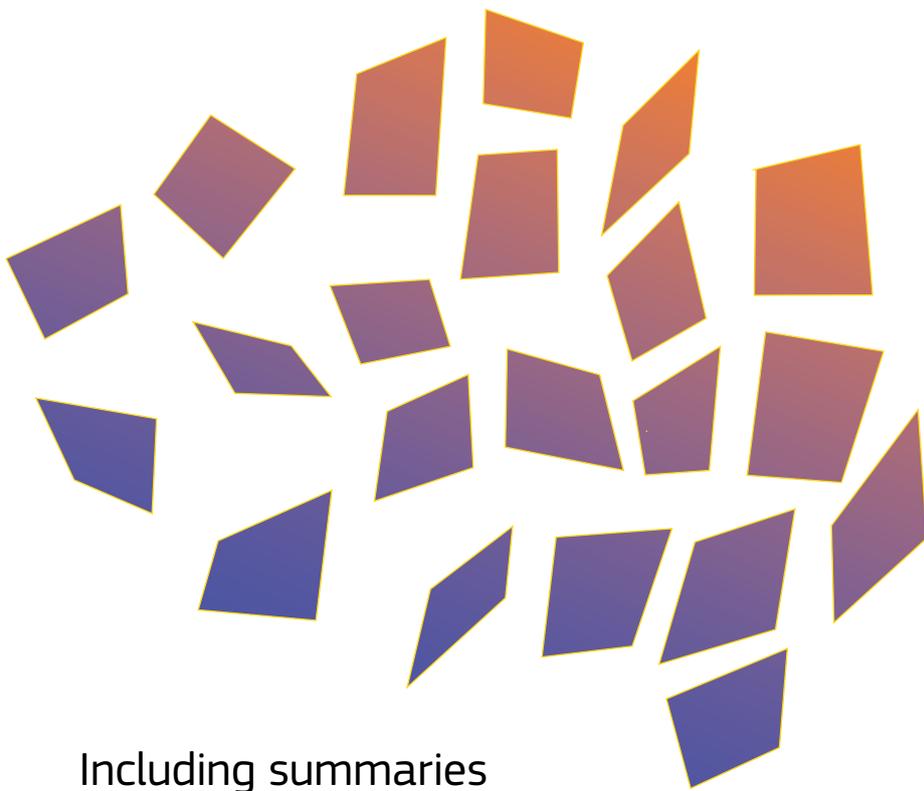




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# Intersectional discrimination in EU gender equality and non-discrimination law

**EUROPEAN COMMISSION**

Directorate-General for Justice and Consumers  
Directorate D — Equality  
Unit JUST/D1

*European Commission*  
*B-1049 Brussels*

# **Intersectional discrimination in EU gender equality and non-discrimination law**

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May 2016

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# Executive summary

It is increasingly recognised that discrimination can occur on the basis of more than one ground. A person who is discriminated against on grounds of her race might also suffer discrimination on grounds of her gender, her sexual orientation, her religion or belief, her age or her disability. Such discrimination can create cumulative disadvantage. Thus ethnic minority women, older women, black women and disabled women are among the most disadvantaged groups in many EU Member States. Similar cumulative disadvantage is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people.

The report begins by briefly defining its terms and setting out the problems the concept of intersectionality aims to address. There are several different ways of conceptualising discrimination when it occurs on more than one ground. Terms such as ‘multiple discrimination,’ ‘cumulative discrimination,’ ‘compound discrimination,’ ‘combined discrimination’ and ‘intersectional discrimination’ are often used interchangeably although they might have subtly different meanings. There is no single settled terminology, either within legal systems or in the literature. Generally, however, there are three main ways in which such discrimination may manifest itself. The first is when a person suffers discrimination on different grounds on separate occasions. For the purposes of this report, this type of discrimination will be called ‘sequential multiple discrimination.’ A second manifestation occurs when a person is discriminated against on the same occasion but in two different ways. For example, a gay woman might claim that she has been subject to harassment both because she is a woman and because she is gay. Such discrimination can be said to be ‘additive’, in that each type of discrimination can be proved independently. For the purposes of this report, this type of discrimination will be called ‘additive multiple discrimination.’ The third manifestation is, however, of a different order in that discrimination does not simply consist in the addition of two sources of discrimination; the result is qualitatively different, or, as Crenshaw terms it, ‘synergistic.’<sup>1</sup> For example, black women may experience discrimination in a way which is qualitatively different from either white women or black men. Black women share some experiences in common with both white women and black men, but they also differ in important respects. Thus while white women may be the victims of sex discrimination, they may also be the beneficiaries and even the perpetrators of racism. Conversely, black men may experience racism but be the beneficiaries and perpetrators of sexism. It is this type of discrimination which is the subject of this thematic report. It is usually referred to as ‘intersectional discrimination’ and it is this terminology which will be used in this report.

Both sequential and additive multiple discrimination can be dealt with within existing legal frameworks. Each manifestation of discrimination can be treated as if it were a single ground. Intersectional discrimination, however, because of its synergistic nature, has been much more challenging. Taken alone, either ground will not seem to be discriminatory: because white women are not treated less favourably than men, there will not appear to be sex discrimination, and because black men are not treated less favourably than whites, there will not seem to be race discrimination. Crenshaw argued that the focus on single grounds in discrimination law rendered invisible those who were at the intersection of two grounds. This invisibility was part of a deeper structural problem, namely that the categories on which grounds are based tend to focus on the more privileged of the group: white women in the case of sex discrimination, and black men in the case of race discrimination. Intersectional discrimination is also difficult to monitor, since many national statistics do not include data disaggregated by both sex and race, still less by other sources of intersectional discrimination, such as ethnic minority people with disabilities. The central problem identified by the notion of intersectional discrimination then is how to render visible and properly remedy the wrongs of those who are multiply disadvantaged.

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1 Crenshaw, K. (1989), *Demarginalising the intersection of race and sex*, University of Chicago Legal Forum, p. 139.

Chapter 2 of the report deals with the challenges posed by intersectionality. Intersectionality highlights the flaws in discrimination laws which focus on one ground at a time. Firstly, focussing on single grounds at a time ignores the fact that everyone has an age, a gender, a sexual orientation, a belief system and an ethnicity; many may have or acquire a religion or a disability as well. Secondly, it assumes that everyone within an identity group is the same, obscuring real differences within groups. Thirdly, it ignores the role of power in structuring relationships between people. Discrimination is not symmetrical; it operates to create or entrench domination by some over others. But such power relations can operate vertically, diagonally and in layers. Thus within the example of black women, black men are in a position of power in relation to their gender, but not in relation to their colour. White women conversely are in a position of power in relation to their colour, but not their gender. Ethnicity, too, is framed by power relations, with minorities in some countries being majorities in others. This demonstrates that structures of domination work in complex ways which cannot easily be captured through a single-identity model.

At the same time, intersectionality theory has encountered some difficult questions. This is because earlier approaches to intersectionality focussed on creating new groups, such as black women or battered immigrant women, to reflect specific intersectional experiences. However, this raised the problem of the extent to which categories and kinds of subjects can multiply and reconfigure, and how the law can manage such proliferation. Behind this was the deeper problem of the focus of intersectionality theorists on groups and identities. This has led more recent theorists to refocus on structures of power and exclusion, rather than groups and identities, highlighting relationships of domination and subordination rather than groups per se.

This report draws on these more recent insights, or ‘structural intersectionality,’ to argue that discrimination law should focus on relationships of power in order to determine who to protect and how. Since everyone has a range of identities, a relational view allows us to see that some characteristics signal privilege, while others are relationships of disadvantage. In addition, the ways in which detriment or disadvantage is experienced might be significantly shaped by circumstances and context. Thus power operates vertically, diagonally and in layers. The aim of intersectionality should be to capture and address the wrongs suffered by those who are at the confluence of all these relationships.

This in turn means that the references to particular grounds need not be understood as delineating a group with fixed boundaries, which gives the impression that everyone in the boundary is the same. Instead, reference to a ground of discrimination or a protected ground might be understood in a relational way, that is, as a conduit to describe different power relationships. Rather than constructing further sub-groups, existing grounds should therefore be construed as sufficiently capacious to address the confluence of power relationships which compounds disadvantage. In other words, discrimination on grounds of gender can refer to all the relationships of power and disadvantage experienced by women, including women with disabilities, older women, black women, gay women or any combination of these characteristics. Such an approach can be found in international human rights law, in particular, in the application of the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD). These are briefly described in Section 1.6.

To absorb an intersectional analysis into anti-discrimination law also requires us to move beyond a conception of equality which is based solely on the principle that likes should be treated alike. In the context of intersectionality, treating likes alike is particularly constraining because it requires us to make a comparison between two individuals who are similarly situated except for the difference in protected characteristics such as race. This tempts us to ignore all other facets of identity. Instead, it is argued for a substantive conception of equality which incorporates four dimensions: (i) the need to redress disadvantage, (ii) the need to address stigma, stereotyping, prejudice and violence, (iii) the need to facilitate voice and participation; and (iv) the need to accommodate difference and change structures of discrimination.

Chapter 3 of the report consists of a brief exploration of the social context, to give a flavour of some of the problems which an intersectional approach might seek to address. The extent of intersectional disadvantage in the EU is difficult to gauge because of the lack of comprehensive data reflecting intersectional experiences. This section does not, therefore, attempt to give a comprehensive view of the extent or nature of intersectional disadvantage in the EU. Instead, it draws on the patchwork of available qualitative studies to illuminate intersectional experiences and therefore to demonstrate the challenges facing EU law in addressing intersectionality. In each case, it analyses the available evidence in relation to the four axes of substantive equality detailed above. The most detailed of such studies concern women from disadvantaged ethnic communities and, particularly, Roma women. The report therefore uses these accounts to illuminate the vertical, diagonal and layered relationships of power experienced by women from these communities. It shows how women in these communities are specifically disadvantaged in an intersectional manner in all four dimensions of substantive equality detailed above: disadvantage; stigma, stereotyping, prejudice and violence; lack of voice and participation; and structural obstacles. The report similarly describes qualitative studies on the ways in which gender discrimination is affected by age, and points to some work which has been done on intersectionality in relation to ethnic minorities and LGBT people in the context of age. There is also a growing body of work on domestic workers. Domestic work is a particularly complex site of intersectionality because of the ways in which it creates power imbalances between some women and others, illustrating the vertical, diagonal and layered analysis of intersectional discrimination presented in this report. Much less work has been done on sexual orientation, gender identity, or disability meaning that these are all sites in which intersectional issues are rarely recognised or addressed.

Chapter 4 of the report analyses the ways in which European states deal with multiple discrimination and intersectionality. It draws on responses by national experts from all the EU member States, as well as the candidate countries (Montenegro, the former Yugoslav Republic of Macedonia, Serbia and Turkey) and Liechtenstein, Iceland and Norway. About 13 of the States surveyed make explicit mention of multiple discrimination in their legislation. Multiple discrimination is generally defined as discrimination on more than one protected ground, although some provisions refer to multiple discrimination without defining it. Only one State (Serbia), however, refers to ‘intersecting’ discrimination. Several jurisdictions specify that multiple discrimination is a severe, grave or aggravating form of discrimination. Statutory provision generally focuses on enhanced compensation, although some countries go further and integrate multiple discrimination into positive duties or the powers of inspectorates or equality bodies. Some countries limit the grounds which can be combined. There is no explicit mention in the legislation of 20 of the States covered. However, national experts point out that this does not preclude claims under multiple grounds in at least eight States.

National experts report very little case law, whether or not States have an explicit provision for multiple discrimination. Where there have been cases, the full implications of intersectionality are rarely developed. The absence of explicit provision for multiple discrimination, on the other hand, has not precluded cases from referring to multiple discrimination, although here, too, it is unusual to find a fully-fledged intersectionality approach in the form discussed in Chapter 1 of this report. Some experts point to cases where in fact courts addressed the issue as one of multiple discrimination or even intersectionality without necessarily using these terms. On the other hand, several national experts draw attention to cases which should have been identified as intersectional, but were not. The ad hoc nature of the case law makes it clear that for coherent jurisprudence to emerge, it is important to undertake targeted strategic litigation aimed at bringing appropriate arguments before courts in order to establish the principles. Only one State seems to have pursued this approach.

More attention has been given to multiple discrimination by equality bodies, or their equivalent in the States covered in this report. This is particularly important in relation to the research and information being disseminated by these bodies. There is also more data from equality bodies than from courts concerning the numbers of complaints which raise issues in relation to more than one ground of discrimination. There have been decisions by equality bodies in individual disputes which show some recognition of multiple

discrimination, but the extent to which multiple discrimination can be fully addressed might depend on whether there is a single equality body or ombud, as against several different ground-specific bodies.

Chapter 5 of the report considers the potential within existing EU anti-discrimination law to incorporate an intersectional approach. On the face of it, EU anti-discrimination law presents severe structural obstacles to intersectional claims. There are four interrelated reasons for this. Firstly, different grounds are found in different pieces of legislation; secondly, the various directives have differing scopes; thirdly, justification defences and exceptions are framed differently for different grounds; and fourthly, there is no scope for an expansion of the listed grounds without legislative amendment. To this is added the ubiquitous problem of the need to find an appropriate comparator. The report expands on each of these. Some of these difficulties, particularly in relation to the narrower scope of the Employment Directive, might be resolved by the draft 'Horizontal Directive' for age, disability, sexual orientation and religion and belief, which aims to harmonise the scope of the Employment Directive to match that of the Race Directive. However, this draft directive is still being negotiated in Council.

Chapter 6 of the report considers whether intersectional experiences can nevertheless be addressed within EU law. Three possible ways forward can be identified. The first is the creation of new subgroups to reflect intersectional groups. While some equality instruments permit courts to develop new grounds analogous to those listed, the Court of Justice has repeatedly emphasized that it is not within its power to extend the grounds listed exhaustively in the directives. The second possible way forward is to combine grounds within the existing list without seeing this as a new subgroup. There is some support in the EU legislative framework for such an approach. Article 19 of the CFEU, which gives power to take action to combat discrimination, lists sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This suggests that there is no obstacle in principle to combining grounds. Moreover, the preamble to the Race Directive states that in implementing the principle of equal treatment irrespective of racial or ethnic origin, the European Union should aim to eliminate inequalities between men and women since women are often the victims of multiple discrimination. However, given the obstacles set out above, it is clear that this approach could only happen in limited circumstances. The most likely field is employment, since employment is covered for all the grounds; but even here there would be difficulties if the justifications and exceptions differ for different grounds, such as race and age. When the draft horizontal directive is passed some of these problems will be resolved, particularly if the European Parliament's proposal that there be included an express reference to multiple discrimination were to be accepted. However, even if all these proposed amendments were accepted, this approach seems better suited to sequential and additive multiple discrimination than intersectional claims. This is because the basic premise is that two or more grounds are combined, rather than that the person at the intersection of two grounds experiences disadvantage and discrimination that is qualitatively different from either of the two grounds taken alone.

The third potential means to address intersectionality in EU law is to take an expansive or 'capacious' view of existing grounds, so that intersectional experiences can be addressed by acknowledging that even within a single ground, multiple intersecting power relations can be addressed. Rather than focusing only on one axis of disadvantage and assuming the remaining characteristics are privileged, a capacious view suggests that all aspects of an individual's identity should be taken into account even within one identity ground. For example, a woman who suffers intersectional disadvantage because she is an ethnic minority woman is still subject to discrimination on the grounds that she is a woman, but this is specific to the relationships of disadvantage resulting from her social location as an ethnic minority woman. The category 'woman' covers all women, and the more disadvantaged, the more she should attract protection. Similarly, there is no reason to assume that only men can claim on grounds of ethnic origin. All members of an ethnic minority, including ethnic minority women, should be protected against discrimination on grounds of ethnic origin, and the fact that she suffers specific discrimination as an ethnic minority woman should enhance her claim rather than precluding it. This approach draws on the model of both the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with disabilities (CRPD). These Conventions appear to be 'single axis' because of their

focus on women and persons with disabilities respectively.<sup>2</sup> Nevertheless, they expressly regard ‘women’ and ‘people with disabilities’ as including intersections of disadvantage. The report also considers some practical challenges to this approach.

Chapter 7 of the report examines the extent to which existing jurisprudence from the Court of Justice might be understood as reflecting intersectionality. The first approach, creating new groups has been eschewed, and there is little evidence at present of the second. The report evaluates several sets of judgements where the Court could be said to be incorporating an intersectional perspective into a capacious view of grounds. These cases are primarily a result of the ways in which the litigants frame the case, and the extent to which the Court has been receptive to such a framing. Perhaps the main instance of a capacious approach are the cases in which gender or sexual orientation discrimination have been applied to the specific experience of older women or older same-sex couples. The pattern was set in a series of cases focussing on the specific disadvantage of older women. The intersection of age and gender has also been addressed through indirect discrimination claims, particularly in relation to pension cases, where a practice or criterion has a disproportionate impact on older women. This capacious view has had some echoes in the recent jurisprudence on sexual orientation discrimination, which has likewise focussed on the provision of pensions and other age-related benefits to same-sex partners. None of the age discrimination cases reflect the specific disadvantage of older or younger members of ethnic minorities, nor of older LGBT people or older people with disabilities as briefly chronicled in Chapter 3. The poorest old and young people, primarily women, ethnic minorities and people with disabilities, are clearly not using this avenue of redress.

The report analyses several other issues with potential for a capacious view of grounds to incorporate intersectional experiences. Gender has been capaciously interpreted to include pregnancy and parenting, but most recently, commissioning mothers have been excluded. The recognition of gender reassignment as a species of sex discrimination can also be seen as an instance of a fluid approach to the understanding of sex discrimination which includes multiple overlapping identities; but this is set against the earlier refusal to incorporate sexual orientation discrimination into sex discrimination. There have only been a handful of cases under the Racial Equality Directive, and here too the many intersectional issues which were described in Chapter 3 above have not been surfacing before the Court. However, in the recent case of *Nikolova v CHEZ* (henceforth CHEZ), an intersectional approach can be detected.<sup>3</sup> Disability, too, has on occasion been treated in a capacious manner, but here, too, there are counter-examples. While there remains significant potential for a capacious approach, there are also important ways in which the Court’s jurisprudence continues to render invisible the specific nature of intersectional disadvantage in its understanding of existing grounds. For a genuine intersectional approach, both litigants and the Court would need to be more open to recognising and articulating the ways in which relationships of power interact in vertical, diagonal and layered ways so that the most disadvantaged are the most protected, rather than the converse. In any event, a litigation route, because of its expense and the length of time it requires, is a less effective way of addressing intersectionality than proactive measures.

This leads to the discussion in Chapter 8 of the report on positive duties and mainstreaming. Positive duties and other proactive measures are particularly valuable because they allow public bodies to take the initiative to identify and target those who are disadvantaged in several different ways. Language teaching is a good example. Migrant women with childcare obligations have particular difficulty in accessing ways of learning the dominant language, compared to migrant men, and non-migrant women. Therefore, positive action should include providing language teaching which facilitates participation by women with childcare obligations. Using positive action to address intersectionality also assists in monitoring, by providing guidance on which statistics should be gathered and how. Positive duties also permit structural remedies. The report discusses the legal basis in EU law for addressing intersectionality through mainstreaming

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<sup>2</sup> See section 2.4 above.

<sup>3</sup> Case 83/14 *CHEZ v Nikolova*.

and positive duties, and briefly touches on some of the challenges, such as how to facilitate appropriate participation and to achieve full compliance.

The final chapter briefly considers positive action and mainstreaming in EU policies. Although mainstreaming has been central to the promotion of gender equality by the European Commission, the attention paid to intersectionality has been patchy. A specific set of measures were proposed by the European Commission in its Report on Multiple Discrimination in 2007, which have much potential both to raise awareness and to make a start in combating intersectional discrimination. However, it is not clear what follow-up there has been. Active inclusion policies at State level have also appeared promising. Here too, although some good practice has been noted, initiatives dealing with intersectional experience remain rare. In the meanwhile, there is little sign of momentum towards addressing intersectional experiences in the five-year strategy plans for gender equality. Although the Strategy for Equality between Women and Men 2010-2015 includes a definition of multiple discrimination, it does not make any further mention of the principle.<sup>4</sup> The recently released strategy (the Commission Staff Working Document on Strategic Engagement For Gender Equality for 2016-2019) makes a commitment to pay particular attention to groups facing multiple disadvantage, but there is almost no further reference to these issues in the document.<sup>5</sup> The same is true for the List of Actions by the Commission to advance LGBTI Equality 2016 – 2019, which makes no mention at all of multiple discrimination.<sup>6</sup> Intersectionality is not mentioned in any of these three documents.

The report concludes by reiterating that it is possible to incorporate the perspectives of intersectionality into EU law as it currently stands without requiring new amendments, although, of course, it would be of considerable assistance if the scope and reach of the directives were to be harmonised. The first step is to generate a greater awareness of and sensitivity to the ways in which cross-currents of different sources of discrimination impact on people in different contexts. This requires equality bodies and other civil society organisations to pay specific attention to raising awareness of the issues and to monitor intersectionality through their reports and other investigatory powers they might have. There are already good examples of such activity in some member states. Once the issues are properly identified, then equality bodies and others are in a position to determine how to tackle them. Mainstreaming and proactive measures which can target the most vulnerable groups are in principle better able to deal with structural issues than litigation. But litigation also plays an important role, first because it gives affected individuals the opportunity to articulate their own claims and, secondly, because there is scope for framing selected strategic litigation, as best practice from the states surveyed showed. Remedies should be effective and dissuasive, both through compensating individuals but equally importantly through addressing structural issues, such as policies and practices which have a particular effect on the most disadvantaged groups. It is hoped that at EU level, active inclusion policies and future strategic plans will more actively include strategies based on the intersectional analysis here, and not just for gender but for intersectionality across all the grounds.

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4 European Commission (2011), The Strategy for Equality Between Women and Men 2010-2015. [http://ec.europa.eu/justice/gender-equality/files/documents/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf), p. 38.

5 Commission Staff Working Document on Strategic Engagement for Gender Equality 2016-2019 [https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019\\_en](https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019_en).

6 [http://ec.europa.eu/justice/discrimination/files/lgbti\\_actionlist\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/lgbti_actionlist_en.pdf).

# Résumé

Il est de plus en plus largement reconnu qu'une discrimination peut se fonder sur plus d'un motif: une personne visée par une discrimination fondée sur sa race peut également faire l'objet d'une discrimination fondée sur son genre, son orientation sexuelle, sa religion ou ses convictions, son âge ou son handicap – et subir en conséquence des désavantages cumulatifs. C'est ainsi que les femmes appartenant à une minorité ethnique, les femmes âgées, les femmes noires et les femmes handicapées sont parmi les groupes les plus défavorisés au sein de nombreux États membres. Les membres homosexuels de minorités ethniques, les personnes noires porteuses d'un handicap, les jeunes appartenant à une minorité ethnique et des personnes âgées handicapées peuvent connaître une même situation de désavantage cumulé.

Le rapport commence par définir la terminologie utilisée et par exposer les problèmes auxquels le concept d'intersectionnalité vise à fournir une réponse. Il existe plusieurs façons de conceptualiser la discrimination lorsque celle-ci se fonde sur plusieurs motifs. Des expressions telles que «discrimination multiple», «discrimination cumulative», «discrimination composée», «discrimination combinée» et «discrimination intersectionnelle» sont souvent utilisées de façon interchangeable alors qu'elles peuvent avoir une subtile différence de signification. Aucune terminologie unique n'a été fixée, que ce soit au niveau des systèmes juridiques ou au niveau de la littérature. On peut toutefois distinguer globalement trois grands modes de manifestation de ce type de discrimination. Premièrement, une personne peut être victime d'une discrimination fondée sur des motifs différents et intervenant à des occasions distinctes; elle est désignée dans le présent rapport sous le terme de «discrimination multiple séquentielle». Deuxièmement, une personne peut faire l'objet d'une discrimination manifestée à la même occasion mais de deux manières différentes: ainsi par exemple, une lesbienne peut alléguer qu'elle a subi un harcèlement à la fois parce qu'elle est une femme et parce qu'elle est homosexuelle; on parle ici de «discrimination additive» du fait que chaque forme de discrimination peut être prouvée indépendamment. Ce type de discrimination est désigné sous le terme de «discrimination multiple additive» dans la suite du présent rapport. Troisièmement, la discrimination peut être d'un autre ordre lorsqu'elle ne se manifeste pas simplement comme la somme de deux sources de discrimination, mais qu'elle engendre un effet qualitativement différent ou, comme le dit Crenshaw, «synergétique».<sup>1</sup> Les femmes noires, par exemple, peuvent connaître une discrimination qualitativement différente de celle vécue aussi bien par les femmes blanches que par les hommes noirs: tout en ayant une expérience commune à la fois avec les femmes blanches et avec les hommes noirs, leur expérience diffère à certains égards importants. Ainsi si les femmes blanches peuvent être victimes de discrimination fondée sur le sexe, elles peuvent également être les bénéficiaires d'actes racistes, voire même en être les auteurs. De leur côté, les hommes noirs peuvent être victimes de racisme, mais être les bénéficiaires et les auteurs d'actes sexistes. C'est cette forme de discrimination qui fait l'objet du présent rapport thématique. Elle est généralement appelée «discrimination intersectionnelle» et c'est le terme que nous utiliserons ici.

La discrimination multiple séquentielle et la discrimination multiple additive peuvent être abordées l'une et l'autre dans les cadres juridiques existants – chaque manifestation de discrimination pouvant être traitée comme relevant d'un motif unique. En raison de sa nature synergétique, la discrimination intersectionnelle pose pour sa part un problème beaucoup plus complexe. Considéré séparément, chacun des motifs ne semble pas discriminatoire: il n'y a aucune apparence de discrimination fondée sur le sexe du fait que les femmes blanches ne font pas l'objet d'un traitement moins favorable que les hommes, et il n'y a aucune apparence de discrimination fondée sur la race du fait que les hommes noirs ne font pas l'objet d'un traitement moins favorable que les hommes blancs. Crenshaw affirme que la focalisation de la législation antidiscrimination sur des motifs uniques prive de toute visibilité les personnes qui se

1 Crenshaw, K. (1989), *Demarginalising the intersection of race and sex*, University of Chicago Legal Forum, p. 139.

trouvent à l'intersection de deux motifs. Cette invisibilité relève d'un problème structurel plus profond, à savoir que les catégories sur lesquelles les motifs reposent tendent à se concentrer sur les plus privilégiés du groupe: les femmes blanches en ce qui concerne la discrimination fondée sur le sexe, et les hommes noirs en ce qui concerne la discrimination fondée sur la race. La discrimination s'avère en outre difficile à surveiller, étant donné que beaucoup de statistiques nationales n'établissent pas de données ventilées à la fois par sexe et par race, et moins encore par autres sources de discrimination intersectionnelle (personnes handicapées appartenant à une minorité ethnique, par exemple). Le problème essentiellement posé par la notion de discrimination intersectionnelle réside donc dans le moyen de rendre visibles les préjudices subis par ceux qui souffrent de désavantages multiples, et d'y remédier de façon adéquate.

Le chapitre 2 du rapport se penche sur les défis associés à l'intersectionnalité et commence par mettre en évidence les failles des lois qui, en matière de discrimination, se concentrent sur un motif unique. Premièrement, cette focalisation sur un seul motif à la fois ignore le fait que toute personne a un âge, un genre, une orientation sexuelle, des convictions et une origine ethnique; et que beaucoup peuvent avoir ou acquérir une religion ou un handicap. Deuxièmement, elle prend pour hypothèse que tous les personnes appartenant à un groupe identitaire sont les mêmes et occulte ainsi les différences existant en réalité au sein de chaque groupe. Troisièmement, cette focalisation ignore le rôle du pouvoir dans la structuration des relations interpersonnelles. La discrimination n'est pas symétrique: elle opère de façon à créer ou à ancrer la domination de certains individus sur d'autres. Ceci dit, ces relations de pouvoir peuvent fonctionner verticalement, en diagonale ou en strates. Pour reprendre l'exemple des femmes noires, les hommes noirs sont en position de pouvoir en raison de leur genre, mais pas en raison de leur couleur de peau. À l'inverse, les femmes blanches sont en position de pouvoir en raison de leur couleur de peau, mais pas de leur genre. L'origine ethnique s'inscrit, elle aussi, dans des relations de pouvoir puisque des groupes minoritaires dans certains pays peuvent être majoritaires dans d'autres. Ce qui précède démontre que les structures de domination ont un fonctionnement complexe qu'un modèle basé sur une identité unique ne peut aisément refléter.

La théorie de l'intersectionnalité ne s'en trouve pas moins confrontée à plusieurs questions difficiles. En effet, des approches antérieures de ce concept avaient surtout mis l'accent sur la création de nouveaux groupes (les femmes noires ou les femmes immigrées battues, par exemple) pour traduire des expériences intersectionnelles particulières. Or ces approches ont soulevé le problème de savoir jusqu'à quel point les catégories et les types de sujets pouvaient être multipliés et reconfigurés, et de quelle manière la législation pouvait gérer cette prolifération – une problématique que sous-tendait le problème plus fondamental posé par la focalisation des théoriciens de l'intersectionnalité sur des groupes et des identités. Cette situation a conduit récemment des théoriciens à se recentrer sur les structures de pouvoir et d'exclusion, par préférence à une concentration sur des groupes et des identités, et à mettre en évidence les rapports de domination et de subordination plutôt que des groupes en tant que tels.

Le présent rapport s'appuie sur ces perspectives nouvelles – ou «intersectionnalité structurelle» – pour défendre l'idée que la législation en matière de discrimination devrait être axée sur les relations de pouvoir, afin de déterminer qui doit être protégé et de quelle manière. Étant donné que chaque personne présente une série d'identités, une approche relationnelle permet de constater que certaines caractéristiques indiquent un privilège tandis que d'autres attestent de relations bâties sur le désavantage. Les circonstances et le contexte peuvent en outre considérablement influencer la manière dont le préjudice ou le désavantage est vécu. Le pouvoir fonctionne donc verticalement, en diagonale et en strates, et l'intersectionnalité vise à saisir et à réparer les torts subis par ceux qui se trouvent à la croisée de ces différentes relations.

Cette démarche exige à son tour de ne pas envisager les références à des motifs particuliers comme délimitant un groupe à l'intérieur d'un périmètre fixe, ce qui donnerait l'impression que toutes les personnes de ce groupe sont identiques. Mieux vaut envisager la référence à un motif de discrimination ou à un motif protégé dans une perspective relationnelle, autrement dit comme un moyen de décrire différents rapports de pouvoir. Il conviendrait donc, plutôt que de construire des sous-groupes supplémentaires, de considérer les motifs existants comme suffisamment larges pour prendre en compte l'intersection des relations de

pouvoir qui accentue le désavantage. Autrement dit, la discrimination fondée sur le genre pourrait couvrir l'ensemble des relations de pouvoir et des relations génératrices de désavantage que vivent les femmes, y compris les femmes handicapées, les femmes âgées, les femmes noires, les femmes homosexuelles ou les femmes présentant n'importe quelle combinaison de ces caractéristiques. On trouve cette approche en droit international relatif aux droits humains, et notamment dans l'application de la convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) et de la convention relative aux droits des personnes handicapées (CDPH), lesquelles sont brièvement décrites à la section 1.6 du rapport.

L'intégration d'une analyse intersectionnelle dans la législation antidiscrimination exige également que nous dépassions une conception de l'égalité exclusivement fondée sur le principe selon lequel des personnes semblables doivent recevoir un traitement semblable. Envisagé sous l'angle de l'intersectionnalité, le traitement semblable de personnes semblables est particulièrement contraignant car il oblige à comparer deux individus qui se trouvent en situation semblable si ce n'est qu'ils diffèrent au niveau de caractéristiques protégées telles que la race – ce qui incite à ignorer toutes les autres facettes de leur identité. Des arguments sont avancés en faveur d'une conception substantive de l'égalité qui comporterait quatre dimensions: (i) la nécessité de réparer le désavantage, (ii) la nécessité de prendre en compte la stigmatisation, les stéréotypes, les préjugés et les violences, (iii) la nécessité d'offrir la possibilité de se faire entendre et de participer; et (iv) la nécessité de s'adapter aux différences et de faire évoluer les structures de discrimination.

Le chapitre 3 du rapport explore brièvement le contexte social pour donner un aperçu des problèmes auxquels une approche intersectionnelle pourrait tenter de remédier. L'ampleur du désavantage intersectionnel au sein de l'UE est difficile à mesurer faute de données exhaustives reflétant les expériences de discrimination intersectionnelles. Ce troisième chapitre n'ambitionne donc pas de présenter une image complète de l'étendue ou de la nature du désavantage intersectionnel dans l'UE, mais plutôt de tirer parti de la mosaïque d'études qualitatives disponibles pour éclairer les expériences intersectionnelles et mettre ainsi en évidence les défis que le droit de l'UE est appelé à relever face à cette problématique. Il analyse dans chaque cas les éléments factuels disponibles par rapport aux quatre axes d'égalité réelle détaillés ci-dessus. Les études les plus approfondies en la matière concernent les femmes appartenant à des communautés ethniques défavorisées et les femmes roms en particulier. Le rapport s'appuie donc sur ces descriptions pour éclairer les relations de pouvoir verticales, diagonales et stratifiées vécues par les femmes de ces communautés. Il montre qu'elles sont, en raison d'une discrimination intersectionnelle, particulièrement défavorisées par rapport aux quatre dimensions de l'égalité réelle décrites ci-dessus: le désavantage; la stigmatisation, les stéréotypes, les préjugés et les violences; la difficulté de se faire entendre et de participer; et les obstacles structurels. Le rapport expose des éléments qui, également tirés d'études qualitatives, montrent de quelles manières la discrimination fondée sur le genre est affectée par l'âge, et met en évidence des travaux réalisés en matière d'intersectionnalité concernant des minorités ethniques et des personnes LGBT dans le contexte de l'âge. Les études se multiplient par ailleurs à propos des travailleurs domestiques – le travail domestique étant un point d'intersection particulièrement complexe en raison de la façon dont il crée des déséquilibres de pouvoir entre certaines femmes et d'autres, illustrant ainsi l'analyse verticale, diagonale et stratifiée de la discrimination intersectionnelle présentée dans le présent rapport. Les études s'avèrent beaucoup plus rares en ce qui concerne l'orientation sexuelle, l'identité de genre et le handicap, ce qui conduit à conclure que ces points d'intersection de discriminations sont rarement reconnus et pris en compte.

Le chapitre 4 du rapport analyse la façon dont les États européens gèrent la discrimination multiple et l'intersectionnalité. Il s'appuie à cette fin sur les réponses émanant des experts nationaux des 28 États membres de l'UE ainsi que des pays candidats (Monténégro, ancienne République yougoslave de Macédoine, Serbie et Turquie) et le Liechtenstein, l'Islande et la Norvège. Treize environ des pays couverts par l'analyse mentionnent expressément la discrimination multiple dans leur législation. Elle y est généralement définie comme une discrimination fondée sur plus d'un motif protégé, mais certaines dispositions y font référence sans la définir. Un seul État (la Serbie) parle de discrimination «croisée».

Plusieurs juridictions précisent que la discrimination multiple est une forme grave, voire aggravante, de discrimination. La disposition réglementaire porte le plus souvent sur une indemnisation plus conséquente, même si certains pays vont plus loin et intègrent la discrimination multiple dans les obligations positives ou les compétences des services d'inspection ou des organismes pour l'égalité. Plusieurs pays limitent les motifs pouvant être combinés. Dans vingt pays couverts par l'analyse, la législation ne fait aucune mention expresse de la discrimination multiple mais les experts nationaux soulignent que cela n'empêche pas, dans huit au moins d'entre eux, le dépôt de plaintes alléguant des motifs multiples.

Les experts nationaux signalent très peu de jurisprudence, que le pays concerné ait adopté ou non une disposition portant expressément sur la discrimination multiple. Il est rare en outre que, dans les cas existants, toutes les implications de l'intersectionnalité soient examinées. Par ailleurs, l'absence de disposition visant expressément la discrimination multiple n'a pas empêché d'y faire référence dans certaines affaires – même si, ici également, il est rare de trouver une approche intégrale de l'intersectionnalité telle que décrite au premier chapitre du présent rapport. Plusieurs experts attirent l'attention sur des cas où les juridictions ont effectivement traité la question dont elles ont été saisies comme relevant d'une discrimination multiple, voire même d'une discrimination intersectionnelle, sans utiliser ces termes pour autant. D'autre part, plusieurs experts nationaux attirent l'attention sur des cas qui auraient dû être traités comme relevant d'une discrimination intersectionnelle, mais qui ne l'ont pas été. Le caractère ad hoc de la jurisprudence montre clairement que l'instauration d'une plus grande cohérence à ce niveau réclame une stratégie du contentieux axée sur la présentation d'arguments appropriés devant les tribunaux en vue d'en établir les principes. Un seul État semble avoir opté pour cette approche.

Une attention plus grande a été réservée à la discrimination multiple par les organismes pour la promotion de l'égalité, ou leur équivalent, dans les pays couverts par le présent rapport – ce qui revêt une importance particulière étant donné les analyses et informations que ces organismes diffusent. Il existe d'ailleurs davantage de données en provenance de cette source qu'en provenance des juridictions en ce qui concerne le nombre de plaintes alléguant une discrimination fondée sur plusieurs motifs. Certaines décisions prises par les organismes de promotion de l'égalité dans le cadre de litiges individuels attestent d'une reconnaissance de la discrimination multiple, mais la mesure dans laquelle celle-ci est intégralement prise en compte peut dépendre de l'existence d'un organisme ou d'un médiateur unique – par opposition à l'existence de plusieurs organismes chargés chacun d'un motif spécifique de discrimination.

Le chapitre 5 du rapport analyse la capacité de l'actuelle législation antidiscrimination de l'UE d'intégrer une approche intersectionnelle. Au premier abord, cette législation comporte des obstacles structurels majeurs en ce qui concerne les griefs intersectionnels, et ce pour quatre raisons interdépendantes. Premièrement, les différents motifs figurent dans des actes législatifs différents; deuxièmement, les diverses directives ont des champs d'application différents; troisièmement, les causes de justification et les exceptions sont formulées différemment selon les motifs; et quatrièmement, il n'y a pas de possibilité d'élargissement de la liste des motifs sans amendement législatif. Vient encore s'ajouter à ce qui précède l'éternel problème de la recherche d'un comparateur adéquat. Le rapport développe chacun de ces points. Certaines des difficultés énoncées, à propos notamment du champ d'application plus étroit de la directive relative à l'emploi, pourrait être résolues par le projet de «directive horizontale» couvrant l'âge, le handicap, l'orientation sexuelle et la religion ou les convictions, qui vise à harmoniser le champ d'application de la directive relative à l'emploi avec celui de la directive relative à la race. Ceci dit, ce projet de directive est toujours en cours de négociation au sein du Conseil.

Le chapitre 6 du rapport pose la question de savoir si les expériences intersectionnelles pourraient malgré tout être prises en compte dans le cadre de la législation de l'UE. Trois pistes sont possibles à cette fin. La première est la création de nouveaux sous-groupes pour représenter les groupes visés par une discrimination intersectionnelle; en effet, si certains instruments en faveur de l'égalité autorisent les cours et tribunaux à développer de nouveaux motifs analogues à ceux figurant dans la liste des motifs protégés, la Cour de justice a insisté à plusieurs reprises sur le fait qu'il n'entraîne pas dans ses compétences d'élargir la liste exhaustive des motifs figurant dans les directives. La seconde piste consiste à combiner des motifs

à l'intérieur de la liste existante sans considérer qu'il s'agit d'un nouveau sous-groupe. Des éléments du cadre législatif européen permettraient d'étayer une approche de ce type. L'article 19 du TFUE, qui habilite à prendre des mesures en vue de combattre toute discrimination, *énumère le sexe, la race ou l'origine ethnique*, la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle – ce qui fait penser que rien ne s'oppose en principe à une combinaison de motifs. De surcroît, le préambule de la directive relative à la race stipule que, dans la mise en œuvre du principe de l'égalité de traitement sans distinction de race ou d'origine ethnique, l'Union européenne doit chercher à éliminer les inégalités entre les hommes et les femmes, en particulier du fait que les femmes sont souvent victimes de discriminations multiples. Il est évident toutefois au vu des obstacles décrits plus haut que cette approche n'est possible que dans un nombre restreint de situations. Le domaine le plus probable est celui de l'emploi, lequel est couvert pour tous les motifs; mais certaines difficultés surgiraient même dans ce domaine si les causes de justification et les exceptions devaient *différer* selon les motifs (race et âge, par exemple). Certains de ces problèmes seraient résolus par l'adoption du projet de directive horizontale, surtout en cas d'acceptation de la proposition du parlement européen visant à inclure une référence expresse à la discrimination multiple. Il n'en reste pas moins que, même si tous les amendements proposés étaient acceptés, cette approche semble mieux adaptée aux griefs relevant de la discrimination multiple séquentielle ou additive qu'à ceux relevant d'une discrimination intersectionnelle – l'hypothèse de base étant que deux motifs ou davantage sont combinés, et non le fait que la personne à l'intersection des deux motifs connaît un désavantage et une discrimination qualitativement différents de l'un ou l'autre des deux motifs considérés séparément.

La troisième piste envisageable pour que la législation de l'UE intègre l'intersectionnalité consiste à opter pour une vision plus large ou plus globale des motifs existants de façon à aborder les expériences intersectionnelles en considérant que des rapports de pouvoir multiples et intersectionnels peuvent exister dans le cadre d'un motif unique. Au lieu de se focaliser sur l'une des dimensions du désavantage et de supposer que les autres caractéristiques sont privilégiées, une vision globale suggère de prendre en considération toutes les facettes de l'identité d'une personne, même lorsqu'un seul motif d'identité est en cause. Ainsi par exemple, une femme qui subit un désavantage intersectionnel parce qu'elle appartient à une minorité ethnique n'en reste pas moins victime de discrimination parce qu'elle est une femme, mais cette situation est propre à la relation de désavantage découlant de sa situation sociale en tant que femme issue d'une minorité ethnique. La catégorie «femme» couvre toutes les femmes, et plus une femme est défavorisée, plus elle doit bénéficier de protection. De même, il n'y a aucune raison de supposer que seuls les hommes peuvent déposer plainte en invoquant le motif de l'origine ethnique. Tous les membres d'une minorité ethnique, y compris les femmes, doivent être protégés contre une discrimination fondée sur l'origine ethnique, et le fait qu'une femme soit victime d'une discrimination spécifique en tant que membre d'une minorité ethnique devrait conforter son grief au lieu de l'exclure. Cette approche se fonde sur le modèle adopté à la fois par la convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW) et la convention relative aux droits des personnes handicapées (CDPH) – deux conventions qui semblent axées sur une dimension unique dans la mesure où l'une se concentre sur les femmes et l'autre sur les personnes handicapées.<sup>2</sup> Elles n'en considèrent cependant pas moins expressément «les femmes» et «les personnes handicapées» comme incluant respectivement des groupes à l'intersection de désavantages. Le rapport s'intéresse également à certaines difficultés pratiques associées à cette approche.

Le chapitre 7 du rapport analyse dans quelle mesure la jurisprudence de la Cour de justice peut être perçue comme reflétant l'intersectionnalité. La première piste, à savoir la création de nouveaux groupes, a été évitée et peu d'indices attestent à ce jour de la seconde. Le rapport se penche sur plusieurs séries d'arrêts permettant de considérer que la Cour intègre une perspective intersectionnelle dans une vision globale des motifs. Ces arrêts sont essentiellement liés à l'angle sous lequel les parties présentent l'affaire ainsi qu'à la mesure dans laquelle la Cour a été réceptive à cette présentation. L'approche globale est principalement illustrée par une série d'affaires dans lesquelles l'expérience spécifique de femmes plus âgées ou de couples homosexuels plus âgés a été plaidée en tant qu'allégation de discrimination

2 Voir le point 2.4 du rapport.

fondée sur le genre ou l'orientation sexuelle – schéma mis en place suite à de nombreux cas axés sur le désavantage particulier des femmes plus âgées. L'intersection de l'âge et du genre a également été abordée dans le cadre de griefs portant sur une discrimination indirecte (en matière de retraite notamment) lorsqu'une pratique ou un critère a une incidence disproportionnée sur les femmes. Cette vision globale trouve un certain écho dans la jurisprudence récente relative à la discrimination fondée sur l'orientation sexuelle, qui s'est parallèlement penchée sur le versement de pensions et autres prestations liées à l'âge à des partenaires de même sexe. Aucun des arrêts ne reflète le désavantage spécifique des membres âgés ou jeunes de minorités ethniques, ou des personnes LGBT âgées ou des personnes âgées handicapées, brièvement évoqué au chapitre 3. Les personnes âgées ou jeunes extrêmement pauvres (des femmes principalement), les membres de minorités ethniques et les personnes handicapées n'utilisent manifestement pas cette voie de recours.

Le rapport analyse plusieurs autres éléments en lien avec l'intégration potentielle des expériences intersectionnelles dans une vision globale des motifs. Le genre a été globalement interprété comme incluant la grossesse et la parentalité mais, très récemment, les mères commanditaires en ont été exclues. La reconnaissance de la conversion sexuelle comme relevant d'une discrimination indirecte peut également être considérée comme une approche souple de la perception de la discrimination fondée sur le sexe incluant de multiples identités qui se recoupent; mais cette avancée intervient alors que la Cour a antérieurement refusé d'inclure la discrimination fondée sur l'orientation sexuelle dans la discrimination fondée sur le sexe. On ne compte que quelques affaires invoquant la directive relative à l'égalité raciale, et on constate ici également que les nombreux aspects intersectionnels décrits au chapitre 3 n'ont pas été évoqués devant la Cour. Une approche intersectionnelle est néanmoins observée dans une affaire récente, en l'occurrence l'affaire *Nikolova c. CHEZ*.<sup>3</sup> Le handicap a lui aussi été occasionnellement envisagé sous l'angle global, mais on trouve ici également un certain nombre de contre-exemples. S'il subsiste un potentiel important en termes d'approche globale, il existe également des manières dont la jurisprudence de la Cour continue d'occulter la nature spécifique du désavantage intersectionnel dans sa perception des motifs existants. Une véritable approche intersectionnelle exigerait que les deux parties en présence et la Cour se montrent davantage disposées à reconnaître et à formuler les modes d'interaction verticale, diagonale et stratifiée des relations de pouvoir, afin que les personnes les plus défavorisées soient les mieux protégées, au lieu de l'inverse. En tout état de cause, la voie litigieuse constituée, en raison de son coût et de sa durée, un moyen moins efficace que l'adoption de mesures proactives pour aborder la problématique de l'intersectionnalité.

On en vient ainsi à la discussion présentée au chapitre 8 du rapport concernant les obligations positives et le mainstreaming. Les obligations positives et autres mesures proactives sont particulièrement précieuses parce qu'elles permettent aux organismes publics de prendre l'initiative de l'identification et du ciblage des personnes les plus défavorisées à plusieurs égards. L'enseignement de la langue en fournit un bon exemple. Les femmes migrantes ayant charge d'enfants éprouvent des difficultés particulières à accéder aux diverses formes d'apprentissage de la langue dominante, que ce soit par rapport aux migrants masculins ou par rapport aux femmes non migrantes. Il convient donc qu'une action positive prévoie notamment un enseignement linguistique qui favorise la participation des femmes s'occupant de leurs enfants. Le recours à l'action positive dans le contexte de l'intersectionnalité contribue également au processus de suivi en fournissant des indications quant aux statistiques qu'il faudrait rassembler, et de quelle manière. Les actions positives conduisent également à des remèdes de nature structurelle. Le rapport examine le fondement juridique permettant, au titre du droit européen, d'aborder l'intersectionnalité via le mainstreaming et les obligations positives, et évoque ensuite succinctement certaines difficultés, parmi lesquelles les moyens de favoriser une participation adéquate et de parvenir à une pleine conformité.

Le dernier chapitre analyse brièvement l'action positive et le mainstreaming dans les politiques de l'UE. Alors que l'intégration dans l'ensemble des politiques et actions de l'Union a été au cœur de la promotion

3 Affaire 83/14 *CHEZ c. Nikolova*.

de l'égalité des genres par la Commission européenne, l'attention réservée à l'intersectionnalité a été pour le moins sporadique. Une série de mesures spécifiques ont été proposées par la Commission européenne dans son rapport sur la discrimination multiple qui, publié en 2007, offre un large potentiel tant en termes de sensibilisation qu'en termes d'amorce d'une lutte contre la discrimination intersectionnelle. Le suivi apporté à ce rapport reste cependant peu clair. Des mesures d'inclusion active adoptées au niveau d'États membres semblaient également prometteuses mais, ici également, les initiatives axées sur l'expérience intersectionnelle restent rares en dépit des bonnes pratiques proposées. On ne note pas entre-temps de réelle impulsion visant à inclure les expériences intersectionnelles dans les stratégies quinquennales en faveur de l'égalité des genres. Si la Stratégie pour l'égalité entre les femmes et les hommes 2010-2015 contient une définition de la discrimination multiple, elle ne fait aucune autre mention du principe.<sup>4</sup> Récemment publiée, la stratégie 2016-2019 (document de travail des services de la Commission intitulé *Strategic Engagement For Gender Equality for 2016-2019*) formule l'engagement de réserver une attention particulière aux groupes confrontés à un désavantage multiple – mais le document ne fait pratiquement aucune autre référence à ces questions.<sup>5</sup> Il en va de même de la liste d'actions établie par la Commission pour promouvoir l'égalité LGBTI (2016-2019), qui ne fait absolument aucune mention de la discrimination multiple.<sup>6</sup> L'intersectionnalité n'est évoquée dans aucun de ces trois documents.

Le rapport conclut en réitérant la possibilité d'intégrer les perspectives de l'intersectionnalité dans le droit de l'UE tel qu'il est actuellement libellé, sans nécessité de nouveaux amendements, étant entendu évidemment qu'une harmonisation du champ d'application et du rayonnement des directives constituerait une aide considérable. La première étape doit être un renforcement de la prise de conscience et de la sensibilité à l'égard des manières dont des personnes peuvent, dans divers contextes, être affectées par l'intersection de courants provenant de sources différentes de discrimination. Il faut à cette fin que les organismes de promotion de l'égalité et autres organisations de la société civile veillent tout particulièrement à renforcer la sensibilisation vis-à-vis de ces problématiques et à suivre l'intersectionnalité au moyen de rapports et de tout autre pouvoir d'enquête dont ils disposent. Il existe d'ores et déjà de bons exemples de ce type d'actions dans certains États membres. Une fois les problématiques dûment recensées, les organismes pour l'égalité et autres seront en mesure de déterminer la manière d'y faire face. Un *mainstreaming* et des mesures proactives capables de cibler les groupes les plus vulnérables sont en principe une meilleure voie que celle du contentieux pour remédier aux problèmes structurels. Le contentieux n'en revêt pas moins un rôle important: premièrement parce qu'il est pour les personnes concernées l'occasion de formuler leurs griefs personnels et, deuxièmement, parce qu'il offre la possibilité de présenter en justice une sélection d'actions à visée stratégique, comme en attestent de bonnes pratiques en vigueur dans les pays couverts par l'analyse. Les sanctions doivent être efficaces et dissuasives, tant en ce qui concerne l'indemnisation des individus qu'en ce qui concerne – et ce point est tout aussi important – la recherche de solutions au niveau structurel sous la forme de politiques et de pratiques ayant une incidence particulière sur les groupes les plus défavorisés. On peut espérer qu'au niveau de l'UE les mesures d'inclusion active et les futurs plans d'action se montreront davantage proactifs en prévoyant des stratégies qui, fondées sur l'analyse intersectionnelle, abordent l'intersectionnalité dans une perspective qui dépasse le genre pour englober l'ensemble des motifs de discrimination.

4 Commission européenne (2011). Stratégie pour l'égalité entre les femmes et les hommes 2010-2015, p. 38 ([http://ec.europa.eu/justice/gender-equality/files/strategy\\_equality\\_women\\_men\\_fr.pdf](http://ec.europa.eu/justice/gender-equality/files/strategy_equality_women_men_fr.pdf)).

5 Document de travail des services de la Commission sur l'engagement stratégique pour l'égalité hommes-femmes 2016-2019 ([https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019\\_en](https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019_en)).

6 [http://ec.europa.eu/justice/discrimination/files/lgbti\\_actionlist\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/lgbti_actionlist_en.pdf).

# Zusammenfassung

Zunehmend wird erkannt, dass Diskriminierung auf mehr als einem Merkmal basieren kann. Eine Person, die aufgrund ihrer rassischen Zugehörigkeit diskriminiert wird, kann auch Diskriminierung aufgrund ihres Geschlechts, ihrer sexuellen Ausrichtung, ihrer Religion oder Weltanschauung, ihres Alters oder einer Behinderung erleiden. Eine solche Diskriminierung kann zu kumulativer Benachteiligung führen. Frauen aus ethnischen Minderheiten, ältere Frauen, schwarze Frauen und Frauen mit Behinderungen gehören daher in vielen Mitgliedstaaten der Union zu den am stärksten benachteiligten Gruppen. Ähnliche kumulative Benachteiligungen erleben Schwule und Lesben, die einer ethnischen Minderheit angehören, schwarze Menschen mit Behinderungen, jüngere Menschen, die einer ethnischen Minderheit angehören, und ältere Menschen mit Behinderungen.

Der Bericht beginnt mit einer kurzen Bestimmung der verwendeten Begriffe und beschreibt danach die Probleme, auf die das Konzept der Intersektionalität abhebt. Es gibt verschiedene Möglichkeiten, Diskriminierung, die auf mehr als einem Merkmal basiert, zu konzeptualisieren. Begriffe wie "Mehrfachdiskriminierung", "kumulative Diskriminierung", "mehrdimensionale Diskriminierung", "kombinierte Diskriminierung" und "intersektionelle Diskriminierung" werden häufig synonym verwendet, obwohl sich ihre Bedeutung leicht voneinander unterscheidet. Eine einheitliche, etablierte Terminologie existiert weder in den Rechtssystemen noch in der Literatur. Es lassen sich jedoch grob drei Formen unterscheiden, in denen sich diese Art von Diskriminierung manifestiert. Die erste liegt vor, wenn eine Person in unterschiedlichen Situationen aus verschiedenen Gründen diskriminiert wird. Für die Zwecke dieses Berichts wird diese Art der Diskriminierung als "sequentielle Mehrfachdiskriminierung" bezeichnet. Eine zweite Erscheinungsform liegt vor, wenn eine Person gleichzeitig aus zwei verschiedenen Gründen diskriminiert wird. Eine lesbische Frau kann zum Beispiel Belästigungen ausgesetzt sein, weil sie eine Frau und weil sie homosexuell ist. Diese Art von Diskriminierung ist sozusagen "additiv", da jede einzelne Diskriminierung unabhängig voneinander nachgewiesen werden kann. Für die Zwecke dieses Berichts wird diese Form von Diskriminierung als "additive Mehrfachdiskriminierung" bezeichnet. Die dritte Erscheinungsform unterscheidet sich insofern, als sie nicht einfach die Addition zweier Ursachen von Diskriminierung ist, sondern zu einem Resultat führt, das qualitativ anders oder, wie Crenshaw es nennt, "synergetisch" ist.<sup>1</sup> Schwarze Frauen können zum Beispiel auf eine Art und Weise diskriminiert werden, die sich qualitativ sowohl von der Diskriminierung unterscheidet, die weiße Frauen erleiden, als auch von der, die schwarze Männer erleiden. Schwarze Frauen teilen gewisse Erfahrungen mit weißen Frauen und gewisse Erfahrungen mit schwarzen Männern, in wichtigen Punkten unterscheiden sie sich aber auch. Weiße Frauen können einerseits Opfer geschlechtsbezogener Diskriminierung, andererseits aber auch Nutznießerinnen und sogar Urheberinnen von Rassismus sein. Umgekehrt können schwarze Männer von Rassismus betroffen, gleichzeitig jedoch Nutznießer und Urheber von Sexismus sein. Es ist diese Art von Diskriminierung, die Gegenstand dieses Themenberichts ist. Sie wird in der Regel als "intersektionelle Diskriminierung" bezeichnet, und diese Bezeichnung wird auch in dem vorliegenden Bericht verwendet.

Sowohl gegen sequentielle als auch gegen additive Mehrfachdiskriminierung kann innerhalb des bestehenden Rechtsrahmens vorgegangen werden, da jede Manifestierung von Diskriminierung als auf einem einzigen Merkmal beruhend behandelt werden kann. Intersektionelle Diskriminierung hat sich aufgrund ihres synergetischen Charakters jedoch als weitaus schwieriger erwiesen. Für sich allein genommen scheint keines der Merkmale diskriminierend zu sein: Da weiße Frauen nicht weniger günstig behandelt werden als Männer, liegt scheinbar keine geschlechtsbezogene Diskriminierung vor, und da schwarze Männer nicht weniger günstig behandelt werden als weiße, liegt scheinbar auch keine rassistische Diskriminierung vor. Nach Ansicht Crenshaws führt die Fokussierung des Antidiskriminierungsrechts auf einzelne Merkmale dazu, dass Diskriminierungen, die auf dem Schnittpunkt zweier Merkmale liegen,

1 Crenshaw, K. (1989), *Demarginalising the intersection of race and sex*, University of Chicago Legal Forum, S. 139.

unsichtbar sind. Diese Unsichtbarkeit beruht auf einem tiefer liegenden, strukturellen Problem – dass sich nämlich die Kategorien, auf denen die Gründe für Diskriminierung basieren, in der Regel auf die Privilegierteren der Gruppe konzentrieren: weiße Frauen im Fall von geschlechtsbezogener Diskriminierung und schwarze Männer im Fall von rassistischer Diskriminierung. Intersektionelle Diskriminierung ist auch schwer zu kontrollieren, da viele nationale Statistiken keine Daten enthalten, die sowohl nach Geschlecht als auch nach rassistischer Zugehörigkeit aufgeschlüsselt sind, geschweige denn nach anderen Ursachen intersektioneller Diskriminierung (z. B. Menschen mit Behinderungen, die einer ethnischen Minderheit angehören). Das zentrale, mit dem Begriff der intersektionellen Diskriminierung bezeichnete Problem liegt also darin, herauszufinden, wie das Unrecht, das mehrfach benachteiligte Menschen erleiden, sichtbar gemacht und wie diesem Unrecht wirksam abgeholfen werden kann.

Kapitel 2 des Berichts geht auf die Herausforderungen der Intersektionalität ein. Intersektionalität macht die Schwachstellen von Antidiskriminierungsgesetzen deutlich, die sich auf einzelne Merkmale fokussieren. Erstens lässt die Fokussierung auf einzelne Merkmale die Tatsache außer Acht, dass jeder Mensch ein Alter, ein Geschlecht, eine sexuelle Ausrichtung, eine Weltanschauung und eine ethnische Zugehörigkeit hat; viele haben auch eine religiöse Überzeugung oder eine Behinderung oder nehmen eine solche an bzw. erwerben sie. Zweitens geht sie davon aus, dass innerhalb einer Identitätsgruppe alle Personen gleich sind und verdeckt reale Unterschiede innerhalb von Gruppen. Drittens vernachlässigt sie die Rolle der Macht in der Strukturierung zwischenmenschlicher Beziehungen. Diskriminierung ist nicht symmetrisch; sie bewirkt, dass Dominanz einiger über andere erzeugt bzw. verankert wird. Solche Machtbeziehungen können jedoch vertikal, diagonal oder in Schichten funktionieren. Um bei dem Beispiel schwarzer Frauen zu bleiben: Schwarze Männer sind hinsichtlich ihrer Geschlechtszugehörigkeit in einer Machtposition, hinsichtlich ihrer Hautfarbe jedoch nicht; weiße Frauen hingegen sind hinsichtlich ihrer Hautfarbe in einer Machtposition, nicht jedoch hinsichtlich ihrer Geschlechtszugehörigkeit. Auch die ethnische Zugehörigkeit unterliegt solchen Machtbeziehungen: Was in manchen Ländern Minderheiten sind, sind in anderen Ländern Mehrheiten. Dies verdeutlicht, dass Dominanzstrukturen komplexe Wirkungsweisen haben, die mit einem Modell der Einzelidentität nicht ohne weiteres erfasst werden können.

Andererseits ist die Theorie der Intersektionalität auf einige schwierige Fragen gestoßen. Frühere Ansätze in Bezug auf Intersektionalität konzentrierten sich darauf, neue Gruppen – zum Beispiel schwarze Frauen oder misshandelte Migrantinnen – zu schaffen, um spezifische intersektionelle Erfahrungen abzubilden. Dies warf jedoch die Frage auf, bis zu welchem Grad Kategorien und Subjektarten vermehrt und rekonfiguriert werden können und wie das Gesetz mit einer solchen Vermehrung umgehen soll. Dahinter war das tiefer liegende Problem der Fokussierung der Intersektionalitätstheorie auf Gruppen und Identitäten. In jüngerer Zeit sind Theoretikerinnen und Theoretiker deshalb dazu übergegangen, sich nicht auf Gruppen und Identitäten, sondern auf Strukturen der Macht und Ausgrenzung zu konzentrieren, den Schwerpunkt also nicht auf Gruppen an sich, sondern auf Beziehungen von Dominanz und Unterordnung zu legen.

Ausgehend von dieser neueren Sichtweise, oder "strukturellen Intersektionalität", wird in dem Bericht dafür plädiert, dass sich das Diskriminierungsrecht auf Machtbeziehungen konzentriert, um festzulegen, wer geschützt werden soll und wie. Jeder Mensch besitzt mehrere Identitäten, und mithilfe einer relationalen Herangehensweise ist es möglich zu sehen, dass manche Merkmale auf ein Privileg hindeuten, andere hingegen Beziehungen signalisieren, die von Benachteiligung geprägt sind. Außerdem kann die Art und Weise, wie Benachteiligung erfahren wird, erheblich von den Umständen und vom Kontext abhängen. Macht wirkt also vertikal, diagonal und in Schichten. Ziel von Intersektionalität sollte es sein, das Unrecht zu erfassen und zu bekämpfen, das denjenigen widerfährt, die an den Schnittstellen all dieser Beziehungen stehen.

Dazu wiederum ist es erforderlich, die Bezugnahme auf bestimmte Merkmale nicht so zu verstehen, dass damit eine Gruppe beschrieben wird, die nach außen klar begrenzt ist, und der Eindruck entsteht, dass alle Menschen innerhalb dieser Begrenzung gleich sind. Die Bezugnahme auf einen Diskriminierungsgrund oder ein geschütztes Merkmal sollte vielmehr relational, also als Mittel zur

Beschreibung unterschiedlicher Machtbeziehungen verstanden werden. Anstatt weitere Untergruppen zu konstruieren, sollten die bestehenden Merkmale und Gründe großzügig genug ausgelegt werden, um die Überschneidungen von Machtbeziehungen zu erfassen, durch die Benachteiligung verstärkt wird. Anders ausgedrückt: Diskriminierung aufgrund des Geschlechts kann sich auf alle von Macht und Benachteiligung geprägten Beziehungen beziehen, die Frauen erleben, darunter auch Frauen mit Behinderungen, ältere Frauen, schwarze Frauen, homosexuelle Frauen oder Frauen mit einer beliebigen Kombination dieser Merkmale. Dieser Ansatz ist in internationalen Menschenrechtsvorschriften zu finden, insbesondere in der Anwendung des Übereinkommens zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW) und des Übereinkommens über die Rechte von Menschen mit Behinderungen, die in Abschnitt 1.6 kurz beschrieben werden.

Um einen intersektionellen Ansatz in das Antidiskriminierungsrecht einzuführen, ist es auch erforderlich, eine Vorstellung von Gleichheit zu überwinden, die allein auf dem Grundsatz basiert, dass Gleiche gleich behandelt werden sollten. Aus dem Blickwinkel der Intersektionalität ist die Gleichbehandlung von Gleichen besonders einengend, weil sie verlangt, einen Vergleich zwischen zwei Personen anzustellen, die sich, mit Ausnahme ihres Unterschieds in einem geschützten Merkmal wie zum Beispiel rassistische Zugehörigkeit, in einer vergleichbaren Situation befinden. Dies verleitet dazu, alle anderen Facetten ihrer Identität außer Acht zu lassen. Anstelle dieses Ansatzes wird für ein substantielles Konzept von Gleichheit plädiert, das vier Dimensionen umfasst: (i) die Notwendigkeit, Benachteiligungen zu beseitigen, (ii) die Notwendigkeit, gegen Stigmen, Klischees, Vorurteile und Gewalt vorzugehen, (iii) die Notwendigkeit, Mitsprache und Teilhabe zu ermöglichen, und (iv) die Notwendigkeit, Unterschieden Rechnung zu tragen und diskriminierende Strukturen zu verändern.

Kapitel 3 des Berichts wirft einen kurzen Blick auf den sozialen Kontext, um einen Eindruck von den Problemen zu vermitteln, die mit einem intersektionellen Ansatz angegangen werden könnten. Das Ausmaß der intersektionellen Benachteiligung in der Union ist schwer abzuschätzen, da umfassende Daten über intersektionelle Erfahrungen nicht vorliegen. Dieses Kapitel erhebt daher nicht den Anspruch, einen vollständigen Überblick über das Ausmaß oder die Beschaffenheit intersektioneller Benachteiligung in der Union zu liefern. Es greift stattdessen auf das Patchwork verfügbarer qualitativer Studien zurück, um intersektionelle Erfahrungen zu beleuchten und so die Herausforderungen zu verdeutlichen, vor denen das Unionsrecht in Bezug auf Intersektionalität steht. Es untersucht jeweils die verfügbaren Daten in Hinblick auf die vier oben beschriebenen Achsen substantzieller Gleichheit. Die ausführlichsten dieser Studien beziehen sich auf Frauen aus benachteiligten ethnischen Gruppen und vor allem auf Roma-Frauen. Der Bericht stützt sich auf diese Beschreibungen, um die vertikalen, diagonalen und sich überlagernden Machtbeziehungen zu beleuchten, die Frauen aus diesen Gemeinschaften erleben. Er zeigt auf, wie Frauen in diesen Gemeinschaften in allen vier oben erwähnten Dimensionen substantzieller Gleichheit – Benachteiligung; Stigmen, Klischees, Vorurteile und Gewalt; mangelnde Mitsprache und Teilhabe; strukturelle Hindernisse – besonders stark von intersektioneller Benachteiligung betroffen sind. Außerdem geht der Bericht auf qualitative Studien ein, in denen untersucht wurde, wie sich das Alter auf geschlechtsbezogene Diskriminierung auswirkt, und weist auf einige Arbeiten hin, die zum Thema Intersektionalität bei ethnischen Minderheiten und LGBT-Menschen im Zusammenhang mit dem Faktor Alter durchgeführt wurden. Es existiert auch eine wachsende Zahl von Arbeiten zu Hausangestellten. Hausarbeit schafft Machtungleichgewichte zwischen einigen Frauen und anderen; sie ist deshalb ein besonders komplexer Schauplatz von Intersektionalität und veranschaulicht die vertikale, diagonale und sich überlagernde Analyse intersektioneller Diskriminierung, die dieser Bericht präsentiert. Deutlich weniger Arbeiten liegen zu sexueller Ausrichtung, Geschlechtsidentität oder Behinderung vor – Ausdruck davon, dass dies alles Schauplätze sind, auf denen Intersektionalität selten erkannt und thematisiert wird.

Kapitel 4 des Berichts untersucht, wie die europäischen Staaten mit Mehrfachdiskriminierung und Intersektionalität umgehen. Es stützt sich auf Informationen von Expertinnen und Experten aus allen EU-Mitgliedstaaten, den Kandidatenländern (Montenegro, ehemalige jugoslawische Republik Mazedonien, Serbien und Türkei) sowie Liechtenstein, Island und Norwegen. In rund 13 der untersuchten Länder wird Mehrfachdiskriminierung in den Rechtsvorschriften ausdrücklich erwähnt. In der Regel wird

Mehrfachdiskriminierung als Diskriminierung aufgrund mehr als eines geschützten Merkmals definiert; in manchen Vorschriften wird Mehrfachdiskriminierung jedoch erwähnt, ohne sie zu definieren. Nur ein Land (Serbien) spricht allerdings von "sich überschneidender" Diskriminierung. Mehrere Länder präzisieren, dass Mehrfachdiskriminierung eine schwere, schwerwiegende oder erschwerte Form von Diskriminierung ist. In den Gesetzesvorschriften geht es in der Regel hauptsächlich um eine verbesserte Entschädigung; einige Länder gehen jedoch weiter und beziehen Mehrfachdiskriminierung in die positiven Pflichten oder Befugnisse der Aufsichtsbehörden oder Gleichbehandlungsstellen mit ein. Manche Länder beschränken die Gründe, die miteinander kombiniert werden können. In 20 der untersuchten Länder wird Mehrfachdiskriminierung in den Rechtsvorschriften nicht ausdrücklich erwähnt. Die nationalen Expertinnen und Experten weisen jedoch darauf hin, dass dies zumindest in acht Ländern einer Geltendmachung von Ansprüchen aufgrund mehrerer Merkmale nicht entgeht.

Unabhängig davon, ob in den jeweiligen Ländern ausdrückliche Vorschriften für Mehrfachdiskriminierung existieren oder nicht, gibt es den Berichten der nationalen Expertinnen und Experten zufolge nur sehr wenig Rechtsprechung. Dort, wo es zu Rechtsstreiten kam, wurde Intersektionalität selten in ihrer ganzen Tragweite untersucht. Das Fehlen ausdrücklicher Vorschriften über Mehrfachdiskriminierung hat andererseits nicht verhindert, dass Mehrfachdiskriminierung in einigen Rechtsstreiten thematisiert wurde; auch in diesen Fällen kam aber in der Regel das in Kapitel 1 des Berichts beschriebene umfassende Konzept von Intersektionalität nicht zur Anwendung. Einige Expertinnen und Experten berichten von Rechtsstreiten, bei denen Gerichte den Fall faktisch als einen Fall von Mehrfachdiskriminierung oder sogar Intersektionalität behandelten, ohne jedoch notwendigerweise diese Begriffe zu verwenden. Andererseits berichten mehrere nationale Expertinnen und Experten von Rechtsstreiten, die als Fälle von intersektioneller Diskriminierung hätten behandelt werden müssen, jedoch nicht als solche behandelt wurden. Der Ad-hoc-Charakter der Rechtsprechung macht deutlich, dass, um für mehr Kohärenz in diesem Bereich zu sorgen, eine gezielte strategische Prozessführung erforderlich ist, die geeignete Argumente vor Gericht bringt, um die entsprechenden Grundsätze zu etablieren. Nur ein einziges Land scheint diesen Ansatz gewählt zu haben.

Mehr Beachtung fand das Thema Mehrfachdiskriminierung bei den Gleichbehandlungsstellen, oder deren Äquivalent, der in dem Bericht untersuchten Länder, was besonders im Hinblick auf die von diesen Stellen verbreiteten Forschungsergebnisse und Informationen von Bedeutung ist. Auch was die Zahl der Beschwerden angeht, in denen es um Fragen geht, die mehr als einen Diskriminierungsgrund betreffen, liegen von Gleichbehandlungsstellen mehr Daten vor als von Gerichten. In einzelnen Fällen haben Gleichbehandlungsstellen Entscheidungen getroffen, die ein gewisses Bewusstsein für Mehrfachdiskriminierung erkennen lassen; inwieweit es möglich ist, Mehrfachdiskriminierung in vollem Umfang anzugehen, könnte jedoch davon abhängen, ob eine einzige Gleichbehandlungs- bzw. Ombudsstelle existiert oder ob es mehrere Stellen gibt, die jeweils für ein spezifisches Merkmal zuständig sind.

Kapitel 5 des Berichts untersucht die Möglichkeiten, einen intersektionellen Ansatz in das bestehende Antidiskriminierungsrecht der Union zu integrieren. Oberflächlich betrachtet weist das Antidiskriminierungsrecht der Union schwerwiegende strukturelle Hindernisse für die Geltendmachung intersektioneller Ansprüche auf, und zwar aus vier miteinander zusammenhängenden Gründen. Erstens werden unterschiedliche Merkmale in unterschiedlichen Vorschriften behandelt; zweitens haben die verschiedenen Richtlinien unterschiedliche Geltungsbereiche; drittens sind Einwände der gerechtfertigten Ungleichbehandlung und Ausnahmen für verschiedene Merkmale unterschiedlich ausgestaltet; und viertens kann die Liste der geschützten Merkmale ohne gesetzliche Änderung nicht erweitert werden. Hinzu kommt das allgegenwärtige Problem der Suche nach geeigneten Vergleichspersonen. Der Bericht geht auf jeden dieser Punkte ein. Einige der genannten Schwierigkeiten, vor allem was den engeren Geltungsbereich der Beschäftigungsrichtlinie betrifft, könnten mithilfe des Entwurfs für eine "horizontale Richtlinie" für die Merkmale Alter, Behinderung, sexuelle Ausrichtung, Religion und Weltanschauung gelöst werden, die den Geltungsbereich der Beschäftigungsrichtlinie mit dem der Antirassismusrichtlinie in Einklang bringen soll. Über diesen Entwurf wird im Rat jedoch noch immer verhandelt.

Kapitel 6 des Berichts geht der Frage nach, ob es dennoch möglich ist, intersektionelle Erfahrungen im Rahmen des Unionsrechts zu behandeln. Drei Möglichkeiten sind vorstellbar. Die erste besteht darin, neue Untergruppen einzurichten, die intersektionelle Gruppen abbilden. Während einige Gleichbehandlungsinstrumente es den Gerichten erlauben, analog zu den bereits erfassten Diskriminierungsgründen neue Gründe zu entwickeln, hat der Gerichtshof mehrfach betont, dass es nicht in seiner Macht steht, die in den Richtlinien abschließend aufgezählten Diskriminierungsgründe zu erweitern. Die zweite Möglichkeit besteht darin, die bereits erfassten Diskriminierungsgründe miteinander zu kombinieren, ohne dies als neue Untergruppen anzusehen. Die rechtlichen Rahmenvorschriften der Union unterstützen diesen Ansatz bis zu einem gewissen Grad. Artikel 19 AEUV, der dazu ermächtigt, Vorkehrungen zur Bekämpfung von Diskriminierungen zu treffen, zählt Geschlecht, Rasse, ethnische Herkunft, Religion oder Weltanschauung, Behinderung, Alter und sexuelle Ausrichtung auf. Dies lässt vermuten, dass einer Kombination von Merkmalen im Prinzip nichts entgegensteht. Außerdem heißt es in der Präambel der Antirassismusrichtlinie, dass die Union bei der Anwendung des Grundsatzes der Gleichbehandlung ohne Ansehen der Rasse oder der ethnischen Herkunft bemüht sein sollte, Ungleichheiten zwischen Männern und Frauen zu beseitigen, da Frauen häufig Opfer mehrfacher Diskriminierungen sind. Es ist jedoch klar, dass dieser Ansatz aufgrund der oben beschriebenen Hindernisse nur begrenzt zum Tragen kommen könnte. Der wahrscheinlichste Bereich ist Beschäftigung, da im Beschäftigungsbereich alle Merkmale abgedeckt sind; gewisse Schwierigkeiten würde es aber auch hier geben, wenn die Rechtfertigungsgründe und Ausnahmen für unterschiedliche Merkmale (z. B. rassische Zugehörigkeit und Alter) voneinander abweichen. Einige dieser Probleme werden im Zuge der Verabschiedung des Entwurfs für eine horizontale Richtlinie gelöst werden, insbesondere dann, wenn der Vorschlag des Europäischen Parlaments, Mehrfachdiskriminierung in der Richtlinie ausdrücklich zu berücksichtigen, akzeptiert wird. Trotzdem: Selbst wenn alle Änderungsvorschläge akzeptiert würden, scheint sich dieser Ansatz eher für Fälle von sequentieller und additiver Mehrfachdiskriminierung als für Fälle von intersektioneller Diskriminierung zu eignen. Denn Grundprämisse ist, dass zwei oder mehr Merkmale kombiniert werden, nicht jedoch die Tatsache, dass die Person am Schnittpunkt zweier Merkmale eine Benachteiligung und Diskriminierung erleidet, die sich von beiden Merkmalen, jeweils für sich genommen, qualitativ unterscheidet.

Die dritte Möglichkeit, Intersektionalität im Rahmen des Unionsrechts zu berücksichtigen, besteht darin, die bestehenden Diskriminierungsgründe mit einer großzügigen, breiten Sichtweise zu betrachten: Indem anerkannt wird, dass auch innerhalb eines einzelnen Merkmals mehrere sich überschneidende Machtbeziehungen existieren können, wäre es möglich, intersektionelle Erfahrungen zu berücksichtigen. Anstatt sich nur auf eine Achse von Benachteiligung zu konzentrieren und davon auszugehen, dass alle übrigen Merkmale privilegiert sind, würde eine breite Sichtweise auch innerhalb eines einzigen Merkmals alle Aspekte der Identität einer Person erfassen. So ist zum Beispiel eine Frau, die von intersektioneller Benachteiligung betroffen ist, weil sie einer ethnischen Minderheit angehört, trotzdem Opfer geschlechtsspezifischer Diskriminierung, jedoch im spezifischen Kontext der Beziehungen von Benachteiligung, die sich aus ihrer sozialen Lage als Frau, die einer ethnischen Minderheit angehört, ergeben. Die Kategorie "Frau" bezieht sich auf alle Frauen, und je benachteiligter eine Frau ist, desto stärker sollte sie geschützt werden. Genauso gibt es keinen Grund anzunehmen, dass nur Männer aufgrund ihrer ethnischen Herkunft diskriminiert werden können. Alle Angehörigen ethnischer Minderheiten, auch Frauen, müssen vor Diskriminierung aufgrund ihrer ethnischen Herkunft geschützt werden, und die Tatsache, dass Frauen, die einer ethnischen Minderheit angehören, besonders diskriminiert werden, sollte ihre Ansprüche eher stärken als ausschließen. Dieser Ansatz stützt sich auf das Modell, das sowohl im Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW) als auch im Übereinkommen über die Rechte von Menschen mit Behinderungen angewendet wird. Beide Übereinkommen haben nur eine einzige Achse, da sich das eine nur auf Frauen und das andere nur auf Menschen mit Behinderungen bezieht.<sup>2</sup> Nichtsdestotrotz verstehen sie "Frauen" und "Menschen mit Behinderungen" ausdrücklich als Kategorien, die Schnittpunkte von Benachteiligung beinhalten. Der Bericht geht auch auf einige praktische Schwierigkeiten dieses Ansatzes ein.

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2 Siehe Abschnitt 2.4 des Berichts.

Kapitel 7 des Berichts untersucht, inwieweit Intersektionalität sich in der Rechtsprechung des Gerichtshofs widerspiegelt. Die erste Möglichkeit, also die Schaffung neuer Gruppen, wurde vermieden, und für die zweite gibt es derzeit kaum Anzeichen. Der Bericht analysiert verschiedene Urteile, in denen der Gerichtshof sozusagen intersektionelle Aspekte mit einer breiten Sichtweise der Diskriminierungsgründe verbindet. Hintergrund dieser Urteile ist im Wesentlichen die Art und Weise, wie die Prozessparteien ihr Anliegen präsentierten, und der Umfang, in dem das Gericht für diese Präsentation empfänglich war. Am deutlichsten zeigt sich der breite Ansatz vielleicht bei den Fällen, in denen Diskriminierung aufgrund des Geschlechts oder der sexuellen Ausrichtung auf die spezifische Erfahrung älterer Frauen oder älterer gleichgeschlechtlicher Paare angewendet wurde. Entwickelt wurde das Schema in einer Reihe von Fällen, in denen es primär um die spezifische Benachteiligung älterer Frauen ging. Um die Überschneidung von Alter und Geschlecht ging es auch in einer Reihe von Rechtsstreiten, in denen mittelbare Diskriminierung (vor allem im Zusammenhang mit Renten) geltend gemacht wurde, weil eine Praxis oder ein Kriterium Frauen unverhältnismäßig stark betraf. Diese breite Sichtweise hat in der jüngeren Rechtsprechung über Fälle von Diskriminierung aufgrund der sexuellen Ausrichtung, in der es ebenfalls um Rentenansprüche und andere altersbezogene Leistungen für gleichgeschlechtliche Partnerinnen und Partner ging, einigen Widerhall gefunden. Keiner der Fälle wegen Altersdiskriminierung spiegelt die spezifische, in Kapitel 3 kurz angesprochene Benachteiligung älterer oder jüngerer Angehöriger ethnischer Minderheiten, älterer LGBT-Menschen oder älterer Menschen mit Behinderungen wider. Extrem mittellose alte und junge Menschen (vor allem Frauen), ethnische Minderheiten und Menschen mit Behinderungen nutzen diesen Weg eindeutig nicht, um ihre Ansprüche geltend zu machen.

Der Bericht untersucht verschiedene andere Bereiche, in denen es möglich ist, intersektionelle Erfahrungen in einer breiten Sichtweise von Diskriminierungsgründen zu berücksichtigen. *Geschlecht* wurde breit ausgelegt, so dass auch Schwangerschaft und Elternschaft darunter fielen; Bestellmütter wurden vor kurzem jedoch ausgeschlossen. Auch das Betrachten von Geschlechtsangleichung als eine Form geschlechtsbezogener Diskriminierung kann als Beispiel für ein flexibles Verständnis von geschlechtsbezogener Diskriminierung gelten, das mehrere, sich überlagernde Identitäten einbezieht; andererseits wurde es in früheren Entscheidungen jedoch abgelehnt, Diskriminierung aufgrund der sexuellen Ausrichtung im Rahmen geschlechtsbezogener Diskriminierung zu behandeln. Nur eine Handvoll Fälle bezog sich auf die Antirassismusrichtlinie, und auch hier war zu beobachten, dass die vielen, in Kapitel 3 beschriebenen intersektionellen Aspekte vor dem Gerichtshof nicht zur Sprache kamen. In der neueren Rechtssache *Nikolova / CHEZ* ist hingegen ein intersektioneller Ansatz festzustellen.<sup>3</sup> Behinderung wurde gelegentlich ebenfalls breit ausgelegt, aber auch hier gibt es Gegenbeispiele. Während einerseits noch immer ein großes Potenzial für breite Auslegungen besteht, sorgt andererseits die Rechtsprechung des Gerichtshofs in ihrer Auslegung der bestehenden Diskriminierungsgründe in erheblichem Maße dafür, dass der spezifische Charakter der intersektionellen Benachteiligung weiterhin unsichtbar bleibt. Um zu einem wirklichen intersektionellen Ansatz zu kommen, wäre es erforderlich, dass sowohl die Prozessparteien als auch der Gerichtshof offener dafür sind, die vertikale, diagonale und sich überlagernde Interaktion von Machtbeziehungen zu erkennen und zu artikulieren, damit die am stärksten benachteiligten Menschen auch die sind, die am stärksten geschützt werden – statt umgekehrt. Aufgrund der Kosten eines Rechtsstreits und seiner Dauer ist der Rechtsweg als Mittel, um dem Problem der Intersektionalität zu begegnen, auf jeden Fall weniger effektiv als proaktive Maßnahmen.

Dies führt zu der Auseinandersetzung mit positiven Pflichten und Mainstreaming in Kapitel 8 des Berichts. Positive Pflichten und andere proaktive Maßnahmen sind sehr nützliche Instrumente, weil sie staatlichen Stellen die Möglichkeit geben, die Initiative zu ergreifen, um zu ermitteln, wer mehrfach benachteiligt ist, und diese Personen anzuvisieren. Sprachunterricht ist ein gutes Beispiel. Migrantinnen mit Kindern haben im Vergleich zu männlichen Migranten und Frauen, die keine Migrantinnen sind, besonders große Schwierigkeiten, Angebote zum Erlernen der dominierenden Sprache in Anspruch zu nehmen. Im Rahmen positiver Maßnahmen sollte daher Sprachunterricht angeboten werden, der Frauen mit Kindern die Teilnahme ermöglicht. Die Anwendung positiver Maßnahmen im Kontext von Intersektionalität ist auch im Hinblick auf die begleitende

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3     Rechtssache 83/14 *CHEZ / Nikolova*.

Überwachung hilfreich, weil sie Leitlinien dafür liefert, welche Statistiken erstellt werden sollten und wie. Auch positive Pflichten ermöglichen es, für strukturelle Abhilfe zu sorgen. Der Bericht untersucht, welche Rechtsgrundlagen das Unionsrecht bietet, um Intersektionalität mittels Mainstreaming und positiver Pflichten anzugehen, und geht kurz auf einige der damit verbundenen Schwierigkeiten, etwa die Frage ein, wie eine angemessene Beteiligung ermöglicht und eine vollständige Übereinstimmung erzielt werden kann.

Das letzte Kapitel geht kurz auf positive Maßnahmen und Mainstreaming in den Unionspolitiken ein. Während Mainstreaming für die EU-Kommission in ihrem Engagement für die Gleichstellung von Frauen und Männern immer eine zentrale Rolle gespielt hat, wurde dem Thema Intersektionalität nur punktuell Aufmerksamkeit gewidmet. In ihrem Bericht über Mehrfachdiskriminierung schlug die Europäische Kommission 2007 eine Reihe konkreter Maßnahmen vor, die viel Potenzial haben, sowohl Bewusstsein zu fördern als auch mit der Bekämpfung intersektioneller Diskriminierung anzufangen. Inwieweit diese Maßnahmen umgesetzt wurden, bleibt jedoch unklar. Maßnahmen zur aktiven Eingliederung auf der Ebene der Mitgliedstaaten schienen ebenfalls vielversprechend zu sein. Wenngleich einige Beispiele guter Praxis verzeichnet wurden, sind Initiativen im Zusammenhang mit intersektionellen Erfahrungen auch hier eher selten. Anzeichen für einen Impuls zur Berücksichtigung intersektioneller Erfahrungen in den Fünf-Jahres-Strategien für die Gleichstellung von Frauen und Männern existieren indessen kaum. In der Strategie für die Gleichstellung von Frauen und Männern 2010-2015 wird der Begriff der Mehrfachdiskriminierung zwar definiert, das Konzept darüber hinaus jedoch nicht mehr aufgegriffen.<sup>4</sup> Die kürzlich veröffentlichte Strategie für die Gleichstellung von Frauen und Männern 2016-2019 enthält die Verpflichtung, Gruppen, die von Mehrfachbenachteiligung betroffen sind, besondere Aufmerksamkeit zu widmen; in dem Dokument werden die entsprechenden Fragen ansonsten jedoch kaum angesprochen.<sup>5</sup> Dasselbe gilt für die Liste von Maßnahmen der Kommission zur Förderung der Gleichstellung von LGBTI 2016-2019, in der Mehrfachdiskriminierung überhaupt nicht vorkommt.<sup>6</sup> Intersektionalität wird in keinem dieser drei Dokumente erwähnt.

Abschließend wird in dem Bericht noch einmal bekräftigt, dass es möglich ist, die Aspekte der Intersektionalität in das bestehende Unionsrecht zu integrieren, ohne dass dafür neue Änderungen erforderlich wären, wenngleich es natürlich sehr hilfreich wäre, den Geltungsbereich der Richtlinien zu vereinheitlichen. Der erste Schritt müsste darin bestehen, mehr Bewusstsein und Sensibilität dafür zu schaffen, wie sich Überschneidungen von Diskriminierungen unterschiedlicher Ursachen auf Menschen in unterschiedlichen Kontexten auswirken. Um dies zu erreichen, müssen Gleichbehandlungsstellen und andere Organisationen der Zivilgesellschaft spezielles Augenmerk darauf richten, das Bewusstsein für diese Fragen zu schärfen, und das Thema Intersektionalität im Rahmen ihrer Berichte und anderer ihnen zur Verfügung stehender Ermittlungsbefugnisse verfolgen. In einigen Mitgliedstaaten existieren bereits gute Beispiele für ein solches Vorgehen. Sind die Probleme erst einmal richtig erkannt, sind Gleichbehandlungsstellen und andere Akteure in der Lage zu entscheiden, wie gegen diese Probleme vorgegangen werden kann. Mainstreaming und proaktive Maßnahmen, die auf die am stärksten gefährdeten Gruppen abzielen, sind grundsätzlich besser geeignet, strukturelle Probleme anzugehen, als Gerichtsverfahren. Gerichtsverfahren spielen aber auch eine wichtige Rolle, weil sie erstens Betroffenen Gelegenheit geben, ihre persönlichen Ansprüche zu artikulieren, und weil sie zweitens – wie Gute-Praxis-Beispiele aus den untersuchten Ländern belegen – die Möglichkeit bieten, anhand ausgewählter Fälle strategische Prozesse zu führen. Die Abhilfemaßnahmen sollten wirksam und abschreckend sein, indem sie einerseits die betroffenen Personen entschädigen, andererseits aber auch – was gleichermaßen wichtig ist – gegen strukturelle Probleme, zum Beispiel gegen Politiken und Praktiken vorgehen, die besonders starke Auswirkungen auf die am meisten benachteiligten Gruppen haben. Auf Unionsebene bleibt zu hoffen, dass Maßnahmen zur aktiven Eingliederung und zukünftige Strategiepläne stärker als bisher Strategien einbeziehen, die auf der hier vorgelegten intersektionellen Analyse basieren, und zwar nicht nur was Geschlecht, sondern was Intersektionalität in Bezug auf alle Diskriminierungsmerkmale betrifft.

4 Europäische Kommission (2011), Strategie für die Gleichstellung von Frauen und Männern 2010-2015, [http://ec.europa.eu/justice/gender-equality/files/documents/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf), S. 38.

5 Commission Staff Working Document on Strategic Engagement for Gender Equality 2016-2019, [https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019\\_en](https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019_en).

6 [http://ec.europa.eu/justice/discrimination/files/lgbti\\_actionlist\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/lgbti_actionlist_en.pdf).

# 1 Introduction: definitions and concepts

## 1.1 What is intersectional discrimination and how does it differ from other versions of 'multiple discrimination'?

*'All the women are white; all the blacks are men; and some of us are brave.'*<sup>1</sup>

It is increasingly recognised that discrimination can occur on the basis of more than one ground. A person who is discriminated against on grounds of her race might also suffer discrimination on grounds of her gender, her sexual orientation, her religion or belief, her age or her disability. Such discrimination can create cumulative disadvantage. Thus ethnic minority women, older women, black women and disabled women are among the most disadvantaged groups in many EU Member States. Similar multiple discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people.<sup>2</sup> International human rights instruments are showing growing recognition of the issue. Most important was the contribution of the World Conference for Women held in Beijing in 1995, which drew attention to the fact that age, disability, socio-economic position, and membership of a particular ethnic or racial group could create particular barriers for women. A framework for the recognition of multiple and coexisting forms of discrimination became a key part of the resulting Beijing Platform for Action.<sup>3</sup>

There are several different ways of conceptualising discrimination when it occurs on more than one ground. Terms such as 'multiple discrimination,' 'cumulative discrimination,' 'compound discrimination,' 'combined discrimination' and 'intersectional discrimination' are often used interchangeably although they might have subtly different meanings. There is no single settled terminology, either within legal systems or in the literature. Generally, however, there are three main ways in which such discrimination might manifest. The first is when a person suffers discrimination on different grounds on separate occasions. For example, a person of minority ethnic origin with a disability might be subject to racist discrimination on one occasion and to discrimination on grounds of disability on another occasion, and both incidents could contribute to his or her dismissal. This is perhaps the easiest to deal with. Each incident can be assessed on a single ground and compensation awarded accordingly.<sup>4</sup> For the purposes of this report, this type of discrimination will be called 'sequential multiple discrimination.'

A second manifestation occurs when a person is discriminated against on the same occasion but in two different ways. For example, a gay woman might claim that she has been subject to harassment both because she is a woman and because she is gay. Such discrimination can be said to be 'additive', in that each type of discrimination can be proved independently. The complainant can compare herself to men to show that she has been subjected to sex discrimination and to heterosexuals to show that she has been subjected to sexual orientation discrimination.<sup>5</sup> For the purposes of this report, this type of discrimination will be called 'additive multiple discrimination'.

The third manifestation is, however, of a different order in that discrimination does not simply consist in the addition of two sources of discrimination; the result is qualitatively different, or, as Crenshaw terms it,

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1 Hull, G. (1982), *All the men are black, all the women are white, and some of us are brave*, The Feminist Press.

2 See e.g. FRA European Union Agency for Fundamental Rights EU-MIDIS Data in Focus Report (2010), *Multiple Discrimination*; FRA (2013), *Multiple Discrimination in Healthcare*, March; FRA (2014), *Discrimination against and living conditions of Roma women in 11 member states* and see further below.

3 Beijing Declaration (United Nations, 1995) <http://www.un-documents.net/beijingd.htm>.

4 See for example *Al Jumard v Clywd Leisure Ltd* 2008 IRLR 345 where the complainant suffered discrimination based on race on one occasion and disability on another. The Employment Appeal Tribunal held that compensation for each event should be assessed separately, although regard should be had to the global figure.

5 See also Makkonen, who refers to the first type of manifestation as multiple discrimination and the second as compound discrimination.: Makkonen, T. LL.M. (2002), *Multiple, Compound and Intersectional Discrimination*, Institute for Human Rights, Abo Akademi University, April, pp. 10-11; Burri, S., Schiek, D. (2009), *Multiple Discrimination in EU Law*, Network of Experts in the field of Gender Equality.

'synergistic.'<sup>6</sup> Thus, the disadvantage experienced by black women is not the same as that experienced by white women or black men. For example, in *DeGraffenreid*, a US redundancy case,<sup>7</sup> black women, being the most recent entries to the company, were made redundant first. Since both white women and black men were among those who escaped redundancy, the black women complainants could not claim that they had been less favourably treated on grounds of either gender alone or race alone. It was only because she was both black and female that she was discriminated against. Such discrimination is not fully described by simply adding two kinds of discrimination together. Black women share some experiences in common with both white women and black men, but they also differ in important respects. Thus while white women may be the victims of sex discrimination, they may also be the beneficiaries and even the perpetrators of racism. Conversely, black men may experience racism but be the beneficiaries and perpetrators of sexism. Nor is it accurate to generalize about 'black' women: this category fragments under the pressure of cultural diversity. For example, in Europe, the experience of women of African or Afro-Caribbean origin is quite different from that of women of Pakistani and Bangladeshi origin. It is this type of discrimination which is the subject of this thematic report. It is usually referred to as 'intersectional discrimination' and it is this terminology which will be used in this report.

## 1.2 Why was the notion of intersectional discrimination developed? What problems does it address?

Both sequential and additive multiple discrimination can be dealt with within existing legal frameworks. Each manifestation of discrimination can be treated as if it were a single ground. Intersectional discrimination, however, because of its synergistic nature, has been much more challenging. Taken alone, either ground will not seem to be discriminatory: because white women are not treated less favourably than men, there will not appear to be sex discrimination, and because black men are not treated less favourably than whites, there will not seem to be race discrimination. It was this insight which led to the pioneering work of Kimberlé Crenshaw, who demonstrated that the reliance by discrimination law on a single ground analysis rendered invisible those who were at the intersection of two grounds. This invisibility was not just because of the structure of discrimination law, which tended to require a comparison only on the basis of a single ground. It was because of a deeper problem, that is that the categories on which grounds are based tended to focus on the more privileged of that group. As Crenshaw argued in her seminal work on the subject: 'The paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against black women.'<sup>8</sup>

The synergistic nature of intersectional discrimination also makes it difficult to monitor. Many national statistics do not include data disaggregated by both sex and race, still less by other sources of intersectional discrimination, such as ethnicity and disability. For example, an Irish study demonstrates the invisibility of ethnic minority people with disabilities, an invisibility underlined by the total absence of this group in national statistics.<sup>9</sup> Yet this group suffers in complex and often subtle ways from both race and disability discrimination. Service and healthcare providers tend to ignore their ethnicity in framing structures for accommodating disability, with the result that their culture and identity is devalued and they face greater difficulty accessing appropriate services. At the same time, they might face discrimination from their own ethnic community on grounds of disability. The central problem identified by the notion of intersectional discrimination then is how to render visible and properly remedy the wrongs of those who are multiply disadvantaged. These were the issues which theories of intersectionality, as developed by Crenshaw and others, have tried to tackle.

6 Crenshaw, K. (1989), *Demarginalising the intersection of race and sex*, University of Chicago Legal Forum, p. 139.

7 *DeGraffenreid v General Motors Assembly Division* 413 F Supp. 142 (US Federal Court of Appeals).

8 Crenshaw, K. (1989), *Demarginalising the intersection of race and sex*, University of Chicago Legal Forum, p. 139.

9 Pierce. M. (2003), *Minority Ethnic People with Disabilities in Northern Ireland*, Equality Authority, Dublin.

### 1.3 The structure of this report

This report aims to explore the following question: to what extent does existing EU gender equality and non-discrimination law address the notion of intersectional discrimination? Having set out the definitions to be used in this report in Chapter 1 above, Chapter 2 turns to a consideration of the challenges of intersectionality. It points to the flaws in an identity-based approach and develops an approach which focuses on relationships of power. This makes it possible to construe existing grounds sufficiently capaciously to address the confluence of power relationships which compounds disadvantage. Such a 'capacious' approach is illustrated by considering the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD). It is also argued that in order to absorb an intersectional approach into anti-discrimination law, it is necessary to move beyond a conception of equality which is based solely on the principle that likes should be treated alike to one based on substantive equality.

The third Chapter of the report turns to a brief exploration of the social context, to give a flavour of some of the problems which an intersectional approach might seek to deal with. Chapter 4 considers the ways in which intersectionality and multiple discrimination have been addressed in European States, based on information provided by the gender equality and non-discrimination experts of the European Equality Law Network. Chapter 5 turns to EU law, and briefly describes the structural obstacles to an intersectional approach in EU law. Chapter 6 argues that despite the structural obstacles in EU law, opportunities to develop an intersectional approach can nevertheless be discerned. It is argued that, once the analytic lens has been adjusted, it may indeed be possible to include intersectional insights in the interpretation of EU anti-discrimination and gender equality law. It does this by considering the role of 'grounds' or personal characteristics in the schema of the directives, and in particular, how the references to particular grounds might be understood in a relational way, that is, as a conduit to describe different power relationships, rather than as delineating a group. Chapter 7 examines the extent to which existing jurisprudence from the Court of Justice might be understood as reflecting intersectionality. Chapter 8 then turns to the possibilities created by the mainstreaming and other positive provisions, drawing on the policies of the European Commission in this respect. Intersectionality becomes more visible through positive duties to promote equality than under a complaints-led approach, since those responsible for instituting change are required to identify group inequalities and to craft solutions, rather than reacting to self-identified complainants. The report concludes that it is possible to incorporate the perspectives of intersectionality into EU law as it currently stands without requiring new amendments, although of course it would be of considerable assistance if the scope and reach of the directives were to be harmonised. The key issue is to create a greater awareness and understanding of intersectional issues, so that both litigation and policy initiative are framed accordingly.

## 2 Intersectionality and its challenges

Since its articulation by Kimberlé Crenshaw, intersectionality and its challenges have received much attention but little resolution.<sup>10</sup> As we have seen, in her path-breaking work, Crenshaw highlighted the ways in which discrimination law, by focussing on separate grounds of discrimination, tended to homogenise protected groups, rendering invisible those who experienced discrimination from more than one direction.<sup>11</sup> To assume that groups are rigidly delineated by race, gender, disability, sexual orientation or other status, is to render invisible those that are found in the intersection between those groups. Her work has encouraged growing recognition that discrimination is experienced very differently by differently situated individuals sharing a protected characteristic. Women, for example, experience gender discrimination in a wide variety of ways, depending on their class, race, ethnicity, sexual orientation, age, religion, and disability. Similar intersectional discrimination is experienced by gay or lesbian members of ethnic minorities; disabled black people; younger ethnic minority members or older disabled people, particularly if they are gay.

### 2.1 The flaws in 'single ground' approaches

Intersectionality theory highlights the flaws in a notion of discrimination based only on one ground at a time. Firstly, such an understanding ignores the fact that people have multiple identities. We all have an age, a gender, a sexual orientation, a belief system and an ethnicity; many have or acquire a religion or develop a disability as well. Secondly, such an approach assumes that identity groups are internally homogenous. Often known as 'essentialism', such an approach obscures the very real differences within identity groups. This issue has been confronted within feminism from the early days when white middle-class feminists were rightly criticised by black women for assuming that their own experience was a universal characteristic of gender oppression.<sup>12</sup> Still more fractured are the categories of religion and belief, disability, and age.

The third flaw of viewing discrimination as if based on a single source of identity is that it ignores the role of power in structuring relationships. Discrimination is not symmetrical; it operates to create or entrench domination by some over others. But such power relations can operate both vertically and diagonally. Thus black men are in a position of power in relation to their gender, but not in relation to their colour. White women conversely are in a position of power in relation to their colour, but not their gender. Power operates at an even more fundamental level, to construct identity categories themselves. Race is a social construct, a marker for oppression rather than a biological reality. This is recognised in the preamble to the Racial Equality Directive, which declares that 'The European Union rejects theories which attempt to determine the existence of separate human races.'<sup>13</sup> Ethnicity, too, is framed by power relations, with minorities in some countries being majorities in others. This demonstrates that structures of domination work in complex ways which cannot easily be captured through a single-identity model.

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10 See for example Schiek, D., Lawson, A. (eds) (2011), *European Union Non-Discrimination Law and Intersectionality*, Ashgate; Grabham, E., Cooper, D., Krishnadas, J., Herman, D. (eds) (2009), *Intersectionality and Beyond: Law, Power and the Politics of Location*, Routledge-Cavendish; Conaghan, J. (2009), 'Intersectionality and the Feminist Project in Law', in Grabham, E. et al. (eds) (2009), *Intersectionality and Beyond: Law, Power and the Politics of Location*, Routledge-Cavendish; MacKinnon, C. (2013), 'Intersectionality as Method: A Note,' 38 *Signs*, p. 1019; Fredman, S. (2008), 'Positive Rights and Duties: Addressing Intersectionality,' in Schiek, D., Chege, V. (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish; Schiek, D. (2015), 'Intersectionality and the Notion of Disability in EU Discrimination Law,' *European (Legal) Studies on-line papers*, Vol. 4, Issue 4; Cho, S., Crenshaw, K., McCall, L. (2013), 'Toward a Field of Intersectionality Studies: Theory, Applications and Praxis,' 38 *Signs*, p. 785.

11 Crenshaw, K. (1989), *Demarginalising the intersection of race and sex*, University of Chicago Legal Forum 139.

12 Spellman, E. (1988), *Inessential Woman*, Beacon Press, esp. pp. 114-115.

13 Directive 2000/43, Preamble, Recital 6.

## 2.2 From intersectionality as identity to structural intersectionality

Intersectionality theory has spread into many disciplines and many other contexts. In doing so, it has cast important light on the way in which discrimination law can operate to render invisible and exclude the most disadvantaged. To assume that groups are rigidly delineated by race, gender, disability, sexual orientation or other status, is to render invisible those that are found in the intersection between those groups. Thus intersectionality theory aims to disrupt the established group demarcations used in anti-discrimination law. At the same time, intersectionality theory has itself encountered some difficult questions. The aim appears to be to create better delineated sub-groups, thereby granting 'greater inclusion to differently defined subjects such as black women plaintiffs or battered immigrant women.'<sup>14</sup> However, this immediately raises what has been dubbed the 'etcetera' problem: the extent to which categories and kinds of subjects can multiply and reconfigure,<sup>15</sup> and how the law can manage such proliferation.

This anxiety about the management of multiple sub-groups problematizes the focus of intersectionality theorists on groups and identities. Even apart from the potential proliferation of sub-groups, this appears to fall into the very trap that intersectionality has aimed to avoid, namely the assumption that all members of the sub-group are the same and that identity is fixed and static. Conaghan argues that intersectionality has become too bound up with notions of identity and especially the role of subjective experiences in identity formation. For her, issues of identity are not well suited for certain kinds of analysis, such as that of class, because class has been understood in terms of objective structures of relationships rather than subjective experiences of social location. A focus on identity therefore risks obscuring economic and distributive issues.<sup>16</sup>

It has become clear, then, that intersectionality theory, at least in some of its manifestations, took a wrong turn in focussing on groups and identities. This has led to a reformulation of intersectionality in terms of structures and relationships. In their more recent work, Cho, Crenshaw and McCall helpfully demonstrate that many of these seemingly intractable difficulties arise from a misconception of intersectionality as being preoccupied with groups and identities, or 'fascinated with the infinite combinations and implications of overlapping identities.'<sup>17</sup> Instead, they attempt to refocus on the structures of power and exclusion, or 'structural intersectionality.' Rather than assuming that groups or categories have rigid boundaries, intersectionality reveals how power works through the creation and deployment of identities. In this sense, intersectionality concerns 'the way things work rather than who people are.'<sup>18</sup> Analysing power relationships, moreover, makes it possible to discern which kinds of differentiation warrant attention. As Tomlinson notes: 'If critics think intersectionality is a matter of identity rather than power, they cannot see which differences make a difference. Yet it is exactly our analyses of power that reveal which differences carry significance.'<sup>19</sup> This does not mean that identities are not important: more that they should be seen both as a manifestation of the intersection of multiple hierarchies and a way of maintaining such hierarchies.<sup>20</sup>

14 Cho, S., Crenshaw, K., McCall, L. (2013), 'Toward a Field of Intersectionality Studies: Theory, Applications and Praxis', 38 *Signs*, p. 792.

15 Ibid. p. 787.

16 Conaghan, J. (2009), 'Intersectionality and the Feminist Project in Law', in Grabham, E., Cooper, D., Krishnadas, J., Herman, D. (eds) (2009), *Intersectionality and Beyond, Law, Power and the Politics of Location*, Routledge-Cavendish, p. 21 at pp. 30-31.

17 Cho, S., Crenshaw, K., McCall, L. (2013), 'Toward a Field of Intersectionality Studies: Theory, Applications and Praxis', 38 *Signs*, p. 797.

18 Chun, J., Lipsitz, G., Shin, Y. (2013), 'Intersectionality as a Social Movement Strategy: Asian Immigrant Women Advocates', 38 *Signs*, p. 917 at p. 923.

19 Tomlinson, B. (2013), 'To Tell the Truth and Not Get Trapped: Desire, Distance, and Intersectionality at the Scene of Argument', 38 *Signs*, p. 993 at p. 1012.

20 MacKinnon, C. (2013), 'Intersectionality as Method: A Note', 38 *Signs*. p. 1019 at 1023.

## 2.3 Stereotyping

Closely related to the pitfall of focusing on (sub)groups and their identities instead of structural intersectionality, is the danger of stereotyping. Rebecca Cook and Simone Cusack describe a stereotype as 'a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group'.<sup>21</sup> When an intersectional analysis focuses on (sub)groups, the impression is easily created that these groups have some fixed identity. In other words: focusing on groups easily leads to stereotyping. The problem with that is that stereotyping can cause discrimination and perpetuate inequality.<sup>22</sup>

This report describes existing patterns of inequality without endorsing the underlying stereotypes which cause them: indeed it argues that a key issue in understanding discrimination is the recognition of such stereotypes and therefore being in a position to redress them.<sup>23</sup> This is heightened in the case of intersectionality,

An important example of how stereotyping perpetuates inequality is discussed in an OECD Development Centre report issued in December 2014. It states: 'On account of gendered social norms that view unpaid care work as a female prerogative, women across different regions, socio-economic classes and cultures spend an important part of their day on meeting the expectations of their domestic and reproductive roles.'<sup>24</sup> Indeed, there is extensive evidence, both globally and in Europe, that women still perform a disproportionate amount of unpaid work compared to men. As the OECD report put it, 'The day-to-day lives of women around the world share one important characteristic: unpaid care work is seen as a female responsibility.'<sup>25</sup> The report finds that women spend two to ten times more time on unpaid care work than men, and argues that this unequal distribution of caring is the missing link in the analysis of gender gaps in labour outcomes. This is also true for Europe. According to the European Commission, in 2015, working women still took on three quarters of household chores and two thirds of parental care.<sup>26</sup>

These reports also demonstrate that, due to ongoing gendered stereotypes in the allocation of unpaid caring work, many women have lower pay, shorter working hours and interruptions in their working lives. Like the OECD, a 2015 report from the McKinsey Global Institute shows that the share of women engaged in unpaid work relative to men has a high correlation with female labour force participation. This has been recognized too by the European Parliament in a 2009 study, which affirmed that in Europe, the data confirmed the evidence on gender gaps, with men working more for the market and engaging less in domestic work than women in all countries covered by the Harmonised European Time Use Study.<sup>27</sup>

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21 Cook, R. and Cusack, S. (2010), *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, p. 9.

22 Cook, R. and Cusack, S. (2010), *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press; Timmer, A. (2011) 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' 11 *Human Rights Law Review*, pp. 707-738.

23 See for example Timmer, A. (2011) 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' 11 *Human Rights Law Review*, pp. 707-738.

24 OECD Development Centre (Dec 2014), document 'Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes', p. 2.

25 OECD Development Centre (Dec 2014), document 'Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes', p. 2.

26 European Commission 'Report on Equality Between Men and Women 2015' (EU 2016 p.10) [http://ec.europa.eu/justice/gender-equality/files/annual\\_reports/2016\\_annual\\_report\\_2015\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/annual_reports/2016_annual_report_2015_web_en.pdf). Similarly, the ILO reports: 'A most striking and well known feature of unpaid work is that women, as compared to men, perform it disproportionately in developing and developed countries alike.' Rania Antonopoulos 'The Unpaid Care Work–Paid Work Connection' (ILO 2009). This is confirmed by the McKinsey Global Institute's September 2015 Report, 'The Power of Parity', which states that 75% of the world's total unpaid care work is undertaken by women McKinsey Global Institute's 'The Power of Parity', (2015) <http://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>, p. 2.

27 Directorate General for internal policies 'Women and Unpaid family care work in the EU' (European Parliament, 2009) [http://www.psi.org.uk/pdf/2010/women\\_unpaid\\_work.pdf](http://www.psi.org.uk/pdf/2010/women_unpaid_work.pdf), p. 23.

The recognition of the role of gendered stereotypes is key to eliminating them and the consequent inequalities.<sup>28</sup> This is even more the case when stereotypes interact, creating intersectional disadvantage. Thus gendered and racial stereotypes interact to aggravate disadvantage for migrant women. For example, the European Commission 'Report on Equality Between Men and Women 2015' demonstrates that becoming a migrant or displaced person affects men and women differently.<sup>29</sup> In particular, displaced women and female refugees are particularly vulnerable to gender-based violence.<sup>30</sup> By highlighting such patterns, this report does not endorse them, but aims to find ways to correct them.

## 2.4 From groups and grounds to relationships of power

Integrating these insights into anti-discrimination law requires a closer look at the role of 'groups' and 'grounds'. It is argued in this report that what matters is not so much which ground we focus on, as how our specific characteristics pattern relationships with others. Everyone has a gender, a race or ethnicity, a sexual orientation, an age. Some have a religion or belief and some are secular. Taking a relational view, it can be seen that some of these characteristics might signal privilege, while others are relationships of further disadvantage. This means that power relationships do not only operate vertically. They also operate diagonally and in layers. For example, ethnic minority men may be relatively disadvantaged in relation to women in their communities, but relatively disadvantaged in relation to both ethnic majority women and ethnic majority men. Similarly, white women may be relatively advantaged in relation to ethnic minority women while relatively disadvantaged in relation to men.<sup>31</sup> In the EU, the vast majority of domestic workers in Europe are women, many of them migrant women in irregular employment. Brigitte Anderson concludes from her research into this area that most employers of domestic workers in Europe are also women and that 'the power relations among these women are very complex, to the point where even acts of kindness work to reproduce an employer's status and self-image.'<sup>32</sup> Her research also points to the 'racialisation of paid domestic labour' in Europe.<sup>33</sup> Moreover, the ways in which detriment or disadvantage is experienced might be significantly shaped by circumstances and context. Educational background and socio-economic status have been consistently chronicled as impacting on experiences of discrimination.<sup>34</sup> Timo Makkonen helpfully introduces the conception of 'social location.'<sup>35</sup> Discrimination in a relational sense, which focuses on power rather than a group or even a personal characteristic, can only be properly described and redressed by including individuals' social location.

Chart A gives a stylized representation of the vertical, diagonal and layered power relations in intersectional discrimination, using Crenshaw's original example of black women. While white women experience patriarchal domination in relation to men, they also benefit from belonging to the dominant ethnic group in relation to black women. Similarly, the relationship between black men and white men is structured along racial lines, but black men benefit from belonging to the dominant gender in relation to women. Black women fall at the confluence of all these power relations.

28 See further Cook and Cusack above footnote 28.

29 European Commission 'Report on Equality Between Men and Women 2015' (EU 2016 p.10) [http://ec.europa.eu/justice/gender-equality/files/annual\\_reports/2016\\_annual\\_report\\_2015\\_web\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/annual_reports/2016_annual_report_2015_web_en.pdf), p. 15.

30 Ibid.

31 Cock, J. (1990) *Maids and Madams*, Women's Press.

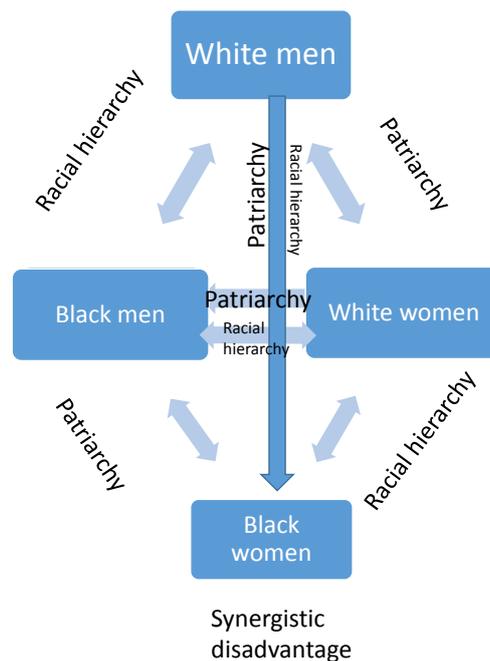
32 Anderson, B. (2004) 'Just Another Job: the Commodification of Domestic Labour' in B.Ehrenreich and A. Hochschild (ed) *Global Woman: Nannies, Maids and Sex-workers in the New Economy*, Sage, p. 113.

33 Anderson, B. (2000) *Doing the Dirty Work: The Global Politics of Domestic Labour*, Zed Books.

34 See for example FRA EU-MIDIS Data in Focus Report (2010), *Multiple Discrimination*, p. 6.

35 Makkonen, T. (2002), *Multiple, Compound and Intersectional Discrimination: Bringing the experiences of the most marginalized to the fore*.

Chart A. Vertical, diagonal and layered relationships of power



It is argued throughout this report that intersectionality should be seen in terms of relationships of power rather than in terms of identities per se. Whereas a focus on fixed identities renders invisible the most disadvantaged, a consideration of relationships of power has the opposite effect, requiring specific attention to be paid to those who are detrimentally affected by multiple interacting relationships.

However, the role of ‘grounds’ in discrimination law has frequently functioned to obscure these relationships. In order to establish that discrimination is on the ground of sex, for example, it might seem that only the gender of a person should be taken into account, rather than her other identities and the ways in which these identities influence her relationships.<sup>36</sup> The result has been, as Crenshaw highlighted, that the stylized claimant in a gender discrimination claim is constructed as experiencing disadvantage only in relation to her gender. This assumes that all her other characteristics are on the privileged side of the relationship. In other words, she is assumed to be a white, able-bodied, heterosexual woman, of the dominant religion or belief (which could include secularism) etc. This means that those who are the most disadvantaged are ignored.

This is not an inevitable result. Since we all have multiple identities, there is no reason why a particular characteristic or ground should not be interpreted as including everyone with that characteristic, rather than just the ‘privileged’ among them. For example, discrimination on grounds of gender is itself variegated depending on the ways in which power relations in the society as a whole are patterned. Women experience discrimination on grounds of gender because of the relationships of power constructed through gender, but these relationships differ for different women in material ways. In a society where power is also constructed along the axes of race or ethnicity, her race changes the nature of the power relationship without changing the fact that she has been discriminated against on grounds of gender. This in turn means that a reference to a ‘ground’ does not necessarily mean that the ground demarcates a group with set boundaries.<sup>37</sup> If that were the case, it would indeed be impossible to deal with those that fall at the intersection of groups, without creating a proliferation of further groups. Instead, the emphasis on structural and institutional disadvantage should be maintained through focussing on relationships of disadvantage rather than on the configuration of the group itself.

36 *DeGraffenreid v General Motors Assembly Division* 413 F Supp 142 (US Federal Court of Appeals).

37 Atrey, S. (2016), *Realising Intersectionality in Discrimination Law*, D Phil thesis, Oxford University.

## 2.5 A ‘capacious’ approach to grounds: International precedents

A structural approach to intersectionality therefore understands particular grounds in a relational way, that is, as a conduit to describe different power relationships, rather than as delineating a group. This means that rather than constructing further sub-groups, it is possible to construe existing grounds sufficiently capaciously to address the confluence of power relationships which compounds disadvantage. Such an approach can be found in international human rights law, in particular, in the application of the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD). These are briefly described below.

### 2.5.1 CEDAW: An intersectional approach to ‘women’

The aim of the CEDAW is explicitly to eliminate discrimination against women.<sup>38</sup> Unlike the International Convention on Civil and Political Rights (ICCPR),<sup>39</sup> which prohibits discrimination in relation to a list of grounds, CEDAW does not primarily use a grounds-based approach. Nevertheless, CEDAW does not regard ‘women’ as an undifferentiated category, but recognises the ways in which different aspects of different women’s identity interact to produce disadvantage. For example, the preamble expresses its concern that women in situations of poverty have the ‘least access to food, health, education, training and opportunities for employment and other needs.’<sup>40</sup> It also emphasizes that ‘the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women.’<sup>41</sup> Similarly, specific attention is given to rural women.<sup>42</sup> Campbell has convincingly argued that because CEDAW uses the category ‘women’ rather than a grounds-based approach, there is an implicit commitment to address all forms of disadvantage that women experience, including intersectional disadvantage.<sup>43</sup>

This is further borne out by the approach of the CEDAW Committee, particularly through its General Recommendations. General Recommendation No. 28 on the core obligations under CEDAW refers expressly to intersectionality, declaring that intersectionality is a basic concept for understanding the obligations of States under CEDAW. According to General Recommendation No. 28, discrimination against women based on sex and gender ‘is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.’ Emphasizing that ‘discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men,’ it requires States parties to legally recognise and prohibit such intersecting forms of discrimination, and to adopt and pursue policies to eliminate it.<sup>44</sup> Campbell also points out that the CEDAW Committee has produced several General Recommendations regarding specific issues facing women in some contexts, including migrant status, statelessness, and age.<sup>45</sup> It is also recognised that these specific contexts are not themselves unidimensional: for example GR No. 27 on older women refers to the discrimination experienced by older women as ‘multi-dimensional,’ compounded by poverty, migrant status, family status and ethnicity.<sup>46</sup> Campbell demonstrates further, through a close investigation of the CEDAW Committee’s approach in its Concluding Observations, Inquiry Procedure and Individual Communications that ‘there is overwhelming evidence that CEDAW Committee

38 CEDAW Article 1.

39 ICCPR Article 2(1).

40 CEDAW Preamble.

41 CEDAW preamble.

42 CEDAW Article 14(1).

43 Campbell, M. (2015), ‘CEDAW and Women’s Intersecting Identities: A Pioneering Approach to Intersectional Discrimination,’ *Revistia Dretio GV*, p. 479.

44 Committee on the Elimination of Discrimination Against Women General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of CEDAW, CEDAW/C/2010/47/GC.2 para. 18.

45 CEDAW General Recommendations 26, 32 and 27.

46 CEDAW GR 27, para. 13.

is applying the fluid and expansive concept of intersectional discrimination that it is pioneering in the General Recommendations.<sup>47</sup>

### 2.5.2 *Convention on the Rights of Persons with Disabilities (CRPD): An intersectional approach to persons with disabilities*

A similar approach can be detected in the Convention on the Rights of Persons with Disabilities (CRPD). Like CEDAW, the CRPD appears to be a 'single axis' Convention, focussing specifically on people with disabilities. However, this has not meant that it ignores or neutralises other disadvantaging aspects of an individual's social location. The preamble expresses concern about the 'difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.'<sup>48</sup> It goes on to emphasize the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights by persons with disabilities, and to recognise that women and girls with disabilities are often at greater risk of violence, abuse, neglect and exploitation, both within and outside the home.<sup>49</sup> It also makes specific mention of children with disabilities and highlights that the majority of persons with disabilities live in poverty.<sup>50</sup> This is echoed in the Convention itself, with Article 6 referring to women with disabilities and Article 7 to children with disabilities. Moreover, Article 8b enjoins signatory states to take measures to combat stereotypes, prejudices and harmful practices relating to persons with disabilities 'including those based on sex and age.' The definition of disability in the Convention recognises that it is the interaction between impairments and social or other barriers which hinders full participation, rather than the impairments on their own.<sup>51</sup> 'Other barriers' could include barriers due to other grounds, such as age, sexual orientation, or racial and ethnic origin. Of particular interest is Article 17, which gives all persons with disabilities the right to equal respect for his or her physical and mental integrity. Shreya Atrey argues powerfully that the concept of integrity signifies a conception of a person as a whole, including all their characteristics rather than just their disability, and that this can form the basis of a wider theory of intersectionality which pays regard to the integrity of all individuals and therefore includes all their multiple characteristics.<sup>52</sup>

## 2.6 From formal to substantive equality

To absorb an intersectional analysis into anti-discrimination law also requires us to move beyond a conception of equality which is based solely on the principle that likes should be treated alike. In the context of intersectionality, treating likes alike is particularly constraining because it requires us to determine, from among the myriad differences and similarities between individuals, which characteristics should be appropriate to compare. It is this approach which tempts us to hold all characteristics constant while varying only the 'protected' characteristic. In other words, if the claim is for race discrimination, it seems that all the other characteristics of the two people being compared need to be the same, including gender, sexual orientation, age and so on. The result is that like treatment has powerful conformist tendencies. Unless the claimant can conform to the framework set by the dominant group, she or he might fall outside of the 'likes treated alike' formula.

Substantive equality, by contrast, explicitly incorporates differences in power relationships. The meaning of substantive equality, however, remains contested.<sup>53</sup> It could be understood as focussing on equal results,

47 Campbell, M. (2015), 'CEDAW and Women's Intersectioning Identities: A Pioneering Approach to Intersectional Discrimination,' *Revista Diretio G.V.*

48 CRPD preamble para. p.

49 CRPD preamble paras s and q.

50 CRPD preamble paras r and t.

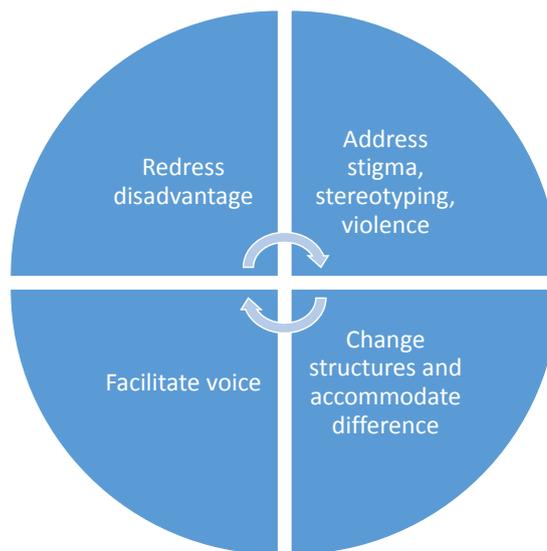
51 CRPD Article.

52 Shreya, A. (2015), *Lifting as We Climb: Recognising Intersectional Gender Violence in Law*, Oñati Socio-Legal Series, Vol. 5, No. 6. Available at SSRN: <http://ssrn.com/abstract=2709972>.

53 See further Fredman, S. (2003), 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights,' in Boerefijn, I., Coomans, F., Goldschmidt, J., Holtmaat, R., Wolleswinkel, R. (eds), *Temporary Special Measures*,

equal opportunities, or dignity, as a substitute for equal treatment. Each of these, in turn, has its limitations. 'Equal results' remains ambiguous as to both 'results' are in question. Furthermore, it is not clear whether 'equality of results' requires exact numerical equality, which might be particularly difficult to apply when we are concerned with multiple sources of disadvantage. A second possibility is to regard substantive equality as furthering equality of opportunity. However, like equality of results, equality of opportunity, or equalising the starting point, is similarly difficult to measure: does it require intense resource input to be sure that everyone has the same chance in life, or simply an end to patronage, 'old boy' networks or other closed group practices?<sup>54</sup> Dignity is particularly difficult to pin down.<sup>55</sup> Drawing on the strengths of each of these, I have developed a four-dimensional framework of substantive equality which regards equality as having four complementary functions: the need to redress disadvantage (the redistributive dimension); (ii) the need to address stigma, prejudice, stereotyping and violence (the recognition dimension); (iii) the need to facilitate participation and voice (the participative dimension); and (iv) the need to accommodate difference through structural change (the transformative dimension).<sup>56</sup> Multiple intersecting relationships of power can be analysed according to the extent to which (i) they create socio-economic disadvantage, (ii) they are stigmatic, prejudiced, stereotyping or violent; (iii) they exclude or marginalise; and (iv) they require conformity. Where some relationships are privileged and some are disadvantaged, these various conflicting trends can be identified and conflicts resolved. Chart B gives a stylised representation of a four-dimensional approach to substantive equality.

Chart B: Substantive Equality: A four dimensional concept



## 2.7 Intersectionality or context?

It could be asked whether, given the change in focus from groups and identities to relationships and structures of power, the concept of intersectionality should be abandoned altogether in favour of emphasizing the need to take social context into account in all discrimination claims. On this view, intersectionality adds nothing to the general requirement that discrimination be properly understood in

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Intersentia; Fredman, S. (2012), *A Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India*, European Network of Experts in the Non-Discrimination Field, European Commission, pp. 50 -55.

54 Hepple, B. (2008), 'The Aims of Equality Law', 61 *Current Legal Problems*, pp. 1-22.

55 Kretzmer, D., Klein, E. (eds) (2002), *The Concept of Human Dignity in Human Rights Discourse*, Kluwer; McCrudden, C. (2008), 'Human dignity and judicial interpretation of human rights', *European Journal of International Law*, p. 655; Feldman, D. (1999), 'Human Dignity as a Legal Value', *Public Law*, p. 682; Hennette-Vauchez, S. (2011), 'A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence', 9 *International Journal of Constitutional Law*, pp. 32-57.

56 Fredman, S. (2011), *Discrimination Law*, 2nd edn. Oxford University Press.

the context of the background relations that cause and shape specific experiences of disadvantage.<sup>57</sup> Intersectionality as elaborated in this report clearly requires that all claims of discrimination be understood in context. However, intersectionality is valuable because it requires particular attention to be paid to the ways in which discrimination law can render the most disadvantaged the most invisible. A general reference to context is vague and leaves it to the discretion of courts, equality bodies or public bodies to determine whether or not to incorporate a contextual analysis and also which aspects of context to incorporate. Intersectionality is more specific than a general reference to context because it focuses on the ways in which relationships of power interact to create synergistic disadvantage.

This is particularly important for proactive action. By considering how different aspects of identity interact to create specific imbalances of power, equality bodies and policy makers can prioritise those affected in these ways.

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57 I am grateful to Lilla Farkas and other participants in the European Commission Legal Seminar in Brussels in November 2015 for these helpful criticisms.

### 3 Intersectionality in context

The extent of intersectional disadvantage in the EU is difficult to gauge because of the lack of comprehensive data. While data disaggregated by gender and by age are readily available, there is little systematic collection of data on the other grounds, let alone data reflecting intersectional experiences. Indeed, the categories for data disaggregation are themselves still unsettled. For example, a study on trans people by the Fundamental Rights Agency acknowledged diverse experiences within the trans group itself, with different experiences recorded between trans women, trans men, female and male cross-dressers, transgender, gender variant and other trans people.<sup>58</sup> A recent report has usefully produced guidelines for the collection of data on disability and ethnic origins, which include a requirement both that respondents self-identify and that they be given the option to record multiple and intersecting identities,<sup>59</sup> but this focuses only on these two categories. The few studies which do focus on intersectional experience are small scale and tend to be qualitative. This section does not, therefore, attempt to give a comprehensive view of the extent or nature of intersectional disadvantage in the EU. Instead, it draws on existing qualitative studies to illuminate intersectional experiences and therefore to demonstrate the challenges facing EU law in addressing intersectionality. The examples chosen are therefore dependent on the availability and accessibility of such studies. As will be seen, while there is substantial work on women in ethnic minorities and particularly Roma women, there is very little on other sites of intersectional discrimination. The account below is therefore only able to deal in any detail with the issues arising in these contexts.

Moreover, it is difficult to chronicle intersectional experiences without falling into the trap of drawing boundaries which appear to be rigid and therefore exclusive. Thus instead of looking at grounds in pairs or other multiples, this section describes qualitative research which has been done in relation to specific 'sites' of intersectionality.

#### 3.1 Gender in disadvantaged ethnic minorities

A key site of intersectional experience concerns women in disadvantaged ethnic minorities. As the expert group on gender equality, social inclusion, health and long-term care (EGGSI) concluded: 'Addressing the conditions of Roma and ethnic minority women is particularly challenging, because it means considering the multiple interaction of social, cultural and economic factors that influence their daily lives — barriers of gender and traditions, discrimination, racism, poverty and poor access to education and employment.'<sup>60</sup> Their 2008 report on ethnic minority and Roma women shows that, overall, women from disadvantaged ethnic minorities are at greater risk of social exclusion and poverty, both when compared to the men of their communities and that of ethnic majority women. This is especially true in accessing employment, health, education and social services.<sup>61</sup> This is partly due to the interaction between the unequal power relations within their communities, and the unequal power relations in relation to the dominant community.

A four-dimensional approach to substantive equality can illuminate these differing directions of power. So far as the first dimension (redressing disadvantage) is concerned, women in disadvantaged ethnic minorities might experience disadvantage which is both shared with the majority women and intensified through racism and discrimination on grounds of ethnic origin. Like ethnic majority women, ethnic minority women experience labour market disadvantage and inequality, largely due to the fact that they remain primarily responsible for childcare and housework. This is intensified for those ethnic minority women

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58 Fundamental Rights Agency (2014), *Being Trans in the European Union*, p. 24.

59 Chopin, I. Farkas, L., Germaine, C. (2014), *Ethnic Origin and Disability Data Collection in Europe: Measuring Inequality – Combating Discrimination*, Open Society Foundations, November.

60 Expert group on gender equality, social inclusion, health and long-term care (EGGSI) (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, p. 15: This report is based on national reports from experts in the expert group on gender equality, social inclusion, health and long-term care, which is supported under the European Union Programme for Employment and Social Solidarity – Progress (2007-13).

61 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, p. 6.

for whom religious and cultural factors within their own communities accentuate a gendered division of labour and consign women to a primary child-caring role. Women from disadvantaged ethnic minorities tend to have higher inactivity and unemployment rates than either ethnic majority women or minority men. A major cause of this is their traditional domestic role in the family, an issue directly related to their gender. But it is also due to their lack of qualifications and the prejudice they often face from employers.<sup>62</sup> The result is that they are more likely to work in part-time precarious jobs, especially in cleaning and personal care services, where wages are low and their work is regarded as self-employment, precluding them from eligibility for unemployment benefit or other contributory benefits. They are therefore more likely to be dependent on means-tested benefits where these are available. Their lack of regular, secure employment also means that they are likely to have limited access to financial services, exacerbated by the fact that they do not have property to function as security for loans. This might make it difficult, not just to obtain funds for entrepreneurship or property purchase, but even to open a bank account. These difficulties are in turn exacerbated by language difficulties, a lack of information, and straightforward discrimination and prejudice against them, both on grounds of gender and ethnicity, on the part of lending institutions. Women who are victims of domestic violence are particularly vulnerable because of their greater dependence on their partners, and their lack of independence both financially and culturally. For women whose immigration status depends on their continued marriage this is even more problematic. The result is that ethnic minority women tend to be discriminated in more ways than men from the same communities.<sup>63</sup>

At the same time, ethnic minority women experience discrimination specific to their social location, in a way not shared by ethnic majority women. Such disadvantage is shared with men in their communities. An FRA Data in Focus Report from 2010 found that socio-economic disadvantage was a key factor contributing to the experience of discrimination among ethnic minority or immigrant respondents, with an average of 46 % of respondents who reported experiencing multiple discrimination being in the lowest income quartile recorded in their country.<sup>64</sup> Disadvantaged ethnic minorities tend to live in segregated, low-income neighbourhoods, with poor access to public transport and social services. They often are subjected to discrimination in the private housing market, paying higher rents and having more insecure contracts than members of the dominant community. This is especially true if they are irregular migrants. However, women may experience these deprivations in a more intense way than the men in their community, since they are likely to be tied to the home and the community by childcare and other domestic obligations. Similarly, poorer healthcare, which affects both men and women in their communities, might affect them specifically in relation to reproductive health. Women also experience health risks which are specific to their social location as ethnic minority women. The EGGSI reports a high incidence of early and multiple pregnancies, abortions and psychosomatic diseases.<sup>65</sup> Health risks are increased by poor socio-economic conditions, reducing the life expectancy of disadvantaged ethnic minority women, compared to other women. Linguistic, cultural and religious barriers make access to healthcare services difficult, exacerbated by a lack of information and low income levels. Illegal immigrants might be ineligible for healthcare at all.<sup>66</sup> Again, a lack of education is a key factor both shared with men in their communities and intensified due to patriarchal structures.

So far as the second dimension is concerned, stereotyping within the community of women as primarily child-bearers and home-makers is overlaid by stigma and prejudice experienced as ethnic minority women in the wider society. Cultural stereotypes and prejudice, for example in relation to dress, might be specific to women in these communities. A particular manifestation occurs in relation to healthcare. A FRA study from 2013 revealed the ways in which stereotypes based on culture, sex, age, ethnicity, migrant background, religion or a combination of these characteristics can lead to unequal treatment

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62 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality*, p. 7.

63 EGGSI, *Ethnic minority and Roma women in Europe: A case for gender equality*.

64 FRA EU-MIDIS Data in Focus Report (2010), *Multiple Discrimination*.

65 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, pp. 7 et seq.

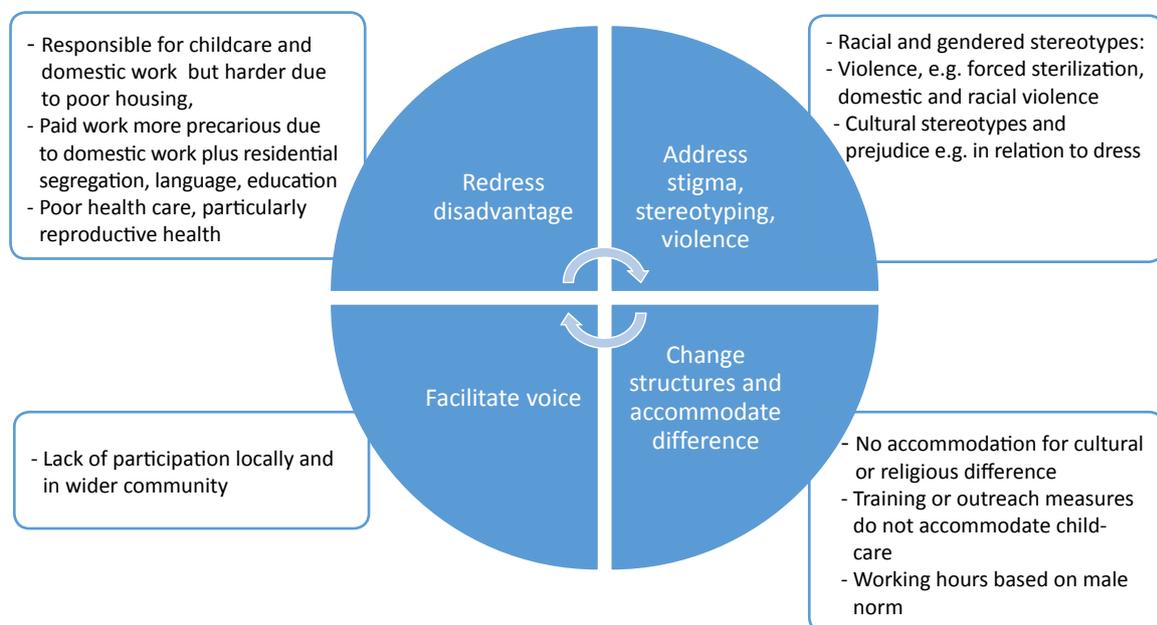
66 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, pp. 7 et seq.

in healthcare.<sup>67</sup> In particular, it found recurrent stereotypes across Member States, such as the wearing of headscarves by Muslim women; and other cultural stereotypes. This is compounded by the stigmatic way in which some people are viewed. Roma health users and Muslim women reported that healthcare professionals at times regarded them to be too poorly educated to understand and therefore did not fully communicate their health problems.<sup>68</sup> In addition, when domestic violence occurs, women in these communities might find it difficult to report it to the police, through fear of a combination of racism and sexism by the police,<sup>69</sup> or because they are concerned in case reporting violence will reinforce negative stereotypes and expose their own communities to racist treatment, including deportation or injury. Thus both disadvantage and stigma are experienced in ways specific to women in such communities.

This is also true for the other two dimensions, participation and transformation. The absence of political or other representation on behalf of members of the community as a whole might be compounded for women by the absence of decision-making powers within their communities. Lack of accommodation of cultural differences might be intensified for women, both in that working life is based on a dominant male norm, but also in that as an ethnic minority, there may be language, dress, and other cultural barriers. Women in such communities may have even fewer opportunities to gain the language skills needed to interact with majority ethnic communities, or their cultural or religious dress requirements might act as a greater barrier than in the case of men in her community. The 2013 FRA study found that many migrant women, who have followed their partners as family members, may have difficulty learning the dominant language, particularly if they remain at home doing unpaid work.<sup>70</sup> In such circumstances, unidimensional approaches based on gender discrimination, race discrimination, or religious discrimination (for instance) all fail to capture the complex confluence of discriminatory currents.

Chart C gives a stylised illustration by using the example of women in disadvantaged ethnic minority communities which are also internally intensely patriarchal.

Chart C: Substantive equality and intersectionality: woman in disadvantaged ethnic communities



67 FRA (2013), Multiple Discrimination in Healthcare, March.

68 FRA (2013), Multiple Discrimination in Healthcare, March.

69 See for example the facts of *Opuz v Turkey*, Application No. 33401/02, Merits, 9 June 2009; *Eremia v Moldova*, Application No 3564/11, Merits, 28 May 2013.

70 FRA (2013), Multiple Discrimination in Healthcare, March.

### 3.2 Intersectionality in Roma, Sinti and Traveller Communities

Intersectionality is perhaps most marked within Roma, Sinti and Traveller communities, where race, gender, age, disability and religious discrimination all interact to create multiple synergies of disadvantage. For many members of these communities, the discrimination manifested along the four axes highlighted here is particularly acute. According to a survey into the situation of Roma in 11 Member States by the EU Agency for Fundamental Rights, of the approximately 10-12 million Roma and related minority communities in Europe, about a third are unemployed, 20 % are not covered by health insurance and 90 % are living below the poverty line.<sup>71</sup> Secondly, they suffer from stigma, prejudice, stereotyping and violence: the FRA survey found that in all the EU member states surveyed, a significant proportion of Roma respondents reported having experienced discriminatory treatment in the previous 12 months;<sup>72</sup> and more than half of respondents looking for work reported having experienced discrimination because they were Roma.<sup>73</sup> Thirdly, they are both socially and politically excluded; and fourthly they are clear victims of institutional structures which do not accommodate their lifestyle. As the Advisory Committee of the National Framework for Minorities put it in their 2014 report, 'Roma are also increasingly – and legitimately – calling for their rights in the fields of culture and education to be more adequately addressed. But Roma are calling louder still for states and societies to cease to treat them as a 'problem' to be resolved – the 'other, who must be made to conform to mainstream society's vision of itself – and to come to grips with a more fundamental question: how to create societies that do not generate the exclusion of Roma.'<sup>74</sup>

These dimensions of discrimination are compounded for women from these communities. Angéla Kóczé argues that 'the social position of Roma women as a group is shaped by the interaction of (at least) ethnic, gender and class inequalities'.<sup>75</sup> Although there are many differences among Roma women, and comprehensive data is still scarce, there are some general trends. A FRA study of discrimination against Roma women in 11 EU member states in 2014 found that while both Roma men and Roma women suffered discrimination along all four axes, Roma women on average fared worse.<sup>76</sup> Thus, while there exists a significant ethnic gap between Roma and non-Roma so far as literacy is concerned, more Roma men (85 %) say they can read and write than Roma women (77 %). In addition to the prejudice and disadvantage experienced by all Roma children, the EGGSI report shows that many Roma girls leave school even earlier than boys, due to responsibilities in the family.<sup>77</sup> Only a small minority across Europe pursue higher education.<sup>78</sup> Unemployment is very high among all Roma but even higher among Roma women. On average, across the member states surveyed, 21 % of Roma women are in paid work, as against 35 % of Roma men.<sup>79</sup> So far as housing is concerned, as many as 42 % of the Roma surveyed were found to live in conditions of 'severe deprivation,' that is, they have no running water or sewage or electricity.<sup>80</sup> The extremely poor housing conditions of Roma communities, often without basic facilities

71 European Union Agency for Fundamental Rights (2012), *The situation of Roma in 11 EU Member States* <http://fra.europa.eu/en/publication/2012/situation-roma-11-eu-member-states-survey-results-glance>.

72 Ibid. p. 27.

73 Ibid. p. 19.

74 Council of Europe Advisory Committee on the Framework Convention, (2012-2014), *Ninth activity report*, [www.coe.int/minorities](http://www.coe.int/minorities), p. 12.

75 Kóczé, K. (with contributions from Popa, R.M.) (2009), *Missing Intersectionality: Race/Ethnicity, Gender and Class in Current Research and Policies on Romani Women in Europe*, Policy Studies Series, Center for Policy Studies, Central European University, p. 13.

76 European Union Agency for Fundamental Rights (FRA) (2014), *Discrimination against and living conditions of Roma women in 11 member states*, pp. 10-11.

77 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, p. 11.

78 Kóczé, K. (with contributions from Popa, R.M.) (2009), *Missing Intersectionality: Race/Ethnicity, Gender and Class in Current Research and Policies on Romani Women in Europe*, Policy Studies Series, Center for Policy Studies, Central European University, p. 13.

79 European Union Agency for Fundamental Rights (FRA) (2014), *Discrimination against and living conditions of Roma women in 11 member states*, pp. 10 – 11. Note that in the former socialist countries, which have a tradition of equal participation of women in the paid labour force, the proportion of women and men doing paid work is roughly equal.

80 European Union Agency for Fundamental Rights (FRA) (2014), *Discrimination against and living conditions of Roma women in 11 member states*, pp 10-11.

such as running water and electricity, high levels of eviction, and serious overcrowding, make the domestic workload of Roma women particularly burdensome.<sup>81</sup> This is one factor contributing to their health problems. Both Roma men and women have a considerably lower life expectancy than the rest of the population, a consequence of their poor housing conditions and their sporadic access to primary and secondary healthcare. Roma women, however, experience health risks which are greater than both Roma men and non-Roma women.<sup>82</sup> Moreover, the EGGSI report points out that despite the high levels of unemployment, many members of the Roma community have difficulty accessing social assistance benefits, possibly because of the lack of identity documents. This leaves the care burden almost entirely on Roma women.<sup>83</sup>

These aspects of socio-economic disadvantage can often reinforce and be reinforced by the second axis of inequality, namely stigma, stereotyping, prejudice and violence. Here, too, this is a result of a confluence of ethnic discrimination, class and patriarchy. Patriarchy within many Roma communities intensifies women's experience of patriarchy in relation to the broader society. As Kóczé describes it, the minority of Roma women who can access the labour market are frequently 'deemed suitable only for jobs in the lowest strata of the labour market.'<sup>84</sup> The Director of the FRA points out that while women in general continue to take primary responsibility for childcare and housework, many Roma women are particularly vulnerable, especially those who marry early, have many children and live in severely deprived housing conditions. As he puts it: 'They must sometimes run a household which may lack electricity, running water, a washing machine or other facilities that are taken for granted across Europe. Such difficult conditions, coupled with the often confined household space and a lack of financial resources and employment opportunities, can increase the likelihood of domestic violence and conflict.'<sup>85</sup> Similarly Kóczé reports that many Roma women 'find that their sexual and reproductive lives are threatened by violence exerted against them, including by healthcare providers and public officials and sometimes also by their own families and communities.'<sup>86</sup>

Stereotyping and stigma operate in a particularly complex way in the context of intersectional discrimination. On the one hand, it is clear that in some communities, internal patriarchal relationships operate to severely restrict women's progress, intensifying the racial and gendered discrimination experienced in relation to the dominant community. According to a 2013 European Commission report on Gender Empowerment in Roma Communities,<sup>87</sup> 'Due to patriarchal traditions, Roma women and girls still do not enjoy full respect for their freedom of choice in matters concerning the most fundamental decisions of their lives, and they still face significant levels of discrimination and difficulties in all areas of life. Roma women/girls are still highly undervalued in their communities regardless of which group/subgroup they belong to. Having a subordinate role in the families, a large number of Roma women suffer physical or sexual violence and a great number of them are victims of domestic violence, in many cases over long periods of time. Domestic violence takes various forms and modalities, and living in the extended families makes it more difficult to a woman-victim, as her freedom of movement is often limited. She is watched by family members, especially in critical situations, in order to prevent her from escaping from the abusive husband.'<sup>88</sup>

81 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, p. 11.

82 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, p. 11.

83 EGGSI (2008), *Ethnic minority and Roma women in Europe: A case for gender equality?*, p. 12.

84 Kóczé, K. (with contributions from Popa, R.M.) (2009), *Missing Intersectionality: Race/Ethnicity, Gender and Class in Current Research and Policies on Romani Women in Europe*, Policy Studies Series, Center for Policy Studies, Central European University, p. 13.

85 Kjaerum, M., 'Foreword', in European Union Agency for Fundamental Rights (FRA) (2014), *Discrimination against and living conditions of Roma women in 11 member states*, p. 3.

86 Kóczé, K. (with contributions from Popa, R.M.) (2009), *Missing Intersectionality: Race/Ethnicity, Gender and Class in Current Research and Policies on Romani Women in Europe*, Policy Studies Series, Center for Policy Studies, Central European University, p. 23.

87 Crowley, N., Genova, A., Sansonetti, S. (2013), *Empowerment of Roma Women within the European Framework of National Roma Inclusion Strategies*, Directorate General For Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs.

88 Crowley, N., Genova, A., Sansonetti, S. (2013), *Empowerment of Roma Women within the European Framework of National Roma Inclusion Strategies*, Directorate General For Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs.

On the other hand, it is crucial to avoid stigmatising communities as a whole and imposing stereotypical images on Roma relationships. Kóczé highlights the dilemma confronting Roma women activists who attempt to argue from a perspective on the intersection between racism and sexism. This is ‘the danger of further stigmatizing the group by *exposing intra-group hierarchies*. For example, the discussion of early marriages in Roma communities can easily fuel majority biased representations of Roma culture as “oppressive” and “backward.”<sup>89</sup> Indeed, Kóczé argues that the racism suffered by their community as a whole often leads Roma women to resist taking a stand against gender oppression internally to their communities in case they should aggravate the general stigma suffered by Roma people.<sup>90</sup> An intersectional perspective which focuses on vertical, diagonal and layered relationships of power as argued for here helps deal with the dilemma. Highlighting the power relationships between Roma men and Roma women does not detract from the continuing focus on power relationships between all Roma people and the dominant community. Stereotyping Roma communities as oppressive or backward is as much a breach of substantive intersectional equality as patriarchal internal relationships. To ignore either is problematic.

The third dimension, voice and participation, is similarly lacking. This does not only manifest itself in the serious under-representation of Roma people, both men and women, in political decision-making. It also manifests in terms of the frequent representation of Roma women as passive victims of multiple currents of discrimination. In their report on National Roma Inclusion Strategies, Crowley and others conclude that in most of these strategies, as well as in EU documents, women are represented as vulnerable subjects deserving of protection.<sup>91</sup> In many areas, particularly in relation to health, they found that Roma women were excluded from the decision-making process, and either regarded as passive beneficiaries of services or even subject to a victim-blaming approach. Crowley and others conclude that, although recognition of Roma women’s greater vulnerability is a crucial starting point, it is imperative that Roma women be involved in the analysis of their needs, in planning policy interventions and in monitoring and evaluating outputs. ‘The active participation of Roma women’s CSOs at local, national, and European level, as well as of gender equality bodies and women’s rights organizations, is indispensable.’<sup>92</sup>

The fourth dimension, which focuses on the extent of the accommodation of difference and the need for structural change, similarly manifests in an intersectional way. There are clearly deep structural issues which act as specific barriers to the full and equal participation and empowerment of Roma women. For example, in the area of education, it is not sufficient to provide schools; it is also important to ensure that girls can access schools. This requires a sensitivity to early marriage and childbearing, including the need to accommodate the needs of those young Roma women to facilitate their ongoing education. For example, it has been proposed that Governments should develop a range of formal or informal adult literacy programmes for Roma women who have missed out on education as well as programmes for young people who have dropped out which takes the specific needs of Roma girls into account.<sup>93</sup>

Although most research has been done on Roma women, there have also been some studies on other intersectional issues for Roma people. This can be seen in relation to disability and age. In particular, the difficult socio-economic conditions of disadvantaged ethnic communities pose severe challenges for persons with disabilities in such communities. For example, the FRA study on *Housing conditions of Roma and Travellers in the EU* point out that Roma and Travellers with a physical disability living in geographically isolated housing face obstacles in accessing schooling, employment and health care.<sup>94</sup>

89 Kóczé, K. (with contributions from Popa, R.M.) (2009), *Missing Intersectionality: Race/Ethnicity, Gender and Class in Current Research and Policies on Romani Women in Europe*, Policy Studies Series, Center for Policy Studies, Central European University, p. 16.

90 Ibid. p. 27.

91 Crowley, N., Genova, A., Sansonetti, S. (2013), *Empowerment of Roma Women within the European Framework of National Roma Inclusion Strategies*, Directorate General for Internal Policy Department C: Citizens’ Rights and Constitutional Affairs, p. 59.

92 Ibid. p. 59.

93 Nagy, A. (2015), *Creating a platform for Romani women and girls: Making them heard and seen through education*, Commission on the Status of Women (Fifty-ninth session), p. 5.

94 FRA (2009), *Housing Conditions of Roma and Travellers in the EU: Comparative report*, October, p. 89.

The distance from public services also creates difficulties for elderly members of Roma and Traveller settlements, especially when they require medical attention. This in turn creates extra strain on the younger women who are responsible for caring.<sup>95</sup>

### 3.3 Age as a site of intersectional experience

Age is a further area where qualitative work has been done on the experience of intersectionality. This is particularly so for gender, where data on both age and gender are available. This makes it possible to track the ways in which gender discrimination is affected by age, and in particular to record the lifecycle effect of gender discrimination.<sup>96</sup> Recent figures show that across the EU, women over 65 are at a substantially higher risk of poverty and social exclusion than their male counterparts. Below 65, however, gender differences in poverty are much smaller. A major reason is the pensions gap. According to the European Commission's 2015 Report on Equality Between Men and Women: 'The gender gap in pensions stood at 40 % in the EU in 2014 and shows no sign of narrowing.'<sup>97</sup> This suggests that it is a synergistic combination of age and gender that leads to older women's disadvantage. As the European Commission's 2015 Report put it: 'Women's lower earnings, lower employment rates, and high rates of part-time work and career breaks due to care responsibilities reduce their pension contributions and, ultimately, pension entitlements.'<sup>98</sup> The most recent statistics from the Eurostat (March 2016) found that for the economy as a whole, in 2014, women's gross hourly earnings were on average 16.1 % below those of men in the European Union (EU-28) and 16.5% in the euro area (EA-18).<sup>99</sup> Moreover, as was shown in Section 2.3 above, there is extensive evidence, both globally and in Europe, that because of gendered social norms viewing unpaid work as a female prerogative, women still perform a disproportionate amount of unpaid work compared to men. Reports from the OECD, the ILO, the MacKinsay Global Institute and the European Parliament also demonstrate that gender inequalities in unpaid care work are linked to gender wage gaps.<sup>100</sup>

This evidence shows that, due to ongoing gendered stereotyping, many women have lower pay, shorter working hours and interruptions in their working lives. This affects the ability of many women to make contributions to their pensions for old age. This is exacerbated by the fact that in some systems the statutory pension age for women remains lower than that for men, leading to shorter contributory periods. The result is that in all Member States, the average pension income of a woman is lower than that of a man: for the EU as a whole in 2012, the average pension of women was only 60 % of men (although survivors' benefits might ameliorate this for some women). Women over 65 are also much more likely to live alone than men in this age group, meaning that they are unable to share the costs of a household.<sup>101</sup>

Age is also a site of intersectionality in relation to ethnic origin, sexual orientation, and disability. An FRA *Data in Focus Report* from 2010 found that one in four ethnic minority or immigrant respondents stated that they had felt discriminated against on at least two grounds. In particular, young ethnic minority or immigrant men reported high levels of discriminatory treatment on grounds of ethnic minority or immigration status.<sup>102</sup> This can also be seen in relation to healthcare. An FRA study from 2013 revealed the ways in which stereotypes based on culture, sex, age, ethnicity, migrant background, religion or a

95 Ibid.

96 EGGSI (2009), Gender mainstreaming active inclusion policies, European Commission, p. 80.

97 European Commission 'Report on Equality between Men and Women 2015 (EU 2016) p. 22.

98 Ibid.

99 [ec.europa.eu/eurostat/statistics-explained/index.php/Gender\\_pay\\_gap\\_statistics#Gender\\_pay\\_gap\\_levels](http://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics#Gender_pay_gap_levels).

100 See above section 1.3: Antonopoulos, R. (2015) 'The Unpaid Care Work–Paid Work Connection' (ILO 2009) McKinsey Global Institute's 'The Power of Parity,' <http://www.mckinsey.com/global-themes/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>, p. 2, 29; Directorate General for internal policies 'Women and Unpaid family care work in the EU' (European Parliament, 2009) [http://www.psi.org.uk/pdf/2010/women\\_unpaid\\_work.pdf%20P.23](http://www.psi.org.uk/pdf/2010/women_unpaid_work.pdf%20P.23).

101 Vothknecht, M. (2015), 'Why older women are much more exposed to the risk of poverty than older men,' European Commission, Employment, Social Affairs and Inclusion News, 14 October <http://ec.europa.eu/social/main.jsp?langId=en&caTid=89&newsId=2349&furtherNews=yes> (accessed 17 October 2015).

102 FRA EU-MIDIS Data in Focus Report (2010), *Multiple Discrimination*.

combination of these characteristics can lead to unequal treatment in healthcare. In particular, it found some recurrent stereotypes across Member States. Among others, these related to the expectation that members of migrant communities might feign illness, especially if they were older or disabled. The FRA study also notes that older migrants, who learned the dominant language as adults, may forget it due to dementia.<sup>103</sup> Older migrants or migrants with disabilities may not be eligible for social protection schemes because they lack full residency status.<sup>104</sup>

It is notable that although the early gender discrimination cases before the CJEU reflected the intersectionality of gender with age,<sup>105</sup> the preponderance of recent age discrimination cases have primarily concerned older white men.<sup>106</sup> By contrast, an intersectional approach based on substantive equality reveals deeper inequalities. The redistributive dimension requires attention to be paid to the fact that older women, as well as older people from ethnic minorities tend to be poorer. The second dimension, stigma and prejudice, casts the spotlight on younger men from some ethnic minorities, who tend to be the victims of stereotyping and prejudice, particularly in contexts of Islamophobia. Lack of participation and the right to voice their own concerns is particularly problematic for older people from minorities who may not speak the dominant language. The fourth dimension, which considers structural impediments, illuminates the deep structural issues in the paid workforce which mean that women's role in child-bearing and parenting has lasting effects on their long-term economic situation and therefore their situation in old age. Similarly, it brings some focus to the lack of accommodation for older people from cultural backgrounds or languages differing from the dominant one.

### 3.4 Domestic workers

There is also a growing body of work on domestic workers. Domestic work is a particularly complex site of intersectionality, illustrating the vertical, diagonal and layered analysis of intersectional discrimination presented in this report.<sup>107</sup> As the ILO demonstrates, the growth in demand for domestic workers in the North has been the main reason for the mass migration of women from developing to developed countries. This is in turn a response to a lack of attention to proper work–life policies in the recipient states. Demand for domestic workers is growing with the decline of the extended family. Ageing populations mean that help is needed to care for the elderly, and working parents need childcare and help with housework. This is exacerbated in a recession with the privatization of public services, which has led to a growing demand for domestic workers, while at the same time increasing the downward pressure on wages, and terms and conditions of work. In all probability, the wages of domestic workers are below those of their employers.<sup>108</sup>

In this sense, then, domestic work creates complex layers of power relations. Unless there is state or private provision for childcare and secure flexible working for parents, some households with children might have to depend on domestic workers, themselves low-paid women, for their childcare. As the European Commission's 2015 report puts it, 'the double shift is still a reality for working women in all EU Member States. In 2015, working women took on three quarters of household chores and two thirds

103 FRA (2013), Multiple Discrimination in Healthcare, March.

104 FRA (2013), Multiple Discrimination in Healthcare, March.

105 The discriminatory effect has been recognised in several cases before the CJEU. See for example Case 1007/84 *Bilka-Kaufhaus* [1986] IRLR 317 (ECJ); C-317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-4625 (ECJ).

106 C-447/09 *Prigge v Deutsche Lufthansa AG* [2011] I.R.L.R. 1052 (ECJ); *Dansk Jurist- og Økonomforbund v Indenrigs- og Sundhedsministeriet* (C-546/11) [2014] 1 C.M.L.R. 41 (ECJ (2nd Chamber)); Joined Cases C-250/09 and C-268/09 *Georgiev v Tehnicheski Universitet So"ia "Iial Plovdiv* [2011] 2 CMLR 179 (ECJ); C341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* ([2010] 2 CMLR 830.

107 This does not assume that women should remain in these gendered roles, but describes the unfortunate fact that these gendered roles remain commonplace. Only by describing the reality can it be better understood and attention be paid to how it might be redressed.

108 This paragraph is based on Fredman, S. (2014), 'Home from Home: Migrant Domestic Workers and the ILO Convention on Domestic Workers,' in Costello, C., Freedland, M. (eds) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law*, OUP.

of parental care.<sup>109</sup> It is likely, therefore, that in some households, the paid domestic worker will relieve working women of some of their unpaid care work. Conversely, undertaking paid domestic work might be the only route to survival for many women and their families. This is especially true if they have been deprived of an education, whether through poverty or discrimination, leaving them with the only skills that they inevitably acquire within the family. Thus liberation from unpaid domestic work for some women depends on the availability of other women to perform that work, and necessarily at lower pay; while survival for other women depends on the availability of paid domestic work in other people's homes.

Domestic work therefore exhibits intersectional discrimination along all four axes described here. As well as facing clear socio-economic disadvantage, domestic workers can be subject to significant stigma and stereotyping, due to a synergy of gender and race. Thus Anderson argues that while domestic work remains women's work, whether paid for or not, the 'female employer must differentiate between herself and the type of women who does the dirty work.'<sup>110</sup> For her, 'it is not only gendered but also racial/ ethnic identities that are reproduced through household labour. As different meanings are assigned to different jobs, so notions of what is appropriate in terms of gender and race are played out and the identities for workers and employers are confirmed.'<sup>111</sup> Many EGGSI national experts are concerned 'that the ongoing shift to migrant care-givers may create new race-based segregation of care work. Stereotypes of the characteristics of migrant women (for example, their willingness to accept low wages and to work without protest) may indeed end up feeding the vicious circle of low paid and low skill jobs in the domestic care sector.'<sup>112</sup> Indeed, it is not unusual that the relationship of domestic worker to employer is overlaid by a significant degree of racism, often among the most vulnerable of employers or care users. Research done in the UK on migrant care workers showed that older care users at times made overt references to race, colour, and nationality, including verbal abuse.<sup>113</sup> So far as the third axis is concerned, the difficulty in organizing domestic workers into trade unions means that they often have little or no voice or active participation in decisions as to their terms and conditions or in broader social and political terms.<sup>114</sup> Fourthly, not only is little accommodation made for their specific needs, but the deep structural issues outlined above present entrenched obstacles to change.

All of these issues are further complicated in the case of migrant domestic workers, where the 'global care chain' crosses multiple jurisdictional boundaries. As Fudge points out: 'Many of the women who leave the South to work in the North are temporary migrant workers who do not enjoy either the right to become permanent residents in their host country or the right to circulate without restriction in the labour market.'<sup>115</sup> Crucial to the creation and maintenance of these global care chains are private employment agencies, which recruit domestic workers and find employment for them across national boundaries. Although a wide range of abusive practices are committed by private employment agencies against migrant domestic workers, they have proved extremely difficult to regulate. This is exacerbated in relation to domestic workers who lack proper legal status, for example, where their entry visa is tied to a single employer.<sup>116</sup>

109 European Commission Fact Sheet 2015: Gender Equality Report [http://ec.europa.eu/justice/gender-equality/files/annual\\_reports/160307\\_factsheet\\_gender\\_equality\\_2015\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/annual_reports/160307_factsheet_gender_equality_2015_final_en.pdf).

110 Anderson, B. (2001), 'Why Madam has so many Bathrobes: Demand for Migrant Domestic Workers and the EU,' 92 *Tijdschrift voor Economische en Sociale Geografie*, p. 18 at pp. 23-24.

111 Ibid.

112 EGGSI (Expert Group in Gender Equality, Social Inclusion, Health and Long-Term Care) (2009), *Gender Mainstreaming active inclusion policies*, European Commission, p. 12.

113 Cangiano A. et al. (2009), *Migrant Care Workers in Ageing Societies: Research Findings in the United Kingdom*, COMPAS), pp. 143-5.

114 Albin, E., Mantouvalou, V. (2015), 'Active Industrial Citizenship of Domestic Workers: Lessons Learned from Unionizing Attempts in Israel and the United Kingdom,' *Theoretical Inquiries in Law*, Volume 17(1). Available at SSRN: <http://ssrn.com/abstract=2709547>.

115 Fudge, J. (2011), 'Global Care Chains, Employment Agencies and the Conundrum of Jurisdiction: Decent work for Domestic Workers in Canada,' 23 *Canadian Journal of Women and the Law*, p. 235.

116 See e.g. Mantouvalou, V. (2016), 'A Right to Change Employer for Overseas Domestic Workers,' OxHRH Blog, 18 January 2016 <http://ohrh.law.ox.ac.uk/a-right-to-change-employer-for-overseas-domestic-workers/>.

### 3.5 Sexual orientation and gender identity

Much less work has been done on sexual orientation and gender identity, meaning that this is a site in which intersectional issues are often invisible. The FRA report on homophobia and discrimination on grounds of sexual orientation and gender identity is one of the few reports which pay specific attention to this issue.<sup>117</sup> Although it notes the very limited data on this issue, it nevertheless brings into focus how discrimination and exclusion are experienced in different ways by minority, disabled or older LGBTI people. In particular, it outlines the difficulties faced by the 'double minority' status of LGBTI persons. Reflecting the analysis based on vertical, diagonal and layered intersectional discrimination, the report shows how LGBTI people from ethnic minorities might face discrimination from their ethnic minority community on grounds of sexual orientation or gender identity, but also racism from the broader LGBTI community and a combination of both from the dominant heterosexual community. The report relays an account by an interviewee from Romania noting the difficulty in coming out in the Roma community. There is also the increased risk of hate crime motivated both by racism and sexual orientation.

The Safra project based in the UK gives a very helpful account of the intersectional issues facing Muslim LGBTI women, and their struggle to reconcile their sexual orientation or gender identity with their cultural or religious identities.<sup>118</sup> The report demonstrates how Muslim LGBTI women experience discrimination and exclusion as a result of multiple interrelated factors, again reflecting vertical, diagonal and layered relationships. Even if they resolve their own internal struggles, they face serious consequences within their own communities for coming out, or being found out. These include total or partial rejection by family and friends, intense pressure to marry, possibly leading to forced marriage, domestic violence, homelessness and losing custody of children. Their pre-assigned gender roles aggravate the situation by requiring them to remain in the marital home, to marry and have children, and to be dependent on male relatives for support. Some Muslim women are discouraged from taking up paid employment and are instead expected to take on a full-time role as wife and mother. Limited access to education in poorer households might be a further obstacle to entering employment. The Safra project also found that women from a middle or upper-class social location are likely to have families with a more liberal attitude towards personal freedom and therefore to be more tolerant. LGBTI women in such families are also more likely to have an education and to be employed, giving them somewhat more independence from their families.<sup>119</sup>

In relation to the dominant community, Muslim LGBTI women can encounter a noxious mixture of racist, homophobic, transphobic and sexist behaviour. Even when service providers are culturally sensitive, they tend to ignore diversity within Muslim communities, and may prefer to deal with the dominant forces rather than address LGBT issues or women's rights in relation to Muslims.<sup>120</sup> As the Safra report puts it: "The common belief is that "Muslims are not gay" and "gay people cannot be Muslim."<sup>121</sup> In addition, the report found that service providers can become complicit by endorsing the views of the Muslim community that LGBTI women should not have custody of children.<sup>122</sup>

At the same time, LGBTI Muslim women might face discrimination or hostility from the non-Muslim LGBTI community. Safra points out that in mainstream LGBTI circles, there is a great deal of pressure to come out. However, this might not be a viable or safe option for a Muslim LGBTI woman, who may have worked

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117 FRA (2009), *Homophobia and Discrimination on Grounds of sexual orientation and gender identity in the EU Member States: Part II Social Situation*, pp. 102 ff.

118 Safra Project *Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services* (January 2003) p. 5.

119 Safra Project *Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services* (January 2003) p. 13.

120 Safra Project *Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services* (January 2003) p. 5.

121 Safra Project *Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services* (January 2003) p. 14.

122 Safra Project *Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services* (January 2003) p. 17.

out their own compromises and balances in their lives.<sup>123</sup> Nor do many Muslim LGBTI women identify easily with the visible gay scene. This is partly because it is often predominantly white, and many social activities revolve around alcohol. But it is also partly because they might experience explicit Islamophobia and cultural insensitivity in the gay scene. The result is that many Muslim women feel that they do not belong to the mainstream LGBTI community, nor to their own Muslim communities.

Domestic violence represents a particularly acute manifestation of intersectional difficulties faced by LGBTI Muslim women. Being LGBTI in some Muslim communities can bring enormous dishonour and shame to the family. At the same time, refusing to conform to gender roles, for example by marrying, is viewed as threatening the patriarchal status quo. Some family members might resort to domestic violence to force compliance. Their financial dependence may make it very difficult to find alternate housing, and refuges for women experiencing domestic violence are often culturally insensitive or even homophobic. At the same time, Muslim LGBTI women are reluctant to approach the police, since this would be regarded as a form of betrayal. This research showed that the police were in any event frequently viewed as both racist and homophobic.<sup>124</sup>

Being LGBTI and having a disability is another site of intersectional issues which is rarely recognised or addressed. For wheelchair users, the difficulty in accessing many urban spaces is exacerbated in that areas in which LGBT people congregate are likely to be inaccessible for wheelchair users. The cross-cutting axes of power can be particularly marginalising: the sexuality of persons with disabilities is often ignored by the dominant community; LGBTI people still experience homophobia in some disability organisations; and able-bodied LGBTI people may well be prejudiced against persons with disabilities.<sup>125</sup> Finally, elderly LGBTI people can be particularly isolated due to continued homophobia or the lack of recognition of same-sex partnerships. A German study showed that LGBTI persons in nursing homes can be confronted with negative stereotypes expressed both by other residents and staff.<sup>126</sup>

There is very little data on transgender people.<sup>127</sup> What is known is that those from minority ethnic or cultural backgrounds are likely to find their own communities heterosexist and rigid in their perception of gender, in the same way or possibly more so than the dominant community. Elderly trans people, who belong to an earlier cohort, might have been discriminated against in all phases of their life cycle, but are particularly vulnerable in old age to infringements on their dignity and privacy as they become more dependent on others for care. Trans children also face unique experiences of multiple discrimination.<sup>128</sup>

### 3.6 Disability

As in other areas, there are many cross-cutting issues in relation to disability. Persons with disabilities do not form a homogeneous group, as disability spans many different sorts of impairment. A study for the European Parliament Policy Department on Citizens' Rights and Constitutional Affairs from 2013 notes that too little attention has been paid to an intersectional approach to disability, especially in relation to gender and disability.<sup>129</sup> Yet, 'disabled women's life experiences are differentiated with respect

123 Safra Project Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services (January 2003) p. 13.

124 Safra Project Identifying the difficulties experienced by Muslim lesbian, bisexual and transgender women in accessing social and legal services (January 2003) p. 22.

125 FRA (2009), Homophobia and Discrimination on Grounds of sexual orientation and gender identity in the EU Member States: Part II Social Situation.

126 FRA (2009), Homophobia and Discrimination on Grounds of sexual orientation and gender identity in the EU Member States: Part II Social Situation, p. 106.

127 See e.g. FRA (2014), *Being Trans in the European Union*, which does not mention intersectional discrimination.

128 FRA (2009), Homophobia and Discrimination on Grounds of sexual orientation and gender identity in the EU Member States: Part II Social Situation.

129 Davaki, K. Marzo, C. Narminio, E. Arvanitidou, M. (2013), *Discrimination generated by the Intersection of Gender and Disability*, Directorate-General for Internal Policies Policy Department on Citizens' Rights and Constitutional Affairs, European Parliament, p. 20.

to age, family background, social status, class, income, language, geographical location, race, and sexual orientation.<sup>130</sup>

Intersectional discrimination against women with disabilities falls along all four axes of substantive equality identified above. Firstly, persons with disabilities are generally at high risk of poverty. Davaki et al. point out that an intersectional approach in the context of employment would look at the ways in which gender and disability interact. For example, quota-based systems which apply separately to gender and disability might favour non-disabled women and disabled men.<sup>131</sup> So far as the second dimension (stigma, prejudice and violence) is concerned, disabled women are at more risk of violence and abuse than both non-disabled women and men with disabilities. It is estimated that women with disabilities are 10 times more likely to be abused either physically or sexually by a family member or caregiver than women without disabilities.<sup>132</sup> Women with disabilities face more significant barriers to seeking help and different types of abuse. In particular Davaki et al. cite a UK study which shows that the intersection of disability, gender and race significantly raises the risk of domestic violence for minority ethnic women with disabilities, and yet there is a striking absence of services and policy development to support women in this position, both due to a lack of funding and prevailing attitudes.<sup>133</sup> Moreover, such trends tend to be exacerbated with age. One of the most strident manifestations of violence against women with disability is that of forced sterilisation. Thirdly, a key area of exclusion concerns a lack of participation and voice within existing social structures. Fourthly, there is a serious lack of accommodation and adjustment for the kind of disabilities in which women predominate. Indeed, Dagmar Schiek argues that EU disability discrimination law has drawn on a model which operates to exclude women with disabilities.<sup>134</sup>

The social model of disability illuminates the ways in which disability is not so much about individual identity or physical impairments as about the relationships with social structures, which turn impairments into disabilities.<sup>135</sup> However, Schiek points out that although the social model of disability has always been presented as progressive, in fact its shift in focus from impairments to social obstacles has underestimated or even disguised the real suffering and pain experienced by those with conditions such as arthritis, chronic fatigue syndrome, depression or diabetes. Indeed, she argues that those who advocate a pure social model tend to construct an 'ideal' person, namely a young male wheelchair user, who is otherwise fit and never ill. Yet the majority of wheelchair users are women over 60, and the majority of people affected by less visible impairments such as arthritis, chronic fatigue syndrome, depression or diabetes are women.<sup>136</sup> This suggests that for a truly intersectional approach to disability, it is necessary to temper the social model with proper attention to impairments. This makes it possible to pay proper attention to the structural changes which would be required to cater for the many different and unique experiences of intersectional disability.

As we have seen above, being LGBT and having a disability is another site of intersectional issues which is rarely recognised or addressed.

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130 Ibid. p. 56.

131 Ibid. p. 48.

132 Ibid. p. 54.

133 Thiara, R., Hague, G. and Mullender, A. (2011), 'Losing out on both counts: disabled women and domestic violence', *Disability and Society*, Vol. 26:6, 757-771.

134 Schiek, D. (2015), 'Intersectionality and the Notion of Disability in EU Discrimination Law', *European (Legal) Studies on on-line papers*, Volume 4, Issue 4.

135 See further Fredman, S. (2005), 'Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm', in Lawson, A., Gooding, C. (eds), *Disability Rights in Europe: From Theory to Practice*, Hart.

136 Schiek, D. (2015), 'Intersectionality and the Notion of Disability in EU Discrimination Law', *European (Legal) Studies on on-line papers*, Volume 4, Issue 4, p. 11.

## 4 Member States

The country reports of the national experts of the European network of legal experts in gender equality and non-discrimination included specific questions on multiple and intersectional discrimination. The results of these, collated for this thematic report, reveal an interesting picture. The overall theme is that multiple discrimination remains marginal in the legislation and case law of the vast majority of the European States covered in the country reports.<sup>137</sup> Nevertheless, there is potential for development.

National experts from the gender stream of the European network of legal experts in gender equality and non-discrimination were asked the following questions:

- (1) Is multiple discrimination – i.e. discrimination based on two or more grounds simultaneously – and/or intersectional discrimination – i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination – explicitly addressed in national legislation?
- (2) If not, if there are proposals pending which aim at incorporating the concept of multiple discrimination and/or the concept of intersectional discrimination in national legislation, please provide a short description of the proposals.
- (3) Is there any case law that addresses multiple discrimination and/or intersectional discrimination (where gender is one of the grounds at stake)? If yes, please provide a short description of the relevant case law (including opinions of equality bodies). Please provide full references.
- (4) Do the cases raise any particular difficulties with the concepts of multiple discrimination and/or intersectional discrimination?

National experts from the non-discrimination stream of the European network of legal experts in gender equality and non-discrimination (covering all the grounds except for gender) were asked: Is multiple discrimination explicitly prohibited in national law?

It should be noted that national experts were asked generically about multiple discrimination, defined as discrimination based on two or more grounds simultaneously, and intersectional discrimination, i.e. discrimination resulting from the interaction of grounds of discrimination which interact to produce a new and different type of discrimination. The account below uses the generic term ‘multiple discrimination’ but investigates further how different jurisdictions define the term, if at all.

### 4.1 Explicit mention of multiple discrimination

According to the country reports, about 13 of the States surveyed make explicit mention of multiple discrimination in their legislation.<sup>138</sup>

#### 4.1.1 Defining ‘multiple discrimination’

Multiple discrimination is generally defined as discrimination on more than one protected ground,<sup>139</sup> although some provisions refer to multiple discrimination without defining it.<sup>140</sup> Almost none refer to ‘intersecting’ discrimination, with the exception of **Serbia**, which refers to cases of multiple or intersecting

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137 The reports included all EU member States, the candidate countries (Montenegro, the former Yugoslav Republic of Macedonia, Serbia and Turkey) as well as Liechtenstein, Iceland and Norway.

138 Austria, Bulgaria, Croatia, Germany, Greece, Italy, Liechtenstein, FYR Macedonia, Montenegro, Romania, Serbia, Spain (mentioned for data collection), Turkey (only in disability legislation).

139 See for example Protection Against Discrimination Act (PADA) Additional Provisions, § 1 (11) (Bulgaria); Anti-Discrimination Act (Croatia); Art. 12 Law on the prevention and protection against discrimination (Macedonia); Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination (Romania).

140 E.g. Liechtenstein.

discrimination.<sup>141</sup> Several jurisdictions specify that multiple discrimination is a severe, grave<sup>142</sup> or aggravating<sup>143</sup> form of discrimination, along with such categories as repeated discrimination, continued discrimination and discrimination whose consequences are particularly harmful to the victim.<sup>144</sup>

#### 4.1.2 Multiple discrimination as pertaining to compensation

Statutory provision generally focuses on enhanced compensation. For example, the **Austrian** statutes state that the fact of multiple discrimination should be considered when assessing the amount of immaterial damages.<sup>145</sup> Notably, the explanatory notes for these provisions stress that discrimination on multiple discrimination needs to be assessed from an overall perspective, rather than being separated or cumulated by grounds. Similarly, the **Croatian** Anti-discrimination Act considers multiple discrimination as a severe form of discrimination, and requires the court to take it into consideration when determining the sanction or the amount of compensation.<sup>146</sup> The same is true for **Serbia**, which requires a more severe penalty for cases of multiple or intersecting discrimination,<sup>147</sup> and for Liechtenstein, although in the latter case, only in relation to disability.<sup>148</sup>

#### 4.1.3 Multiple discrimination and positive duties and powers

Some member states go further and integrate multiple discrimination into positive duties or the powers of inspectorates or equality bodies. For example, the **Bulgarian** statute places a statutory duty on public authorities to give priority to positive measures for the benefit of multiple discrimination victims.<sup>149</sup> For multiple discrimination cases, the relevant tribunal sits as an extended panel of five members (rather than three).<sup>150</sup> Other statutes focus on the duty of relevant agencies to co-operate, as in **Germany**; while in **Greece**, a provision dating from 2011 requires the labour inspectorate to supervise the principle of equal treatment taking account of multiple discrimination, including HIV.<sup>151</sup> In **Italy**, the 'Programme of action for the integration of people with disability,' approved in 2013,<sup>152</sup> takes multiple discrimination into account to define new criteria to collect data on the integration of people with disability, to make it possible to verify effective integration and monitor other factors which ease or hinder integration.

#### 4.1.4 Available grounds

Some countries limit the grounds which can be combined. **Italian** legislation 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.'<sup>153</sup> Similarly, the implementation of equal treatment irrespective of religion or belief, disability, age or sexual orientation must be carried out in a 'perspective that also takes into account the different impact that

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141 Law on the Prohibition of Discrimination (Serbia).

142 Art. 12 Law on the prevention and protection against discrimination (Macedonia); Article 20 para. 1, item 1, Law on the Prohibition of Discrimination, Official Gazette of Montenegro 46/10 and 18/2014 (Montenegro).

143 Ordinance (GO) 137/2000 regarding the prevention and the punishment of all forms of discrimination (Romania).

144 See for example Article 6(1) of the Anti-discrimination Act (Croatia); Article 13(5) Law on Prohibition of Discrimination (Serbia).

145 § 19a Federal-Equal Treatment Act and §§ 12/13, 26/13, and 51/10 Equal Treatment Act (Austria). See also § 9 (4) of the Federal Disability Equality Act and §7o of the Act on the Employment of People with Disabilities (Austria).

146 Article 6(1) and (2) of the Anti-discrimination Act (Croatia).

147 Law on the Prohibition of Discrimination (Serbia).

148 Article 23 Act on Equality of People with Disabilities (AEPD/BGIG) (*Behindertengleichstellungsgesetz*).

149 PADA, Article 11 (2). Under Article 11 (1), authorities are placed under a general statutory duty to take positive action whenever necessary to achieve the legislation's goals.

150 PADA, Article 48 (3).

151 Law 3396/2011 on the general reform of the Labour Inspectorate Body and other provisions on Social Insurance.

152 [www.gazzettaufficiale.it/eli/id/2013/12/28/13A10469/sg](http://www.gazzettaufficiale.it/eli/id/2013/12/28/13A10469/sg).

153 Article 1 of Decree No. 215/2003.

the same forms of discrimination can have on women and men.<sup>154</sup> The Italian experts point out that this demonstrates that multiple discrimination is perceived by the legislator only as a sum of gender and other grounds.

Some countries refer to multiple discrimination only in legislation relating to a particular ground. Thus in **Liechtenstein**, multiple discrimination is only referred to in the Act on Equality of People with Disabilities (AEPD/BGIG) (*Behindertengleichstellungsgesetz*), which states that multiple discrimination must be taken into account when determining compensation for immaterial damages at a court trial.<sup>155</sup> There are no provisions in relationship to the other grounds, and multiple discrimination is not defined. **Turkey's** legislation similarly refers only to disability law.

## 4.2 No explicit mention in legislation

There is no explicit mention in the legislation of 21 of the States covered.<sup>156</sup> However, national experts point out that this does not preclude claims under multiple grounds in **France, Malta, the Netherlands, Norway, Poland, Portugal, Sweden**, and the **UK**. Thus in **France**, courts have allowed cumulative discrimination claims although there is no express statutory or other reference. French law prohibits many grounds of discrimination and it is possible to combine them. The Court of Appeal of Paris, for example, has recognised discrimination based on the state of health, disability and trade union membership.<sup>157</sup>

The potential to combine grounds, however, is complicated in some states by the continued existence of separate statutes. For example, in **Belgium**, each element of a multiple claim must be challenged separately under three different statutes, replicating the position at EU level, although the same proceedings can be used. The statutes are, however, unified at regional level, in some cases for the very reason that a single framework is better suited to multiple discrimination.<sup>158</sup>

## 4.3 Case law

National experts report very little case law, whether or not States have an explicit provision for multiple discrimination. Indeed, out of the countries with explicit provision, only Austria, Germany and Italy point to cases before the courts where there is even a suggestion of multiple discrimination. Where there have been cases, the full implications of intersectionality are rarely developed. Thus in Austria, in one case the Supreme Court pointed to multiple discrimination (in this case, gender and ethnicity) but did not give guidance how to deal with it.<sup>159</sup> In Germany, the experts report that although a number of cases have concerned several grounds,<sup>160</sup> the courts regularly do not categorise these as cases of 'multiple discrimination' but instead focus on one ground. The **Italian** experts point to a group of cases in which the Constitutional Court recognized the double grounds of nationality<sup>161</sup> and disability in determining the claims of non-EU disabled residents who were banned from social protection benefits and advantages. In one of these decisions, the Court extended the mobility allowance to non-EU residents.<sup>162</sup> It recognised the double grounds of nationality and disability by referring to Articles 3 (principle of equality), 10 (status of foreign persons), 32 (health rights) and 38 (social protection) of the Constitution. The Constitutional

154 Article 1 of Decree No. 216/2003.

155 Article 23 Act on Equality of People with Disabilities (AEPD/BGIG) (*Behindertengleichstellungsgesetz*).

156 Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France (but possible through judicial interpretation), Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands (but possible), Norway (but possible), Portugal (but possible), Slovakia (but possible), Slovenia, Sweden (but possible), UK (but possible).

157 19 March 2015, Nos 12/10164, 12/10370.

158 See the Draft Framework Decree on Equal Opportunities, *Flemish Parliament 2007-2008*, Doc. 1578/1, p. 165.

159 Case No. 80bA63/09m from 22 September 2010.

160 For example, Cologne Labour Court (*Arbeitsgericht Köln, AG Köln*), 06.03.2008 19 Ca 7222/07; Düsseldorf Administrative Court (*Verwaltungsgericht Düsseldorf, VG Düsseldorf*), 05.06.2007, 2 K 26225/06; Frankfurt Administrative Court (*Verwaltungsgericht Frankfurt, VG Frankfurt*), 09.12.2009, 9 L 3454/09.

161 Note that nationality is not a ground which is protected by the EU anti-discrimination directives.

162 Case No. 306/2008 (Italian Constitutional Court).

Court used a similar combination of the equality principle and Article 32 of the Constitution (health rights) to extend the right to free use of public transport to non-EU disabled residents. Here, too, it recognised both nationality and disability as cumulative grounds of discrimination.<sup>163</sup> These cases carry forward an earlier interpretative decision by the Court in 1998, when it acknowledged the relevance of the grounds of nationality and disability in a case upholding the rights of non-EU disabled residents in employment procedures.<sup>164</sup> However, the Italian experts point out that although various grounds were recognised, their combined effect was not. In particular, because these cases were decided by the Constitutional Court, which has no power to award damages, there is no precedent as yet for awarding greater sanctions in multiple discrimination cases.

The absence of explicit provision for multiple discrimination, on the other hand, has not precluded cases referring to multiple discrimination, although here, too, it is unusual to find a fully-fledged intersectionality approach in the form discussed in Chapter 1 of this report. The **French** experts point out that French law prohibits many grounds of discrimination and it is possible to combine them. Some grounds also include an overlap. Courts have in practice allowed claimants to claim that they are cumulatively discriminated against for a number of grounds, for example in cases where selection for university education or employment could be influenced by cumulative conditions of age and nationality, age and sex. Thus, the Court of Appeal of Paris has recognized discrimination based on state of health, disability and trade union membership.<sup>165</sup>

Similarly, in **Sweden**, the courts have heard cases on multiple discrimination without an express statement in the legislation. An important case in the Labour Court in 2010 concerned discrimination on grounds of both age and gender.<sup>166</sup> A 62 year-old woman applying for a job as a job coach at a public employment office was neither called for an interview, nor hired. The employer claimed that the woman was not suitable for the job but failed to demonstrate this. The Labour Court found discrimination on both grounds in relation to the interview and age discrimination in relation to the employment. The Swedish experts point out that this raises an intersectionality issue, since among the interviewed were not only less meritable men, and younger, less meritable women but also an equally old man. However, although compensation was set fairly high, at SEK 75 000 (approx. EUR 7 000), this does not seem to be a reflection of the fact of multiple discrimination. In fact, the Labour Court stated that although there was age discrimination and sex discrimination, they both arose from the same act or omission, and therefore, this was *not* a reason to raise the level of the discrimination award.

On the other hand, there have been several cases in the Swedish Labour Court which have failed because of the difficulty with finding an appropriate comparator. The Swedish experts refer to two cases,<sup>167</sup> both concerned with discrimination on the grounds of gender and ethnicity. Both cases were lost since the claimant could not prove that she was in a similar position to that of the male comparator. Cases where the complaint concerns two separate events, one based on ethnicity and the other on sex, are more likely to succeed. The Swedish experts points to a 2011 case,<sup>168</sup> where the complainant alleged harassment on two different occasions, one based on ethnicity and one on sex. Although this is not truly an intersectional case, it does highlight the ways in which different aspects of her identity could lead to denigratory treatment. The plaintiff won and therefore obtained compensation for both offences (SEK 35 000, about EUR 3 000). In the same case, another employee was found to have been sexually harassed on one occasion. She obtained SEK 25 000 (EUR 2 000) in compensation only. The fact that one act of harassment related to sex and one to ethnicity seemed to have had no additional effect: the

163 Case No. 432/2005 (Italian Constitutional Court).

164 Case No. 454; see also Case No. 324/2006 (Italian Constitutional Court).

165 19 March 2015, No. 12/10164, 12/10370 (Paris Court of Appeal), and see also see, Cour de cassation Soc. 3 Nov. 2011, No. 10-20765 as interpreted by Mercat-Bruns, M. (2015), 'Les discriminations multiples et l'identité au travail au croisement des questions d'égalité et de libertés', *Revue de droit du travail*, p. 28.

166 Labour Court 2010 No 91, The Equality Ombudsman v State Employment Board (Statens arbetsgivarverk) (judgement 2010-12-15).

167 Labour Court 2009 No. 11 and 2006 No. 96.

168 AD 2011 No. 13. v. *Municipality of Helsingborg*, Judgement 16 February 2011. The case is described in section 3.

number of events was decisive and the same compensation would have been achieved if both events had related to sexual harassment.<sup>169</sup>

The **Dutch** experts point to a judgment from 2000 which does seem to have awarded higher compensation in a case in which it found discrimination on grounds of race and sex. This was a case where the employment relationship was terminated after the employer had indicated that he did not expect the employee to return to her full working hours after maternity leave. This was because he assumed that this would be too difficult for her in view of her being a Moroccan woman married to a traditional Moroccan man. The court ruled that this constituted discrimination on the grounds of sex and race and awarded a higher severance fee than usual.<sup>170</sup>

Other jurisdictions show a similarly mixed picture. The **Norwegian** experts point to one main case in which multiple discrimination was upheld by the court. The case concerned a female worker aged 41 employed part time in the fire brigade. A full-time position was advertised stating that applicants should be between 27 and 35 years old. Her application was rejected in favour of a male worker who was less qualified for the position. Both the Equality Ombud and the Equality Tribunal had held in her favour. The court of first instance found that she had been discriminated against on grounds of both gender and age.<sup>171</sup> Compensation of EUR 37 500 (NOK 300 000) for economic loss as well as EUR 18 759 (NOK 150 000) for non-pecuniary damage was awarded. The decision does not state that the award was higher because of the multiple discrimination. Nevertheless, the Norwegian experts report that the non-pecuniary damage was much higher than it would have been in 'ordinary' labour law cases. The court specifically stated that this was because the anti-discrimination regulations on sanctions state that sanctions are meant to be real and effective, as well as dissuasive and proportionate to the damage suffered.

There has also been one successful case before the Equality Tribunal. In this case, the first explicitly to address multiple discrimination, the Tribunal found that two women with an Asian background who had not been permitted to book a hotel room in Oslo had been discriminated against on grounds of gender and ethnicity.<sup>172</sup> However, since the Ombud and Equality Tribunal are not empowered to award damages, no damages were awarded in this case.

However, the experts refer to two other cases in which multiple discrimination was alleged but that were not successful, largely on the grounds that no discrimination had been proved. In the first one, a 61-year old male social worker claimed to be subject to discrimination because of gender and age, as he was not selected to participate in an interview for a position at the local welfare office on a small island called Smøla. However, none of the adjudicative bodies involved based their decision on multiple discrimination. Both the Equality Ombud and the court of first instance found age discrimination, but not gender discrimination. The Court of Appeal and the Supreme Court rejected even the age discrimination case, holding that the reason was not age but that he did not have the appropriate professional profile. In the second case, which came before the Equality Tribunal, a woman who was suspected of anorexia had been refused entrance to a gym unless she provided a certificate stating that she was healthy. She claimed that she was subject to multiple discrimination on grounds of gender and disability. The tribunal assessed the case to determine whether there had been direct discrimination on grounds of disability and indirect discrimination on grounds of gender. No discrimination was, however, proven.<sup>173</sup>

169 AD 2011 No. 13. *The Equality Ombudsman v. Municipality of Helsingborg*, Judgement 16 February 2011. The case is described in section 3. FOLLOW UP.

170 District Court Schiedam, 5 July 2000, JAR 2000/180.

171 Øst-Finnmark Court of first instance. Judgment of 17 March 2010 in case No. 09-136827VI-OSFI, and the Equality and Anti-Discrimination Tribunal, Case No. 8/2008.

172 Equality Tribunal, case 1/2008. The full text of the case in English can be accessed at: <http://www.diskrimineringsnemnda.no/sites/d/diskrimineringsnemnda.no/files/501748867.pdf>, <http://www.diskrimineringsnemnda.no/sites/d/diskrimineringsnemnda.no/files/62958820.doc>.

173 Equality Tribunal case 46/2011 (Norway).

Similarly, in **Poland**, although there is no express mention of multiple discrimination, courts have been open to adjudicating cases which bring multiple discrimination claims. Nevertheless, the tendency is to focus on one ground, such as gender, and if this has been proved, the other grounds are not pursued. The Polish experts point to the cases on ‘forced retirement’ when employees are fired when they reach retirement age. Since the retirement age for women was for many years lower than for men (as a general rule 60 for women and 65 for men),<sup>174</sup> cases of forced retirement of women were treated by the courts as gender discrimination and the issue of age discrimination never attracted attention. However, the same kind of cases involving men were treated as age discrimination. Only in 2009 did the Supreme Court state in a resolution that such a case raises two kinds of discrimination – indirect discrimination because of gender and direct discrimination because of age.<sup>175</sup> The experts do refer to occasional cases where more than one ground of discrimination is identified. For example, in one case, the district and regional courts identified discrimination on grounds of sexual orientation and obesity in the same case.<sup>176</sup> There is no evidence, however, that the mention of multiple discrimination in any of these cases influenced the sanction.<sup>177</sup>

The ad hoc nature of the case law mentioned thus far makes it clear that for coherent jurisprudence to emerge, it is important to undertake targeted strategic litigation aimed at bringing appropriate arguments before the courts in order to establish the principles. Only Slovakia seems to have pursued this approach. **Slovakia** is a jurisdiction where multiple discrimination is not expressly protected but can be implied by judicial interpretation. The Slovakian experts report that the Slovakian Centre for Civil and Human Rights has initiated two cases, using the concept of *actio popularis* against the State, to develop these principles, both of which are still on appeal or pending. The first consists of a challenge against a provision of the Act on Childbirth Allowance<sup>178</sup> that makes eligibility for the benefit dependent on the woman concerned not having left the healthcare facility or maternity hospital without the consent of the healthcare facility or maternity hospital. The Centre for Civil and Human Rights argued that this practice is discriminatory against women in general but that it specifically discriminates against Roma women who are in very vulnerable positions and who, for various reasons, including ill-treatment by the maternity hospitals, often leave the hospital upon giving birth without having the consent of the hospital. The case was dismissed by the court of first instance in May 2014<sup>179</sup> and is pending before the second instance court. In autumn 2013, the Centre for Civil and Human Rights submitted a new *actio popularis* challenging the segregation of Roma women in maternity hospitals as discriminatory on grounds of both ethnicity and sex. The case was still pending before the first instance court in April 2015.

In the **UK**, the statutory provision recognising a limited form of multiple discrimination was never brought into effect and will probably be repealed. Early case law seemed to suggest that when two grounds were claimed, each had to be proved separately.<sup>180</sup> Nevertheless, the UK expert reports that there are cases which show some recognition of multiple discrimination. In *Ministry of Defence v DeBique* the claimant, a single mother who had originally been recruited to the British Army from St Vincent and the Grenadines, found it difficult to comply with the 24/7 requirement and asked to bring her sister from St Vincent to assist

174 In May 2012, the retirement age was changed by Parliament. The normal retirement age for both men and women will be 67 (to be reached step by step, finally attained in the case of men in 2020 and in the case of women in 2040; every year, starting from 2013, three months are to be added to the retirement age).

175 Supreme Court resolution of 21 January 2009.

176 See Słubice District Court judgement, 18 June 2012, sygn. akt IV P 30/11 and Gorzów Wielkopolski Regional Court judgement, 27 November 2012, VI Pa 56/12 (not published).

177 See e.g. See for example judgment of the Supreme Court 8 January 2008, II PK 116/07.

178 Act No. 235/1998 Coll. on Childbirth Allowance and on Allowances for Parents who have Three or More Concurrently Born Children or Twins More than Once within Two Years, Section 3(5). In 2013, the act was renumbered and renamed into Act No. 383/2013 Coll. on Childbirth Allowance and on Allowance on More Concurrently Born Children and on changing and supplementing other laws (*zákon č. 383/2013 Z. z. o príspevku pri narodení dieťaťa a príspevku na viac súčasne narodených detí a o zmene a doplnení niektorých zákonov*). The relevant provision against which the Centre for Civil and Human Rights filed its lawsuit is now Section 3(4)(b).

179 Decision of the District Court Bratislava I (exact date unknown), file No. 12C 231/2010. The argumentation of the court is unknown since the decision has not yet been published.

180 *Kamlesh Bahl v. The Law Society; Network Rail Infrastructure Ltd v Griffiths-Henry* 2006 IRLR 865 (EAT) UK.

her with childcare. However, although a British national would have been permitted to have an adult live with her to provide childcare, she was not permitted to bring her sister because of immigration rules. It was held that the combined effect of the 24/7 and the immigration requirements indirectly discriminated against her and could not be justified.<sup>181</sup> The EAT ruled that ‘the nature of discrimination is such that it cannot always be sensibly compartmentalised into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant’s true disadvantage.’<sup>182</sup>

More recently, in *Hewage v Grampian Health Board* the Supreme Court accepted that a tribunal had been entitled to find that the claimant had been discriminated against on grounds of sex and race. The Supreme Court did not take issue with the fact that the claimant argued both race and sex discrimination, and that the tribunal did not identify separate facts to support findings of race discrimination and sex discrimination.<sup>183</sup> However, it is not clear whether the combined nature of the discrimination affected the level of damages. In *Ministry of Defence v DeBique*, the claimant was awarded EUR 18 333 (£15 000) in damages in respect of injury to her feelings.<sup>184</sup>

Some jurisdictions can point to cases where in fact courts addressed the issue as one of multiple discrimination or even intersectionality without necessarily using these terms. Thus the **Spanish** expert points to a case from the High Court of Galicia<sup>185</sup> which confirmed the invalidity of a dismissal of an employee because the company had infringed her right to equal treatment ‘without discrimination on grounds of gender, (...) opinion or any personal or social circumstance’ (Article 14 of the Spanish Constitution), and her right to ‘ideological freedom’ (Article 16 of the Spanish Constitution). The Court noted that there was discrimination on several grounds, without being able to specify one as more important than the other, and without expressly mentioning multiple discrimination.

On the other hand, several national experts draw attention to cases which should have been identified as intersectional, but were not. For example, in the **Czech Republic**, in cases contesting the wrongful sterilization of Roma women, the courts have never expressly acknowledged multiple discrimination on grounds of gender and ethnicity. Many of the cases involving sterilization during the Communist era were declared to be statute barred.<sup>186</sup> For cases occurring since the Velvet Revolution, the Czech courts have identified serious shortcomings with respect to the duty to obtain informed consent, and in some cases compensation was awarded for health damages.<sup>187</sup> However, although a considerable number of the women affected were Roma, ethnic grounds for these sterilisations were never proven in Czech judicial proceedings. Instead, the focus has been on attempting to put in place proper mechanisms for compensation for victims.<sup>188</sup> The **Slovakian** expert also points out that it has not been possible to bring multiple discrimination claims on the part of Roma women who underwent forced sterilizations because the sterilizations occurred before the Anti-discrimination Act was passed. Instead, the Slovakian Centre for Civil and Human Rights used other legal routes. Although three of the cases of unlawful sterilisations had already been decided by the European Court of Human Rights (ECtHR),<sup>189</sup> and violations of Article 14 were claimed in all of the cases before the Slovakian Court, the Court did not address this issue.

181 [2010] IRLR 471 UKEAT/0075/11, available at [http://www.bailii.org/uk/cases/UKEAT/2011/0075\\_11\\_1509.html](http://www.bailii.org/uk/cases/UKEAT/2011/0075_11_1509.html).

182 *Ministry of Defence v DeBique* [2010] IRLR 471 Para 165.

183 [2012] UKSC 37, [2012] IRLR 870, [2012] EqlR 884, [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2011\\_0050\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2011_0050_Judgment.pdf), accessed 19 March 2015.

184 *Debique v Ministry of Defence (No. 2)* UKEAT/0075/11/SM [http://www.bailii.org/uk/cases/UKEAT/2011/0075\\_11\\_1509.html](http://www.bailii.org/uk/cases/UKEAT/2011/0075_11_1509.html).

185 High Court of Justice of Galicia, in its judgment 3041/2008 (Spain).

186 But see Czech Republic, (Nejvyšší soud), Brno/30 Cdo 2819/2009, 23 June 2011, [http://www.nsoud.cz/Judikatura/judikatura\\_ns.nsf/WebSearch/2D9E62AC63415036C1257A4E0064BCCC?openDocument&Highlight=0](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/2D9E62AC63415036C1257A4E0064BCCC?openDocument&Highlight=0).

187 Czech Republic (Ústí nad Labem Regional Court, Liberec Department), Liberec/36 C 15/2008 – 228, 16 January 2013.

188 Human Rights Committee, Information received from the Czech Republic on follow-up to the concluding observations, Date received: 3 November 2014.

189 See ECtHR’s judgements in cases *V. C. v. Slovakia* (No. 18968/07), *I. G. and Others v. Slovakia* (No. 15966/04), and *N. B. v. Slovakia* (No. 29518/10).

The **Estonian** experts refer to a similar problem in relation to discrimination on grounds of ethnic origin and age. In one case, an older person of Russian ethnic origin claimed ethnic and/or age discrimination when rejected for a position in favour of a young person of majority ethnic origin. The Tallinn court decided the case on the basis that the claimant did not qualify for the position rather than analysing it on the basis of multiple discrimination.<sup>190</sup> In a case from 2014, a prison public official of minority origin was released from service because he did not fulfil the mandatory minimum requirement in Estonian language proficiency. His claim was also rejected. The court considered age and ethnic origin as two separate grounds and held that since all officials who had not achieved the requisite level of language proficiency were treated alike, there was no discrimination on either ground.<sup>191</sup> Notably, this was not seen as an indirect discrimination case, which would have shifted the burden onto the respondent to prove the justifiability of the language proficiency requirement. Neither the **Czech Republic** nor **Estonia** have explicit provision for multiple discrimination, but neither appears to have an express prohibition either.

## 4.4 Equality bodies and Ombuds

### 4.4.1 Research and information

More attention has been given to multiple discrimination by equality bodies, or their equivalent. This is particularly important in relation to the research and information being disseminated by these bodies. Thus in **Croatia**, the Gender Equality Ombud in her 2014 report identifies several intersectional groups of women as especially vulnerable, including rural women, women with a disability, women of Roma ethnic origin, women victims of sexual violence during the Homeland War, and sex workers. Similarly important framing work has been done by the **German** Federal Anti-Discrimination Agency, which commissioned two expert reports, published in early 2011. They concern the conceptual framing and legal handling of 'multidimensional discrimination', as well as an empirical study on this phenomenon. It was found that a very high percentage of the individuals selected by the researchers due to their experience of social injustice based on one ground also suffered from a similar experience on another ground (181 out of 290). This was particularly true of the ground of sex (as the second ground).<sup>192</sup> An online survey also produced the result that in most cases reported by victims, discrimination was experienced as 'multidimensional' rather than 'one-dimensional'.<sup>193</sup>

There is also more data from equality bodies than from courts concerning the numbers of complaints which raise issues in relation to more than one ground of discrimination. In the **Czech Republic**, although there is no explicit provision for multiple discrimination, the Ombudsman recorded 27 cases in 2014, mostly regarding age and disability. The **Norwegian** Equality Ombud handled 15 cases in 2012 which involved cases of multiple discrimination.<sup>194</sup> The **Swedish** Equality Ombudsman receives around 200 cases, attributed to more than one ground.<sup>195</sup> Most of them concern one instance of bad treatment which the plaintiff wants to connect to two or more protected grounds. The **Slovenian** experts similarly point out that the Advocate of the Principle of Equality has dealt with several cases of multiple discrimination

190 *Tallinna Ringkonnakohus* Tallinn Circuit Court, Decision of 23 January 2013 in civil case 2-12-32-921 (*S.S. vs. Transparency International*).

191 Tallinn Circuit Court, Decision of 23 January 2014 in administrative case 3-13-510 (*L.J. vs. Tallinn Prison*).

192 Cf.: Baer (2011), *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*; Dern, S., Inowlocki, L., Oberlies, D., *Mehrdimensionale Diskriminierung – Eine empirische Untersuchung anhand von autobiographisch narrativen Interviews* (2011), both published on 11 January cf.: [http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise\\_Mehrdimensionale\\_Diskriminierung\\_empirische\\_untersuchung.html?nn=4192910](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Mehrdimensionale_Diskriminierung_empirische_untersuchung.html?nn=4192910)

193 Cf. above, Rottleuthner, H., Mahlmann, M. (2011), *Diskriminierung in Deutschland: Vermutungen und Fakten*, Nomos Verlag.

194 See the Ombud's annual report for 2012 (in Norwegian) at [http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/rapporter\\_analyser/rapporter\\_diverse/ldo-arsrapport-2012.pdf](http://www.ido.no/globalassets/brosjyrer-handboker-rapporter/rapporter_analyser/rapporter_diverse/ldo-arsrapport-2012.pdf) (accessed 1. April 2015).

195 Compare, Equality Ombudsman, *Yearly Report 2012*, p. 13 and 15. The total number of grounds is 1 835 and the total number of cases is 1 559. The number of grounds is thus 276 more than the number of cases. However, there may be three grounds in some cases and parental leave is a ground so a case concerning both sex discrimination and parental leave discrimination will show up as concerning two grounds. For 2014 there were 1 611 cases handled according to the Discrimination Act and 1 810 grounds were concerned. Equality Ombudsman *Yearly Report 2014*, p.45f and 49.

(two cases in 2009, three in 2010 and two in 2011).<sup>196</sup> Comprehensive information about these cases is not available. The **Romanian** experts report that data on cases of multiple discrimination are difficult to verify as there is no public access to the equality body (NCCD) or court databases. Nevertheless, in an important report in 2011, the NCCD recorded that it had received 12 cases on multiple discrimination in 2003, one case in 2004, 18 cases in 2005, four cases in 2006, six cases in 2007, eight cases in 2008, one case in 2009, four cases in 2010 and one case in 2011. Based on the cases so far publicly available, it seems that most of the multiple discrimination cases include gender as one of the grounds. However, in a very prominent case against the Romanian President on the grounds that he had used pejorative terms to describe a female journalist (the expressions used by Traian Băsescu in relation to a female journalist being ‘birdie,’ a pejorative with sexual connotations and ‘filthy Gypsy’), the NCCD did not consider that gender discrimination had occurred and did not assess the other grounds of discrimination.

Some of the differences in country experiences might be a result of different ways of recording cases as being single ground or multiple. The **Serbian** experts point to data showing that several grounds for discrimination were raised in 120 complaints before the Commission for the Protection of Equality. These included cases of age discrimination (46), marital and family status (42), nationality (38), membership of political organizations, trade unions and other organisations (35), religious and political belief (32) and sex (23). The Serbian experts have pointed out that applicants generally name several grounds when unsure as to which personal characteristic was the ground in their case. Nevertheless, although this means that multiple discrimination was not necessarily present in all these cases, the very fact of uncertainty as to which ground applies indicates that it is important to keep the intersectional perspective in mind.

#### 4.4.2 Decisions by equality bodies and ombuds

There have also been decisions by equality bodies in individual disputes which show some recognition of multiple discrimination. The **Netherlands’** equality body, the NIHR, tends to investigate all grounds mentioned in cases of multiple discrimination. The experts refer as an example to a case in which the NIHR ruled that a hospital had discriminated against a woman of Iraqi origin on the grounds of both sex and race. An employee of the hospital had rejected the application of the woman with reference to her origins and the responsibility for her family.<sup>197</sup> The **French** equality body predecessor of the Defender of Rights, the HALDE,<sup>198</sup> held that the erroneous refusal to admit a plaintiff on the ground of her origin was influenced by subjective discrimination on the basis of her age, over 30, and the fact that she had young children.<sup>199</sup> The French experts also refer to a finding in relation to the refusal of a social housing administrator to take into consideration the priority situation of a disabled person, on the basis of her origin.<sup>200</sup> Discrimination in hiring was also established in a case in which the employer had evaluated the claimant, a woman of 44, as very efficient while she was a temporary employee, but not dynamic enough when she applied to be hired in competition with young inexperienced persons.<sup>201</sup> In the **Irish** case of *O'Brien v. ComputerScope Limited*,<sup>202</sup> the Equality Officer found discrimination on grounds of both age and gender in upholding the complainant’s claim that she was not paid commensurate with her position as an Assistant Editor and was paid less than two older male colleagues for doing like work. The experts point out that issues of age and gender were treated together but this did not lead to the award of higher

196 Advocate of the Principle of Equality, Annual report 2012, available at [http://www.mddsz.gov.si/si/delovna\\_podrocja/enake\\_moznosti/zagovornik/letna\\_porocila/](http://www.mddsz.gov.si/si/delovna_podrocja/enake_moznosti/zagovornik/letna_porocila/) (11 August 2015).

197 2014-160 (the Netherlands).

198 Haute autorité de lutte contre les discriminations et pour l’égalité / High Authority against Discrimination and for Equality.

199 Halde Deliberation No. 2006-03 of 23 January, 2006 (France): <http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/deliberation-ndeg2006-03-du-23-janvier-2006-relative>.

200 Halde Deliberation No. 2007-162 of 18 June 2007 (France): <http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/deliberation-ndeg2007-162-du-18-juin-2007-relative>.

201 Halde Deliberation No. 2006-20 of 6 February 2006 (France): <http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/deliberation-ndeg2006-20-du-6-fevrier-2006-relative>. The Court of Appeal of Poitiers followed Halde’s analysis: Court of Appeal of Poitiers, 17 February 2009, No. 08/00461. (France).

202 DEC-E2006-030, 1 August 2006 <http://www.workplacelrelations.ie/en/Cases/2006/August/DEC-E2006-030-Full-Case-Report.html> hyperlink accessed 16 July 2015.

damages. On the other hand, even where there is express provision for multiple discrimination, equality bodies and ombuds might not pursue this line of reasoning. Thus in **FYR Macedonia**, the equality body received eight (6 %) cases where applicants claimed discrimination on several grounds. However, the body either did not accept the applications on procedural grounds, or did not find discrimination.<sup>203</sup>

The extent to which multiple discrimination can be fully addressed might depend on whether there is a single equality body or ombud, as against several different ground-specific bodies. Thus in Belgium, there are two distinct equality bodies, one dealing with gender (the Federal Institute for the Equality of Women and Men, or the Gender Institute) and one dealing with the other protected grounds, apart from language (the *Inter-federal* Centre for Equal Opportunities (ICEO)). There may also be structural obstacles within an equality body. The **Belgian** experts note that the ICEO had for many years divided claims into racial and other claims, with separate departments for each, making it difficult to deal with intersectional cases. The change in internal functioning, to permit cases to be identified as including several different grounds (excluding gender), has made intersectionality much more visible and facilitated appropriate adjudication. As a result, in its 2013 report, the ICEO reported that 15 % of the complaints it registered in 2013 involved several grounds of discrimination, such as race plus religion, race plus sexual orientation, race plus property or disability and state of health.<sup>204</sup>

Several cases have been brought concerning Muslim headscarves. However, it is unusual for this to be expressly identified as a multiple discrimination issue, let alone an intersectional one. The **Danish** Court of Appeals upheld one claim brought by a schoolgirl for religious discrimination when a department store refused to allow her to be a trainee during a work-placement week arranged by her school because she wore a headscarf.<sup>205</sup> This case, however, appears to have been upheld on the basis of religious discrimination, rather than an intersectional case of gender and religion. The Danish experts also refer to a Supreme Court case in 2005, where a supermarket fired a young Muslim woman who began to come to work wearing a headscarf four years after she had begun her employment there. In this case, the Court found that the employer had indirectly discriminated against Muslim women who wear headscarves for religious reasons. However, it concluded that the dress code did not violate the Discrimination Act's prohibition against discrimination because it was justified by a legitimate and neutral objective and the principle of proportionality was complied with.<sup>206</sup>

This could be contrasted with a case referred to by the **French** experts, brought before the Administrative Tribunal of Paris.<sup>207</sup> In this case, the plaintiff was denied access to an adult education programme managed by a public secondary school on the ground that she was wearing an Islamic headscarf. The court held that the prohibition of religious signs in public schools did not apply to adult education programmes. An injunction ordering her immediate reintegration was granted. As in the Danish case, the Court appears to have decided the case on the basis of religion, especially since the submissions of the equality body were based on secularity principles. However, the role of multiple discrimination did emerge in the Court's rejection of the public school authorities' defence, which was based on the assumption that her personal project was not serious because she was pregnant and her husband had substantial resources. This defence was held to be discriminatory in itself.

Equality bodies have been more open to viewing discrimination against women in headscarves as an intersectional issue. In **Austria**, the equality body for the private sector<sup>208</sup> has given several opinions

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203 Commission for Protection Against Discrimination (Комисија за заштита од дискриминација), 2014 Annual Report of the Commission for Protection Against Discrimination (2015) [www.sobranie.mk/materialdetails.nsp?materialId=d93111d8-975d-471e-be2c-e07a2df372f3](http://www.sobranie.mk/materialdetails.nsp?materialId=d93111d8-975d-471e-be2c-e07a2df372f3).

204 Annual report of the ICEO 2013 (*Discrimination – Diversité*), p. 80-81, available on the website of the Centre ([www.diversite.be](http://www.diversite.be)).

205 Danish Court of Appeals, U 2000, 2350

206 Ugeskrift for Retsvæsen: UFR 2005.1265H (Danish Supreme Court).

207 Administrative tribunal of Paris, *Said vs. Greta*, 27 April, 2009, No. 0905233/9.

208 Senat I der Gleichbehandlungskommission für die Privatwirtschaft.

on headscarves, in which it found both sex and religious discrimination.<sup>209</sup> The one case noted by the **Croatian** experts concerned the Regulation on Driving Licences, which disallowed head coverings to be worn for drivers' licence photographs. The only exception was for elderly persons wearing head covers as part of a traditional dress code.<sup>210</sup> After receiving complaints by three young women belonging to the Muslim minority, the Croatian Ombudsperson held that this regulation constituted multiple discrimination on grounds of religion and age.<sup>211</sup> Following the Ombudsperson's recommendation, the Ministry of the Interior amended the Regulations on Driving Licences and allowed head covers to be worn in driving licence photographs when a person wears such a cover for religious or medical reasons.<sup>212</sup>

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209 [https://www.bmbf.gv.at/frauen/gleichbehandlungskommissionen/gleichbehandlungskommission/gbk\\_i\\_392\\_11m.pdf?4kd7gj](https://www.bmbf.gv.at/frauen/gleichbehandlungskommissionen/gleichbehandlungskommission/gbk_i_392_11m.pdf?4kd7gj), among others.

210 Article 6(3) of the Regulations on Driving Licences, Official Gazette 155/2008, 8/2009.

211 Ombudsperson report for 2013, p. 116: <http://ombudsman.hr/hr/component/jdownloads/send/56-2013/663-izvjee-puke-pravobraniteljice-za-2013>.

212 Article 12(4) of the Regulations on Driving Licences, Official Gazette 43/2013, 77/2013, 155/2013.

## 5 Obstacles and obfuscations: Intersectionality and EU Law

On the face of it, EU anti-discrimination law presents severe structural obstacles to intersectional claims. There are four inter-related reasons for this. Firstly, different grounds are found in different pieces of legislation; secondly, the various directives have differing scopes; thirdly, justification defences and exceptions are framed differently for different grounds; and fourthly, there is no scope for an expansion of the listed grounds without legislative amendment. To this is added the ubiquitous problem of the need to find an appropriate comparator. These points are expanded below.

### 5.1 Separate directives

Until 2000, EU anti-discrimination law was limited to 'sex' discrimination, and discrimination on grounds of nationality for EU nationals.<sup>213</sup> The grounds of discrimination were expanded in 2000 to include racial and ethnic origin, disability, sexual orientation, religion and belief, and age, opening up new possibilities for the recognition of multiple discrimination. However, the structure of the directives creates several potential obstacles. The most important concerns the segmentation into three different sets of directives: one concerning race and ethnic origin,<sup>214</sup> one concerning religion or belief, disability, age or sexual orientation,<sup>215</sup> and a set of directives on gender discrimination.<sup>216</sup> This means that claims referred to the CJEU which straddle different directives may have to be brought under two or more directives.

### 5.2 Differing scope

This is aggravated by the second obstacle, namely the difference in scope. The Racial Equality Directive recognises explicitly that 'to ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services.'<sup>217</sup> On the other hand, the Employment Directive, which deals with discrimination on grounds of disability, age, religion and belief and sexual orientation, is limited to employment and vocational training. The scope of the various gender discrimination directives is narrower than the Racial Equality Directive but wider than that of the Employment Directive. Thus the Recast Equal Treatment Directive covers access to employment, including promotion, and to vocational training; working conditions, including pay; and occupational social security schemes.<sup>218</sup> Directive 2004/113 implements the principle of equal treatment between men and women in access to and the supply of goods and services available to the public.<sup>219</sup> It does not, however, apply to education or to the content of media and advertising.<sup>220</sup> It thus remains narrower than the Racial Equality Directive. Notably, for the purposes of intersectionality, it is specifically limited to the provision of goods and services which are available to

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213 Nationality discrimination is considered to be part of the freedom of movement provisions in EU law, rather than the anti-discrimination provisions.

214 Racial Equality Directive (2000/43/EC).

215 Employment Directive (2000/78/EC).

216 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast); Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

217 Racial Equality Directive 2000/43 Recital 12.

218 Directive 2006/54/EC.

219 Directive 2004/113, Article 3(1).

220 Directive 2004/113, Article 3(3).

the public and which are 'offered outside the area of private and family life and the transactions carried out in this context.'<sup>221</sup> This is explained in the preamble as follows: 'While prohibiting discrimination, it is important to respect other fundamental rights and freedoms, including the protection of private and family life and transactions carried out in that context and the freedom of religion.'<sup>222</sup> There are also separate directives on equal treatment between men and women in the field of self-employment,<sup>223</sup> and on statutory social security.<sup>224</sup>

The result is that racial and ethnic origin are privileged over gender, which is in turn privileged over age, disability, sexual orientation and religion or belief. This means that an individual faced with discrimination in respect of education or housing might have a claim under EU law if she can prove it was on grounds of her ethnic origin but not if it was due to her religion.<sup>225</sup> This assumes a bright-line distinction between 'religion' and 'ethnic origin.' Similarly, older members of ethnic minorities would have difficulty bringing a claim of multiple discrimination in respect of healthcare or housing. Such claimants would only have a claim under the directives on grounds of ethnic origin. But such a claim might be precluded if younger members of their ethnic group do not suffer detriment. Despite a longstanding commitment by the European Commission to harmonise the scope of the Employment Directive to match that of the Race Directive, the draft 'Horizontal Directive' for age, disability, sexual orientation and religion and belief is still waiting to reach an agreement in the Council, y.<sup>226</sup> Even within the Employment Directive, there are differences in scope as between grounds. Thus Member States may provide that the Directive shall not apply to the armed forces in relation to discrimination on grounds of disability and age.<sup>227</sup>

Chart D: Scope of EU Anti-Discrimination Directives

	Employment and vocational training	Workers' and employers' organizations	Social protection incl. social security	Social protection incl. healthcare	Social advantages	Education	Public Goods and services, incl. housing
Racial or ethnic origin	Dir. 2000/43	Dir. 2000/43	Dir. 2000/43	Dir. 2000/43	Dir. 2000/43	Dir. 2000/43	Dir. 2000/43
Gender	Dir. 2006/54 Dir. 2010/41 (self-employment)	Dir. 2006/54	Dir. 79/7 (statutory social security only) Dir. 2006/54 (occupational social security only)				Dir. 2004/113
Sexual orientation	Dir. 2000/78	Dir. 2000/78					
Religion or belief	Dir. 2000/78	Dir. 2000/78					
Disability	Dir. 2000/78	Dir. 2000/78					
Age	Dir. 2000/78	Dir. 2000/78					

### 5.3 Differing defences and exceptions

The third obstacle in the way of bringing intersectional claims is that the defence of justification and the various exceptions are framed differently for different grounds. This is clearest in relation to age

221 Directive 2004/113, Article 3(1).

222 Directive 2004/113, Preamble para. (3).

223 Directive 2010/41 EC.

224 Directive 79/7 EC.

225 Contrast Directive 2000/43 which covers social protection, social advantages, education and access to goods and services which are available to the public, including housing as well as employment and vocational training with Directive 2000/78 which applies only to employment and vocational training.

226 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008) 426 final (Brussels 2 July 2008).

227 Directive 2000/78 Article 3(4).

discrimination. Whereas there is no general justification defence for direct discrimination on the other grounds, Directive 2000/78 permits discrimination on grounds of age to be justified if ‘within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.’<sup>228</sup> There is also a specific exception permitting Member States to maintain national practices allowing organisations with an ethos based on religion or belief to discriminate on grounds of religion if a person’s religion or belief constitutes a ‘genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.’<sup>229</sup> Notably, the Directive provides that such difference of treatment should not justify discrimination on another ground.<sup>230</sup> There are also separate provisions for disability. The reasonable accommodation provisions in Article 4 apply only to disability, as reaffirmed by the CJEU in *Coleman*.<sup>231</sup> On the other hand, Article 7(2) states that with regard to persons with disabilities, the principle of equal treatment is without prejudice to the right of Member States to provide for the protection of health and safety at work.

## 5.4 Exhaustive list of grounds

A further obstacle is the fact that the lists of grounds of discrimination in the Treaty and the Directives are exhaustive. This means that there is no scope for the Court to add to the listed grounds by analogy. This was reiterated in the recent case law of the CJEU. Thus in *Chacón Navas*, the Court held that because the Treaty basis for the Directive (then Article 13, now Article 19) did not refer to further grounds such as ‘sickness’, there was no legal basis for measures to counter such discrimination. It emphasized that although non-discrimination was an integral part of the general principles of Community law, it did not follow that the grounds listed exhaustively in the Directive should be extended by analogy.<sup>232</sup>

This is particularly problematic because of the absence of some centrally important grounds. Notably discrimination on grounds of nationality is excluded from the remit of the Racial Equality Directive, pointing to what Craig and de Burca call ‘the troubling issue of the relationship between discrimination, race, and migration in Europe.’<sup>233</sup> There is of course a robust jurisprudence under the EU freedom of movement provisions protecting citizens of EU member states against discrimination on grounds of nationality.<sup>234</sup> However, the Racial Equality Directive expressly excludes discrimination on grounds of nationality; and is also without prejudice to provisions relating to the entry into and residence of third-country nationals, and to any treatment which arises from their status.<sup>235</sup> Only if policies excluding third-country nationals can be shown to be indirectly discriminatory on grounds of race will they fall within the scope of the Directive.

This contrasts with other regional and international instruments such as the ECHR, the ICCPR and ICESCR, which have non-exhaustive lists. Article 14 of the European Convention on Human Rights prohibits discrimination on grounds ‘such as sex, race, colour, language ... or other status’ (emphasis added). The non-exhaustive or open nature of this list has enabled the European Court of Human Rights to expand it, to include, for example, disability and sexual orientation.<sup>236</sup> Notably, too, the EU Charter of Fundamental Rights includes a similarly non-exhaustive list. Thus Article 21 provides: ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief,

228 Employment Equality Directive 2000/78 Article 6.

229 Directive 2000/78 Article 4(2).

230 Directive 2000/78 Article 4(2).

231 *Coleman v Attridge Law* para. 42.

232 *Chacón Navas v Eures Colectividades SA* paras 55 and 56; reaffirmed in *Coleman v Attridge Law* para. 46 and *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, paras 36 and 37.

233 Craig, P., DeBurca, G. (2011), *EU Law: Text, Cases and Materials*, OUP, p. 906.

234 For a detailed examination of EU Law on freedom of movement of workers see Craig, P., DeBurca, G. (2011), *EU Law: Text, Cases and Materials*, OUP, chapter 21, p. 715ff.

235 Directive 2000/43 Preamble, Recital 13; Article 3(2).

236 *Kiyutin v Russia* (2011) 53 EHRR 26 (European Court of Human Rights); *Kiss v Hungary* (2013) 56 EHRR 38 (ECHR); *SL v Austria* (2003) 37 E.H.R.R. 39 (ECtHR); *Schalk and Kopf v Austria* (2011) 53 EHRR 20 (ECHR); *Salgueiro da Silva Mouta v Portugal* [2001] 31 EHRR 1055 (European Court of Human Rights).

political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.' However, the Charter does not extend the competence of the EU to matters not included under its competence. Nevertheless, it will be argued below that the more flexible formulation in the Charter gives strong support to an expansive understanding of single grounds, which can thereby incorporate intersectional experiences.<sup>237</sup>

## 5.5 Comparator

Finally, there is the difficult question of finding an appropriate comparator. Discrimination is generally formulated as taking place when a person is or would be treated less favourably than another person in a comparable situation.<sup>238</sup> The need for a comparator is particularly difficult in intersectionality cases, as the *DeGraffenreid* case itself demonstrated. Comparing a black woman with a white woman will reveal no discrimination based on gender, and comparing a black woman with a black man will reveal no discrimination on grounds of race. But comparison with a white man might not reveal the synergistic nature of discrimination on grounds of race and sex combined.

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237 See 6.3 below.

238 Racial Equality Directive 2000/43, Article 2(2)(a); Employment Directive 2000/78 Article 2(2)(a); Recast Directive 2006/54 Article 2(1)(a).

## 6 Addressing intersectionality in EU law

How, then, can intersectional experiences be addressed within EU law? Three possible ways forward can be identified. Firstly, new subgroups could be created to reflect intersectional experiences. Secondly, grounds within the existing list could be combined. Thirdly, existing grounds can be interpreted expansively, so that intersectional experiences can be addressed by acknowledging that even within a single ground, multiple intersecting power relations can be addressed. It is argued here that although there is some promise in the second approach, the greatest potential for achieving an intersectional dimension in EU law remains the third approach, a capacious definition of single grounds to include multiple intersecting relationships of disadvantage. However, a truly intersectional approach can only be furthered if those arguing the case are able to present it in a sufficiently nuanced way so as to highlight the differing power relationships. Reflecting intersectionality in the case law requires recognition among civil society organisations of intersectional issues and an assessment of whether litigation is a feasible or effective strategy. The extent to which intersectionality is currently recognised in the CJEU case law is to some extent a reflection of an appreciation within women's organizations of intersectional issues such as age, pregnancy and parenting, who framed such issues as cases of gender discrimination. It is also suggested that intersectionality is far better achieved through positive action than in response to individual complaints. Each of these three possibilities is briefly described below before turning to an evaluation of the existing jurisprudence before the Court of Justice.

### 6.1 Delineating groups at the intersection

The synergistic nature of intersectional discrimination seems to suggest that new, intersectional groups should be recognized in their own right. Rather than insisting on a choice between the different grounds for discrimination, black women or disabled gay people are then seen to be treated less favourably on the grounds of being black women or disabled gay people.

The Canadian Supreme Court has adopted an approach along these lines in some of its case law. In *Law v Canada*, the majority of the Court held that it was open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds.<sup>239</sup> The inquiry should then be whether and why the newly delineated ground is analogous to those explicitly enumerated. The Court made it clear that there was no reason in principle why an intersection of grounds could not be understood as analogous to the grounds listed in the Constitutional equality guarantee, provided it could be shown to advance the fundamental purpose of that provision.<sup>240</sup> In particular, it should be asked whether discrimination on the proposed intersectional ground brings into play a potential violation of human dignity. This was applied in a later case, *Corbière v. Canada*,<sup>241</sup> in which the Supreme Court of Canada recognised a new analogous ground of discrimination which combined ethnicity (in this case being a member of an aboriginal or First Nation band) and residence. Aboriginal people who were members of a band but did not live on the reserve allocated to the band were not permitted to vote in band elections. The discrimination was therefore neither solely on the grounds of ethnic origin (membership of a First Nation Band) nor of residence, but on the basis of an intersection of these two grounds. The judgment of L'Heureux-Dubé J. also emphasized a third axis of intersectionality, namely the adverse effect on Aboriginal women, or descendants of Aboriginal women who lost their band status if they married a man without band status. A similar approach can be found from the South African Constitutional Court. In one case, Muslim women in polygynous marriages argued that they were being treated less favourably than non-Muslim women in polygynous marriages because whereas the latter were fully recognized, only one wife in a Muslim polygynous marriage was recognized as an heir. The Court unanimously held that they were discriminated against on the triple grounds of religion, gender, and marital status.<sup>242</sup>

239 *Law v Canada* [1999] 1 SCR 497 (Canadian Supreme Court).

240 *Law v Canada* [1999] 1 SCR 497 (Canadian Supreme Court) pp. 554-555.

241 *Corbière v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 (Supreme Court of Canada).

242 *Hassam v Jacobs NO and Others (CCT83/08)* [2009] ZACC 19; 2009 (11) BCLR 1148 (South African Constitutional Court).

This approach is valuable, but only in narrowly defined circumstances. In particular, it necessitates the creation by courts of new categories or grounds of discrimination, extrapolated from those which are already enumerated. This requires a statute or constitution which permits this. Several constitutions or human rights instruments have such non-exhaustive lists. For example, the European Convention on Human Rights states that States should ensure that Convention rights are enjoyed without discrimination on grounds *such as* race, sex, etc. It also includes the possibility of a finding of discrimination on grounds of any other status.<sup>243</sup> The European Court of Human Rights has indeed extended the list of enumerated grounds to include grounds not expressly mentioned.<sup>244</sup> It was because Section 15 of the Canadian Charter of Rights and Freedoms has an equality guarantee with a non-exhaustive list of this kind that the Canadian Court was able to extrapolate in the way it did in *Corbiere* above.<sup>245</sup> This is also a possibility in some member states. The South African Constitution has a similar non-exhaustive list.<sup>246</sup>

However, this is not possible at EU level. The Court of Justice has repeatedly emphasized that it is not within its power to extend the grounds listed exhaustively in the directives.<sup>247</sup> This means that it would not be possible to create new grounds to reflect the specific experience of discrimination experienced by groups such as black women.

Even if it were possible to extend the list of grounds, there are limits to the extent to which intersectional discrimination can be addressed by creating new grounds to cater for the specific intersectional group. How many such groups can be created? If we have a category for black women, do we also need one for black women with a disability, and then for older black women with a disability, or for older lesbian black women with a disability? Judges and law-makers have in fact been wary of opening a ‘Pandora’s box’ to claims by multiple intersecting groups. For example, in *DeGraffenreid*, the US Federal Court of Appeals categorically refused to accept that black women formed a separate category, arguing that this gave them a ‘super remedy’ or ‘greater standing’ than black men or white women.<sup>248</sup> Subsequent US cases have been more promising. In *Jefferies*, the Fifth Circuit Federal Court of Appeals recognized that discrimination against black women can exist even in the absence of discrimination against black men or white women.<sup>249</sup> It is now accepted that black women constitute a distinct subgroup.<sup>250</sup> However, later courts took fright at the possibility that this would turn ‘employment discrimination into a many-headed Hydra, impossible to contain... Following the *Jefferies* rationale to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion.’<sup>251</sup> To prevent the spectre that the benefits of the anti-discrimination legislation would be ‘splintered beyond use and recognition’,<sup>252</sup> it was held that cumulative discrimination should be restricted to a combination of only two of the grounds (the ‘sex plus’ approach).<sup>253</sup> The result is both artificial and paradoxical. The more a person differs from the norm, and the more likely she is to experience multiple discrimination, the less likely she is to gain protection.

Nevertheless, it was this approach which was chosen by **UK** legislators when attempting to introduce intersectional discrimination into UK law. Previously, only additive multiple discrimination had been

243 ECHR, Article 14. For other examples, see Canadian Charter of Rights and Freedoms, s. 15; South African Constitution, s. 9.

244 *Glor v Switzerland*, Application No. 13444/04, Merits, 30 April 2009 (disability); *Salgueiro da Silva Mouta v Portugal* (2001) 31 E.H.R.R. 47 (ECtHR) (sexual orientation).

245 Scales-Trent, J. (1993) ‘Black Women and the Constitution: Finding our Place’, in Smith, P. (ed), *Feminist Jurisprudence*, OUP, pp. 287ff; *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 (Supreme Court of Canada).

246 South African Constitution, s. 9.

247 C-13/05 *Chacón Navas v Eures Colectividades SA* [2006] 3 C.M.L.R. 40 (CJEU (Grand Chamber)) para. 56; C-303/06, *Coleman v Attridge Law* [2008] ECR I-5603, [2008] IRLR 722 (ECJ) para. 46; C 354/13 *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund*, (CJEU) para. 36.

248 *DeGraffenreid v General Motors Assembly Division*.

249 *Jefferies v Harris County Community Action Assn* 615 F.2d 1025 (5th Cir 1980) (USA Federal Court of Appeals).

250 *Ibid.* at 1034.

251 *Judge v Marsh* 649 F.Supp. 770 (1986) (United States District Court, District of Columbia).

252 *Ibid.* 779.

253 *Jefferies v Harris County Community Action Assn* at 1033–4.

recognised. In *Bahl v Law Society*,<sup>254</sup> the Court of Appeal held that a woman who complained of both race and sex discrimination was required to prove each type of discrimination separately. This was partly because each ground was protected by separate legislation. When it was decided to consolidate the separate pieces of legislation into one Equality Act 2010, this seemed the ideal possibility to institute a fully-fledged intersectional approach. The consolidated equality statute does in fact make express provision for discrimination on more than one ground.<sup>255</sup> However, the legislation chose to follow the US principle of confining the comparison to two protected characteristics. It also excluded marriage and civil partnership; and pregnancy and maternity. In fact, the section has never been brought into effect.

## 6.2 Combining Grounds within the existing list

The second possibility is to combine grounds within the existing list without regarding this as a new subgroup. Despite the obstacles identified above, there is scope for combining more than one ground in EU law. As we have seen, this is an approach taken in several Member States, such as France. The Commission takes the view that ‘the Directives already allow a combination of two or more grounds of discrimination to be tackled in the same situation,’ although it acknowledges that the differing levels of protection provided for under the different directives may cause some difficulties.<sup>256</sup> There is some support in the EU legislative framework for such an approach. The preamble to the Racial Equality Directive states that in implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should aim to eliminate inequalities between men and women ‘especially since women are often the victims of multiple discrimination.’<sup>257</sup> Article 19 of the CFEU, which gives power to take action to combat discrimination, lists sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This suggests that there is no obstacle to combining grounds. Article 21 of the EU Charter prohibits discrimination based ‘on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.’ In the *CHEZ* case, the CJEU stated that the Racial Equality Directive gives ‘specific expression’ to Article 21 and drew on both Article 19 TFEU and Article 21 of the Charter to interpret the Racial Equality Directive.<sup>258</sup> This would be equally true of the other directives.

Combining grounds clearly has a role to play. However, given the obstacles set out above, it is clear that it could only happen in limited circumstances. The most likely field is employment, since employment is covered for all the grounds (see Chart D). For example, a person claiming employment discrimination on grounds of both ethnic origin and religion may be able to bring her claim under the Racial Equality Directive and the Employment Directive. However, even within employment, a claim combining two or more grounds might run into difficulties where the exclusions or justifications differ. For example, direct discrimination on grounds of age can be justified but that on grounds of racial or ethnic origin cannot. This would be challenging in the case of a claim by an older person from an ethnic minority that she had been discriminated against on grounds of ethnic origin and age. If the employer argues that the age discrimination is justified, this would leave only the race discrimination claim intact. In addition, the combination could only draw on the six stated grounds. A domestic worker claiming employment discrimination on grounds of ethnic origin, gender and migrant status would not have a claim unless she is able to show discrimination on grounds only of the first two.

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254 *Kamlesh Bahl v. The Law Society* [2004] EWCA Civ 1070 (Court of Appeal).

255 Section 14 of the EA 2010.

256 European Commission (2014), Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘Racial Equality Directive’) and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (‘Employment Equality Directive’), Brussels 17 January, COM(2014) 2 final para. 4.4.

257 Racial Equality Directive 2000/43, preamble recital 14.

258 Case C83/14, *CHEZ Razpredelenie Bulgaria AD v Nikolova*, Grand Chamber (16 July 2015) (henceforth *CHEZ*).

If and when the draft horizontal directive is passed some of these problems should be resolved. The European Parliament went further and proposed that the draft horizontal directive be amended to include an express reference to multiple discrimination.<sup>259</sup> Pointing out that discrimination can occur on two or more of the grounds listed in what is now Article 19 of the Treaty, the Parliament proposed that the preamble of the draft directive should include a statement that effective legal procedures should be available to deal with multiple discrimination with the aim of eliminating inequalities on the listed grounds, 'whatever combination of characteristics related to the above mentioned factors a person may have.'<sup>260</sup> The Parliament also proposed a definition of multiple discrimination, which attempted to deal with any remaining differences in scope. Thus its proposed amendment states that multiple discrimination can occur on one or more of the grounds in the employment directive, or on these grounds plus sex so far as the complaint is within the material scope of both the employment directive and Directive 2004/113 EC; or on these grounds plus race provided the complaint falls both within the scope of the employment directive and that of the Racial Equality Directive 2000/43. Notably, it would also include nationality so far as the complaint is within the scope of the Treaty.

Even if all these proposed amendments were accepted, combining grounds seems better suited to sequential and additive multiple discrimination than intersectional claims. This is because the basic premise is that two or more grounds are combined, rather than that the person at the intersection of two grounds experiences disadvantage and discrimination that is qualitatively different from either of the two grounds taken alone. Yet, as we have seen, the key to an intersectional approach is that it is more than the sum of two sources of disadvantage: it creates a synergistic, or qualitatively different sort of disadvantage. It would be important for intersectional perspectives to be firmly brought before the CJEU so that the specificity of intersectional disadvantage is addressed.

### 6.3 A capacious interpretation of grounds

The third approach argues that even within a single ground, it is possible to capture the diagonal, vertical and layered structures of power which constitute discriminatory relationships. In other words, multiple intersecting relationships can be reflected within a capacious notion of each ground, making it possible to address intersectionality even in the absence of new groups or combined grounds. It will be recalled that Kimberlé Crenshaw argued that discrimination on grounds of sex was thought to refer only to white women, while discrimination on grounds of race referred only to black men. Black women, caught at the intersection, were rendered invisible. However, this is not an inevitable result. Rather than focusing only on one axis of disadvantage and assuming the remaining characteristics are privileged, a capacious view suggests that all aspects of an individual's identity should be taken into account even within one identity ground. If it is accepted that discrimination law addresses relationships of disadvantage, the aim would be to address all relationships of disadvantage experienced by that person in a synergistic manner. For example, a woman who suffers intersectional disadvantage because she is an ethnic minority woman is still subject to discrimination on the grounds that she is a woman. The category 'woman' covers all women, and the more disadvantaged, the more she should attract protection. Similarly, all members of an ethnic minority, including ethnic minority women, should be protected against discrimination on grounds of ethnic origin, and the fact that she suffers specific discrimination as an ethnic minority woman should enhance her claim rather than precluding it. This approach draws on the model of both CEDAW and the CRPD. As was seen above, these Conventions appear to be 'single axis' because of their focus on women and persons with disabilities respectively.<sup>261</sup> Nevertheless, they expressly regard 'women' and 'people with

259 European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)): see Recital 12.

260 European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)): see Recital 13.

261 See section 2.4 above.

disabilities' respectively as including intersections of disadvantage. Incorporating this approach is further supported by the flexible formulation of grounds in Article 21 of the Charter.

This approach has two helpful consequences. Firstly, it frees us from the 'Pandora's box' scenario of infinitely reconfiguring groups. Thus there is no need, as in the US and UK, to attempt to restrict the analysis to only two groups or categories.<sup>262</sup> Secondly, it makes it unnecessary to argue for an extension of the list of grounds, either by amendment or by judicial extrapolation. Although a non-exhaustive list of grounds remains desirable because it gives the right to equality a dynamism and responsiveness to changing contexts, intersectionality can still be accommodated in a fixed list, such as that currently in force in the EU.

This approach raises several practical challenges, which still need further thought. One challenge concerns whether it makes a difference which ground is the 'lead' ground. For example, does it make a difference whether the intersectional experience of Roma women is litigated as a claim in sex discrimination, on the basis that her ethnic origin is key to her experience of sex discrimination, or as a claim of ethnic origin discrimination, on the basis that her gender is key to her experience of race discrimination? If the experience of Roma women is litigated as a claim in sex discrimination, albeit bringing into account ethnic origin discrimination, does this wrongly obscure the salience of race discrimination and, particularly, the moral condemnation of race discrimination as a separate wrong from sex discrimination? This would be an incorrect application of the intersectional approach argued for here. Regarding intersectionality and discrimination law more generally in terms of structures and relationships is intended to avoid the competition between grounds which considers a focus on one as eclipsing another. Instead, the aim is to bring into focus the specific experience of discrimination when that discrimination is caused by the synthesis of more than one ground. Instead, the question of the 'lead' ground should be entirely a strategic one.

A more difficult question arises when there are different justifications and exceptions across different grounds; or the scope varies. Thus if an older Roma woman with a disability brings a complaint about discrimination in healthcare, she would advisably bring a claim for ethnic origin discrimination, which is the only way in which EU law would cover healthcare discrimination. However, at the same time, she may be claiming a reasonable accommodation or adjustment, which is not available under the Racial Equality Directive. One way to resolve this might be at the remedial stage. Thus if her claim is upheld under a capacious interpretation of discrimination on grounds of racial or ethnic origins, interpreted to include her particular social location as a disabled ethnic minority woman, a remedy which is effective in such circumstances should require an accommodation of her needs, such as adequate facilities for translation or sign language. A further problem concerns the fact that many NGOs and civil society organizations are themselves ground-specific and therefore might either compete over issues or ignore them. Part of the awareness-raising function would therefore be to encourage co-operation over such issues, as has been seen in some member states. Indeed, this was the recommendation of the Commission's report on Multiple Discrimination in 2007.<sup>263</sup>

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262 See section 6.1 above.

263 See section 10 below.

## 7 Intersectionality in the jurisprudence of the Court of Justice

To what extent, then, does existing jurisprudence from the Court of Justice reflect an intersectional approach as understood in this report? The first approach, creating new groups, has been eschewed, as we have seen, and there is little evidence at present of the second. However, there is some evidence of a capacious approach to interpreting some of the existing grounds when cases have been brought by claimants who experience specific disadvantage because of the confluence of different identities.

In particular, where several aspects of a woman's identity coincide to produce a unique form of discrimination, the Court has still characterised it as discrimination on grounds of sex. This can be seen by its approach to age, as well as to pregnancy and parenthood, all characteristics which intersect with gender. The Court has also been willing to see 'sex discrimination' as including transgender and gender identity. The few cases before the Court on racial or ethnic origin discrimination have also required the Court to incorporate the social location of the claimant. There has also been contestation on the boundaries of disability as to whether the Court will accept illness or obesity as a disability. Indirect discrimination also has potential in incorporating an intersectional approach.

However, there are also important ways in which the Court's jurisprudence continues to render invisible the specific nature of intersectional disadvantage in its understanding of existing grounds. In particular, the proliferation of recent cases on age discrimination tend to focus on older men of the dominant ethnic community. Intersectional issues in relation to age have instead been largely brought as gender discrimination cases. This may also reflect the kind of cases which eventually come before the court. There is very little in the case law which addresses the great bulk of intersectional experience chronicled in Chapter 3 above. This may in part be because of the way in which a single axis approach propels claimants to focus only on one aspect of their identities. For a genuine intersectional approach, litigants need to illuminate the ways in which relationships of power interact in vertical, diagonal and layered ways so that the most disadvantaged are the most protected, rather than the converse. But it might also be because the expense and time-consuming nature of a litigation process puts it out of reach for the most disadvantaged. For this reason, litigation is likely to be a less effective way of addressing intersectionality than proactive measures.

### 7.1 Age as an intersectional issue

Perhaps the main instance of a capacious approach is the set of cases in which the experience of older women or older same-sex couples have been litigated as sex discrimination claims or sexual orientation claims. The pattern was set in a series of cases focussing on the specific disadvantage of older women. Thus in *Marshall*, the Court upheld a challenge to unequal retirement ages for men and women.<sup>264</sup> This can be seen as an intersectional issue because older women were treated less favourably than men but also less favourably than younger women. The Court has similarly been prepared to regard discrimination against older women as sex discrimination in a range of cases concerning occupational pensions, addressing the specific disadvantage faced by women in old age because of their intermittent labour market engagement.<sup>265</sup> Particularly significant was its decision to strike down the derogation in Article 5(2) of the 2004 Directive for proportionate differences in insurance premiums and benefits based on gender.<sup>266</sup> For many years, the exception for actuarial factors in relation to occupational pensions permitted ongoing generalisations along gender lines, to the detriment of older women, who, as we have seen, remain the most disadvantaged group in most European societies.<sup>267</sup> In the 2011 *Test-Achats* case,<sup>268</sup> the Grand Chamber of the Court held that the exception breached the fundamental right to gender

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<sup>264</sup> C-152/84 *Marshall v Southampton Area Health Authority* [1986] ECR 723 (ECJ).

<sup>265</sup> C-408/92 *Smith v Avdel Systems Ltd* [1995] I.C.R.596 (ECJ).

<sup>266</sup> Directive 2004/113, Article 5(2).

<sup>267</sup> See section 3.3.

<sup>268</sup> C-236/09 *Association belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres* (2011) 2 CMLR 238 (CJEU).

equality articulated in the Charter of Fundamental Rights.<sup>269</sup> Although the Charter was not incompatible with a gradual phasing out of the widespread use of sex-based actuarial factors, the absence of a temporal limitation in Article 5(2) put it in breach of the principle of equality.<sup>270</sup>

The intersection of age and gender has also been addressed through indirect discrimination claims, particularly in relation to pension cases, where a practice or criterion has a disproportionate impact on older women. For example, the 2010 case of *Brachner*<sup>271</sup> concerned an **Austrian** statutory provision which reserved the exceptional increase in pensions for the year in question exclusively to pensions which were in excess of EUR 746.99 per month. It was demonstrated that 57 % of female pensioners were in receipt of a pension lower than this figure, as against 25 % of male pensioners. In other words 75 % of male pensioners were liable to benefit from the exceptional increase in pensions, as against only 43 % of female pensioners. This was aggravated by an increase in a compensatory supplement, which only assisted about 18 % of women on minimum pensions as against 42 % of men in this position. The Court concluded that this provision was prima facie in breach of the prohibition on indirect discrimination in Article 4(1) of Directive 79/7 on equal treatment between men and women in social security. What is important for our purposes in this conclusion is that the Court focussed on the disparate impact on women pensioners as against male pensioners. In order to answer the question of whether the disadvantage affected a greater number of women than men, it examined whether ‘the category of retired persons suffering from that disadvantage consists of a significantly greater number of women than men.’<sup>272</sup> In other words, it took an intersectional group, older women, and had no difficulty in concluding that the disparity between older women and older men amounted to a breach of the principle of equal treatment as between men and women in Directive 79/7.

This capacious view has had some echoes in the recent jurisprudence on sexual orientation discrimination, which has likewise focussed on the provision of pensions and other age-related benefits to same-sex partners. Thus in *Maruko*,<sup>273</sup> the Court held that the denial of a survivors’ pension provided for under an occupational pension scheme established by collective agreement to same-sex partners could be challenged. Similarly, it upheld a challenge in *Römer*,<sup>274</sup> to the denial to same-sex partners of a supplementary retirement pension paid by a public scheme. Both these cases concerned the intersection of sexual orientation and age.

However, the case law on age as a ground of discrimination has not shown a similar appreciation of intersectionality. There are many complex intersectional issues in relation to age, especially concerning the extent to which a mandatory retirement age is permitted by way of an exception to the prohibition on age discrimination. Mandatory retirement ages might detrimentally affect women or minorities who have not amassed a sufficient pension. Alternatively, in some contexts, the retirement of older, white, male workers might make space for previously disadvantaged women, and other minorities. Some of the recent age discrimination cases have accepted that a mandatory retirement age might be necessary to refresh the workforce.<sup>275</sup> Nevertheless, the preponderance of cases at EU level on this issue, and the need for the Court to tread a carefully balanced line between competing interests, fails to represent the deeper disadvantage and stigma of age discrimination. None of the age discrimination cases reflect the specific disadvantage of older or younger members of ethnic minorities, nor of older LGBT people or older

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269 Articles 21 and 23.

270 Although *Test-Achats* concerned Directive 2004/113/EC on the equal treatment of men and women in the field of insurance, it presumably also means that Article 9(1)(h) and (j) of the Recast Directive 2006/54/EC, which includes an exception for actuarial factors, violates the fundamental principle of gender equality: see Jacquain, J., Wuïame, N. (2015) ‘Gender based actuarial factors and EU gender equality law,’ *European Equality Law Review*, p. 14.

271 Case C123/10 *Brachner* [2011] ECR I10003.

272 Case C123/10 *Brachner* [2011] ECR I10003 para. 59.

273 *Maruko v Versorgungsanstalt der Deutschen Bühnen* (Case C-267/06) [2008] 2 C.M.L.R. 32 (CJEU).

274 Case C-147/08 *Römer v Freie und Hansestadt Hamburg* [2013] 2 C.M.L.R. 11 (CJEU).

275 C341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* ([2010] 2 CMLR 830 para. 70; Joined Cases C-250/09 and C-268/09) *Georgiev v Tehnicheski Universitet So“a “Iial Plovdiv* [2011] 2 CMLR 179 (ECJ); C-159/10 *Fuchs v Land Hessen* (2102) ICR 93 (CJEU).

people with disabilities as briefly chronicled above. The poorest old and young people, primarily women, ethnic minorities and people with disabilities, are clearly not using this avenue of redress. This might be because of the focus on employment, whereas much of the intersectional experience chronicled above concerned healthcare and other services. Thus there is an inbuilt bias towards those who have remained in the workforce until close to the end of their working lives and are in a position to protect their positions. Many of the incidents of age discrimination occur because of the interaction between these issues and the labour market, and measures addressing labour market discrimination on their own will inevitably fail to provide remedies for those whose labour market participation is prejudiced or who never reach the labour market in the first place due to discrimination.

## 7.2 Pregnancy

A second area in which intersectional issues in relation to gender discrimination have been highlighted concerns pregnancy. This issue is somewhat different to age in that the gender and sexual orientation discrimination cases in the previous section could be thought of as straddling two different grounds, age and gender, or age and sexual orientation. Pregnancy might seem to be a subset of gender, rather than bringing together two different grounds. However, on closer inspection, this is a misconception. Not all women are pregnant, and some women might never have been or become pregnant. Thus it might be argued that pregnant women are arguably not discriminated against on grounds of sex because non-pregnant women are not subject to detrimental treatment. It was only with a capacious understanding of 'sex' that pregnancy can be seen to be discrimination on grounds of sex.<sup>276</sup> This can be seen in the Canadian case of *Brookes*, where it was argued that detrimental treatment on grounds of pregnancy could not be discrimination on grounds of sex because not all women are pregnant.<sup>277</sup> Taking a capacious view, the Supreme Court of Canada rejected this argument in favour of the view that, even though pregnant women were treated less favourably than non-pregnant women and non-pregnant men, this was still sex discrimination.<sup>278</sup> Similarly, in the watershed case of *Dekker*, the Court made it clear that discrimination on grounds of pregnancy was sex discrimination.<sup>279</sup> There was no need to find a comparator, thus eschewing the futile quest for a suitable male comparator. Instead, the Court was prepared to hone in on the specific intersecting axes of power that made a pregnant woman particularly disadvantaged in the paid workforce. Notably, Article 2 of the Recast Directive now makes this explicit, stating that for the purpose of the directive, discrimination on grounds of sex includes less favourable treatment of a woman related to pregnancy or maternity leave.<sup>280</sup> In some jurisdictions, such as the UK, pregnancy is now included as a separate ground of discrimination.<sup>281</sup> However, the fact that pregnancy can be included as a separate ground or incorporated into sex discrimination reinforces the insight that grounds are fluid and inter-related, regardless of whether there is formal provision for 'combining' two grounds. The intersectionality of pregnancy is even more visible when recognised in relation to transgenders.

## 7.3 Parenting

A similar approach can be discerned in the context of parenting. Again, not all women nor all men are parents, but it has nevertheless been held in recent cases that a refusal to afford parental rights to men can constitute 'sex' discrimination. This can clearly be seen in *Roca Alvarez*,<sup>282</sup> where an employed father was not eligible for the same rights to time off in relation to parenting that were available to employed mothers. The Court upheld his claim for gender discrimination. Here, too, the question of the comparator did not function to obstruct the inclusion of parenting as an additional identity to gender. The Court had no hesitation in declaring that 'the positions of a male and a female worker, father and mother of

276 The word 'sex' rather than 'gender' is used here because this is the term used in both Canadian law and the EU.

277 *Brookes v Canada Safeway Ltd* (1989) 1 SCR 1219. (Supreme Court of Canada).

278 *Brookes v Canada Safeway Ltd* (1989) 1 SCR 1219. (Supreme Court of Canada).

279 Case C177/88 *Dekker* [1991] IRLR 27 (ECJ).

280 Recast Directive Article 2(2)(c).

281 Equality Act 2010 (UK), s. 4, which includes 'pregnancy and maternity' as a protected ground.

282 C-104/09 *Roca Alvarez v Sesa Start España ETT SA* [2011]1 C.M.L.R. 28

a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child.<sup>283</sup> However, the Court has not been wholly consistent in this respect. In the *Betriu Montull* case, which also concerned **Spanish** law, the employee scheme provided for paid maternity leave of up to 16 weeks, of which 10 weeks could be transferred to the father, if he was also an employee.<sup>284</sup> The mother of the child was self-employed. The father of the child, who was an employee covered by the general scheme, applied for the maternity benefit for the 10 weeks which, had his partner been an employee, she would have been entitled to transfer to him. His claim was rejected by the Spanish tribunal. Surprisingly, in the light of the *Roca Alvarez* case, the CJEU held that this was not in breach of the equal treatment principle in what was still Article 76/207. The Court recognised that the Spanish measure established a difference on grounds of sex between employed mothers and employed fathers. However, it held that the difference was justified because it fell into the exception for provisions concerning the protection of women with regard to pregnancy and maternity in Article 2(3) of Directive 76/207. Particularly worrying, the Court construed the measure as protecting both the woman's biological condition during and after pregnancy and 'the special relationship between a woman and her child over the period which follows childbirth',<sup>285</sup> thus resurrecting its earlier approach in *Hoffman*,<sup>286</sup> which had been rejected by the Advocate General in *Roca Alvarez*. Instead of taking a relational view, which recognised that the father's involvement in childcare was crucial to the ability of the mother to participate equally in the paid workforce, the Court in *Betriu* saw only the woman and not the relationship between men and women as central to patterning gendered disadvantage.<sup>287</sup>

On the other hand, in the more recent *Konstantinos Maïstrellis* case, the court resurrected the *Roca Alvarez* approach, comparing the treatment of fathers with young children with that of mothers of young children.<sup>288</sup> In this case, the applicant, a **Greek** Judge, applied for leave to look after his new baby. His application was rejected on the grounds that his wife was not involved in paid employment. According to the relevant regulations, a civil servant was not entitled to parental leave if his wife did not work or exercise a profession, unless she was seriously ill or injured and unable to look after the child. The court held that the measure breached the equal treatment principle in the Recast Directive 2006/54. As in *Roca Alvarez*, it reiterated that 'the situation of a male employee parent and that of a female employee parent are comparable as regards the bringing-up of children.'<sup>289</sup> Particularly importantly, it did not accept any potential justification to the effect that such provisions were required for the protection of women in regard to pregnancy and maternity. Indeed, the Court did not even refer to Article 28(1) of Recast Directive 2006/54, which permits measures for the protection of women, particularly in relation to pregnancy and maternity. Nor did it accept that the measure had been adopted or maintained 'with a view to ensuring full equality in practice between men and women in working life,' which is permitted by Article 3 of Directive 2006/54. Rather, it reiterated its view in *Roca Alvarez* that such a provision, 'far from ensuring full equality in practice between men and women in working life, is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.'<sup>290</sup> Similarly, it could not be protected by the Pregnant Workers Directive 92/85 in that depriving a father of the right to parental leave because of his wife's employment situation could not be regarded as encouraging improvements in the health and safety at work of pregnant or breastfeeding workers.<sup>291</sup> Notably for our purposes, the Court held that there had been sex discrimination by comparing male employee parents to female employee parents rather than by comparing the former to either all women or all men.

283 Ibid.

284 Case C-5/12, *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, of 19 September 2013.

285 *Betriu Montull* para. 62 citing *Hofmann*, paragraph 2, and *Roca Álvarez*, paragraph 27.

286 Case C184/83 *Hoffman* [1984] ECR 3047 (ECJ).

287 Case 5/12 *Betriu Montull*.

288 Case 22/14 *Konstantinos Maïstrellis* 15 July 2015.

289 Case 22/14 *Konstantinos Maïstrellis* para. 47.

290 Case 22/14 *Konstantinos Maïstrellis* para. 50.

291 Case 22/14 *Konstantinos Maïstrellis* para. 51.

## 7.4 Gender reassignment

The recognition of gender reassignment as a species of sex discrimination can also be seen as an instance of a fluid approach to the understanding of sex discrimination which includes multiple overlapping identities.<sup>292</sup> In *P v S* the Court emphasized that the principle of equal treatment ‘for men and women’ contained in the Equal Treatment Directive was simply the expression of the fundamental principle of equality in Community law. Therefore it could not be confined simply to discrimination based on the fact that a person is of one or other sex. Crucially, discrimination on the grounds of gender reassignment ‘is based essentially if not exclusively, on the sex of the person concerned.’<sup>293</sup> Here, too, the Court was prepared to develop the comparator principle to match the context, rather than as an obstruction to recognising the discrimination which might otherwise have remained invisible. For the Court, the person who has undergone gender reassignment is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.<sup>294</sup> This is now reinforced in the preamble to the Recast Directive.<sup>295</sup>

Here, too, however, the record of the Court has not been consistent. In *Grant*, it was argued that the provision of an employment-related benefit to opposite-sex partners but not to same-sex partners was discriminatory on grounds of sex. The Court rejected this claim.<sup>296</sup> This can be compared to the European Court of Human Rights, which has been prepared to take a much more capacious approach to ‘sex’ as a ground of discrimination, which includes sexual orientation discrimination.<sup>297</sup> This case has now been superseded by the express inclusion of sexual orientation as a ground of discrimination under the Employment Directive.<sup>298</sup>

## 7.5 Racial or ethnic origin

There is some potential for a capacious approach to race or ethnic origin in EU jurisprudence. There is no express definition of racial or ethnic origin. The preamble to the Racial Equality Directive merely states that the use of the term ‘racial origin’ does not imply an acceptance of theories which attempt to determine the existence of separate human races.<sup>299</sup> Similarly, there is no definition of ethnic origin in the Directive or elsewhere in EU law.<sup>300</sup> This suggests not just that the term should be interpreted broadly, but also that it only gains meaning in an anti-discrimination law context in the light of relationships of power. As the EGGSI report for the European Commission points out, not all ethnic minorities in Europe are disadvantaged. Those groups that are formally recognised as minority groups are often given special protection by the State to preserve their cultural identity, for example, by making special provision for education, political representation and other key conditions.<sup>301</sup> The report also points out that the disadvantaged groups are not homogenous, and there are important differences in the nature of the disadvantage related to the culture and religion, settlement model, and legal status. This requires an interpretation of the grounds of racial or ethnic origin which is sensitive to the many different interacting relationships of power that function to constitute discrimination on these grounds. In principle, this should open the way to a capacious interpretation which includes intersectional experience.

292 *C-13/94 P v S and Cornwall County Council* [1996] ECR I - 2143 (ECJ).

293 *C-13/94 P v S and Cornwall County Council* [1996] ECR I - 2143 para. 21.

294 *C-13/94 P v S and Cornwall County Council* [1996] ECR I - 2143 (ECJ).

295 Directive 2006/54 preamble para. (3).

296 *C-249/96 Grant v South-West Trains Ltd* [1998] IRLR 206 (ECJ).

297 *Salgueira da Silva Mouta v Portugal* [2001] 31 EHRR 1055 (ECHR).

298 Directive 2000/78.

299 Racial Equality Directive 2000/43 Preamble para. 6.

300 Member States are free to decide whether they define these concepts in their national law. The Commission notes that Member States only refer to ‘ethnic origin’ or ‘ethnicity’ and do not use the concept of ‘race’ or ‘racial origin’ at all in their national legislation. This is acceptable to the Commission provided it does not limit the scope of the directive in any way: Joint Report, 2014.

301 EGGSI (2008), Ethnic minority and Roma women in Europe: A case for gender equality, p. 5.

There have only been a handful of cases under the Racial Equality Directive, and here too the many intersectional issues which we saw in section III above have not been surfacing before the Court. However, in the recent case of *Nikolova v CHEZ* (henceforth CHEZ), an intersectional approach can be detected.<sup>302</sup> In this case, all the electricity meters in an urban district predominantly populated by Bulgarian citizens of Roma origin were placed in large silver locked boxes on pylons at a height of between six and seven metres. In other districts, the meters were placed in small boxes on the outer walls of houses. CHEZ, the utility company responsible for the policy, claimed that the regime was to prevent electricity theft, since the meters could not be tampered with. The result was visibly stigmatic. A study by the Open Society Institute described two affected neighbourhoods as looking like ‘surrealist anti-robbery experiments. With the huge shining silver boxes in front of the houses and dozens of cables hanging down, the appearance of these Roma streets is dramatically different from the look of a non-Roma neighbourhood. The inhabitants say that they feel as if the companies are treating them like criminals.’<sup>303</sup> In addition, they were disadvantaged in that they were unable to access their metres to check and monitor their electricity consumption effectively and regularly.

The case raises intersectional issues because the policy applied to all inhabitants of the district, regardless of whether they were themselves of Roma origin. Indeed, the claimant herself did not identify as a Roma. Conversely, it did not apply to Roma living in other districts which were not predominantly Roma. Did this mean that the policy was not ‘discrimination on the grounds of ethnic origin’? The Court held that it was not necessary to show that the claimant was discriminated against on grounds of *her* ethnic origin to establish discrimination contrary to the Directive. Given the aims of the Directive and the rights it aims to safeguard, it stated, a restrictive interpretation should be avoided. This was supported by the fact that both the preamble to and Article 3(1) of the Directive state that the directive is designed to benefit ‘all’ persons. Moreover, the Court pointed out, Article 19 TFEU, the legal basis of the Directive, gives the EU competence to combat discrimination on grounds of racial and ethnic origin rather than giving protection only to those who suffer less favourable treatment on grounds of ‘his or her’ racial or ethnic origin. Similarly, the Court reiterated, the right to equality in Article 21 of the EU Charter, to which the directive gives specific expression, refers simply to the principle of non-discrimination on grounds of race and ethnic origin. Drawing all these sources together, the Court held that the Directive applies to a collective measure irrespective of whether it only affects persons of a certain ethnic origin or also subjects others not of that ethnic origin to the less favourable treatment or particular disadvantage resulting from that measure.<sup>304</sup>

This decision could be read as a capacious definition of the individual ground of racial or ethnic origin which can address intersecting power relations. The reality was that there was intersectional discrimination on the basis of ethnic origin, socio-economic disadvantage, and location. Not all Roma were affected, and not all those affected were Roma. However, there was a serious imbalance in the power relationship between everyone in the community and the electricity company, based on socio-economic disadvantage, stigma, social exclusion and a failure to accommodate particular differences. Although not all of these fall directly within a conception of ethnic origin, the Court was nevertheless able to hold that there was discrimination on this ground.

The Court in *CHEZ* found both direct and indirect discrimination. Both reveal the potential of an intersectional approach. The direct discrimination case potentially raised difficult questions as to who the appropriate comparator should be. There were some persons not of Roma origin in the region affected, and in districts not affected, there were a minority of Roma who were similarly unaffected. The definition of direct discrimination in the Racial Equality Directive requires proof that a person has been treated ‘less

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302 Case 83/14 *CHEZ v Nikolova*.

303 Zoon, I. (2001), *On the Margins: Roma and Public Services in Romania, Bulgaria, and Macedonia* Open Society Institute, pp. 138-9. <https://www.opensocietyfoundations.org/reports/margins-roma-and-public-services-romania-bulgaria-and-macedonia>.

304 Para. 60.

favourably' than another in a 'comparable situation' on grounds of racial or ethnic origin.<sup>305</sup> The Court saw no difficulty with this. All final consumers of electricity who are supplied by the same distributor within an urban area must be regarded as being in a comparable situation in so far as their ability to access a meter is concerned. Thus the Court held that a measure such as that at issue in this case would constitute direct discrimination if it proves to have been introduced and/or maintained 'for reasons relating to the ethnic origin common to most inhabitants of the district concerned.'<sup>306</sup>

Although the Court was prepared to regard the policy as direct discrimination on grounds of ethnic origin, it went on to consider the case from an indirect discrimination perspective. The Racial Equality Directive states that indirect discrimination occurs when 'an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'<sup>307</sup> The Court reiterated that the concept of an 'apparently neutral' provision, criterion or practice means a provision, criterion or practice which 'is worded or applied, ostensibly, in a neutral manner, that is to say, having regard to factors different from and not equivalent to the protected characteristic.' This opens up the possibility of using a different protected characteristic, or even a characteristic that is not protected, to define the provision, criterion, or practice. In this case, it was the geographical location, namely the districts chosen for detrimental treatment, which defined the provision, criterion or practice. In practice, then, the basis of the claim was the intersection of geographical location (which here was also a proxy for social location) and ethnic origin. The result was that the intersection of geographical location and ethnic origin could be dealt with in an intersectional way through the indirect discrimination claim. There have been too few cases under the Racial Equality Directive to establish whether the sensitivity to intersectionality exhibited in *CHEZ* will be maintained.

## 7.6 Disability

Schiek has argued that the definition of disability as developed by the CJEU in its six disability discrimination cases tends to 'move impairments suffered disproportionately by women beyond the reach of disability discrimination law.'<sup>308</sup> Certainly, the early case law on disability was not conducive to an intersectional analysis. Nevertheless, more recent cases could be understood as leaving open the opportunity for more visibility of intersectional issues, if they are properly framed.

Perhaps the clearest case with the potential for a capacious interpretation of grounds is *Coleman*, in which the complainant claimed that she had been subject to discrimination on grounds of disability because she was the primary carer of her disabled child.<sup>309</sup> She argued that she had been treated less favourably than parents of non-disabled children. The Court held that the principle of equal treatment in Directive 2000/78 was not limited to people who themselves have a disability, but to combat all discrimination on grounds of disability. This made it possible to address discrimination which occurred as a result of relationships of power in society. The complainant was subjected to a detriment because of her need to care for her child, thus highlighting the vertical, diagonal and layered relationships of power which intersect to compound disadvantage. Crucially, for our purposes, it stated: 'The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1.'<sup>310</sup> This was supported by the wording of the Treaty basis for the directive, which confers competence to combat discrimination 'based, inter alia, on disability.'<sup>311</sup> Equally importantly, it held that although there was no scope for extending the listed grounds, this did

305 Racial Equality Directive Article 2(2).

306 *CHEZ* para. 91.

307 Racial Equality Directive 2000/43/EC Article 2(2)(b).

308 Schiek, D. (2015), 'Intersectionality and the Notion of Disability in EU Discrimination Law,' *European (Legal) Studies on-line papers*, Volume 4, Issue 4, at p. 11.

309 Case C-303/06 *Coleman v Attridge* [2008] 3 C.M.L.R. 27 (CJEU).

310 *Coleman v Attridge Law* para. 38.

311 *Ibid.* para. 38.

not mean that each of the grounds themselves should be interpreted narrowly.<sup>312</sup> Again, the Court did not regard it as difficult to frame a suitable comparator. The question was not so much who the comparator was, but what was the reason for the treatment that was at issue. Thus if an employee who was not herself disabled was treated less favourably than an employee in a comparable situation, and it was established that the less favourable treatment was 'based on' the disability of the complainant's child, then it would constitute direct discrimination.<sup>313</sup> This makes it possible to bring intersectional issues into a disability discrimination case, particularly since, as the evidence in section 2.3 above shows, due to continuing gendered stereotypes, a disproportionate share of unpaid work, including child-care, is performed by women.

The Court's other case law on disability is more mixed. The first case on disability, *Chacon Navas*,<sup>314</sup> drew a rigid distinction between long-term illness and disability. This meant that the applicant in the case could not claim reinstatement and accommodation under the disability discrimination legislation, but instead was eligible only for compensation.<sup>315</sup> The Court defined disability as 'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.'<sup>316</sup> In subsequent cases, however, the Court was prepared to adjust the definition of disability to account for that in the Convention on the Rights of People with Disabilities (CRPD), which the EU had in the meanwhile ratified. Importing aspects of a social model of disability, it held that disability referred a long-term 'limitation which results from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.'<sup>317</sup> In the *HK Danmark*<sup>318</sup> case in 2013, the Court reiterated the declaration in *Chacón Navas* that new grounds, such as illness, could not be added to Directive 2000/78. Nevertheless, it was able to incorporate illness into the existing ground of disability if the illness entailed a limitation which in interaction with social and other barriers hindered full and effective participation in professional life on a long-term basis.<sup>319</sup> Equally importantly, it held that the concept of reasonable accommodation in Directive 2000/78 was not limited to the list of measures exemplified in recital 20 to the Directive, but instead included the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life.<sup>320</sup> This suggests a broad and inclusive interpretation of reasonable accommodation: indeed in this case, it was held to include a reduction in working hours, provided the latter did not constitute a disproportionate burden on the employer.

Schiek is critical of the *Danmark* case as reflecting the Court's reluctance to extend the definition of disability to include long-term conditions, so that conditions occurring more frequently in women are more likely to be excluded.<sup>321</sup> She points out that the impairments at issue in the *Danmark* case, namely chronic back pain on the part of secretarial staff, is disproportionately suffered by women because of the sedentary nature of secretarial work, in which women predominate. Empirical evidence also shows that chronic pain and associated reduced ability to perform are typical impairments disabling women.<sup>322</sup> However, it is argued here that if a claim were more clearly framed as bringing in the gender dimension of disability, the Court's approach leaves open the possibility of responding accordingly.

312 Ibid. Para. 46.

313 Ibid. Para. 56.

314 *Chacón Navas v Eures Colectividades SA*.

315 No information was given about the nature of her illness.

316 *Chacón Navas v Eures Colectividades SA* para 43.

317 *HK Danmark v Dansk Arbejdsgiverforening (Joined Cases C-335/11 & C-337/11)* [2013] 3 C.M.L.R. 21 (CJEU) para 38.

318 *HK Danmark v Dansk Arbejdsgiverforening (Joined Cases C-335/11 & C-337/11)* [2013] 3 CMLR 21 (CJEU).

319 Ibid. Para. 41.

320 Directive 2000/78 Recital 20.

321 Schiek, D. (2015), 'Intersectionality and the Notion of Disability in EU Discrimination Law,' *European (Legal) Studies on-line papers*, Volume 4, Issue 3, p. 19.

322 Schiek, D. (2015), 'Intersectionality and the Notion of Disability in EU Discrimination Law,' *European (Legal) Studies on-line papers*, Volume 4, Issue 3, p. 19.

Particularly illuminating in this context is the case of *Kaltoft*,<sup>323</sup> which concerned a childminder who complained that he had been discriminated against on grounds of obesity when he was dismissed from his job. Obesity is not expressly mentioned as a ground of discrimination, and the Court made it clear that such a ground could not be derived from a general principle of non-discrimination. Nor could the list in Directive 2000/78 be extended to include obesity: the Court reiterated that ‘the scope of Directive 2000/78 should not be extended by analogy beyond the discrimination based on the grounds listed exhaustively thereof.’<sup>324</sup> The Charter was similarly inapplicable. However, the ground of disability was sufficiently capacious to include obesity when in practice ‘the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one.’<sup>325</sup> *Kaltoft*, too, therefore has potential for including intersectional insights, if these are fully brought into the frame. Childminding is predominantly a female profession, and obesity has been found to have more negative effects on women in the workplace than on men.<sup>326</sup>

Incorporating compounded relationships of disadvantage, such as those experienced by women, in a disability claim has the advantage of permitting a claim for reasonable accommodation, which is currently not available for other grounds. Particularly importantly, the *Danmark* case suggests that the duty itself can be shaped to address such compound manifestations of disability, such as gendered disability, for example by requiring reduced or flexible hours.

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323 Case 354/13 *Fag og Arbejde* (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund (henceforth *Kaltoft*) (18 December 2014) CJEU.

324 *Kaltoft*, para. 36.

325 *Ibid.* para. 59.

326 Shinall, J.B. (2014), ‘Why Obese Workers Earn Less: Occupational Sorting and Its Implications for the Legal System,’ (January 15). Available at SSRN: <http://ssrn.com/abstract=2379575> or <http://dx.doi.org/10.2139/ssrn.2379575>.

## 8 Proactive measures and mainstreaming

### 8.1 Why proactive measures?

Intersectionality becomes more visible through proactive measures and duties to promote equality than under a complaints-led approach, since those responsible for instituting change are required to identify group inequalities and to craft solutions, rather than reacting to self-identified complainants. Proactive measures are distinctive in four main ways.<sup>327</sup> Firstly, instead of consisting in reactions to ad hoc claims brought by individuals, the initiative lies with policy makers and implementers, service providers or employers. This relieves individual victims of the burden and expense of litigation, achieving results within an acceptable time-frame. Secondly, change is systematic rather than random or ad hoc, ensuring that all those with a right to equality are covered. The institutional and structural causes of inequality can be diagnosed and addressed collectively and institutionally. Thirdly, in recognition of the institutional basis of discrimination, there is no need to prove fault or find a named perpetrator. Instead, the duty to bring about change lies with those with the power and capacity to do so. Instead of determining fault and punishing conduct, the focus is on systemic discrimination and the creation of institutional mechanisms for its elimination.<sup>328</sup> This means that the right to equality is available to all, not just to those who complain. Fourthly, proactive measures are prospective as well as retrospective. This means that remedies are not simply retrospective, compensatory and individualised. Instead, they require steps to be taken which are also forward-looking, structural and group-based. They can be used to assess new policies and practices for their impact on affected groups. They can go further still, and require the creation and implementation of new policies to promote equality.

Proactive measures open up many more possibilities to deal with intersectionality than a complaints-led model. Rather than relying on a self-identified complainant to show that she has been treated less favourably on a particular ground than a comparator, proactive measures require public or private bodies to identify sources of inequality and take action to bring about change. There is no need to prove specifically that a person was treated less favourably than a comparator is or would be, and therefore many problems in finding an appropriate comparator are avoided. But by making it possible to address intersectionality, a proactive approach also exposes the limits of our current understanding of how and why we identify groups in the context of equality law. As was argued above, it is not just the gender, race or other status of a group which is at issue, but the ways in which these status markers create or perpetuate disadvantage or power imbalances, obstruct participation, and undermine dignity and mutual respect. This suggests that in designing proactive measures, groups should be defined not merely in terms of their status markers, but with reference to the particular aims of equality. Paying closer attention to the aims of equality and structural relationships makes it possible to identify who should be the focus of attention and how their claims should rank in the order of priorities. In this way, relationships of disadvantage previously rendered invisible come into focus and a start can be made on addressing intersectionality.

As argued above, a multi-dimensional approach to equality facilitates the identification of intersectional harms. The four goals of equality identified entail: redressing distributive disadvantage; harassment, prejudice, stigma and violence; enhancing participation; and affirming and accommodating identity, including bringing about structural change or transformation. Each of these can be mapped on to a way of identifying the targets of action. This is particularly sensitive to intersectionality, since it highlights not so much the additive nature of the two sources of discrimination, but the qualitative or synergistic quality of intersectional discrimination. It also counters the fear by judges and law-makers that addressing multiple

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327 This section draws heavily on. Fredman, S. (2008), 'Positive Rights and Duties: Addressing Intersectionality', in Schiek, D., Chege, V. (2008), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge Cavendish.

328 PE Taskforce (2004), 'Pay Equity: A New Approach to a Fundamental Right', Pay Equity Taskforce and Departments of Justice and Human Resources Development Canada, Ottawa 2004, p. 147.

discrimination would open a 'Pandora's box' to claims by multiple sub-groups. A closer relationship between aims and group demarcation makes it possible to identify those groups who should be the focus of attention in proactive measures and how their claims should rank in the order of priorities. Only those groups or sub-groups which experience one or all of the detriments set out above, namely, stigma and prejudice, negation of identity, distributive disadvantage or marginalisation should be a target for positive action. For example, migrant women experience detriment under all four heads, whereas migrant men may do so only under some, and the same is true for non-migrant women; and in both cases, the intensity of detriment is of a different order. The result is to require proactive measures specifically aimed at migrant women. Language teaching is a good example. Migrant women with childcare obligations have particular difficulty in accessing ways of learning the dominant language, compared to migrant men, and non-migrant women. Therefore positive action should include providing language teaching which facilitates participation by women with childcare obligations. Other key examples concern disabled black or ethnic minority people and Roma women.

Using positive action to address intersectionality also assists in three further arenas. The first is concerned with monitoring. Many national statistics do not include data disaggregated to reflect intersectionality. This means that policy is often directed at only one aspect of an individual's identity. However, in order to reflect intersectionality in statistics, it is necessary to have a clear understanding of which groups and sub-groups should be monitored. Otherwise the statistics themselves will continue to render intersectional groups invisible. The diversity of EU Member States means that there cannot be a uniform set of groups across different states: a minority could suffer discrimination in one state and not in another. Using the above criteria, however, it would be possible to produce guidance based on national statistics as to which intersectional groups should be the appropriate target for positive action. Such guidance would permit employers to identify and monitor the appropriate sub-groups. It should also be stressed that statistics and their availability should not be the only driving force behind such measures. Qualitative surveys, interviews with individuals, and common sense should all be used to supply the initial impression or suggestion that such discrimination might be occurring.

A second advantage of this understanding of intersectionality and positive action relates to the so-called 'creamy layer' problem. It is well known that the most advantaged of a disadvantaged group may make best use or even capture the benefits of proactive measures. This problem could be mitigated by targeting positive action on groups defined on the basis of multiple discrimination, which by definition comprise the least advantaged in each of the relevant groups. In the example given above, in the provision of language teaching for migrants, it should be possible to make sure that it was not only men who could make use thereof. In situations of actual reservation or quotas, proper attention would need to be paid to the group for whom the reservation was intended. Unless an intersectionality approach is used, as outlined here, the more advantaged of the group might fill the quotas. For example, a quota for women might be filled by white women. Thus special attention would be needed to ensure that intersectional groups were able to benefit.

A third advantage relates to remedies. As was seen above, courts, tribunals and equality bodies in the States surveyed have struggled to find compensatory remedies which reflect intersectional discrimination. In addition, structural remedies such as reasonable accommodation are strictly only available under disability discrimination law. Positive approaches can craft structural approaches through policy and impact assessment which better address the particular needs and problems of those affected.

## 8.2 Challenges of proactive measures

Possibly the most challenging aspect of intersectionality in the context of positive action concerns representation and involvement. By placing the initiative on those responsible for bringing about change rather than the victim herself/himself, the model is inherently a top-down approach. While this is one of its strengths, it also creates a potential participatory vacuum. Involvement of those affected is essential to ensure that positive action is adequately responsive to real needs. However, unless intersectionality

is taken into account, those involved might simply not speak for an intersectional group. White women might speak for women and ethnic minority men for ethnic minorities. Thus specific attention needs to be paid to ensuring that the intersectional group has a voice. Again the above criteria assist in both identifying the group and ensuring that it has an appropriate set of spokespeople.

A second challenge posed by proactive duties in this sense is to create an appropriate compliance regime. To work properly, positive duties need to be championed by those at the top of the institutional hierarchy, to be an integral part of decision-making strategy rather than an add-on once major decisions have been made.<sup>329</sup> A range of levers, particularly through procurement policies, should be available in addition to the role of stakeholders, Commissions and a long-stop judicially enforceable sanction. This in turn requires transparency and mechanisms for monitoring and ongoing review. An EGGSI report on gender mainstreaming and active inclusion policies has produced a helpful checklist for designing effective active inclusion policies. Particularly important in relation to labour inclusion policies is to identify the most vulnerable groups of women or men, such as lone parents, women returners, disabled women, ethnic minority or immigrant women and the long-term unemployed. Similarly, in relation to access to services, the checklist includes a question as to whether the needs of specific groups, such as ethnic minority and immigrant women, and disabled women are taken into account. In particular, it asks whether shelters for the homeless taking into account the specific needs of women and men, for example, single men as against lone mothers with children, and whether the specific needs of women and men are considered in the way in which training or childcare is offered.<sup>330</sup>

### 8.3 Legal basis for mainstreaming and proactive measures in EU law

There is clearly scope within EU law for addressing intersectionality through mainstreaming and positive duties. Article 7 of the Employment Equality Directive permits member states to maintain or adopt specific measures in order to compensate for disadvantage '*linked to any of the grounds referred to*'<sup>331</sup> and Article 5 of the Racial Equality Directive similarly refers to compensation for disadvantages '*linked to racial or ethnic origin*' (emphasis added).<sup>332</sup> A capacious understanding of any of the listed grounds, or a combination of grounds would be '*linked*' to one or more of these grounds and therefore would, provided they fulfilled the other requisite criteria, be potentially legitimate. There is similar provision in relation to gender. Article 157 (4) of the Treaty permits Member States to maintain or adopt '*measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*'<sup>333</sup> This is made more specific in Article 3 of the Recast Directive which permits similar measures, this time referring to measures aimed at '*ensuring full equality in practice between men and women in working life.*'<sup>334</sup> Both of these provisions allow for a capacious understanding of '*sex*', '*men*' and '*women*' as argued for in the report. Similarly, Article 29 of the Recast Directive requires member states to '*actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.*' The preamble expands on this by emphasizing that '*given the current situation ... Member States should, in the first instance, aim at improving the situation of women in working life.*'<sup>335</sup> The preamble also exhorts member states to raise public awareness of wage discrimination and changing public awareness in relation to equal treatment of men and women. In none of these provisions does the law preclude addressing all the facets of women's identity.

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329 Hepple, B., Coussey, M., Choudhury, T. (2000), *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart, Oxford.

330 EGGSI (2006), *Gender mainstreaming active inclusion policies*, European Commission, p. 48.

331 Directive 2000/78, Article 7.

332 Directive 2000/43, Article 5.

333 TFEU, Article 157(4).

334 Directive 2006/54, Article 3.

335 Directive 2006/54, preamble, para. 22.

## 8.4 Positive action and mainstreaming in EU policy: Some examples

Mainstreaming has been central to the promotion by the European Commission of gender equality in the EU. However, the attention paid to intersectionality has been patchy. A limited gesture was made in this direction as early as 2006, in the 'Roadmap of Equality between Women and Men 2006 – 2010',<sup>336</sup> which stated that: 'The EU is committed to combating the double discrimination immigrant women and those from ethnic minorities are subject to.' It also mentions that women are at greater risk of poverty than men, particularly in old age because of the lack of adequate pensions. At the end of the Roadmap's five year programme, however, it was severely criticised by the European Parliament's Committee on Women's Rights and Gender Equality.<sup>337</sup> The Committee pointed out that although the Roadmap served to some extent to highlight key aspects of gender equality, its achievements were modest. This was partly because of the lack of political force to bring it to fruition and partly because of inconsistencies in EU programmes. The Committee specifically emphasised that the most serious forms of discrimination were those inflicted on 'specific categories of women, including older women, women with dependants, women who are migrants or belong to minorities and women with disabilities.'<sup>338</sup>

More specific measures were proposed by the European Commission Report on Multiple Discrimination in 2007.<sup>339</sup> This aimed to highlight good practice and prepare recommendations on how multiple discrimination could best be addressed. The report recommended action to increase both the capacity to recognise multiple discrimination and awareness of the need to combat occurrences. As a start, it stated that it was imperative to 'monitor and track the unique ways in which people experience multiple discrimination,' including research, legislation, awareness raising, training and education, data collection and the promotion of multiple ground NGOs.<sup>340</sup>

However, it is not clear how much follow-up there has been on these recommendations.. The Strategy for Equality between Women and Men 2010-2015, although it includes a definition of multiple discrimination in its glossary, does not make any further mention of the principle. Intersectional discrimination is not referred to at all.<sup>341</sup> The evaluation of the Strategy conducted in 2015<sup>342</sup> identified as one of the areas of improvement the need to give greater attention to the heterogeneity of women and men, and to adopt an intersectional perspective.<sup>343</sup> It particularly pointed to the need to address the requirements of elderly women living alone, and the specific risks faced by migrant women, including their role in domestic and care work, their vulnerability to trafficking and traditional harmful practices and the need to recognise their skills and education.<sup>344</sup> In addition, gender mainstreaming was reported to remain 'weakly institutionalised' in the EU decision-making process. Rather than gaining focus through intersectionality, the evaluation report saw the 'recent tendency to merge all grounds of discrimination, including discrimination based on sex, with the promotion of civil rights and equal treatment for all risks downgrading the profile of gender equality and gender mainstreaming in the policy agenda.'<sup>345</sup>

336 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:c10404>.

337 Report on assessment of the results of the 2006 – 2010 Roadmap for Equality between women and men (2009/2242 (INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0156+0+DOC+XML+V0//EN#title2> See Explanatory Note.

338 Report on assessment of the results of the 2006 – 2010 Roadmap for Equality between women and men (2009/2242 (INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2010-0156+0+DOC+XML+V0//EN#title2> See Explanatory Note.

339 European Commission (2007), Tackling Multiple Discrimination – Practices, policies and laws.

340 European Commission (2007), Tackling Multiple Discrimination – Practices, policies and laws, p. 6.

341 European Commission (2011), The Strategy for Equality Between Women and Men 2010-2015. [http://ec.europa.eu/justice/gender-equality/files/documents/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf), p. 38.

342 European Commission (2015), Evaluation of the Strengths and Weaknesses of the Strategy for Equality between Women and Men 2010-2015.

343 Ibid. p. 7.

344 Ibid. p. 8.

345 Ibid. pp. 7-8.

Somewhat more sustained attention was given to intersectionality in the context of active inclusion policies. A recommendation was adopted in 2008 by the Commission setting out guidelines on the active inclusion of people excluded from the labour market.<sup>346</sup> Gender mainstreaming was identified as an integral part of active inclusion policies. A report from 2010 aimed to inform and help develop gender mainstreaming in active inclusion policies, noting that gender mainstreaming was still underdeveloped in policy design and monitoring. It pointed out that ‘the concept of ‘intersectionality’ provides a nuanced tool ... for understanding gender-based differences to various forms of discrimination and social exclusion.’<sup>347</sup> Reflecting the analysis in this report, it argued that ‘gender discrimination, racism and other systems interact to structure the roles of women and men. Some are pushed to the extreme margins of the society, while others are more integrated. ... This approach also acknowledges that an individual can experience both oppression and privilege in a single society: for example a woman may occupy a high-status professional position yet still be exposed to racism or domestic violence.’<sup>348</sup> However, the report found that although gender mainstreaming was widely acknowledged, in quite a number of countries, policies had not been developed with an explicit gender perspective, especially regarding women within vulnerable groups.<sup>349</sup> Many EU Member States had active inclusion policies which focussed on the integration of specific groups in the labour market, such as migrants, young people, the elderly or persons with disabilities. However, gender issues within these groups were not always addressed unless the group was predominantly made up of women, such as lone parents. Some initiatives addressing the intersectional experience of migrant women were highlighted in various member states, but active labour market policies specifically targeted at vulnerable groups of women were limited. Particularly sparse were measures dealing with migrant women care-givers, despite the concern noted above of race-based segregation of care workers.<sup>350</sup>

The recently released strategy (the Commission Staff Working Document on Strategic Engagement For Gender Equality for 2016-2019)<sup>351</sup> the European Commission makes a commitment to ‘pay particular attention to the specific needs of groups facing multiple disadvantage,’ giving as examples, single parents and older, migrant, Roma and disabled women. It proposes to use a mix of different measures, including the integration of a gender-equality perspective into all EU activities, the enforcement of equal treatment legislation, EU funding programmes, improved data collection, exchanges of good practice and an annual review.<sup>352</sup> There is, however, very little by way of specific reference to taking steps to deal with intersectional disadvantage. The labour market integration of migrant women is mentioned as one of the objectives of increasing female labour market participation.<sup>353</sup> But there is no further mention of older women, women with disabilities, or Roma women, let alone gay women or women from ethnic or religious minorities. The same is true for the list of actions by the Commission to advance LGBTI Equality 2016-2019, which makes not mention at all of either multiple discrimination or intersectionality.<sup>354</sup> On the other hand, 2011 EU Framework for National Roma Integration Strategies stresses the need to pay special attention to the interests and difficulties of Roma women and girls, pointing out that they face the risk of multiple discrimination and therefore requiring a gender perspective to be applied in all policies and actions for advancing Roma inclusion.<sup>355</sup> This was followed by the Council recommendation on effective Roma integration measures in member states, adopted in December 2013, which includes a recommendation that member states should ‘combat all forms of discrimination, including multiple discrimination, faced

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346 Recommendation 2008/867/EC and COM(2008) 639 of 3 October 2008 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0639:FIN:EN:PDF>).

347 European Commission (2010), Gender Mainstreaming active inclusion policies, pp. 5-6.

348 Ibid. p. 6.

349 Ibid. p. 71.

350 Ibid. p. 12.

351 Commission Staff Working Document on Strategic Engagement for Gender Equality 2016-2019 [https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019\\_en](https://ec.europa.eu/anti-trafficking/eu-policy/commission-staff-working-document-strategic-engagement-gender-equality-2016-2019_en).

352 European Commission (2015), Strategic Engagement for Gender Equality 2016-2019.

353 Ibid. p. 19.

354 [http://ec.europa.eu/justice/discrimination/files/lgbti\\_actionlist\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/lgbti_actionlist_en.pdf).

355 An EU Framework for National Roma Integration Strategies un to 2020 (Council of the European Union, 24 May 2011, 10658/11) para 17.

by Roma children and women, and fight violence, including domestic violence against women and girls, trafficking in human beings, underage and forced marriages and begging involving children.<sup>356</sup>

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356 Council recommendation on effective Roma integration measures in the member states (Council of the European Union, Brussels, 9 and 10 December 2013), para. 2.5.

## Conclusion

Intersectionality continues to be highly challenging both for anti-discrimination law and for strategies promoting equality. Intersectional experiences of disadvantage remain largely invisible, despite growing attention to the issue. It was argued above that the insights of intersectionality theorists were of great value in revealing the ways in which anti-discrimination laws tended to ignore the most disadvantaged. However, such theories took a wrong turn in regarding the issue as one of groups and identities. This tends to see intersectional grounds as creating separate groups and identities, and therefore itself operating at the margins of anti-discrimination and equality laws. Instead, since everyone has many identities, intersectionality should be regarded as central to anti-discrimination law. The report draws on the more recent insights of 'structural intersectionality' to argue that discrimination law should focus on relationships of power in order to determine who to protect and how. Since everyone has a range of identities, a relational view allows us to see that individuals might experience both privilege in relation to some characteristics, and disadvantage in relation to others. Others, however, might experience disadvantage across all their relationships. In addition, the ways in which detriment or disadvantage is experienced might be significantly shaped by circumstances and context. Thus power operates vertically, diagonally and in layers. The aim of intersectionality should be to capture and address the wrongs suffered by those who are at the confluence of all these relationships.

This in turn means that the references to particular grounds should not be understood as delineating a group with fixed boundaries, which gives the impression that everyone within the boundary is the same. Instead, reference to a ground of discrimination or a protected ground might be understood in a relational way, that is, as a conduit to describe different power relationships. Rather than constructing further sub-groups, existing grounds should therefore be construed as sufficiently capacious to address the confluence of power relationships which compounds disadvantage. In other words, discrimination on grounds of gender can refer to all the relationships of power and disadvantage experienced by women, including women with disabilities, older women, black women, gay women or any combination of these characteristics. Similarly, discrimination on grounds of disability includes all aspects of the experience of people with disabilities, including their gender, race, sexual orientation, religion and age, and the ways in which these intersecting relationships could enhance disadvantage or balance it out. Such an approach can be found in international human rights law, in particular, in the application of the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of People with Disabilities (CRPD).

To absorb an intersectional analysis into anti-discrimination law also requires us to move beyond a conception of equality which is based solely on the principle that likes should be treated alike. In the context of intersectionality, treating likes alike is particularly constraining because it requires us to make a comparison between two individuals who are similarly situated except for the difference in protected characteristics such as race. This tempts us to ignore all other facets of identity. Instead, it is argued for a substantive conception of equality which incorporates four dimensions: (i) the need to redress disadvantage, (ii) the need to address stigma, stereotyping, prejudice and violence, (iii) the need to facilitate voice and participation; and (iv) the need to accommodate difference and change structures of discrimination.

The continued invisibility of intersectional experiences is evidenced in the paucity of comprehensive data or qualitative studies in the EU. Nevertheless, there are some sites of intersectionality, particularly in relation to women from disadvantaged communities, from which there is sufficient evidence to illuminate the vertical, diagonal and layered relationships of power which are central to intersectional analysis. Since disadvantage is experienced along all four of the dimensions set out above (socio-economic disadvantage; stigma, stereotyping and violence; lack of voice and participation; and structural impediments), policy and practice should be directed to addressing these issues by focussing on these criteria.

The report has revealed some activity in this respect in Member States, although generally speaking awareness of intersectionality is low and references to multiple discrimination rarely incorporate a full recognition of the issues described in this report. The most effective strategies were seen to involve equality bodies or ombuds focussing on intersectional disadvantage in their monitoring and data-gathering work, followed up by policy measures specifically shaped by such issues. Litigation is also more effective when used strategically to frame intersectional claims as addressing the ways in which a confluence of relationships of power intersect to cause specific types of disadvantage. Such an approach is, however, hampered by the fact that many civil society organisations are organised around single identities, and in some countries, legislation and institutions remain similarly divided.

On the face of it, existing EU anti-discrimination law presents severe structural obstacles to intersectional claims, having separate directives, with differing scope, differing justifications and exceptions and a fixed list of grounds. This makes it impossible to create new subgroups to reflect intersectional experience, and difficult to combine grounds. Nevertheless, there is potential to incorporate intersectional insights through a capacious view of existing grounds, so that intersectional experiences can be addressed by acknowledging that even within a single ground, multiple intersecting power relations can be addressed. Rather than focusing only on one axis of disadvantage and assuming the remaining characteristics are privileged, a capacious view suggests that all aspects of an individual's identity should be taken into account even within one identity ground. For example, a woman who suffers intersectional disadvantage because she is an ethnic minority woman is still subject to discrimination on the grounds that she is a woman, but this is specific to the relationships of disadvantage resulting from her social location as an ethnic minority woman. The category 'woman' covers all women, and the more disadvantaged, the more she should attract protection. Similarly, there is no reason to assume that only men can claim on grounds of ethnic origin. All members of an ethnic minority, including ethnic minority women, should be protected against discrimination on grounds of ethnic origin, and the fact that she suffers specific discrimination as an ethnic minority woman should enhance her claim rather than precluding it.

The report evaluates several sets of judgements of the CJEU where the Court could be said to be incorporating an intersectional perspective into a capacious view of grounds. These cases are primarily a result of the ways in which the litigants frame the case, and the extent to which the Court has been receptive to such a framing. Perhaps the main instance of a capacious approach are the cases in which gender or sexual orientation discrimination have been applied to the specific experience of older women or older same-sex couples. Gender has also been capaciously interpreted to include pregnancy and parenting and there are some important insights in relation to a capacious interpretation of ethnic origin. Nevertheless, there are also important ways in which the Court's jurisprudence continues to render invisible the specific nature of intersectional disadvantage in its understanding of existing grounds. For a genuine intersectional approach, both litigants and the Court would need to be more open to recognising and articulating the ways in which relationships of power interact in vertical, diagonal and layered ways so that the most disadvantaged are the most protected, rather than the converse. Moreover, those who experience the most acute intersectional discrimination are clearly not using litigation as an avenue of redress.

This demonstrates that litigation, because of its expense and the length of time it requires, is a less effective way of addressing intersectionality than proactive measures. Mainstreaming and other proactive measures are particularly valuable because they allow public bodies to take the initiative to identify and target those who are disadvantaged in several different ways. However, although mainstreaming has been central to the promotion by the European Commission of gender equality in the EU, the attention paid to intersectionality has been patchy.

It has been argued here that it is possible to incorporate the perspectives of intersectionality into EU law as it currently stands without requiring new amendments, although of course it would be of considerable assistance if the scope and reach of the directives were to be harmonised. The first step is to generate a greater awareness of and sensitivity to the ways in which cross-currents of different sources of

discrimination impact on people in different contexts. This requires equality bodies and other civil society organisations to pay specific attention to raising awareness of the issues and to monitor intersectionality through their reports and other investigatory powers they might have. There are already good examples of such activity in some member states. Once the issues are properly identified, then equality bodies and others are in a position to determine how to tackle them. Mainstreaming and proactive measures which can target the most vulnerable groups are in principle better able to deal with structural issues than litigation. But litigation also plays an important role, first because it gives affected individuals the opportunity to articulate their own claims and secondly because there is scope for framing selected strategic litigation, as best practice from the states surveyed showed. Remedies should be effective and dissuasive, both through compensating individuals but equally importantly through addressing structural issues, such as policies and practices which have a particular effect on the most disadvantaged groups. It is hoped that in the future at EU level, strategic plans on mainstreaming gender equality will more actively include strategies based on the intersectional analysis here, and that this will also be generalised beyond gender to intersectionality across all the grounds.

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