



The EU anti-discrimination directives and EU equality law

The case of multidimensional discrimination

Conceptual issues

- Additive discrimination (also double, compound or *multiple* discrimination)
- Intersectional discrimination (also *compound* discrimination)
- Overall terms – multidimensional discrimination which is also called multiple discrimination

Legal framework – The equality directives

Race and ethnic origins (Directive 2000/43/EC)

- Religion and belief, disability, sexual orientation, age (Directive 2000/78/EC)
- Sex (Art. 157 TFEU [ex. Art. 141 EC]; Dir. 2006/54/EC and Dir. 2004/113/EC)

Legal framework beyond the TFEU

- Charter of Fundamental Human Rights
 - Art. 21(1) & (2)
 - Art. 23
- European Convention on Human Rights and Fundamental Freedoms (ECHR)
 - Art. 14
 - Protocol 12

No explicit prohibition

Art. 8 TFEU [Ex Art. 3 (2) EC] and gender-mainstreaming

- Now also Art. 10 TFEU
- Recitals 3 and 14 of the Framework and Race Directives respectively make reference to multidimensional discrimination (multiple discrimination)

Multidimensional discrimination and the case law of the ECJ: Treading on a new ground

- Before 2000 – age/sex cases
 - *Defrenne* cases
 - *Marshall v. Southampton and South-West Hampshire Area Health Authority* (Case 152/84)
 - *Foster and others v. British Gas* (Case C-188/89)
 - *Kurtz-Bauer v. Freie und Hansestadt Hamburg* (Case C-187/00)

Multidimensional discrimination in the case law of the ECJ since 2000

Lindorfer (Case C-227/04 P)

Arguments:

- Age and sex discrimination due to actuarial values envisaged in staff regulations
- Applicability of the given variants for currency conversion –discrimination on grounds of nationality

Multidimensional discrimination in the case law of the ECJ since 2000

Lindorfer (Case C-227/04)

Advocate General Jacobs

- Age, sex, nationality

- Advocate General Sharpston

- Age and sex

- Both found sex discrimination

- Age claims were dismissed because the facts took place before the prohibition to discriminate on grounds of age had taken place

Multidimensional discrimination in the case law of the ECJ since 2000

- ECJ - Lindorfer (Case C-227/04 P)
 - Sex discrimination established
 - Claims for discrimination as regards the applicability of the given variants for currency conversion were dismissed (but Art. 12 EC (now Art. 18 TFEU) was not mentioned in the process)
 - Age claims not examined

Multidimensional discrimination in the case law of the ECJ since 2000

C-356/09 *Pensionsversicherungsanstalt v. Kleist*

○ Facts and arguments

- Dismissal of a female doctor because she had reached the age entitling her to draw a retirement pension
- Sex and age discrimination

○ AG General Kokott

- Direct discrimination on grounds of sex
- Age claims not helpful, since age discrimination can be objectively justified.

○ ECJ → Dismissed age claims, since they were not included in the preliminary reference questions



The challenges

Addressing multidimensional discrimination in the absence of a legislative prohibition

Additive claims – no problem

Intersectional claims?

- Are intersectional claims covered by the directives, or are they new grounds in the light of Chacón Navas?
- Positive → recitals 3 and 14 of Dir. 2000/78/EC and Dir. 2000/43/EC (although again the concept used therein remains undefined)

Addressing multidimensional discrimination in the absence of a legislative provision

Can the non-exhaustive list of the Charter be relied on to extend the scope of the Directives and of Art. 19 TFEU?

- Art. 21 (1) does not alter the extent of the powers granted under Art. 19 TFEU, nor the interpretation given to it (explanatory note on Art. 21 (1))
 - Charter: horizontal relations?
- Separate claims may however be brought under both the Charter and the ECHR
 - But then not in horizontal relationships
 - EU and Protocol 12 ECHR?

Inconsistent levels of protection

Hierarchy in grounds

Dir. 2000/43/EC has the widest level of protection (education, media, health care, advertising)

Sex intermediary protection (in secondary law)

- Dir. 2004/113/EC excludes education, media, health care, advertising
- Directive 2000/78/EC
 - Only employment-related
- Other inconsistencies can also be identified:
 - No equal treatment bodies under Dir. 2000/78/EC
 - Concept of harassment (7/25)
 - Personal scope of protection (Art. 3 (2) of Race and Framework Directives)

Justifying direct discrimination

General justifications

Genuine occupational requirements (Art. 4 Dir. 2000/43/EC & Dir. 2000/78/EC; Art. 14°(2) Dir. 2006/54/EC)

- Positive action (Art. 5 Dir. 2000/43/EC; Art. 7 Dir. 2000/78/EC; Art. 3 Dir. 2006/54/EC; Art. 6 Dir. 2004/113/EC)

○ Ground-specific justifications

- Age (Art. 6 (1) Dir. 2000/78/EC)
- Public security, public order, public health and protection of rights and freedoms of others (Art. 2 (5) Dir. 2000/78/EC)

Justifying direct discrimination

Ground-specific justifications

- Age/ disability and the armed forces (Art. 3 (4))
- Sex and genuine service requirement (Art. 4 (5) Goods and Services Directive)
- Pregnant workers, paternity or adoption rights (Art. 16 Dir. 2006/54/EC)

Inconsistent Justifications – revisiting *Kleist*

- Opinion of Advocate General Kokott
 - Additive claims
 - Age discrimination claims would most probably have been rebutted
 - Intersectional claims
 - Had intersectional claims been brought, the case would most probably have been lost
 - Cases need to be constructed with care

Comparator concept and multidimensional discrimination – who is the appropriate comparator?

- *Clay v. BPS Guard Services* 1993 US Dist. LEXIS 8399 (ND Ill 1993)
- *Lam v. University of Hawaii*, 40. F. 3d 1551, 1562 (9th Cir. 1994)

Addressing the comparator issue

Single comparator

i.e. White man in relation to the intersections of sex and race

- Who is a single comparator for a disabled women?
- Caution: Are the persons really in a similar situation? (compare with *Atijosan v. Lambeth Service* [2000] UKEAT 968_99_2606)

○ Multiple comparator

- Ali v (1) North East Centre for Diversity & Racial Equality (2) Jamiel Bux111 [2005] ET/2504529/03 (UK)
- Caution: need to highlight intra-group differences

Addressing the comparator issue

Comparator free approach (i.e. definition of harassment which is based on human dignity test)

- Caution – human dignity is at the discretion of courts
- Hypothetical comparators
 - Mackie v. G & N Car Sales Ltd t/a Britannia Motor Co [2004] ET/1806128/03
 - What about on cases involving several grounds?

Conceptual weaknesses

Indirect discrimination and disparate effect

- Sociological studies

- Single-issue approach dominates research
- Different approaches to intersectionality

- Statistics??

- Lack of statistics
- Lack of statistics disaggregated along intersectional lines

What about remedies and multidimensional discrimination?

Art. 18 Dir. 2000/65/EC & Art. 8 Dir. 2004/113/EC

- Real and effective compensation which must be dissuasive, and proportionate to the *damage* suffered.
- Art. 25 Dir. 2006/54/EC; Art. 14 Dir. 2004/113/EC; Art. 15 Dir. 2000/43/EC; Art. 17 Dir. 2000/78/EC
 - effective, proportionate and dissuasive sanctions, which might include compensation
- How can these be transferred to multidimensional discrimination cases?

Different approaches

Germany

- § 4 General Equal Treatment Act (AGG)
- Explanatory note on § 15 (2) AGG (BT-Drs 16/1780)

○ UK

- Government Equalities Office, *Equality Bill. Assessing the Impact of a Multiple Discrimination Provision (April 2009)*, para. 5.8.

Different approaches

Germany - BAG, 22.01.2009 (8 AZR 906/07)

UK - *Al Jumard v Clywd Leisure Ltd* [2008]

UKEAT 0334_07_2101, [2008] IRLR

- Same facts- more than one form of discrimination – no separate wrongs
- Do discrimination acts fall into one category or another?- injury to feelings to be considered separately; separate wrong
- Overall sum to be proportionate; no double counting
- Also *Khanum v. IBC Vehicles Ltd* [1999] EAT/685/98

Concluding remarks

- Addressing multidimensional discrimination – still a challenge in EU law
- No legislative guidance at the moment
- No guiding case law as yet
- Fragmented legislative framework more apt for the single-ground approach
- Main challenge: adapting concepts from single-ground to multidimensional discrimination

Looking ahead

- COM (2008) 426
- EP amendment 38 on Art. 2 para. 2
 - Positive development
 - But another fragmented approach that needs to be extended to other directives



Thank you for your attention!
