wearing a headscarf to work in their production department, because she could not fit her entire headscarf under a net hat, which the factory required the staff to wear for hygienic reasons. The Court found that hygienic and safety reasons justified the factory's policy. The claimant appealed the judgment to the Supreme Court, but the parties reached a settlement while the case was still pending.

The third and most important case²³ was decided by the Supreme Court in 2005. In this case, which is discussed in more detail below under 5, a supermarket, Føtex, fired a young Muslim woman when she began to come to work wearing a headscarf four years after she had begun her employment at Føtex. The Danish Supreme Court held that Føtex's dress code indirectly discriminated against Muslim women who wear headscarves for religious reasons, but that the dress code did not violate the Discrimination Act's prohibition against discrimination because it was justified by a

¹⁹ 2000/78/EC.

²⁰ Case No. 6/2007.

²¹ U 2000, 2350.

²² Toms Fabrikker, 18 *afdeling sag* B-0877/00, judgment of 5 April 2001.

²³ U 2005, 1265H.

legitimate and neutral objective and the principle of proportionality was complied with.

3. Any cases where gender-related discrimination is overlooked?

Not to my knowledge.

4. Proof and procedural problems

There are no particular problems of proof and procedure.

5. Description of a specific case

In the following, the Føtex case will be looked into in more detail. The claimant in this case began wearing the Muslim headscarf after she had begun studying the Koran. The defendant was a big multi-ethnic and multi-religious employer with a staff composed of many different ethnic and religious groups.

The employer had a dress code which had been agreed with representatives of the staff in accordance with Danish collective labour law on collaboration. The Court in its reasoning underlined that the contested dress code was not an expression of a unilateral employer decision but that it had been accepted by the staff at a collective level. The claimant in that case therefore did not just oppose her employer but also her fellow workers.

The dress code prescribed that staff with jobs with direct customer contact were obliged to wear a uniform and were not allowed to display religious and political symbols. The claimant in the Føtex case worked in a bakery's department of Føtex.

The dress code did not apply to certain jobs with low visibility. After the claimant was fired for refusing to remove her headscarf, she was offered a low-visible job in another part of Føtex where she would be allowed to wear the *hijab*. She refused to accept such a change in her working conditions and regarded herself as dismissed and claimed compensation for unlawful indirect discrimination on grounds of religion in violation of the Discrimination Act.

She could also have claimed unlawful discrimination on grounds of sex under the Equal Treatment Act and unlawful discrimination on grounds of ethnic origin (she was of Moroccan origin) under the Discrimination Act. The claimant did not include gender or ethnic origin in her claims. The Supreme Court did, however, consider the claim of indirect discrimination as indirect discrimination against Muslim women. The court did not compare the impact of the dress code on all Muslims or all women, but recognised that Muslim women were disadvantaged compared to Muslim men and compared to non-Muslim women.

The purpose of the dress code was, according to the material distributed by the employer to explain it, to ensure that the employees had a neutral and uniform appearance in order to avoid potential conflicts between sub-groups in the staff and between members of the staff and customers. The purpose was thus to promote 'peace at the workplace'. That is clearly a legitimate aim. It is, for example, contrary to the interests of a Danish employer to have the Palestinian-Israeli conflict reproduced in his workplace in the interaction between Jewish and Palestinian members of staff. In Denmark, most violence against Danish Jews is committed by sub-groups of Muslims. Many Jews refrain from displaying the star of David in public to avoid provoking emotional reactions. It was the same method of trying to avoid open conflict by keeping a low profile in religious and political matters that was employed in the Føtex dress code. The employer and the staff representatives had in collaboration reached the opinion that the dress code was an appropriate and necessary method to achieve

peace at the workplace. The court did not go far in reviewing the discretion exercised by the employer in collaboration with the staff at collective level. That is in accordance with the Danish collective labour law tradition.

The employer treated expression of religious and political opinions in the same way. That has been criticised.²⁴ It is, however, in accordance with the Danish Discrimination Act, which gives the same protection against discrimination on grounds of political opinions as on grounds of religious beliefs; see the proposed amendment to the Administration of Justice Act, which also treats political and religious views in the same way. ILO Convention 111 and Article 21 in the EU Charter on Fundamental Rights do the same. When the rule on discrimination on grounds of religious and political views is the same as it is in Denmark, I think it is unlawful to treat a particular religious view better than any political view, unless the conditions of positive action are fulfilled, which they were not in the Føtex case. Positive action for religious or ethnic purposes is not possible under Danish law. Positive action on grounds of sex requires an application for and the granting of an administrative exemption.

6. Effects of legislation and case law in practice

There are no effects of legislation and case law in practice, apart from what is reported in *Tackling multiple discrimination – Practices, policies and laws*.²⁵

7. Role of equality bodies

By 1 January 2009, a new Equality Complaints Board for all prohibited grounds of discrimination was established. The new Complaints Board deals with discrimination both in employment and in other areas, e.g. the supply of goods and services. The previously existing Complaints Boards for Gender Equality and Ethnic Equality were abolished. Their functions were taken over by the new Complaints Board from 1 January 2009. The new general Complaints Board is modelled on the Complaints Board for Gender Equality. It is – like the previous gender equality complaints board – competent to deal with complaints about discrimination from victims of discrimination. It has no competence to conduct independent surveys concerning discrimination, publish independent reports or make recommendations on any issue relating to such discrimination and it will not be able to start cases at its own initiative. It is therefore not a monitoring body as required by Article 12 of Directive 2004/113 or Article 20 of the Recast Directive (2006/54/EC). As mentioned above under 2, the previous Gender Equality Complaints Board ruled in a headscarf case.

8. Reinforcement of legal approach at EU level necessary?

There is a need for clarification of the relationship between the existing anti-discrimination directives and Article 21 in the EU Charter on Fundamental Rights.

9. Community-law definition of multiple discrimination necessary?

No, the existing provisions are sufficient.

²⁴ See in particular Lynn Roseberry: 'Religion, ethnicity and gender in the Danish headscarf debate' in: D. Schiek and V. Chege (eds.) *European Union Non-Discrimination Law: Comparative Aspects on Multidimensional Equality Law* London 2008.

²⁵ <http://ec.europa.eu/social/main.jsp?catId=618&langId=en&moreDocuments=yes>, accessed 30 March 2009.

10. Available literature or research?

There are some articles in Danish:

- Bjørn Dilou Jacobsen *Mere om Føtex-sagen*, U 2005, B301.
- Kirsten Ketscher *Etnisk ligebehandling, religionsfrihed og ligestilling mellem kvinder og mænd - set i lyset af Føtex-sagen*, U 2005, B 235.
- Ruth Nielsen *Princippet om forbud mod forskelsbehandling pga. alder som et almindeligt EU-retligt princip*, U 2006, B 259.
- Lynn Roseberry *Tørklædediskrimination på arbejdsmarkedet*, U 2004, B189.

The following is a two-volume commentary in Danish on (all) Danish equality laws on all the prohibited grounds of discrimination and related case law:

- Agnete Andersen, Ruth Nielsen and Kirsten Precht 'Ligestillingslovene med kommentarer', 6. Udgave Bind I, *Forskelsbehandlingsloven, den etniske ligebehandlingslov, ligestillingsloven, loven om ligebehandlingsnævnet, håndhævelse og generelle spørgsmål*, Copenhagen 2008.
- Agnete Andersen, Ruth Nielsen and Kirsten Precht 'Ligestillingslovene med kommentarer', 6. Udgave, Bind II, *Ligebehandlingsloven, ligelønsloven, barselloven, barselsudligningsloven og loven om ligebehandling mht. pension, forsikring og lignende finansielle ydelser*, Copenhagen 2009 (forthcoming).

A commentary in Danish to the Discrimination Act:

- Yvonne Frederiksen and Mads Krarup: *Lov om forbud mod forskelsbehandling på arbejdsmarkedet - med kommentarer*, Copenhagen 2008.

In English there is:

- Lynn Roseberry 'Religion, ethnicity and gender in the Danish headscarf debate' in Dagmar Schiek and Victoria Chege (eds.) *European Union Non-Discrimination Law: Comparative Aspects on Multidimensional Equality Law*, London 2008.

11. Further research

There is a need for clarification of the relationship between the existing anti-discrimination directives, Article 21 in the EU Charter on Fundamental Rights, ILO Convention 111 and national law, not least in relation to protection against discrimination on grounds of political opinion.

ESTONIA – Anneli Albi

1. Concept of multiple discrimination in legislation

The concept of multiple discrimination is not explicitly regulated in statutory legal instruments in Estonia.

2. Case law

No case law on gender-related multiple discrimination currently exists in Estonia.

3. Any case where gender-related discrimination is overlooked?

No information is available on cases where gender-related multiple discrimination would have been dealt with under the other discrimination grounds.

4. Proof and procedural problems

Legislation does not at present address issues of proof and procedure in a different way with regard to cases of multiple discrimination. This issue has not yet emerged in practice, and no relevant case law exists.

However, the question of proof and procedural issues may arise with regard to the fact that the scope of protection for different grounds of discrimination is different. According to the Gender Equality Act (hereinafter GEA), the principle of equal treatment on the grounds of sex applies to all areas of social life, except to professing faith or working as a minister in a religious organisation and in family and private life (Article 2). On 1 January 2009, the Equal Treatment Act (hereinafter ETA) came into force. The ETA provides protection against discrimination on the grounds of race, ethnic origin, colour, religious or other beliefs, age, disability and sexual orientation. The main purpose of the Act was to transpose Directives 2000/43 and 2000/78. The scope of the protection provided corresponds to that of the Directives. Therefore, discrimination on the grounds of race or ethnic origin is prohibited beyond the field of employment, while discrimination on other grounds, i.e. religious or other beliefs, age, disability and sexual orientation, is prohibited only in employment-related areas.

Therefore, it is unclear whether and to what extent persons are protected against discrimination on the latter grounds. According to Estonian constitutional theory, fundamental rights have to be applied between private persons.²⁶ This implies that in cases where the alleged discrimination takes place outside the areas regulated by the ETA, the principle of equal treatment has to be observed. Nevertheless, it is unclear to what extent the concepts of discrimination and corresponding principles as established under the ETA can be applied by recourse to analogy in such cases. Even if the substantial principles can and should be applied analogously, it is doubtful whether the procedural principles, such as the principle of shared burden of proof, can be applied in areas not explicitly regulated by the ETA. This means that in cases of multiple discrimination, where different grounds intersect and the scope of protection of the respective grounds is different, it might be difficult to apply the principle of shared burden of proof.

5. Description of a specific case

No case law exists on gender-related multiple discrimination.

6. Effects of legislation and case law in practice

No information is available on the legal aspects of multiple discrimination in Estonia. A few studies were carried out under the auspices of the European Year of Equal Opportunities, investigating the sociological aspects of multiple discrimination.²⁷

²⁶ Article 19 of the Estonian Constitution stipulates the following: 'Everyone has the right to free self-realisation. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties.'

²⁷ The following studies addressing the issue of multiple discrimination were carried out: M. Lagerspetz et al. *Isiku tunnuste või sotsiaalse positsiooni tõttu aset leidev ebavõrdne kohtlemine: elanike hoiakud, kogemused ja teadlikkus: uuringuraport* (Unequal treatment on personal characteristics or social position: expectations, experience and awareness of persons: report of the study), Tallinn, 2007. Available at: [http://213.184.49.171/est/HtmlPages/Isikutunnustevõisotsiaalsepositsioonitõttuasetleidevebavõrdne_kohtlemine_Uuringuraport/\\$file/Isiku%20tunnuste%20või%20sotsiaalse%20positsiooni%20tõttu%20aset%20leidev%20ebavõrdne%20kohtlemine_%20Uuringuraport.pdf](http://213.184.49.171/est/HtmlPages/Isikutunnustevõisotsiaalsepositsioonitõttuasetleidevebavõrdne_kohtlemine_Uuringuraport/$file/Isiku%20tunnuste%20või%20sotsiaalse%20positsiooni%20tõttu%20aset%20leidev%20ebavõrdne%20kohtlemine_%20Uuringuraport.pdf) (in Estonian, accessed 22 February 2009); M. Tali et al. *Naised Eesti mustlaskogukondades, uurimuse aruanne* (Women in Estonian Roma communities, a report of the study), Tallinn, 2007. Available at:

However, no information is available on any action or surveys where the sociological data would have been analyzed from a legal perspective, and no legislation has been initiated to improve the situation.

7. Role of equality bodies

No information is available on opinions delivered by equality bodies in cases concerning gender-related multiple discrimination.

The Gender Equality Commissioner (since 1 January 2009 ‘Gender Equality and Equal Treatment Commissioner’) has pointed out that she has not yet handled any cases concerning multiple discrimination, although she intends to look into this issue more thoroughly in the future.²⁸ As of 1 January 2009, the Commissioner has the power to also supervise the requirements of the Equal Treatment Act. This should make the powers of the Commissioner to tackle the issue of multiple discrimination more effective, as in addition to gender inequality she now has the competence to address discrimination on the grounds of race, ethnic origin, colour, age, disability, religion and beliefs and sexual orientation.

The Chancellor of Justice has pointed out the effects of the provisions of the ETA with regard to multiple discrimination. As noted above, discrimination on the grounds of gender and race or ethnic origin is prohibited beyond the field of employment, while discrimination on the grounds of age, disability, religion and belief and sexual orientation is prohibited in employment-related areas only. The Chancellor of Justice pointed out in his letter to the Constitutional Affairs Commission of Parliament that the different scope of protection makes it more difficult to address cases of multiple discrimination. However, Parliament did not follow the recommendations of the Chancellor of Justice when adopting the ETA.

The role of the equality bodies could be considerable in tackling multiple discrimination.

According to the ETA, the Gender Equality and Equal Treatment Commissioner has the power to monitor the fulfilment of the requirements of the ETA and GEA; to analyse the impact of laws on the situation of men and women and persons who have certain characteristics as provided in Article 1 of the ETA (i.e. race, ethnic origin, colour, age, disability, religion or belief, sexual orientation); to make proposals to the Government, government agencies, local governments to amend laws etc. (Article 16 of the ETA). The Commissioner has made some recommendations regarding the need to amend laws to address certain issues that have emerged in practice (such as an amendment to the Labour Contracts Act which would prohibit questions to the job applicant regarding his or her civil status and children, and the need to amend the powers of the Commissioner to carry out her tasks).

Further, the Chancellor of Justice has the power to promote equality and the principle of equal treatment. To this end, the Chancellor of Justice has *inter alia* the following responsibilities: to analyse how the implementation of the legal acts influences the members of society and to make proposals to Parliament, the

[http://213.184.49.171/est/HtmlPages/NaisedEestimustlaskogukondades_uuringuraport/\\$file/Naised%20Eesti%20mustlaskogukondades_uuringuraport.pdf](http://213.184.49.171/est/HtmlPages/NaisedEestimustlaskogukondades_uuringuraport/$file/Naised%20Eesti%20mustlaskogukondades_uuringuraport.pdf) (in Estonian, accessed 22 February 2009); S. Anspal, E. Kallaste *Vähemusrahvustest naiste olukord Eesti tööturul* (The situation of women belonging to national minorities in Estonian labour market) – Poliitikauuringute keskus Praxis, Tallinn, 2007. Available at:

[http://213.184.49.171/est/HtmlPages/Vähemusrahvustestnaisteolukordtooturul/\\$file/Vähemusrahvustest%20naiste%20olukord%20tööturul.pdf](http://213.184.49.171/est/HtmlPages/Vähemusrahvustestnaisteolukordtooturul/$file/Vähemusrahvustest%20naiste%20olukord%20tööturul.pdf) (in Estonian, accessed 22 February 2009).

²⁸ Presentation by the Gender Equality Commissioner at seminar ‘Rights of national minorities, civil society and actual problems in the fight against discrimination’, 21 November 2008, Tallinn.

Government, state agencies, local governments and employers to amend legal acts. However, in practice, these tasks are interpreted in line with the other tasks of the Chancellor of Justice to monitor the compliance of legislative acts with the Constitution.

8. Reinforcement of legal approach at EU level necessary?

Two aspects of concern could be addressed to strengthen the existing legal protection at the EU level.

Firstly, as noted above, the different scope of protection for different grounds of discrimination makes it more difficult to effectively tackle discrimination. It is difficult to see any justification for discrimination on some grounds being prohibited only in the field of employment. The different standards of protection also make the enforcement of the principle of equal treatment more difficult in cases of multiple discrimination. Therefore, the review and amendment of the respective EU legislation is necessary to harmonize the scope of protection for the different grounds of discrimination as far as possible.

Secondly, as it is generally recognised that the concept of multiple discrimination has its own legal meaning and particularities, it may be worth regulating the main legal aspects of this concept in legislation. This would make the concept more visible and enhance legal clarity in this field. This would enable persons to more effectively enforce their right to equal treatment.

9. Community-law definition of multiple discrimination necessary?

As pointed out above, it would be advisable to define multiple discrimination in legislation. This would enhance clarity as regards the meaning of the concept and the standards of protection.

10. Available literature or research?

No information is available.

11. Further research

Further research on multiple discrimination would appear to be necessary. At the EU level it is necessary to analyse which amendments of the legislative framework could effectively address cases of discrimination and particularly multiple discrimination. There would also appear to be a need for studies to analyse which forms of multiple discrimination are critical in Europe today and what measures could remedy the problems arising.

At national level the purpose of research ought to be finding out the following: which forms of multiple discrimination are common in the Member States; what are the effects of existing legislation; and the question whether and what kind of legislative amendments are necessary to prevent or to compensate for the situations of multiple discrimination. As pointed out above, some studies exist in Estonia exploring the sociological aspects of multiple discrimination, but no research has been carried out on the legislative aspects of multiple discrimination.

FINLAND – *Kevät Nousiainen*

1. Concept of multiple discrimination in legislation

Multiple discrimination is not explicitly prohibited or defined in Finnish legal instruments.

2. Case law

No case law seems to exist. Two equality bodies, the Equality Ombudsman, who monitors the Act on Equality between Women and Men (609/1986), and the Minority Ombudsman, who monitors the Non-Discrimination Act (21/2004) as to ethnic origin, have consulted on problems that arise when both gender and ethnic discrimination are involved. A matter that is being handled by several authorities concerns gender-segregated time slots for women only in municipal swimming pools in Helsinki. One motivation behind reserving women-only time slots is that immigrant women would not use swimming halls that are open to both sexes. The case was presented both to the Equality Ombudsman and to the Minority Ombudsman, and even to the Parliamentary Ombudsman. In such cases, several authorities may consider that they have a mandate to deal with the matter. In practice, cases are also transferred from one Equality Body to another, if they are clearly misdirected, or if the authority in question considers that the strongest prohibited ground is not the one that she has powers to deal with. In all these cases, discrimination is treated as a single-ground case, involving either gender or ethnic origin.

The occupational safety officials monitor discrimination on other prohibited grounds besides gender and ethnic origin, and even labour market discrimination on the ground of ethnic origin. The occupational safety officials tend to consider discrimination as an issue of violation of labour law, and aggravated cases such as violations of the Penal Code are reported to the public prosecutor. The combination of age and gender seems to come up often in the context of occupational safety officials monitoring the Non-Discrimination Act.

No case law involving several grounds has surfaced to the media or to the higher courts.

3. Any cases where gender-related discrimination is overlooked?

The Discrimination Board imposed a conditional fine to the municipality of Enontekiö in a recent case concerning discrimination against the Sami.²⁹ The Minority Ombudsman had asked the Board to decide whether the municipality had arranged day care for children, health services, services to the elderly and basic education in a manner that violates the Non-Discrimination act and the Act on Sami Language. The Minority Ombudsman referred to the Act on Day Care which states that municipalities shall offer day care in three languages: Finnish, Swedish and Sami. The municipality of Enontekiö is in the Sami region, where authorities have a heightened duty to provide services in the Sami language. Thus, the case involved the right to services in a minority language, rather than ethnicity as such. The Discrimination Board considered that the right of the Sami children to receive day care in their own language was not equal to that of children whose mother tongue was Finnish, and therefore the children had been disadvantaged on the ground of their ethnicity. On the other hand, the lack of day care in the languages used by the 'old' Finnish minorities of the Sami and Roma have been considered as cases of gender discrimination in the

²⁹ Discrimination Board; decision 17 December 2008.

context of national reporting to the CEDAW Committee,³⁰ because in practice the lack prevents women (who are considered as the main preservers and transmitter of the ‘mother tongue’ of these groups between generations) from accepting gainful employment. This aspect of the case was not considered by the Discrimination Board. The municipality has brought the decision of the Board before the Administrative Court where it is now pending.

There have been several cases of ethnic discrimination concerning Roma in the caseload of the Minority Ombudsman. A recurring issue has been the clothing of Roma women. Both in employment and in access to services, the specific ethnic dress that Roma women wear has had a role in the alleged discrimination. The Minority Ombudsman is reviewing the cases in order to see to what extent these cases can be considered as multiple discrimination.

Issues of harassment are in practice often treated as violations of the Act on Safety at Work, which also contains a provision against harassment. ‘Harassment’ is thus defined as a threat to occupational safety, rather than discrimination, which is a violation of human or fundamental rights. It seems that cases of occupational ‘harassment’ very often involve at least one dimension that could be defined as sexual harassment or harassment on the ground of sex. Here, the fact that monitoring is done by the Safety at Work officials has an impact on the outcome. These officials have an organisation on the local level, whereas the equality bodies only have an office on the national level. While the occupational safety authorities may have more effective access to the work place conflicts, they have little experience about discrimination or protection of civil or human rights. Harassment as an occupational safety issue includes many types of behaviour such as bullying, but only if it presents a health hazard.

4. Proof and procedural problems

So far, as no cases have appeared to test procedural or evidence problems in courts, what can be said is based merely on legal definitions, preparatory works for the Act on Equality, and legal doctrine. It can be difficult to find a comparator in cases involving several prohibited grounds. The definition of direct discrimination under the Act on Equality involves comparison, as direct discrimination means ‘1) treating women and men differently on the basis of gender, or 2) treating someone differently for reasons of pregnancy or childbirth’. Where pregnancy and childbirth is in question, a comparator has not been considered necessary. In the preparatory works for the amendment of the Act of 2005, it was clearly stated that recognition of pay discrimination does not always require a concrete comparator that would have been treated better. Nor is a comparator necessary in order to prove discrimination as to other conditions of employment.³¹ The wording of the provision on pay and other conditions of employment under Section 8(1)3 defines discrimination on these grounds as a situation where an employer ‘implements conditions of pay and other conditions of employment in such a way that one or more employees find themselves in a less favourable position than one or more other employees in the employer’s

³⁰ The latest report for Finland was presented in 2008, see UN Committee on the Elimination of Discrimination against Women 42st Session: Finland, combined 5th and 6th report, 9 July 2008. Also the UN Committee on the Cultural, Economic, and Social Rights, Consideration of reports submitted by State Parties under Articles 16 and 17 of the Convention. Concluding Observation: Finland, 38th session, 18 May 2007, para 13, 14, 22 and 23, E/C.12/CO/FIN/5.

³¹ Committee Report 2002:9, 79, K. Ahtela et al. *Tasa-arvo ja yhdenvertaisuus*, Talentum Helsinki 2006, p. 120.

service performing the same work or work of equal value'. The wording was selected such that it is up to the claimant to choose the comparator, and it is enough to find a comparator that is of the opposite sex and is paid more for the same work or work of equal value.³² Whether a claimant who claims discrimination on grounds of ethnicity and gender is able to present a comparator within these parameters as easily as a person claiming discrimination on the single ground of gender is an open question.

5. Description of a specific case

No such case can be presented.

6. Effects of legislation and case law in practice

Information regarding multiple discrimination can be found in the national CEDAW reporting referred to under 3.

7. Role of equality bodies

The on-going review of the equality legislation has certainly brought the issue more to the fore, because a better way of handling cases of multiple discrimination is one of the aims of the review. The equality bodies are not unaware of the problem of multiple discrimination. They do confer with each other on the issue, and last year the Equality Ombudsman organised a seminar on multiple discrimination.³³ The Ombudsman stated that the topic was little known in Finland, and that she wanted to learn about it, rather than direct others on the issue.

8. Reinforcement of legal approach at EU level necessary?

A legal approach at EU level could be useful or even necessary. The problems of less than harmonised legal provisions on various grounds of discrimination, as well as the strong emphasis on a suitable definition of multiple discrimination, could and probably should be solved at EU level. Merely combining the tasks of specific equality bodies into a single equality body could, in the worst case, reduce the resources that are available for the specific grounds, especially gender, where previously specific bodies for gender existed, and still not offer any tenable remedies or appropriate sanctions in cases of multiple discrimination.

9. Community-law definition of multiple discrimination necessary?

A Community-law definition (which should be able to deal with the problems caused by the required comparator) would probably help to strengthen the national legal protection.

10. Available literature or research?

- K. Nousiainen 'Utility-based equality and disparate diversities' in: D. Schiek and V. Chege (eds) *European Union Non-Discrimination Law. Comparative*

³² Ahtela et al., p. 122. The writers note, however, that the Supreme Administrative Court used a different reasoning in case KHO T 1902, *Dnro* 3772/03 in 2005. It no longer seems quite obvious that the alleged victim of employment discrimination chooses the comparator, not the employer.

³³ The seminar was the annual thematic seminar organised by the Equality Ombudsman on 30 October 2008. The choice of subject was, according to the Ombudsman, motivated by the fact that the issue of multiple discrimination is on the agenda of the Equality Committee, which is nominated to propose a reform of equality legislation; see <http://www.tasa-arvo.fi/Resource.phx/tasa-arvo/moniperusteinensyrjinta.htx>, accessed 16 April 2009.

Perspectives on Multi-Dimensional Equality Law pp. 187-214 London 2008 considers multiple discrimination based on gender and ethnicity in Finland.

- J. Kantola and K. Nousiainen, ‘Pussauskoppiin? Tasa-arvo- ja yhdenvertaisuuslakien yhdistämisestä’, *Naistutkimus – Kvinnoforskning* 2/2008 pp. 6-20, discusses the on-going reform of equality legislation also from the point of view of multiple discrimination.

11. Further research

Further research is certainly needed. Not only combating multiple discrimination by prohibition, but also by taking positive measures aimed at reducing multiple discrimination should be studied. Research should seriously study the point presented by the Commission’s communication (COM (2008) 420 final) that attention should be paid to the need to ‘tailor’ the approach to the combat of discrimination on various grounds, due to the fact that the grounds and structures that uphold discrimination differ.

FRANCE – Sylvaine Laulom

1. Concept of multiple discrimination in legislation

French employment law prohibits various grounds of discrimination and the list of these prohibited types of discrimination is longer than the one provided by the European directives. Currently, the prohibited grounds for discrimination listed in Article L1132-1 of the Labour Code comprise: origin, sex, sexual orientation, lifestyle, age, family status, pregnancy, genetic features (actual or assumed), belonging to an ethnic group, nation or race, political opinion, trade union activities, religious belief, physical appearance, name, state of health and disability.

As such, multiple discrimination is not explicitly prohibited in France and until now there has been no debate on the question of multiple discrimination, at least, not among lawyers. For example, there have been no articles in legal reviews on this issue. French law has not addressed multiple discrimination until now.

One of the questions to be raised could be whether the current legal framework is consistent with the fight against that specific form of discrimination. It could be argued that the French anti-discrimination legislation could address the issue of multiple discrimination. Generally, despite the existence of specific provisions relating to certain grounds of discrimination, French anti-discrimination legislation cannot be considered as ground specific and the same principles apply for every form of discrimination: direct and indirect discrimination are prohibited, specific sanctions apply with regard to discriminatory acts and the French equality body, the HALDE, has the responsibility to cover all grounds of discrimination and thus it should be able to address multiple discrimination. The way Article L1132-1 of the Labour Code is written seems to allow to combine the grounds of discrimination. Some grounds include certain overlap and this could also be favourable for a multiple discrimination claim. However, in practice, multiple discrimination issues are not raised or complaints brought before the tribunals and the HALDE tends to focus on one ground of discrimination.

2. Case law

A review of the cases of the *Cour de cassation* reveals that the most common approach to discrimination claims is one that tends to focus on a single ground. One

of the reasons could be that for pragmatic reasons, claimants or their lawyers may prefer to choose one ground of discrimination because it is the easiest to prove or it is the one that tribunals are more familiar with. The process of selecting the discrimination ground may also be made by the court itself.

Between 2001 and 2009, out of some 600 judgments relating to discrimination claims, only 6 judgments could be found referring to more than one ground of discrimination³⁴ and 4 cases are about sex and one other ground of discrimination (trade union activity or race).³⁵ Those judgments are not considered ‘important’ cases of the *Cour de cassation* since they were neither published nor the subject of legal comment. They are very short decisions, not well motivated and thus difficult to analyse. Thus they could not be analysed as recognizing multiple discrimination and it is not possible to draw any general conclusions concerning the judicial approach to multiple discrimination. They merely indicate that it is possible to bring a case based on more than one ground of discrimination and that courts are capable of dealing with such claims.

In one case,³⁶ the two grounds are dealt with separately. The court found a discrimination based on sex, and more precisely on pregnancy. The worker did not have the chance to be evaluated for a promotion as she was on a maternity leave. But the discrimination on trade unionism was not admitted because the Court of Appeal failed to analyse if the change in working conditions was justified by an objective aim. Referring to the definitions given by the report ‘Tackling Multiple Discrimination. Practices, policies and laws’, the case was not about a compound discrimination but a multiple discrimination defined as a situation where discrimination takes place on the basis of several grounds operating separately. Also, there was not really an interaction of grounds of discrimination or an addition of grounds of discrimination.

In the three other cases, the two grounds (sex and race or sex and trade unionism) are not addressed separately and no discrimination is found. In these cases, a comparison is made between the situation of the women and the position of other workers to conclude that there were no discrimination, in two cases because the difference was justified by the employer and, in the other, because the woman who asserts discrimination ‘for example on the ground on sex or race’ could not prove that there was any difference. The courts clearly do not distinguish between the grounds of discrimination and they seem to treat the two asserted grounds of discrimination as one ground of discrimination. It could be argued that here courts could treat multiple discrimination as a specific type of discrimination and not as an addition of two discrimination which should be treated differently.

Another case, of a Court of Appeal,³⁷ seems interesting. A black woman employed by the Parisian public transport authority (RATP) claimed that she had suffered discrimination on the grounds of sex and race both in terms of career progression and access to vocational training. A comparison with the situation of

³⁴ The *Cour de cassation* publishes all its decisions on the Legifrance website. Thus, in a keyword search, it is possible to select all judgments by the *Cour de cassation* referring to ‘discrimination’. After selecting these judgments, it was possible to analyse on which grounds of discrimination the claims were based. The same analysis cannot be made for the decisions of lower tribunals, because they are not published on a website.

³⁵ *Cass. Soc.* 4 July 2001, No. 99-45598, on sex and trade union activity; *Cass. Soc.* 24 January 2007, No. 05-42054, on sex and trade union activity; *Cass. Soc.* 11 April 2008, No. 07-41099, on sex and origins; *Cass. Soc.* 28 October 2008, No. 07-41856, on sex and trade union activity.

³⁶ *Cass. Soc.* 28 October 2008, No. 07-41856, on sex and trade union activity.

³⁷ Judgment of the Paris Court of Appeal, 29 January 2002, No. 2001/32582.

others workers clearly revealed that her career progression had come to a halt at a particular point. The group used for the purposes of comparison included men and a woman. Thus, seemingly, she was entitled to compare herself to a group composed mainly of men (white men) and one woman. On the facts, the employer was unable to provide objective grounds justifying the difference in treatment. Here again, the Court of Appeal did not approach the matter asking first if there was discrimination based on gender and second if there was a discrimination based on race.

In fact when reading these decisions, one has the impression that for the courts the alleged ground of discrimination is not so important if a difference is found between one worker and other workers. And in fact, the *Cour de cassation*, to which the matter was brought following the judgment of the Court of Appeal, confirms the judgment of the Court of Appeal, in a very short judgment of its own.³⁸ The *Cour de cassation* simply states that the inequality has been proven. When we read the judgment of the *Cour de cassation*, it is impossible to know on which grounds the claim was originally based. It reveals that the manner in which judicial decisions are written sometimes hides the fact that multiple discrimination was initially alleged. This certainly has to do with one specificity of the French legal framework on discrimination. Most discrimination cases relate to wages, in particular, since 1996, when the *Cour de cassation* held that there is an equal treatment principle under which workers have a right to 'equal pay for equal work'. The consequences of this principle are very important and litigation has significantly increased since that judgment, also because the *Cour de cassation* allocates the burden of proof in equal pay cases in the same manner as it does in discrimination cases. Thus the ground of the difference established becomes irrelevant. The comparators are simply people doing the same work and, accordingly, there is no focus on the personal characteristics of claimants. It suffices for the claimant to establish facts from which it may be presumed that there has been a difference in treatment. Once that has been done, the burden shifts to the employer to prove that this difference in treatment is justified by objective grounds. Judgments in these equal pay cases do not provide any information on the source of the difference of treatment and the characteristics of the claimants are ignored. In this judicial context, there is little room for explicit recognition of the specificities of multiple discrimination while at the same time it also allows a judicial treatment of this type of discrimination.

Concerning the French Equality Body, the HALDE (High Authority for the fight against discrimination and for equality), it seems that claims are classified according to the ground of the alleged discrimination and the HALDE annual reports do not report any claims based on multiple discrimination. The analyses of the HALDE are also grounds based, with separate sections for different grounds.

3. Any cases where gender-related discrimination is overlooked?

As there have been very few and no significant cases on multiple discrimination, it is not possible to identify cases on multiple discrimination where gender-related discrimination is overlooked.

However, it could be argued that a single-ground discrimination approach could sometimes overlook an issue of gender discrimination. For example, the ban on Islamic headscarves is only analysed as a discrimination based on religion and the gender aspect is ignored while it could be interpreted as a form of gender

³⁸ *Cass. Soc.* 20 March 2007, No. 02-42427.

discrimination.³⁹ The single-ground approach could not be the best way to analyse this type of discrimination. However, in a recent deliberation concerning the headscarf, the HALDE states that the *burqa* or *niqab* might contradict the French republican values and more precisely the principle of equality between men and women because the *burqa* or *niqab*, beyond their religious meanings, symbolises women's oppression.⁴⁰ The gender aspect is reintroduced into the debate but not really where it was expected!

4. Proof and procedural problems

It can be argued that French legislation on discrimination could apply to multiple discrimination which means that the specific burden of proof, the right of trade union and association to bring a case for a victim, etc. could also apply to multiple discrimination. If this interpretation is right (as until now there has not really been confirmation by case law, and there are no significant case laws on multiple discrimination), there will be no particular problems of proofs or procedural problems related to cases on multiple discrimination.

5. Description of a specific case

If it is possible at all to find any cases referring to more than one ground of discrimination, they are not significant enough.

6. Effects of legislation and case law in practice

As there is no explicit legislation on multiple discrimination, there have been no studies on the effects of such legislation. Generally, multiple discrimination has not been given great academic attention, at least among lawyers.

7. Role of equality bodies

The French Equality Body, the HALDE, has general competences in the field of discrimination and it has the responsibility to cover all grounds of discrimination. However, there is no explicit prohibition of multiple discrimination in France and until now the HALDE has focussed its actions on a single-ground approach. For example, on its website, the claims and decisions of the HALDE are classified by grounds of discrimination. Until now the HALDE has not played a major role in tackling multiple discrimination. This does not mean that the HALDE does not have the competence to tackle this type of discrimination. Because of its general competencies the HALDE should be able to address the issue of multiple discrimination and could also play an important role. The HALDE could contribute to the dissemination of the concept of multiple discrimination, it could also contribute to the knowledge on multiple discrimination by conducting and commissioning studies and research. What would be interesting to know is if claimants may prefer to choose one ground of discrimination and/or if there is a process of selecting the discrimination ground by the HALDE itself.

8. Reinforcement of legal approach at EU level necessary?

Reinforcement of the legal approach aimed at combating multiple discrimination could create greater awareness of the problem, as in France there is no real debate on

³⁹ See for example the HALDE's deliberations No. 2008-166, 29 September 2008 or No. 2008-197, 29 September 2008.

⁴⁰ Deliberation No. 2008-193, 15 September 2008. The case was about the prohibition to wear a *burqa* in the mandatory linguistic training sessions for foreign people wishing to reside in France.

this issue. In this case, it will be necessary to define multiple discrimination at European level and to prohibit this discrimination. Like in the European Directives on discrimination, direct and indirect discrimination should be prohibited, the burden of proof should apply, etc. One of the questions to be answered is the scope of the prohibition of multiple discrimination. From a gender perspective, it should have the same scope as the prohibition of discrimination based on gender and thus it should not apply only in employment relations as the 2000/78 Directive does.

9. Community-law definition of multiple discrimination necessary?

If we believe that reinforcement of the legal approach on multiple discrimination is necessary, there is also a need for a Community-law definition of multiple discrimination.

10. Available literature or research?

No literature or research on multiple discrimination is available in France.

11. Further research

The definition of multiple discrimination should be clarified.

When discussing multiple discrimination, are there certain types of multiple discrimination which would need better protection, for example gender and race or gender and religion? Is gender, most of the time, part of multiple discrimination, i.e. one of the grounds which has to be combined with another?

Until now in France, there has been a single-ground approach to discrimination. It will be interesting to analyse, if possible, how many cases could be defined as multiple-discrimination cases, and, after identifying these cases, to analyse why and how claimants have selected one ground of discrimination to bring their cases and what could be the consequences of this selection process.

GERMANY – Beate Rudolf

1. Concept of multiple discrimination in legislation

German law does not use the term ‘multiple discrimination,’ which means that it neither defines it nor prohibits it explicitly. However, it contains a specific rule for situations where unequal treatment occurs on the basis of several prohibited grounds. According to Section 4 of the General Equality Act (*Allgemeines Gleichbehandlungsgesetz*, AGG), such unequal treatment on the basis of several prohibited grounds must be justified with respect to each of these grounds. By speaking of ‘unequal treatment on the basis of several prohibited grounds,’ the law does not distinguish between multiple and intersectional discrimination; both are covered by the provision.

2. Case law

There is one case in which multiple discrimination was alleged and which has made the headlines because of the high material damages claimed by the claimant (EUR 434 000). In this particular case,⁴¹ a German woman of Turkish origin brought

⁴¹ Labour Court Wiesbaden, judgment 5 Ca 46/08 of 18 December 2008; http://www.arbg-wiesbaden.justiz.hessen.de/irj/ArbG_Wiesbaden_Internet?rid=HMdJ/ArbG_Wiesbaden_Internet/sub/c9b/c9b70103-326a-4e11-f3ef-ef97ccf4e69f...11111111-2222-3333-4444-

a claim for discrimination on grounds of sex and ethnic origin. She worked as an agent for an insurance company and sold insurances in a particular area. When she returned after four months' maternity leave, she was assigned a new area that generated considerably lower premiums. Her successor was male and of German ethnic origin. She also alleged that he received better treatment, such as an office and a secretary, and that she was denied her prior special benefits, such as a laptop computer. The Labour Court of Wiesbaden found that only the allocation of a less attractive area constituted discrimination because it occurred immediately after her return from maternity leave. However, it did not consider the other facts as indicative for gender-based or ethnic discrimination. As the judgment has not yet been published, it is impossible to assess the persuasiveness of the Court's evaluation of the facts brought forward by the claimant to show a *prima facie* case of discrimination. It is noteworthy, however, that the Court's press release does not use the term multiple discrimination. It thus seems that the case was dealt with as one of compound discrimination, i.e. a case of two separate grounds of discrimination having been relied on in the same case.

3. Any cases where gender-related discrimination is overlooked?

In addition to the case reported above, there are numerous decisions in labour law (public services and private employment relations) concerning the dismissal or refusal to hire women because of their wearing a headscarf for religious reasons. All these decisions examine the problem as religious discrimination; the fact that it might also amount to indirect gender-based discrimination (and ethnic discrimination) is not taken into account. The reason might be that in determining whether there is indirect gender-based discrimination, it has to be examined whether the measure in question pursues a legitimate aim in a proportionate way. Thus, the considerations used with respect to determining whether there has been direct discrimination on grounds of the claimant's religion will have to be referred to, again. Apparently, lawyers do not see any added value in using the concept of multiple discrimination in these cases.

4. Proof and procedural problems

As there is no pertinent case law, questions of proof or procedural questions have not arisen so far. In legal literature, commentators express the view that moral damages should be higher in cases of multiple discrimination than in cases of single-ground discrimination. This had already been the view expressed by the legislator. However, these commentators consider that this approach does not amount to multiplying the 'simple' moral damage by the number of grounds infringed (no doubling of moral damage in case of multiple discrimination based on two grounds, etc.).

5. Description of a specific case

Given the dearth of pertinent case law in Germany, no specific cases can be described here. In the view of this expert, it may be useful to consider the concept of multiple discrimination not by focussing on individual cases, but by looking at the policy-making level (both on the state level and on the institutional level, e.g. in companies, state bodies, etc.). It is submitted here that the particular added value of the concept of multiple discrimination, *viz.* intersectional discrimination, is that it emphasises that not all women are in the same situation, but that their identities are made up of other

[10000005003%26overview=true.htm](#), accessed 3 March 2009 (press release of the Wiesbaden Labour Court).

factors as well, which may, or may not, increase their risk of becoming the victim of discrimination. Hence, gender mainstreaming can be targeted much better if these differences between women are taken into account and if, consequently, promotional measures are designed to meet the needs of these particular groups. In the same vein, diversity management policies must always bear in mind that women form at least half of the group sharing a particular characteristic, and that, as a consequence, diversity management strategies must be gender-sensitive to be fully successful.

6. Effects of legislation and case law in practice

No surveys regarding multiple discrimination and the effects of legislation are available. The Director of the German Federal Anti-Discrimination Body (*Antidiskriminierungsstelle des Bundes*) expressed the intention of collecting information on anti-discrimination cases decided by German courts, but no such information has been published so far (the Equality Body was set up in 2007). Reportedly, a study on the occurrence of discrimination is underway, but again, no results have been published yet.

7. Role of equality bodies

The German Federal Anti-Discrimination Body (*Antidiskriminierungsstelle des Bundes*) has no power to initiate investigations in individual cases of alleged discrimination. It is only empowered to support persons who have contacted it alleging that they have been the victim of discrimination. This support may be in the form of general information on legal remedies, establishing contact of the alleged victim with institutions and providing help and advice. The equality body may also mediate a peaceful settlement between the parties. No such settlements have been reported so far. In the view of this expert, the Federal Anti-Discrimination Body should be more assertive and should make wider use of this latter power. The area of multiple discrimination appears to be particularly useful for such a pro-active approach, because most institutions or NGOs that provide support for alleged victims of discrimination follow the single-ground approach. Hence, they may not have much experience with cases of multiple discrimination, which might reach them in a haphazard way. In contrast, because of its horizontal approach, the Federal Anti-Discrimination Body is particularly well positioned to become the addressee of complaints of multiple discrimination and to develop expertise in this area. Although its activities in individual cases may require confidentiality, this would not prevent the Anti-Discrimination Body from publishing its findings of multiple discrimination (and its methods of determining the characteristics of multiple discrimination and the examination of possible justifications) in a way that respects this confidentiality.

8. Reinforcement of legal approach at EU level necessary?

In the view of this expert, it is too early to discuss ways of strengthening the existing legal protection against multiple discrimination at EU level. At this point, the concept is still too difficult to grasp. In particular, the question of possible justification is unclear (see under 11). At this point in time, it seems more promising to further the exchange between actors in the field of anti-discrimination law concerning their approaches to multiple discrimination, so as to institute a process of mutual learning. In addition, measures should be taken to make institutional actors (public and private actors in the areas covered by EU anti-discrimination law) more sensitive to the issue of multiple discrimination.

9. Community-law definition of multiple discrimination necessary?

A community-law definition appears helpful if it clearly distinguishes between the different types of multiple discrimination, which may require different approaches with respect to their determination and possible justification. However, an independent definition makes little sense; if the Community takes up the problem of multiple discrimination, it must deal with the concomitant questions, in particular the occurrence of direct and indirect discrimination on different grounds, justification, proof, procedure, and remedies (including sanctions). For this reason, it seems preferable to adopt a non-binding instrument defining multiple discrimination and to continue research on the issue before enacting legislation.

10. Available literature or research?

No literature or research on multiple discrimination is available.

11. Further research

In the view of this expert, further research is necessary as to methods for examining whether multiple discrimination is justified. In particular, it is unclear whether the approach as chosen by German law, i.e. to require that such discrimination must be justified with respect to every ground of discrimination involved, is appropriate or whether it leads to breaking up interconnected factors and hence does not fully grasp the impact of multiple discrimination. If the latter proves correct, methods for establishing a comprehensive understanding of the differentiation and its possible justification must be developed.

GREECE – *Sophia Koukoulis-Spiliotopoulos*

1. Concept of multiple discrimination in legislation

multiple discrimination is not explicitly prohibited in Greek legislation. Neither Act 3304/2005⁴² transposing Directives 2000/43⁴³ and 2000/78,⁴⁴ nor any other piece of legislation mentions multiple discrimination. This is also true for collective agreements (at least national general collective agreements, which fix minimum standards that are mandatory for all workers under a private-law employment relationship throughout Greece).

2. Case law

There does not seem to be any case law which recognizes discrimination on grounds of gender in conjunction with another ground of discrimination. If such case law develops, its added value would appear in both criminal and civil cases. Thus, in criminal cases, multiple discrimination can influence the determination of criminal sanctions. In particular where a minimum and a maximum sanction is provided, e.g. a criminal offence is punished with imprisonment of one to three years or with a fine of EUR 100 to EUR 500, in case of multiple discrimination, the court can impose a more severe sanction than for single-ground discrimination. Moreover, multiple

⁴² Act 3304/2005 ‘on the application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation’, OJ A 16/27 January 2005.

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

⁴⁴ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2 December 2000, p. 16.

discrimination may constitute more than one offence; in such cases, the criminal sanctions can be imposed accumulatively. In civil cases, the financial compensation consists in payment of the total of the actual damage (e.g. back pay or social benefits, plus legal interest). The added value can consist in the award of a higher compensation for moral damages due to multiple discrimination than for discrimination due to a single ground.

The Ombudsman, who is the Equality Body dealing with discrimination prohibited by Directives 2000/43 and 2000/78, as transposed by Act 3304/2005, and gender discrimination prohibited by Directive 2002/73,⁴⁵ as transposed by Act 3448/2006,⁴⁶ has recently successfully dealt with a case which he considered to involve a multiple-discrimination issue.⁴⁷ More particularly, a joint Ministerial Decision⁴⁸ provided that working (including self-employed) or unemployed mothers shall be granted places for babies, infants, children and adolescents in crèches, kindergartens and centres for the creative occupation of children, subject to certain conditions, including a means test. This action point was included in the framework of a more general campaign under the title ‘Harmonization of Family and Professional Life’, and in particular in its thematic axis ‘Measures of Support for the Promotion of Gender Equality in Employment’, and was financed by the European Social Fund.

According to the Joint Ministerial Decision, the above action shall be implemented by the ‘Workers’ Social Benefits Organization’ (OEE).⁴⁹ Consequently, the OEE issued a ‘Call for the Expression of Interest in the Implementation of Actions within the Framework of the Action “Harmonisation of Family and Professional Life”’. This call required, *inter alia*, that the beneficiaries of the action be Greek nationals or nationals of an EU Member State, a condition that was not laid down by the Joint Ministerial Decision. Following a complaint by an immigrant mother, who was a third-country national, the Ombudsman considered that this condition was incompatible with the character of the said action as part of European policies for promoting the social inclusion of immigrants, and in particular women immigrants, and combating multiple discrimination, and requested the cancellation of this condition. This issue was also raised by trade unions and MPs who tabled a question in Parliament. As a result, a new Call for the Expression of Interest was issued, which included explicitly ‘mothers who are foreigners from third countries and reside legally in Greece’ among the beneficiaries.⁵⁰

⁴⁵ Directive 2002/73/EC, OJ L 269, 5 October 2002, p. 15.

⁴⁶ Act 3488/2006 ‘on the implementation of the principle of equal treatment of men and women regarding access to employment, professional training and evolution, terms and conditions of work and other related provisions’, OJ A 191/11 September 2006.

⁴⁷ See the Ombudsman’s Press Release dated 24 September 2008, under the title ‘All foreign mothers legally residing in the country shall be granted benefits by the Workers’ Social Benefits Organisation’: http://www.synigoros.gr/allodapoi/news_archive.htm, accessed 20 February 2009.

⁴⁸ Joint Decision of the Minister of the Interior, the Minister of Economy, the Minister of Employment and Social Protection and the Minister of Health and Social Solidarity, No. οικ. 46855/1622 of 26 June 2008, OJ B No. 1186/26 June 2008, as amended by Joint Decision of the same Ministers No. οικ. 60460/2171 of 28 August 2008, OJ B No. 1739 of 28 August 2008: http://www.synigoros.gr/allodapoi/news_archive.htm, accessed 20 February 2009.

⁴⁹ Οργανισμός Εργατικής Εστίας (OEE), a public agency under the supervision of the Ministry of Employment and Social Protection, whose task is to implement social policy for financially weak and socially vulnerable groups and to financially assist the trade union movement. The OEE management board is composed of representatives of the State and employers’ and workers’ organisations; the OEE is financed by workers’ and employers’ contributions: <http://www.oee.gr>, accessed 20 February 2009.

⁵⁰ See http://www.oee.gr/docs/prosklisi_56396_4-9-2008.zip, accessed 20 February 2009.

3. Any cases where gender-related discrimination is overlooked?

We did not find any judicial decisions where gender-related discrimination was overlooked in favour of another ground of discrimination. However, there is a case that (to our knowledge) has not been ruled on yet, but that is making the headlines and has aroused strong reactions from trade unions and the general public. This case revealed that certain workers, mostly women and foreign women from (new) EU Member States and third countries, are employed in the cleaning sector under conditions of servitude. A Bulgarian woman, employed by one of the many firms which provide, as subcontractors, cleaning services to owners of buildings, to private undertakings and even to undertakings of the public sector, such as hospitals, transport companies etc., had become secretary general of a trade union of the cleaning sector whose members are women and was very active in fighting for the rights of her colleagues. She and her union publicly declared that these subcontractors violate collective agreements and legislation regarding minimum wages, hours, health and safety and other conditions of work, including dismissal, social security legislation and the right of association; that they use all kinds of pressure, blackmail and harassment and try to silence the workers by dismissing and blacklisting those who claim their rights or disclose their working conditions. They also declared that the main victims of these practices are foreign women who are under the constant fear of deportation, and drew attention to practices of deceit of the Labour Inspection. In December 2008, this woman was attacked by individuals who soaked her in vitriol. She is still in hospital, suffering from serious injuries.

This case and the cases of women who are in a similar situation seem to be dealt with as issues of gross violations of labour and social security law and uncontrolled flexibilization/deregulation of working conditions, in conjunction with intimidation, blackmail and attempts against the (physical and mental) integrity of the workers concerned, coupled with the inadequacy of controlling mechanisms,⁵¹ not as an issue of multiple discrimination.

However, it may be considered that there is indirect gender discrimination against female cleaners who are in the aforementioned situation (since women are the great majority of these cleaners) along with indirect discrimination on grounds of national origin (since most of the cleaners are foreigners, EU and third-country nationals) in matters of employment and social security. Harassment of these women may be considered direct gender discrimination along with direct discrimination on grounds of national origin. For female cleaners involved in trade unions, it may be considered that there is indirect gender discrimination, along with direct multiple discrimination in cases of harassment, as described above, and direct discrimination on grounds of beliefs and freedom of their expression.

More generally, these cases should be seen in the light of Paragraph 13 of the Preamble to Directive 2000/43 and Paragraph 12 of the Preamble to Directive 2000/78, in view of the objective of the gender equality directives and the directives prohibiting discrimination on other grounds. The growing presence of third-country nationals in the EU and the ensuing increasing risks of social dumping, widespread

⁵¹ See this and further information on this particular case and on the situation in the cleaning sector on the website of the woman's trade union, the 'Pan-Attican Union of Women Cleaners and Household Personnel' (PEKOP) (Παναττική Ένωση Καθαριστριών & Οικιακού Προσωπικού (ΠΕΚΟΠ): <http://pekop.formyjob.net>, and in a study of the Institute of Employment (INE) of the General Confederation of Labour (GSEE) and the Confederation of Civil Servants (ADEDY): INE, GSEE/ADEDY, *Labour Relations in the Cleaning Sector; Outcome of an Empirical Research* Athens January 2009: <http://www.gsee.gr/default.php>, both accessed 23 February 2009.

social exclusion⁵² and social unrest should also be taken into account. It should thus be considered that discrimination is prohibited not only against EU nationals, but also against third-country nationals on one or more of the grounds mentioned in Article 13 EC, and that the prohibited grounds of discrimination should be interpreted in a wide, teleological way.

4. Proof and procedural problems

The proof and procedural problems in multiple discrimination cases are, in principle, of the same nature as those in single-ground discrimination cases, but they may often be more serious. There are problems in respect of the burden of proof and the *locus standi* of organisations to pursue the claims of victims of discrimination. More particularly, the burden of proof rule was inadequately implemented by a Decree⁵³ which merely copied it from the Burden of Proof Directive,⁵⁴ although it should have been included in the Codes of Civil and Administrative Procedure,⁵⁵ therefore, this rule is unknown. The only known case where the issue was raised led to a preliminary reference,⁵⁶ which, however, does not seem to have encouraged other cases. Furthermore, the rule of Directive 2002/73 requiring *locus standi* of trade unions and other organizations to bring individual workers' claims before courts or other authorities was implemented by Act 3488/2006 transposing this Directive in the same ineffective way as the burden of proof rule, with the result that it is also unknown. Moreover, Article 12(2) of Act 3488/2006, which is meant to transpose the latter rule, restricts the scope of this *locus standi*: it provides that organisations may initiate cases before administrative authorities and intervene before such authorities in favour of victims of discrimination, but it does not provide that organisations may bring claims of victims of discrimination before a court; they may only intervene before a court in favour of a victim after the victim him/herself has initiated a judicial procedure. The victims of discrimination are thus deprived of the support of the organisations at the stage where they need it most, since they often do not dare bring their cases to court themselves. Another inadequacy of the transposition of the *locus standi* rule is that Article 12(2) of Act 3488/2006 requires the 'consent', while Directive 2002/73 requires the 'approval' of the victim. According to the Greek Civil Code (Articles 236-238), the 'consent' must be given before the action concerned, while the 'approval' can be given afterwards. If a 'consent' is required, the recourse may be time-barred before the consent is given and the judicial protection of the victim of discrimination will not be achieved. Similar inadequacies in respect of the burden of proof and the *locus standi* rules appear in Act 3304/2005 transposing Directives 2000/43 and 2000/78. As a result of the above inadequacies, in spite of well-known extensive gender and multiple discrimination in practice, only few gender discrimination cases and no multiple discrimination cases have been brought, the judicial protection of victims of both single-ground and multiple-ground discrimination thus being an illusion.⁵⁷

⁵² Cf. the repeated references to social inclusion and social coherence and solidarity in the Preamble of Directives 2000/43 and 2000/78.

⁵³ Presidential Decree 105/2003 'on the adaptation of internal law to the provisions of Directive 97/80/EC', OJ A 96/23 April 2003.

⁵⁴ Directive 97/80/EC, OJ L 14, 20 January 1998, p. 6.

⁵⁵ This is what the Council of State (Supreme Administrative Court) had recommended in its Opinion 348/2003, on the legality of the draft Decree.

⁵⁶ Case C-196/02 *Nikoloudi v Organismos Tilepikoinonion Ellados (OTE)* [2005] ECR I-1789.

⁵⁷ On these problems, see Sophia Koukoulis-Spiliotopoulos 'Greece', in European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* No. 1/2008:

5. Description of a specific case

As far as we know, the only case which was considered to be a multiple-discrimination case was the one dealt with by the Ombudsman, see under 2. In the Ombudsman's press release (the only text available regarding the handling of this case)⁵⁸ it is only mentioned that this case raised an issue of multiple discrimination, without any mention of the grounds. The Ombudsman may have considered that, since the action in question was implemented within the framework of the more general action 'Harmonisation of Family and Professional Life', and in particular within its axis 'Measures of Support for the Promotion of Gender Equality in Employment', the exclusion of third-country women constituted discrimination on grounds of family status and/or gender, all the more so as the harmonisation of family and professional life is recognized as a corollary to gender equality by the ECJ⁵⁹ and the Greek Council of State (Supreme Administrative Court).⁶⁰ The Ombudsman may also have considered that multiple discrimination resulted from the combination of the above ground(s) between them and with the ground of national origin.

The added value of a multiple discrimination approach, from a gender perspective, can be multiple: i) through multiple discrimination, gender discrimination can be addressed in all areas covered by the Directives that prohibit discrimination on grounds other than gender, even beyond the areas in which gender/sex is an explicitly prohibited ground of discrimination; ii) in a similar vein, positive measures in favour of women may be also taken in areas not covered by the gender directives;⁶¹ and iii) sanctions for multiple discrimination can be more severe, and therefore more effective, than sanctions for gender discrimination imposed individually (see under 2).

6. Effects of legislation and case law in practice

No effects of legislation and case law can be detected in practice, as long as there is neither legislation nor case law on multiple discrimination. However, the Ombudsman's intervention in the case that he considered to be a multiple discrimination case had very positive effects (see under 2).

7. Role of equality bodies

The case that the Ombudsman considered to be a multiple discrimination case (see under 2) proved that the role of the Ombudsman in tackling multiple discrimination may be very important, all the more so as persons belonging to vulnerable and disadvantaged groups are more willing to seek support from the Ombudsman, who is

<http://ec.europa.eu/social/main.jsp?catId=641&langId=en>, accessed 20 February 2009; Greek National Commission for Human Rights 'Remarks on the Bill "Implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation – Harmonization of existing legislation with Directive 2006/54/EC of the European Parliament and the Council, of 5 July 2006"': www.nchr.gr, accessed 20 February 2009.

⁵⁸ Press Release dated 24 September 2008: http://www.synigoros.gr/allodapoi/news_archive.htm, accessed 20 February 2009; Act 3304/2005 'on the application of the principle of equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation', OJ A 16/27 January 2005.

⁵⁹ Cases C-243/95 *Hill and Stapleton v the Revenue Commissioners and the Department of Finance* [1998] ECR I-3739; C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253.

⁶⁰ Council of State judgments Nos. 1 and 2/2006, referring to the ECJ cases mentioned.

⁶¹ Under the Greek Constitution, positive measures in favour of women are a 'must' for all state authorities, in all areas, even those not falling within EC jurisdiction. See Sophia Koukoulis-Spiliotopoulos 'Greece' in European Network of Legal Experts in the Field of Gender Equality, *European Gender Equality Law Review* No. 2/2008: <http://ec.europa.eu/social/main.jsp?catId=641&langId=en>

generally less formalistic than courts and other public authorities and whose intervention is free of charge.

8. Reinforcement of legal approach at EU level necessary?

At EU level, there does not seem to be an urgent need for reinforcement of the legal approach aimed at combating multiple discrimination. In particular, a new directive exclusively dealing with multiple discrimination will be of very doubtful added value, if not confusing. For the time being, it would be better to organise information for courts and other competent authorities, lawyers, trade unions and the general public, so as to raise awareness of situations where discrimination is based on more than one ground and thus bring such situations to light. Later, preferably on the occasion of the drafting of a recast directive bringing together the provisions of directives dealing with the Article 13 EC grounds, except gender/sex, an explicit, simple and clear prohibition of multiple discrimination (i.e. a prohibition of discrimination on more than one of the grounds mentioned in Article 13 EC) can be included in such a recast directive. A reference to multiple discrimination should also be made in the preamble of the new gender directives (as in the Preambles to Directives 2000/43 and 2000/78), including those relating to maternity and parental protection and those to be adopted on the basis of Article 13 EC, until a new recast gender directive is drafted.

At national level, it should be stipulated that multiple discrimination, i.e. discrimination on more than one ground, constitutes an aggravating circumstance in criminal cases as well as in the award of moral damages (see under 2).

9. Community-law definition of multiple discrimination necessary?

When a prohibition of multiple discrimination is included in directives, as suggested above (under 8), a simple community-law definition would be necessary (e.g.: multiple discrimination is discrimination on more than one prohibited ground'). The concepts of 'compound' and 'intersectional' discrimination, interesting and challenging as they may be, should better be left to legal theory, as they would not seem to help in practice; they would rather risk creating confusion.

10. Available literature or research?

There does not seem to be any specific literature or research available regarding multiple discrimination.

11. Further research

Further research regarding multiple discrimination is necessary at both EU and national level.

HUNGARY – *Csilla Kollonay Lehoczky*

1. Concept of multiple discrimination in legislation

Multiple discrimination, or the same phenomenon under any other name, is not explicitly prohibited by statutory legal instruments in Hungary. The total legal database of Hungary as valid in March 2009 includes only one regulatory document that mentions multiple discrimination: Parliamentary Resolution 10/2006 (16 February 2006) OGY on the National Disability Programme for the years 2007-2013 contains, in its Appendix (the description of the Programme), a fairly vague reference to disabled women or disabled people belonging to ethnic minority

groups who ‘might be exposed to multiple discrimination’. For this reason, the text adds, it is held as an important principle for the programme that the various measures shall be ‘designed on the basis of individual needs’. The little information available on the implementation of this Parliamentary Resolution, does not reveal whether and how this ‘principle’ was realized.

2. Case law

Article 8 of the Hungarian Equality Act prohibits discrimination on a number of grounds. It explicitly lists 19 grounds, such as gender, ethnic origin and age. The last syllabus adds the 20th ground as ‘another situation, attribution or condition (hereinafter together: characteristics)’. This will be referred to as ‘other ground’. This ‘other ground’ has been interpreted broadly. With 20 grounds of discrimination, one would expect that cases where more than one ground are relevant occur frequently. In practice, such multiple discrimination has not been acknowledged yet. The multiplication of grounds is not acknowledged by the legal practice.

While there have been numerous cases where a claim was submitted on multiple grounds, in which sex was coupled with another ground (age and sex, family status and sex, ethnicity and sex), no decisions are known where the administrative authority’s decision or the court decision explicitly found multiple discrimination. Therefore, the multiple (sometimes only potentially multiple) grounds of discrimination could not be reflected in increased sanctions or damages.

No cases are known where multiple discrimination – gender together with another characteristic recognized as the ground of discrimination – would have led to more serious consequences. Although there are many cases, the multiplicity of grounds is never addressed, or it is overlooked. However, this frequently happens because the victim herself fails to include reference to one of the grounds; e.g. discrimination is claimed due to ethnicity or age, while the sex of the victim might have contributed to the discriminatory measure, even if this element remained covered.

‘Compounded discrimination’ is widely known, e.g. in discrimination against Roma women, who are not only discriminated against as Roma, and not only discriminated against within their own ethnic group as women, but rather discriminated against as ‘Roma women’ (e.g. they get even less assistance against domestic violence than the already unsatisfactory assistance provided in cases of violence against women, because the violence is considered to be ‘part of their culture’), or in their discrimination connected to reproductive health problems. This type of discrimination is addressed by politicians in general statements, but not addressed by concrete measures.

3. Any cases where gender-related discrimination is overlooked?

When both gender and age are raised in the complaint, the ETA more readily accepts discrimination on the basis of age, and the gender aspect usually remains in the background. Again, it is also true that women are more willing to refer to grounds other than that of gender. In one case, a travel agency dismissed three women over fifty. Discrimination on the ground of age was found by the Authority and confirmed by the court. The issue of gender was not considered, although it might have played a role (with special regard to the fact that the pensionable age in Hungary was 55 for women before the pension reform, and thus women over 50 were in the specially protected ‘pre-pension’ age). In another case, No. 57/2006, the representative body of dismissed public employees contacted the ETA, submitting the claim that a collective redundancy measure applied by a certain state agency primarily affected women,

older employees, and those employees who were raising children as single parents or were taking care of a sick family member. In spite of the lack of proper authorization of the trade union, the ETA carried out an investigation *ex officio*. On the basis of the data and figures supplied by the employer, the Authority concluded that there was no violation on the basis of any of the grounds mentioned by the trade union.

The slightly hesitant attitude of the ETA towards discrimination on multiple grounds is also clear from the fact that in other cases which involved a double ground (usually a combination of a classic ground and a so-called ‘other ground’), the ETA in most cases found discrimination on the ‘other ground’ and dropped the ‘classic’ (gender) one. Interestingly, however, the case described above appears under both grounds – the accepted and the rejected one – in the Authority’s case-law records, in which cases are classified on the basis of the characteristic that was the ground of the discrimination complaint. (Not surprisingly, the records include no ‘box’ yet for multiple-ground cases.)

4. Proof and procedural problems

The burden of proof has not yet been reversed in practice, although this is an explicit requirement in the Equality Act. Although formally the burden of proof is on the discriminating actor, this rule is not applied as strictly as it would be in other cases; the discriminating actor is required to show a major likelihood of non-discrimination rather than to prove non-discrimination in a way that excludes the opposite. This does not only characterize the Authority, but the courts as well, and is illustrated by the cases described above, where information and data were accepted from the employer with almost no questions asked.

In case 534/2006, a job applicant claimed that she was rejected due to her age and sex. The ETA rejected the claim on both grounds because the employer certified that they had nearly three times as many female employees as male employees, and that there had been no questions in the job application form regarding age.

5. Description of a specific case

The ETA issued an interesting decision in case 2076/2007, in which a female employee wanted to resume work in her original executive position during her ‘childcare leave’⁶² and was rejected with reference to the termination of the position (which proved false later). She was offered a lower position, suggesting that ‘it can be done from home’. She claimed before the ETA that she was discriminated against on the ground of her family status (having two small children). The ETA found discrimination on a double ground, on the basis of family status and on the basis of ‘another ground’, namely her original executive position. This case calls attention to the higher likelihood of being discriminated against on the ground of ‘traditional’ reasons when the victim is in a (higher) position that is not common or regular for her group. In other words, the combination of traditional gender-related grounds (sex,

⁶² A somewhat peculiar legal situation in Hungary is that, in order to promote the increase of female employees on the labour market, legislation has made it possible for women on ‘childcare leave’ to take a job, either part time or full time, with their original employer or with another employer, thus converting the former income-compensatory childcare allowance into an almost merely financial grant. Still, women retain their status of ‘being on childcare leave’, in the sense that they are protected against dismissal and that they retain their right to return to their original job after the expiry of the childcare leave. Previously, they had the right to work without losing the benefit, but not the right to return to their original job.

pregnancy, raising children) with ‘other’ grounds is more likely, if the concept of ‘another ground’ is interpreted broadly.⁶³

6. Effects of legislation and case law in practice

No systematic information is available on multiple discrimination in Hungary. There are declarations, plans, programmes – e.g. declaring the importance of discovering facts about multiple discrimination – but no targeted survey has been made public yet. There are scattered statements about the social facts, mainly the multiple discrimination of Roma women.

In addition to political statements on the importance of the matter, some private individuals and NGOs have published information. NANE and PATENT (two major Hungarian NGOs for the combat of violence against women) published a book on their 2008 litigation cases, which describes a case where sex and health condition were multiple grounds, underlining the multiple discrimination element. In one case they represented a woman, whose serious injuries caused by the husband evidenced repeated violence by the husband, whose emotional threats were also proved. The wife’s deteriorated condition caused her psychiatric problems. When, after two years, the court (which was reluctant to decide on a restraining order in the long-stretched procedure, facilitating the continuation of intimidating violence) asked for a psychological expert opinion, it was regarding *the battered wife*, to ascertain whether her mental condition made it impossible for her to act rationally, whereas the man, who admitted that he used battery as a regular way to ‘discipline’ his wife, was not examined for any psychiatric or mental disorder.

7. Role of equality bodies

Equality bodies (ETA in Hungary) can promote general awareness of multiple discrimination, provided that they themselves are aware of it and also of hidden forms of multiple discrimination. Their case procedures and case law should automatically check incoming cases for possible multiplication of grounds and, within their powers, assist complainants if their complaint would not extend to grounds that are present in the documents.

Raising awareness is a major objective. Awareness of lawyers adjudicating incoming cases could be more aware of the possibility of multiple discrimination and its role in the fight for equal treatment. However, I attach greater importance to detecting multiple discrimination and clarifying this type of discrimination and its grounds in unusual situations, as described above under 5 or below under 8. As the concept of multiple discrimination becomes generally accepted, related case law may gradually develop.

8. Reinforcement of legal approach at EU level necessary?

In my view, the phenomenon of multiple discrimination is more a problem of not properly addressing ‘simple’ discrimination, especially when it is combined with serious social segregation, as is true for disabled people and the Roma. (Programmes on ‘health food’ cannot be efficient, until starvation is the main problem.)

On the other hand, I think that it would also be useful to focus on multiple discrimination – which, in spite of all rhetoric is still treated as a peripheral issue – in order to attract more attention to other discrimination areas that are also treated as less

⁶³ It is impossible to analyse here whether the ETA’s case law exceeds the boundaries of discrimination on ‘other grounds’.

central (if not peripheral), e.g. discrimination on the ground of age or sexual orientation. For example, if the issue of elderly homosexuals or homosexual disabled people were addressed, this might bring a breakthrough in the less-addressed issue of discrimination on the ground of sexual orientation.

9. Community-law definition of multiple discrimination necessary?

The definition needs further clarification and specification, together with the also existing term of ‘diagonal’ discrimination.

10. Available literature or research?

Not on Hungary, but on a situation similar to situations in Hungary, Enikő Magyar-Vince has published a study among Hungarian-speaking Roma in a Romanian (Transylvanian) town, addressing the lack of reproductive health and freedom due to their educational, social and economic disadvantages.⁶⁴

11. Further research

The detection and proper treatment of multiple discrimination cases could be somewhat promoted by specially recording such cases in the judicial and/or in the administration system. Perhaps systematic research at European level would be too early at this stage; not much more could be addressed there than in the research paper mentioned in the introduction of the questionnaire.

ICELAND – *Herdís Thorgeirsdóttir*

1. Concept of ‘multiple discrimination’ in legislation

The Constitution of Iceland does not address the concept of multiple discrimination as such. Article 65 of the Constitution contains the main basis of legal protection against various forms of discrimination. Under this provision, everyone is equal before the law and enjoys human rights irrespective of gender, religion, opinion, ethnic origin, race, colour, property, family origin or ‘other status’. The wording ‘other status’ is to refer to other grounds that may be the source of discrimination such as physical condition or health, according to the explanatory report with the amendments to the Constitution. There is no indication that it was meant to cover the possibility of discrimination based on a combination of grounds, but neither is this excluded. The non-discrimination principle is above all a policy statement which is not to be interpreted too narrowly or literally without taking into consideration the conditions affecting peoples’ lives and which therefore takes into account the necessity to assist by legislation those whose conditions need to be corrected in order to achieve greater equality. Hence the concept of multiple discrimination may be derived from the principle of non-discrimination in the Constitution.

2. Case law

No cases have been brought before the Gender Equality Complaints Committee or the courts concerning multiple discrimination or the intersection of gender discrimination with other grounds of discrimination.

⁶⁴ Enikő Magyar-Vince *Social exclusion at the crossroads (of ethnicity and gender)*; <http://www.policy.hu/news/Magyar-Vincze-PS/10>, accessed 2 April 2009.

3. Any cases where gender-related discrimination is overlooked?

There are no cases that I know of. The extent and depth of gender discrimination is such that gender-related violations are probably often treated as breaches of other statutes and regulations, rather than violations of a fundamental human right.

4. Proof and procedural problems

As there are no cases regarding multiple discrimination, no problems regarding proof or procedures can be reported.

5. Description of a specific case

See under 2 above.

6. Effects of legislation and case law in practice

The term 'multiple discrimination' is relatively new and it is not a legal concept or rooted in legal discourse yet. There have been discussions on the forum of the academia on women with disabilities, but these have not been prominent enough to attract general attention to the problem. The term mainly seems to be familiar to those who are actually dealing with the problem in practice, such as in the cases of immigrant female workers on the forum of NGOs. There are attempts to raise awareness of their rights, as many of them find themselves in a situation of excessive dependence on their employers and many are victims of domestic violence.

A working group established by the Minister for Social Affairs has issued its recommendations on implementing EU Directive 2000/43 implementing the principles of equal treatment between persons irrespective of racial or ethnic origin and EU Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. This working group has suggested *inter alia* that the Centre for Gender Equality should have a staff member to offer objective assistance to those who have allegedly been discriminated against on the basis of multiple discrimination.

7. Role of equality bodies

In addition to monitoring the application of the Gender Equality Act, the Centre for Gender Equality supervises educational and informational activities and makes suggestions and proposals to the Minister of Social Affairs and other government authorities regarding measures to achieve gender equality. As is usually the case, the creativity of and initiatives taken by institutions like the Centre for Gender Equality, an institution under the control of the Government, depend on the people running such bodies. Research may go unnoticed and conferences may not attract the attention needed to create social response and legislative developments. In my view, it is essential for bodies such as the Centre for Gender Equality to maintain a high profile in the media, in order to call attention to various problems such as multiple discrimination. Taking an active stance with immediate analysis when cases/situations occur that reflect the worst sides of multiple discrimination ought to be the task of equality bodies, as nothing grasps public attention to societal problems as much as shocking news stories do.

The Centre for Gender Equality and other local bodies have recently applied for funding from the EU PROGRESS programme in the area of employment and social affairs. The aim is to prepare an educational programme for immigrant women. If this project goes through, it will be the first activity by the Centre potentially encompassing aspects of multiple discrimination.

8. Reinforcement of legal approach at EU level necessary?

Reinforcement at EU level might best be served by encouraging discussion on understanding human rights in a wider context, taking into account that in order to enjoy civil and political rights one first needs economic and social rights. A contextualized approach will place less emphasis on the discriminatory ground itself and more on the overall response from society. An analysis of discrimination that takes into account the actual realities of people's lives and social context of discrimination may be a much more effective method to reinforce equality in general than even more complex legislation. The aim should be to fully realize a contextual approach to discrimination that includes multiple and intersecting grounds.

9. Community-law definition of 'multiple discrimination' necessary?

A Community-law definition is not necessarily required. It may constitute a limitation or restriction to the complex reality of multiple discrimination, if the objective is to minimize the legislative hurdles created by separate non-discrimination statutes. A more fundamental re-conceptualization of what constitutes discrimination may better serve the objective of equality.

10. Available literature or research?

A recent survey has been conducted on prejudice, but the results have not been published yet.⁶⁵ There are no articles in Icelandic legal journals on the topic of multiple discrimination.

An Icelandic author who has addressed the issue is Professor Rannveig Traustadóttir, department of social sciences, University of Iceland. She has discussed various aspects of discrimination and social exclusion, disability etc.

11. Further research

What is necessary is a more fundamental re-conceptualization of what constitutes discrimination. The vulnerability of individuals facing multiple discrimination is caused by the instability of their economic, social and even political position. Therefore, it seems essential to expose human rights abuses of women vulnerable to multiple forms of discrimination in order to promote legal reform.

IRELAND – *Frances Meenan*

1. Concept of multiple discrimination in legislation

The Employment Equality Act 1998 prohibits discrimination on nine separate grounds, namely gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community.⁶⁶ This Act was amended by the Equal Status Act 2000, the Equality Act 2004, and the Civil Law (Miscellaneous Provisions) Act 2008.⁶⁷ These Acts apply only to discrimination in relation to employment, vocational training, access to employment and pay and conditions of employment. This Act, which repealed earlier legislation, transposes Council Directive 75/117/EEC, Council Directive 76/207/EEC, Council Directive

⁶⁵ Information from the Director of the Multicultural Centre in Reykjavík.

⁶⁶ The community of people commonly so called, who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

⁶⁷ Employment Equality Acts 1998 – 2008.

97/80/EC, Council Directive 2000/43/EC, Council Directive 2000/78/EC and Council Directive 2002/73/EC. The 1998 Act was structured in order to give more importance to the gender ground with general provisions prohibiting discrimination, but also two specific parts: Part III stipulating specific provisions as to equality between men and women, and Part IV stipulating specific provisions as to equality between other categories of persons.

The Pensions Acts 1990 to 2004 prohibit discrimination in respect of access to pension schemes etc., and the Equal Status Acts 2000 to 2008 prohibit discrimination in respect of the provision of goods and services on the same nine grounds.⁶⁸

‘Multiple discrimination’ is not defined in Irish legislation. The legislation provides in practice that a person who claims discrimination on a certain ground must compare their difference with that of somebody else on the same ground, e.g. two persons of the opposite sex, so that one is a man and the other is a woman, or for example on the marital status ground, where two persons have a different marital status. There is no ‘compound’ discrimination where each ground adds to another ground. Each ground is a separate case which must be pleaded and defended; the grounds cannot be looked at collectively.

It must be noted that the concept of multiple discrimination or multiple grounds of discrimination are considered on a ‘ground by ground’ basis. This approach has been in operation for nearly ten years in Ireland.⁶⁹ The term ‘intersectionality’ should perhaps be considered so that there is a clearer understanding of the term multiple discrimination.⁷⁰ The fact that grounds of discrimination are not mutually exclusive is also important. *Harvey on Industrial Relations and Employment Law*⁷¹ states that ‘A single act may give rise to more than one wrong’. The approach in Ireland, however, is to initiate proceedings under each ground and plead it separately. Recent statistics about such numbers of claims are as follows:

Referrals on multiple grounds before the Equality Tribunal:⁷² 67 cases in 2003; 71 cases in 2004; 95 cases in 2005; 98 cases in 2006 and 113 cases in 2007.⁷³

Appeals from the Equality Tribunal before the Labour Court: 8 cases in 2005 and 10 cases in 2006. The 2007 Annual Report does not state the number of cases with multiple grounds, but does state that a number of cases had one or more ground.⁷⁴

2. Case law

When a prospective claimant is bringing proceedings before the Equality Tribunal⁷⁵ they complete a Claim Form (Form EE.1), and in Part 3 of that form prospective claimants are asked to ‘tick box (yes) as appropriate’ and then all the nine grounds are set out. Accordingly, a person specifically claims under one ground and/or any other

⁶⁸ All Irish legislation is available at www.irishstatutebook.ie, accessed 20 April 2009.

⁶⁹ For example see *Doyle v Jury's Doyle Hotel* DEC-P2009 – 001, where the issue of access to pension schemes for a long-serving part-time female employee was considered separately on the gender ground and on the age ground. There had been an earlier prohibition on part-time employees joining the scheme.

⁷⁰ *Equality Law in an Enlarged European Union – Understanding the Article 13 Directives*, p. 5, Helen Meenan (ed.), Cambridge University Press 2007.

⁷¹ Division L, Equal Opportunities 6, LexisNexis.

⁷² Gender-related claims may be referred to the Circuit Court. Such figures are not available, as they are lodged in the court offices throughout the country. The numbers are very small, however.

⁷³ Source Annual Reports; www.equalitytribunal.ie, accessed 24 February 2009.

⁷⁴ Source Annual Reports; www.labourcourt.ie, accessed 24 February 2009.

⁷⁵ Cases are referred to the Equality Tribunal where by agreement the parties may go to mediation. If mediation fails or if the parties do not wish to go to mediation, the claim is assigned to an equality officer for investigation; www.equalitytribunal.ie

ground. Of course, they must set out particulars of each and every ground that they are claiming under.

On reference to the Equality Tribunal, the complaint is investigated on each and every ground. In respect of each ground there must be a *prima facie* case and each ground is investigated separately. Inevitably, there may be cases where either party is not satisfied with the investigation and/or decision of the Equality Tribunal or the Labour Court, but this does not affect the statutory provision that each and every ground must be considered separately.

3. Any cases where gender-related discrimination is overlooked?

If there is a specific complaint on the gender ground, such complaint must be investigated separately as is the case for each and every ground of alleged discrimination. It is important to note that unless a claim on the gender ground is initiated there cannot be an investigation on the gender ground.

4. Proof and procedural problems

If facts are established by or on behalf of a claimant from which it may be presumed that there has been discrimination, it is for the respondent to prove to the contrary.⁷⁶ In a case where there are a number of cases of alleged discrimination, the claimant will have to initially show a *prima facie* case of discrimination and then the burden of proof will shift to the respondent. Proofs required to establish a *prima facie* case were dealt with in *Lawless v Eurozone Investment Options Ltd*⁷⁷ where the claimant claimed on the grounds of gender, marital status and family status in relation to dismissal. The respondent denied the claimant's allegation of discrimination and submitted that her employment was terminated in circumstances where the sales jobs undertaken by the claimant and others were being outsourced because the respondent's Managing Director wished to reduce his workload. The Equality Tribunal stated that the claimant in order to satisfy the burden of proof must prove the primary facts on which she relied to raise a presumption of unlawful discrimination. The facts as established would have to have raised a presumption of unlawful discrimination and a presumption that she was less favourably treated than a male and/or that she was less favourably treated than someone with a different family status in relation to the dismissal. As the equality officer considered that the claimant had failed to satisfy the burden of proof, she had therefore failed to establish a *prima facie* case and the burden of proof therefore did not shift to the respondent.

In another case, the Labour Court on appeal overturned one particular recommendation where it considered that an equality officer dealt with the three grounds of discrimination of marital status, family status and age as one issue. The equality officer's recommendation did not show how the claimant was directly discriminated on each of the grounds.⁷⁸

5. Description of a specific case

The recommendation in the case of *Doyle v Jury's Doyle Hotel*⁷⁹ concerns a claim that the employer indirectly discriminated against the complainant on the grounds of her gender and age contrary to Section 66(2) of the Pensions Acts 1990 to 2008 in not giving her access to her employer's pension scheme pursuant to Section 70 of the Act.

⁷⁶ Section 85A of the 1998 Act and see also *Southern Health Board v Mitchell* [2001] ELR 201.

⁷⁷ E2007 – 010.

⁷⁸ *Freeman v Superquinn* DEC-E/2002/13; www.labourcourt.ie, accessed 24 February 2009.

⁷⁹ DEC- P2009 – 001 and available at www.equalitytribunal.ie, accessed 30 March 2009.

The complainant commenced employment with the respondent in 1975 as a member of the banqueting staff, together with a group of other female employees with varied hours of work. In time they were called ‘permanent casual staff’. In 1995 she enquired about joining the pension scheme, but was not allowed as she was not a permanent full-time employee. However, she was allowed to join the respondent’s scheme for Additional Voluntary Contributions (a separate private scheme⁸⁰) in 2002. In the year 2000, she enquired again about joining the pension scheme and was told that even though her category of employee was now allowed to join the main scheme, she could not because she was over 50 years of age. At this time, there was one woman in her group of employees who was below 50. She maintained that she was indirectly discriminated against. The issue for decision before the Equality Tribunal was the question whether she was discriminated against on the basis of gender or age. Two issues arise in determining whether the complainant was subjected to indirect discrimination on grounds of gender, namely which group of employees constitutes her comparator group and what is a ‘particular disadvantage’. It was held that the group should be all part-time staff employed by the respondent at the material time, as all these employees were barred from joining the scheme. In percentages, 42.8 percent of part-time workers were male and 57.2 percent were female; thus a differential of 14.4 percent. It was considered that this differential did not establish a ‘particular disadvantage’ for the complainant. The Equality Tribunal considered that it would only take a small number of jobs to be staffed by men instead of women to achieve a parity of genders. This could easily happen with normal fluctuations as permanent part-time staff were employed throughout the hotel’s operations. Thus, it was held that there was not a *prima facie* case based on gender. The Equality Tribunal noted that part-time employees as a group may have been discriminated against but that it was not because of their gender.

The Equality Tribunal then turned to the age ground in relation to the application in the year 2000 to join the pension. Section 72(1) of the Pensions Act 1990 (as amended) permits pension schemes to fix an age or a period of qualifying service as a condition or criterion for admission into the scheme, where in the context of the relevant employment to do so is appropriate and necessary by reference to a legitimate object of the employer, provided that it does not result in unequal treatment on the gender ground. In short, it was held that the fact that the complainant was over 50 years by the time the respondent, in compliance with the Protection of Employment (Part-Time Work) Act 2001, admitted its part-time workers to the scheme to be coincidental. It was considered that there was not a *prima facie* case of discrimination on the age ground.

This case highlights the problem of multiple or intersectional discrimination. In addition, it emphasises some of the problems of past discrimination of part-time workers who were mainly women. In Ireland each ground of discrimination under the Employment Equality Acts 1998 to 2008 or under the Pensions Acts 1990 to 2008 has to be pleaded and proved separately. However, even if successful the maximum award can only be two years’ remuneration. It is interesting that there is no reference in the recommendation to multiple discrimination nor indeed to any statistics in the wider workforce in respect of indirect gender discrimination and age. There is also no linking of the two grounds of discrimination or of considering the one ground together. Furthermore there is no reference to EU Directives, but the Equality

⁸⁰ In practical terms an extra top-up arrangement for employees, frequently used by employees in a pension scheme to get enhanced pensions.

Tribunal did rely on *Bilka – Kaufhaus*.⁸¹ The Tribunal also distinguished *Bilka* from the present case by noting in *Bilka* that the employees had to have 15 years of full-time service to be able to enjoy the benefits of the pension scheme, a condition which was much harder to fulfil for female employees than it was for male employees. In the present case, however, the part-time employees were simply not allowed to join the scheme at all. Whilst this case is not the most perfect example of intersectional discrimination, it highlights the difficulties that may arise.

6. Effects of legislation and case law in practice

Commencement of proceedings: the commencement of proceedings before the Equality Tribunal is by way of Form EE1, which asks prospective claimants to ‘tick’ boxes in respect of each and every ground that they are claiming under and then set out the particulars of their claim under each and every ground. If a prospective claimant wishes to bring a claim on the gender ground, then at their request the matter may be referred to the Equality Tribunal where there is a maximum of two years gross remuneration in respect of redress, or alternatively a reference to the Circuit Court where there is no ceiling in respect of an award of discrimination.⁸² However, if the claimant wishes to bring proceedings under two or more grounds the choice of venue is more problematic, because technically they can bring proceedings before the Circuit Court on the gender ground and before the Equality Tribunal on the age ground. This can result in two hearings. In practice, when a claimant is bringing a claim on the gender ground and also on another ground, it is usually decided to bring it before the Equality Tribunal even though there is a two-year ceiling on the gender ground. Of course, this results in the prospective claimant waiving their right to a higher level of compensation on the gender ground. The Judge of the Circuit Court can avoid two hearings by referring a question back to the Equality Tribunal and therefore arguably the Equality Tribunal can investigate and prepare a report for the court.⁸³

Ceiling on compensation award: in the event that a claimant is successful in proceedings on two or more grounds or where the situation included both discrimination on one or more than one of such grounds and harassment or sexual harassment, there is a ceiling of two year’s remuneration which may be awarded by the Equality Tribunal. Such limit does not apply in respect of an equal remuneration term.⁸⁴ However, if there is a reference to the Circuit Court on the gender ground, this limit on compensation does not apply.

Gender, marital status and family status grounds: if a claimant brings a claim on these grounds and if the employer is regarded as indirectly discriminating against an individual on the marital status or family status ground and is also regarded as discriminating on the gender ground, the employer shall be regarded as indirectly discriminating on the gender ground only.

7. Role of equality bodies

The Equality Authority has been to the fore in respect of diversity in the workplace. As recently as November 2008, it published an action strategy for integrated workplaces supported by the employer bodies and trade unions. This is an action plan to enable Black and minority ethnic employees (to include Travellers) to work in a

⁸¹ ECJ 61984J0170, 1986.

⁸² In respect of equal remuneration, the award may go back six years.

⁸³ Section 79(4) of the 1998 Act.

⁸⁴ Section 82(6)(b) of the 1998 Act as amended.

welcoming workplace, free from discrimination and harassment, and providing for cultural and linguistic diversity.⁸⁵ Other awareness campaigns include avoidance of stereotyping across the nine grounds.⁸⁶ The Equality Authority have advised and or represented claimants with multiple claims before the Equality Tribunal and the Labour Court, but given the current considerable cutbacks this may no longer be possible.

8. Reinforcement of legal approach at EU level necessary?

There might be merit in a recast or consolidation of the employment directives. The concept of ‘compound’ discrimination could also be considered in respect of redress, for example. Older women may be more vulnerable to discrimination, yet for example a successful claimant on the gender and age ground may only be awarded two years’ remuneration which is little compensation if a woman loses her job at, say, the age of 59 with no employment or pension prospects.

9. Community-law definition of multiple discrimination necessary?

It is submitted that at national level, with the exception of some procedural difficulties, the application of legislation with multiple grounds is relatively satisfactory. However, difficulties can arise in respect of ‘intersectional discrimination’, e.g. age and gender or race and religion. A definition of multiple discrimination or ‘intersectional discrimination’ would be useful, with the clarification that a claim brought on a number of grounds shall be investigated together as a ‘compound ground’ and that a *prima facie* case does not have to be proved on two grounds, therefore taking the two grounds together to prove a *prima facie* claim. However, the issue of redress on each and every ground may be addressed in order to avoid the Irish difficulty.

10. Available literature or research?

The Equality Authority published a document entitled *2007 European Year of Equal Opportunities for All – A national strategy for Ireland*. The priorities are multiple discrimination, an approach to multiple discrimination in relation to women and to include gender mainstreaming as a strategy for the year 2007. A report entitled *The Experience of Discrimination in Ireland – Analysis of the QNHS Equality Module* was published jointly by the Equality Authority and the Economic and Social Research Institute.⁸⁷ This report results from the ‘Research Programme on Equality and Discrimination’ carried out by the Central Statistics Office in 2004. Discrimination was defined as including all of the nine grounds, but it also showed examples of discrimination on a number of grounds, and across a range of social contexts, both in the workplace and in respect of goods and services. As many as 24 600 people were surveyed and all grounds of discrimination. Of the perceived grounds of discrimination, age-related discrimination was the most commonly reported (19 %) followed by race/ethnicity/nationality (16 %) and sex (12 %). In respect of women and men, women were more likely to report discrimination on marital and family status grounds and to a lesser extent on the gender ground. 45 % of reports of gender-based discrimination came from men predominantly in relation to financial services. Whilst the data does not provide the information, the report suggests that young men

⁸⁵ <http://www.equality.ie/index.asp?locID=109&docID=744>, accessed 24 February 2009.

⁸⁶ E.g., *Give Stereotyping the Boot* <http://www.equality.ie/index.asp?locID=106&docID=746>, accessed 24 February 2009.

⁸⁷ Dublin, 2008.

interpret higher motor insurance premiums on the basis of their age as discrimination. Age, nationality/ethnicity and disability were more commonly cited by men as the perceived grounds of discrimination. The report notes that with regard to the gender and age grounds, women were more likely to feel that they have been discriminated against at work than men, namely 5.7 % compared to 4.1 %. This difference remains when it is corrected for socio-demographic statistics including marital status, family status and job characteristics.⁸⁸ The Equality Authority published *An Introduction to the Situation and Experience in Ireland*.⁸⁹

11. Further research

There may be further research, but it would be of an empirical nature as opposed to a legal nature.

ITALY – *Simonetta Renga*

1. Concept of multiple discrimination in legislation

Multiple discrimination has entered our legislation in the extremely simplified form of double discrimination. The only references to it are in legislative decrees nos. 215 and 216 of 2003, transposing Directives 43/2000 and 78/2000, and in the corresponding delegation act. In particular, Article 1 of Decree No. 215/2003 provides that the implementation of equal treatment irrespective of race and ethnic origin must take place ‘also in a perspective that takes into account the different impact that the same forms of discrimination can have on women and men, and the existence of forms of racism with a cultural and religious character’; this formula is repeated in Article 7 of the Decree, where the tasks of the National Office against Racial Discrimination (UNAR) are defined. In this respect, the Decree fulfils the guideline provided by Delegation Act No. 39/2002, which in Article 29 requires that the implementation of Directive 43/2000 take into account the existence of discrimination on the double ground of gender and race and ethnic origin. A similar concept of multiple discrimination is provided by Article 1 of Decree No. 216/2003, which states that the implementation of equal treatment, irrespective of religion or belief, disability, age or sexual orientation, as regards employment and occupation must be carried out in a ‘perspective that also takes into account the different impact that the same forms of discrimination can have on women and men’. Multiple discrimination, therefore, is not properly defined and it is perceived by the legislator only as an intersection between the grounds of gender and other discriminatory factors.

2. Case law

There is a group of cases in which gender could be recorded in combination with another ground of discrimination. These are cases where reaching the pensionable age or the possibility to rely on early retirement are used as a criterion for redundancy. In our system, the pensionable age, and consequently the age of early retirement, is lower for women than it is for men, although women can choose to keep working until the age provided for men. This means that the criterion of reaching the age of retirement, irrespective of the lower pensionable age of women, is discriminatory both

⁸⁸ On page 15. Note, however, that this difference is smaller than earlier studies in relation to pay would suggest. It was also noted that men felt that they were more likely to have been discriminated against in respect of job search.

⁸⁹ 2006; <http://www.equality.ie/index.asp?locID=106&docID=577>, accessed 24 February 2009.

on the ground of gender and age, as it causes women to be dismissed at a younger age and earlier than men, despite the fact that women can choose to keep working until the retirement age provided for men. Nevertheless, the case law that deals with this issue, which is very limited, is absolutely unaware of the hypothesis of multiple discrimination. Therefore, there are cases where the criterion of reaching retirement is regarded as discriminatory exclusively on grounds of age, the gender ground being ignored (*Tribunale Milano* 27/4/2005) and cases where the existence of gender discrimination is denied and the age ground is not taken into consideration at all either (*Cassazione* No. 9866/2007; *Cassazione* No. 20455/2006; *Tribunale Genova* 30/9/1997).

3. Any cases where gender-related discrimination is overlooked?

As described above, gender-related discrimination has been totally ignored or denied by the limited case law on the redundancy criteria of approaching the age of retirement or early retirement, irrespective of the lower pensionable age of women. This despite the fact that the Constitutional Court had declared it unlawful, for violation of the equality principle, that the notional contributions paid to women for the purpose of retiring earlier are lower than those of men; this decision has neutralized the consequences of the different pensionable age between men and women, in relation to the discipline of early retirement (cases No. 371/1989 and No. 134/199). The reason why gender discrimination is often overlooked goes hand in hand with the reason why only few discrimination cases are initiated: lack of awareness of anti-discrimination legislation among the judiciary and lawyers; a widespread lack of trust regarding the effectiveness of anti-discrimination legislation; difficulties of proof; and absence of a policy of leading cases. This cautious attitude in applying anti-discrimination legislation is also evident in the cases where courts recognised the right of non-EU residents to social security disability benefits, although denied by the local authorities because they did not have a 'green card', by using other legal tools such as the non-retroactive nature of the new standard that banned these residents from benefits, rather than by recognising multiple discrimination on the grounds of nationality, disability and sometimes age (*Cassazione* 29 May 2007, No. 12605; *Tribunale Trento*, 11 November 2004; *Tribunale Verona* 22 May 2006). As described above, the Constitutional Court recently intervened, declaring unlawful some of these standards on the double ground of nationality and disability (case No. 306/2008; case No. 432/2005).

4. Proof and procedural problems

The case law mentioned above does not go into any problems of proof, procedural issues or questions related to comparisons.

5. Description of a specific case

There are no cases of multiple discrimination involving gender discrimination and one or more other grounds of discrimination in our case law.

6. Effects of legislation and case law in practice

There is no information available regarding multiple discrimination and the effects of legislation and case law in practice in Italy. A study has recently been carried out on multiple discrimination. This study has a sociological character and is based upon perceptions of persons at risk of multiple discrimination. It attempts to formulate a definition of multiple discrimination as 'a phenomenon that, rather than depending on

people belonging to a group, is rooted in the structure of societies'; according to this definition, 'multiple discrimination does not concern the individual person or his/her group or the intersection between groups, but it is caused by the fact that society as a whole gives rise to several forms of discrimination that involve different social groups and persons'. The report stresses the interviewees' perceptions of the inadequacy of social services in handling cultural differences: the reasons of discrimination are perceived to be essentially cultural and rooted in a lack of education and information rather than in a lack of legislation.⁹⁰

Another study, on gender discrimination at the workplace, is a trade union social policy study and contains a chapter on multiple discrimination. This research underlines the importance of the intersection between gender discrimination and race/ethnic discrimination in relation to the immigrant workforce and identifies empowerment of civil society and of multicultural associations as well as the acknowledgment of basic social rights as the appropriate instruments to prevent social exclusion.⁹¹

Moreover, on 9 and 10 October 2008, Equinet (European Network of Equality Bodies), with the support of the EU Commission and of the Department of the National Office against Racial Discrimination (UNAR), held a training seminar in Rome, entitled 'How do we understand Multiple Discrimination and can we work to tackle it?'. The presentations of the members of UNAR at the seminar are available on the Internet.⁹²

7. Role of equality bodies

As regards tackling multiple discrimination (or better double discrimination, see under 1), the only equality body that could play an active role is the UNAR, recently set up under Decree No. 215/03 to promote equality and to tackle all forms of discrimination grounded on race or ethnic origin in all fields (employment and non-employment). Article 7 states that the UNAR shall perform its tasks 'also in a perspective that takes into account the different impact that the same forms of discrimination can have on women and men, and the existence of forms of racism with a cultural and religious character'. All other equality bodies operating in the field of gender discrimination are exclusively involved in this specific field both formally (i.e. under the Code for Equal Opportunities) and in actual fact.

Moreover, the very small number of cases, the limited dissemination of information on this matter and the lack of an institutional link between UNAR and the other bodies are probably the main factors reducing its intervention in tackling double (race/ethnic origin and gender) discrimination to a marginal aspect of its activity. The UNAR Report 2007 to Parliament on the effectiveness of the instruments to tackle race discrimination underlines the possible multiplying effect of cross-discrimination and the opportunity to broaden the grounds of discrimination that UNAR can take into account.⁹³ In fact, for instance, discrimination on the grounds of religion and personal opinion is very similar to discrimination on the grounds of race and ethnic origin but

⁹⁰ Antidiscrimination European Networks, Progetto Antenne 2001-2002, with the support of the European Commission, *Rapporto di ricerca sulla discriminazione multipla*, edited by Claudio Baraldi, Università di Modena e Reggio Emilia, on www.comune.modena.it/antenne/reports/RapportoFinaleMonitoraggio.pdf, last accessed 21 February 2009.

⁹¹ *Rapporto discriminazione di genere nei luoghi di lavoro*, CGIL, Roma, 2004, Chapter IV, on www2.no-discrim.fr/web/xmedia/etudes/NDp2ItalieEenI.pdf, last accessed 21 February 2009.

⁹² <http://www.pariopportunita.gov.it/DefaultDesktop.aspx?doc=2035>, last accessed 21 February 2009.

⁹³ http://www.pariopportunita.gov.it/Pari_Opportunita/UserFiles/II_Dipartimento/UNAR/Notizie/relazione_2007.pdf, last accessed 23 February 2009.

cannot be analysed as double discrimination, as Decree No. 215/03 only provides for a generic reference to ‘the existence of forms of racism with a cultural and religious character’. From a general point of view, the introduction of the right to bring actions directly to court and of the right to conduct official inquiries is also underlined as important necessary changes. Representing individuals in ‘leading cases’ would strengthen the effectiveness of the UNAR’s intervention, giving this body more visibility and authority, also in the pre-judicial but crucial stage of attempted conciliation or of giving advice. The UNAR Report 2007 also points out the necessity to coordinate positive action aimed at social inclusion and positive action in the employment field.

Actually, apart from the obvious consideration that any change aimed at strengthening the powers of UNAR, which is the only equality body charged, although partially, with tackling double discrimination, would be a step forward, it is not easy to say in general which role equality bodies could play exactly in tackling multiple discrimination.

The present situation shows a number of organisations which act in different fields with different powers, on the one hand, and no organisation charged with tackling discrimination on the grounds of religion or belief, disability, age or sexual orientation in employment and occupation, on the other hand. A more active and effective role of equality bodies in tackling multiple discrimination seems to depend mainly on the extension of the grounds of discrimination to be taken into account and on the attribution of this competence to one particular body, which would thus be enabled to analyse the specificity of these cases. The model of equality bodies provided by the Code for Equal Opportunities, which is well tried and structured, could be followed to add new competencies, on the condition that proportionate human and financial resources are allocated.

In this respect, it is very important to ensure that the equality body charged with tackling discrimination, including multiple discrimination, forms part of a coherent system, which would allow to exploit all different organisations already playing a role in this field (social parties, associations, public employment agencies, labour inspectorates etc.) as well as guarantee the independence of the body from the Government, which is even more crucial, considering that certain grounds of discrimination are less politically ‘neutral’ than gender.

Nevertheless, although combining all grounds of discrimination under the competence of one single equality body seems the appropriate choice to tackle multiple discrimination, this raises doubts regarding the risk of intervention in the employment field being mixed with intervention in other fields. The risk is that all interventions become muddled in too wide a scope of objectives. This could lead to the contact with the specificity of the discrimination in the employment relationship being lost. A similar objection could probably be made against mixing gender with other grounds of discrimination. Moreover, concentrating all competencies in one organisation to tackle multiple discrimination needs a complex reorganisation. The risk is, again, that of losing some of the *acquis* in terms of resources and rights, as regards different kinds of discrimination, first of all the gender ones.

8. Reinforcement of legal approach at EU level necessary?

The lack of legislation against discrimination outside employment and occupation on the grounds of age, disability, religion/belief and sexual orientation is a problem when these grounds are combined with existing grounds, because this does not allow the grounds being argued in an intersected or additive way, as is required in multiple

discrimination hypotheses. Furthermore, the fact that the two Anti-Discrimination Directives provide for an exhaustive list of discriminatory grounds rather than for an open list of prohibited factors does not promote protection against multiple discrimination.

In my view, plans should be made for the introduction, perhaps through a dedicated directive, of specific provisions to tackle multiple discrimination, such as: a definition of multiple discrimination; standards regarding the burden of proof and regarding comparison; provisions on the award of damages, including moral damages; provisions geared to explicitly address the competence of national equality bodies to assist the victims of multiple discrimination, and consequently supplying them with the necessary human and financial resources; and provisions for the development of positive tasks and actions in the area of multiple discrimination as well as of equality mainstreaming in public and private sectors. A dedicated directive, rather than spider-web changes to existing directives, would have the advantage of avoiding the loss of all *acquis* as regards each single ground of discrimination. I am afraid that a softer approach, for example, only by mainstreaming or by positive action, would be insufficient to promote domestic legal and judiciary developments. Finally, at a more general level, gender policies and non-discrimination policies should not be kept separate, because this does not promote the development of coordinated action to tackle discrimination and, in particular, endangers those intersections and communication across the various grounds that are necessary to recognise the combined effect of different grounds of discrimination.

9. Community-law definition of multiple discrimination necessary?

One of the reasons why the Italian judiciary and legislation fail to address multiple discrimination is the lack of explicit provisions in domestic legislation. Lawyers generally tend to choose the strongest ground to argue their case before court and to leave out the grounds which are difficult to prove either singularly or in combination. Most of the time they do not even consider the possibility of arguing on the basis of more than one ground. Thus an EU definition of multiple discrimination and a specific prohibition of it to be implemented by national legislation would be crucial to introduce into domestic legislation the protection against this form of discrimination. It would also raise awareness of the problem among public authorities and the judiciary and this would enhance the protection for individuals and groups experiencing multiple discrimination. Moreover, an EU definition of multiple discrimination would play an important role in creating a common understanding of the concept, as has happened before in relation to concepts contained in the Race and Employment Equality Directives.

10. Available literature or research?

Literature and research on multiple discrimination is very limited in our country. The theoretical elaboration of this concept has only just begun.

The following are social policy and legal essays that contain paragraphs on multiple discrimination or refer to double discrimination:

- O. Bonardi ‘Le discriminazioni basate sull’età’ in: Marzia Barbera (ed.) *Il nuovo diritto antidiscriminatorio* pp. 168-169, Milano, Giuffrè 2007, ISBN 88-14-12907-X.
- D. Gottardi ‘Le discriminazioni basate sulla razza e sull’origine etnica’ in: Marzia Barbera (ed.) *Il nuovo diritto antidiscriminatorio* pp. 24-28 Milano, Giuffrè 2007,

- ISBN 88-14-12907-X, on <http://www.donatagottardi.net/appunti.htm#pub>, last accessed 21 February 2009.
- D. Gottardi ‘Dalle discriminazioni di genere alle discriminazioni doppie o sovrapposte: le transizioni’, *Giornale di diritto del lavoro e delle relazioni industriali* 2003 p. 447, ISSN 1720-4321, on www.donatagottardi.net/testi/dalle_discriminazioni.doc, last accessed 21 February 2009;
 - C. Ingrao ‘Differenza di genere e razzismo’ in: *Donne, migrazioni, diversità. L'Italia di oggi e di domani, Commissione nazionale per la parità* Roma, Istituto Poligrafico dello Stato 2002, ISBN 9788824035255.
 - IRES, *Combattere le discriminazioni delle donne immigrate. Progetto europeo Codelfi*, Working Paper No. 16, Luglio 2001, on training.itcilo.it/esf/tantetinte/docs/discriminazione_donne_migranti.doc, last accessed 21 February 2009.
 - P. Patel ‘Discriminazione razziale e discriminazioni di genere’ in: *Donne, migrazioni, diversità. L'Italia di oggi e di domani, Commissione nazionale per la parità* Roma, Istituto Poligrafico dello Stato 2002, ISBN 9788824035255.
 - C. Romany, *Razza e differenza di genere: una rilettura del diritto internazionale*, on http://www.dirittiumani.donne.aidos.it/bibl_1_temi/g_indice_per_temi/razzismo/d_romany.html, last accessed 21 February 2009.

11. Further research

In a country such as Italy, where multiple discrimination is currently overlooked, further research at European and national level would be crucial in order to increase the capacity to recognize and identify it and to raise awareness of the problem. Research initiatives ought to be targeted at raising awareness amongst decision makers, public authorities and the judiciary. Research should develop the conceptual tools to analyse multiple discrimination in all its forms and to identify the intersectional groups where it is likely to manifest itself. Moreover, as one of the obstacles to the recognition of multiple discrimination is the so-called ‘single-ground approach’, which appears to be very frequent in Italian legislation, case law and literature, research should be aimed at constructing a comprehensive approach geared to putting an end to the segmentation and the hierarchical appraisal of discriminatory grounds and promoting intersections and communication across the various grounds in order to recognise the combined effect of different grounds of discrimination on the victim. Research should address not only the problem of how to process intersectional cases, but also the issues of the burden of proof and that of comparison regarding multiple discrimination hypotheses. Another question to be answered ought to be that of how damages in cases involving two or more grounds should be assessed.

LATVIA – *Kristīne Dupate*

1. Concept of multiple discrimination in legislation

Multiple discrimination is not explicitly prohibited by statutory legislation.

2. Case law

There is no case law in Latvia in which the concept of multiple discrimination would have been recognized as such. However, there have been three relevant cases dealing with discrimination on two grounds – one decided by the national court, one reviewed by the National Equality Body, and one by the Constitutional Court.

In one case, the national court recognized discrimination on two separate grounds.⁹⁴ This was the case where a Ms Stūriņa was dismissed from the post of stoker, because, as the court established, the employer (a municipality) considered this profession as a 'male' profession, thus 'females should not have to stoke anymore'. In addition, the national court discovered that there was another reason why a particular male person was employed instead of Ms Stūriņa. It was because the employer considered that his pay was low in another job. In the provisions on discrimination grounds, Latvian Labour law explicitly provides for the prohibition of discrimination on the grounds of property status. Based on this, the national court decided that Ms Stūriņa had been discriminated against on two grounds: sex and property status.

Another case where multiple discrimination was found was reviewed by the National Equality Body (Ombudsman Office). This case was about gender and age harassment during a recruitment procedure. Mr O., a middle-aged male applied for the published position of waiter in a rest house. During the job interview, the employer announced that she expected to employ 'young girls, because waiters working in rest houses must be very quick and guests want to see young girls as waiters'. When the case was brought before the Ombudsman Office for investigation, they found multiple discrimination and decided to represent Mr O. before the national court (because the National Equality Body in Latvia may make legally non-binding recommendations only, but may also represent a person's interests before the court in discrimination cases). After this, the parties reached an amicable settlement. Because of this, no national court has analysed whether multiple discrimination is compound or intersectional. It seems that in this case, discrimination was intersectional, although statistics in general do not reveal any evidence that middle-aged men would experience a disadvantage in the labour market in comparison to young girls, rather the opposite. In addition, it is more likely that this case was more about age discrimination, because of the stereotype that the profession of waiter is more appropriate for young persons. This makes it likely that in this situation middle-aged female candidates would not have been successful either.

The third case was decided by the Constitutional Court of Latvia and could also be considered as relating to multiple discrimination.⁹⁵ In 2003, the Constitutional Court delivered a decision on the compatibility of the Civil Services Law stipulating an age limit for the civil service (until retirement age) with the Constitution of Latvia, and on the compatibility of the same provision of the Civil Services Law with the Law on State Pensions stipulating different retirement ages for men and women with the Constitution. The claimant was a civil servant who was dismissed from the civil service at the age of 58 because she became entitled to the old-age pension, while if she had been male this would have been four years later, at the age of 62.

The Constitutional Court found, first, that the age limit for civil servants is compatible with the Constitution on the condition that in each case it is possible to prolong service based on the decision of a head of institution or minister, and second, that the Law on State Pensions in conjunction with the Civil Services Law is not discriminatory on the grounds of sex. This is because the different retirement ages for men and women are stipulated by transitional provisions of the Law on State Pensions, envisaging progressing equalization of the retirement age for both sexes by 2008, but the current norms of the Law on State Pensions provide for the same

⁹⁴ Decision of the Cēsis District Court of 5 July 2005 in case No. C 11019405, not published.

⁹⁵ Decision in case No. 2003-12-01 'On the Conformity of Section 41 (Item 1, Sub-item 'f') of the State Civil Services Law with Articles 91, 101 and 106 of the *Satversme* (Constitution)', available in English on <http://www.satv.tiesa.gov.lv/upload/2003-12-01E.rtf>, last accessed 20 April 2009.

retirement age. Accordingly, this is a problem of proper application of the law, rather than the Law itself. The Court concluded that within the meaning of the Civil Services Law, the equal retirement age must be applied as provided by the basic text of the Law on State Pensions.

In all of these cases, discrimination grounds were addressed separately. The reason is simple: Latvian law does not explicitly provide for the concept of multiple discrimination and the knowledge of Latvian lawyers on discrimination in general is weak, because this concept was only introduced by the implementation of EC law.

Gender as a discrimination ground was explicitly identified in all three cases, but there is a lack of analysis whether the gender aspect has any connection to or impact on the other discrimination ground. This could be true in the case of Ms Stūriņa, where property status was involved with regard to the male person employed after Ms Stūriņa. There are strong stereotypes in Latvia about the male as the bread winner, thus they should be supported when looking for extra work.

In the case of Mr O., the grounds were intersected. This was recognized by the Equality Body, but due to the lack of a legal basis for claiming multiple discrimination before a court, it was prepared as referring to multiple discrimination but still dealt with addressing each ground separately.

So far, the multiple character of discrimination has not resulted in higher sanctions.

3. Any cases where gender-related discrimination is overlooked?

Cases where gender-related discrimination was overlooked have not been identified among the publicly available decisions. However, there are several decisions of the Constitutional Court on child-care allowance⁹⁶ and child-care allowance for a disabled child⁹⁷ where the gender-discrimination aspect was not reviewed.

4. Proof and procedural problems

Problems with comparators appear in intersectional discrimination cases, because of the lack of a clearly defined comparator. Since Latvian law provides for ‘copy out’ of definitions of EU non-discrimination directives, there are requirements for the comparator and comparability of the situations within the framework of only one discrimination ground.

In Mr O.’s case, for example, the court addressed the two discrimination grounds separately, because of the lack of legal doctrine on comparators with more than one discrimination ground.

5. Description of a specific case

Nothing to report.

6. Effects of legislation and case law in practice

There is no information available (e.g. surveys) regarding multiple discrimination and the effects of legislation (if any) and case law in practice in Latvia.

⁹⁶ Cases No. 2005-09-01 and No. 2006-07-01.

⁹⁷ Cases No. 2006-08-01 and No. 2007-15-01.

7. Role of equality bodies

Currently only the National Equality Body is expressly aware of multiple discrimination. However, due to restricted financial means, it will not be possible in the near future to conduct any research of multiple discrimination on a national level.

The National Equality Body could start discussing the existence of multiple discrimination and represent the interests of the victims of discrimination before national courts. However, while there are no explicit provisions in national law prohibiting multiple discrimination, there is little chance of being able to address two or more grounds simultaneously.

8. Reinforcement of legal approach at EU level necessary?

There is an obvious necessity for EU law to provide a definition of multiple discrimination.

I believe that the definition of multiple discrimination must be included in all EU non-discrimination directives, although difficulties will arise with regard to incoherent coverage of the fields where discrimination is prohibited. It follows that a definition of multiple discrimination may be provided only in the field of employment for all grounds and with regard to the access to and supply of goods and services relating to sex, race and ethnic origin.

A definition of multiple discrimination by EU law would provide a legal basis for the concept under Latvian law.

9. Community-law definition of multiple discrimination necessary?

For Latvia, a community-law definition of multiple discrimination would be the best solution, because discrimination law is new here. Consequently, Latvia still has some problems with the proper and effective enforcement of the current provisions of EC law in the field of discrimination, and there has not been any legal or political debate on the necessity to combat multiple discrimination.

10. Available literature or research?

No literature or research is available on a national level on multiple discrimination in Latvia.

11. Further research

Further research is necessary both at EU and at national level, because of the different social contexts of the Member States (composition of population) and the regions of the EU (e.g. Western and Eastern Europe). Western Europe, for example, has many immigrants from Africa and Asia, which involves not only ethnic but also religious aspects, while in Eastern Europe, the population is more homogeneous, but still with its own specific aspects, such as a large Russian-speaking minority, the majority of whom do not possess Latvian citizenship.

In my opinion, the most important legal aspect regards the issue of comparators and comparability of situations. A definition must be provided of multiple discrimination, allowing intersectional comparators.

LIECHTENSTEIN – *Nicole Mathé*

1. Concept of multiple discrimination in legislation

Statutory legislation in Liechtenstein includes no explicit prohibition of multiple discrimination .

2. Case law

No gender-related multiple discrimination cases have been found.

3. Any cases where gender-related discrimination is overlooked?

Such cases have not occurred yet in courts.

4. Proof and procedural problems

No such particular problems can be reported at the moment.

5. Description of a specific case

No such specific case can be reported.

6. Effects of legislation and case law in practice

No specific effects because of lack of legislation and case law can be reported.

7. Role of equality bodies

According to information given on the homepage of the equality bodies, it seems that no specific approach exists in dealing with multiple discrimination. My impression is that different grounds are only dealt with separately. I did not even receive a reply to my direct question put by email to the manager of the Equality Office concerning multiple discrimination. In my opinion, the equality bodies should raise awareness among all stakeholders involved regarding the issue of multiple discrimination and should start dealing with multiple discrimination cases.

8. Reinforcement of legal approach at EU level necessary?

Yes, this will be necessary to promote national legislation and case law.

9. Community-law definition of multiple discrimination necessary?

Yes, this will be necessary to give more input and motivate national legislators and courts to regulate the matter.

10. Available literature or research?

No such specific literature or research is available in Liechtenstein.

11. Further research

This is highly necessary in order to make all stakeholders involved aware of the issue of multiple discrimination.

LITHUANIA – *Tomas Davulis*

1. Concept of multiple discrimination in legislation

Lithuanian legislation does not contain any definition of multiple discrimination.

2. Case law

No cases on multiple discrimination have been brought so far.

3. Any cases where gender-related discrimination is overlooked?

On 30 June 2008, the Court of the First Instance in Vilnius announced its decision in a landmark case on the discrimination against a woman of Roma origin (Case No. 2-1189-545/2008). The case was the first significant case where under strong evidence of refusal to employ a person on discriminatory grounds the court had to apply national legislation in conjunction with equality legislation and EC directives. The employer had refused to employ a female candidate in the position of washer and was ordered to pay her the minimum wage for the period from the day of unlawful refusal to employ until the day of her actual employment by another employer and to compensate non-material damage. The discrimination against race and ethnic origin was proved with no reference to the sex of the victim. However, it is still unclear whether the situation constituted a case of multiple discrimination, since successful candidates were Lithuanian females of a similar age. The Office of Equal Opportunities that is familiar with the notion of multiple discrimination actively participated in the litigation.

In general, the phenomenon of multiple discrimination is not even considered due to the lack of knowledge and understanding of the definition and, more importantly, of its manifestation.

4. Proof and procedural problems

No case law is available.

5. Description of a specific case

There have not been any cases, so a description of a specific case is impossible.

6. Effects of legislation and case law in practice

No surveys or reports are available. In her Annual Report, the Ombudsperson of Equal Opportunities only referred to the notion of multiple discrimination as a general term, alleging that there 'may be' multiple discrimination of sex and age in conjunction; in the labour market, older women are less competitive than the men of the same age and it is more difficult for them to find a job. The same applies for young women; their employment and career options are more restricted due to possible future pregnancy or parental leave. However, no particular studies or cases were presented.

7. Role of equality bodies

So far, the Office of Equal Opportunities has only supported a small number of conferences and public events devoted to multiple discrimination. The topic was declared as one of the Office's priorities in its 2007 call for proposals for financing of antidiscrimination projects and a small number of supported projects have been devoted to the issue.

8. Reinforcement of legal approach at EU level necessary?

Yes, the definition of discrimination based on sex should also include cases of multiple discrimination.

9. Community-law definition of multiple discrimination necessary?

Yes, this would definitely cover some important areas, such as discrimination of older or younger women.

10. Available literature or research?

There is no literature or research available.

11. Further research

Further research should address the following issues:

1. use of multiple comparisons;
2. use of specific justifications and exceptions for different grounds;
3. cumulative effect of application of provisions on discrimination on different grounds; and
4. levels and principles of damages awarded in cases of multiple discrimination.

LUXEMBOURG – Anik Raskin

1. Concept of multiple discrimination in legislation

In Luxembourg, there is no explicit prohibition of multiple discrimination.

2. Case law

There are no cases to be reported in which a combination of grounds of discrimination was addressed.

The national equality body has been operational since December 2008. Until now (February 2009), the *Centre pour l'Égalité de Traitement* (Centre for Equal Treatment) has been consulted on about 30 demands. No complaints for multiple discrimination have been registered yet.

3. Any cases where gender-related discrimination is overlooked?

Considering that there is no case law on multiple discrimination, it is impossible to answer this question.

4. Proof and procedural problems

As there is no case law, problems of proof and procedural problems cannot be identified.

5. Description of a specific case

As there is no case law, no description can be provided.

6. Effects of legislation and case law in practice

Multiple discrimination is a concept which is rarely addressed in Luxembourg. However, actions on multiple discrimination are regularly taken mainly by NGOs which try to raise awareness on the subject. If the concept is addressed, it generally appears in relation with the gender perspective. Problems encountered by specific groups such as disabled women or migrant women have for example been addressed by exhibitions or conferences on national level. But there are no specific surveys or publications available on the subject.

7. Role of equality bodies

The *Centre pour l'Égalité de Traitement* launched a media campaign in February. Although the main aim of this campaign is to give public visibility to the Centre itself, the messages which are disseminated may also raise awareness on multiple discrimination, as each message refers to two or more discrimination grounds. As the equality body only started its activities a few months ago, multiple discrimination has not specifically been addressed. At the moment, its main concern is organizing and fixing procedures and informing people on existing legislation.

According to the law, the *Centre pour l'Égalité de Traitement* may conduct surveys on discrimination. Multiple discrimination could be one of its future research fields. As the national equality body is concerned with the six grounds of discrimination protected by EU law, it appears that it is the ideal platform to address multiple discrimination.

8. Reinforcement of legal approach at EU level necessary?

On the national level, considering that current legislation on discrimination is only used very little, by victims or by legal professionals, adding specific legislation on multiple discrimination may appear to make no much sense. One may assume that the national equality body will contribute to motivating victims and legal professionals to change their attitude, but even if so, this will probably take a few years. However, a legal provision consisting in obliging the equality body to provide figures on multiple discrimination could be useful.

Further reinforcement of legislation on multiple discrimination could even cause confusion and risk enhanced lack of motivation on proceedings in Luxembourg. As courts and tribunals are not familiar with anti-discrimination law, introducing specific legislation on multiple discrimination could result in a reinforcement of the hierarchy of grounds. In a general way, people seem to react to visible discrimination. As an example, a survey from the *Centre pour l'Égalité de Traitement*, which will be published in April 2009, shows that the respondents are oversensitive regarding discrimination on the grounds of race and disability. Excepting the pay gap, discrimination on the ground of sex does not seem to be perceived as very worrying. Reinforcing legislation on multiple discrimination could emphasise this tendency by relating sex discrimination to second ground added to a first ground which could be perceived as more important.

This hierarchy was instituted by excluding sex discrimination from the fields of media and education in the access to and supply of goods and services. There are no such restrictions on the five other grounds. As a result, one could assume that sex discrimination could be perceived as less worth to be protected.

9. Community-law definition of multiple discrimination necessary?

The concept of multiple discrimination is perceived as not very clear, even by professionals in the anti-discrimination field. Before providing a Community-law definition, parties involved have to be aware of the concept in order to avoid counterproductive interpretations. On a national Luxembourg level, gender equality seems to have been weakened during the last few years. Focusing on multiple discrimination as a legal provision could even amplify this tendency, because as a result, inequality between women and men may be perceived as not being 'sufficient' to identify a certain situation as discrimination.

Currently, courts, lawyers and victims can already invoke other grounds apart from gender, and such invocation should clearly remain a subsidiary option.

10. Available literature or research?

There is no specific literature or research on multiple discrimination in Luxembourg.

11. Further research

Research on multiple discrimination should be encouraged. It could be important to analyze the opinion and the awareness of different crucial parties involved, such as courts, lawyers, equality bodies, government departments in charge of anti-discrimination legislation, social partners and NGOs. It could also be interesting to analyze how law professionals currently deal with discrimination in general and with multiple discrimination in particular. Finally, it would certainly be interesting to focus on the effects of the recognition of multiple discrimination by courts and equality bodies. Does multiple discrimination call for higher sanctions and what would be the implication of such an approach?

MALTA – Peter G. Xuereb

1. Concept of multiple discrimination in legislation

In Malta, multiple discrimination is not defined, nor is it explicitly prohibited in non-discrimination law. It is clear that discrimination on any one of the grounds mentioned in any piece of legislation that prohibits discrimination on more than one ground (for example, regulation 1 of the Equal Treatment in Employment Regulations of 2004, Legal Notice 461 of 2004, as amended) is prohibited, and that such legislation often uses the cumulative ‘and’ rather than the alternative ‘or’. However, it can be deduced from the subsequent provisions (or lack of specific provisions) in the body of the legislation that the assumption is that the grounds are to be ‘operated’ or ‘called in’ (by a claim or a complaint) singly. This interpretation is supported by the fact that much of the legislation was passed in order to implement the corresponding Community Law, itself formulated in a ground-specific way. In the above example of the Equal Treatment in Employment Regulations, these were enacted in order to give effect to the relevant provisions of Council Directives 2000/78, 2000/43 and then, by later amendment, Directive 2006/54. However, on the other hand, there is no legal principle that would prevent a person claiming discrimination on a number of different grounds. There is no case law on this point.

2. Case law

The issue of multiple discrimination as such has not come up before the courts. Without heightened awareness among the legal profession, I suspect that claims would be made on a number of grounds where several were suspected as possible grounds singly or even cumulatively, but that in any case they would be treated with a leaning towards a ‘single-ground’ approach in the same way as has happened in other jurisdictions that do not make any special provision for multiple discrimination. This is speculation and could well not be the case with heightened awareness of the work that has been done in some Member States on the concept. However, the law is not designed in such a way as to invite a multiple-ground claim by potential claimants or a multi-ground approach by the courts. Nor do the most recent reports of the National Commission for the Promotion of Equality (the NCPE), the national equality body, make reference to multiple discrimination as a concept. The latest annual report of

that body, published in February 2008 and covering the year 2007,⁹⁸ listed complaints under two headings only and separately, namely ‘gender’ and ‘race’, reflecting its broadened brief since the latter’s extension to race besides gender, in virtue of the Equal Treatment of Persons Order 2007.⁹⁹ Of course, there is general awareness of the concept of multiple discrimination within the equality body, but it cannot yet be said that a policy has evolved in relation to it.

3. Any cases where gender-related discrimination is overlooked?

There are no such cases known.

4. Proof and procedural problems

There have been no cases where this has been raised as an issue. In general, at the level of principle, the law is consistent on each of the grounds, except that there is no shifting of the burden of proof in the case of disability under the Equal Opportunities (Persons with Disability) Act of 2000 (Chapter 413, Laws of Malta).

However, at one step removed from the courts, a matter that has a bearing on this point is that Malta still has no single equality body, which means that different grounds fall under the competence of different ‘bodies’. The NCPE has no remit over disability nor, for the ground of race or ethnic origin, for employment matters. Of course, this is one side of the same coin that applies in reverse in relation to the other bodies covering those grounds and areas. This can effectively mean that a ‘holistic’ or ‘multiple’ approach – or indeed even an unproblematic ‘simultaneous’ approach (that is a ‘single-ground approach’ for two or more grounds in a separate way) – cannot be taken under the current set-up in many cases. The relevant procedures would be those set out in the relevant legislation, and this legislation is doubly compartmentalised, that is, it is compartmentalised both by ground and also by area (for example, employment, self-employment, access to services, education). This remains the case, although recent years have seen a harmonisation of definitions and burden of proof rules. The key problem remains that the distribution of functions across different equality bodies renders the making of a ‘multiple discrimination case’ difficult in the absence of a liaison between them that currently does not exist, and that arguably cannot exist without a restructuring of the system in the sense of the creation of a single equality body.

5. Description of specific case

There have been no decisions in cases that can serve as illustration. However, the multiple discrimination concept, and the approach devised to deal with its manifestations in reality, are arguably vital for properly addressing the full range of possible discrimination against women and helping women who are particularly vulnerable on account of the co-mixture of different factors or characteristics. There is no doubt that there is much room for analysis of the situation faced by minority ethnic women, by ethnic minority women of different religion, by older women seeking to enter/re-enter the labour market, and other permutations. A comprehensive study needs to be commissioned with a view to applying existing state of the art knowledge and research on multiple discrimination to the Malta case.

⁹⁸ Available at www.gov.mt, accessed 20 February 2009.

⁹⁹ Legal Notice 85 of 2007, as amended by Legal Notice 267 of 2007.

6. Effects of legislation and case law in practice

Besides the Eurobarometer surveys, which provide some scant information, there have been few surveys or similar studies touching on these issues.¹⁰⁰

7. Role of equality bodies

The NCPE has not been given, formally speaking, an explicit brief to cover multiple discrimination. It originally had a gender brief only. This was extended to race in 2007 (see above), but this was to the exclusion of employment matters, so that discrimination in employment matters on the ground of race was entrusted to the Department of Employment. This would make it difficult (well nigh impossible) for the NCPE to take a ‘multiple ground’ approach in the key case of alleged multiple discrimination in an employment context in relation to a key type of possible victim, namely a woman of different race, even though it has the remit both for gender and for race. Nor is it competent in the area of disability (another body is so designated). It is clear, from a multiple discrimination perspective, that the NCPE should be considered as a candidate to become a single equality body and that its brief should span all areas as well as grounds – and at the least all the areas for the grounds with which it is charged. At the moment, it has no brief regarding disability. Nor is there any equality body for age or sexual orientation. Yet sexual orientation is already giving rise to litigation in a private/family context, and in the light of what the Gay Rights movement has called ‘growing homophobia’ (as more LGBT persons ‘come out’) the argument for a single equality body with an all-embracing brief is certainly one that will become stronger. This being said, it is not intended here to pre-empt the debate – a debate that will have to happen sooner or later, and one that I hope that this report will bring forward – on the ‘pros’ and ‘cons’ of that particular result. At the moment, therefore, it cannot be said that the NCPE, or the equality body for disability, has any great role in this context. However, the NCPE has made a start with raising public awareness about the concept in some of its television spots, even without a formal brief. It is certainly adept at this form of action. A single equality body could take this sort of action even more comprehensively.

8. Reinforcement of legal approach at EU level necessary?

At EU level: In my view, a strong case can be made for action at EU level. At some point, Community law should clearly mention and prohibit multiple discrimination *per se* and in all contexts. Harmonisation in this area is deeply desirable on the same principle that justifies EU level action on the single grounds. It would be crucial in ensuring the application of a common definition(s) of multiple discrimination, which I advocate in principle, although much attention will need to be given to the substance of the definition. While further study is needed before proposals on the detailed content of any such measure were made, I would advocate the inclusion in such a measure of clear provisions on the questions of proof and of penalty, the content of which should flow from the full analysis of the nature of the phenomenon; for example, it might be that the penalty issue needs to be formulated other than with an ‘aggravated element approach’ (main ground aggravated), or even with more than a cumulative approach (double etc. penalty for discrimination on two or more grounds), on the basis that some other approach (the ‘inter-sectional’ approach) is indicated.

At national level: The experience of some Member States with legislation that expressly addresses multiple discrimination can be most helpful. However, I feel that

¹⁰⁰ See however www.quing.eu/files/results/so_malta.pdf, accessed 20 February 2009.

the impetus will need to come from Community law. National action will then follow EU action. This will be at the legislative level (parliaments) and at the protective/enforcement level (led by the Equality Body or equality bodies). In my view, EU action is needed in particular in order for the kind of legislation and structures needed to address all types of multiple discrimination to be put in place. Secondly, because some Member States will otherwise resist the sort of moves that I think should be considered deeply in a multiple discrimination context. However, it may be that these moves can be more readily argued for in this context, with a beneficial spill-over effect into EU and national law effectiveness even regarding the single grounds.

Therefore, I regard action at both levels, inter-relatedly, as being necessary for the sake of harmony across systems in law and in fact. It is important that the appropriate legal tools be put in place. The latter could include appropriate (and, in the EU context, common) definitions, modalities of enforcement, including as to proof, and guidance as to remedies. In the context of multiple discrimination, one would need to consider whether special rules were required in these areas. As to remedies, the question is how much discretion can remain with the national legislators or the national courts, or whether a common rule should be agreed. I would normally expect rules to find the right balance such that they would effectively deter the offender or potential offender. However, I accept that more academic/expert work on this is needed. Also, equality bodies must by law be given appropriately comprehensive competence (briefs), authority and capacity.

9. Community-law definition of multiple discrimination necessary?

Yes, a definition at Community level would put all Member States on the same track, by opening eyes to reasons that are not readily discernible by focusing on single grounds, and covering all angles. From this perspective, the prohibition against multiple discrimination would also be attacking something more than 'just' discrimination on more than one ground. Recent studies have identified at least three forms of multiple discrimination (that properly so-called, so-called 'compound' discrimination and so-called 'intersectional' discrimination). I believe that all forms should be addressed, albeit under the banner heading of 'multiple'. The nuances (at least the main ones) can probably only be brought out through a definition, however basic, so I would support the suggestion that we formulate a definition and then prohibit it, even if only adding it on ('tacking it on') to existing lists or catalogues in the legislation already in place. The formal definition would then of course be reinforced or further elaborated and itself further defined by any substantive and procedural provisions based on the most enlightened theory and experience as to the operation of rules of proof, access to court, penalty provision and so on, with this whole 'package' instilling a common appreciation of the nature of the phenomenon in its various guises.

It seems clear, even at this early stage, that multiple discrimination is or can be regarded as a particularly individually damaging and socially insidious phenomenon different from discrimination on one ground, also in the complex approach needed to fight it. The difficulties of establishing a definition should not deter us from seeking one. Without a common legal concept of what it is or can be (transmitted through a legally binding, and therefore judicially cognisable, definition) it is unlikely that there will be any harmonious recognition, interpretation or application (indeed any certainty even about its existence) of any true Community desire to impose and follow through on a prohibition against a particularly noxious phenomenon.

An added complication is that other factors, not yet included in the list of grounds covered by Community legislation, can play a part in explaining the unequal treatment of a person, and some legal basis should be found for permitting (requiring) account of these to be taken singly and as part of the multiple discrimination phenomenon (socio-economic status, political opinion, language, social origin, property and birth, among others).

10. Available literature or research?

No professional studies directly in point have been published. The Malta Confederation of Women's Organisations has designated 'multiple discrimination and women's diversity' as one of eight policy priorities for the confederation for 2008/2009, and it is hoped that this will lead to an important policy paper.¹⁰¹ Some reference to the issue in the immigration context is made by the ENAR shadow report on Malta for 2007.¹⁰²

11. Further research

Issues that need further research include:

Empirical research to ascertain the prevalence of various forms of multiple discrimination, based on a working definitional model, and testing that model, across the Member States. However, this should not hold up legislative initiatives based on the current state of knowledge and the experience of some Member States. There is a need for such research in Malta.

The main legal issues include the question whether all gaps in current Community-law protection, as exist between the different grounds and the areas or spheres in which protection is necessary, have been addressed. Can new grounds and areas be envisaged? Discrimination on grounds of political or voting bias (including by association), social distinctions, civil status and even language differences (for example: the predilection for the use of a particular language from among two official languages, or particular language characteristics. This is in itself often associated with a certain presumed political allegiance) can come into the discrimination equation in several Member States, including Malta.

Another legal issue is the question whether the ban on discrimination should be extended to cover all the functions of public authorities or of a public nature. The experience of all the Member States has shown that the specific measures of enforcement must be complete to ensure that the law is effective. Then, we need to research further how and on what conditions a measure on multiple discrimination will supply spill-over effects for protection on the individual grounds.

Then, the general legal background, including international law and regional treaties (European Convention on the Protection of Human rights and Fundamental Freedoms of 1950) and national human rights provisions: The human rights basis for further action needs to be explored. A particular issue here is the question of the rights of immigrants, and especially refugees and asylum seekers, and the question of positive action. This is a highly sensitive and contested area. This is also true, by extension, for the rights of ethnic minority women, young men and children. However, positive action may have to be at the core of any approach to effectively tackle the 'reality gap' between rights on the statute book and (individual) enforcement of those rights in practice.

¹⁰¹ www.mcwo.net/the_way_forward.html, accessed 20 February 2009.

¹⁰² www.enar-eu.org/malta, accessed on 21 February 2009. See also www.um.edu.mt/pub/praxeological_gerogogy.html, accessed 21 February 2009.

While Community/EU law has an obvious role in tackling the problems of enforcement and having a good record to put in place individual rights, it remains true that such can be circumvented by mechanisms or ploys that make it virtually impossible for an individual to know that discrimination has occurred in regard to that individual or to the group to which they belong. ‘Collective enforcement mechanisms’, in the same way as positive action, can address this lacuna, and it may well be that a multiple discrimination measure that is strong on this front (for example, by raising an irrebuttable presumption of discrimination where, in defiance of all ordinary reason and odds, the workforce of an employer of a certain size in a certain community shows an ‘exclusionary’ picture) will be more readily accepted and effective, having this spill-over effect into the reality gap of individual enforcement.

One key issue, in my view, is therefore the question whether Member States are prepared to permit independent actions by relevant organisations and by a single equality body whose competence to act across grounds is legally secure. Arguably, the integrity of any system of rights protection requires that this option be available where it appears clear to such an association or body that discrimination is occurring, and the evidence clearly points in this direction, but individual cases are not pursuable either because individual victims cannot be identified or because they will not come forward. In this context, perhaps, our discrimination law can begin to speak also of group rights, to mean the rights of groups who are categorised around a particular intersection of characteristics that may be used as a ground for discrimination. Where the problem is large, multiple discrimination-specific NGOs (say, an NGO dedicated to the plight of black immigrant women) might be the answer, as long as they can take legal action independently in the interests of the group they represent (in their own name).

Another issue might be to what extent the nature itself of multiple discrimination points in the direction of developing the law on the ‘positive duties’ side, that is, taking more seriously at Community level the substance and the enforcement of positive duties on the States and on employers and others (so the promotion of equality) going beyond the obligation to abstain from or sanction discrimination. Going with this is the use of the idea of ‘reasonable accommodation’ and its possible reach.

NETHERLANDS – *Rikki Holtmaat*

1. Concept of multiple discrimination in legislation

The concept of multiple discrimination is not explicitly addressed in Dutch equal treatment legislation. Although the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*, hereinafter ‘GETA’) contains an exhaustive list of non-discrimination grounds, parliamentary history does not exclude the combination of grounds. Moreover, including the possibility of discrimination based on a combination of grounds seems to be in line with the legislator’s objectives with this legislation.

2. Case law

Until now, the Equal Treatment Commission (the national equality body, hereinafter 'ETC') has accepted an intersectional approach in only one case.¹⁰³ In this case, the grounds of disability and race intersected (the case was not gender-related) and the combined effect was acknowledged by the ETC. This combined effect was no reason to apply other standards of scrutiny regarding the question whether the facts of the case violated the principle of equal treatment. The ETC has shown willingness to apply different grounds of discrimination collectively in some other cases (with gender aspects as well), but the claimants failed to substantiate or to prove the combined effect of intersecting grounds in these cases.¹⁰⁴

As far as the author is aware, there are no instances of cases of multiple discrimination before Dutch courts.

3. Any cases where gender-related discrimination is overlooked?

The author does not know of any.

4. Proof and procedural problems

In the gender-related cases before the ETC that are mentioned under 2, the complaints were rejected due to a lack of evidence. This is also true for some other cases of alleged multiple discrimination (e.g. ETC Opinion 2006-133, in which a 52-year-old applicant complained about being rejected for a position because of his age and race). These, however, did not seem to be issues that can be linked to the phenomenon of multiple discrimination in particular. Under Dutch equal treatment law, the burden of proof shifts to the defendant if the claimant manages to substantiate a presumption of discrimination. Therefore, in a case of alleged multiple discrimination, the claimant has to give a more detailed explanation of the combined effect of the grounds in question, rather than the mere accusation that there was discrimination. This requirement does not seem unreasonable or unduly damaging.

5. Description of a specific case

ETC Opinion 2007-40

In this case, a Dominican woman complained to the Commission of having been the victim of sexual harassment and discrimination by employees at the location of her temporary job as a cleaning lady and in the termination of her contract as well. The claimant requested the Commission to assess whether her former employer had acted in contravention to equal treatment law by racially and/or sexually discriminating against her during working hours and in terminating her contract, or by inadequately handling her complaints of discrimination and sexual harassment. In support of her claim, the claimant recounted several events. However, in the respondent's version of the events, the claimant had complained only once about the behaviour of one other employee, which was then dealt with in an appropriate way and the claimant never complained about other acts of discrimination or sexual harassment. Her accusations

¹⁰³ ETC Opinion 2006-256 (complaint of a blind Turkish woman against an employment agency for not being subjected to an adapted examination); accessible in Dutch on <http://www.cgb.nl/opinion-full.php?id=453056545> (accessed 13 May 2009).

¹⁰⁴ ETC Opinion 2006-67 (complaint from a divorced father against a hospital for not giving adequate information about his son; alleged intersecting grounds: sex and marital status; presumption not substantiated, no breach), ETC Opinion 2007-40 (complaint of a female cleaner about dismissal and (sexual) harassment; alleged intersecting grounds: sex and race; presumption not substantiated, no breach); accessible in Dutch on <http://www.cgb.nl/opinion.php?id=453055819>, (accessed 13 May 2009).

were denied by several other employees as well. Lastly, the claimant argued that she had been discriminated against on the basis of her race and/or gender. Arguing that she had never received complaints about her job performance, she thought she might have been employed only until a Dutch female could be found to replace her. (The cleaner hired after the claimant was indeed a Dutch female. Yet at the time of the judgment the cleaner who held the job was a Turkish female). The respondent, in contrast, stated that the reason for the dismissal of the claimant was the insufficient performance of her tasks, towards which her race and gender had played no part at all. Finally, the ETC found no breach of equal treatment law, as the accusations could not be substantiated by any evidence.

First of all, this case is an example of the difficulty of proving or establishing discriminatory treatment legally in general, as discriminatory interaction between persons often occurs subtly and in private, and is thus hard to prove.

If the view of the Dominican woman was right in this case, it would have been likely that the treatment resulted from a combination of the grounds of race and sex. It is, however, still difficult to assess the possibility to use a multiple discrimination approach to such a case and to assess its added value. It might further the understanding of discrimination as a social phenomenon (which is important), but the current legal approach – arising from the directives – hardly takes account of the perpetrators' intentions and social backgrounds of discrimination.

However, had it been available, statistic evidence about intertwining grounds of discrimination with regard to the labour market might have been of added value here. It might have proven a possibly significant under-representation of females of foreign descent in this particular sector of the labour market. Such a fact could have helped the Dominican women to underline her weak position and could have substantiated her accusations.

6. Effects of legislation and case law in practice

There is no specific legislation concerning the issue of multiple discrimination. The only case before the ETC in which there was a judgment (Opinion) based on an intersectional approach has not had any perceptible effects yet.

7. Role of equality bodies

As mentioned above, the ETC has applied the GETA only once in such a way that the intersecting grounds can constitute discrimination together, and it has shown willingness to accept such an effect in other cases (however, there was a lack of evidence in these cases). Apart from this, the Dutch ETC has not yet taken a specific role regarding this issue.

The Dutch ETC has the competence to perform surveys and give advice about certain issues, apart from dealing with actual complaints. As there is still great unfamiliarity and uncertainty about the issue and the extent of the problem of multiple discrimination, the ETC could consider to conduct research into this issue, or perform specific statistical surveys of the labour market.

8. Reinforcement of legal approach at EU level necessary?

There still seems to be too little knowledge about the actual extent of the problem. The author is not yet convinced if, and if so, what kind of special legal approach could be of added value. Non-legal research, such as statistic evidence about intertwining grounds of discrimination with regard to the labour market might, however, be of added value for the legal position of victims of discrimination (in terms of

substantiating or underscoring their claims), and for knowledge about this issue in general.

9. Community-law definition of multiple discrimination necessary?

This is not necessary; see under 8.

10. Available literature or research?

- Ellen-Rose Kambel ‘Op het kruispunt van gender en etniciteit. Zmv-vrouwen in het Nederlands werkverkeer’ (At the crossroads of gender and ethnicity. B(lack), M(igrant) and R(efugee) women on the labour market highways) (editorial), *Nemesis* 2001 No. 4 pp. 103-106.
- Toni Lester ‘Race, Sexuality, and the Question of Multiple, Marginalized Identities in the U.S. and European Discrimination Law’ in: Toni Lester (ed.) *Gender Nonconformity, Race and Sexuality: Charting the Connections* pp. 84-101 Madison, WI, University of Wisconsin Press 2002.
- Mieke Verloo ‘Multiple Inequalities, Intersectionality and the European Union’, *European Journal of Women’s Studies* Vol. 13(3) 2006 pp. 211-228.
- Virginia W. Wei, ‘Asian women and employment discrimination: Using intersectionality theory to address Title VII claims based on combined factors of race, gender and national origin’, *Boston College Law Review* Vol. 37:4 1996 pp. 771-812.

11. Further research

The following legal and non-legal research questions could be addressed:

- Is there any statistic evidence about under-representation in different sections of the labour market of persons with multiple features which are grounds discrimination findable?
- What is the real extent of the actual problem?
- What kind of legal approaches might be of added value in this respect? Can they be fit into the present framework of equal treatment law, as it arises from the directives, or is a whole new approach necessary?

NORWAY – Helga Aune

1. Concept of multiple discrimination in legislation

multiple discrimination is not explicitly prohibited in statutory legislation or statutory legal instruments in the field of non-discrimination.

2. Case law

Case No. 1/2008 is the first case where the Equality Tribunal recognized gender-related multiple discrimination. Two women with an Asian background entered a hotel in downtown Oslo and asked for a room for the night. When the receptionist on duty discovered that the women’s home address was in the Oslo area, they were asked why they were not going to spend the night at home. The women were subsequently refused a room at the hotel. The hotel had issued written guidelines permitting staff to refuse access to people domiciled in Oslo and its environs. The women asked for an explanation as to why they had been refused a room. The receptionist informed them of the hotel’s guidelines, explaining that the reason was that guests living in Oslo and its environs could be prostitutes or drug addicts who sought access to the hotel in

order to cause trouble. The Tribunal assessed the case pursuant to Section 3 of the Gender Equality Act and Section 4 of the Anti-Discrimination Act. The Tribunal found circumstances which gave grounds to believe that the hotel had attached negative importance to the women's gender and ethnicity background when they were refused a hotel room. In this connection, the Tribunal referred to another clause in the guidelines which nevertheless allowed staff members to offer a room to guests whose home address is in Oslo and its environs. A concrete assessment was thus made in each individual instance. The women had no luggage with them, only shopping bags, when they arrived at the hotel. They explained that they were decently dressed, were not wearing make-up, and that they were not intoxicated. Further, the Tribunal attached importance to the receptionist's comment about prostitutes and drug addicts. This explanation of the guidelines was given in spite of the fact that there was nothing to indicate that the two women could be linked to the risk groups against which the hotel wished to protect itself using the guidelines. The burden of evidence was therefore passed to the hotel pursuant to Section 16 of the Gender Equality Act and Section 10 of the Anti-Discrimination Act. The hotel was unable to substantiate that only circumstances other than gender and ethnicity lay behind the two women being refused a room. Apart from a general reference to the fact that the guidelines allow hotel staff to turn away people domiciled in Oslo and its environs, the hotel offered no explanation as to why the receptionist considered it necessary to use the opportunity to refuse access in this instance. The receptionist was aware that discretion could be shown. The Equality Tribunal found both grounds of discrimination to have been violated, both Section 3 of the Gender Equality Act of 9 June 1978 No. 45 and Section 4 in the Discrimination Act of 3 June 2005, No. 33.

The Tribunal found that 'there are circumstances that give grounds to believe that the hotel attached negative importance to B and her girlfriend's gender and ethnicity when they were refused a room at the hotel, where the combination of gender and ethnic background was the basis for turning them away. The Tribunal does not find that the hotel has substantiated that only other reasons lie behind why B and her girlfriend were refused a room at the hotel'.¹⁰⁵

Case 8/2008 was the second case that the Tribunal handled which specifically addressed multiple discrimination. A municipality discriminated on the grounds of age and gender in connection with the appointment of a person to a temporary position and the subsequent permanent position as a fire-fighter. The Tribunal found that both age and gender, each separately, had been given negative weight during the application and hiring procedure of a female fire-constable. The Tribunal evaluated the case both under Gender Equality Act Section 3 and 4 and under the Working Environment Act Section 13-1 and Section 13-2.

The case concerned a female fire-fighter aged 41 who was employed in the part-time fire brigade. She first applied for a temporary position with the opportunity of an extension and subsequently for a permanent position in the full-time fire brigade. A male fire-fighter aged 27 who was also employed in the part-time fire brigade was appointed to both the temporary position and subsequently to the permanent position. The Tribunal found that negative importance had been attached to the complainant's age in connection with the appointments. In the announcement, it was stated: 'Applicants should be between 22 and 35 years of age'. In the case material concerning the position as a substitute, it was explicitly stated that importance would

¹⁰⁵ The full English text the case can be accessed on <http://www.diskrimineringsnemnda.no/sites/diskrimineringsnemnda.no/files/62958820.doc>, accessed 20 April 2009.

be attached to age when assessing the applicants. Further, it was stated: ‘Of the applications received, there is one applicant – C – who fulfils the requirements set forth in the announcement.’ In the case material concerning the permanent position, it was stated: ‘As regards the announcement, age has been included (...)’ and ‘C is 27 years old and within the preferred age group (see the announcement).’ In the recommendation, the applicants were ranked according to age. The complainant, who was the oldest of the three applicants, was recommended as number three. The Tribunal also found it proven that negative importance was attached to the complainant’s gender in connection with the appointments. Among other things, the Tribunal attached importance to the fact that the complainant was just as qualified as the man who was offered the positions. Only the male fire-fighter who was appointed to the positions was recommended for the substitute position. The complainant’s qualifications were not assessed at all, despite the fact that she had worked at the municipal fire brigade for four years and that both unions pointed out that the complainant, as a woman, had the first right of refusal to the position. Further, the announcements contained no wording urging women to apply, despite the fact that women are clearly underrepresented in the municipal fire brigade. The Tribunal pointed out that pursuant to Section 1 a of the Gender Equality Act, the municipality has a duty to actively, regularly and in a targeted manner in order to achieve equality between the genders within its operations. The Tribunal also attached importance to the link between the lack of assessment of the complainant as being qualified for the temporary position, the fact that she was the only woman in a male-dominated environment and that after she had brought up matters worthy of criticism she was considered by her employer to be a difficult employee. The municipality’s appointments thus represented a breach of both the ban on discrimination on the grounds of age in Section 13-1 of the Working Environment Act and the ban on discrimination on the grounds of gender in Section 3 of the Gender Equality Act. The Tribunal’s decision was unanimous.

The multiple character of discrimination has not been reflected in higher sanctions or damages. So far we only have the above-mentioned cases from the Equality Tribunal, and the Tribunal is not entitled to award damages. There are no cases from the civil courts, but the regular rules of compensation laws do allow increased compensation where multiple causes may constitute a double burden.

3. Any cases where gender-related discrimination is overlooked?

Apart from the two cases mentioned above, there are no specific cases in which gender-related discrimination was overlooked. However, the Ombud has in previous press interviews addressed the issue of the intersectionality between gender and religion, as there are a number of cases relating to wearing the *hijab*, where the woman who was discriminated against defined this as discrimination because of religion, but not because of her gender. In a landmark case from 2001, the Gender Equality Board of Appeals stated that this was discrimination because of gender. In 2001, religion was not yet a legal ground of discrimination, and the question of intersectionality was thus not addressed by the Board. From research analysing the gender perspectives in Norwegian case law – or lack thereof – I found that the gender perspective was hardly addressed.¹⁰⁶ I would thus assume that the gender perspective

¹⁰⁶ Helga Aune *Deltidsarbeid. Vern mot diskriminering på individuelt og strukturelt grunnlag*, PhD thesis, 2009, University of Oslo, to be published, in Norwegian, at Cappelen Damm Publishing House in the autumn of 2009. See Chapters 6-10 for an analysis of the civil case law and Chapter 11 for analysis of the Norwegian Labour Court cases regarding part-time work.

is often overlooked in other parts of the legal system as well, except for the fairly new cases of the Tribunal as described above.

4. Proof and procedural problems

Formally, there are no particular problems of proof and/or procedural problems and/or problems related to comparisons in cases of multiple discrimination. However, in case 8/2008 (age/sex) the Ombud included the rather odd statement that as long as the burden of proof had concluded that discrimination had occurred on basis of age, the Ombud did not see reason to apply the burden of proof rule regarding sex discrimination. The Tribunal did not agree with that view, and found that the rule on the burden of proof could be used for each of the separate grounds of discrimination, as long as 'there are circumstances that give reason to believe that differential treatment had occurred'. The Tribunal was very brief in its reasoning on this matter.

5. Description of a specific case

For the two cases available, see under 2.

6. Effects of legislation and case law in practice

There is no information available.

7. Role of equality bodies

The equality bodies are responsible for the enforcement of all prohibitions of discrimination regardless of sex, ethnic background, language, nationality, disability, sexual orientation and religion. However, the possibility of several grounds being violated at the same time has not been stressed by the equality bodies. The latest quite heated media debate in Norway concerned the issue of whether or not the Muslim headscarf should be allowed as an integrated part of the Norwegian police uniform. The debate tends to focus quite simply on the matter of freedom of religion and not as much on the gender stereotypes and the freedom of the individual. The Ombud should take a careful approach in the complex weighing of the various values, including women who are forced to wear the headscarf as a result of internal pressure in various communities.

8. Reinforcement of legal approach at EU level necessary?

Multiple discrimination is very often a result of mixed structural patterns (social, economic and socio-economic), e.g. both belonging to a certain group of women and to a specific ethnic immigrant group where religion may put strong pressure on gender stereotypes. Identification of these structures is important in order to be able to initiate changes, which in turn may be important in order to prevent indirect discrimination in the long run. Technical rules stressing the double wrong in multiple discrimination in itself will not tackle the problem, but will be a small step in that direction. The legal technique that may constitute a bigger step will, as I see it, be to increase the obligation to work on changing the gender stereotypes in line with CEDW Article 5a) (and Articles 10 and 11), and connect this more directly with the prohibition against indirect discrimination. The stereotypes are the commonality in most cases of indirect discrimination.

9. Community-law definition of multiple discrimination necessary?

Yes, see my answer under 8. A community-law definition of multiple discrimination may help identify structural patterns which in turn may be a cause of discrimination.

That type of legislation should in my opinion be combined with reporting and activity obligations for public authorities as well as for private enterprises as regards surveying various structural/systemic mechanisms that may lead to multiple discrimination. A definition of multiple discrimination will most likely add to the awareness that multiple factors may coincide and together place persons in doubly weak positions. However, it is important in my opinion that thought is given to the question whether or not the level of sanctions should also reflect that a person has been the victim of multiple discrimination, perhaps even more than if only one ground of discrimination is violated.

10. Available literature or research?

There is little Norwegian literature specifically on multiple discrimination. Hege Scheie has published the following articles on the topic:

- Hege Skjeie ‘Multiple equality claims in the practice of the Norwegian anti discrimination agencies’ in: Dagmar Schiek and Victoria Chege (eds.) *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law* London and New York, Routledge pp. 295-309.
- Hege Skjeie ‘Headscarves in Schools: European Comparisons’ in: Jenny Goldschmidt and Titia Loenen (eds) *Religious pluralism and human rights in Europe: Where to draw the line?* Intersentia 2007 pp. 129-146.
- Birte Siim and Hege Skjeie ‘Tracks, Intersections and dead ends. Multicultural challenges to state feminism in Denmark and Norway’, *Ethnicities*, Vol. 8 (3) (2008), pp. 322-344

In addition, I would like to refer to Ronald Craig’s PhD thesis: *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*. Craig¹⁰⁷ discusses various ways of identifying systemic structures (regarding ethnic discrimination) as well as the need to strengthen the control and enforcement of activity duties for enterprises.

I would also like to refer to my PhD regarding part-time work with special focus on sex discrimination, which discusses the relationship between the protection against discrimination on an individual as well as on a structural level, as well as CEDAW Article 5a.¹⁰⁸

11. Further research

Yes, see my answer under 8.

POLAND – Eleonora Zielińska

1. Concept of multiple discrimination in legislation

In Poland, there is no definition of multiple discrimination and there is no explicit prohibition of such discrimination, neither in the Labour Code nor in any other statutory acts, providing for the prohibition of discrimination in relation to access to the labour market or in social security regulations. The draft law of 22 December 2008, implementing several EU equality directives, including the Race Directive and

¹⁰⁷ R. Craig *Systemic Discrimination in Employment and the Promotion of Ethnic Equality*, Martinus Nijhof Publishers 2007, http://www.brill.nl/product_id25533.htm, last accessed 19 May 2009.

¹⁰⁸ Helga Aune *Deltidsarbeid. Vern mot diskriminering på individuelt og strukturelt grunnlag*, PhD thesis, 2009, University of Oslo, to be published at Cappelen Damm Publishing House in the autumn of 2009.

the Service Directive, does not refer to this notion either. However, the Polish legislator did acknowledge that discrimination may occur on more than one ground. In the definition of the concepts of direct and indirect discrimination, the laws state that each form of discrimination may occur on the basis of one or several grounds (Article 18^(3a) (3) for direct and Article 18^(3a) (4) for indirect discrimination). In addition, these anti-discriminatory provisions, since they jointly refer to all possible grounds of discrimination, seem to create favourable conditions for special protection against multiple discrimination. The same may be said for the attempt, provided for in the draft law of 21 December 2008, to confer on one body (the Commissioner for the Protection of Citizens' Rights) the duty to assist all victims of alleged discrimination, without regard to the ground of discrimination and area in which it occurs. Nevertheless, those who drafted the law, seemed to be unaware of this opportunity since the notion of multiple discrimination does not appear in any official explanation of the respective law amendments.

2. Case law

An example of the recognition of gender-related multiple discrimination may be the decision of the Supreme Court (the Labour and Social Security Chamber) of 4 October 2007 (I PK 24/07),¹⁰⁹ in which the Court considered as ill-founded the cassation claim brought by an employer against a female employee, who had alleged that she has been harassed and discriminated against on the grounds of age and appearance. The perpetrator was a female superior who, in the opinion of the claimant, had treated unequally – without any rational justification – all her female subordinates who were young and attractive. Amongst them was the claimant who had been offended and humiliated by her actions. She was also forced to work overtime, subject to unequal conditions, compared to the other employees. The claimant informed the perpetrator's superiors about this situation, but they did not react and did not prevent her dismissal. The Court of First Instance acknowledged that discrimination had taken place and that the behaviour of the employer violated Article 18^(3a)(1) of the Labour Code.¹¹⁰ The Court decided that the claimant should be awarded compensation, amounting to PLN 10 000 (approximately EUR 3 000). This verdict was upheld by the Appeals Court and by the Supreme Court. The Supreme Court explained, while dismissing the cassation claim filed by the employer that, firstly, the claimant had been harassed within the meaning of Article 18^(3a)(5) point 2 of the Labour Code¹¹¹ by the superior's conduct, which violated her dignity and humiliated her. The employer was found liable for discrimination, since he tolerated such situation. Secondly, it was established that the claimant's young age and

¹⁰⁹ Case I PK 24/07, unpublished.

¹¹⁰ The Labour Code, dated 26 June 1974 as amended (consolidated text: *Dziennik Ustaw Journal of Laws*, hereafter: Dz.U. 1998, No. 21, item 92, as amended). As a result of two amendments, Section IIa of the Labour Code, currently called 'Equal treatment in employment' was modified, thereby enabling the application of provisions contained therein also to instances of discrimination based on reasons other than gender. Article 18^(3a)(1) of the Labour Code reads as follows: 'Employees should be treated equally within the scope of initiating and terminating an employment relationship, conditions of employment, promotion as well as access to training for the purpose of improving job qualifications, in particular regardless of sex, age, disability, racial or ethnic origin, religion, faith and sexual orientation, as well as regardless of whether they are employed for a definite or an indefinite period of time, or have a full-time or part-time job.'

¹¹¹ Under Article 18^(3a)(5) of the Labour Code, discrimination also includes: '(...) (2) certain behaviour, the purpose or consequence of which is the violation of the dignity or the humiliation or abasement of the employee (harassment) (...)'

attractive appearance were the basis for this harassment. The Court, at the same time, stipulated that, although ‘appearance’ is not included in the list of grounds of discrimination provided for in Article 18^(3a) (1) of Labour Code, it may be identified, since the catalogue of the grounds of discrimination, provided for in this Code, is not exhaustive. In the reasoning of the Supreme Court, the gender aspects were not explicitly mentioned, but the reasoning of lower courts proved that they had been identified. There was no information on whether the lower courts, while deciding about the compensation of damages, had taken into consideration the multiple character of discrimination.

Another interesting Supreme Court decision was linked to a legal question posed by the Commissioner for the Protection of Citizens’ Rights. The Commissioner, having in mind divergent verdicts of the Supreme Court on the issue of retirement, asked for a binding opinion on whether the dismissal from work based exclusively on the fact that the employee has reached the statutory retirement age may be considered as discrimination based on age and sex (Article 11³ Labour Code).¹¹²

It should be added that the Supreme Court in its former rulings, while answering this question positively, had always overlooked the possible intersectional character of discrimination, because all those cases concerned female employees entitled to earlier retirement than men, where thus a gender aspect of discrimination was predominant.¹¹³

In its decision of 21 January 2009 (II PZP 13/08), the Supreme Court confirmed that if an employee reaches the statutory retirement age, this shall not be sufficient reason for the dissolution of his work contract by the employer (Article 45 Paragraph 1 Labour Code).¹¹⁴ The recognition by the Supreme Court, that compulsory, automatic dismissal from work after reaching the statutory retirement age may be considered as discrimination on the ground of age, makes this ruling also applicable to male employees (however, only for women will such discrimination have an intersectional character).

¹¹² At the same time, the Commissioner posed the legal question to the Constitutional Tribunal whether different retirement ages for women and men are compatible with the constitutional principle of equality; <http://www.rpo.gov.pl/pliki/>, accessed 20 February 2009.

¹¹³ For example, in its decision of 19 March 2008 (I PK 219/07), the Supreme Court (the Labour and Social Security Chamber), considered as ill-founded the cassation claim, brought by an employer (Polish State Railways) against a female employee who demanded compensation for illegal dismissal from work, when she reached the statutory retirement age. The Court of First Instance acknowledged this claim, recognising that the release had a discriminatory character based on sex and decided that the claimant should be awarded compensation amounting to circa PLN 22 500 (approximately EUR 6 600). This verdict was upheld by the Appellate Court. The Supreme Court, while dismissing the cassation claim, shared the opinions of the above courts, that the dismissal, based exclusively on the fact that the employee reached the statutory retirement age, was not justified in the light of Article 45 of the Labour Code, due to the fact that this explanation does not remain in relation with work performed by the claimant. In addition, taking into consideration the statutory difference in retirement ages between women and men, such dismissal should be considered as directly violating the prohibition of sex discrimination provided for in Article 11³ of the Labour Code, as well as the equality clause, subject to Article 18^{3a} of the Labour Code. The Supreme Court explained that the possibility of earlier retirement created for women should be understood as their right, not an obligation. This means that the woman concerned may, but should never be obliged to, use this opportunity. <http://www.sn.pl/orzecznictwo/index.html>, accessed 20 February 2009.

¹¹⁴ The reasoning of this decision has not been published yet; <http://www.sn.pl/orzecznictwo/index.html>, accessed 20 February 2009.

3. Any cases where gender-related discrimination is overlooked?

I was able to find one case in which, in my opinion, gender-related discrimination was overlooked. The case I am referring to¹¹⁵ belongs to a series of court cases filed in 2007 before different courts against the Polish Radio S.A. (joint stock) in relation to the group dismissal of more than 290 employees of this enterprise. The suspicion that the persons dismissed are victims of discrimination on one or more grounds such as sex, age, political beliefs or trade union activities was caused, among other things, by remarks made in public by the new Director of Polish Radio who used to say: 'I only see old women around me' or 'The average age of employees in Polish Radio is close to that in a cemetery', and who himself was 54 years old at that moment. One of the dismissed female journalists of around 50 alleged that her dismissal was discrimination-based on the ground of age, sex and trade union activities. The regional court in Warsaw found discrimination in employment on the ground of age and trade union activities since the employer failed to prove that other reasons justifying the claimant's dismissal existed. She was awarded punitive damage in the amount of PZL 1 126 (approximately EUR 300, equalling the minimum wage) for the violation of the principle of equal treatment in employment. The court, however, did not recognise discrimination on the ground of sex since, as it explained in its reasoning 'the claimant never personally met the Director of Polish Radio and the words cited above were not addressed personally at her (...). Therefore, those words should be considered as an establishment of facts about the age and sex of employees at Polish Radio rather than a negative statement violating somebody's personal character'. However, the court did not even ask for information about the number of women among the persons on the list for lay-off. At the same time, the court asked for and was presented such information in relation to the age of dismissed persons which led them to the conclusion that this group dismissal may be considered as an instance of indirect discrimination on the ground of age, since not more than 20 persons on this list were under 40.

It should be stressed that I only found this case 'by accident', since in Poland any research about specific grounds of discrimination is extremely difficult. For example, in order to find out whether gender-related discrimination has been overlooked in an individual case decided by lower courts (whose judgments are not published) one should screen court files of every individual case, which is not feasible in the framework of this project. Such research is difficult in general, due to the fact that official Polish court statistics concerning discrimination cases do not reflect ground/s of discrimination or sex of the victim. In order to monitor regularly the case law in discrimination cases, the manner of collecting statistical data should be changed.

4. Proof and procedural problems

In the cases described, there were no proof or procedural problems.

5. Description of a specific case

In cases of violence against women (in particular domestic violence), the police is reluctant to intervene and to register the alleged crime. Such behaviour is considered to be an act of sex discrimination, since there are no justified reasons to treat those crimes differently than other violent crimes. Such reluctance is even more serious when the police intervention concerns a female victim of another ethnicity (e.g. Roma

¹¹⁵ Case of Regional Court for the City of Warsaw, Małgorzata D. v Polish Radio SA, Judgment of 21 May 2008, VIII P 937/07, unpublished.

women or asylum seekers from Chechnya living in shelter). When the alleged crime is committed among Roma or Chechen people, as a rule the police refuses to interfere, regarding it as an internal community problem. Sometimes this attitude results from informal agreements concluded by local authorities or the police with decision makers within certain ethnic communities.¹¹⁶ Such refusal should be considered as discrimination on the ground of ethnicity and especially condemned, taking into consideration that by crying for help, a Romani woman violates the internal ethnical code (Romani pen), prohibiting Roma people to contact bodies of justice. Her decision proves that she must be desperate and the police should be aware of this fact. Therefore, the refusal to provide assistance in such cases should be considered as aggravated discrimination. The concept of multiple discrimination increase awareness of this problem.

6. Effects of legislation and case law in practice

There is no special legislation in Poland.

7. Role of equality bodies

The existing body responsible for the monitoring of equality policy and counteracting discrimination has not taken any position in the matter of multiple discrimination.

The conferment of the duties of an equality body to a single independent body, namely the Commissioner of the Protection of Citizens' Rights, foreseen in the draft law of 21 December 2009, may improve the recognition and perception of multiple discrimination. However, in the present Polish situation, in which the person who heads the post of Commissioner does not show any interest or awareness concerning the issue of equality of women, the risk exists that gender-based discrimination are overlooked in the monitored cases.

8. Reinforcement of legal approach at EU level necessary?

It would be useful to include into EU gender directives the recommendation that multiple (intersectional) discrimination ought to be considered as an aggravated form of discrimination and that awards and remedies for victims should reflect this assumption.

9. Community-law definition of multiple discrimination necessary?

The elaboration of a community-law definition of multiple discrimination should be preceded by a comprehensive study on all its pros and cons in litigation procedures.

Such a definition, however, might still be useful for policy purposes. Its elaboration might facilitate the identification of all possible grounds and constellations of institutional (structural) discrimination and thereby provide more effective protection for these individuals and groups, which are especially vulnerable to multiple discrimination.

¹¹⁶ According to the information received from the Association of Crisis Intervention in Krakow, in some asylum shelters, the Polish administration, overloaded by work, confers some of its competence to the national council of inhabitants. In the Chechen Community, it happens that the members of such a council compulsory apply Sharia law towards other nationals (allowing forced religious marriages or the kidnapping of future wives), which negatively affects women in particular. However, due to these informal arrangements women feel helpless.

10. Available literature or research?

Recently, a very interesting Polish-language sociological publication appeared, which discusses the problem of multiple discrimination and the migration of women from a multi-dimension perspective.¹¹⁷

In 2002, the European Monitoring Centre on Racism and Xenophobia (EUMC), in cooperation with the Office of the High Commissioner on National Minorities of the Organisation for Security and Cooperation in Europe (HCNM-OSCE) and the Migration Roma/Gypsies Division of the Council of Europe, conducted a project on Romani women from Central and Eastern Europe and their access to healthcare. The Polish report, prepared by Anna Pomykała¹¹⁸ and underlining the multiple character of their discrimination, became part of the general report, entitled 'Breaking the barriers - Romani Women and Access to Public Healthcare'.¹¹⁹

In some other reports on the situation of Roma in Poland,¹²⁰ as well as in the description of the problems presented by customers of legal adviser offices,¹²¹ one can find dispersed information, proving that quite often the discrimination is experienced at multiple levels (sex, ethnicity, disability, belief, sexual, orientation etc.).

In the years 2007-2008, some NGOs,¹²² with financial support of the Department for Women, Family and Counteracting of the Discrimination of the Ministry of Labour and Social Policy, carried out the project 'Silence is not golden', aimed at combating discrimination and violence on the grounds of gender and sexual orientation. The goal of this project also was to raise public awareness of multiple (intersectional, cross) discrimination, in general. One of the means to achieve this, was translating into Polish, from different foreign publications, the definitions and the mechanism of multiple discrimination and giving information about the typical examples of such discrimination and dimensions of this phenomenon in other EU countries.¹²³ This project also included a public information campaign and training for

¹¹⁷ Krystyna Slany (ed.) *Migracje kobiet. Perspektywa wielowymiarowa*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2008.

¹¹⁸ Entitled '*Romani Women from Central and Eastern Europe. A Fourth World or Experience of Multiple Discrimination: Poland*'. Ms Anna Pomykała also prepared the general report.

¹¹⁹ The project sought to describe and improve the understanding of the situation of Romani women, with regard to the vital subject of healthcare, to examine it in terms of applicable standards and the genuine needs of the population, as well as to draw appropriate conclusions and make practical recommendations. The countries visited were: Bulgaria, Finland, France, UK, Greece, Hungary, Ireland, Lithuania, Moldova, Poland, the Netherlands, Romania, Serbia and Montenegro, Slovakia and Spain; http://www.eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&contentid=3fb3ffb26b5db&catid=3fb3fa7f43f49&search=1&frmsearch=Breaking%20the%20barriers&lang=EN, accessed 20 February 2009.

¹²⁰ Report from the programme 'Phare 2003: Enforcement of the justice system from a Roma perspective', carried out in 2005-2006 (written by Anna Lipowska-Teutsch, Marcin Dziurok and Ewa Ryłko) and the report on the project 'Facing hate crimes' (written by Anna Szul Szywala), studying the attitude of public authorities towards Roma in the context of the protection of human rights, in particular the principle of equality, carried out in 2007, both by the NGO Association of Crisis Intervention, in Krakow (crisisintervention.free.ngo.pl), with the financial support of the Ministry of Labour and Social Policy. The reports are unpublished. I received the information by courtesy of the Director of the Association mentioned above, Dr. Anna Lipowska-Teutsch.

¹²¹ Legal consultations for persons especially vulnerable to discrimination have been conducted in 2007, as part of the project named 'Facing hate crimes'.

¹²² This project was carried out by the Foundation 'Autonomia' with the participation of several other feminists or lesbian NGOs; www.zumi.pl/1450587.Fundacja_Autonomia_Krakow_firma.html – 27k, accessed 20 February 2009.

¹²³ <http://www.bezuprzedzen.org/aktualnosci/art.php?art=264>. Sources of this information are the report of the Commission 'Tackling Multiple Discrimination: practices, policies and laws':

persons working with women and girls who are especially vulnerable to multiple discrimination (teachers, psychologists, educators, social workers, health providers, police officers and persons working for the system of justice). In the framework of this project, another publication was translated into Polish: *Homophobia – A weapon of Sexism*, written by Suzanne Pharr, also available online.¹²⁴

11. Further research

In my opinion, further research might be useful in Member States that have already introduced a legal definition of multiple discrimination. The goal of such research should be to establish whether the introduction of the notion of multiple discrimination into legislation has improved the protection of individual victims of discrimination in the practice of conciliatory or litigation proceedings and to assess, in accordance with the principle of gender mainstreaming, the impact of such a legal amendment on the situation of women and men.

PORTUGAL – Maria do Rosário Palma Ramalho

1. Concept of multiple discrimination in legislation

Multiple discrimination (as a comprehensive notion, including compound and intersectional discrimination and all other forms of discrimination consisting of any combination of two or more grounds) is not defined as such in national legislation. In the Labour Code,¹²⁵ where discrimination issues are addressed in a general and comprehensive way, several grounds of discrimination are listed (discrimination based on association, age, sex, sexual orientation, civil status, economic situation, origin or social condition, genetic features, race, ethnic origin, age, disability, reduced working skills, political or ideological beliefs, union affiliation, language or religion)¹²⁶, so the situation of some of them arising together in one particular situation and being considered together is not unlikely. However, the law does not develop the concept of multiple discrimination as such and the prohibition of multiple discrimination arises only indirectly from the general prohibition of any form of discrimination which is explicit in the law (Article 24 No. 1 of the Labour Code).

2. Case law

We are not aware of any cases having been initiated. Anyway, we would like to emphasise that in Portugal, discriminatory issues (even when based on a singular ground) are seldom brought before court, except when maternity issues are also involved.

3. Any cases where gender-related discrimination is overlooked?

We have no knowledge of such cases.

‘Multiple discrimination: the need for justice for the whole person’; <http://www.era.int>, and publications of K Crenshaw, K Zappone and S. Fredman.

¹²⁴ http://www.bezuprzeczen.org/doc/homofobia_web.pdf, accessed 30 March 2009.

¹²⁵ A new Labour Code entered into force in Portugal just a few days ago. The new Code was approved by Law No. 7/2009, on 12 February 2009.

¹²⁶ Article 24 No. 1 of the Labour Code.

4. Proof and procedural problems

We have no knowledge of such problems, since there are no cases related to this subject.

5. Description of a specific case

This question does not apply to Portugal, given our previous answers.

6. Effects of legislation and case law in practice

We have no knowledge of any specific information on this issue.

7. Role of equality bodies

We have no knowledge of any specific work performed by the Portuguese Equality Bodies in this area. However, we think that an important role of the agencies in this area could be to disseminate information on the subject at several levels (unions, enterprises, employees, labour inspection services and the general public) and to conduct surveys in this field, to make this issue more visible, since even the concept of multiple discrimination is still relatively unknown in Portugal.

8. Reinforcement of legal approach at EU level necessary?

Both at EU level and at national level, it is important to develop a clear approach to the notion of multiple discrimination, mainly in order to make the practice of gender discrimination together with other sources of discrimination more visible, since these various sources of discrimination combined with gender discrimination are very common and may be misunderstood (or even ignored) when they are viewed separately on each ground.

The development of this new concept would also be important to make more visible insidious forms of gender discrimination that may in practise arise from other rights (even from fundamental rights) – for instance, different treatment of women based on religion and on the fundamental right of religious freedom.

Finally, we think that this new concept may be useful to combat multi-disciplinary problems in a more effective way, since the proof of each single source of discrimination can be more difficult than the proof of a combination of several grounds of discrimination. But, at this level, it is very important to ensure that the notion of multiple discrimination will be able to facilitate the proof, rather than to make it more difficult. In this sense, the reversal of the burden of proof attached to this new concept is essential in our view.

9. Community-law definition of multiple discrimination necessary?

Yes. Such a definition would at least make the issue of multiple discrimination more visible to the Member States and would enable them to develop an integrated approach regarding discriminatory issues at the national level.

10. Available literature or research?

We have no knowledge of any specific literature on this topic in our country.

11. Further research

Yes, further research is necessary, since this is a very important issue in our opinion. We believe that the first aspect that should be addressed is the importance and visibility of this issue at a national level, since the concept of multiple discrimination is a new concept.

1. Concept of multiple discrimination in legislation

The concept of multiple discrimination is foreseen in Romanian legislation in such a simplistic manner that it makes it rather impossible to be applied in practice. The provisions of Article 4(h) of the reissued 2002 Act on Equal Opportunities¹²⁷ stipulates that ‘multiple discrimination is understood to be any discriminating action based on two or more discrimination criteria’. The concept as provided for by law does not detail elements of compound or intersectional discrimination. Although not directly provided for by the Governmental Ordinance 137 of 2000¹²⁸ (hereafter referred to as 2000 Anti-Discrimination Act), the concept of multiple discrimination is implied, however, by the legal provisions of the Governmental Ordinance 77 of 2003¹²⁹ which state that any difference, exclusion, restriction or preference based on two or more grounds of unlawful discrimination constitutes an aggravating circumstance in addition to the establishment of the contravention liability, unless one or more of its components do not fall under criminal law.

2. Case law

The 2000 Anti-Discrimination Act represents the national legal framework addressing anti-discrimination. It provides for the establishment of the national equality body, namely the National Council for the Combat of Discrimination (hereafter referred to as NCCD or the Council). The NCCD’s mandate focuses on ensuring the enforcement of the anti-discrimination legal provisions as stipulated by the 2000 Anti-Discrimination Act.

There is no evidence of cases, including in the case law of the Equality Body, in which gender in combination with any other ground of discrimination was recognized as multiple discrimination. The 2007 NCCD Activity Report does not address the issue of multiple discrimination. All data available in the 2007 Activity Report¹³⁰ is built based on distinct grounds of discrimination. One possible explanation for such an approach is given by the fact that the 2000 Anti-Discrimination Act does not explicitly address the concept of multiple discrimination. The concept itself is provided for by the 2002 Act on Equal Opportunities. This provides the basis for the

¹²⁷ Act No. 202 of 19 April 2002 on equal opportunities and treatment between women and men, reissued, published in the Official Gazette No. 150 of 1 March 2007. Act 202 of 2002 was republished on the basis of Article III of Emergency Ordinance No. 56 of 2006 for the completion and modification of Act 202 of 2002, published in Official Gazette No. 768 of 8 September 2006, approved through Act No. 507 of 2006, published in Official Gazette No. 10 of 8 January 2007 by giving the texts a new numbering.

¹²⁸ Governmental Ordinance No. 137 of 2000 on preventing and sanctioning all forms of discrimination, republished, published in Official Gazette No. 431 of 23 September 2000. See also Act No. 48 of 2002 concerning the adoption of the Governmental Ordinance 137 of 2000 regarding the prevention and sanctioning of all forms of discrimination. See also Governmental Ordinance No. 77 of 2003 for the amendment of Governmental Ordinance 137/2000 regarding the prevention and sanctioning of all forms of discrimination. See also Act No. 27 of 2004 concerning the adoption of Governmental Ordinance No. 77 of 2003 for the amendment of Governmental Ordinance No. 137 of 2000 regarding the prevention and sanctioning of all forms of discrimination. Governmental Ordinance 137 of 2000 was amended subsequently to assure transposition of the Directive 2000/43/EC and the Directive 2000/78/EC.

¹²⁹ Article 2(4) Governmental Ordinance 77 of 2003 published in Official Gazette No. 619 of 30 August 2003.

¹³⁰ <http://www.cncd.org.ro/presa/CNCD-a-prezentat-raportul-de-activitate-pe-anul-2007-19/?language=ro>, accessed on 18 February 2009.

National Agency on Equal Opportunities (hereafter referred to as NAEO). While in July 2006, the Parliament adopted an amendment clarifying that the NAEO can only receive and forward petitions on alleged discrimination on grounds of gender to the NCCD, by law the NCCD is responsible for all aspects regarding anti-discrimination in Romania. As autonomous public authority under the control of the Parliament, the NCCD is the specialised body mandated to deal with all forms of discrimination on every ground, including sex, race or ethnic origin, nationality, religion, disability, sexual orientation and it carries its mandate based on the 2000 Anti-Discrimination Act.

Another explanation of the absence of data on multiple discrimination in the NCCD 2007 Activity Report, is given by the fact that the 2000 Anti-Discrimination Act is built on the premises of addressing the concept of discrimination from a one-dimensional perspective, namely based on individual and distinct grounds. According to public declarations of the NCCD President, in practice, discrimination allegations are investigated separately for each ground contained in the complaint. If the investigation proves the existence of more unlawful discrimination grounds, the fine applied shall be double or triple, reflecting the existence of more grounds.¹³¹

3. Any cases where gender-related discrimination is overlooked?

There is not enough evidence¹³² to conclude that any cases of gender-related multiple discrimination have been dealt with under the other discrimination grounds with the gender-related discrimination being overlooked.

4. Proof and procedural problems

As the concept of multiple discrimination is not used within the NCCD case law or in any court decision, problems regarding proof and other procedural elements cannot be assessed.

5. Description of a specific case

No case is available involving gender discrimination and one or more other grounds of discrimination.

6. Effects of legislation and case law in practice

As a part of the 2007 European Year of Equal Opportunities for All, the NAEO as implementing agency subcontracted two entities, namely the Romanian Society for Feminist Analysis (AnA¹³³) and the National Institute for Scientific Research in the Field of Labour and Social Protection (hereafter referred to as NISRLSP)¹³⁴ to conduct a study on multiple discrimination in Romania. The study was finalized and published in 2008 (hereafter referred to as 2008 Study on MDR). The aim of the report was to investigate to which extent multiple discrimination represents a reality in Romania, to clarify theoretical perspectives of approaching the concept of multiple discrimination and to identify any population groups with a high risk of multiple

¹³¹ NCCD public position cited in the 2008 Study on Multiple Discrimination in Romania, available at http://www.incsmps.ro/documente/Microsoft%20Word%20-%20discriminare_final_print.pdf p. 38, accessed on 19 February 2009.

¹³² Exhaustive information on case law of the NCCD cannot be provided. The NCCD website contains no information under the section of 'Decisions'. See <http://www.cncd.org.ro/decisions/>, accessed on 21 February 2009. Information on relevant case law is obtained based on data from 2007 NCCD Annual Report.

¹³³ Non-governmental organization whose mandate is to promote the position of women in Romania.

¹³⁴ State structure coordinated by the Ministry of Labour, Family and Social Protection.

discrimination. While the full report is available in electronic format on the NISRLSP website,¹³⁵ the main findings were also made public. The preliminary findings published on the NAEO website¹³⁶ state that 10.9 % of the individuals who were in a situation of differential treatment/discrimination in the last three years were aware that the treatment they were subjected to was determined by at least two criteria of discrimination.

Also, findings of the 2008 Study on MDR reveal that the population groups most vulnerable to multiple discrimination in Romania are represented by women with different social characteristics such as: Roma women, women over 40 and women from rural areas.¹³⁷ The same study reveals that 'Several categories of women, characterised by another identity than only that of being a woman, like being Roma, old or poor, are the groups most exposed to discriminatory acts in public places, as well as when accessing public services such as education, health services and in contacts with local public authorities. Hospitals and health centres are perceived to be the most discriminatory public places'.¹³⁸

Moreover, 'at the intersection of gender and age, the research clearly showed that several groups are perceived or self-perceived to be extremely vulnerable to discrimination: young and old men compared to women of the same ages are more exposed to discrimination when applying for jobs, but young and older women are vulnerable to discrimination in the workplace, facing barriers to advancing in their career and in access to training and professional development. Women with children compared to men with children are more subject to discrimination or suffer specific forms of discrimination, both in terms of access to jobs and in the workplace. Also, women that belong to ethnic minorities in Romania suffer specific forms of discrimination on the labour market, and are more often subject to discrimination both compared to men of the same minority and to Romanian women'.¹³⁹

In terms of the population's awareness of legislative provisions to protect the victims of discrimination, the 2008 Study on MDR reveals that 49 % of the population knows about their existence, 24 % is convinced that in Romania there is no legislation for combating discrimination, and 26 % does not know if there are such laws. Women, individuals aged 50 and older, and Roma people are the groups with the lowest level of awareness with respect to the existence of laws combating discrimination in Romania. These are also the groups that are most often victims of discrimination.

The lower the level of education among the respondents, the lower the level of awareness of anti-discrimination legislation existing in Romania. Thus, 17.6 % of the people that do not know about the anti-discrimination legal mechanisms have no education, while 26.1 % only have basic education. The people with no education or basic education represent an extremely vulnerable group on the labour market, especially because discrimination that occurs when trying to access jobs could be easily masked behind the argument that the applicant's level of education is unsatisfactory.

¹³⁵ http://www.incsmps.ro/documente/Microsoft%20Word%20-%20discriminare_final_print.pdf, accessed 21 February 2009.

¹³⁶ NAEO website, <http://www.anes.ro/raport2007/p5.htm>, accessed 20 February 2009.

¹³⁷ 2008 Study on Multiple Discrimination in Romania, available at http://www.incsmps.ro/documente/Microsoft%20Word%20-%20discriminare_final_print.pdf, page 46, accessed 21 February 2009.

¹³⁸ 2008 Study on Multiple Discrimination in Romania, available at http://www.incsmps.ro/documente/Microsoft%20Word%20-%20discriminare_final_print.pdf, page 160, accessed 21 February 2009.

¹³⁹ 2008 Study on Multiple Discrimination in Romania, available at http://www.incsmps.ro/documente/Microsoft%20Word%20-%20discriminare_final_print.pdf, page 160, accessed 21 February 2009.

7. Role of equality bodies

The NCCD is the public authority of the State that rules in matters of discrimination and has the mandate to deal with all forms of discrimination on every ground, including sex, race or ethnic origin, nationality, religion, disability, sexual orientation. The Council is responsible for the application and observation of the provisions of the 2000 Anti-Discrimination Act in its field of activity, as well as the harmonization of provisions from normative and administrative acts that violate the principle of non-discrimination. NCCD exercises its legal authority based on petitions and complaints from natural or legal persons or takes action *ex officio*. The Council solves the complaints and petitions submitted through decisions of its Steering Board.

Currently, the NCCD does not deal with multiple-discrimination cases by considering multiple discrimination as representing an intersection of several grounds of discrimination. If an investigation reveals the existence of more grounds of discrimination, these are simply combined in terms of sanctions.

8. Reinforcement of legal approach at EU level necessary?

Reinforcement of the legal approach aimed at combating multiple discrimination at EU and national level is highly necessary. Multiple discrimination shall be approached as a necessary step for further substantiation of a more complex way to discriminate. Where social reality is becoming more and more dynamic and complex, so are the forms of discrimination. Reinforcing the legal approach on multiple discrimination at EU level will represent a very important signal to the Member States that this concept is no longer a purely theoretical and sophisticated one, but a concept in need of being made operational within the national legal frameworks.

9. Community-law definition of multiple discrimination necessary?

A community-law definition of multiple discrimination would not only further strengthen the existing legal protection at EU level and in Romania regarding gender-related multiple discrimination, but it would also leave room for a minimum to be required in terms of transposing it into the national legal framework.

10. Available literature or research?

There is one very complex and important piece of research on multiple discrimination:

- *Multiple Discrimination in Romania*, 176 pages, Romanian Society for Feminist Analysis (AnA) and National Institute for Scientific Research in the Field of Labour and Social Protection, 2008.

While the whole study is only available in Romanian, an executive summary of 15 pages is also available in English.

SLOVAKIA – Zuzana Magurová

1. Concept of multiple discrimination in legislation

There is no legislation explicitly defining the term of multiple (cumulative) discrimination. The Antidiscrimination Act¹⁴⁰ (*Antidiskriminačný zákon*) stipulates

¹⁴⁰ Act No. 365/2004 Coll. on Equal Treatment in Certain Areas and on Protection against Discrimination and on the amendment of certain acts (Antidiscrimination Act), as amended by Constitutional Court decision No. 539/2005 Coll. of Laws, Act No. 326/2007 Coll. of Laws and Act No. 85/2008 Coll. of Laws.

the different grounds of discrimination, but it does not exclude the application of the definition in cases where several grounds are accumulated.

During the preparation of the amendment to the Antidiscrimination Act from 2008, the representative of NGOs proposed that the explicit definition of multiple discrimination should be included in the amended act, but the Government rejected this proposal.

2. Case law

At present, only a small number of court decisions concerning cases of gender discrimination is known. None of them include multiple discrimination.

In some cases, the Slovak National Centre for Human Rights as Equality Body represented the injured parties – Romany women who were discriminated at work on the ground of both their gender and ethnic origin. However, in all cases it based the formulation of the action for breach of the principle of equal treatment on the racial ground only.

3. Any cases where gender-related discrimination is overlooked?

Most of the court decisions concern cases involving discrimination on the ground of race, particularly in the area of supply of services and access to employment. The citizens' association *Poradňa* that specializes in litigation and represented the clients in many of such cases always strategically concentrated on one of the grounds, because this provided a larger chance of success. Another reason was the effort in the most economic proceedings, as well as the fact that courts are 'more inclined' to decide on racial discrimination than on gender discrimination.

4. Proof and procedural problems

The implementation of antidiscrimination legislation still causes some courts major problems, although there are organisations, particularly non-government ones, that offer special training devoted to antidiscrimination legislation for lawyers, including judges.

5. Description of a specific case

There is no such case.

6. Effects of legislation and case law in practice

No specialized discussion devoted to the issues of multiple discrimination has taken place yet. The author has no publication, study or official research into this subject available.

There are no specific strategies aimed at multiple discrimination, at the level of both the ministries and the Slovak National Centre for Human Rights as Equality Body. At present, the Government is preparing the document 'Basis of National Strategy on Gender Equality 2009-2013', where it only states the need of solution of the problem of multiple discrimination of women and men without any further specification of any particular measures.

No research or monitoring of cases of multiple discrimination has been implemented in Slovakia.

The NGOs described the problem of multiple discrimination, particularly of Romany women, in the shadow report to the CEDAW Committee,¹⁴¹ which contains a special chapter devoted to Romany women.

This year, some NGOs have started a cooperation on the project ‘Observance of Human Rights in Segregated Settlements’, which is devoted to discrimination on the ground of ethnic origin and gender and to social exclusion.

7. Role of equality bodies

The amendments to the Antidiscrimination Act have extended the tasks of the Slovak National Centre for Human Rights to the elaboration and publication of reports and recommendations on the questions related to discrimination and to the conduct of independent surveys of discrimination, not only in cases of racial discrimination, but also in cases of gender discrimination. In spite of this, the activities of the Centre are still characterized by several weaknesses that constitute an obstacle to a more effective protection of human rights and the enforcement of gender equality. In reality, the capacities of the Centre, particularly in the number of experts on gender equality and its budget have not been extended. Since its establishment, the Centre has actually lacked a long-term strategy for the comprehensive and systematic protection of human rights. It was not profiled as an entity addressing the burning issues and actively enforcing a significant improvement of the situation in the area of gender equality. This is obvious particularly from the Report on the Observance of Human rights in the Slovak Republic 2007, which particularly lacked clear attitudes of the Centre to some of the described cases of infringement of human rights and more specific recommendations for the area of legislation and public policies.

8. Reinforcement of legal approach at EU level necessary?

Experiences of several women’s NGOs prove the existence of multiple discrimination of Romany women and women belonging to national minorities. They are described in more detail in the shadow report to CEDAW.

To improve the situation at both the European and the national level, it will not be sufficient to explicitly define the term of multiple discrimination in legislation, but it particularly requires the elaboration of a specific strategy aimed at gender discrimination of Romany women and women belonging to the groups that are exposed to discrimination on other grounds.

9. Community-law definition of multiple discrimination necessary?

It may be stated that, like in other cases, our government will not be willing to strengthen the protection against multiple discrimination, unless it is pushed to do so by having to implement European legislation into national law. The courts will then be allowed to decide on the basis of the explicit legal regulations.

10. Available literature or research?

No literature or research available.

11. Further research

Further research and collection of data are very important. Only on the basis of collected data will it be possible to more effectively adjust the programmes aimed at

¹⁴¹ http://www.moznostvolby.sk/ShadowReport_CEDAW_Slovakia2008_ENG_FINAL.pdf

the achievement of gender equality for groups exposed to discrimination on other grounds as well.

SLOVENIA – Tanja Koderman Server

1. Concept of multiple discrimination in legislation

In Slovene statutory legislation multiple discrimination is not explicitly prohibited.

2. Case law

So far, the issue of multiple discrimination has not been dealt with in Slovene case law or in decisions of the Office for Equal Opportunities. However, in 2005, two petitions claiming discrimination on more than one ground were submitted to the Advocate of the Principle of Equality (hereinafter the Advocate) who works within the Office for Equal Opportunities. In the first case, a female member of a Roma minority claimed gender discrimination together with discrimination on ethnic origin. The petitioner, unaware of her rights, signed an agreement with her cohabiting partner after the end of their relationship on joint custody of their daughter. After she found out about the consequence of their agreement, she initiated a lawsuit and an injunction request for the sole custody of their child before the court. In addition, she filed a petition with the Advocate. The Advocate did not rule in this case, because the petitioner did not cooperate with the Advocate and, therefore, the case was not heard by the Advocate. The court decided in favour of her ex-partner.

In the second case, the petitioner was a disabled woman, a member of the German minority who claimed to have been discriminated against on grounds of gender, disability and ethnic origin many years ago. Unfortunately, the Advocate did not consider or rule in this case either, because the petition was not submitted in time.

3. Any cases where gender-related discrimination is overlooked?

Since there is no case law on this matter, this cannot be discussed.

4. Proof and procedural problems

Since there is no case law on this matter, this cannot be discussed..

5. Description of a specific case

Since there is no case law on this matter, this cannot be discussed.

6. Effects of legislation and case law in practice

There is not much information available. There was a survey carried out by the Office for Equal Opportunities and the Association of Handicapped People in Movement of Slovenia (VISION) in November 2008: *Violence against the disabled in the private sphere and in partnerships*.¹⁴² The survey found that disabled women are often discriminated against on both grounds, disability and gender.

7. Role of equality bodies

The Office for Equal Opportunities covers multiple grounds of discrimination (gender, nationality, racial or ethnic origin, religious or other belief, disability, age,

¹⁴² http://www.uem.gov.si/si/delovna_podrocja/tematski_posveti/nasilje_nad_invalidnimi_osebami/nasilje_nad_invalidnimi_osebami/, accessed 26 March 2009.

sexual orientation). Since multiple discrimination is not explicitly defined in Slovene legislation, it mostly focuses on individual grounds and does not have any strategy how to tackle multiple discrimination. Also, multiple discrimination is not mentioned in the Resolution on the National Programme for Equal Opportunities for Women and Men (2005-2013) which is a strategic document defining objectives and measures as well as key policy makers for the promotion of gender equality in various areas of life of women and men in the Republic of Slovenia during the period 2005–2013. However, it seems that the Office is aware of the problem and does recognize it in some projects, brochures (leaflet on non-discrimination), surveys (violence against the disabled) and in their annual reports when dealing with cases of alleged discrimination on multiple grounds.

However, it is certain that it should recognize the importance of the issue and should start initiating studies, surveys, campaigns, seminars, collecting statistical data and develop awareness-raising activities on this issue, which would eventually result in a higher number of claims of discrimination. It should also recognize the issue in the next Resolution on the National Programme for Equal Opportunities for Women and Men and therefore make multiple discrimination more visible, since it is evident that it exists.

8. Reinforcement of legal approach at EU level necessary?

I think reinforcement of the legal approach aimed at combating multiple discrimination is necessary at EU level. In order to strengthen the existing legal protection, I would propose the adoption of an exact definition of the concept of multiple discrimination at both EU level and national level, which would lead to a common understanding of this notion. In addition, specific provisions to combat multiple discrimination, including intersectional discrimination, should be introduced in order to increase awareness of the problem and therefore provide greater and more effective protection to persons being discriminated against on several grounds.

9. Community-law definition of multiple discrimination necessary?

An EU definition of multiple discrimination would strengthen the existing legal protection at EU and at national level for cases of gender-related multiple discrimination.

10. Available literature or research?

All available literature or research on multiple discrimination in Slovenia is listed in the bibliography of the report *Tackling Multiple Discrimination. Practices, policies and laws*.

11. Further research

Further research on multiple discrimination is, in my opinion, definitely recommended at EU level as well as at national level. In this research, questions regarding damage assessment in cases involving two or more grounds of discrimination and questions on how to develop legal frameworks to handle multiple discrimination cases should be addressed.

1. Concept of multiple discrimination in legislation

Article 14 of the Spanish constitution contains an open list of discrimination grounds, although it does not specifically mention the possibility of multiple discrimination. Law 3/2007 on Effective Equality between Women and Men contains three references related to multiple discrimination. The Introduction (II) gives special consideration to ‘cases of double discrimination and to the particular difficulties that women face when in a situation of vulnerability, like women belonging to a minority, migrant women and women with disabilities’. Article 14.6 of Law 3/2007 states the general criteria for actions of public authorities. One of the criteria will be ‘consideration of the particular difficulties in which women included in groups of special vulnerability (at risk of social exclusion) are, such as those belonging to a minority, migrant women, girls, women with disabilities, elderly women, widows and female victims of domestic violence, for which public authorities could also adopt measures of positive action’. Finally, Article 20 c) of Law 3/2007 states that the authorities shall, when preparing studies and statistics, introduce indicators and the necessary mechanisms which are important to show how the incidence of other variables can generate situations of multiple discrimination in the various spheres of action.

In conclusion, Spanish legislation recognizes the existence of possible situations of multiple discrimination and includes certain obligations for the authorities (to consider the special vulnerability derived from multiple discrimination, possibility of adopting positive actions to tackle multiple discrimination and to reflect multiple discrimination in studies and statistics).

2. Case law

Multiple discrimination is not usually clearly identified in cases and the approach before the courts is usually limited to a single ground. An important example was the situation of an independent worker (a woman) and her inclusion in the agrarian regime of social security. One of the requirements to be included in this regime was to obtain the main income from the agrarian economic activity, taking care of her own needs and those of her relatives living with her. This means that this income should be the highest obtained in the nuclear family. This norm, apparently neutral, prevented the inclusion of women in the regime of social security because of two reasons. First, due to the condition of women in Spanish social reality, where the highest income is usually that of the man. Second, because of her family condition: being married and belonging to a nuclear familiar in which the higher income is provided by the husband. This situation was modified by Law 36/2003 on Measures of Economic Reform, but until that moment there were enough claims from female workers, although the existence of indirect discrimination or a double ground of discrimination was not always identified (example: the sentence of the Superior Court of Justice of Catalonia 6676/2001 of 30 July 2001; the sentence of the Superior Court of Justice of Andalusia (Seville) 152/2001 of 18 January 2001).

A second example is the inequality in cases of part-time work in relation to social security due to the old Article 12.4 of the Worker’s Statute (already amended). The rule to calculate the requirements needed for part-time workers to become entitled to social security benefits leads to a disproportionate result from the point of view of the equality principle. In this way, the worker does not just obtain a lower pension when there are part-time working cycles in his labour life (which is correct, based on the smaller contributions made), but the part-time worker’s access to social protection

also becomes difficult because the number of worked days required is higher. Therefore, the Constitutional Court, in sentence 253/2004, declared the unconstitutionality of the old Article 12.4 of the Worker's Statute due to violation of the principle of equality from the point of view of proportionality between the adopted measure, the result of the measure and the final purpose. From another perspective, the part-time contract is an institution that in fact mainly affects women. The impact of the rule to calculate the requirements needed for this type of contracts affects a much greater proportion of women than of men. Since there are no reasons of social policy that can justify that measure, this constitutes indirect discrimination. The situation of multiple discrimination results from the direct discrimination of having a part-time contract and from the indirect discrimination mainly affecting women.

A third example is the discrimination of immigrant women due to a double condition of women in situations of domestic violence and women belonging to another race or ethnic group or women having another religion (Muslim). One possible situation is when the condition of illegal immigrant makes it difficult to lodge a formal complaint regarding violence due to a fear of deportation, according to studies presented by NGOs and research.¹⁴³ Another possible problem arises when immigrant women work as domestic employees with a specific work contract. The reason is that the protective measures in case of domestic violence (such as geographic mobility, suspension of the contract etc.) which are offered to employees working in enterprises do not apply to these specific domestic employees.¹⁴⁴

3. Any cases where gender-related discrimination is overlooked?

Constitutional Court Case 69/2007, of 16 April 2007, analyses the situation of the refusal of a widow's pension to a woman because of not satisfying the requirement to have a legally recognized marriage with the worker (deceased). The couple had married according to gypsy customs in 1971, although legally this marriage does not give the spouse any right to a widow's pension. The Constitutional Court considers that discrimination does not exist, since civil marriage is not conditional to one race excluding others. The requirement of a civil marriage is an option of the legislator, who can exclude other forms of cohabitation, for example living together or marriages concluded according to gypsy customs. The alleged reason for discrimination is race or social condition, and sex discrimination is never mentioned. From my point of view, pleading the case to include multiple discrimination considering the condition of being a woman and also indirect discrimination could have had other results. In particular, as described by Rey Martínez,¹⁴⁵ when taking into account the condition of gypsy women who are socially and culturally submitted to marriage according to the gypsy rite and to a form of life where the man is the one who works. This would be a discriminatory situation that could not have applied to a non-gypsy woman nor to a gypsy man. A gypsy man would fall under the same law, but the effects would be different because it is generally the man who works. The woman does not become entitled to a widow's pension if she has not worked previously during a certain period of time.

¹⁴³ Annual studies from the Organización SOS Racismo. 'Violencia doméstica y la mujer inmigrante', by Rosario Gaspar Blanch, *Boletín de Azanzadi Penal* 1/2003.

¹⁴⁴ 'Extranjeras y mujeres, la irregularidad en la precariedad. Sin papeles ni derechos' by Pilar Rivas Vallejo. *Jurisprudencia Aranzadi Social* 20/2005. ('Foreign women and women, the irregularity in uncertainty. Without papers or rights').

¹⁴⁵ 'La discriminación múltiple, una realidad antigua, un concepto nuevo' in *Revista Española de Derecho Constitucional* un. 84, 2008 ('Multiple discrimination, an old reality, a new concept').

4. Proof and procedural problems

There are no cases where multiple discrimination is expressly and clearly considered. In procedures, pleading arguments are usually limited to one of the grounds of discrimination, except in sentence 253/2004 of the Constitutional Court regarding part-time workers. Specific problems have not been observed.

5. Description of a specific case

No specific cases are known.

6. Effects of legislation and case law in practice

See under 10.

7. Role of equality bodies

The Women's Institute mainly works on one discrimination ground (gender/sex). As far as I know, their approach to multiple discrimination is not thorough enough for them to have a definition of the phenomenon

8. Reinforcement of legal approach at EU level necessary?

In Spain, multiple discrimination is, in my opinion, a quite unknown phenomenon from a theoretical point of view (in reality there are problems, of course). Although it is possible to find some provisions in Law 3/2007 connected to multiple discrimination, they are mainly obligations for the authorities, who have not done much until now. It is necessary to make multiple discrimination more visible and to improve the way to deal with related claims, but whether this target can be reached by a reinforcement of the legal approach, by a community-law definition of multiple discrimination or by other measures, such as further research, is not very clear to me.

9. Community-law definition of multiple discrimination necessary?

See under 8.

10. Available literature or research?

- José Fernando Lousada Arochena *El principio de Transversalidad de la Dimensión de Género* Ed. Ministerio de Trabajo y Asuntos Sociales, Madrid 2007.
- Fernando Rey Martínez 'La discriminación múltiple, una realidad antigua, un concepto nuevo' in: *Revista Española de Derecho Constitucional* un. 84 2008.
- Pilar Rivas Vallejo 'Extranjeras y mujeres, la irregularidad en la precariedad. Sin papeles ni derechos', *Jurisprudencia Aranzadi Social* 20/2005.

11. Further research

See under 8.

SWEDEN – Ann Numhauser-Henning

1. Concept of multiple discrimination in legislation

Sweden has no express rule on the prohibition of multiple discrimination. The Swedish (2008:567) Discrimination Act contains the bans on discrimination in Chapter 2. These are organised by area (employment, education etc.), but there is no express reference to the different grounds of discrimination or to multiple

discrimination in the respective ban itself. Its design can be said to represent a ‘silent integrated approach’. However, the ban covers differential treatment ‘linked to’ any ground covered by the Act, as listed in Chapter 1 Section 1. Therefore, there is no need for the alleged discrimination to be ‘caused’ by a specific ground. On the contrary, differential treatment can perfectly well be ‘linked to’ various different grounds simultaneously and thus amount to multiple discrimination. In fact, the design of the bans of discrimination in combination with the rule on the reversed burden of proof may well show to facilitate claims of multiple discrimination. However, since the Act only entered into force on 1 January 2009, there is no case law to prove this yet.

In the *travaux préparatoires* there was special mention of the ‘single act’ approach being more adequate for cases of multiple discrimination.¹⁴⁶

2. Case law

I have found only two court cases, both from the Labour Court, explicitly referring to more than one ground of discrimination, since the year 2000.¹⁴⁷ There are no such cases from the ordinary court system concerning discrimination in other areas of society than employment.

Labour Court case 2003 No. 63 concerned a Muslim woman wearing a headscarf who was denied employment only after a personal meeting. Earlier contact by telephone – without her ethnicity or religion being revealed¹⁴⁸ – had led the woman to believe there was room for employment. The case was brought to court by the Ethnic Discrimination Ombudsman (DO), but the discrimination claim was argued/based both on the ground of ethnicity¹⁴⁹ and on the ground of sex. The Court found no ethnic or sex discrimination in employment, since the position had already been filled when the meeting took place. It had been argued that the company uniform policy amounted to indirect sex discrimination to the detriment of Muslim women. However, since no employment situation was at issue, it was not proven that such a policy had informed any decision by the employer. The case was thus lost.

A special issue in this case was the question whether the DO had the competence to bring a case to court, not only on the basis of the (then) 1999 Ethnic Discrimination Act but also on the basis of the (then) 1991 Equal Opportunities Act. The Labour Court answered this in the affirmative, referring to the broadly formulated competences of the ombudsman (‘When bringing an action on behalf of an individual on the basis of the present Act, the Ombudsman may also in the same proceedings bring another action as representative of that person’) and to express statements in the *travaux préparatoires* that such a situation (thus plausible) would require coordination with (in this case) the Equal Opportunities Ombudsman.¹⁵⁰ Nor did the Labour Court find it unacceptable that sex discrimination was additionally claimed only at a later stage in the process and not argued from the beginning since both discrimination claims referred to the very same factual circumstances.

¹⁴⁶ Government Bill 2007/08: 95, p. 85.

¹⁴⁷ Discrimination bans on other grounds than sex/gender were introduced only in 1999 (concerning employment only), so there could be no earlier case law.

¹⁴⁸ It is important to stress here that ethnicity and religion and other beliefs all are grounds covered by the former 1999 Ethnicity Discrimination Act, making it less important to distinguish between them.

¹⁴⁹ Ethnicity and religion and other beliefs all are grounds covered by the former 1999 Ethnicity Discrimination Act, making it less important to distinguish between them. Religion was thus not spelled out as a specific ground.

¹⁵⁰ Government Bill 1993/94:101 p. 100 and Government Bill 1993/94:147 p. 57.

Labour Court case 2006 No. 96 concerned a Bosnian woman who was denied employment at a Swedish prison (*håkte*). A Swedish man was hired instead. The case was brought to court by the alleged victim's trade union and both ethnic and sex discrimination was claimed. However, the Labour Court found no discrimination whatsoever, since a *prima facie* case of discrimination could not be proven: the woman was not shown to be better qualified than the man who got the position and they were thus not in a comparable situation. The case was lost.

However, in addition to the 2008 Discrimination Act (and the earlier different discrimination acts that it replaced), there is also a prohibition of detrimental treatment in the (1995:584) Parental Leave Act. This ban was introduced in 2006. It can be argued that this ban constitutes a ban on discrimination of the parents of young children, although the law as such uses the concept detrimental treatment, not discrimination. Since the introduction of this ban, cases are known to be argued both in terms of sex discrimination according to the 1991 Equal Opportunities Act (as of 1 January 2009 the 2008 Discrimination Act) and detrimental treatment of parents according to the 1995 Act, since discrimination on the grounds of maternity is covered by both Acts (e.g. Labour Court cases 2008 No. 14 and 2009 No. 15). In the 2008 case, detrimental treatment according to the 1995 Parental Leave Act was found. However, the Labour Court did not try the case under the Equal Opportunities Act, since this was only an alternative ground according to the claim. In the 2009 case, no discrimination was found, neither under the Equal Opportunities Act nor under the 1995 Act.

As indicated above, to my knowledge, no cases have been brought on multiple discrimination in the ordinary court system based on the bans of discrimination outside the area of employment.

As far as the specialised bodies are concerned: Sweden used to have a number of different Ombudsmen (the Ethnicity Discrimination Ombudsman, the Disability Ombudsman, the Ombudsman against Discrimination due to Sexual Orientation and the Equal Opportunities Ombudsman) who have now merged into one Discrimination Ombudsman (DO), as of 1 January 2009 when the 2008 Discrimination Act entered into force. Practices and decisions from before 1 January 2009 are no longer easy to find, since their respective homepages are (partly) closing down. A study of the Equal Opportunities Ombudsman's yearly reports, however, reveals no experiences with multiple discrimination claims. An analysis of the claims processed by the Ombudsman against Discrimination due to Sexual Orientation shows, however, that some of these include allegations concerning multiple discrimination. This is, for instance, true for Decision 2007-08-31, *dno.* 511-2007 (sexual orientation and ethnicity), and Decision 2005-03-17, *dno.* 33-2005 (sexual orientation and disability). None of these allegations was taken any further, however, since there was no proof of discrimination whatsoever. This is likely to be true for the other Ombudsmen as well, but no such cases have shown up in argued decisions/opinions by the Ombudsmen or in the courts.

3. Any cases where gender-related discrimination is overlooked?

Such cases have not been found. However, there is another case worth mentioning: a criminal case of alleged illegal discrimination against Roma women according to Chapter 16 Section 9 of the Criminal Code (Supreme Court case NJA 1999 p. 556, judgment 13 September 1999). For crime-prevention purposes, a store introduced a prohibition denying persons dressed in wide, long and heavy skirts entry to the store. A Roma woman was denied entry because she was dressed in traditional clothes,

something which the Court held to be illegal discrimination. This criminal offence applies to discrimination on ethnic, religious or homosexual grounds only and – for legal reasons – a claim based on both Roman ethnicity and sex could therefore not be made. Currently, such discriminatory behaviour is *also* banned by the 2008 Discrimination Act both on the grounds of ethnicity and sex (among other grounds).

4. Proof and procedural problems

As was already described under 1, the bans on discrimination in Chapter 2 of the 2008 Discrimination Act cover differential treatment ‘related to’ any ground covered. This means that the alleged discrimination does not need to be ‘caused’ by a specific ground. On the contrary, differential treatment can perfectly well be ‘related to’ various different grounds simultaneously and thus amount to multiple discrimination. In fact, the design of the bans on discrimination in combination with the rule on the reversed burden of proof may well show to facilitate claims of multiple discrimination in the future.

Until now, however, since there are no cases where multiple discrimination was found, experience with procedural details concerning such claims is quite limited. Here, however, Labour Court case 2003 No. 63 concerning the Muslim woman wearing a headscarf who was denied employment, as described above under 2, should be called to mind again. In that particular case, a special issue concerned the question of whether the DO had the competence to bring a case to court, not only on the basis of the (then) 1999 Ethic Discrimination Act but also on the basis of the (then) 1991 Equal Opportunities Act. The Labour Court thus answered this in the affirmative (see above, under 2)

5. Description of a specific case

Labour Court case 2003 No. 63 was already described in some detail above. It concerned a woman who for religious reasons wore a headscarf and who applied for employment at a company that demonstrates food products in food stores. In a telephone call between the woman and the company it was not said or asked what religion the woman had or if she wore a headscarf. The parties agreed to meet the following day. On this occasion, the company’s representative explained that the woman cannot wear a headscarf when demonstrating food products, because she is supposed to be the ‘face of the company in the contact with its customers’. The representative furthermore said that it will ‘take a hundred years before people will accept’ that kind of clothing in public. She also assured the woman that she herself had nothing against people from other parts of the world or against any other religion. The Labour Court concluded in its decision that the company’s actions were not discriminatory because the employment procedure was terminated on the day before the meeting between the representative and the woman, when the company employed another person who had better skills (discrimination during an applications procedure was not as such prohibited at this time and, moreover, the Court explicitly found that no application procedure was ongoing at that time).

No discrimination was thus found, and there is little to be concluded from the Labour Court’s judgment as far as allegations of multiple discrimination are concerned. However, had the employment not been filled when the meeting took place, this would have been a case where, in my opinion the claim on sex discrimination should be added to the one on ethnic/religious discrimination. Muslim women are especially exposed to detrimental treatment, not only from an

ethnicity/religious point of view in a more general sense, but also on grounds of the dress code applied, in this case argued to constitute indirect sex discrimination.

6. Effects of legislation and case law in practice

No reports/surveys have been produced on multiple discrimination in practice, to my knowledge.

7. Role of equality bodies

As indicated under 2 above, until the beginning of this year Sweden had four different ombudsmen monitoring and tackling discrimination on different grounds; the Ethnicity Discrimination Ombudsman, the Disability Ombudsman, the Ombudsman against Discrimination due to Sexual Orientation and the Equal Opportunities Ombudsman. They have now, as of 1 January 2009 and the introduction of the 2008 Discrimination Act, been merged into one Discrimination Ombudsman (DO). Despite the fact they have probably been consulted on cases comprising potential multiple discrimination, very few, if any, such cases (see under 2) have so far reached the courts. The one exception, Labour Court case 2003 No. 63, clearly shows that there has been no legal hindrance for any of the ombudsmen to present a discrimination claim based on multiple grounds. Still, this has not happened.

However, the new ombudsman (DO) is known to be organised in a truly horizontal manner, which may prove to foster claims of multiple discrimination. The new Authority is thus organised along the lines of employment, education, other areas of society, positive action, etc., and not according to the respective grounds of discrimination. Only the future can tell what the effect of this will be.

8. Reinforcement of legal approach at EU level necessary?

In my opinion, the design of the Swedish 2008 Discrimination Act with its truly integrated approach concerning the bans on discrimination and the different grounds – see under 1 above – may show to be really useful where multiple discrimination is concerned, as might the requirement of any detrimental treatment being merely ‘linked to’ a(ny or various) grounds covered’. This could be an adequate model for Community law as well. It is obvious that the existing number of rules and still scattered character of Community regulation in this field, i.e. a number of separate directives, may be to the detriment of multiple discrimination claims. Slight differences in wording etc. of the regulations might cause considerable problems in practice.

However, this line of arguing will leave us with the single regulation (and specialised body) solution something which I, from other points of view, am quite sceptical to. There are, in my opinion, important arguments against such a solution, relating to differences in character among the various grounds and, in particular, as regard the needs of a proactive approach.

9. Community-law definition of multiple discrimination necessary?

I am not in favour of a legal definition of the multiple discrimination concept, neither in national nor in Community law. Such an endeavour is intrinsically related to the issue of definition/identification of new groups – or subgroups – to be protected by discrimination law. It is preferable to have the flexibility of a less precise concept, allowing the Courts to combine two or more grounds of discrimination. It is by no means obvious that a case of multiple discrimination must be more severely punished

than a simple one; this very much depends on the context and character of the discrimination at issue.

10. Available literature or research?

There are, to my knowledge, no Swedish publications of multiple discrimination research, nor do I know of any ongoing research.

11. Further research

In my opinion, further research is important since we need a better understanding of complex discrimination, including the identification of significant subgroups in need of positive action or proactive measures.

UNITED KINGDOM – *Aileen McColgan*

1. Concept of multiple discrimination in legislation

The term multiple discrimination is not used anywhere in UK legislation and the phenomenon is not addressed

2. Case law

There is one appellate case in which the Employment Appeal Tribunal and Court of Appeal allowed appeals against a finding that a woman had been discriminated against *as a Black woman* (*Bahl v Law Society* [2003] I.R.L.R. 640 and [2004] I.R.L.R. 799). The employment tribunal had accepted that the claimant, an Asian woman, had been discriminated against specifically *as a Black woman*. The Employment Appeal Tribunal overturned the tribunal's decision, Elias J ruling that the tribunal erred in law 'in failing to distinguish between the elements of alleged race and sex discrimination', and the Court of Appeal rejected Bahl's appeal. The court ruled that the tribunal had failed:

'to identify what evidence goes to support a finding of race discrimination and what evidence goes to support a finding of sex discrimination. It would be surprising if the evidence for each form of discrimination was the same (...) In our judgment, it was necessary for the [employment tribunal] to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did in favour of Dr. Bahl on whom lay the burden of proving her case.'

Dr Bahl would have had to make separate claims under the Race Relations Act 1976 by reference to the treatment of real or hypothetical white women, and under the Sex Discrimination Act 1975 by reference to Black men. If the discriminatory treatment which she alleged was intersectional, that is, specifically connected with her identity as a Black woman, the RRA and SDA claims could each readily be defeated by evidence relating to the employer's non-discriminatory treatment of Black men and white women respectively.

3. Any cases where gender-related discrimination is overlooked?

The effect of the decision in *Bahl* is that claimants will choose to litigate *either* under the Sex Discrimination Act 1975 or under the legislative provision relating to the

other aspect of the discrimination they have experienced, *or* will bring parallel claims under the SDA and the other legislation. They cannot bring these claims in combination without risking the kind of outcome experienced in *Bahl*.

4. Proof and procedural problems

See discussion of *Bahl* above. We have a very comparator-driven approach to discrimination, the result of which is frequently that a claimant will be put under pressure to point to a real or hypothetical comparator who is similarly situated but for the particular grounds of discrimination relied upon. This causes obvious difficulties in connection with multiple discrimination.

5. Description of a specific case

Bahl is the only case. The ‘added value’ of a multiple discrimination approach would be that it (a) would acknowledge that people are not single-dimensional characters who can only be identified by race *or* sex *or* sexual orientation, etc, and avoid the ways of thinking which flow from this single dimensional approach; (b) could deliver legal protection more effectively by dealing with people as they really are in the world, rather than requiring them to identify themselves by reference to a single protected characteristic for the purposes of a discrimination claim; and (c) could remove the discrimination inherent in the existing framework against those who differ from the ‘norm’ (that is, white, male, of Christian or no religion, heterosexual, without disability) in more than one respect.

6. Effects of legislation and case law in practice

See the literature mentioned below and ‘Reconfiguring Discrimination Law’, *Public Law* (2007), pp. 74-94 as well as those listed in the bibliography to the Copenhagen study generally and, in particular, Diamond Ashiagbor (1999) ‘The intersection between Gender and Race in the Labour market: Lessons for Anti-discrimination Law’ in: Anne Morris, Thérèse O’Donnell (eds.) *Feminist perspectives on Employment Law*, Cavendish and Sarah Harnet (2003) ‘Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination’, *Oxford Journal of Legal Studies*, Vol. 23, No. 1, pp. 65-86.

7. Role of equality bodies

Until recently the equality bodies covered only sex, race and disability and were legally prevented from sharing information. Anecdotal evidence, accepted by commission personnel in public conferences, suggests that (for example) a Black woman complaining of discrimination might be advised by the CRE that her claim was one of sex (therefore not within that Commission’s scope) whereas the EOC might then take the view that it was race-based (therefore outside that Commission’s scope). One of the benefits of the creation of a single Equality and Human Rights Commission, whose remit covers all grounds of protected discrimination (sex, race, disability, sexual orientation, religion and belief) as well as human rights more generally, is that the difficulties of information sharing have been resolved and there is more scope for work on multidimensionality. It is too early to say what has been achieved but certainly the Commission has already undertaken research into the impact of the pay gap on complexly defined groups (that is, disaggregated by sex and race and religion, age, disability and sexual orientation¹⁵¹) and is conscious of the

¹⁵¹ S. Longhi and L. Platt *Pay Gaps Across Equalities Areas* 2009.

concept of multiple discrimination. A search of the Commission's website for multiple discrimination resulted in almost 100 returns.

8. Reinforcement of legal approach at EU level necessary?

I think EU law should make it mandatory that Member States regulate discrimination in relation to the protected grounds where those grounds interact, that is, should require the prohibition of direct discrimination 'on any of the protected grounds, individually or in any combination or intersection' (or words to that effect) and that it should also clarify that indirect discrimination covers disparate impact not only in relation to individual grounds but also where they intersect or overlap.

9. Community-law definition of multiple discrimination necessary?

Yes. Although the Equality Bill currently before Parliament has been amended during parliamentary progress to include a provision on multiple discrimination, that provision would only cover direct discrimination on up to *two* combined grounds, e.g. disability and gender, or disability and race, the Government considering it too complicated and burdensome to allow claims on three or more different discrimination grounds.¹⁵² In addition, the provision on multiple discrimination applies only to *direct* and not to *indirect* discrimination. It would be beneficial if a community-law definition of multiple discrimination were adopted which covered more than two grounds and which applied to indirect as well as direct discrimination.

10. Available literature or research?

A. McColgan, 'Reconfiguring Discrimination Law', *Public Law* (2007), pp. 74-94.

11. Further research

My own view is that the nature of the legal difficulties presented by national law will differ between jurisdictions but that proposals for legal solutions do not require further study of what the problems of multiple discrimination are. In my view the EU should press on and require Member States to ensure that their legislation permits claims of additive or intersectional discrimination.

¹⁵² See <http://www.equalities.gov.uk/pdf/090422%20Multiple%20Discrimination%20Discussion%20Document%20Final%20Text.pdf>

Annex I

Report on Multiple Discrimination Questionnaire

Drafted by Dagmar Schiek, H el ene Masse-Dessen and Susanne Burri

Introduction

The European Commission recently published the study *Tackling Multiple Discrimination. Practices, policies and laws*.¹ This comparative study provides information on legal and policy developments in Canada, the United States and 10 Member States of the European Union. The report on multiple discrimination by the European Network of Legal Experts in the field of Gender Equality should have an important added value. In particular the gender dimension should be further elaborated. The aim of the Network's report on multiple discrimination is twofold: first the report should provide information on legal developments regarding multiple discrimination in 30 (EU and EEA) countries at national level; second it should give more insight on how to tackle multiple discrimination at EU level in particular where gender aspects are involved.

In this report, the concept of multiple discrimination is used as an overarching notion, comprising compound² and intersectional³ discrimination and all other forms of discrimination consisting of any combination of two or more grounds.

¹ Danish Institute of Human Rights, Mandana Zarrehparvar and Caroline Osander *Tackling Multiple Discrimination. Practices, policies and laws*, September 2007. See: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/stureps_en.htm, accessed 28 February 2009.

² T. Makkonen provides the following definition of compound discrimination:
'Compound discrimination should be taken to refer to such a situation in which several grounds of discrimination add to each other in one particular instance: discrimination on the basis of one ground adds to discrimination based on another ground to create an added burden. There can be two or more types of discrimination in play at one given situation. An example would be, to continue along the intersection of origin and gender, a situation in which the labour market is segregated on multiple basis: some jobs are considered suitable only for men, and only some jobs are reserved particularly for immigrants. In such a situation, the prospects of an immigrant woman to find a job matching her merits are markedly reduced because of compound discrimination.' T. Makkonen *Multiple, compound and intersectional discrimination: bringing the experience of the most marginalised to the fore* Institute for Human Rights, Åbo Akademi University, April 2002, p. 11 available at: <http://web.abo.fi/institut/imr/norfa/timo.pdf>, accessed 23 January 2009.

³ See the definition of T. Makkonen, on p. 11: 'Intersectional discrimination, in its narrower sense, should be taken to refer to a situation in which there is a specific type of discrimination, in which several grounds of discrimination interact concurrently. For instance, minority women may be subject to particular types of prejudices and stereotypes. They may face specific types of racial discrimination, not experienced by minority men. Crucial to this kind of intersectional discrimination is thus the specificity of discrimination: a disabled woman may face specific types of discrimination not experienced by disabled men or by women in general. One example of such discrimination would be unjustified subjection of disabled women to undergo forced sterilization, of which there is evidence around the world: this kind of discrimination is not experienced by women generally nor by disabled men, at least not nearly to the same extent as disabled women.'

Questions for the national experts:

1. Is multiple discrimination as described above explicitly prohibited in (non-discrimination) statutory legislation or statutory legal instruments of your Member State/country? If it is, is multiple discrimination defined and if so how?
2. Have cases (including case law of equality bodies), in which gender in combination with any other ground of discrimination was relevant (gender-related multiple discrimination), been recognized as such – ie where case law addresses gender and one or more other grounds at the same time? If that is the case, to what extent were the different grounds addressed separately and why? Were gender aspects explicitly or implicitly identified? If different grounds intersected, was the combined effect of such grounds acknowledged by the courts/equality bodies? Was the multiple character of discrimination reflected in higher sanctions or awards of damages, for example?
3. Have cases of gender-related multiple discrimination been dealt with under the other discrimination grounds with the gender-related discrimination being overlooked? If that is the case, what are the possible reasons or explanations given for the choice of not addressing gender discrimination (for example: legal reasons, the role of NGOs, trade unions, specialized agencies or lawyers?).
4. Are there any particular problems of proof and/or procedural problems and/or problems related to comparisons in cases of multiple discrimination? If this is the case, please describe these problems as they have appeared in your country.
5. Please describe and analyse in more detail one specific case (if there is such case) involving gender discrimination and one or more other grounds of discrimination which you consider particularly interesting. Explain what in your view is or could be the added value (if any) from a gender perspective of a multiple discrimination approach.
6. Is there any information available (e.g. surveys) regarding multiple discrimination and the effects of legislation (if any) and case law in practice in your country?
7. Taking into account the results of the study mentioned in footnote 1 which explicitly looked at the role of equality bodies, what role do equality bodies play in your country in the combat of multiple discrimination? What role could they play in your view?
8. Do you believe that a reinforcement of the legal approach aimed at combating multiple discrimination at EU level and national level is necessary? If so, what would you propose to strengthen the existing legal protection at EU level? Which effects would you eventually expect from such reinforcement?
9. Do you think that a Community-law definition of multiple discrimination would further strengthen the existing legal protection at EU level and/or at national level in your country in case of gender-related multiple discrimination?

- 10.** Is there any literature or research in your country on multiple discrimination which is not yet listed in the bibliography of the report mentioned in footnote 1? If so, please include the bibliographic references and send electronic copies of the literature if available.

- 11.** Would you recommend further research on multiple discrimination at EU level and/or national level? If so, which legal questions should be addressed in future research in your view?

